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Max Goldberg

Singapore's Violations of the Right to the Freedom of Expression and the Universal Applicability of the UDHR
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A Reluctant Partnership: Daniel Ortega and His Vexed Relationship with the Nicaraguan Private Sector
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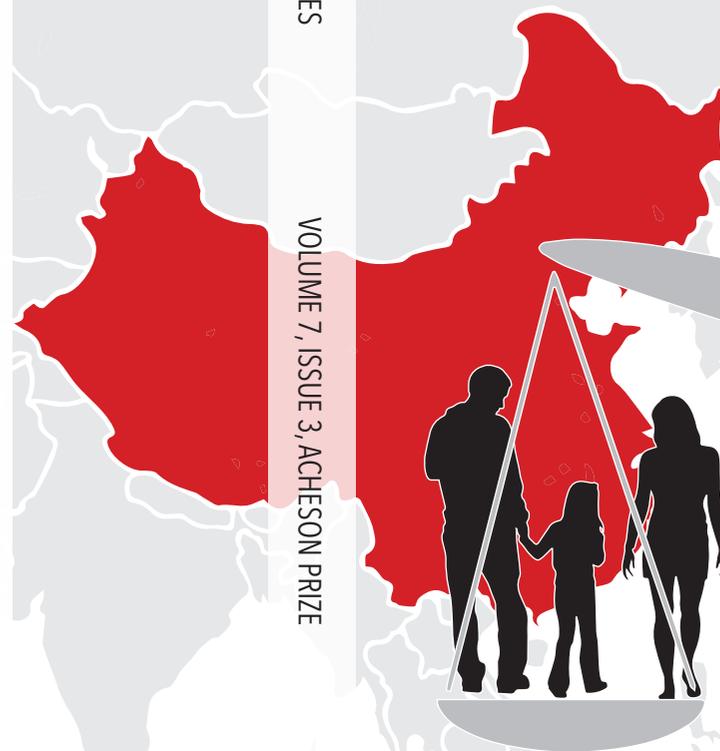
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DEAR READER,

For this year's Acheson Prize issue of YRIS, the editors were honored to have received a veritable deluge of academic papers, out of which we eventually selected five for recognition. Papers covered an incredible range of academic topics, and represented a Yale community of exceptional scholarship in international studies. As always, though we had to choose only a handful of papers to publish, we saw far more excellent pieces than we were able to recognize officially. To all students who submitted to this issue: thank you so much for the opportunity to review your work, and we sincerely hope that you will consider contributing to future issues.

We would like to express special thanks to Professor Charles Hill for dedicating his time to help us select the winners of the 2017 Acheson Prize, as he has done for multiple years. We also greatly appreciate our institutional sponsors, the International Security Studies program and the Yale International Relations Association, whose financial assistance was essential for publishing this issue. Finally, thank you to all of our readers. It was a privilege to read the pieces featured here, and we hope that you will enjoy them as well.

In addition to this issue, we have been proud to produce our regular Weekly Updates, which summarize global news for all Yale International Relations Association (YIRA) members and the distribution of student work from YIRA-run international research trips. If you are interested in signing up for the Weekly Update, looking at our archives of previous issues' papers or checking out any of our other new projects, please explore yris.yira.org!

Best,
The Editors

ESSAYS

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TANGLED ROOTS: MIGRATION AND JUVENILE CRIME IN CHINA

Why truly meaningful Juvenile Justice reform in China requires solving the migrant dilemma and reforming the Hukou system.

INTRODUCTION

The juvenile justice system of the People's Republic of China (PRC or simply "China") is situated within the complex political, economic, and social fabric of the contemporary Chinese State. Over the last century, China has been rocked by numerous revolutions, famines, political uprisings, and episodes of social unrest. At every turn, children have been caught between their families, the state, and society at large, as each placed unique duties, responsibilities, and restrictions upon them. The story of juvenile justice in China, then, is as much a story of the social and political motivations of a nation as it is a story of the children themselves. With over 200,000¹ juveniles standing trial and possibly millions more having other interactions with the legal system each year, demystifying China's juvenile justice system is critical to understanding how China's government addresses complex and interrelated social problems.

In this paper, I examine the juvenile justice system within its social and political context. After giving a broad overview of the history of juvenile justice in China to provide a backdrop for contemporary social norms, I review the development of the current system in more depth. I then examine the phenomenon of juvenile crime and explore its connection to the phenomenon of urban-rural migration. I then move to recent statutory changes, especially the 2012 revision of the Criminal Procedure Law (CPL), and examine China's uncharacteristic statutory compliance

with international law in the area of juvenile justice. I argue that this compliance exists primarily because it is expedient for the government to display a juvenile justice system whose formal structure is impressive to direct attention away from the root cause of juvenile crime: semi-urbanization and the associated rural-urban divide. I will go on to show how the state of juvenile justice and the migrant problem are direct manifestations of China's state interests, and how the reforms that would meaningfully resolve these problems are very unlikely to occur in the near future. The paper will conclude with some suggestions for both international and domestic policy action that may help spur real change, and provide some directions for future research in the area.

HISTORICAL OVERVIEW OF JUVENILE JUSTICE IN CHINA

The current system of juvenile justice in China has existed for a scant 31 years if we think of it as beginning when the first juvenile tribunal was established in Shanghai in November 1984. But the history of Chinese thought on juvenile justice is much longer. In particular, examining the Confucian and other sociocultural underpinnings of this thought alongside its history is critically important because these ideologies continue to have deep impact on the dynamics of Chinese society and the way the juvenile justice system functions within it.²

While references to juvenile punishment can be found in even the ancient writings of Legalist and Confucian scholars, the first systematic treatment of the juvenile as a distinct legal category that deserved additional protections appeared in the Tang Dynasty.³ For nearly all of

¹ Zhōngguó fǎlǜ shèhuì, Zhōngguó fǎlǜ niánjiàn, 2013.

² Jie Zhang and Eric Y. Liu, "Confucianism and Youth Suicide in Rural China," *Review of Religious Research* 54, no. 1 (2012): 93–111.

³ Wáng límín, *Tánglǜxūn tǎn* (Běijīng: Běijīng dàxué chūbǎn shè, 2007).

the history of Imperial China, Confucian legal norms and broad judicial discretion guided by traditional philosophies (Confucianism foremost among these, especially in the later dynastic years) governed the adjudication of children and youths.⁴ Mediation, which has been the preferred form of dispute resolution in China since the 7th century B.C.E., was used for most cases, while lawsuits were reserved mostly for those cases in which mediation failed to lead to an acceptable outcome.⁵ Because Confucian philosophy emphasizes virtue (dé), harmony (hé), and propriety (lǐ) over the use of coercive law (fǎ) in governance, both community-based and court-led mediation have been widely utilized throughout the history of Chinese Civilization. Because mediation techniques serve the purpose of moral education in addition to dispute resolution, they were and continue to be especially preferred for children.⁶

While criminal sanctions in the imperial period generally came in the form of corporal and capital punishment or penal servitude, punishments for children and other groups with reduced culpability or high status were often commuted to a restitutive fine in the unusual case that mediation could not resolve the problem.⁷ The Tang code's generous stipulations that any sentence lighter than exile could be replaced by financial penalties for anyone below the age of 15, and that serious sentences for children younger than 10 required direct review by the emperor were mostly preserved throughout the dynastic history of China.⁸ Compared to the kingdoms of Europe, sentencing regimes were progressive, since the imperial penal codes generally prohibited the harshest punishments for the young and old, with severity of sentencing adjusted appropriately for degree of age.^{9*}

The judicial enshrinement of reduced capacity for children closely aligned with Con-

fucian thought. Perhaps the most important Confucian text for children, the Three Character Chant (Sānzìjīng), begins with the couplet, “人之初，性本善” (“People are naturally good at birth”).¹⁰ Strict statutory regulations on the nature, timing, and administration of punishments usually meant that children received lighter sentences, although the strong philosophical conviction that punishments should fit crimes (zuiyǒuyīngdé) rather than the criminals who committed them tempered these factors to the extent that they sometimes failed to recognize children's decreased criminal capacity as a reason for mercy. Ultimately, the strongest mitigating factor for most of China's history was the practical constraints on the criminal justice apparatus: for example, in 1812, the ratio of judges to citizens was over 1:330,000, which meant that amnesties were common, especially for children.¹¹ The state took no pride in administering punishments; philosophically, these leniencies stemmed from the Confucian idea that the mere occurrence of crime, especially on the part of supposedly morally pure children, was a sign that the state had failed to govern well.¹² According to Confucian theory, a morally just society would self-correct deviant or criminal behavior through social relationship networks.¹³

These Confucian ideals did not always mean light punishments for children. For example, even in the late Qing, parents were treated with extreme deference for harsh punishments administered to their children, while children were severely sanctioned for unfilial (búxiào) acts. Household heads (jiāzhǎng) were legally empowered and sometimes even obliged to punish members of their family.¹⁴

While the strong influence of traditional Chinese judicial philosophies ceded ground somewhat to western norms in the Qing, case records illustrate just how pervasive the old norms remained. In one case, after learning that his son was a habitual thief who disobeyed his orders not to steal, the father tied him up, pummeled him with the butt of an axe, and hacked at the boy's hamstrings as he writhed on the

4 Klaus Mühlhahn, *Criminal Justice in China: A History* (Cambridge, Mass: Harvard University Press, 2009).

5 Yuning Wu, “People's Mediation in China,” in *The Routledge Handbook of Chinese Criminology* (Routledge, 2010), <http://www.routledgehandbooks.com/doi/10.4324/9780203766774.ch10>, 117.

6 Ibid.

7 Brian E. McKnight, *Law and Order in Sung China* (Cambridge: Cambridge University Press, 1992), <http://ebooks.cambridge.org/ref/id/CBO9780511529030>.

8 Zhào guó líng and Cháng lǐ, “Zhōngguó wèi chéngnián rén shěn pàn zhìdù de fǎ zhǎn.” 97.

9 Geoffrey MacCormack, *Traditional Chinese Penal Law*, Law in East Asia Series (London: Wildy, Simmonds & Hill, 2013).

* Of course, sentences were ordinarily still quite severe by modern standards.

10 Wángyīnglín, *Sānzìjīng* (Běijīng: Qīng píngguǒ shùjù zhōngxīn, 2013).

11 Mühlhahn, *Criminal Justice in China*.

12 Ibid., 41.

13 Dennis S. W. Wong, “Changes in Juvenile Justice in China,” *Youth & Society* 32, no. 4 (June 1, 2001): 492–509, doi:10.1177/0044118X01032004005, 498.

14 John Henry Gray, *China, a History of the Laws, Manners and Customs of the People*, ed. W.G. Gregor, 1878.

ground, exsanguinating.¹⁵ Because the son disobeyed his fathers' orders, thereby shirking his filial duty, the Qing court cleared the father of any wrongdoing.¹⁶ In another case, a court acquitted a father's killing of his son for "using foul language," as doing so was considered a capital offense.¹⁷ Even in the Qing, when the court determined that fathers had "unreasonably" killed their sons, the harshest punishment was only beating.¹⁸ In general, brutal punishments to children did not garner much public attention or outcry. This attitude has persisted into modern day China – while netizens perennially rail against corruption, far less is heard about the plight of children in the country, especially at the hands of the juvenile justice system. In general, Confucian value systems place greater value on community or family interests than those of a particular individual or class of individuals, such as women or children.

Republican reforms in the early 20th century had a great impact on juvenile punishment. Two major themes dominate the criminal reforms of the era: the expansion of the criminal justice apparatus as a whole, and the introduction of new, westernizing norms via a new set of penal laws.¹⁹ Perhaps the most dramatic change was the introduction of imprisonment as a widespread punishment.²⁰ While this change appeared gradually, it had a profound effect on juvenile justice. The transition most clearly indicated a shift of authority over children's crimes from the parents to the state. As public prisons cropped up during the late Qing, parents gained the ability to commit their own children to these places, squalid and miserable as they were.²¹ While this was still a voluntary transfer of parental authority to the state, it was a drastic change. As children began to be convicted in the courts without parents present, the Guomin Dang (GMD) republican period marked the beginning of mass-scale, state-inflicted punishment on children largely independent of the will of the parents, a trend that would continue through the revolutionary period.

As the old Confucian traditions clashed with the new western norms that shattered the

previous hegemony of family authority and feudal jurisprudence, the standards that had previously governed the punishment of children became murky and irregular in their application. But, overall, outcomes for children improved as the focus of punishment shifted from the criminal act itself towards the criminal as a person.²² Sentencing judges in the Chinese Republic were statutorily instructed to consider state of mind, general capacity, upbringing, and other factors, not only when they passed judgment on juveniles, but for all defendants.²³ Reformatory schools were established on the provincial level, and two juvenile prisons were established in 1933 and 1934, respectively.²⁴ The resemblance of these new systems to the American, German, and Japanese systems was no accident, as the 20th century marked a period of intense Chinese desire to enter the world on a level footing with the more preeminent nations of the globe.²⁵

The Chinese Civil War and resulting communist rule rocked the judicial systems yet again. The Chinese Communist Party (CCP) government did not have a juvenile justice system during the revolution or during the reign of Mao, though some of the revolutionary criminal law included provisions that mitigated punishment in various ways for juvenile convicts.²⁶ This step backwards was mostly the result of the communists' distrust of western-trained legal specialists and their ideas, as well as a persecution of GMD lawyers and the closing of law schools alongside other centers of bourgeois intellectualism. Because Maoist theories saw all crime as the result of class struggle, Mao's government neglected to give the proper legal attention to juvenile crime as an issue of social systems. Most juvenile crimes were handled informally through mediation committees, which provided a ideologically pleasing fusion of Maoist proletarianism with the traditional, Confucian method of dealing with crime through "a net of relationships."²⁷

The sparse provisions governing juvenile prosecution were generally nonbinding and

15 Tongzu Qu, *Law and Society in Traditional China* (Mouton and Company, 1961).

16 Ibid., 41.

17 Ibid., 123.

18 Jonathan D. Spence, *The Search for Modern China*, Third Edition (New York: W.W. Norton & Company, 2013).

19 Mühlhahn, *Criminal Justice in China*, 58.

20 Mühlhahn, *Criminal Justice in China*.

21 Gray, *China, a History*, 236.

22 Zhao chen, *Jiānyù xué* (Běijīng: Běijīng zhōng xiàn tà fāng jēji fāzhǎn yōuxiàn gōngsī, 1933).

23 Mühlhahn, *Criminal Justice in China*, 67.

24 Zhao, *Jiānyù xué*, 104.

25 Ibid., 67.

26 Yáojiànóng, Zhǎng dà chénggrén: *Shàonián sīfǎ zhìdù de jiàngòu* (Běijīng: Zhōngguó rénmin gōng'ān dàxué chūbǎn shè, 2003), http://article.chinalawinfo.com/ArticleHtml/Article_23841.shtml.

27 Wong, "Changes in Juvenile Justice in China," 499.

served as sentencing guidelines rather than as strict protections for juveniles. Aside from the fact that parental involvement was occasionally encouraged for minor offenses, procedural treatment for juveniles was not substantially different under either the republican or communist governments. Through about 1960, most of the law governing children and youth came from official replies from higher courts and mostly concerned issues of criminal responsibility or sentencing guidelines.

The following decades saw a few minor changes set against a backdrop of political uncertainty and upheaval. The 1954 Regulation of Reform-through-labor (RTL, or *láo gǎi*) directed those under 18 to newly-built reformatories* rather than labor camps, and a 1962 working rule institutionalized the rights of parents and school officials to be present during investigations of a juvenile or child.²⁸ These reforms came slowly, as the problem was far from urgent: crimes of 14 to 18 year olds as a percentage of total crime remained below one percent in the 1940s and 50s, rising to only three and seven percent in the 1970s and 80s, respectively.²⁹ Figures for ages 14 to 25 were low as well, with their crimes as a percentage of the total hovering around 30 percent in the 1950s and 60s and slowly rising to the mid-40 percent range by the 1970s.³⁰ During the early years of the PRC, mass scale migration was prevented by the Hukou** system, which, when combined with food rationing in the planned economy after its introduction in 1958, made urban migration a near impossibility for impoverished rural youth.³¹ A comprehensive juvenile justice

apparatus did not begin to appear in China until the mid-eighties, as sharp upticks in juvenile crime and increased migration forced the government to act.

HOW THE CURRENT SYSTEM OF JUVENILE JUSTICE DEVELOPED

Deng Xiaoping's economic reforms and the "opening up" of China (*gǎi gé kāifàng*) from the late seventies onwards greatly accelerated economic growth, but also led to massive inflation and unchecked urban migration. This, in turn, led to greater social instability, especially in terms of youth crime. Because the market reform strategy to develop an export industry generated a massive demand for cheap urban labor, the government relaxed Hukou restrictions on travel somewhat, allowing a flood of migrant workers to move from rural areas to the cities. Because Hukou determined eligibility for benefits and social services, migrant workers had little to no access to hospitals, schools, social security or other government services in urban areas.

The migrant workers lived and worked in cities but never belonged, and for this reason their move to the cities is often known as "semi-urbanization." Juvenile crime rates (14-25) were already increasing in association with the baby boom of the cultural revolution years,³² but they climbed even higher in this era: Juvenile crime increased from 61.2 percent of total crime in 1980 to 71.3 percent in 1985 and 74.1 percent in 1989.³³ Much of this increase happened at the same time as increasing numbers of migrant workers and their children were flowing into the cities. Without access to education or other social services, many turned to crime. To the present day, migrants and their children make up the lion's share of juvenile offenders in cities.³⁴

In response to these increases, China convened its first conference on juvenile crime in 1982. Since the influence of Maoist ideologies that had dominated the previous era had diminished immensely following the Cultural Revolution, the Western notion that juvenile crime was the result of social problems had gained

* As juvenile specific RTL facilities were built, it would become permissible for juveniles to be sent there.

28 Zhao, *Jiānyù xué*, 105.

29 Børge Bakken, "Crime, Juvenile Delinquency and Deterrence Policy in China," *The Australian Journal of Chinese Affairs*, no. 30 (1993): 29–58, doi:10.2307/2949991. 39.

30 *Ibid.*, 38.

** Hukou, which roughly translates to "household registration," is a system existing in China since 1958 that restricts free movement within the country by classifying the population into two categories: agricultural/rural and nonagricultural/urban. Those holding urban Hukou (the word refers to the individual registration as well as to the system as a whole) have much more expansive access to social services; unsurprisingly, to this day it is extremely hard to convert a rural Hukou to an urban one. While Hukou-related restrictions on movement have been eased somewhat in the half century since the system began, the two-tiers of citizenship continue to be the root cause of immense social problems in China, and the glaring gap between rural and urban residents in terms of rights and benefits continues to provoke both the anger of citizens and the fascination of scholars.

31 Jianhua Xu, "Urbanization and Inevitable Migration." In *The Routledge Handbook of Chinese Criminology*, Routledge, 2010,

<http://www.routledgehandbooks.com/doi/10.4324/9780203766774.ch17.211>.

32 *Ibid.*

33 Kāng shùhuá and Xiàng zéxuǎn, *Qīng shàonián fǎxué xīn lùn.*, 95.

34 John Kamm, "Trying Juveniles," *The New York Times*, November 29, 2012, <http://www.nytimes.com/2012/11/30/opinion/global/trying-juveniles.html>.

some credibility among Chinese jurists.³⁵ As a result of the conference, the first juvenile tribunal appeared in Shanghai in November 1984. The development of the modern system of juvenile justice followed a familiar model for PRC legal systems: limited experimentation on the local level, followed by broad implementation, systematization and standardization across all areas, and finally the refinement and “deep reform” stage in which China’s juvenile justice system now finds itself.³⁶

For the four years following the establishment of the Shanghai tribunal in 1984, several of the richer provinces and municipalities, including Beijing and Fujian, followed Shanghai’s lead and began to toy with their own tribunals, testing out various forms of operation and trial methods. While these tribunals were largely a legal experiment without explicit endorsement from national authorities, Beijing watched them closely. In 1988, the Supreme People’s Court (SPC) formally declared at a meeting in Shanghai that juvenile tribunals were “worthwhile,” and juvenile courts began appearing throughout the country at an increased rate.

The second major milestone for China’s juvenile justice system occurred on 1 February, 1991, when the SPC promulgated the first national normative document on the tribunals, Rules on Administering Juvenile Criminal Cases. This document delineated the philosophical purpose of the tribunals, and gave the first complete set of official guidelines for their operation, including some special rules of criminal procedure for the “trials” themselves.³⁷ A brief flurry of supporting rules and other judicial documents ensued, including several encouraging inter-agency cooperation on juvenile crime and delinquency prevention.

This rule-making progress had domestic and international impact. Domestically, in September 1991, the Standing Committee of the National People’s Congress (NPCSC) adopted the Law of the People’s Republic of China on the Protection of Minors, the first of China’s laws to explicitly protect “minors” as a class. As might be expected in an environment dominated by paternalistic Confucian philosophy, the word “responsibility” (zérèn) appears 10 times

in the Law, emphasizing various groups’ communal duty to “protect” (bǎohù, appears 16 times) children. The law followed the example of the earlier rules in that it explicitly recruited “The Communist Youth League organs, women’s federations, trade unions, youth federations, students’ federations, young pioneers’ organizations and other social organizations” to work together to enforce the law.³⁸ On the international stage, China ratified the United Nations’ Convention on the Rights of the Child (CRC), which publically affirmed China’s commitment to children’s rights and opened it up to greater international scrutiny in this area. It was a timely move for China—by the end of 1991, the country had a basically functional system of juvenile justice that was already progressing towards compliance with international standards on the criminal prosecution of juveniles.

While most localities had dedicated mechanisms for processing juvenile offenders by 1991, standards varied widely: The Shanghai tribunal was functioning efficiently, but it was a rarity: the majority of juvenile cases were still handled by judicial officials who lacked the requisite specialization to work with children. The work of standardizing the juvenile justice system across the nation thus became the object of reform efforts, though they focused almost exclusively on courts, barely touching the other agencies that continued to deal with youth crime.

Meanwhile, increasing semi-urbanization continued to fuel the youth crime epidemic. While the reforms up to this point had attempted to halt juvenile crime, they only managed to slightly blunt the increases: in the six-year period between 1986 and 1992, delinquency rates doubled (from 100 to 200 out of 100,000) for ages 14-18 and nearly tripled (from 120 to 300 out of 100,000) for ages 14-25.³⁹

After China ratified the CRC, in 1994 the SPC officially began to oversee all juvenile tribunals through the establishment of the Juvenile Tribunals Steering Group, as well as a General Office of Juvenile Tribunals.⁴⁰ Before these two bodies were established, the SPC had governed the juvenile courts through rules and interpretations, but had not controlled their operations directly. These new bodies allowed

35 Dennis S.W. Wong, “Juvenile Protection and Delinquency Prevention Policies in China,” *Australian & New Zealand Journal of Criminology* 37, no. 1 suppl (December 2004): 52–66, doi:10.1177/00048658040370S104.

36 Zhao, “Juvenile Criminal Justice System in China,” 105–106.

37 Zhōnghuá rénmín gònghéguó zuìgāo rénmín fǎyuàn, “Guānyú Bànlǐ Shàonián Xíngshì ànjiàn de Ruògān Guǐdìng.”

38 Quánguó réndà chángwěi huì, Zhōnghuá rénmín gònghéguó wèi chéngnián rén bǎohù fǎ (2012 xiūzhèng).

39 Wong, “Changes in Juvenile Justice in China,” 494.

40 Zhāng zōngtáng and Yáng wéihàn, “Fǎyuàn xū shèi shēnlǐ wèi chéngnián rén fǎzù ànjiàn de zhuānmén jīgòu.”

the high court not only to ensure that juvenile courts complied with central directives, but that they did so in a uniform, orderly way. While the internal administration worked on these guidelines, the central government instituted a series of small but prominent reforms of juvenile criminal law; most notably, it effectively ended capital punishment for juveniles in 1997.⁴¹

This wave of standardization and flashy reform was pushed along in 1999 by the passage of the Law of the People's Republic of China on the Prevention of Juvenile Delinquency. This law was notable not only because it was the first to mention juvenile courts (shàonián fǎtíng) explicitly, but also because it distinguished "serious adverse acts," (yánzhòng bùliáng xíngwéi) or delinquency, from "illegal conduct" (wéifǎ xíngwéi), creating a separate category for delinquency.⁴² This cemented the bifurcated system that already existed: serious juvenile offenders were tried in juvenile court, while most other cases were handled through administrative courts or mediation, which has always been and continues to be the culturally preferable method for dispute resolution in China.⁴³

Despite these changes, the juvenile crime rate (ages 14-18) remained relatively high, at 36.71 percent of total crimes in 1999.⁴⁴ The achievements of the juvenile courts' standardization and development were impressive, but they couldn't keep up with an urban population that increased from 36.2 to 49.7 percent of the nation's population in the decade between 1990 and 2000.⁴⁵ Urban migration had a profound influence on juvenile crime, as the hundreds of millions of young migrant workers flowing into the cities from the countryside were removed from their customary social policing mechanisms and could not enjoy full citizenship or access to social services in the cities due to the residency requirements imposed under China's Hukou system.

On the eve of the millennium, between 15 to 30 percent of migrant workers were youths, and many more had children that they either brought along or left behind.⁴⁶ The young workers were a major contributing factor to the high

rates of youth crime, as migrants constituted anywhere from 45 to 91 percent of arrests in Chinas' urban centers.⁴⁷ Even more problematic were the children of migrant workers. Those workers who were parents faced a stark choice: bring their children to the city where they would be divorced from their home without access to social services, or leave them behind in the countryside. Most still choose the latter option, and these "left behind" children today constitute 38 percent of all rural children. 57 percent live with their grandparents, but three percent of them live on their own. "Leaving behind" children creates a cycle of crime, as they are particularly vulnerable and often become offenders – over 80 percent of young migrant workers with criminal records were "left behind" as children.⁴⁸ The option of taking children along is just as bad – migrant children in cities fall behind in school, have little to no access to medical care when they get sick, and lack the community connections that are vital to child development. Across the country, migrant workers and their children make up over two thirds of all juvenile offenders, up from 50 percent in 2000.⁴⁹ While the migrant worker phenomenon was and remains the main driver behind high rates of youth crime, the SPC's objective of standardization continued largely without addressing migration issues directly; the CCP's economic agenda required the cheap labor in the cities, and reforming the Hukou system was not as important.

In 2003, the National People's Congress (NPC) Judicial Affairs Committee officially announced "the pilot work of juvenile courts should be carried out," finalizing the central government's approval of the juvenile courts.⁵⁰ These reform efforts continued throughout the second decade of the 21st century, with some modest but real successes. In 2006, the SPC intensified the expansion of juvenile courts, assigning 17 intermediate people's courts in large municipalities across the country as candidates for reform. By 2010, 179 juvenile judges and court clerks were at work in these pilot courts.⁵¹ The courts have continued to spread across the country.

41 Kamm, "Trying Juveniles."

42 Zhōnghuá rénmin gònghéguó yùfáng wèi chéngnián rén fànzuì fǎ (2012 xiūzhèng), Article 34.

43 Wu, "People's Mediation in China," 166.

44 Zhōngguó fǎlù niánjiàn, 2000.

45 Xu, "Urbanization and Inevitable Migration," 210.

46 China Labor Bulletin, "Migrant Workers and Their Children," *China Labor Bulletin*, June 27, 2013, <http://www.clb.org.hk/en/content/migrant-workers-and-their-children>.

47 Xu, "Urbanization and Inevitable Migration," 213.

48 Wáng jué, "Ràng Liúshǒu értóng Xīnlíng Bù Zài 'liúshǒu'."

49 "Hard Times," *The Economist*, October 26, 2013, <http://www.economist.com/news/china/21588402-how-young-criminals-are-treated-says-much-about-urban-rural-gap-hard-times>.

50 Zhao, *Jiānyù xué*, 106.

51 Chéndéyǒng, Shàonián fǎtíng zhǐdǎo xiǎozǔ, and Zuìgāo fǎyuàn, Zhōngguó shàonián sīfǎ.

THE CURRENT SYSTEM AND INTERNATIONAL COMPLIANCE

In the context of China's poor and lackadaisical compliance with international laws on human rights, juvenile justice stands out as an exception. China's statutory regime for juvenile justice appears to be nearly fully compliant with the UN Convention on the Rights of the Child (CRC, enacted 1990) and the International Covenant on Civil and Political Rights (ICCPR, enacted 1966), in addition to the five guidelines⁵² that the UN has issued regarding the administration of juvenile justice (the most comprehensive of these are the "Beijing Rules").⁵³ Internationally, there is broad agreement that China has generally complied with the CRC and ICCPR enforcement bodies with regard to juvenile justice.⁵⁴ The fact of China's compliance was first emphasized by the eighth amendment to China's Criminal Law, which made it the first national general criminal statute to recognize the value of restraining orders, community correction, and sealed juvenile records, though it provided little mechanism for instituting these policies.⁵⁵ The 2012 amendment to the Criminal Procedure Law, which included a conspicuous new section on juvenile justice within the

criminal defense system, has been regarded as far more important in affirming China's compliance with international standards. While this new section mainly represented a codification and consolidation of rules and practices that had already been implemented in several jurisdictions, the appearance of the rules for juvenile justice in such a dramatic way piqued scholars' interest.

One of the primary questions they've asked is: Why has China written this law in compliance with the body of UN-sponsored international law, when so many of its other laws fail to protect basic rights, such as freedom of expression, labor rights, and so on? To find an answer to this question, it is helpful to turn first to the international standards and examine to what extent the new Criminal Procedure Law actually complies with them. Because the law was adopted on March 14, 2012 and went into effect on January 1, 2013, the data that would allow analysis of its on-the-ground impact is not yet available. Nevertheless, the statutory text provides a useful guide to potential enforcement, especially when considered in its historical context.

Chapter 1, part 5 of the 2012 Criminal Procedure Law (CPL), articles 266-276, represents the new section of the CPL concerning juvenile justice. Article 266 lays out "education, rehabilitation, and rescue" as the objectives of the system of "education first with punishment as a supplement." This purpose aligns well with the CRC, which calls for "reintegration"⁵⁶ as the fundamental goal of juvenile justice. While the meat of the new CPL shows a great deal of improvement in terms of international compliance, I would argue that scholars have overstated this improvement.⁵⁷

In the case of the CPL, compliance with international norms generally means that the law provides procedural protections to minors within the adversarial system. Based on its statutory text, the CPL provides most of the rights stipulated in the UN documents: it gives juveniles access to free legal counsel,⁵⁸ provides for

52 These are:

(1) United Nations Economic And Social Council, "Economic and Social Council Resolution 1997/30: Administration of Juvenile Justice," July 21, 1997, <http://www.un.org/documents/ecosoc/res/1997/eres1997-30.htm>;

(2) United Nations General Assembly, "Assembly Resolution 40/33: United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules')," November 29, 1985, <http://www.un.org/documents/ga/res/40/a40r033.htm>;

(3) United Nations General Assembly, "Assembly Resolution 45/112: United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)," December 14, 1990, <http://www.un.org/documents/ga/res/45/a45r112.htm>;

(4) United Nations General Assembly, "Assembly Resolution 45/110: United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), G.A. Res. 45/110, Annex, 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990)," 1990, <http://www1.umn.edu/humanrts/instreet/i6unsmr.htm>;

(5) United Nations General Assembly, "Assembly Resolution 45/113: United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, Annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990)," 1990, <https://www1.umn.edu/humanrts/instreet/j1unrjd.htm>.

53 Stephanie Persson, "China Talks Juvenile Justice Reform: A Constructivist Case Study," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 1, 2014), <http://papers.ssrn.com/abstract=2394747>, 4.

54 Ibid.

55 Guoling Zhao, "Juvenile Criminal Justice System in China," in *The Routledge Handbook of Chinese Criminology* (Routledge, 2010), <http://www.routledgehandbooks.com/doi/10.4324/9780203766774.ch9.111>.

56 Convention on the Rights of the Child, Article 40(1), September 1990, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

57 Specifically, Persson, "China Talks Juvenile Justice Reform," in which the author presumes that the new law is nearly perfect from a compliance perspective.

58 Article 267 of the CPL calls for law enforcement, the procurator, or the courts to obtain appoint counsel from the legal aid organization for any "juvenile criminal suspect" who "has not retained a defender" regardless of need. This is an interesting change from the previous law, since Article 51 of the Law of the People's Republic of China

specially trained judicial staff and treatment,⁵⁹ guarantees separation from adult criminals in all stages of the judicial process,⁶⁰ gives parents and other responsible adults the right to participate,⁶¹ ensures that records are automatically sealed upon completion of a juvenile sentence less than 5 years,⁶² and allows the procurator to assume a preference for “conditional non-prosecution” for certain, limited cases.⁶³ In some ar-

eas, including the allowance for the presence of responsible adults besides the parents⁶⁴ and requiring analysis of the totality of the circumstances in addition to the crime,⁶⁵ the CPL goes beyond what international standards require. However, in other areas, the law does not provide the level of protections required. For example, the CPL does not give an adequate level of preference for diversion of the accused juvenile from imprisonment to other alternatives,⁶⁶ nor does it convincingly assure limited arrest for juveniles.⁶⁷ Article 274, banning public trials for minors, has obvious controversial elements.⁶⁸

on the Protection of Minors (as amended in 2005) placed the burden squarely on the legal aid apparatus, which was not an actual participant in the trial. Within the broader context of the juvenile justice section, it is one of the only sections that actually place a responsibility on a specific body rather than simply requiring it without specification. CPL Article 267 provision echoes CRC Article 37(d), which provides that juvenile suspects “shall have the right to prompt access to legal and other appropriate assistance,” in addition to similar requirements for “legal assistance [...] without payment” in ICCR article 14(d).

59 Article 266 of the CPL provides that officials handling the case must be “familiar with the special qualities of juveniles.” This fits nicely with Beijing Rule 12.1, which stipulates that “special training” is a requirement for law enforcement personnel “who frequently deal with juveniles.” The CPL, however, does not specify how this new training will occur. Article 480 of the judicial explanations also provide for strict restrictions on the use of restraints, and article 484 of the rules requires the language used in court to be comprehensible by the juvenile. This is in line with Beijing Rule 14.2, which provides that “the proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely”

60 Article 269 of the CPL specifies that juveniles held in any form of custody must be “detained, managed, and educated separately from adults.” This lines up well with CRC article 37(c), which states “every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so.”

61 Article 270 of the CPL requires that a “legal representative” of the child be present at any interrogations and that all records be provided to the representative. The representative can “exercise the juvenile’s rights on their behalf” and can make statements on behalf of the juvenile. The legal representative may be separate from legal counsel, and article 106(3) of the CPL specifies that it can be a “parent, adoptive parent, guardian” or another entity with “duty to protect.” Beijing Rule 15.2 provides for parents or guardians to “participate in the proceedings;” here, the CPL is even more generous to the accused than international law would require.

62 This requirement is enunciated under CPL Article 275, with an exemption only on the basis of overriding regulation. While the CRC contains only vague requirements that a right “to have his or her privacy fully respected at all stages of the proceedings” (CRC Article 40(2)(b)(vii)), Beijing Rule 21 asserts that “records of juvenile offenders shall be kept strictly confidential and closed to third parties” and “shall not be used in adult proceedings in subsequent cases involving the same offender.” While it would appear that China has less protections that would be required by international law here, the Beijing Rule it includes a vague privacy exemption for “other duly authorized persons” that is difficult to interpret with clarity.

63 Articles 271-273 outline the procedures for what the CPL calls “conditional non-prosecution” (Article 271). Eligible offenders are those who are both (a) facing a sentence of under one year in duration and (b) “display regret for the crime” (Article 271). Procurators must conduct a hearing with law enforcement officials and victims before moving forward with a conditional non-prosecution, and victims retain the right to appeal under articles 175 and 176 (Article 271). The probationer period lasts from 6 months to one year, and may be conditioned on acceptance of “corrections

and education” and “compliance with supervision” (Article 272). Probation must be withdrawn and prosecution initiated if, during the probation period, the suspect commits a new crime or violates the rules of probation (Article 273). In the eyes of international law, this provision is probably too ungenerous, as CRC Article 40(4) provides for “counseling [...] and other alternatives” be provided, not just the “corrections and education” specified in CPL article 272. The commentary to Beijing Rule 11 (on diversion) emphasizes that “in the majority of cases, non-intervention would be the best response.” Additionally, the CPL rules for conditional non-prosecution afford very few, if any, procedural protections to the accused. The limited scope and applicability of and the numerous roadblocks to conditional non-prosecution in China makes it seem unlikely that the CPL provides the full prosecutorial protections envisioned by the UN General Assembly in this area.

64 See note 61.

65 While the GMD legal reforms had included totality of the circumstances analysis for all criminal cases in the legal reforms that it introduced after the collapse of the Qing dynasty (page 6), the revolution swept these changes away until they returned in a limited capacity for minors in Article 268 of the CPL, which states that judicial officials “may” (kěyǐ) consider “the circumstances of the juvenile suspect or defendant’s upbringing, the motivations for the offense, the suspect’s supervisory and educational conditions, and any other relevant circumstances.” While “social inquiry reports” are recommended in Beijing Rule 16, CPL Article 267 provides for a more expansive view, even if it does not specify the requirements of the “investigation.”

66 See notes 63 and 67.

67 When it comes to actually protecting juveniles from unfair arrest, CPL Article 269 seems like little more than a paper tiger. While it states emphatically that “strict restrictions shall apply to arrest procedures,” the word “arrest” (dàibù) tends to refer to the procedure of the police obtaining the procurator’s authorization to proceed with a case, which is more analogous to the application of getting a warrant than it is to “arrest” in the American or British sense. This provision is clearly in line with neither Article 37(b) of the CRC, which specifies that a child’s “arrest [...] shall be used only as a measure of last resort and for the shortest appropriate period of time,” nor the commentary on Beijing Rule 10.2, which states that “the question of release shall be considered without delay.” Especially considering the lack of adequate procedures for prosecutorial diversion (see note 63), this deficiency raises the frightening possibility that children of less favored social groups could be easily arrested, detained without trial, and forced into conditional non-prosecution agreements that significantly restrict their liberty without giving them a chance to prove their innocence.

68 Article 274 of the CPL, which asserts “for a defendant under 18, do not hold an open trial,” seems to conform with prevailing UN standards, since CRC article 40(2)(vii) states that a child has the right “to have his or her privacy fully respected at all stages of the proceedings.” That said, in certain cases this could conflict

As the lengthy footnotes to the previous paragraph emphasize, China's written law is mostly compliant with the body of international law concerning juvenile justice, or, at the very least, it is about as compliant as the United States'. While the provisions for trial alternatives are somewhat deficient, the core of the law – criminal trial procedure – is relatively solid with respect to international standards. As a whole, the children's section of the CPL is certainly more compliant than it is in other areas of human rights concern, such as extrajudicial rendition or freedom of expression.

While the CPL's protections for minors are certainly a step forward on paper, they have been in practice for only two years. The changes in the CPL certainly count for something, but the question of what exactly that "something" is cannot yet be answered definitively. This fact has not given much pause to those rejoicing over China's juvenile justice reform. This exuberance, which is premature at best and irrational at worst, has reached far beyond China: Justice Anthony Kennedy even gave China's reforms a "shout out" in his 2005 majority opinion in *Roper v. Simmons*, praising the country for ending juvenile capital punishment some 8 years before the Supreme Court's opinion in that case abolished it in the United States. Some scholars have gone so far as to argue that the mere fact that the SPC has promulgated "guidelines" and "explanations"⁶⁹ to the law (items which accompany nearly every piece of national legislation in China), along with some local governments' issuance of regulations that align with the law (again, this is routine), is convincing evidence "that the Chinese government is serious about implementing these reforms."⁷⁰ They bolster these claims with statistics released by the Chinese government that show the number of juvenile cases declining every year since 2006 or 2008.⁷¹

But the official account and the focus on the statutes hides the true nature of juvenile justice in China: a confused system of criminal and administrative courts, official and unofficial

mediation, and various public security agencies, a confusion that is ultimately explained by China's state interests.

THE REAL JUVENILE JUSTICE SYSTEM

Juvenile justice in China today is not a cohesive system. On the one hand, juvenile trials have a system of procedural protections that closely track the requirements of international law and whose flaws, while serious, are not obvious to the international community. Furthermore, while China's prosecutorial alternatives appear progressive and exciting, they have yet to be implemented in a uniform manner, and they often conceal the true prevalence of juvenile crime and deny juveniles due process. Even if we were to accept the presumption that China will enforce its laws to their fullest extent, the system of juvenile justice will not achieve the requirements of international law, and the reforms will not have gone far enough. From a preliminary analysis of the aftermath of the 2012 CPL reform, it seems that China can fulfill its legitimacy interests without actually making the enormous changes that would allow its system to truly comply with international law: changing the formal process in the criminal courts is enough.

The greatest flaw in how the international community analyzes China's juvenile justice system is that it's overly focused on statutory reform, giving insufficient attention to the way that the system works in practice. The foremost cause of this misperception is related to the fact that in analyzing the state of juvenile justice in China, the lack of adequate statistics on juvenile crime and the juvenile justice apparatus as a whole is a serious problem. While a non-trivial but thematically limited body of independent criminological research has slowly emerged over the last decade, the main source for China's official crime statistics are the yearbooks compiled by government agencies and their affiliates, which provide neither methodology nor sampling information. Furthermore, the published statistics often omit crucial data. This is of key importance when it comes to analyzing recent trends in juvenile justice. While official statistics for juvenile crime as a proportion of total crime show an uninterrupted decrease after 2006 (or 2008 if you count arrests instead of convictions),⁷² this is accompanied by a marked rise in cases resolved through official

with Article 14(1) of ICCR, which guarantees the right to "a fair and public hearing," with limited exceptions that would not seem to cover all juvenile cases to the degree that China's law does.

69 It's worth noting that in the period since the law was introduced, the SPC has issued only one explanation to the law, which highlights the need to listen to victims before the procurator can opt for conditional non-prosecution under CPL Articles 271-273, a move that, if anything, somewhat weakens the protections for juveniles.

70 Persson, "China Talks Juvenile Justice Reform," 8.

71 Zhōngguó fǎlǜ shèhuì, ed., *Zhōngguó fǎlǜ niánjiàn*, 2000.

72 Zhōngguó fǎlǜ shèhuì, *Zhōngguó fǎlǜ niánjiàn*, 2000-2012.

mediation. Specifically, while instances of juvenile crime remained nearly constant during the period 2006-2012 as total crime rose by over 30 percent, cases handled by mediation more than doubled.⁷³ In areas not served by youth courts or specific delinquency apparatuses, China often handles juvenile matters in administrative courts, or, as always, through community or court mediation.⁷⁴ Essentially, there are four broad systems than can handle juvenile offenses in China: juvenile criminal or delinquency courts, the administrative court system, mediation apparatuses, and public security organs. In general, administrative courts mostly handle extremely minor matters, so the lack of juvenile specific data from these courts is not a major issue in analyzing youth crime. Because of strong preferences for "harmonious" methods of conflict resolution, mediation is used even for more serious cases. Even where youth courts exist, many boast high "mediation rates," sometimes up to 100 percent.⁷⁵ This means that the vast majority of cases in these jurisdictions are settled through out-of-court mediation, in situations where the rules of the new CPL will never apply. If a juvenile case is handled in mediation, it is difficult to identify as such because of the way that mediation cases are classified. The Law Yearbook of China presents only five categories for mediation: "marriage and family," "housing and land," "neighbors," "compensations for injury," and "other."⁷⁶ Youth crimes can appear under any of the categories above except "housing and land," which accounted for less than 7 percent of all mediation cases in 2012. Of the other 93 percent, it is nearly impossible to tell what crimes went into each category. As far as official statistics are concerned, youth crime has quite literally become invisible.

Because of its long history in China as an alternative to the adversarial courts that are less compatible with Chinese social norms, Chinese citizens and leaders alike tend to see mediation as much more favorable than adversarial alternatives. This perception is not necessarily false. However, mediation in China presents serious problems, especially in cases involving children and youth. Mediation as it is practiced in China makes youth participants particularly

susceptible to persuasion and overwhelmingly favors the more powerful party: mediation gives those bringing a case an unfair advantage over juvenile defendants.⁷⁷ The mediators employed in criminal cases are often very close to the "party line," and often coerce confessions with promises of leniency.⁷⁸

Because mediation procedures inherently provide fewer protections to juveniles who already have less capacity to advocate for themselves, high mediation rates could present special challenges. Until future research examines mediation procedures in juvenile cases more carefully, there will be no way of knowing either how many juvenile crime cases are being handled through mediation or whether the procedures are fair to accused juveniles. Without changes in reporting practices or new, independent criminological research covering the phenomenon of juvenile mediation, it will be extremely difficult to track the flow of youth cases into mediation and other alternatives to formal trials. This problem is compounded by the fact that many of the cases that do not directly involve juvenile criminal wrongdoing may be handled in a plethora of places outside of the juvenile court system: other courts, civil affairs agencies, and, most prominently, the public security organs. The public security organs are often the worst of the bunch, since their main approach to juvenile crime is to simply drive away mostly migrant youth by adopting policing policies that are openly hostile to them.⁷⁹

These various systems obviously cannot coordinate their efforts, erring on the side of punishing juveniles rather than preventing crime. Each of these systems has its own problems. The increased procedural protections in juvenile criminal cases allow minors greater due process of law (approaching, and nearly reaching the level for adult cases, assuming the new CPL requirements are implemented effectively), but make it more difficult for judicial officials to give special protections to juveniles (this is also a core problem with the United States' juvenile justice system). Mediation, administrative procedures, and other methods may have more flexibility in adjusting to the particular needs and circumstances of the juvenile, but are also

73 Ibid, 2006; 2012.

74 *Juvenile Justice Systems: International Perspectives*, ed. John A. Winterdyk (Toronto: Canadian Scholars' Press, 2002).

75 Zhōu kǎi, "Shànghǎi liǎng qū shàonián tíng tiáojiě chèsù lǜ dá 100%."

76 Zhōngguó fǎlǜ shèhuì, *Zhōngguó fǎlǜ niánjiàn*. And Zhōngguó fǎlǜ shèhuì, *Zhōngguó fǎlǜ niánjiàn*, 2000-2012.

77 Wong, "Changes in Juvenile Justice in China." 501.

78 Ibid, 503-504.

79 J. Xu, "Drive-Away Policing and Situational Crime Prevention in China: An Analysis of Motorcycle Ban (jinmo) Policy in Guangzhou," *International Journal of Offender Therapy and Comparative Criminology* 56, no. 2 (April 1, 2012): 239-64, doi:10.1177/0306624X10395715, 253.

more likely to distort justice and deprive the accused of due process.

Drive-away policing, which is the dominant mode in China for the migrants who make up the majority of delinquents, simply moves crime elsewhere. With the exception of these inferior, stopgap measures taken up by the police, the other alternatives (administrative courts, mediation, other agencies etc.) aren't necessarily worse or better than the criminal process – the problem is that the coexistence of many separate systems combined with the relative dearth of data on the efficacy of each makes it nearly impossible to assess how well China is doing, and creates a system as a whole that is at best unpredictable because it has so many disparate parts.

Among Chinese academics, the most widely proposed way to resolve the problems inherent in the current system is for China to pass a national law that specifies under which judicial systems given types of juvenile cases are to be handled. Such a “unified Juvenile Law” would be able to clearly define the roles of criminal courts, administrative courts, and mediation within the juvenile justice system, and would give the system greater legitimacy than it has currently.⁸⁰ It could ensure that more of the juveniles processed get directed towards diversionary alternatives that prevent crime, providing children with protection, not punishment.

There are several roadblocks to this kind of reform: first of all, both historical evidence and current public opinion research indicate that the Chinese public (and, by extension, its leaders) place less emphasis on the rights and protection of children or other specific groups than it does on social units or society as a whole.⁸¹ Second, the division of juvenile justice among the myriad systems makes it difficult to imagine joining them. Third, reforming police practices and ending the sentencing disparities that unfairly target migrant youth, which would both be required components of an effective juvenile law, would require China to meaningfully address the problem of urban migration. Finally, and most importantly, working directly to resolve the problems faced by urban migrants, who make up the bulk of juvenile delinquents, is not well aligned with the interest of the Chinese state. This suggests a potentially sinister reason for why juvenile crime has been

unaccounted for everywhere except for in the juvenile courts; it may be the Chinese government is manipulating the statistics to hide the true rates of juvenile misconduct and, by extension, the seriousness of current social unrest related to the plight of migrants.

THE STATUS QUO: A MANIFESTATION OF CHINA'S STATE INTERESTS

The Chinese Government is primarily interested in preserving its own power and legitimacy as sovereign. Maintaining political, social, and economic stability is paramount to achieving these aims. Any theory about the juvenile justice reforms of the last two decades must reckon with state interests as it analyzes the glaring problem with juvenile justice in China: juvenile crime in China is deeply linked and highly correlated with semi-urbanization (the phenomenon of disenfranchised migrants living in cities without an urban Hukou). One of the only studies of juvenile delinquency that used independent birth cohort data to study the phenomenon found that juvenile offenders were overwhelmingly the children of low class workers from “dysfunctional families” of “peasant migrants.”⁸² As discussed earlier, while a vastly disproportionate number of juvenile offenders in China are migrant workers, China's statutory reforms on juvenile justice have largely focused on the phenomenon of juvenile crime per se rather than directing more energy towards closing the urban-rural divide that is fueling mass migration and social unrest.

With these broader interests in mind, the CCP, which de facto and de jure controls the Chinese Government, has three major interests at play in reforming the juvenile justice system: (1) maintaining its international image, (2) dealing with the social problems caused by juvenile crime, and (3) ensuring that any methods of dealing with juvenile crime do not disrupt the foundations of the state.

China faces international pressure from the UN and other major global actors to comply with the standards on juvenile justice. These actors measure this compliance by looking at both statutory reform and at changes in actual practices. Convincing the international community that reforms represent an actual improvement in human rights would bring the Chinese

80 Zhao, “Juvenile Criminal Justice System in China,” 111.

81 Zhào guóqíng and Cháng lǐ. “Shàonián sifǎ gǎigé zhōng fǎguān yǔ gōngzhòng rén zhī zhī bǐjiào,” 110.

82 David Drissel, “Subterranean Sources of Juvenile Delinquency in China: Evidence from Birth Cohort Surveys,” *Asian Journal of Criminology* 1, no. 2 (February 1, 2007): 137–54, doi:10.1007/s11417-006-9011-y, 146.

government much greater prestige and legitimacy in international eyes, as China has been repeatedly humiliated when western nations have denounced it for numerous human rights violations. This humiliation is part of a trend – China’s legitimacy as a state has been almost constantly in question since at least the 19th century.

It is clear that the PRC has long seen meeting international standards on juvenile justice as an achievable goal, since it adopted both the Beijing Rules and the CRC almost as soon as the General Assembly passed them, and has subsequently put an unusual amount of energy behind the reform efforts. Article two of the revised CPL specifies “respecting and safeguarding human rights” as a primary purpose of the law, which clearly shows that China is acutely aware of its poor reputation on human rights and wants to showcase the new CPL as a sign of a sea change. As already discussed, the language of the CPL closely tracks that of international law, and it would be naïve to think that this kind of adoption of the global norm isn’t at least partially an appeal to the international community. While some scholars cynically (if correctly) pointed out that the CPL is “(mostly) old wine in new bottles,” the international community as a whole greeted its entirety and especially its juvenile protections⁸³ with great fanfare as state media propagandized the law as a stepwise, pragmatic improvement.⁸⁴

Of course, if the PRC’s compliance with its reforms and the implementation of the new CPL is to be closely monitored by international bodies, it would have to do more than simply put on the appearance of changing its rules. As of now, however, reporting requirements for the relevant international treaties are very lax. The CRC and the associated 5 rules, for example, have only a “soft enforcement mechanism.”⁸⁵ This means that China’s only responsibility to the Committee on the Rights of the Child (the body tasked with enforcing the CRC under Article 43) is to “submit a self assessment based on periodic reports” that allows the committee to assess “the progress made [...] in achieving the realization of the obligations [specified under

the CRC].”⁸⁶

So, from an enforcement perspective, China doesn’t have to show much beyond changing the laws to convince the international community that it is doing the right thing for juveniles. Of course, China’s real reputation on juvenile justice comes not only from its record at the UN, but from general perceptions about how the system functions. These perceptions are shaped mostly by the more visible reforms that China has put into practice.

China’s juvenile justice system has some extremely progressive and beneficial aspects that go beyond the protections that the new CPL provides.* Perhaps the most prominent example is China’s “round-table trials” (Yuánzhuō shěnpàn) for juveniles.⁸⁷ Unlike a traditional trial, all participants—judges, the accused juvenile(s), procurators, legal representatives, and often parents or school officials sit around a round, oval, or U-shaped table.⁸⁸ The defendants are unrestrained and listen to the officials as adjudication is carried out in a conversational manner, transforming the trial into an educational experience (the juvenile portion of the table is even sometimes shaped like a book).⁸⁹ Studies have shown the effectiveness of round table trials, and courts widely utilize them: of 148 youth courts in Shandong province, 83 percent used round-table trial methods.⁹⁰ In addition to the widely utilized “round-table trial” methods, courts are piloting other measures that could potentially be adopted by later national legislation, including suspended judgment,⁹¹ penal-

86 Ibid, 91.

* The beneficial policies provided by the CPL have already been discussed: social enquiry investigations (Article 268); court appearance with eligible adults, including parents, school officials, neighbors, and so on (Article 270); conditional non-prosecution (Articles 271-273), and records sealing (Article 2).

87 Yan Zhang, “‘Round-Table’ Trials Offer Hope,” *China Daily*, June 16, 2011.

88 Zhao guólíng and Cháng lěi, “Zhōngguó wèi chéngnián rén shěnpàn zhìdù de fǎ zhǎn,” 98.

89 Zhao, “Juvenile Criminal Justice System in China,” 106.

90 Zhao guólíng and Cháng lěi, “Zhōngguó wèi chéngnián rén shěnpàn zhìdù de fǎ zhǎn,” 98.

91 Suspended judgment, which is essentially when a judge forgoes judgment on a case, normally conditional upon good behavior, is similar to conditional non-prosecution, differing only in that the judgment occurs after the trial is completed and that it is the judge, not the procurator, that makes this decision. There is almost no evidence of its widespread use, though the first recorded instance of suspended judgment occurred in Shanghai’s Changning District on December 20, 1993.

83 Kamm, “Trying Juveniles.”

84 Joshua Rosenzweig et al., “The 2012 Revision of the Chinese Criminal Procedure Law: (Mostly) Old Wine in New Bottles.” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, July 5, 2014), <http://papers.ssrn.com/abstract=2462686>, 1.

85 Na Jiang, *China and International Human Rights* (New York: Springer, 2014).

ty mitigation,⁹² standardization of sentencing,⁹³ introduction of psychological evaluations as evidence and treatment-based corrections,⁹⁴ community-based alternatives to criminal sanctions,⁹⁵ and “restorative justice” approaches.⁹⁶⁻⁹⁷ Of course, it’s important to realize that these pilot methods are used in only a few courts around the country, and are not codified or even specifically encouraged in any national rules or legislation. Additionally, judicial “alternatives” often work against the procedural protections of the new CPL, because many of those protections mostly apply only in the adversarial setting of a trial. Still, the international community has lauded these developments as real tangible steps forward. Though these are real improvements, the absence of any significant international discourse on the content of these alternatives and whether they actually deliver on their promises should certainly be cause for those interested in the real state of juvenile justice in the PRC to be concerned.

Unfortunately, the most recent complete datasets available are from 2012, the year be-

fore the law was implemented. The question of whether China is serious about implementing the reforms of the 2012 CPL revision is still very much open. So far, the data is mixed. One encouraging piece of evidence is that while the procuratorates rejected only 17.51 percent of juvenile arrests (dàibǔ) in 2012, that number rose to 25.23 percent in 2013 and 26.22 percent in 2014. The corresponding numbers for rejections of juvenile indictments were 5.18, 6.65, and 7.34 percent for 2012, 2013, and 2014, respectively.⁹⁸ However, the rate of non-custodial sentences for juveniles fell from 41.75 to 40.24 percent from 2012-2014.⁹⁹ This could be a good sign if it means that only more substantive cases are ending in the courts, but it could also indicate that sentences are getting harsher in certain cases. And from 2007 to 2012, the proportion of minors receiving legal assistance at trial increased only modestly, from 27.76 to 34.75 percent of all cases.¹⁰⁰ In short, while there certainly has been some improvement, it is almost impossible to believe that China will realize the full promises of the CPL in the near future, and without more statistics than the government is releasing, the picture of China’s compliance will remain hazy at best, and entirely opaque at worst.

Beyond presenting a rosy picture to the world, China has a serious interest in actually handling the phenomenon of juvenile delinquency effectively. Not only are high rates of delinquency a national embarrassment, but cases involving young offenders, especially violent criminals, have a potential to polarize public opinion, leading to heated criticism of the government.* Chinese citizens, and especially netizens, frequently interact with the criminal justice apparatus from the outside, making their concerns heard and creating a strong public consciousness around issues of criminal justice reform.¹⁰¹

It is extremely important to understand the government’s interest in reducing juvenile

92 Mitigation is somewhat more utilized than suspended judgment, though like suspended judgment, it is on a purely discretionary basis. Some courts have been especially generous with mitigation: Haidian District court in Beijing mitigated punishment for approximately 28 percent of the 5200 offenders it processed between September 1987 and September 2007, reporting recidivism rates of only 1 percent, see: Lin wei, “Wǎnjīn Wèi Chéngnián Rén Fànzuì Tóngjī Shùjù Yánjiū.”

93 While nationally there is no standardization of sentencing for “serious adverse acts”, several courts have tried to introduce sentencing standards independently, see Zhāng jūn, Xíngshì fǎlǚ wénjiàn jiédù.

94 As part of social enquiry investigation, most juvenile courts at least occasionally use psychological evaluations for juvenile defendants. Some of the more progressive Courts, such as the Nanjing Intermediate People’s Court, hire counselors during trial and explicitly instruct judges to consider psychological factors for all youth defendants. See: Zhāng jūn, Xíngshì fǎlǚ wénjiàn jiédù. Nánjīng shì zhōngjí rénmin fǎyuàn, Hán liàng, and Xiào tiān, “Rùn Wù Xì Wúshēng — jì Quánguó ‘yóuxiù Qīngshàonián Wéiquán Gǎng’, Quánguó Shàonián Fǎtíng Xiānjīn Jítí, Nánjīng Zhōng Yuàn Shàonián Fǎtíng.”

95 Community-based alternatives to sentencing usually involve sending youths back to school with a plan for corrections within the community rather than. Again, the Nanjing Intermediate People’s Court is a particularly notable example. Community-based alternatives are often used as part of a conditional non-prosecution or suspended judgment arrangement, though they can also formally replace sentencing in some cases. See: Nánjīng shì zhōngjí rénmin fǎyuàn, “Hóngyáng ‘sān Chuàng’ Jīngshén Zuò Dà Zuò Qiáng Pīnpái — nánjīng Fǎyuàn Quèdìng Dàng Qián Hé Jīnhòu Yìduàn Shíqì Shàonián Fǎtíng Gōngzuò Yaodiǎn.”

96 The Nanjing Intermediate People’s Court repeatedly uses this catchphrase in its announcements, though it does not define what it means. See, for example: Nánjīng shì zhōngjí rénmin fǎyuàn, “Zuigāo Yuàn Shàonián Fǎtíng Gōngzuò Bàngōngshì Zhùrèn Jiǎng Míng Yíxíng Dào Gǔlóu Fǎyuàn Diàoyán Shàonián Shènpàn Gōngzuò.”

97 Zhao, “Juvenile Criminal Justice System in China,” 107-108.

98 Leonard Edwards, “Fewer Juvenile Arrests Approved; Migrants Bear Brunt of Charges,” *Dui Hua Human Rights Journal*, accessed November 17, 2015, <http://www.duihuahrjournal.org/search/label/juvenile%20justice>.

99 Ibid.

100 Zhōngguó fǎlǚ shèhuì, Zhōngguó sǎfǎ xíngzhèng niánjiàn, 2008-2013.

* The key example of this was the famous Li Tianyi case in 2013, though multiple other examples abound.

101 X. Huang, “Re-Legalization or De-Legalization?: Netizens’ Participation in Criminal Justice Practices in China,” *British Journal of Criminology* 52, no. 4 (July 1, 2012): 724-43, doi:10.1093/bjcz/azs021, 724.

crime as subordinate to its interest in handling juvenile crime effectively in the interest of maintaining stability and economic prosperity. The leaders of China think it can handle the problem of youth crime without tackling its root cause: internal migration.

The migrants who make up the bulk of juvenile arrests across large cities in China are treated very differently from other juvenile offenders. Migrant children often are unable to attend schools in the cities or lack steady work, leaving them idle and likely to resort to theft to sustain themselves: over a third of juvenile offenders in 2014 neither attended school nor worked, even part time.¹⁰² Across China, while migrants make up only 20 percent of the total population, they make up well over 50 percent of juvenile crime.¹⁰³ ¹⁰⁴ In 2010, Shanghai had 570,000 migrant children aged 15 to 19 alone,¹⁰⁵ and while it wouldn't allow them to attend the city's high schools, it had no problem arresting them: 95 percent of the juveniles arrested in the city from 2008-2010 were migrants.¹⁰⁶ In the industrial city of Shenzhen, migrants make up 75 percent of juvenile arrests.¹⁰⁷ Sentences are also far harsher for migrants: In 2010 Shanghai's courts handed out suspended sentences to 63 percent of youth with local Hukou, but only suspended 15 percent of migrant children's sentences.¹⁰⁸ Often, poor migrant children are specifically disenfranchised because they cannot pay damages, which are usually considered a mitigating factor in sentencing. In the famous "Li Gang Rape" case, for example, a young woman was beaten and raped by Li Tianyi, the son of a general, and four accomplices.¹⁰⁹ While Li was ultimately sentenced to the minimum 10 years for rape, two of his accomplices walked free with suspended sentences: they had paid almost \$25,000 each

to the victim.¹¹⁰ Paying compensatory damages of this magnitude is nearly always impossible for migrant children, who usually liquidate the items they steal as soon as they can to support themselves.

China's current policies handle this crime efficiently, but there is little evidence to support the conclusion that they reduce the actual crime rate. Since Deng's reforms, public security organs have responded to increases in migrant crime by eliciting a public response "similar to reactions against vagrants during the Industrial Revolution in Britain": ostracization and discrimination.¹¹¹ Until the "custody and repatriation" (shōuróng qiǎnsòng) system was abolished under public pressure in 2012, migrants were regularly detained without trial for extended periods of time for even minor offenses or for lack of proper residency documentation, after which they were sent back to their rural hometowns. While police can no longer legally use this approach, their strategy largely remains the same throughout all of China: drive the migrants away.¹¹²

Finally, while migrant semi-urbanization causes significant social unrest, China has a strong interest in maintaining it, or at least in not dismantling it quickly. This is because bringing down the urban-rural divide would require fiscal reforms that would fundamentally change the nature of the Chinese economy and possibly disrupt the power structure of the Chinese state itself. First of all, one of the Chinese government's major sources of revenue, especially on the local level, depends on the fact that it reserves the sole right to convert rural to urban land. On average, 70 percent of tax revenues go straight to national coffers, leaving little left for the local governments that are responsible for the bulk of social service provision.¹¹³ Governments often supplement their income by using their power to take land from farmers, compensating them for what usually amounts to the discounted value of 30 years' harvest. This far underestimates the actual value because it fails to take into account the value of land improvements or harvests beyond 30 years, in addition to other factors.¹¹⁴ The gov-

102 Luo Wangshu, "Migrant Life May Lead to Youth Crime," *China Daily*, April 21, 2015.

103 National Bureau of Statistics of China, "Statistical Communiqué of the People's Republic of China on the 2014 National Economic and Social Development," Communiqué (Beijing: National Bureau of Statistics of China, February 26, 2015), http://www.stats.gov.cn/en/GliSH/PressRelease/201502/t20150228_687439.html.

104 Wangshu, "Migrant Life May Lead to Youth Crime."

105 *The Economist*, "Hard Times."

106 Kamm, "Trying Juveniles."

107 *Ibid.*

108 *The Economist*, "Hard Times."

109 Hongwei Zhang, "Strengthening Juvenile Rights or Doing the Opposite: The Legal Mysteries of the Chinese Juvenile Justice System behind the 'Li Gang-Rape Case,'" 2015, http://works.bepress.com/hongwei_zhang/1.

110 *The Economist*, "Hard Times."

111 Xu, "Urbanization and Inevitable Migration," 216.

112 Xu, "Drive-Away Policing and Situational Crime Prevention in China," 255.

113 Gaurav Daga, "Reforming China's Migration Barriers," *The Diplomat*, January 16, 2015, <http://thediplomat.com/2015/01/reforming-chinas-migration-barriers/>.

114 Keliang Zhu et al., "Rural Land Question in China: Analysis

ernment then rezones the land as buildable urban lots and sells the rights to developers for as much as 20 to 30 times the value at which it was purchased, pocketing the difference.

The government could potentially make the process of converting Hukou from rural to urban easier without giving up its exclusive rezoning privilege. But there's evidence that it won't be enough to solve the problem: a July 2013 survey of 7,000 rural Hukou holders found that only a quarter thought that getting an urban Hukou was important, and only half of those rural Hukou holders whose entire families lived in the cities thought it was important.¹¹⁵ According to the National Health and Family Planning Commission, around 70 percent of migrants do not wish to give up their rural Hukou for fear of losing their land without adequate compensation.¹¹⁶ A study by the Sichuan Bureau of Statistics found that under the current land policies, 90 percent of migrants in the province's cities were not interested in obtaining an urban Hukou.¹¹⁷ Until rural migrants can freely sell their land for a fair price, or are otherwise ensured fair compensation for their land, they are not interested in trading their rural Hukou for urban ones. Because local governments receive so little in taxes, they depend on rural-urban "flippings" for most of their revenue, making it seem unlikely that the central government will take the necessary steps that would incentivize rural migrants to convert their Hukou to become urbanites in the foreseeable future: doing so would entail simply too much risk with almost no (short- or mid-term) reward.

Additionally, another, even more difficult problem looms: leveling the playing field for urban and rural Hukou holders would be extremely expensive. Following the last fiscal reforms in 1994, during the late 1990s through the 2000s, the central government instituted a series of land reforms that "spun off" the primary responsibility for administering the Hukou system to local governments, in the hope that a solution to the social services problem could be devised on a local level.¹¹⁸ Unfortu-

nately, these local initiatives have enjoyed very limited success. Currently, migrants still have little to no access to social services in the cities, and providing access would require massive amounts of money that local governments simply do not have.

The trouble is that in China, the migration problem is deeply linked to the root causes of juvenile crime. For example, one of the major problems that migrant workers' children face in the cities is lack of access to educational services: since they do not have an urban Hukou it is almost always practically impossible for them to attend urban schools, and, as a result, children with urban Hukou are 3.5 times more likely to attend middle school and 16.5 times more likely to attend high school than their counterparts who hold rural Hukou; for tertiary education these disparities are even bigger: urban children are 55.5 times more likely to attend junior college and 281.5 times more likely to attend university than rural youth.¹¹⁹

Migrants have tried to raise these issues on their own, but the government has responded not only with indifference, but with force. When the New Citizens' Movement held small, peaceful demonstrations calling for the educational equality of migrant children in November 2013 (more than a year after the passage of the new CPL), the government responded with a vicious crackdown, detaining scores of key figures without trial.¹²⁰ Local governments have proposed reforms and some, like the city of Zhongshan, have even implemented reforms to allow migrants to obtain urban Hukou. All of the policies instituted so far in medium to large cities have carried significant qualifying conditions for migrants that are difficult and sometimes nearly impossible for them to meet, including educational, financial, employment, and other requirements.¹²¹ Unsurprisingly, the policies have not worked very well. Zhongshan, whose policy the central government held up as a model during 2014 reforms and praised for its unique "point system" that allowed rural migrants to obtain urban Hukou, had only

and Recommendations Based on a Seventeen-Province Survey," *NYU Journal of International Law & Politics* 38 (2005): 761-841, 778.

115 *The Economist*, "Ending Apartheid."

116 *Ibid.*

117 *Wall Street Journal*, "China's Hukou Reform Plan Starts to Take Shape."

118 Kam Wing Chan and Will Buckingham, "Is China Abolishing the Hukou System?" *The China Quarterly* 195 (September 2008), doi:10.1017/S0305741008000787.

119 China Human Rights Defenders, "'Flowers of the Country': Mistreated and Abused A Report on Violations of the Rights of the Child in China," August 2013, <http://www.chrdnet.com/wp-content/uploads/2013/09/CHRD-report-on-Rights-of-the-Child-in-China-FINAL.pdf>, 6.

120 Congressional Executive Commission on China (CECC), "2014 Annual Report," Congressional (Washington D.C.: U.S. House of Representatives), accessed December 12, 2015, http://www.cecc.gov/sites/chinacommission.house.gov/files/2014%20annual%20report_0.PDF, 3.

121 *Ibid.*, 30-32.

30,000 out of its total population of 1,600,000 migrants – just under 2 percent – gain urban status under the plan.¹²² If 2 percent enrollment counts as success to the central government, it seems obvious that the Hukou problem will not be resolved anytime soon.

While the central government is also slowly introducing some minor reforms to the Hukou system on the national level, these only scratch the surface of the problem. Even by the government's own estimates, the reforms will grant urban Hukou to at most 100 million by 2020, less than a third of the urban migrant population that would be projected at that time based on the assumption that the rate of urban migration remains at current levels.¹²³ This assumption is probably optimistic, as the number of outgoing migrant workers has grown uninterruptedly since 1980.¹²⁴ Even according to the government's own estimates, which take into account the current reforms, the population of migrant workers in China will increase by 10 million a year for the next 30 years.¹²⁵ Even if the central government's plans play out perfectly, 100 million rural-to-urban Hukou conversions would barely make a dent.

The only feasible way for China to end the urban-rural divide and migrant problems created by Hukou system, thereby cutting off juvenile crime at its roots, would be to institute another wave of fiscal reform, and plenty of it. The vehemence of local leaders' resistance to any Hukou reforms that come without additional tax revenue to fund social services makes comprehensive reform impossible unless it is matched by increased funds.¹²⁶ Given the current reality that the costs of Hukou reform would fall mainly on local governments, these fiscal reforms would come primarily as some mix of three policies: increasing the proportion of tax revenues that go to the local governments, instituting a value added tax (VAT) to increase government reve-

nues overall, and creating nationalized welfare policies that distribute more benefits to poor and rural migrants, removing the crucial link between Hukou and government benefits.

At this point, anyone familiar with the Chinese state should be chuckling: these reforms would likely take decades to implement in a politically feasible manner, and there's little incentive for national rulers to change the rules, as doing so would almost certainly decrease the central government's income. While in the very long run, this reform would be good for the people, its short-term consequences would mean an end to the cheap labor provided by the rural-urban disparity and a significant decrease in GDP growth rates for the foreseeable future as the economy would shift away from its current dependence on that labor. This would almost certainly spell trouble for the CCP, which in many ways has based its legitimacy on its ability to provide high levels of relatively stable economic growth.

It is now clear why China has concentrated so much on reforming and refining the formal judicial processes of the juvenile court rather than giving attention to the other mechanisms that deal with juvenile crime: the court presents an internationally "up-to-code" version of juvenile justice, even if it does not tackle the underlying problems that migrants face. In short, there is no "easy way out" of the migrant worker problem, and without solving that problem, China's options for reducing juvenile crime will be extremely limited.

THE WAY FORWARD: AREAS FOR REFORM AND RESEARCH

Of course, "extremely limited" does not mean nonexistent. Several concrete policy steps, both on the international and domestic level, as well as additional research in key areas, might help pave the way towards a better juvenile justice system in China, and perhaps even speed resolution of the migrant issue. One of the largest problems with the way the international community sees the issue of juvenile justice is that it has given too much weight to statutory reform and has not done enough independent investigation of affairs "on the ground." One way to improve the latter from a purely international perspective would be to strengthen the CRC reporting requirements by creating a "hard" enforcement mechanism that gives third-party inspectors a chance to more thoroughly understand the realities of juvenile

122 "Ending Apartheid," *The Economist*, April 19, 2014, <http://www.economist.com/news/special-report/21600798-chinas-reforms-work-its-citizens-have-be-made-more-equal-ending-apartheid>.

123 Growth rates from Xu, "Urbanization and Inevitable Migration." 211.

124 *Ibid.*

125 *Ibid.*, 212.

126 The 2014 reforms championed point-based systems for allowing migrants to obtain urban Hukou, removing the central government-imposed limits on Hukou registration in townships and small cities, easing restrictions in medium-sized cities, and suggesting that big cities institute criteria that would allow migrants to obtain urban Hukou. See: "China Focus: Hukou Reforms to Help 100 Mln Chinese." CCTV News.

justice in China, and, of course, to verify the official statistics on crime. Another way, which could be accomplished through cooperation between state actors, domestic activists, and NGOs, would be to push for China to pass a unified juvenile law that clearly defines which government agencies are responsible for the various aspects of juvenile crime.

The international community must also work hard to prevent impending threats to reform. The reality is that most of the current reforms, especially the 2012 CPL amendment, were greatly helped along by NGOs, which have held exchanges with judicial officials, met with Chinese legislators and judges, and helped to translate international law into measures that would be practicable in the Chinese system.¹²⁷ Unfortunately, the NPC is currently considering a new NGO management law modeled after Russia's that would subject both domestic and foreign NGOs to an oppressive degree of scrutiny and regulation.¹²⁸ Given the dependence of past reforms on NGO pressure, the new law is likely to greatly hamper future and ongoing reform efforts. Increased international pressure on China might lead to improvements in the law's terms or an enforcement schedule that is more generous to NGOs.

While the Hukou problem is far more difficult to tackle than juvenile justice as a separate issue, international governments and NGOs may nevertheless benefit from focusing more of their human rights pressures on China towards reformation of the Hukou system. Compared to other human rights issues such as freedom of speech or religion, the semi-urbanization problem gets relatively little international attention; garnering single-digit mentions in the Congressional Executive Commission on China's most recent (2014) report. And unlike these issues, the Hukou problem can be addressed locally as well as nationally. While local government policies are only part of the solution, it is clear that success on the local level increases the likelihood that China will implement a given policy nationwide. Local policymakers in China have been receptive to international attention in the past, and will likely continue to be in the future.

Domestically, local leaders can do a great deal to improve juvenile justice outcomes. When it comes to the system itself, local courts

have a great deal of discretion in how they can handle cases of juvenile crime, especially minor crimes. If the history of the juvenile court in China tells us anything, it is that when more courts experiment with effective alternatives, those alternatives are more likely to become the default procedures of the next generation. For example, the great popularity of mediation is understandable because of China's deep legacy of non-confrontational problem solving. The next step of reform is to introduce psychologically- and age- appropriate mediation techniques that are sufficiently independent from political influences. This is already happening in the Nanjing Intermediate People's Courts, and if more courts follow their lead, outcomes for offending youth across China will improve significantly.¹²⁹

Another one of the major domestic factors standing in the way of juvenile justice and better treatment of the overwhelmingly migrant youth offenders is nearly-ubiquitous public disgust for migrants,¹³⁰ widespread discrimination against them,¹³¹ and a general social atmosphere of indifference towards the poor treatment of juvenile offenders.¹³² While public opinion is difficult to change, many young Chinese activists are tackling the problem on the grassroots level. One particularly famous example occurred when popular TV show host Cui Yongyuan invited 154 migrant workers to dinner in a posh Beijing hotel.¹³³ As he joked with a reporter from *The Beijing Daily* his message was clear: "Respect for migrant workers should be business as usual."¹³⁴ Other movements have cropped up as well: On Chinese Valentine's day 2012, several college students invited 30 migrant workers to dinner on national television.¹³⁵ Much work remains to be done, however, and the more progress activists make in changing urbanites' perceptions of migrants and the juvenile offenders among them, the

129 See note 95.

130 Hsiao-Hung Pai, "China's Rural Migrant Workers Deserve More Respect from the City-Dwellers," *The Guardian*, August 25, 2012, sec. Opinion, <http://www.theguardian.com/commentisfree/2012/aug/25/china-rural-migrants-more-respect>.

131 Jason Gagnon, Theodora Xenogiani, and Chunbing Xing, "Are Migrants Discriminated against in Chinese Urban Labour Markets?" *IZA Journal of Labor & Development* 3, no. 1 (2014): 17, doi:10.1186/2193-9020-3-17, 3.

132 Zhào guó líng and Cháng lěi, "Shàonián sīfǎ gǎigé zhōng fǎguān yǔ gōngzhòng rèn zhī zhī bǐjiào."

133 Běijīng rìbào, "Cuiyōngyuán qǐng mínggōng yīngxióng chīfàn."

134 Ibid.

135 Pai, "China's Rural Migrant Workers Deserve More Respect from the City-Dwellers."

127 Julie Tang, "Introducing Group Homes to China's Juvenile Justice Experts."

128 *The Economist*, "Uncivil Society," August 22, 2015.

more likely it is that local and national politicians will support reforms to help these vulnerable populations.

Finally, on both the international and domestic stage, scholars have an enormous role to play in pushing the reform of China's juvenile justice and Hukou systems forward. First, the recent movements in Western Europe and North America to independently "cross-check" government crime statistics must be transferred to China in order to provide an accurate picture of the macro-scale of the Chinese juvenile justice apparatus.¹³⁶ Second, researchers can fill the gap left by official statistics by researching underreported phenomena including mediation of juvenile crimes and use of administrative courts in matters of juvenile delinquency. Third, researchers, often working together with NGOs have developed many of the reforms that we see reflected today in China's juvenile justice system.¹³⁷ Because researchers have less political baggage than diplomats or foreign politicians, NPC legislators and other key figures in the Chinese legislative and judicial systems have historically been more receptive to their calls for reform.

CONCLUSION

While the complexity of Hukou reform may make the task of reducing juvenile crime in China seem daunting, the history of how China

has treated juvenile crime shows just how malleable the systems managing juveniles can be, and how massive reform can occur in less than a decade. This paper has primarily discussed how juvenile crime in China is intimately and inextricably linked to the phenomenon of migrant semi-urbanization as it intertwines with the Hukou system, and has argued that China can manage juvenile crime effectively only in conjunction with resolution of the migrant issue. China's 2012 reforms to the Criminal Procedure Law marked a significant advance in the rights of children at trial, but the international community mistakenly took the law as an overall improvement in China's juvenile justice system, largely failing to recognize that much of the way China manages juvenile crime has nothing to do with these juvenile courts. The juvenile justice system per se still has much room for reform, and as more changes are implemented, the need to resolve the migrant problem will become more and more obvious. Since the establishment of the PRC, reform in these areas has been slow, but the pragmatic steps of both the national legislature and of local leaders have shown promise, both in improving the state of juvenile justice and in easing the struggle of migrants. Improvement is slow, and perhaps too slow by some standards, but at the very least the overall trend in juvenile justice for the last half century has been one of constant improvement in judicial standards and practices. Through the guidance of passionate China activists and astute leaders, this improvement may continue to accelerate; after all, the task of reducing juvenile crime in China, if Herculean, is emphatically not Sisyphean.

136 Phil He, "The Politics of Numbers," in *The Routledge Handbook of Chinese Criminology* (Routledge, 2010), <http://www.routledgehandbooks.com/doi/10.4324/9780203766774.ch12>.

137 The Dui Hua Foundation, "Dui Hua Hosts Third Juvenile Justice Expert Exchange with China," *Dui Hua Human Rights Journal*, accessed December 17, 2015, <http://duihua.org/wp/?p=6857>.

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SINGAPORE'S VIOLATIONS OF THE RIGHT TO THE FREEDOM OF EXPRESSION AND THE UNIVERSAL APPLICABILITY OF THE UDHR

INTRODUCTION

Singapore frequently comes under criticism from the international community for its violations of the Universal Declaration of Human Rights (UDHR), particularly Article Nineteen, which states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."¹ Singapore justifies its violations in two ways: it argues that the Declaration allows for states to impose restrictions on the absolute freedom of expression and that Singapore's actions are an exercise of this provision, or that the framework around which the UDHR is built is a Western concept that is inapplicable to governance in Singapore.² By analyzing freedom of expression in Singapore regarding topics of race and religion, this essay will examine the applicability of the UDHR and argue that both points of rebuttal are fair; because the UDHR requires a belief in a minimum level of human universality and egalitarianism not yet uniform in the world, there is fair reason to doubt the universality certain articles such as Article Nineteen. This, in turn, questions the legitimacy of international bodies requiring states to conform to these standards universally.

This essay will theoretically evaluate Singapore's opposition to freedom of expression's status as a human right against arguments

by John Stuart Mill, Jack Donnelly, Michael Ignatieff and Amartya Sen. Section II will first provide a brief background of human rights and clarify which conceptual definition of human rights this essay employs. Section III will evaluate whether Singapore's interpretation of the freedom of expression article is fair, assuming the legitimacy and binding quality of the UDHR, while sections IV-VI will investigate whether the UDHR in itself should be seen as a set of universal principles binding on all states.

BACKGROUND TO THE CONCEPT OF RIGHTS

A right, in the context of this discussion, refers to the entitlement³ that one has to something, whereby its fulfilment takes priority over the competing needs of other individuals or of society on the whole. To have a human right to something is to claim that one's status of being a human with intrinsic worth necessarily confers to them certain entitlements, which one can exercise at their will in order to obtain. These human rights exist regardless of whether they are exercised by the individual wielding the right, or if they are respected by the offending authority against which the right is exercised.⁴ Human rights can be protected and enforced within communities, organisations, institutions, or the state. However, human rights are essentially extra-legal with regards to a state's domestic laws:⁵ if an individual's claim to a human right is either violated or not enforced by the laws and customs of the aforementioned

1 "Universal Declaration of Human Rights," *UN General Assembly*, 217 (III) A, 1948.

2 "Government's Response to UN Review a Major Setback for Human Rights," *International Federation for Human Rights*, June 24, 2016.

3 Jack Donnelly, *Universal Human Rights in Theory and in Practice* (New York: Cornell University Press, 1989), 9.

4 *Ibid.*, 10 and 12.

5 *Ibid.*, 14.

different levels of social organisation, the individual can appeal to the international community for the enforcement of their human right, against the legal system of any organisations within the state.

The preamble to the UDHR does not clarify the theoretical origins of human rights. It states that humans are equal in their inherent worth, dignity, and concludes that humans have these inalienable rights without providing a strong explanatory mechanism. The ambiguity of the preamble's phrasing gives it the potential to be universal, for few societies or cultures around the modern world would deny an innate moral quality of human beings, and similarly few would deny that a human should never be subject to certain forms of abusive treatment. Academic and former Canadian politician Michael Ignatieff problematizes this philosophical shared ground: in light of the history of gross injustices that individuals have been subject to when legally unprotected by their own state, he argues that "[p]eople may not agree why we have rights, but they can agree that we need them."⁶ Ignatieff hence takes a historical and pragmatic approach to human rights – even if theoretical justifications for human rights do not sufficiently convince, history makes plain the devastation that follows without them. Ignatieff argues for a minimal set of human rights that are absolutely necessary to protect individuals from abuse at the hands of larger collective groups.

However, one must convincingly defend a theoretical connection between human dignity and human rights in order to understand on what grounds human beings have an inalienable right to all provisions listed in the UDHR rather than just a minimal set of human rights. Jack Donnelly, who has written extensively on human rights theory, sketches the connection in the following manner: all humans have an intrinsic moral worth, and owing to their moral nature, their humanity only flourishes when they live a life of dignity. Thus, humans require a system of rights that ensures humans are never denied their humanity by being forced to live a life without dignity. Because the meaning of living a life with dignity changes depending on developments in the material and political world, human rights similarly contextualize themselves to protect individuals against anything specific to their circumstances that would

force them to lead a life without dignity.⁷

Two Southeast Asian leaders, Mahathir Mohamad and Lee Kuan Yew, have decried the imposition of human rights in Asia, claiming that it is a distinctly western concept at odds with Asian values. However, following the logic laid out by Donnelly, and economist and philosopher Amartya Sen argues that human rights cannot possibly be seen as a Western concept inapplicable to non-Western societies, because the respect for human dignity and the values that human rights seek to protect, such as toleration, personal liberty, and civil rights, are not specific to Western civilisation.⁸ Instead, Sen views the notion that every human being has inherent worth to be an extremely recent development, arising in the wake of the destruction of World War II, a sentiment Donnelly echoes when he argues that prior to 1948, human dignity was accorded to individuals of a certain identity or status rather than universally.⁹ Sen adds that all civilizations, Western and non-Western, have had schools of philosophical thought that promoted or dismissed the values seen in the UDHR. The contents of the UDHR are hence not any more Western than they are non-Western, suggesting that the enforcement of human rights in non-Western states therefore cannot be considered cultural imperialism.

However, Donnelly picks up on the lapse of logic in Sen's argument when he differentiates societies' respect for human dignity with their respect for human rights.¹⁰ Even though all societies and cultures agree that individuals have innate moral worth and that their human dignity should be protected, ensuring and protecting such concepts through a rights system remains an undeniably Western concept. Many ways of protecting the dignity of a human in society exist, and doing so through the idea of rights – a framework of achieving social and political protections that arose in the seventeenth century England – is merely one of them.¹¹

THE LEGITIMACY OF DIFFERENT INTERPRETATIONS OF ARTICLE NINETEEN

One could deliberate on whether Singapore is legally bound by international law to

7 Donnelly, *Universal Human Rights*, 26.

8 Amartya Sen, "Universal Truths: Human Rights and the Westernizing Illusion," *Harvard International Review* 20, no. 3 (1998): 40-43.

9 Donnelly, *Universal Human Rights*, 129.

10 *Ibid.*, 53-55.

11 Donnelly, *Universal Human Rights*, 57-58.

6 Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001), 55.

observe all articles of the UDHR, but this is not the intended focus of this essay. The following section will evaluate Singapore's actions in light of the UDHR, assuming that it accepts and is committed to upholding the UDHR of 1948, or the general concept of human rights.

In "International Human Rights," Donnelly maintains that if radical universalism and strong cultural relativism constitute opposing ends of a spectrum along which human morality falls, the UDHR necessarily occupies the gradient between the two. The very notion of human rights mandates an acceptance of some degree of moral universalism, yet "[t]o insist that all human rights be implemented in precisely identical ways in all countries would be wildly unrealistic, if not morally perverse."¹² Donnelly further divides the "concept" behind an article in human rights from its "implication," and attributes the universal aspect to the former, while suggesting that one can take a more relativist approach with the latter.¹³

For the most part, the Singapore government often uses the distinction between concept and implication to justify restrictions on the freedom of expression. The Singaporean authorities recognize that international law and the Singapore Constitution protect the freedom of expression of individuals in Singapore's territory, but they emphasize that this freedom is not absolute. Authorities' actions correspond to the exemptions to the freedom of expression laid out by the International Covenant on Civil and Political Rights, which states that:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) for respect of the rights or reputations of others;

(b) for the protection of national security or of public order, or of public health or morals.¹⁴

However, these restrictions must meet a strict three-part test approved by the UN Human Rights Committee and the European Court of

Human Rights, which states that the freedom of expression can only be curtailed if it is:

a) provided by law;

b) for the purpose of safeguarding a legitimate public interest; and

c) necessary to secure that interest.¹⁵

Restrictions on the freedom of race and religion-related expression in Singapore are not arbitrary but rather provided for in the Singapore Penal Code, in the Maintenance of Religious Harmony Act as well as a range of other acts that prohibit content circulation of "undesirable content" in the media.¹⁶ Furthermore, Singapore often cites both its history of devastating racial riots¹⁷ and its need to minimize conflict between ethnic groups within its multi-ethnic state as reasons enough to restrict freedom of expression on topics of race and religion. The freedom of expression article hence does not protect individuals who deliver statements or comments that can hurt or incite ill will toward other racial and religious groups. However, critics often point out that at this stage in Singapore's development, the disorder that may result from ethnic conflict would be unlikely to cause enough economic damage to endanger the livelihood of Singaporeans. In other words, even if economic rights do necessarily precede social and political rights,¹⁸ Singapore has already developed to an extent that social and political rights can be upheld without threatening one's enjoyment of their right to basic economic and material needs. Furthermore, as John Stuart Mill has also argued, the right to the freedom of expression may be necessary for continued economic prosperity. Even if it contributes to social destabilisation in the short run, an organic and evolutionary development of society can only occur with the free exchange of ideas and sentiments.

However, these critiques demonstrate that the freedom of expression is a means through which continued social and economic stability can be enjoyed. They do not demonstrate the

15 Ibid., 20.

16 'World Report 2015: Singapore,' Human Rights Watch, accessed December 15, 2016.

17 *Human Rights Institute Report: Prosperity Versus Individual Rights? Human Rights, Democracy and Rule of Law in Singapore*, International Bar Association (July 2008), 8.

18 Kishore Mahbubani, "An Asian Perspective on Human Rights and Freedom of the Press;" in *Can Asians Think?: Understanding the Divide between East and West* (South Royalton: Steerforth Press, 2002), 74.

12 Jack Donnelly, *International Human Rights* (Boulder: Westview Press, 1993), 36.

13 Ibid., 37.

14 James Gomez, *Freedom of Expression and the Media in Singapore*, (London: Article 19, 2005), 19.

primacy of rights over other concerns, nor do they show that freedom of expression is more important than these common goods. These arguments in fact prove the contrary – as long as Singaporeans and the government regard economic prosperity and social stability as a sufficiently weighty and legitimate public interest, the freedom of expression may be curtailed to attain the greater purpose that it serves.¹⁹ Therefore, while rights are precisely intended to have a ‘trump’ quality over social utility, because provisions make the right to the freedom of expression a prima facie right rather than an absolute one,²⁰ it becomes difficult to dismiss the manner in which Singapore has interpreted “implication” from “concept” as wholly illegitimate.

However, if one follows the path taken by philosopher Ronald Dworkin and demands an even more stringent approach to rights, in which rights are entitlements that truly can never be violated unless the exercise of these rights poses a real and imminent threat to other members of the public,²¹ many of Singapore’s restrictions on the freedom of expression become even more contentious. In 2015, sixteen-year-old Amos Yee was found guilty of having the “deliberate intent of offending Christianity” and for the “electronic transmission of an obscene image”²² after uploading a YouTube video of himself drawing offensive analogies between Jesus Christ and the late Prime Minister of Singapore, Lee Kuan Yew. Human rights activists quickly condemned this violation of human rights^{23 24} presumably on the basis that the words of a teenager could not have the ability to offend Christians to the point of violent religious conflict, and that Singapore had gone “beyond recognised constraints”²⁵ in its limitation of Yee’s freedom of expression. In contrast, the decision made by Times Printers, with the strong support from the Media Development Authority (of Singapore),²⁶ to pull the

controversial image of a Charlie Hebdo cover page from the printed copies of *The Economist* in Singapore met with little resistance from local or international critics.

These cases run parallel with Mill’s analogy that “an opinion that corn-dealers are starvers of the poor...ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer...”²⁷ In light of the terrorist killings that had just occurred in Paris in response to the drawings, restricting the freedom of expression in favour of public security no longer seemed like a disproportionate response. However, the impossibility for governments to predict or control events that occur as a response to unrestricted speech make it harder to binarize the two situations, especially as governments and societies, rather than human rights critics, possess the responsibility for dealing with the effects of social unrest within a country.²⁸ There is certainly no clear conclusion on how to determine the likelihood that an exercise of one’s freedom of expression will threaten public safety, but when lives are at stake, it seems judicious for the government to err on the side of caution. Therefore, the exercise of Amos Yee’s freedom of expression to make offensive remarks about Christianity may not have deserved punishment at that point, but may have had vastly different consequences in another context which may not necessarily be easy to predict.

Since it has been demonstrated that the freedom of expression can never be absolute, one could also go further to consider the extent to which a Singaporean must be able to express their views on race and religion in the public sphere for them to enjoy human dignity. If an individual derives human dignity purely from the exercise of one’s free agency, then the enjoyment of human dignity could arise from a person’s ability to express themselves and have those sentiments impact political and civil life. However, this line of argument sees human dignity in purely individualistic terms of a person’s agency, and the connection between human dignity and speech will be changed if an alternate philosophical framework is used.

19 Whether or not prohibiting the freedom of expression is an effective means to social and economic prosperity is a question not intended for this essay.

20 Donnelly, *Universal Human Rights*, 7.

21 Ronald Dworkin, “Taking Rights Seriously” in *Taking Rights Seriously* (London: A & C Black, 2013), 195.

22 “Public Prosecutor v. Amos Yee Pang Sang,” *Global Freedom of Expression* (Columbia University), accessed December 15, 2016.

23 “Singapore: Exonerate 16-Year-Old Blogger,” *Human Rights Watch*, June 22, 2015.

24 “Singapore 2015/2016,” *Amnesty International*, accessed on 15 December, 2016.

25 *Human Rights Institute Report: Singapore*, 6.

26 “The Economist magazine pulls controversial cartoon out of

copies printed in Singapore.” *The Straits Times*, January 16, 2015.

27 J.S. Mill, “Of Individuality, as One of the Elements of Well-Being,” in *On Liberty (1859) and Other Writings*, ed. S. Collini (Cambridge: Cambridge University Press, 1989), 56.

28 *Ibid*, 65-66.

In Confucian thought, for example, a person's human dignity is recognized when they display *Rén*, which translates to the concepts of "love," "humanity," "benevolence," "goodness," etc. This concept of *Ren* has both an individual and a social aspect to it; a person displays *Ren* by firstly cultivating their individual personality, and secondly by recognizing a responsibility to others.²⁹ In this specific understanding of human dignity, an individual then enjoys human dignity through speech or expression not merely as an exercise of their agency, but when their duty toward others is fulfilled. This 'duty' may entail many things, including respect for the human dignity of others. While both individualistic and socially-constructed notions of human dignity undergird Singapore's political and civil spheres, the banning of racist or insensitive speech that questions the dignity of others in society hence remains justifiable. This reasoning may not absolve the Singaporean government from the need to respect freedom of expression, given that the government has committed to upholding human rights, but that justification certainly problematizes how said rights are implemented and enforced, especially when Singapore prohibits remarks made with the intention of negatively inflaming public opinion rather than that of contributing to a healthy debate.

EVALUATING THE UNIVERSAL APPLICABILITY OF THE UDHR

The previous section looked at the difficulties faced when critiquing the Singapore government's implementation of Article Nineteen of the UDHR, protecting one's right to the freedom of expression. The next three sections will consider the relative incompatibility of the UDHR with countries like Singapore, which do not operate within the Anglo-American political tradition or do not occupy the same stratum of socioeconomic and political development as the Western world.

Juggling with Rights

The 1993 Vienna Declaration, which clarifies and reaffirms the principles of the UDHR, clearly states that 'All human rights are universal, indivisible and interdependent and interrelated.' This means several things: one, the total effect of enjoying all of one's rights is greater

than the sum of its parts; two, the enjoyment of some rights are dependent on the enjoyment of others;³⁰ three, the UDHR lists the 'minimum conditions necessary for a life worthy of a human being' and that the systematic violation of any one right disables an individual from 'realising a life full of human dignity.'³¹ Donnelly responds to Henry Shue's notion of "basic rights" by agreeing that it is the goods that result from basic rights, rather than basic rights themselves, which are needed to ensure other rights.³² The rights themselves, differentiated from the goods that they procure, continue to be indivisible.

Yet, one would be hard-pressed to find a state that had the ability or motivation to enforce all thirty articles of the UDHR with equal vigor on the day it came to realize their national sovereignty. Even in the United States and Britain, countries that take credit for creating the language of rights, human rights still evolved to meet the demands of groups in power only in accordance with what the state was able to provide.³³ When the universalization of rights threatened the economic prosperity and national unity of a state, as the question of slavery and the enfranchisement of women did in the United States, the project of handing rights to all persons was quickly filed away for future implementation. The US was hence free to undertake its desired state-building projects of industrialisation and political stabilisation, unhampered by the need to adhere to the requirements of a human rights regime, and could gradually develop a system of rights that would at no point outstrip the US government's capacity to enforce these rights. For a state to even secure some human rights, such as education or freedom from poverty, an initial degree of political power and financial capability is necessary. The ability to further protect human rights requires resources achievable only through development. And, if Donnelly correctly says that no country has developed without repression,³⁴ amassing the power and resources needed to uphold human rights at all may contradictorily require states to violate certain human rights.

Perhaps Singapore, with its economic pros-

29 Pilgrim W.K. Lo, "Human Dignity — A Theological and Confucian Discussion," *Dialog: A Journal of Theology* 115, no. 2 (2009): 169-171.

30 Donnelly, *Universal Human Rights*, 3rd ed., 31.

31 Donnelly, *Universal Human Rights*, 1st ed., 41.

32 *Ibid.*, 38.

33 Jeremy Bentham, "Anarchical Fallacies," in *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, ed. Jeremy Waldron (London: Routledge, 2014), 53-54.

34 Donnelly, *Universal Human Rights*, 1st ed., 187.

perity far exceeding that of many other countries, has long lost its right to claim that providing Singaporeans with the freedoms of security and peace requires the state to violate the freedom of expression on the topics of race and religion. However, costs of effectively implementing human rights are not just fiscal:³⁵ there are social and political costs as well. Although highly unlikely, the unregulated freedom of expression in multi-ethnic Singapore, where clear hierarchies of power exist between racial groups, may damage the ability of the state to protect other rights of individuals in society. It could, in fact, be highly beneficial³⁶⁻³⁷ for Singaporean authorities to loosen restrictions on the freedom of expression on divisive issues such as race and religion in order to foster a genuine exchange of ideas in society, but doing so would still be contingent on the government's continued capacity to maintain the implementation of other human rights.

Exclusion of non-liberal and hierarchal regimes

Proponents of the Asian values debate such as Lee Kuan Yew and Dr Mahathir Mohamad have frequently rejected the universalism of the UDHR; they argue that by placing individualism as its cornerstone, human rights become incompatible with Asian societies that value collectivism and authority. The substantiation provided for this theory has proven to be weak, and critics have accurately pointed out that Lee and Dr Mahathir have a vested interest in using this argument to justify their own authoritarian rule rather than simply demonstrating a population's preference for such governance.³⁸ However, even if this thesis is poorly supported, the question at the heart of its debate remains, and is one that needs to be thoughtfully considered how can human rights be universal if they rely on fundamental values that are incompatible with other societies, Asian or otherwise?

According to Donnelly, the UDHR presupposes the belief in equal concern and respect, which is the only common ground needed between vastly divergent contemporary societies. For him, any society and government that treats people as moral and political equals and that values personal liberty and autonomy is immediately compatible with the core values of the

UDHR.³⁹ Hence, they should have no qualms with accepting its universality. He argues that the belief in equal concern and respect has become the international standard today, such that the refusal to see human beings as fundamental autonomous actors is regarded as legitimately "unreasonable" in the contemporary world.⁴⁰ That this may not accommodate all societies today demands no apology, since they have proven to be unreasonable, but also because it because "[e]ven where citizens do not have a particularly sophisticated sense of what a commitment to human rights means, they respond to the general idea that they and their fellow citizens are equally entitled to certain basic goods, services, protections, and opportunities."⁴¹

When analyzing how Singapore aligns with the core values of the UDHR, one must acknowledge that differentiating the actual values of Singapore from the values that authorities project onto Singapore society can be a difficult task. The People's Action Party (PAP) has paternalistically governed Singapore since it first came to power, only gradually loosening the reins in recent years. Relying on a system of hierarchy between politicians and the people, the population lends electoral support and confers legitimacy to the PAP in exchange for an elitist, top-down governance that stimulates economic growth and provides stability. Despite the rise of a talented and formidable opposition, PAP has continued to win a large majority of the vote share, receiving 69.9 percent of the vote in the 2015 General Election.⁴² Even if only implicitly, Singaporeans have demonstrated a preference for a hierarchical political structure with the power to curb civil liberties when it is exercised for their common good, or at least do not prioritise civil liberties sufficiently to give up efficient governance in exchange for it.

Assuming that Singaporeans have deliberately chosen a hierarchical political structure that contradicts the core values of human rights, how do we assess its place in the international regime of human rights? Firstly, to suggest that human rights are universal because most citizens would respond favorably to being award-

35 Ibid., 117.

36 Bentham, "Anarchical Fallacies," in *Nonsense Upon Stilts*, 53.

37 Mill, "Of Individuality," in *On Liberty*, 65.

38 Donnelly, *Universal Human Rights*, 3rd ed., 146.

39 Ibid., 33-34.

40 Ibid., 70.

41 Ibid., 56.

42 Sumiko Tan. "GE2015: PAP vote share increases to 69.9%, party wins 83 of 89 seats including WP-held Punggol East," *The Straits Times*, September 12, 2015.

ed these rights after considerable thought seems disingenuous, for it is unsurprising that people would want these protections. However, whether human rights truly are society's preferred political expression depends on how they are prioritised when stacked against other practical concerns and when they get in the way of a more effective governing system. Secondly, dismissing societies like Singapore that are not fully egalitarian as unreasonable suggests that attempts should be made to convert it into holding values that are more valid⁴³ – yet simultaneously justifies Singapore's refusal to accept the universality of the UDHR on the basis of incompatible values.

Two solutions have been presented to this problem by John Rawls and Ignatieff respectively. Rawls' *The Law of Peoples* argues that there should be international toleration of Decent Hierarchical Societies, which do not have aggressive aims and which respect a minimal list of human rights, including the right to life, to liberty, to property and to formal equality.⁴⁴ While he intends to incorporate non-liberal, hierarchical states into international society "in good standing,"⁴⁵ the suggestion that Decent Hierarchical Societies are less just than liberal ones, even if hierarchies are used for the common good, is inherently condescending, especially in practice. This theory hypocritically prioritizes certain notions and methods of achieving justice over others, especially considering the fact that the countries at the forefront of promoting these universal standards, such as the United States and other European powers, have benefitted from a hierarchical world order that sustained their development since the modern era. To suggest that some forms of hierarchy are not necessarily unjust does not imply that hierarchical power structures are never used for the personal political gain of a government, as the PAP certainly has done so in Singapore in the past fifty years. However, this does argue that hierarchy can be used for just purposes, such as that of rapid economic development or the enforced equality of minorities who may otherwise be outnumbered in a majoritarian discourse. This point of argument brings up more issues with the application of human rights rather than its theoretical validity but is nonetheless important to consider when

analysing the coherence of the UDHR's claims to universality.

As mentioned in previous sections, Ignatieff acknowledges the impossibility of building a consensus on philosophical grounds for all the human rights articles in the UDHR. Instead, he takes a minimalist approach, arguing that an objectively universal consensus can be reached via a version of the common rule: "The basic intuition that what is pain and humiliation for you is bound to be pain and humiliation for me."⁴⁶ He does not intend to build a comprehensive system of political, social, economic and civil rights, but instead aims to prevent totalitarian regimes in which individuals have no protection against larger social structures⁴⁷ by pursuing a systematic agenda of negative liberty⁴⁸ that equips the individual with the agency to submit themselves to a larger culture if they so wish.⁴⁹ These core rights are further left to the individual to claim, and are enforced based on the victims and what they require rather than at the will of human rights activists.⁵⁰

Ignatieff lowers the bar on what constitutes universal human rights precisely to increase the scope of its universalism, and it is only logical that non-liberal societies that do not agree with the scope of the UDHR and its theoretical foundations will regard this as the most favorable solution. By tracing Ignatieff's use of examples, the reader can get a better understanding of which human rights make up the irreducible core: the right to personal safety, security and liberty. However, where the freedom of expression lies in his human rights framework is unclear. If the freedom of expression is seen as essential to provide an individual with negative liberty from which one can exercise agency, then it is up to each individual Singaporean whether or not to claim their right to the freedom of expression. Ignatieff intends for this to give individuals the choice whether or not they would like to participate in collective or hierarchical customs. Yet, the difficulty in suggesting that Singaporeans can opt in to a system of curtailed freedom of expression for the common good is that it will only work if the entire population agrees not to claim their right to free expression. Unlike the case of female genital mutilation, because of the nature of the

43 Donnelly, *Universal Human Rights*, 3rd ed., 71.

44 John Rawls, *The Law of Peoples* (Harvard: Harvard University Press, 1999), 64-65.

45 *Ibid.*, 67.

46 Ignatieff, *Human Rights as Politics and Idolatry*, 95.

47 *Ibid.*, 66-67.

48 *Ibid.*, 57.

49 *Ibid.*, 72.

50 *Ibid.*, 70.

common good that may arise out of a restricted freedom of expression, the entire collective practice of accepting these restrictions for a common good collapses when even a few individuals opt out of the practice. A racial minority group in Singapore, for example, cannot enjoy the benefit of not being subject to racially derogatory remarks if a few members of society have decided to opt out of this practice, while a community can still continue practicing a certain custom even if the rest of society deems it unacceptable. If the freedom of expression is truly a right in Ignatieff's framework, in that they are undeniable to ensure the basic liberty of an individual and which implies that an individual will be able to claim it against her society regardless of the circumstances, then Singapore's practices are inconsistent with even Ignatieff's minimal conception of human rights. However, if restrictions on the freedom of speech do not lead to pain and humiliation, which is the fountainhead for all rights for Ignatieff, then Singapore's actions do not violate this alternate understanding of human rights.

The problem of human rights and individualism

The difficulty that tugs at the tails of all the previous arguments is this: if human rights evolved out of the Western liberal individualism, where the individual is intentionally prioritised over society's interests or powers⁵¹ in most circumstances, how does the UDHR apply in societies where this arrangement of individuals over the community is neither philosophically accepted nor practically implemented? Again, this is not simply an issue of power-hungry tyrants who have systematically violated human rights in the name of "society's interests" for their political gain. It is a question of whether it makes sense to discuss humans and their innate humanity without their society, not just in that states and societies are responsible for enforcing human rights,⁵² but that the very notion of human dignity, identity and desire is inextricable from the community in their construction. As Chris Brown writes describing the work of Hegel:

"[The] kind of individuals who make up the community are not a more or less random collection of people who happen to inhabit a particular territory at a particular time, but

rather a group of people who are simultaneously the creators of community and created by it... The 'rights' that they assign each other are not the manifestation of a general moral code or the product of universal practical reason, nor are they simply the product of a political bargain; rather, they are more like reminders that the community gives itself as to what it takes to be proper conduct."⁵³

States cannot enforce rights without society coming together to give it the power to do so, and neither can they enforce it without resources that need to be generated by individuals contributing to society. If rights are furthermore seen as "proper conduct" for a given society at a given time, they make no sense without corresponding duties and a general consensus on how these rights are exercised. Contrary to the UDHR, then, Singaporeans do not possess human rights because they are universal human beings that need all the listed articles to enjoy a dignified life, they attain these rights because their states can, and have agreed to, give it to them. Until Singaporean society evolves to see the freedom of expression as something they can and should protect at all costs, pressurising the Singaporean government to respect this right will continue to be a challenge for human rights activists. However, while human rights activists wait for this evolution to occur, the more fundamental question still must be asked: is it productive for Singapore to aspire to improve the lives of its citizens through a system of rights - even if scholars such as Donnelly believe it is the best method - when the histories and values of the Singaporean people seem to be at odds with the foundational principles of the UDHR?

CONCLUSION

This essay has examined four main reasons that Singapore's violation of the freedom of expression article may be justified and that challenge the applicability of human rights on a universal level. Firstly, different interpretations of restrictions to the freedom of expression that are legitimate do exist; secondly, how rights are prioritised in a given society can be unclear; thirdly, the system of human rights naturally excludes non-liberal states and attempts to incor-

51 Donnelly, *Universal Human Rights*, 1st ed., 145.

52 *Ibid.*, 3rd ed., 35.

53 Chris Brown, "Universal Human Rights: A Critique," in *The International Journal of Human Rights* 1, no. 2 (1997): 50-51.

porate them on an inferior basis, and lastly, the individualism that is at the core of the UDHR is not fully compatible with some societies, including that of Singapore. It has been agreed that there are some rights in the UDHR that truly can be accepted as universal and where the individual always takes precedence over the society, such as the prohibitions on arbitrary killings and torture. However, these are not universal rights in the sense that the conceptualisation of these rights arose simultaneously from different communities; the notion of protecting an individual from certain circumstances through a rights framework is still Western in origin, but an individual-centred political expression for these core, fundamental issues is something that can be accepted by other communities. Lastly, the fact that they are Western in origin is not sufficient grounds for non-Western societies to reject them altogether, should they prove to be the most efficacious framework to bring goods to individuals and communities in society. Instead, their foreign origins decree that activists practice caution in the universal application of human rights, being aware of the fundamental changes in values that are demanded of a society fully embracing the UDHR. Lastly, noting the changes that must occur within a state for human rights to be effectively implemented, activists are asked to consider the possibility of bringing productive societal change through mechanisms more suited to the political, economic and social climate of the society in question, rather than viewing human rights as the only solution to the problem.

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A RELUCTANT PARTNERSHIP: DANIEL ORTEGA AND HIS VEXED RELATIONSHIP WITH THE NICARAGUAN PRIVATE SECTOR

A comparative analysis of Daniel Ortega's interactions with COSEP and the private sector elite from the Sandinista Revolution to 2016.

"The Sandinistas needed private enterprise like a zoo needs a gorilla."¹

-Large Cattle Rancher, August 6, 1991

INTRODUCTION

On July 17 1979, Daniel Ortega and his Sandinista National Liberation Front (FSLN) officially overthrew the forty-year family dynasty of Anastasio Somoza Debayle. This established for the first time a revolutionary government in Nicaragua and the first phase of the Junta of National Reconstruction. Ever since, Nicaragua's Sandinista revolution has captured the attention of scholars and academics of the Cold War, leftist movements, and revolutions. However, the initial success did not signal sustained peace and prosperity for Nicaragua. Internal strife, the deterioration of the economy, international opposition, and notable US interventionism in the form of sanctions and the Contra War plagued the first Sandinista period. Despite being defeated in 1990 in the national electoral process that he installed, Daniel Ortega remained a key member of the Sandinista party, campaigning unsuccessfully in two subsequent elections in 1996 and 2001. However, a radically changed Ortega was bolstered by a controversial strategic pact between the FSLN and the Constitutional Liberal Party (PLC), which lowered the percentage necessary to win a presidential election in the first round from forty-five percent to thirty-five percent. He

was then able to secure the presidency once again in 2006 with thirty-eight percent of the vote.

The Sandinista Revolution was unique for many reasons, but one of these was the guerrilla movement's unification with the private sector and business elite of Nicaragua, more specifically its modern capital city of Managua. The powerful minority class of producers, business elites, and the bourgeoisie have exercised varying levels of control over Nicaraguan politics for the last century. They have formed both the strongest supporters and most effective enemies of the Sandinista movement in both of its phases, as supporters in the overthrow of the Somoza dynasty, as political archenemies following the revolution, and now, again as cautious supporters of Daniel Ortega's second presidency. Given their impact and ability to influence international opinion, foreign direct investment, levels of interventionism, and domestic confidence in Nicaragua, the relationship between Ortega and the private sector elite offer a partial explanation for both his successes and failures in maintaining power in Nicaragua. Mark Everingham asserts that "elite relationships constitute an important variable that mitigates the success or failure of new democracies. Various kinds of concerted elite action have been credited for the realization of effective democratic rules in developed and developing countries."² Therefore, by examining Ortega's relationship with the private sector – mainly through his communications with the Superior Council of Private Enterprise (COSEP)³ – the initial success of the 1979 San-

1 Rose J. Spalding, *Capitalists and Revolution in Nicaragua: Opposition and Accommodation, 1979-1993*, (Chapel Hill: University of North Carolina Press, 1994), 63.

2 Mark Everingham, "Neoliberalism in a New Democracy: Elite Politics and State Reform in Nicaragua," *The Journal of Developing Areas* 32, no. 2 (1998): 237–64.

3 Originally, the Superior Council of the Private Sector, and later changed to COSEP in 1978, the non-profit, civil society organization was founded in 1972 as a coordinating body for the diverse business associations of Nicaragua.

dinista Revolution, its subsequent failure in the 1990 elections, the return of the Ortega and the Sandinistas in 2007, and his relatively tenuous position today in 2016, straddling influence from both Venezuelan President Hugo Chavez and the United States, can be explained.

THE REVOLUTION (1978-1981): A UTILITARIAN FRIENDSHIP

From 1939 to 1979, Nicaragua was ruled by the corrupt and wealthy Somoza dynasty, both indirectly through puppet presidents supported by the National Guard and directly by members of the Somoza family. In the years preceding the revolution, there were increasing levels of discontent with the corruption and authoritarianism of the Somoza regime coming from many different factions and not just the Sandinistas, who based their grievances in Leftist, Marxist-Leninist ideologies.⁴ Humberto Ortega, Daniel Ortega's brother, recognized the diverse nature of the opposition when he called for a united mass movement: "it is very difficult to take power without a creative combination of all forms of struggle, wherever they can take place...mass movement is the focal point of the struggle and not the vanguard with the masses limited to merely supporting it."⁵ Tangibly, the Ortegas and Sergio Ramirez, known as the Tercerista faction, took control of the FSLN guerilla movement and delineated a plan for strategic alliances and mass insurrection in the "General Political-Military Platform of Struggle of the FSLN." Within this new blueprint, the FSLN "avoided leftist rhetoric, encouraged the creation of mass organization including workers and peasants, acknowledged the utility of courting businessmen, and called for the Sandinista unification."⁶ Most importantly, the Terceristas attempted to appeal to potential elite collaborators, presenting themselves as a pragmatic option to the bourgeoisie for eliminating the Somoza dynasty, which proved to be an integral appeal in the creation of this cross-class coalition.⁷

It is worth noting that the original motiva-

tions for both the private sector elite and the Sandinistas to overthrow Somoza were not necessarily aligned. The bourgeois private sector elites, those who did not flee the country to places like Miami under Somoza dictatorship, fought because "they had been so long denied their 'right' as the bourgeoisie to rule in their own interest."⁸ They hated the corruption of the Somoza dictatorship, which became all too apparent following a powerful 1972 earthquake. It became known that Somoza illegally appropriated and mismanaged huge amounts of international relief aid, helping to balloon Somoza's personal wealth to over \$400 million USD, all while asking the elites to pay additional emergency taxes.⁹ The beginning of the elite class's campaign against Somoza can be traced back to the formation of Los Doce (the Twelve), an organization of business and intellectual elites that opposed Somoza's rule calling for "a process of political transformation that converts Nicaragua into an independent, democratic, pluralistic society."¹⁰ It was Somoza's assassination of the elite owner of the pro-business, anti-Somoza newspaper, *La Prensa*, Pedro Joaquín Chamorro on September 17, 1980 that served as the final push to fervently mobilize the elite to remove Somoza from power through all means possible.¹¹

The shift of the bourgeoisie in Nicaragua was gradual as Somoza and the business elite traded blows throughout the late 1970s. In response to a deteriorating economy due to US sanctions, decreasing levels of foreign investment, and a growing intolerance of Somoza's corrupt practices, COSEP organized a business "lockout" and issued a communiqué pledging to exact an economic price from Somoza in protest. In response, Somoza forced the Central Bank to cut off all funds to businesses that could not prove to be autonomous from political movements. Everingham comments on the Central Bank freeze, asserting that, "from an economic standpoint, the Somoza regime lost all credibility with COSEP. The complete absence of liquidity and forthcoming capital from foreign lenders made it imperative for businessmen to wrest the banking system from

4 Thomas W. Walker and Christine J. Wade, *Nicaragua: Living in the Shadow of the Eagle* 5th ed. (Boulder, CO: Westview Press, 2011).

5 Gary Ruchwarger, *People in Power: Forging a Grassroots Democracy in Nicaragua* (South Hadley, Mass: Bergin & Garvey Publishers, 1987).

6 Mark Everingham, *Revolution and the Multiclass Coalition in Nicaragua* Pitt Latin American Series (Pittsburgh: University of Pittsburgh Press, 1996), 129.

7 *Ibid*, 130.

8 "Unmaking of the Bourgeoisie," *NACLA Report on the Americas* 14, no. 3 (May 1980): 8–11.

9 Walker and Wade, *Nicaragua: Living in the Shadow of the Eagle*. 5th ed., 46.

10 Everingham, Mark. *Revolution and the Multiclass Coalition in Nicaragua*, 130.

11 *Ibid*.

the state."¹² Therefore, to combat the massive fluctuations in short term external debt and repeated impositions on their business interests, the business elite saw it as a necessity to oust Somoza in order to "preserve its control over the state while simultaneously ensuring commercial, industrial, and financial interests."¹³ Responding to the appeals of the Sandinistas, the elite decided that the best option was to unite behind the burgeoning Leftist movement. On June 27, 1979, COSEP recognized the FSLN's provisional government, the Junta of National Reconstruction, as the legitimate government expressing their "patriotic determination to participate in the reconstruction of the Republic that must be directed by the Junta of National Reconstruction, which was followed on June 27, 1979, by COSEP's declaration of unconditional support for a mixed economy in exchange for full representation in the Council of State, the legislative body to be formed after the victory."¹⁴ For the business elite, this accommodation with the Sandinistas provided them with an opportunity assumedly to accomplish both of their aims: protect their economic interests and ensure positions of power in the Junta and Council of State after the ousting of Somoza.

However, the Sandinistas viewed this partnership through a much different lens. Ortega understood the value of mass movements and valued the alliance with the bourgeoisie. Dennis Gilbert writes that the FSLN, "believed that their allies possessed administrative and technical skills that would be useful to the young government and essential to the reconstruction of the war-damaged economy. They also understood that the bourgeoisie was the key that would open the door to friendly financial and diplomatic dealings with the West."¹⁵ More importantly though, in the 1977 Platform and in an early 1979 interview, Daniel Ortega described the alliance with the anti-Somoza bourgeoisie as "tactical and temporary."¹⁶ Although the unlikely union succeeded in toppling Somoza, it became clear that COSEP's backing of the FSLN to secure their own business interests while maintaining political power would be irreconcilable with Sandinista National Director member Jamie Wheelock's vision of the

future where the bourgeoisie functioned as "producers without power," or his vision of Nicaragua's future as "a mixed economy, guided by a strong government, in the interests of the poor majority...on the way to a society without capitalists."¹⁷ While they did not understand the adverse effects of the dissolution of such a utilitarian and transitory friendship, Ortega and the Sandinistas recognized that the private sector was key for their mass movement to overthrow Somoza and to provide comfort to international audiences regarding the revolution.

POST REVOLUTIONARY PERIOD

"The private sector supported a national insurrection, not a social revolution."¹⁸

-Enrique Dreyfus, COSEP President and owner of a large department store chain

Immediately following the revolution, the unlikely partnership began to unravel at the hands of the Sandinistas. Eager to create their own country and identity in a nation that had not been afforded such an opportunity for decades, the Sandinistas sought to consolidate their power. The first step towards the Sandinista's alienation of the private sector came after the 1980 election when it was decided that the Junta's Council of State was slated to have thirty-three seats, of which approximately half would go to traditional political parties or organizations dominated by the bourgeoisie. Instead, the FSLN and the Junta announced that fourteen additional seats would be added to the Council, most of which would go to mass organizations like the FSLN, not the bourgeoisie elite.¹⁹ Following this, the FSLN expropriated the largest group of bourgeoisie holdings to date through the property of the Somoza clan, followed by the nationalization of all of Nicaragua's commercial banks, thereby taking over the financial nerve centers of the bourgeoisie. Highlighting the importance of this statement, according to the North American Congress on Latin America (NACLA), "virtually every 'interest group' within the bourgeoisie had either owned a bank or a major block of shares in one or more banks."²⁰ This was certainly intentional

12 Ibid., 161.

13 Ibid., 155.

14 Ibid., 165.

15 Dennis L. Gilbert, *Sandinistas: The Party and the Revolution* (New York, NY, USA: B. Blackwell, 1988), 109.

16 Ibid, 110.

17 Ibid, 127.

18 Everingham, *Revolution and the Multiclass Coalition in Nicaragua*, 168.

19 "Unmaking of the Bourgeoisie," *NACLA Report on the Americas*.

20 Ibid.

by the FSLN. A member of the National Directorate at the time recognized the implication of these expropriations not simply as a means to secure control but an attempt to isolate the COSEP elites "by taking control of the banks we have encircled the bourgeoisie."²¹ The cross-class partnership and COSEP's hopes for a mixed economy started slipping away quickly.

These expropriations came with wide-ranging economic measures aimed at bettering the lives of ordinary Nicaraguans, which became the hallmark of the Sandinistas' popular appeal. While announcing all of these new economic policies, Ortega, abandoning attempts to mask the Marxist-Leninist ideology of the FSLN, denounced "unpatriotic investors and producers who have decapitalized factories and farms," and went on to say that, "this is a private sector that is consciously playing with fire, that wants to destroy popular power in order to impose the power to rob and oppress the workers."²² Victor Tirado of the National Directorate summed up the drastic shift in the relationship between the FSLN and COSEP in the years immediately following the Revolution: "We developed another project detached from the one that helped us triumph [Ortega's multi-class coalition]... We let ourselves be guided, perhaps for comfort, by Cuban and Soviet ideas."²³ It was clear from the Sandinista's very first political and economic actions that they planned to take an increasingly belligerent stance towards COSEP and the business elite. Perhaps most importantly though, the Sandinistas revealed that the vision they sold to the elite before the revolution for Nicaragua's future was vastly different than that which they hoped to construct.

These actions sparked reactions from COSEP, notably in the form of letters published in *La Prensa*. Although it was a pro-business institution, the US embassy, which closely monitored the situation in Nicaragua, classified the exchanges between COSEP and the FSLN as "a 'new campaign of hate' unleashed by the FSLN trying to link the private sector with counter-revolutionary bans, accuse it of decapitalization, foment workers seizures of private businesses, and use credit availability to pressure small and medium producers to join FSLN groups" as early as 1981.²⁴ COSEP's main

argument during the period was that "the State controls the keys to our economy, financial system, and foreign commerce and is responsible for 40% of national production."²⁵ Daniel Ortega and the FSLN responded to COSEP's complaints and subsequent demands for the protection of private property by asserting "we are not going to share power with those who only seek to weaken that power – neither in the Government Junta nor in the ministries."²⁶ Further, according to Spalding, FSLN leadership felt that the bourgeoisie had been given the opportunity to develop the country under the Somoza regime, and they had failed in this historic mission. Finally, after Humberto Ortega declared that national elections would be postponed until 1984 and claimed that "if they [those who consciously or unconsciously assist the plans of imperialism] do not mature, if they do not join the defense effort, when aggression comes they will be the first to be hanged along the roads and highways of the nation," COSEP confirmed for itself that the FSLN planned to stay in power indefinitely.²⁷ In a final response letter addressed to Daniel Ortega in 1981, COSEP warned of the preparation of a "new genocide" in Nicaragua targeting those who exercise the right to dissent. He concluded, "we identify an unmistakable ideological line of Marxist-Leninist tendency that is confirmed in the discourse of members of the national directorate, charged with threatening national security." As could be expected, signatories to the document were arrested and imprisoned, the Sandinista regime closed and censored *La Prensa* for periods. Evidently, at that point in 1981, COSEP became the political archrival of the Sandinista revolution and Daniel Ortega.²⁸

ATTEMPTS AT RECONCILIATION AND THE 1990 ELECTION OF VIOLETA CHAMORRO

As a result of the US trade embargo enacted in 1985, the financing of a counterrevolutionary war, and the Contra War, all working to oust Daniel Ortega and the Sandinistas, the Nicaraguan economy suffered following the revolution. The trade embargo affected about fifteen percent of Nicaragua's foreign trade and the counterrevolutionary war forced the Sand-

docview/1679108931?accountid=15172.

25 Everingham, 175.

26 Ibid.

27 Spalding, *Capitalists and Revolution in Nicaragua: Opposition and Accommodation*, 1979-1993, 70.

28 Lars Schoultz, "United States Policy toward Nicaragua," *The University of North Carolina*, March 1982, 11.

21 Ibid.

22 Gilbert, *Sandinistas: The Party and the Revolution*, 114.

23 Everingham, 171.

24 United States Embassy, COSEP Superior Council of Private Enterprise Refutes Ortega, 1981, <http://search.proquest.com/>

inistas to direct fifty percent of government spending in 1985 on national defense.²⁹ Walker and Wade claim that overall, "the collapse of the Nicaraguan economy in the late 1980s was mainly a product of deliberate US policy," and back up their assertion by stating that, "until the impact of the Contra War and other US destabilization techniques really began to hit in the mid-1980s, Nicaragua was one of the few countries of Latin America that actually registered a growth in GDP per capita."³⁰ Within the context of the global Cold War, however, the Sandinista revolution faced great pressure both externally and internally, which only exacerbated their relationship with COSEP and the international business elite who grew angrier and angrier in the face of increased government centralization and lowered levels of foreign investment.

In the late 1980s, with increased US pressure, the Ortega and the Sandinistas started down a drastically different, but all too familiar, path by extending a cautious olive branch to the private sector in order to repair the economy and ensure their own reelection. The 1988 to 1989 period saw huge amounts of government concessions offered to the business elite. In April 1989, the government called for a full, open consultation with private producers in a two day-meeting, formally called the Proceso de Concertación Nacional, which brought together Ortega, all the leading economic ministers, and over 600 private producers. The meeting was monitored by the diplomatic community.³¹ Following the meeting, the government agreed to reduce and fix the interest rates, reduce import taxes and port charges, lower other taxes by fifty percent for producers making investments to benefit their works, extend the grace period for loan repayment, and to take many other pro-business measures.³² The most important concession though was Ortega's renewed affirmation of property rights. Ortega promised that private sector participants in his Concertación process did not need to fear further expropriations, a main grievance of COSEP and the business elite during the Sandinista period.

In advance of the elections, the Ortega government attempted to project the image

that they had rebuilt the confidence of business leaders and local producers in a variety of ways, including holding down the prices for basic public services like gas and water:

*First, producers were included prominently as candidates on the FSLN slate. Second, the government offered a blizzard of new concessions to traditional elites. Third, the government staged a series of last-minute meetings with producers to demonstrate the access and ongoing dialogue that now marked their interaction.*³³

Although COSEP negotiated and accepted concession, in many ways, the Sandinistas' appeals to the private sector seemed to fall on deaf ears. For example, COSEP refused to send delegates to Ortega's May 1989 sojourn to Stockholm, Sweden aimed at soliciting foreign direct investment, refusing to be used as pawns for Ortega's gain.³⁴ However, Spalding argues that actual renewed cooperation with the private sector was not necessarily the FSLN's goal. Instead, they hoped to inspire domestic confidence in their own governance: "the government hoped to persuade the large numbers of peasants, workers, and unemployed Nicaraguans that the economy could be reactivated under their leadership through a renewal of private sector investment."³⁵ In this sense, Ortega, yet again, offered disingenuous appeals to the Nicaraguan elite in an attempt to serve his own purposes.

The Ortega government's 1988 to 1989 attempts to reconcile with COSEP proved fruitless. Tim Merrill offered an explanation in a US government report that, the private sector organized by COSEP "was instrumental in President Ortega's electoral defeat. Private industry had suffered heavy losses during the struggle to overthrow the Somoza regime and then fared even worse during the decade-long administration of the Sandinistas."³⁶ Similarly, Spalding states that despite the concessions made by the Ortega government in 1988 and 1989, the elites felt that "the Sandinista revolution had not only reduced their ability to accumulate but also undercut their social status and the respect with which they were viewed in

29 Rose J. Spalding, ed. *The Political Economy of Revolutionary Nicaragua*. Thematic Studies in Latin America. (Boston: Allen & Unwin, 1987), 233.

30 Walker and Wade, *Nicaragua: Living in the Shadow of the Eagle* 5th ed., 105.

31 Spalding, 111.

32 Ibid.

33 Ibid., 119.

34 Ibid., 115.

35 Ibid., 115.

36 Tim Merrill, ed. *Nicaragua: A Country Study*, Washington: GPO for the Library of Congress, 1993.

their community," and this proved to be irconcilable for Ortega.³⁷ Beyond that, for many Nicaraguans, Chamorro offered the only sure-fire way out of the Contra War and an alternative to Ortega's confrontational style of politics, given the widespread knowledge that UNO was created and funded by Washington D.C.³⁸ In the end, Chamorro offered a politics of reconciliation, as well as connections to the small but powerful private sector, which proved to be more convincing to the Nicaraguan people and business elite than a pandering Ortega.³⁹

While the Sandinistas would transition power peacefully for the first time in Nicaraguan history after losing the 1990 election to Violeta Chamorro and the UNO Party, their actions during their final days may be the most predictive of the future of Nicaragua today. In the final "lame duck" days of Ortega's government after Chamorro had been elected, they revealed one of two things: either the true colors of the FSLN party, or simply the immaturity of a young revolution. In a process that came to be known as the "La Piñata," after the children's game in which a hollow paper-mâché animal filled with candy is broken open, Ortega authorized the property grab of more than 5,000 houses and thousands of hectares of land, breaking one of its major promises made during the campaign season that they would cease expropriations of elites who participated in the Concertacion process of 1988 and 1989.⁴⁰ Although Ortega and the Sandinistas said they were proud to create piñatas for the poor of Nicaragua, the real beneficiaries of two vague laws passed through the National Assembly in 1980 were the Sandinista leaders themselves, including Daniel Ortega. Notably, during "La Piñata" Ortega and his wife changed the registration on the mansion they expropriated from Jamie Morales Carazo during the Sandinista revolution in 1979, effectively making it their own.⁴¹ Chamorro's refusal to do anything about "La Piñata" would come to be a point of contention with COSEP during her presidency.⁴²

THE ELECTION AND 2007 CAMPAIGN OF DANIEL ORTEGA

"Mr. Ortega was once pro-Marxist, but now he's pro-Ortega. And that's the problem."⁴³

Violeta Chamorro would govern for approximately seven years guided by her "politics of reconciliation," attempting to mend the damage the Sandinista regime had done. She brought an end to the all-encompassing Contra War, in large part, because of US disinterest in the region following the fall of the Sandinistas. Unfortunately, she was unable to steady the economic situation in Nicaragua, and experienced a rocky relationship with COSEP, which would leave the door open for Ortega after two subsequent failed campaigns in 1996 and 2001. As the economic situation in Nicaragua continued to deteriorate drastically from increased US pressure, the Nicaraguans became increasingly undecided on the best choice for the future. As a result of this indecision, Daniel Ortega was successfully reelected in 2007 thanks to the power-sharing pact with former President Arnaldo Almenán, known as "El Pacto" that allowed for a president to be elected with only thirty-five percent rather than forty-five percent of the vote.⁴⁴ Most importantly, there was a marked shift in rhetoric used by Ortega to win the election. Just nine years before, in a 1998 New York Times article, Ortega fervently defended his Marxist guerilla ideologies, vowing not to change:

I know there are people who say that if the Front changes its attitude, then we'll have more of a chance to win. It's logical. But logic doesn't always fit reality. It would be nice if this were Europe and the Sandinistas could be Social Democrats, but it isn't. If we gave up our street tactics, we'd be betraying our base, the people who identify with us when we fight and rebel. I know we pay a price for that, that we lose votes, that it frightens some people . . .⁴⁵

37 Spalding, *Capitalists and Revolution in Nicaragua*, 199.

38 Wells, Allen. "The Frente's Bitter Defeat: The National and the Personal." Bowdoin College. Accessed in Yale University Course Packet.

39 Merrill, ed. *Nicaragua: A Country Study*.

40 *Ibid.*

41 Shirley Christian, "Managua Journal; Victor's Lament: To the Losers Belong the Spoils." *The New York Times*, June 8, 1991, sec. World, <http://www.nytimes.com/1991/06/08/world/managua-journal-victor-s-lament-to-the-losers-belong-the-spoils.html>.

42 It is expected the Chamorro remained silent on the issue of "la piñata" as a tacit exchange for the Sandinista's peaceful transfer of

power, marked by an absence of violence.

43 "Ortega, Again," *The New York Times*, November 11, 2006, <http://www.nytimes.com/2006/11/11/opinion/11sat3.html>.

44 Llosa, Álvaro Vargas. "¡Viva El Capitalismo!" *The New York Times*, November 13, 2006, <http://www.nytimes.com/2006/11/13/opinion/13llosa.html>.

45 Francisco Goldman, "The Autumn of the Revolutionary," *The New York Times*, August 23, 1998, <http://www.nytimes.com/1998/08/23/magazine/the-autumn-of-the-revolutionary.html>.

However, something did change as a result of two lost elections for Ortega. His 2007 campaign advertised Ortega's reimagined image and newfound relationship with the private sector, which in both cases represented a direct betrayal of his own creed and ideology. He ditched his Marxist rhetoric of the 1980s and instead appealed to the Catholic nature of his nation and private business interests once again, similar to his tactics in the years leading up to the Sandinista revolution. This represented a marked turnaround for the man who authorized massive land grabs and commandeered his own mansion during "La Piñata" in 1990.⁴⁶ Although it was a gradual process starting in 1989 and 1990 before his electoral loss to Violeta Chamorro and continuing through two failed subsequent campaigns to regain power, the ease with which Ortega abandoned his ideologies raises questions.

Perhaps most illustrative of Ortega's transition from Marxist revolutionary to a calculated authoritarian is his choice of Vice President in Jaime Morales – the same man whose mansion Ortega seized in 1979 during the Sandinista Revolution and officially made his own during the 1980 "La Piñata." According to Stephen Kinzer of *the New York Times*, Morales moved back to Nicaragua from Mexico after the civil war, reached a "private agreement" with the man he swore to defeat by joining the Contras in 1980, and gave up his claim to his old house.⁴⁷ As Spalding asserts, "this odd alliance signaled that the self-declared 'second phase of the Sandinista revolution' would be different from the first."⁴⁸

During the campaign in the days leading up to his 2007 inauguration Ortega made many promises of this "second phase of the Sandinista revolution," documented widely by newspapers and international observers. Prior to his election, Ortega had already signed a pact with the chambers of commerce and subsequently followed up with the main business leaders of Nicaragua to assure them of his absolute respect for private property and wish to encourage enterprise and investment. Recognizing factors out of his control, Ortega even

appealed to his Sandinista supporters not to occupy disputed land or houses, telling them they, too, must respect private property. These measures were received positively, prior to the election the private sector led by Erwin Kruger, head of COSEP, said it was prepared to work with Ortega.⁴⁹ International opinion of Ortega also shifted quickly, the Economist Intelligence Unit's ViewsWire reported in January 2007 that, "Ortega is no longer the fervent Marxist revolutionary who led the country in the 1980s. He says he will respect private property, support free trade and pursue working relations with Washington. He will also retain some of the other policies of his predecessors."⁵⁰ The commonality in these accounts, however, is their reliance on statements from Ortega and reported discussions between Ortega and business leaders and COSEP rather than actions. It is clear that Ortega understood the Nicaraguan political climate of the time and knew that he must respect private property. He also projected that he had the confidence of the business elite in order to win the election. He had tried this same tactic unsuccessfully in the 1990 campaign when his government held down the prices of water and gas and marketed his increased interaction and dialogue with the private sector even though COSEP still opposed his government. Charles Riples, an Arizona State University Latin American specialist and former Nicaraguan resident, asserts that "Ortega is a very brilliant politician," and in regards to his 2007 election, "He has played his hand that wasn't very good after he lost the [1990] election so well to come back to power... He's actually a brilliant strategist within the Nicaraguan context."⁵¹ Although his disingenuous 1990 strategy did work successfully in 2007, it remains to be seen whether these were simply empty promises designed to win the election or if they represent a real shift in Ortega's character.

There are a few explanations that could validate a legitimate change in Ortega's stances towards COSEP and business in general. One is necessity. Ortega began this process of reconciliation during the run-up to the 1990 elec-

46 Ibid.

47 Stephen Kinzer, "The Marxist Turned Caudillo: A Family Story," *The New York Times*, November 12, 2006, <http://www.nytimes.com/2006/11/12/weekinreview/12kinzer.html>.

48 Rose Spalding, "Business and State Relations in Post-Revolutionary Nicaragua: Elite Realignment and the New Strategy of Collaboration," De Paul University, 2013, https://www.american.edu/clas/upload/Spalding_Business_and_State_in_Nicaragua.pdf.

49 "NICARAGUA: Ortega Will Lead Different Administration," *Oxford Analytica Daily Brief Service*, Nov 22, 2006, <http://search.proquest.com/docview/192445405?accountid=15172>.

50 "Nicaragua Politics: Ortega is Back," *EIU ViewsWire*, Jan 10, 2007, <http://search.proquest.com/docview/466588489?accountid=15172>.

51 Walter Cronkite School of Journalism and Mass Communication, "Love Him or Hate Him, Few Doubt Ortega's Political Skill," accessed December 15, 2016, <https://cronkite.asu.edu/buffett/nicaragua/love-him-or-hate-him-few-doubt-ortegas-political-skill/>.

tion as the Nicaraguan economy crumbled under the heavy hand of the United States and appealed to private business in 2007 as a counter to the faltering economy under Chamorro. Spalding argues that this process of coalition building began in the late 1980s while the party attempted to redefine itself during the campaign in response to the realization that its core group had shrunk.⁵² Another possible explanation is simply that the revolution, and Ortega, had seventeen years to mature between the first and second phases of the Sandinistas. Adolfo Cadero, former head of one of the largest Contra factions, supports this notion, although he alludes to more greedy motivations:

*When the Sandinistas came to power, they came in dirty uniforms, with no experience other than giving orders. They were barbarians at the banquet. Now they're older. They have families, and many of them have very strong economic interests. I expect a totally different attitude. My hope is that power won't seduce them, as it did last time, but make them more responsible.*⁵³

In other words, Ortega's aversion to the business elite came from a place of youthful, leftist paranoia. Now, at seventy-one years old, Ortega truly recognizes the influence of the private sector, which when united with UNO, successfully removed him from power in 1990. Yet another explanation could simply be that Ortega desires only power and control. Spalding argues that this "farical saga" tells us that Ortega was much more interested in being president than in being principled. As a result, he now recognizes that anyone who wants to lead must convince voters he will respect the rule of law and private property, regardless of whether or not he actually believes in these things. Spalding highlights Ortega's inconsistent nature revealed through his pursuit of power:

Mr. Ortega is, after all, a crusader for good government who has allied himself with the country's most corrupt figures; an advocate of the poor who has become very rich through a series of mysterious business deals; and a leftist ideologue who has proven ready to embrace any cause – most recently a total ban on abortion – that will

*bring him political advantage.*⁵⁴

Like an apt political operator, Ortega flipped his positions in order to pander to different voting populations, and in this most recent case, the business elite and Catholic majority. Moises Hassan, the former Mayor of Managua who quit the FSLN in 1988, offers support for this notion: "Being a radical revolutionary is all Ortega knows. His vice is power. He'd gladly give up everything else for it."⁵⁵ By examining more recent primary source documents documenting Ortega's relationship with COSEP since his 2007 election, it is possible to begin answering some of the questions raised.

ORTEGA TODAY

In terms of gathering public support, his policies have worked. According to a public opinion poll released by M&R Consultants in January 2014, during Ortega's unprecedented third term, he enjoyed sixty-five percent approval rating.⁵⁶ The question still remains though, to what extent do Ortega's new policy stances represent a change, or increased maturity in the Sandinista party? Or is this simply the repetition of Ortega's multi-class coalition strategy employed before the overthrow of Somoza in order to gain elite support? Will he abandon these relationships as soon as he feels comfortable with the centralization of his own power?

By most accounts, Ortega has held true to his promises. Mario Arana, a former central bank governor and finance minister reported following the election that, "Ortega has effectively co-governed with the private sector. He is aware that economic mistakes are politically costly."⁵⁷ In order to avoid these same mistakes, Ortega has created a Comisión de Seguimiento, as requested by COSEP in 2009, which is composed of three representatives from COSEP and the government each and meets monthly as a forum where proposals can be made and views can be exchanged. As a result, in 2010, over sixty percent of all approved laws, and all but one of the economic laws, were found to involve the active collaboration and endorsement

⁵⁴ Ibid.

⁵⁵ Goldman, "The Autumn of the Revolutionary."

⁵⁶ "Love Him or Hate Him, Few Doubt Ortega's Political Skill."

⁵⁷ Juan and José de Córdoba Montes, "Nicaragua's Leftist Ortega Embraces Business—and Authoritarianism; Daniel Ortega, One of Latin America's Best-Known Marxist Revolutionaries, is Living Out a Second Act as a Pro-Business, Increasingly Authoritarian Leader," *Wall Street Journal* (Online), Nov 04, 2016, <http://search.proquest.com/docview/183594462?accountid=15172>.

⁵² Spalding, *Capitalists and Revolution in Nicaragua*, 119.

⁵³ Kinzer, "The Marxist Turned Caudillo: A Family Story."

of COSEP delegates. Further, by 2011, COSEP had “official status on oversight boards for eleven public-private institutions, ten councils, four ministries and government agencies, and the presidential commissions on investment and trade facilitation.”⁵⁸ This tangible evidence represents a major shift from FSLN’s immediate attempts to dilute COSEP’s influence on the State Council in 1980 by adding non-elite member seats. Further, in strictly quantitative measures, Ortega has performed well. By 2011, Nicaragua posted the highest growth rate in the region at four percent and continues to outpace its Central American neighbors, with the exception of Panama. Under Ortega, GDP increased seventy-four percent from \$6.78 billion in 2006 to \$11.8 billion in 2014. Nicaragua has experienced record investment for the past five years; exports have expanded; and there have been significant improvements in socioeconomic indicators, all of which has won him praise from the business sector.⁵⁹ In the first few years, Ortega appeared to be deferential once again to COSEP, holding true to his promises, and Nicaragua was being rewarded as a result.

However, some opposition forces in Nicaragua have criticized this newfound partnership, likening it to the status enjoyed by the business elite under the Somoza regime. As an example of the newfound closeness, in 2012 a group of COSEP business leaders traveled with Ortega to Washington D.C. to lobby successfully against threatened US aid cutoff to the Ortega government. Spalding writes that, “the willingness of these economic leaders to take action that buffered the Ortega regime reflects the balance of state-business relations in contemporary Nicaragua,” and goes on to say that unlike their predecessors in the 1980s, “Nicaraguan business elites now worked to avoid destabilization of the Ortega government.”⁶⁰ However, Wade writes that this type of cooperation has frustrated opposition forces who claim that the alliance between the administration and COSEP amounts to an extra-parliamentary body. While COSEP has sometimes sought

to balance Ortega’s policies, it has effectively replaced the electoral opposition in that role.⁶¹ Nicaraguan newspaper, *Confidencial*, criticized COSEP further, asserting that, “the main reason COSEP has agreed with Ortega lies in an agreement for economic governance. Daniel Ortega gives favor to certain business associations and preferential treatment to certain companies,” and in return for this preferential treatment, “COSEP business elites have been silent about Ortega’s abuses of authority...the silence can be characterized as ‘don’t bite the hand that feeds.’”⁶² Certainly, both the Ortega administration and COSEP business elites have benefitted from 2007 to 2015.

However, as Ortega becomes more authoritarian in nature, this effective, yet often questioned partnership, has become strained particularly since 2015. A US Congressional Research Report oversimplifies the phenomenon: “Ortega has continued to vacillate between populist, anti-US rhetoric, and pragmatic reassurances that his second administration will respect private property and pursue free-trade policies. His cabinet appointments include both Sandinista loyalists and supporters of a free market economy.”⁶³ More importantly though, this rising tensions with COSEP displays more of a historical pattern than the Congressional Research Report identifies. The Economist Intelligence Unit’s ViewsWire, reported in their 2015 article titled, “Nicaragua Politics: Ortega’s Opponents Pray for Intervention,” that despite the special relationship enjoyed by business elites there is some caution:

Tensions in the business-government relationship have grown in 2015, with private-sector complaints over lack of consultation on a string of policy initiatives, in which the political and economic interests of the government and Mr. Ortega’s family have taken precedence over private business interests. The list includes changes to

58 Spalding, “Business and State Relations in Post-Revolutionary Nicaragua.”

59 Christine Wade, “Revolutionary Drift: Power and Pragmatism in Ortega’s Nicaragua,” *World Politics Review*, August 13, 2015, <http://www.worldpoliticsreview.com/articles/16456/revolutionary-drift-power-and-pragmatism-in-ortega-s-nicaragua>.

60 Spalding, “Business and State Relations in Post-Revolutionary Nicaragua.”

61 Wade, “Revolutionary Drift: Power and Pragmatism in Ortega’s Nicaragua.”

62 “El COSEP También Es Un Actor Político,” *Confidencial*, September 12, 2016, <http://confidencial.com.ni/el-cosep-tambien-es-un-actor-politico/>.

63 Maureen Taft-Morales, “Nicaragua: The Election of Daniel Ortega and Issues in U.S. Relations,” Congressional Research Service, April 19, 2007. http://congressional.proquest.com/congressional/result/congressional/pqpdocumentview:pdfevent?pId=25ccfe2c-3aae-4e08-9808-f7d8efe68309&pdf=/app-bin/gis-congresearch/8/5/5/6/crs-2007-fdt-0532_from_1_to_14.pdf.

energy tariffs, the minimum wage, a proposed Internet law, and the management of customs and other government bodies.⁶⁴

For now it seems the private sector is placated by the decision-making power it is still enjoying, and it “has shown itself to be highly accommodating to the emerging business interests of the Ortega family, in exchange for influence over the direction of economic policy and, in particular, tax reform.”⁶⁵ Interestingly, in an attempt to both protect their economic interests and ensure positions of power within the state, as they did when throwing support behind the Sandinistas, COSEP has stressed the counterproductive effect that Mr. Ortega’s “virulently anti-capitalist rhetoric” has on the investment climate of Nicaragua, asking him to tone it down.⁶⁶ Despite minor critiques like these, at this time the consensus is that there is little sign that this relationship will change fundamentally, “as private business still has more to lose than gain by backing the opposition.”⁶⁷

CONCLUSION

“We are in the pure and simple populism that hates democracy and has maintained through the manipulation of laws and institutions the preservation of an illusion of democracy.”⁶⁸

—Gioconda Belli, July 2, 2016

Despite Ortega’s closeness with COSEP, he still faces international economic pressure in response to his increased authoritarian tendencies, which threatens the entire partnership. Ortega’s opposition has begun to make its voice heard. As of September 2016, the Nicaragua Investment Conditionality Act (NICA) passed unanimously through the US House of Representatives.⁶⁹ NICA aims to pressure the Ortega

regime by opposing loans for Nicaragua from international financial institutions until the US Secretary of State “certifies the Government of Nicaragua is taking effective steps to hold free and fair elections, promoting democracy, strengthening the rule of law, and respecting the right to freedom of association and expression.”⁷⁰ However, it is hard to ignore the similarities in the bill’s language to that used by the US in its support for the Contras and Violeta Chamorro’s UNO Party, which brought an end to Ortega’s first Sandinista phase only a few decades earlier: “The Department of State and the United States Agency for International Development should prioritize foreign assistance to the people of Nicaragua to assist civil society in democracy and governance programs, including human rights documentation.”⁷¹ If the US continues to increase economic pressure, it is possible that we will see another period of disenchantment between COSEP and Ortega as we saw in 1981 and even towards the end of Chamorro’s presidency.

Perhaps the most telling sign of the trajectory of Ortega’s authoritarianism comes from a familiar voice: Carlos F. Chamorro, son of former President, Violeta, and former, assassinated, editor of *La Prensa*, Pedro Chamorro, who were for many the figureheads of the Nicaraguan business elite. Chamorro identifies a trend of Ortega’s broken promises. Just like the promises broken to the business elite following the Sandinista Revolution, Ortega began his presidency in 2007 by breaking the critical political compact, “El Pacto,” with Alemán that allowed him to win the election, when he chose to take sole control, ignoring the power-sharing mechanism.⁷² Strictly through the lens of his relationship with COSEP, it appears that since 2007 Ortega has kept his promises despite some occasional tension. However, his authoritarian leanings, consolidation of ownership and control in the media industry by his family, obstruction of elections, and coziness with Venezuela’s Hugo Chavez have unsettled the international community, which will in turn affect his relationship with the private sector elite who rely on a

64 “Nicaragua Politics: Ortega’s Opponents Pray for Intervention,” *EIU ViewsWire*, Jul 30, 2015, <http://search.proquest.com/docview/1700218037?accountid=15172>.

65 *Ibid*.

66 “Nicaragua Politics: Private Sector Calls for Dialogue,” *Economist Intelligence Unit ViewsWire*, Apr 13, 2009, <http://search.proquest.com/docview/466455879?accountid=15172>.

67 “Nicaragua Politics: Ortega’s Opponents Pray for Intervention.”

68 “Nicaragua: Gioconda Belli Alerta Sobre Daniel Ortega,” *Havana Times En Español*, July 2, 2016, <http://www.havanatimes.org/sp/?p=116668>.

69 Nicaragua Investment Conditionality Act (NICA) of 2016, H.R.5708, 114th Cong. (2016).

70 “Freedom House Welcomes Senate Introduction of NICA Act,” Freedom House, September 8, 2016, <https://freedomhouse.org/article/freedom-house-welcomes-senate-introduction-nica-act>.

71 Nicaragua Investment Conditionality Act (NICA) of 2016, H.R.5708, 114th Cong. (2016).

72 Carlos F Chamorro, “In Nicaragua, a Blatantly Rigged Election,” *The New York Times*, November 4, 2016, <http://www.nytimes.com/2016/11/05/opinion/in-nicaragua-a-blatantly-rigged-election.html>.

stable Nicaragua to encourage a steady flow of foreign direct investment. Simply the fact that Chamorro – just as his father did 36 years ago – reported that there is “no reason, nor anyone to vote for,” in the recent 2016 elections suggests a dangerous pattern may be emerging in Nicaragua.⁷³ However, it may be Gioconda Belli, the Nicaraguan author, novelist, and poet, who summed it up most authoritatively in her July 2, 2016 Op-ed titled “Aproximaciones a un enig-

ma.” Belli writes, “Dictators don’t learn, they only get better at knowing what to fear and how to placate those forces.”⁷⁴ With US action imminent and with tensions rising between the government and COSEP, it remains to be seen how much more Somoza the Nicaraguan business elite and Nicaraguan people will allow Daniel Ortega to exhibit, but he has certainly had time to learn.

73 Ibid.

74 “Nicaragua: Gioconda Belli Alerta Sobre Daniel Ortega,” *Havana Times En Español*, July 2, 2016, <http://www.havanatimes.org/sp/?p=116668>.

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THE REALITIES OF THE RISE OF AN ISLAMIST GROUP TO POWER: A CASE STUDY OF THE 2010 TUNISIAN REVOLUTION

INTRODUCTION

The concept of an Islamic state is central to traditional Islamic thought. Since the dissolution of Muhammad's "perfect" Islamic state in Medina, Muslim leaders have striven to reestablish a state of the same character. Recently, fundamentalist Islam has served as the proponent for the establishment of an Islamic state, namely a state based entirely on shari'a law and the sovereignty of God.¹ Fundamentalism in itself is a reaction to the desolate condition of the Muslim world relative to the West, and finds its two most influential manifestations in the Muslim Brotherhood, founded by Hasan al-Banna in 1928 Egypt, and the Jamaat-e-Islami, founded by Abul-Alla Mawdudi in 1941 Pakistan.² Each of these Muslim thinkers developed their own vision of an Islamic state and, along with Sayyid Qutb, provide almost all of the fundamentalist literature concerning one. Though each Muslim scholar's vision of an Islamic state is relatively idiosyncratic, they all share general themes: the overarching narrative describes an Islamic state founded upon the complete implementation of shari'a law, thereby establishing a supremely just society.

Though none of these figures was ever able to establish the Islamic state they preached, their writings significantly influenced later Islamist groups. Today, Hamas, Hizbollah, and Islamic Jihad all trace their intellectual and ideological roots to the fundamentalist writings of their predecessors. One decidedly more moderate example of such a group, Tunisia's Ennah-

da party, recently emerged on the world stage as the landslide winner of Tunisia's post-revolution elections.³ This marked the first time an Islamist group had risen to power through fair, democratic elections, potentially setting the stage for future Islamist groups to gain power the same way. As such, the Ennahda party possessed unparalleled legitimacy and a remarkable opportunity to finally establish an Islamic state. Therefore, the Tunisian Revolution presents an ideal case study to determine the realities of an Islamist group with legitimate power and its attempts to establish an Islamic state. Considering the Middle East's continuing state of upheaval following the Arab Spring, such a case study maintains relevance and potential applicability today, as it is plausible for future Islamist groups to share similar experiences. The goal of this paper is to closely examine and analyze the causes and initial goals of the Tunisian revolution, the Ennahda party's background and rise to power, and the party's behavior in power, with the ultimate end of outlining underlying themes applicable to the general case of an Islamist group's rise to power. Through the lens of this case study, we can draw greater conclusions concerning the feasibility of the establishment of both the Islamic state of al-Banna and Mawdudi and an Islamic state in general.

CAUSES AND CONTEXTS OF THE REVOLUTION

The causes and goals of the 2010 Tunisian Revolution provide the first access point in

1 Sayyid Abul A'la Mawdudi, "The Political Theory of Islam," in *Political Theory of Islam. Modernist and Fundamentalist Debates in Islam*, ed. M. Moaddel and K. Talattof (New York: Palgrave MacMillan, 2002), 263-271.

2 David Waines, *An Introduction to Islam* (Cambridge: Cambridge University Press, 2003), 239-247.

3 Lise Storm, "The Fragile Tunisian Democracy – What Prospects for the Future?" in *The Making of the Tunisian Revolution: Contexts, Architects, Prospects*, ed. N. Gana (Edinburgh: Edinburgh University Press, 2013) 274.

considering the Islamist Ennahda party's rise to power on the Tunisian political scene. The immediate impetus for the revolution can be found in Sidi Bou Zid on December 17, 2010, when Muhammad Bouazizi, a young street vendor, set himself on fire. Bouazizi acted to raise awareness and stir activism concerning the dismal condition of unemployed Tunisian youth. He was badly burned and died in a Tunisian hospital weeks later, but his suicidal actions served as the metaphorical "straw that broke the camel's back." Though Bouazizi's actions were not the first instances of extreme and suicidal symbolic speech, his self-immolation and subsequent death served as the effective political tipping point, forcing Tunisian President Zine el Abidine Ben Ali to abdicate his position and opening the door for political change.⁴

Bouazizi's attempted suicide may have served as the direct stimulant for Ben Ali's departure and the regime change, but revolutionary stirrings had been in the makings for years. Heightened by the peak of the recent global economic crisis, protests over the economic and social shortcomings of the Ben Ali administration shook Tunisia in the time leading up to Ben Ali's exit. Unemployment, poverty, and internal corruption, along with the detrimental intervention of foreign, Western, financial institutions created what Tunisians saw as intolerable and protest-worthy conditions. Further, the wealth disparity between coastal Tunisians and those farther inland only served to exacerbate the already unhealthy Tunisian socio-economic situation.⁵ Thus, protests became common and widespread, as citizens took to large labor strikes and public protests in reaction to widespread poverty and outrageous food prices, ultimately bringing to the forefront the issues that had been plaguing the country for at least a decade.⁶

While the Tunisian Revolution has its obvious roots in economic and social turmoil, some analysts argue that the greater context of the Tunisian revolution must account for the op-

pression present since Tunisian Independence in 1956 and possibly even earlier. Tunisia has a long history of authoritarian politics, stretching from its status as a colonial possession to the twenty-nine year single party rule of the Dustur Socialist Party to the "medical coup" that brought the corrupt and oppressive president Ben Ali in to power for a quarter-century. In addition, Tunisian bread rioters made clear that their protests expressed their willingness to "live on bread and water" and inability to be bought off by the Ben Ali regime, highlighting the discontent that went beyond the critical economic conditions. Thus, the flame that sparked the Tunisian Revolution may have been the 21st century protests of Bouazizi and others, but the coals had been smoldering from the excessive and oppressive nature of the regimes that had controlled Tunisia since its time as a French protectorate.⁷

Given that the 2010 revolution was the product of long-term discontent and short-term suffering, it is important to recognize that the 2010 Tunisian Revolution was not an Islamic revolution. This fact casts doubt over whether Ennahda's unrivaled support in the 2011 elections was a sign that the Tunisian population supported an Islamist agenda or merely favored their moderate and progressive platform as a solution to the country's problems. After all, if the desire of the population was to establish an Islamic state one would think the people would have set this as a goal and proposed it as a solution from the outset.

THE ENNAHDA PARTY: BACKGROUND AND RISE TO POWER

Though Ennahda was not a major factor in the immediate Tunisian Revolution, an inquiry into its historical and ideological background will illuminate its position in Tunisian politics and its goals as a political Islamist party. In the 1980's Ennahda (Rebirth), also known as Harakat al-Ittihad al-Islami (Islamic Tendency Movement), became politically active as it fought on behalf of the lowest classes. However, its leadership had been significantly influenced by the ideology of the Muslim Brotherhood and of Mawdudi, and in 1985, it shifted its agenda toward Islamism. Ennahda called for a national referendum to repeal the Personal Status Code (PSC), which codified gender equality, claiming it violated basic Islamic principles and hurt men's

4 Julia Clancy-Smith, "From Sidi Bou Zid to Sidi Bou Said," in *The Arab Spring: Change and Resistance in the Middle East*, ed. M. L. Haas and D. W. Lesch (Boulder: Westview Press, 2013), 16-18.

5 Emma C. Murphy, "Under the Emperor's Neoliberal Clothes! Why the International Finance Institutions Got it Wrong in Tunisia" in *The Making of the Tunisian Revolution: Contexts, Architects, Prospects*, ed. N. Gana (Edinburgh: Edinburgh University Press, 2013) 35-57.

6 Sami Zemni, "The Labor Origins of the Tunisian Revolution," in *The Making of the Tunisian Revolution: Contexts, Architects, Prospects*, ed. N. Gana (Edinburgh: Edinburgh University Press, 2013) 127-146.

7 Clancy-Smith, "From Sidi Bou Zid to Sidi Bou Said," 16-34.

position in the workplace.⁸ As Ennahda gained popularity among Tunisians, it was repressed by Ben Ali's government and was even denied recognition as a political party. This marked Ennahda's shift from a political party merely seeking to influence Tunisia to an Islamist party seeking control of the state. This shift was best expressed by Ennahda's leader Rashid al-Ghannouchi when he said: "We sought only a shop and we did not get it. Now it's the whole souk [marketplace] we want."⁹

At this point in Ennahda's history, many of its leaders went into exile. However, it seemed that as Ben Ali's repression of the party grew, so did its support. Ennahda's commitment to Islamism became even more evident, as it became more militant during the Gulf War in 1991 and was even accused of conspiring to lead a coup to establish an Islamic state. Though Ben Ali's harsh reaction to Ennahda activism played a role in creating Tunisia's national mood of discontent and restlessness, as mentioned before, the revolution was not an Islamic revolution. Ennahda leadership only returned from exile and gained power after Ben Ali was ousted, at which point they began campaigning once again for the party's Islamist agenda, which they explained would be pursued through elections.¹⁰

Finally, the causes of the revolution converged with Ennahda's political ambitions, creating an opportunity for the Islamist group to amass political power. Though until then relatively dormant, the Ennahda party mobilized following Ben Ali's exit from power, supporting progressive causes like gender equality. In fact, many posited that Ennahda embodied "the most progressive Islamic party in North Africa or the Arab world."¹¹ With the 2011 democratic elections approaching, Ennahda presented a platform calling for a democratically elected government that respected Islamic values and culture. With no previous record to cite, this ambiguous platform left ample room for speculation, as Ennahda could have just as easily been calling for a state governed by shari'a as it could a state simply administered by Muslims. Ennahda leaders stressed, however, that though they disapproved of the risqué nature of the

tourist industry's alcohol and immodest dress, they would do nothing to harm such beneficial economic sectors. Such claims revealed a willingness to compromise and a "non-ideological pragmatism" that diverged from traditional Islamist principles but positioned Ennahda to succeed within the constraints of a democratic government.¹²

Ultimately, in the October 2011 elections, Ennahda garnered a staggering share of popular support, receiving forty percent of the vote and taking eighty-nine of 217 parliament seats.¹³ The elections represented the first purely democratic vote in the country's history, and also produced the first democratically elected Islamist government. Ennahda's electoral rise to power imparted remarkable legitimacy, and Ennahda appeared shockingly yet reasonably capable of creating an Islamic state. Though many worried about an Islamist group's political triumph, the Ennahda party and Islam seemed poised to shape post-revolution Tunisia.

THE ENNAHDA PARTY IN GOVERNMENT: SUCCESSES AND FAILURES

With its overwhelming electoral success, Ennahda was given a mandate of sorts to govern as it saw fit. Though there exists globally a mindset asserting that an Islamic state and Western, liberal ideals must remain mutually exclusive in an effective government, Tunisia seemed to be the first place capable of integrating the two. Unlike in other secularized Muslim countries, Islam had retained its significance in the Tunisian identity, and millions of Tunisians still supported the establishment of some sort of Islamic government.

Amidst accusations that it sought to create an Islamic theocracy, Ennahda continued to cling to its moderate platform. Ghannouchi preached his theory of the compatibility of Islam and democracy, pointing to the conflict between the Arab-Islamic identity and a Westernized one, not individually between Islam and democracy. He claimed that secularism is not rejected on principle but because it represents the illegitimate sovereignty of non-Tunisians. In short, he focused on the importance of an authentic Tunisian cultural identity and the existence of a civil society in which the will of the people governs. His ultimate vision of religious democracy comprises "a political sit-

8 Ibid.

9 Kenneth Perkins, "The Use and Abuse of Religion," in *The Making of the Tunisian Revolution: contexts, Architects, Prospects*, ed. N. Gana (Edinburgh: Edinburgh University Press, 2013) 58-80.

10 Ibid.

11 Clancy-Smith, "From Sidi Bou Zid to Sidi Bou Said," 16-34.

12 Kenneth Perkins, "The Use and Abuse of Religion," 58-80.

13 Lise Storm, "The Fragile Tunisian Democracy," 274.

uation where society is religious, but the state refrains from interfering with religious affairs, while allowing for the development of piety and virtue.”¹⁴

However, the pressing issue for the post-revolution Tunisian government remained engaging and treating the socioeconomic problems that triggered the revolution. Once in power, Ennahda’s inability to reconcile its rhetoric with tangible progress in socioeconomic areas created a tense political atmosphere. The majority of its efforts continued to concentrate on deflecting accusations that it was a religious party, and though it claimed otherwise, the climax of Ennahda’s Islamist agenda appeared when its members officially pushed for the inclusion of shari’a in Tunisia’s new constitution. Though Ennahda members claimed this desire stemmed not from a desire to establish a fundamentalist Islamic state but an attempt to solidify Tunisia’s Islamic identity, significant opposition arose. Ennahda eventually backed down, and shari’a was not officially included in the drafted constitution.

The conflict that emerged concerning shari’a’s inclusion in the constitution highlights the overwhelming complexity of the post-revolutionary Tunisian political scene and exposes one of Ennahda’s major failures. In terms of politics, many Tunisians believed that Islam, as a central facet of their identity, ought to be incorporated into the constitution. At the same time, the Tunisian populace was unwilling to commit to the explicit implementation of shari’a law. On a smaller scale, the Ennahda party was attempting to straddle the line between remaining loyal to Islamic values and protecting liberal freedoms, and, frankly, was struggling to do so.¹⁵

ENNAHDA’S FAILED ISLAMISM, A FRAGILE DEMOCRACY, AND THE COMPROMISE THAT REMOVED THEM FROM POWER

As the country moved farther from the 2010 revolution, Ennahda’s struggles worsened as they tried to balance their moderate Islamist platform with liberal, Western ideals. Ennahda was consistently badgered by critics on both the left and the right. A particular example of Ennahda’s failure to straddle this political line

involved the Tunisian Salafis, a group of young, poor, traditional, and conservative Muslims. As the Salafi movement pushed to abolish the prohibition on female students to wear a niqab, or traditional Muslim face veil, they criticized Ennahda for what they saw as its abandonment of Islam for “political opportunism.” This criticism highlighted Ennahda’s inability to cater to Tunisia’s more conservative Islamist faction, while the aforementioned shari’a incident emphasized their inability to please the left.¹⁶

As if Ennahda’s reputation wasn’t delicate enough, the 2013 assassination of liberal opposition leader Chokri Belaïd cast doubt over whether the ideals of the original 2010 revolution would ever be realized. It became unimaginably clear that Tunisian democracy was in an incredibly fragile a state.¹⁷ As the process of finalizing Tunisia’s post-revolution constitution dragged on, it appeared violence would become prominent, as Tunisia was wracked by a second assassination, that of Mohamed Brahmi in July. Ultimately, Ennahda was forced to concede in the interests of its country, and in January 2014, Tunisian and Islamist Prime Minister Ali Laarayedh announced his resignation as a part of a compromise that would result in the government’s adoption of a new constitution.¹⁸

Thus Ennahda’s rule of Tunisia ended, and with it disappeared Islamist leaders’ aspirations of establishing an Islamic state in Tunisia. The compromise provided for a new independent government to be installed, and for new elections to occur in the coming weeks and months, with the ultimate goal of finally adopting a new constitution. Perhaps the most interesting and telling aspect of Ennahda’s graceful exit from power is its decision to do so voluntarily – no coup was led and no leader assassinated, and so one must assume that Ennahda recognized its failures in government and decided to pursue realistic nationalist goals over Islamist ones.¹⁹

OVERVIEW

Ultimately, the Ennahda party was unable to successfully establish a traditional Islamic

14 Nadia Marzouki, “From Resistance to Governance: The Category of Civility in the Political Theory of Tunisian Islamists,” in *The Making of the Tunisian Revolution: Contexts, Architects, Prospects*, ed. N. Gana (Edinburgh: Edinburgh University Press, 2013) 207-223.

15 Ibid.

16 Fabio Merone and Francesco CaCavatorta, “The Rise of Salafism and the Future of Democratization,” in *The Making of the Tunisian Revolution: Contexts, Architects, Prospects*, ed. N. Gana (Edinburgh: Edinburgh University Press, 2013) 252-269.

17 Lise Storm, “The Fragile Tunisian Democracy,” 270-290.

18 “Tunisia’s Arab Spring: Three Years On,” *Al Jazeera*, January 14, 2014.

19 “Tunisia Deal to Bring End to Islamist Rule,” *Al Jazeera*, October 6, 2013.

state in Tunisia. Though the causes of the revolution were decidedly un-Islamic, Ennahda was still presented with a legitimate opportunity to establish an Islamic state following its democratic rise to power. As the moderate Islamist party struggled to straddle the line dividing traditional, Islamic values with liberal, Western ideals, it was eventually forced to concede its Islamist visions in the interests of the welfare of the fledgling Tunisian democracy. The compromise that ended Ennahda's brief rule revealed the triumph of national identity over traditional ideology and questioned the realistic plausibility of establishing a modern-day Islamic state.

While I've discussed Ennahda's struggle to straddle the spectral center, its more concrete failure involves its government's inability to address the ills that plagued pre-revolution Tunisia. Had Ennahda tabled its dream of an Islamic state and discussed reforms to ameliorate unemployment and poverty, let alone implemented them, it would be easier to imagine an Ennahda-led Tunisia that still had the potential to be transformed into an Islamic state.

While Ennahda's electoral success failed to fulfill the vision of Qutb's "revolutionary vanguard," there is no questioning their genuine attempt to establish an Islamic state in Tunisia.²⁰ Their attempt to include shari'a in Tunisia's new constitution aligns identically with the fundamentalist notion of a state governed entirely by shari'a. Thus, direct parallels can be drawn between this case study, the hypothetical Islamic state of notable fundamentalist writers, and potential future Islamist groups. Ennahda's position as the overwhelmingly supported Islamist party in Tunisia empowered it with a legitimacy and opportunity to establish a democratically (and therefore favorable, at least by Western normative standards) created Islamic state, and its failure to do so implies much about the general establishment of an Islamic state.

Lastly, the fact that Ennahda voluntarily conceded power is an aspect of the post-revolution saga that can be easily overlooked. Yet its active relinquishing of power and by extension Islamist goals highlights two critical points concerning the establishment of an Islamic state. First, based on Ennahda's rhetoric surrounding its decision to sign the compromise, it is clear the Ennahda's Tunisian identity surpassed its Muslim identity, as Ennahda leaders prioritized

Tunisian national interests over Islamist ones. Second, Ennahda's reluctant yet deliberate decision to resign from power reveals its recognition that its goals were not feasible under the circumstances. Ennahda was not forcibly ousted from power and its leaders will remain Tunisian citizens; thus, Ennahda's decision to stop pursuing the creation of an Islamic state should resonate, suggesting greater implications concerning the viability of a contemporary Islamic state.

CONCLUSION

Following the "Tunisian Experiment," it is obvious that an Islamist group can legitimately rise to power in a democracy; the common conception that Islamism is by definition authoritarian and anti-democratic is flawed. However, it is also evident that such an Islamist group cannot vacillate between appeasing its critics on the left and the right, as the Ennahda party did. It must either commit wholeheartedly to protecting its Islamic values or conform to leftist critics and concede in favor of a fully liberalized (and by extension Westernized) state.

Given that the more moderate Ennahda party was unable to Islamize Tunisian government, it is easy to speculate on the ability of a more conservative and perhaps radical Islamist groups ability to do so. However, one must also question whether such a conservative Islamist group would have been able to democratically rise to power; it seems Ennahda's support was largely due to its progressive nature, and so a more conservative or extreme Islamist entity would likely not have succeeded through the same legitimate means. Conversely, on the success of an even more liberal Islamist party, it's hard to see how a more liberal government could even be considered an Islamic state.

I would suggest that it may be impossible to establish a contemporary Islamic state in line with the vision of the Muslim Brotherhood or Mawdudi. These fundamentalist authors' lack of political power allowed them great leeway in drawing the blueprints for their Islamic state; however, when confronted by the challenges of real political power, one must adapt to survive, as Ennahda attempted to do. Ennahda's "tight roping" as they set out to establish an Islamic state, whether a result of their ideology or pragmatism, revealed the difficulty inherent in doing so. Further, Ennahda's individual decision to step down from power reflects its personal realization that it would be unable to

20 Sayyid Qutb, "Jihad in the Cause of Allah," in *Modernist and Fundamentalist Debates in Islam*, ed. M. Moaddel and K. Talatoff (New York: Palgrave MacMillan, 2002), 223-245.

found an Islamic state in Tunisia, suggesting the complexity and potential impracticality of establishing such a state.

I do not seek to make sweeping generalizations – I concede that an Islamist group could very well rise in the Middle East and establish a state based on shari'a, as Iran did 35 years ago. However, the aforementioned superseding of an Islamic identity by a national one, as evidenced by Ennahda's decision to abandon its Islamist ambitions in favor of Tunisian national interests, complicates the situation. In a world defined by the modern nation-state and nationalism, identities have shifted and the ancient Muslim umma no longer holds the same meaning. This point is perhaps best understood by recognizing the self-identification of Tunisians as "Tunisians" rather than simply "Muslims living in Tunisia."

Discussion of the establishment of a contemporary Islamic state begs the question of what exactly defines an Islamic state. As a contemporary Jew living in a world in which a "Jewish State" exists in the land of Israel, I struggle with the same question. A "Jewish State," like an "Islamic State," could mean anything from a theocracy to a government run by Jews to a country culturally defined by its Jewish heritage. I have concluded that there is no finite Jewish or Islamic state.

While I admit the conclusion that founding an Islamic state today would be impossible may be severely overgeneralized, one would be remiss not to acknowledge the immense difficulties present today that did not exist previously. The unipolar nature of the global balance of power creates a situation in which countries' wills must not conflict with that of the global superpower – America. I therefore feel comfortable asserting that as the consequences of the Arab Spring continue to unfold, I find it hard to envision a world in which either America would

allow a radical military to establish a fundamentalist state or an Islamist group would rise democratically and successfully found an Islamic state. The former claim refers to the United States' sometimes-unwarranted involvement in sovereign nations' domestic affairs, while the latter refers to the above case study of the 2010 Tunisian revolution.

Every religion has historically struggled to reconcile its old and new guards, its conservatives and progressives, its fundamentalists and modernists. Yet as history and hopefully this paper have shown, it may in fact be impossible to do so. As society continues to drive towards the mythical modernity, the question remains whether we must abandon all old-fashioned and traditional inclinations in favor of rational change and progress. I think that Ennahda's experience proved that we don't have to do that.

Rashid al-Ghannouchi stressed that his goal was not to modernize Islam, but to develop it.²¹ I think this poignant statement brings to light an alternate path to progress. Advocates of change call for the discarding of "obsolete" or "backward" traditions in order to develop and modernize, while fundamentalists and conservatives cling to their conception of a perfect past. The middle ground involves implanting important traditional values within modern society. The Ennahda party's use of entirely modern constructions and institutions, specifically democratic elections and a constitution, to incorporate valuable, traditional, Islamic principles was an effort to do just that. And though through this method they may have failed to establish an Islamic state, and though Ghannouchi emphasized their intention not to modernize Islam, their success lies in their steadfast preservation of the old while adjusting to the new: their "Islamization of modernity."

21 Nadia Marzouki, "From Resistance to Governance," 207-223.

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THE POLITICAL AND ECONOMIC IMPLICATIONS OF BREXIT ON THE ISLAND OF IRELAND

INTRODUCTION

On June 23rd 2016, Great Britain shocked Europe and the rest of the world by voting to leave the European Union through a national referendum. The referendum, held in June 2016, stemmed from an election promise made by former British Prime Minister David Cameron prior to the 2015 General Election. Cameron promised to hold a referendum on Great Britain's membership in the EU to curb political support for the United Kingdom Independence Party (UKIP), and the referendum was called British Exit, which was commonly referred to as Brexit. Cameron promised "a very simple in-or-out choice to stay in the EU on new terms, or come out altogether."¹

Campaigning groups such as *Vote Leave* and *Britain Stronger* (more commonly known as Remain) became the loudest advocate for exiting and remaining in the EU, respectively, after the referendum's inception. *Vote Leave* emphasized the issue of immigration, specifically targeting questions of national and cultural identity. Their greatest advocacy tool targeted savings on economic investment: they estimated that exiting the EU would correspond to an additional \$350 million USD per week. This increased governmental revenue, they argued, would enable better financing of the National Health Service, the British governmental healthcare provider.² In contrast, the Remain group focused on the economic benefits of staying within the European Union, citing the ease of transnational movement and access to commercial markets as key assets of long-term

growth in the nation.

In the days preceding the vote public polls showed that Remain had gathered slightly more support than its counterpart, leaving many voters believing that Brexit would be voted down. However, with a seventy two percent voter turnout rate, fifty one point nine percent of Great Britain's population voted in favor of leaving the EU with the remaining forty eight point one percent voting for the status quo.³ While *Vote Leave* celebrated a historic triumph the markets immediately began to decline. At one point, in the hours after the vote, the pound dropped eleven point one percent, to a \$1.33 USD equivalent, its lowest level since the mid-1980s.⁴

At the time of writing the Brexit vote's impacts remain too recent to tell. In other words, the long-term economic and political effects are not yet understood. Despite this, it's clear that Great Britain's decision to leave the EU will have significant impacts on those countries most closely tied to it. One such country is Great Britain's neighbor, Ireland. The focus of the paper that follows is to explore the political and economic effects of Brexit on both Northern Ireland and the Republic of Ireland.

HISTORY OF THE EUROPEAN UNION

The European Union, officially formed in 1992, emerged from a desire for peace and stability across Europe at the conclusion of World War II. This international institution would serve to end the bloody wars that dominated the first half of the 20th century. The roots of the European Union are found in the Europe-

1 "EU Referendum Results – BBC News," *BBC News*, June 24, 2016.

2 "Eight Reasons Leave Won the UK's Referendum on the EU," *BBC News*, June 24, 2016.

3 *Ibid.*

4 Eric Platt and Michael Mackenzie, "How Global Markets Are Reacting to UK's Brexit Vote," *Financial Times*, June 24, 2016.

an Economic Community (EEC) established in 1957 by Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. Throughout the 1970s and 1980s, more countries joined the economic community including Denmark, Ireland, and the United Kingdom, all by national referendum. After the fall of the Berlin Wall in 1989 and the general collapse of the communist bloc, Europe saw an opportunity to realign its institutional purpose to achieve a more integrated, united continent. A wave of countries introduced referendums, all voting to join the EEC, which eventually evolved into the present day European Union. While established on the premise of peace and stability, the EU's focus, over recent decades, has shifted towards the facilitation of trade between member states. The EU now operates a single market, allowing the free movement of goods, capital, services, and people between loosely regulated transnational borders.⁵ Twenty two of twenty eight member states have facilitated the ease of travel by creating the Schengen Area, a coalition of countries who have agreed to abolish passport and border controls at their common borders.⁶ Furthermore, in 2002 nineteen out of the twenty eight member states adopted the Euro as their official currency, allowing for easier and more efficient European based commercial transactions.

Great Britain has had a long and fraught relationship with both Europe and the European Union, and there are both historical and contemporary factors at play in explaining the fifty one point nine percent vote for leaving the EU. Beginning with the former, Britain, as the empire it once was, has a clouded history with that of prominent European powers like France and Germany. For some, membership within the European Union is seen as relinquishing control to countries Great Britain once used to dominate.⁷ In addition, Great Britain is one of the biggest financial contributors to the European Union; however, given the 2008 global economic recession, British citizens have seen their financial contribution to the EU used to help bail other European countries, such as Spain, Portugal and Greece, out of financial distress. Outside of economics, immigration

also served as a large divisive issue in the Brexit campaign. *Vote Leave* campaigners argued that Britain must have stricter border controls, claiming that many immigrants are taking jobs away from British citizens, a mindset that is fundamentally anti-Europe. The UK Independence Party capitalized on these complex issues, aiming their politics at those that disagreed with European ideals to achieve one main goal: to leave the European Union. The Independence Party began to gather intense support prior to the vote citing sovereignty, border control, and immigration as their main reasons for voting in favor of Brexit. With the emergence of the Syrian refugee crisis, immigration became a growing concern in Great Britain, with fears of diminishing employment opportunities lurking in the forefront of the British working class. In an attempt to combat UKIP's growing political support, the Tory Party, under David Cameron, promised to hold an in-or-out referendum on Great Britain's status within the European Union. He explained that an "In" vote would be on renegotiated terms, and an "Out" vote would mean a divorce from the Union entirely. Evidently, the simple, yet extremely complicated in-or-out vote created a clear divide across Great Britain.

RESHUFFLING OF BRITISH CABINET & ARTICLE 50

After the results of the Brexit referendum, David Cameron, on the steps of No.10 Downing Street, announced that he would be stepping down as Prime Minister of the United Kingdom. Cameron explained:

I was absolutely clear about my belief that Britain is stronger, safer and better off inside the EU I made clear the referendum was about this, and this alone, not the future of any single politician, including myself. But the British people made a different decision to take a different path. As such I think the country requires fresh leadership to take it in this direction.⁸

With a vacancy for the Prime Minister position campaign groups on both sides of the referendum began advocating for replacement Prime Ministers, with Boris Johnson, former Mayor of London, garnering the most support

5 "The History of the European Union," European Union Website, accessed September 29, 2016.

6 "What Is the EU, Why Was It Created and When Was It Formed?" Michael Wilkinson, *The Telegraph*, June 22, 2016.

7 Sam Wilson, "Britain and the EU: A Long and Rocky Relationship," *BBC News*, April 1, 2014.

8 Heather Stewart, Rowena Mason, and Rajeev Syal, "David Cameron Resigns after UK Votes to Leave European Union," *The Guardian*, June 24, 2016.

early on. Other campaigners aiming for the role of Prime Minister included Theresa May, Michael Gove, Stephen Crabb, Liam Fox, and Andrea Leadsom. Though their initial efforts were strong, these candidates slowly began withdrawing from the political race. Liam Fox was first after receiving the least amount of votes from the Conservative party. Not long after, Crabb withdrew his name and pledged support to Theresa May. Soon, only two candidates remained: Theresa May and Andrea Leadsom. Once Leadsom quit the race, Theresa May was elected leader of the Conservative party, Prime Minister, and political leader responsible for negotiating the terms of Great Britain's divorce from the EU. In her first act as Prime Minister May decided to reshuffle her cabinet by making the following appointments:

- Philip Hammond: The former Foreign Secretary who campaigned to remain within the European Union. Hammond was appointed to Chancellor of the Exchequer. He will be responsible for steering Britain's economy through Brexit and post-Brexit negotiations.⁹
- Boris Johnson: The former Mayor of London has become the new Foreign Secretary. Johnson was one of the foremost voices for *Vote Leave's* campaign and will now be responsible for a role that looks very different with Great Britain on the outside of the European Union.¹⁰
- David Davis: An avid *Vote Leave* campaigner and former political rival to David Cameron, Davis has been appointed as the newly created: "Secretary of State for Exiting the European Union." This position is known otherwise as the Brexit Secretary.¹¹
- James Brokenshire: Brokenshire was the former Immigration Minister and campaigned to remain in the EU. He has been newly appointed as the Northern Ireland Secretary. Brokenshire takes over for Theresa Villiers, who resigned from the cabinet.¹²

But what jurisdiction do these individuals have with respect to their country and the European Union? The right of a member state to

withdraw from the EU was introduced for the first time with the ratification of the Lisbon Treaty in 2009. Under Article 50 in the Treaty of the European Union, procedural requirements are set out for a country that wishes to withdraw.¹³ Article 50 must be triggered by the member state withdrawing in order for formal negotiations about leaving the European Union to begin. These negotiations must be completed within two years. If a country fails to make an agreement within these two years, its membership automatically ends, unless the European Council and the member state jointly decides to extend the negotiation period.¹⁴ Following the June referendum, Cameron refused to invoke Article 50, leaving it to his predecessor to determine when to start the clock on departure negotiations. Prime Minister Theresa May has said she will invoke Article 50, thus initiating formal negotiations on Brexit, by the end of March 2017, leading to a full exit by 2019.¹⁵

UK HIGH COURT DECISION

On November 3rd 2016, the British government's plan for enacting Article 50 and leaving the European Union was brought to a halt. The UK High Court ruled that Prime Minister May and her cabinet must get approval from Parliament before the process can begin.¹⁶ Beforehand, May had planned to start the legal process of leaving the EU in March 2017. However, numerous British citizens opposing Brexit appealed to the UK High Court on account of the referendum's violation of their inalienable rights as a European. More specifically, under the European Communities Act of 1972, Great Britain inherited certain legal rights created by EU law. Claimants of the High Court recognized that, by invoking Article 50, Great Britain is violating these rights.¹⁷ The High Court verdict: only Parliament can legislate for such rights to be removed.

Thus, the High Court ruled that it is impermissible for the Prime Minister to legally autho-

13 "Article 50 TEU: Withdrawal of a Member State from the EU," European Parliament, Europa, European Union Research Service, February 2016.

14 Ibid.

15 Jenny Gross, "U.K.'s Theresa May Pledges to Set EU Divorce in Motion by End of March," *WSJ*, October 2, 2016.

16 Stephen Castle and Steven Erlanger, "'Brexit' Will Require a Vote in Parliament, U.K. Court Rules," *The New York Times*, November 3, 2016.

17 Fred Lewsey, "Brexit: High Court Ruling on Article 50 Explained," University of Cambridge, November 3, 2016.

9 "Theresa May's Cabinet: Who's in and Who's Out?" *BBC News* – UK Politics, July 14, 2016.

10 Ibid.

11 Ibid.

12 Ibid.

rise the notification of Article 50 without the approval of Parliament. It also must be noted that the Referendum Act of 2015 – the act that authorized the holding of the Brexit vote – only made provision for an advisory referendum and did not give statutory authority for the triggering of Article 50. To little avail, Prime Minister May suggested that initially all EU rights would remain legal upon Britain’s departure from the Union and that, over time, the British government would slowly reform these rights into long-standing law. This uncertain horizon, however, did not appease the claimants of the High Court case. Soon after this verdict, May and her cabinet appealed the High Court’s decision to the UK Supreme Court. The Supreme Court will gather all 11 justices – the largest court ever assembled in Great Britain – to have a four-day hearing in early December 2016.¹⁸ Prime Minister May still intends on enacting Article 50 by March 2017. If the decision is upheld, the government will want legislative authorization from Parliament as quickly as possible. Upon this prospective outcome members of Parliament will be given a chance to uncover future governmental positions on negotiating Britain’s departure from the EU. Parliament has required that Prime Minister May outline her exit strategy for Brexit, but May refuses to do so, claiming that it would “impede her flexibility in negotiations, preventing Britain from getting the best deal possible.”¹⁹

In opposition to the High Court’s decision, the government claimed that executive powers were sufficient to give notice to the EU on behalf of Parliament. However, uncertainty looms, as the High Court did not specify the form of vote or approval needed from Parliament. If the vote is a simple yes-or-no question, members of Parliament will be forced to make very affirmative, and potentially polarizing, decisions. Such acts will put into questions these politicians best judgment and may compromise on the desire of their constituents. MPs are also worried about holding onto their seat in Parliament, especially if a general election is called early, adding to the difficulty in deciding how best to vote. If desired, May could call a vote of no confidence and seek an early general election, hoping to gain a wider mandate of *Vote Leave* supporters in Parliament. The implications of this move are, for now, unclear and I

think, given the bigger picture, that this scenario is unlikely. The High Court decision does not directly prevent Brexit but merely challenges the legality and constitutionality of those responsible for invoking Article 50.

PRE-BREXIT IRELAND

In the lead-up to the June 23 vote, the leadership of the Republic of Ireland grew increasingly worried, for a variety of reasons. Firstly, as a member state of the EU, the withdrawal of any country from the Union would affect Ireland, especially if that country was its next-door neighbor and economic partner. Secondly, Northern Ireland is a part of Great Britain, and the Republic of Ireland has a long and complicated history with the North. Both countries also have a tense relationship with the United Kingdom. The Republic of Ireland was granted independence from Great Britain after the signing of the Anglo-Irish Treaty of 1921. While the treaty marked independence, it also marked the start of the Irish Civil War. Division over the support and rejection of the treaty established the foundation of two modern political parties, Fianna Gael and Fianna Fáil, respectively.

While there were many details and agreements within the treaty, the most conflicting agreement was regarding the geopolitical boundary between Northern Ireland and the “Irish Free State”.²⁰ In accordance with the Anglo-Irish Treaty 1921, six counties on the island of Ireland, (Derry, Down, Antrim, Armagh, Fermanagh, and Tyrone) belong to, and are governed by Great Britain.²¹ The wording of the Treaty is as follows:

...shall determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland, and for the purposes of the Government of Ireland Act 1920, and of this instrument, the boundary of Northern Ireland shall be such as may be determined by such Commission.²²

The commission referred to above is the Boundary Commission, a committee established in 1924 with one representative from each of the governments of the United King-

18 Anne Perkins, “High Court Brexit Ruling: What Does It All Mean?” *The Guardian*, November 3, 2016.

19 Ibid.

20 “Anglo-Irish Treaty 1921,” National Archives, December 6, 1921.

21 Ibid.

22 Ibid.

dom, the Irish Free State,²³ and Northern Ireland. When the Boundary Commission first convened, Irish nationalists looked to alter the original border, drawn in 1920 under the Government of Ireland Act, in the hopes of conglomerating significant areas with nationalist majorities. However, a copy of the original border was leaked to *The Morning Post* in 1925, causing outcry from both unionists and nationalists. As a result, the Boundary Commission could do nothing but maintain the original border, hoping to avoid upsetting either side in the process of adjusting what already existed. The Irish Free State eventually became Éire, and, after full independence, became the Republic of Ireland in 1949. The Anglo Irish Treaty of 1921 gave rise to a divided Ireland and resulted in a civil war. The border between Northern Ireland and the Republic was a source of tension for groups on both sides, eventually leading to a period of intense violence during the 1970s and beyond. The period 1968-1998, known as The Troubles, brought political violence and terrorist attacks to the destabilized region causing the deaths of over 3,600 people as well as thousands of injuries.²⁴ The violence occurred between an overwhelmingly Protestant majority who wanted to remain part of the United Kingdom and a nationalist Catholic minority who wished to become part of the Republic of Ireland. In an attempt to end violence, cross-party talks began in 1996, but nothing was achieved until the signing of the Good Friday Agreement in 1998 (to be discussed in more detail later).²⁵

IRISH REACTION

A week after being named the new Prime Minister, Theresa May met with Irish Taoiseach²⁶ Enda Kenny. May assured both nations that she wanted to make Brexit a success for them, commenting that "our discussions today have focused on Brexit; the particular impact on the Republic of Ireland and what this means for our economic relationship, travel between our countries, and the peace process."²⁷ These three areas of discussion are of critical importance to the future of Ireland and to its relationship with Great Britain. Taoiseach Enda Kenny

echoed May's statement outlining the common issues they share after the referendum decision. Kenny acknowledged that "it's not the outcome that we wanted in Ireland, but we respect the decision of the UK electorate, and we now must work out the consequences of that."²⁸ Kenny also addressed the people of Ireland in a statement, emphasizing similar areas of concern but comforting the people with reassurance that "there will be no immediate change to the free flow of people, goods, and services."²⁹ At the top of the Irish government's priority list are the implications of this vote for Northern Ireland and the relationship between the North and South, something that will require careful consideration in the future and in ongoing conversations and negotiations. Taoiseach Enda Kenny closed his statement with a reminder to the Irish people that Ireland will remain a member of the European Union, noting that it is "profoundly in our national interest" and that the next phase of negotiations with Great Britain may not start for months.³⁰ As these discussions transpire, one factor remains evident: Brexit will have a significant impact on both Northern Ireland and the Republic of Ireland.

UNITED IRELAND

In the final count of votes from Northern Ireland, fifty five point eight percent of people voted to remain, with only forty four point two percent voting in favor of leaving the EU. With a majority of Northern Irish citizens wanting to remain, it is no surprise that the idea of a United Ireland became a topic of household conversations and political speeches across the island. In a British-Irish conference in September 2016, Taoiseach Enda Kenny said that the possibility of Irish unity must be considered in Britain's negotiations to leave the EU. "The possibility of unity by consent must be maintained as a valid democratic option into the future," Kenny explained, "that means that, if there were democratic consent to Irish unity at some time in the future, there must be a mechanism to ensure that democratic decision can be implemented within the European Union, as was the case in Germany."³¹

The possibility of a United Ireland has not

23 The Republic of Ireland was known as the Irish Free State after the Anglo-Irish Treaty 1921.

24 "History – The Troubles," *BBC History*, November 24, 2016.

25 *Ibid.*

26 Taoiseach is the Irish word for Prime Minister.

27 "PM and Taoiseach Enda Kenny Statements: 26 July 2016," *GOV.UK*, Prime Minister's Office, July 26, 2016.

28 *Ibid.*

29 Enda Kenny, "Statement by Taoiseach Enda Kenny on the UK Vote to Leave the European Union," *RTE News*, June 24, 2016.

30 *Ibid.*

31 Denis Staunton, "Irish Unity Must Be Considered in Brexit Talks, Enda Kenny Says," *The Irish Times*, September 9, 2016.

been seriously discussed in Irish politics, or amongst the Irish people, since the institution of the Good Friday Agreement. Since achieving independence, the Republic of Ireland has operated a common travel area with Northern Ireland, although security checks were implemented during wartime and The Troubles. As it stands, the border shared between Northern Ireland and the Republic is the only part of Great Britain that will remain connected to a part of the European Union once Great Britain leaves the international institution. Some politicians suspect that a hard border with passport control and customs checks will be implemented along the 317-mile border between the North and South. Enda Kenny, however, announced his intent on preventing such border construction, emphasizing that this is in the best interest of all three governments: "All three administrations share the common objective of wanting to preserve the common travel area, and an open border on the island of Ireland."³²

ECONOMIC RELATIONSHIP

Brexit will greatly affect trade and foreign direct investment in the Republic of Ireland. In the short term, the Irish economy will be hurt by the volatility of Great Britain's market. In particular, the alarming eleven point one percent drop in sterling that immediately followed the Brexit decision has hit Irish exporters.³³ The sharp fall caused Irish exports to the UK, specifically meat and dairy products, to become fifteen percent less competitive in their respective markets.³⁴ Director of the Irish Business and Employers Confederation (IBEC), Fergal O'Brien, commented on the extent of the economic hit to the Republic: "The Brexit strain is manifest and intense. Without urgent action to address competitive pressures, hundreds of millions of euros worth of exports and thousands of jobs will be lost."³⁵ IBEC analysis of historical trade between Great Britain and Ireland showed that a one percent weakness in sterling results in a point seven percent drop in the value of Irish exports. If the pound fell to £0.90 to the Euro, that would cost Ireland \$880 million (\$USD) in food exports and 7,500 jobs in that sector alone.³⁶ A study done by the Economic and

Social Research Institute estimates that Brexit will significantly impact bilateral trade flows between Ireland and the U.K by twenty percent or more.³⁷ This figure will differ greatly across commercial sectors and products; agriculture, food and beverages, and basic metals industries most impacted given their dependence on British imports.

On a positive note for Ireland, Great Britain will become less attractive to foreign direct investment (FDI) because of the uncertainty surrounding the future of its economy, along with the reduced access to the EU single market. This may be counterbalanced by an increase in FDI in the Republic of Ireland, especially given Ireland's low corporate tax rate (twelve point five percent), English-speaking labour force, and EU membership. Some FDI in Great Britain could also choose to relocate to Ireland for the same reasons. Already a leading city in technology, Dublin appears to be becoming the new hub for financial firms' European Headquarters. Since the Brexit vote, areas within the financial industry including banking, insurance, and funds are in talks and negotiations with IDA Ireland, the agency responsible for the attraction and development of foreign direct investment in Ireland.³⁸ Despite some initially ominous statistics, Ireland is in a good position to shield itself from potentially destructive effects of Brexit, maintaining the fastest-growing economy in Europe despite Brexit's slowing of its annual GDP growth.³⁹

PEACE PROCESS

On April 10, 1998, representatives from the Irish and British governments and Northern Irish political parties co-signed the Good Friday Agreement.⁴⁰ This agreement brought an end to over thirty years of sectarian conflict in Northern Ireland, the period known as The Troubles. The agreement set up the Northern Ireland Assembly, a power-sharing executive that linked Northern Ireland to assemblies in both Dublin and London. The Northern Ireland Assembly sits in the Parliament Buildings at Stormont Castle and is the center of govern-

32 "Enda Kenny: Work Being Done to Keep Border with Northern Ireland Open," *Irish Examiner*, June 27, 2016.

33 Platt, Mackenzie, "How Global Markets Are Reacting."

34 Lisa O'Carroll, "Irish Exporters Feel Chill from Brexit Fall in Sterling," *The Guardian*, August 3, 2016.

35 *Ibid.*

36 *Ibid.*

37 Alan Barrett, Scoping the Possible Economic Implications of Brexit on Ireland, Economic and Social Research Institute, November 2015.

38 Reuters, "Ireland Moves Swiftly to Lure Financial Jobs from the UK After Brexit," *Fortune*, July 27, 2016.

39 Phillip Inman, "Irish Economy Surges 26% as Revised Figures Take in Foreign Investment," *The Guardian*, July 12, 2016.

40 "Good Friday Agreement," *BBC History*, accessed November 23, 2016.

mental power in the North. Northern Irish residents voted seventy one point two percent in favor of a referendum supporting the agreement.⁴¹ The peace process has not been without problems since the signing of the Good Friday Agreement; disagreements over controversial issues such as Orange Order marches, policing, and decommissioning of paramilitary groups continue to this day. However, what once seemed impossible, given the polar opposite political alignment of Northern political parties, was achieved under the Good Friday Agreement, a testament to how far Northern Ireland had come since the dark and violent era of The Troubles.

Today, the Northern Ireland Assembly is led by First Minister Arlene Foster of the Democratic Unionist Party (DUP), seconded by Deputy First Minister Martin McGuinness from Sinn Féin.⁴² Following the Brexit decision, Foster and McGuinness wrote to Prime Minister May declaring their expectation of being fully included in negotiations regarding the UK's future relationship with the EU. In this letter, they stressed that "the border cannot become a catalyst for illegal activity or create an incentive for those who wish to undermine the peace process."⁴³ Newly appointed Northern Ireland Secretary James Brokenshire echoed these sentiments, saying he wants to chart "a positive new future for Northern Ireland."⁴⁴ Taoiseach Enda Kenny emphasized the importance of the relationship between the Northern Ireland Assembly and the governments of Ireland and Great Britain:

*We [PM May and Taoiseach Kenny] did repeat and reiterate the importance of the partnership between our two governments as co-guarantors of the Good Friday Agreement, in supporting the peace process, and in contributing to stability and continued progress in Northern Ireland. We are both very much committed to the 1998 Good Friday Agreement... and we will continue to work for a prosperous and peaceful Northern Ireland in the time ahead.*⁴⁵

Neither Northern Ireland nor the Republic wants to see a return to pre-Good Friday Agreement political violence, given the significant progress both countries have made since then. It is imperative that the border situation be a top priority for the British government in post-Brexit negotiations.

NORTHERN IRELAND REACTION

A majority (fifty five point eight percent) of Northern Ireland residents voted to remain within the European Union. Now, after the referendum has declared an exit from the EU, many have asked Prime Minister Theresa May to address the issues of Northern Ireland and the peace process before initiating Article 50. Northern Ireland has a fraught, complicated, and violent history with the Republic of Ireland. The membership of both Ireland and Great Britain within the European Union was a cornerstone of the 1998 Good Friday Agreement, symbolizing the unity of the two nations in mitigating continued political violence at the time.⁴⁶ The North-South relationship has changed considerably since the 1970s but feelings about a potentially united Ireland seem to have remained strong following the Brexit decision.

In a survey conducted in September 2016, support for a United Ireland increased, with twenty two percent supporting an all-Ireland approach, up from seventeen percent just three years earlier.⁴⁷ Although the survey was conducted amongst a small sample group (1000 people), it revealed some interesting perspectives: nearly half of Catholics supported the idea of a united Ireland, while barely a quarter of Protestants do. In addition, fifty two percent of those interviewed supported the idea of the government calling a border poll within the North.⁴⁸ Those warming up to the idea of a united Ireland may be thinking economically, knowing that a thirty-two county Ireland would see a big economic advantage for the North while also modestly benefitting the South.⁴⁹ At the moment of writing, it is still not clear whether a united Ireland could ever become a reality, but the idea is definitely making headlines and news stories in both the UK and in Ireland.

41 Ibid.

42 "Executive Ministers," The Northern Ireland Assembly, accessed November 23, 2016.

43 "NI Leaders Seek Inclusion in Brexit Talks," *RTE.ie*, August 11, 2016.

44 "Northern Ireland Secretary Does Not Want Return of Hard Border," *RTE News*, July 15, 2016.

45 "PM and Taoiseach Enda Kenny Statements."

46 Welle.Deutsche, "United Ireland Back on the Agenda," *DW.COM*, July 16, 2016.

47 Amanda Ferguson, "Sharp Rise in Support for United Ireland, Survey Reveals," *The Irish Times*, September 8, 2016.

48 Ibid.

49 Harry McGee, "Both Republic and North 'could Benefit from United Ireland,'" *The Irish Times*, October 9, 2016.

In contrast to a united Ireland, the idea of an independent Northern Ireland has also been publicly debated since the Brexit result. Across the Irish Sea, Northern Ireland's neighbor, Scotland, held a referendum for independence in 2014. In response to the question "should Scotland be an independent country?" fifty five point three percent of Scots voted "No" and forty four point seven percent voted "Yes", with eighty four point five nine percent voter turnout.⁵⁰ Scottish independence is a likely outcome after the Brexit vote; but for Northern Ireland, such a fate is much more unlikely. Scotland and Northern Ireland are both small, geographically and by population, but the former could be much more economically viable by itself compared to the latter. That being said, a report has emerged with another political possibility. The report outlines a hypothetical "voluntary union" between England and Wales, Northern Ireland, and Scotland. This proposed union would see a fully developed government in each country, allowing each parliament to have full sovereignty over its own affairs.⁵¹ In this model, there would be an option to voluntarily sign up for "shared UK functions which would include the monarchy as head of state, foreign affairs, defense, national security, immigration...and the civil service." Countries would have the option to opt in or out of these areas.⁵² This proposed independent model is highly unlikely, but nevertheless is interesting to consider.

BORDER

It is not possible to talk about the effect of Brexit on Northern Ireland without mentioning the possible effects that implementing a border would have on the six Northern Irish counties. A hard border would be the biggest threat to peace between the North and South, an eerie reminder of the military checkpoints that dotted the border during the violent decades of The Troubles. As of right now, residents on either side of the border can freely travel between both countries. In fact, there are a lot of people who live on one side of the border and work on the other, relying heavily on the Common Travel Area: the free movement between the two countries, something that will most likely not survive after Brexit negotiations.

Immigration was a key issue of the June 23rd referendum, and directly affects the question of a hard border. Britain wants to be able to control its borders, especially given the recent rise in refugees in Europe. If Great Britain chooses to tighten up its borders on the mainland, then, unfortunately, the same applies to the border on the island of Ireland. At this time, no one is quite sure what the border will look like, whether it will be traffic stops, fences, or checkpoints, not to mention what will happen when the border crosses people's houses, farms, and land. If a hard border does get implemented, it will mean big problems for Northern Ireland; if it does not, then it means big problems for Great Britain, as it would provide an easy path for refugees and migrants within the EU to get into Great Britain.

ECONOMIC EFFECTS

Staying within the United Kingdom was once a sign of guaranteed stability and prosperity, but now certain communities, including Northern Ireland, fear the economic uncertainty of leaving the EU. Despite holding only three percent of the British population, Northern Ireland will be the region most economically affected by Brexit. Northern Ireland is a relatively poor province that relies heavily on its membership in the European Union for financial resources. For Northern Ireland, leaving the EU means leaving behind the financial support the union has provided since peace settlements. Without those funds, there is danger of a return to low-intensity violence within Northern Ireland and across the border. Northern Ireland receives significant economic support from the European Union that has allowed the province to flourish and thrive. The tourist industry is now worth £723 million (\$895 million), the IT industry is growing, and there are plans to bring corporate tax rates down to twelve point five percent, in line with the tax rate in the Republic.⁵³ Northern Ireland received £2.5 billion (\$3.1 billion) in the last EU funding round, with a further £2 billion (\$2.47 billion) promised before 2020.⁵⁴ Furthermore, the EU has rolled out peace programs, cross border business development, subsidies for agriculture and fishing, and rural development programs in the North. Even the most recent creation of new infrastructure and improvement of existing structures in

50 "Scottish Independence Referendum," *GOV.UK*, accessed November 22, 2016.

51 James O'Shea, "Independent Northern Ireland Possible as Top Tories Talk Federal UK," *IrishCentral.com*, July 11, 2016.

52 *Ibid.*

53 Kathryn Gaw, "Northern Ireland's Greatest Fear from a Brexit Is the Return to Conflict," *The Guardian*, June 21, 2016.

54 *Ibid.*

the North are thanks to monetary support from the European Union. If financial support is taken away, what will happen to the maintenance of these structures? A large portion of employment in Northern Ireland is linked to industries that have major trade agreements within the European Union and thus will be heavily affected once Great Britain leaves.⁵⁵ Ulster Bank, Northern Ireland's largest bank, claimed that the uncertainty that surrounds the Brexit negotiations would heavily impact foreign direct investment in the North.⁵⁶ Northern Ireland may have to cut back on government spending and eliminate jobs, leading to high unemployment and consequently low economic growth in the area.

SCOTLAND

An interesting actor in the Brexit fallout is Scotland. The 1707 Act of Union brought together the Kingdom of England and the Kingdom of Scotland, which had been separate states with separate legislatures but the same monarch, as "united into one kingdom by the name of Great Britain."⁵⁷ Since then, the two countries have shared plenty of similarities, such as royalty and religion, but they also have their differences, both culturally and historically. It wasn't until the 20th century that Scottish political parties started to advocate for home rule, what later became known as the Scottish devolution, whereby the UK parliament would give power to a Scottish parliament. The Scots National League, which later became the Scottish National Party, was formed in 1924 with the goal of obtaining Scottish independence. There were small political organizations that campaigned for independence throughout the 1940s and 50s, but no political party saw large electoral success until the Scottish National Party took a number of parliamentary seats in the 1960s. A proposal for a devolved Scottish Assembly was held through a Scotland-wide referendum in 1979. The referendum failed because a clause was inserted into the legislation requiring more than forty percent of all eligible voters to agree to devolution before it took place.⁵⁸

The next constitutional reform took place in 1997, when a second devolution referendum was held. This referendum was successful and passed the Scotland Act 1998, which set up the Scottish parliament with power to legislate certain outlined matters within Scotland.⁵⁹ In 2011, the Scottish National Party (SNP) emphasized its commitment to hold a referendum on Scottish independence during the 2011 parliamentary election cycle. After winning the majority of seats, the SNP followed through on its promise and held a referendum in 2014 asking, "Should Scotland be an independent country?" Before the vote, the Scottish government published a 670-page white paper titled *Scotland's Future*, which outlined the case for independence and the means by which Scotland would become an independent country.⁶⁰ The white paper addressed social policies with a large emphasis on childcare, as well as considering the pension system and minimum wage, among other topics. In the end, Scotland voted against becoming an independent country by fifty five point three percent to forty five point seven percent.⁶¹ When Prime Minister Cameron announced his intention to hold a referendum on Great Britain's membership within the EU, Scottish political parties again broached the subject of Scottish independence.

Despite the overall British vote to leave the European Union, an overwhelming majority of Scots voted to remain in the Union; sixty two percent voted in favor of remaining, with thirty eight percent voting to leave.⁶² Scotland's first minister, Nicola Sturgeon, said that it was "democratically unacceptable that Scotland face the prospect of being taken out of the EU against its will."⁶³ Immediately after the vote, Sturgeon said that the Scottish government would begin preparing legislation to enable another vote on Scottish independence. Great Britain's negotiations with the European Union could result in a hard exit, whereby they leave the single market, end free movement, and reintroduce customs borders. The Scottish government is confident that, if this is the outcome of nego-

55 Paul Mac Flynn, "The Economic Implications of BREXIT for Northern Ireland," Nevin Economic Research Institute, April 2016.

56 Conor Humphries and Amanda Ferguson, "How Brexit Has Suddenly made the prospect of a United Ireland Thinkable," *The Independent*, July 3, 2016.

57 "Union with England Act 1707," *Legislation.gov.uk*, Statute Law Database, National Archives, accessed December 4, 2016.

58 *BBC News*, "EU Referendum Petition Signed by More than 2.5m," *BBC News*, June 25, 2016.

59 "Scottish Parliament Official Report – 12 May 1999," Scottish Parliament, accessed December 4, 2016.

60 "Scottish Independence: Referendum White Paper unveiled," *BBC News*, November 26, 2013.

61 "Scottish Independence Referendum – Results," Scotland Decides, *BBC News*, Sept. 2014.

62 *BBC News*, "EU Referendum Results – *BBC News*," *BBC News*, June 2016.

63 *BBC News*, "Brexit: Nicola Sturgeon Says Second Scottish Independence Vote 'highly Likely,'" *BBC News*, June 24, 2016.

tiations, it will only strengthen the support for Scottish independence. Although independence is what factions of Scotland ultimately desires, the idea would raise questions about its border to England, a similar problem that Northern Ireland is about to encounter. There would have to be discussions around what a hard border between Scotland and England would look like, what the travel area would look like, and whether a strict border would have far-reaching effects on Scotland's relationship with England. Brexit has caused Scots to identify more as Scottish than British and has increased the emphasis that Scotland places on its relationship with Europe. In this way, Scots embrace their European-ness in an attempt to distinguish themselves from their xenophobic and anti-Europe neighbors to the South. In her first speech after the vote, First Minister Sturgeon outlined the Scottish priorities, announcing, "I intend to take all possible steps and explore all possible options to give effect to how people in Scotland voted – in other words to secure our continuing place in the EU, and in the single market in particular."⁶⁴ Scotland relies heavily on the European Union for trade and business ties, hence Sturgeon's emphasis on maintaining the single market. Economically, Brexit came at a less than ideal time for Scotland. They are currently facing low levels of oil and gas and have recently seen a slowdown of their economic growth. As the Brexit negotiations move forward, it will become increasingly clear whether Scotland will get any, some, or none of the protections it seeks from this Brexit situation.

LARGER CONSEQUENCES FOR THE EUROPEAN UNION

Great Britain is the first country to vote to leave the European Union since its inception. As a result, some people fear that Brexit may have a domino effect around Europe, causing other countries to also try and secede. Brexit will impact EU member states in a variety of ways, some more severely than others depending on their connectivity with Great Britain. Three countries stand out for the likely heavy impact Brexit will have on them: most obviously Ireland, but also the Netherlands and Cyprus. The Netherlands, Cyprus, and Ireland share very strong trade, investment, and financial links with Great Britain and are closely aligned

in terms of regulatory and trade policies.⁶⁵ The Netherlands' political landscape is vulnerable to the consequences of Brexit. Right-wing parties have been garnering support around Europe and the Netherlands is no exception, where the fastest-growing party is the *Partij voor de Vrijheid* (Party for Freedom, PVV), a nationalist, right-winged, populist party. The party is consistently Eurosceptic and focuses on issues like immigration, seeking to halt immigration from the east and taking a strong assimilationist stance on the integration of immigrants into Dutch society.⁶⁶ PVV has been advocating for withdrawal from the European Union, a current topic in the ongoing political elections. Similarly in Denmark the *Dansk Folkeparti*, the Danish People's Party (DPP) has gathered support on a nativist, anti-immigrant, far-right political platform. The DPP won twenty one percent of the vote in the 2015 general election, showing the increase in anti-right mindsets across Europe. France is also no exception to the rise of right-winged parties. The French Presidential election is due to be held in late April or early May, and right wing party leader Marine Le Pen is in the running to win it. Le Pen is the president of *La Front National*, the National Front (FN), a national-conservative political party in France that opposes mass immigration and is outwardly anti-Europe. Although the concept of leaving the European Union is a hot topic across the continent right now, many countries will likely wait to see the outcome for Great Britain before committing themselves to the same course.

CONCLUSION

Great Britain's decision to leave the European Union may be one of the most important decisions of 2016. This move is the first of its kind and while many countries may disagree with the final outcome, they will have to find a way to cope with the political and economic fallout. Long-term effects are still unknown and will be for years but some short-term consequences have become apparent since the June vote. Great Britain's economy faltered when the value of the pound declined sharply in the hours and days after the vote. There was an increase in race hate crimes across Great Britain, given the strong position *Vote Leave* took on immigration. Fellow European coun-

65 "Brexit: The Impact on the UK and the EU," Global Counsel, June 2015.

66 Ibid.

64 Ibid.

tries also reacted, putting a quick halt to the UK's presidency of the council of the European Union that they due to take up in July 2017. The longer-term effects on the British economy or Brexit's impact on immigration will not come to fruition until Prime Minister May triggers Article 50. Northern Ireland and the Republic of Ireland will be affected most by Great Britain's departure from the European Union. The history between these two countries will play a big part in negotiations with Great Britain. The biggest implication is the decision regarding the border between the North and the South. Neither the Irish government nor the Northern Irish Assembly want to see a return to borders of the past, something that would remind both countries of the violence and terrorism they have since overcome. However if no hard border is implemented then Great Britain may suffer from a migrant crisis, something *Vote Leave* campaigned to end. Economically, Great Britain and the Republic of Ireland are woven together, being each other's biggest trading partners. Brexit comes at an inopportune mo-

ment for Ireland as the country has successfully recovered from the global economic recession. However, for Ireland, there may be an economic silver lining to Brexit. Foreign direct investment may choose to relocate to Ireland because of its talented, English-speaking labor force, low corporate tax rate, and increasingly vibrant capital city. Northern Ireland will also suffer economically after Great Britain leaves the European Union. The small country of less than two million people will have to find a way to fill the void of financial support that the EU provides. At the same time Northern Ireland may be the next European country to have an influx of migrants if no hard border is put in place between it and the Republic.

At the time of writing, the economic and political implications of Brexit for the island of Ireland are not entirely clear. What is clear is that the next couple years will be an interesting, formative, and transitional period for Ireland, Northern Ireland, Great Britain, and Europe as a whole.

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