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Conscience Protection and the Holy See

Robert John Araujo, S.J.†

The sphere of action of the State has grown steadily larger until it now threatens to embrace the whole of human life and to leave nothing whatsoever outside its competence.¹

I. INTRODUCTION

My objective in this brief essay is to bring together several elements important to the law and to society. These include: religious freedom, the freedom of conscience, and the role of the Holy See in the international order. For many citizens who live in democratic societies, the legal concepts of religious freedom and freedom of conscience are thought to be well understood and welcome to the exercise of democratic institutions. Moreover, these two freedoms are protected by the law, both domestic and international. The nature and role of the Holy See is most likely less-well known. However, as an international person and sovereign, its role in the international order is also well known, as I have demonstrated elsewhere.²

Briefly, the term “Holy See” is based on the Latin sedes (see) and refers to the office (literally “chair”) of St. Peter.³ The term refers to the place where the Pope and the Roman Curia are found, but it is not a synonym for Rome, the Vatican, or the Vatican City State.⁴ Although the Holy See does not fall

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³ The original Latin term Sancta Sedes is therefore translated as “HolySee.” D. P. SIMPSON, CASSELL’S LATIN DICTIONARY 533, 543 (5th ed. 1968).

within conventional norms of international personality and sovereignty, it possesses international personality and exercises a unique sovereignty that is both religious and temporal.

It should generate no surprise that the interests of the Holy See coincide with those of persons who cherish religious freedom and the protection of the exercise of the well-formed conscience. As an international person exercising its unique sovereignty, the Holy See has frequently entered bi-lateral treaties (usually called concordats) with countries in order to protect a broad range of issues falling within the realm of religious freedom within those states. Moreover, the Holy See has also participated in the negotiations of many multi-lateral treaties, and is a party to a number of them. It is at this point that some in-depth study of the Holy See’s treaty-making capacity is in order.

II. THE TREATY-MAKING CAPACITY OF THE HOLY SEE

For hundreds of years, the Holy See has exercised its sovereignty and international legal personality like other sovereigns by entering into treaties and concordats with other sovereigns on a wide variety of matters.\(^5\) These agreements fall into two categories: (1) treaties and agreements dealing with conventional topics entered by States, and (2) concordats.\(^6\)

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\(^5\) For an overview of the Holy See’s international personality and sovereignty, see Robert John Araujo, supra note 2.

\(^6\) Concordats are agreements between the Holy See and another sovereign that address issues concerning the Church in that State. They have been defined as “[p]ublic treaties or agreements, with the force of international law, between the Church and states, regulating relations in areas of mutual concern.” J. A. Abbo, 4 New Catholic Encyclopedia 117 (1981). They have “as their object civil or religious or, more commonly, mixed matters (res mixtæ) compounded of both elements, hence subject to both authorities.” *Id.* at 118. The contracting parties are “the universal Church—personified by the Holy See—and a sovereign state.” *Id.* When duly ratified and promulgated, a concordat immediately becomes civil as well as Canon law. *See id.* For a classic and insightful treatment of concordats and their role in international law, see generally Henri Wagnon, *CONCORDATS ET DROIT INTERNATIONAL* (1935). Dr. Wagnon’s remarkable work was reviewed in English by C. G. Fenwick, who states that the author traces a close parallel “between the law of concordats and the general law of treaties” because the Holy See “has the requisite capacity to enter into agreements valid at international law.” C. G. Fenwick, 30 AM. J. INT’L L. 568, 569 (1936) (book review); *see also*
In the context of conventional treaties and other international agreements, the Holy See has participated in the negotiating, signing, and ratification of major international agreements during three major periods: (1) prior to 1870 in the era of the Papal States; (2) during the period of 1870-1929 after Italy confiscated the Papal States and the resolution of the “Roman Question” by the Lateran Treaty of 1929; and, (3) after 1929 and the establishment of the Vatican City State. One of its more famous agreements was the Concordat of Worms between Pope Calixtus II and King Henry V, concluded in 1122, which addressed a wide variety of subjects including church-state relations.7

But as previously noted, the Holy See has not restricted its international agreements to only religious matters or church-state relations. It has participated in the drafting of international agreements dealing with human rights, humanitarian law, disarmament, and other matters of concern to secular sovereigns. For example, the Holy See became an “adhering State” to the agreement reached at the Conference on the Limitation of Armament in Washington, D.C. from November 12, 1921 to February 6, 1922.8 After the completion of the Lateran Treaty in 1929 but not because of this agreement, the Holy See continued its participation in being a party to international

Msgr. Roland Minnerath, *The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective: Address Before the Symposium at the Catholic University of America, Columbus School of Law* (April 8, 1997), in 47 CATH. U. L. REV. 467, 476 (1998). Msgr. Minnerath notes that: “By establishing concordats with all types of states, common principles have arisen and are being enforced as conforming to the self-understanding of the Church and the demands of states under the rule of law. There is no question anymore of privileges, but strictly of human rights. Thus, the international character of the Holy See indirectly confers to the parallel agreements concluded between states and other religious communities, the support of an international treaty, as it is the first duty of the state to treat all its citizens equally.” Id. This is especially pertinent to the matter of conscience protection developed in the present essay.


agreements on both bilateral and multilateral levels.\(^9\) In more recent times, the Holy See has actively participated in negotiations leading to some of the principal 20\(^{th}\) century international legal instruments.\(^{10}\) In addition, the Holy See has also entered into a wide variety of modern bilateral agreements.\(^{11}\)

A brief comment regarding concordats will be offered here. While some commentators have questioned whether they are international agreements, they are, in the words of one publicist, the equivalent of general conventions “by which one State obtains from another an agreement to refrain

\(^9\) In 1936, an American doctoral candidate at the University of Geneva completed his dissertation on the impact of the Lateran Treaty on the Holy See’s treaty and concordat-making power and diplomatic practice. Whilst the author’s work contained in his published thesis is somewhat dated, it nonetheless provides an important contemporary insight into the impact of the 1929 Agreement between the Holy See and Italy. See generally Oliver Earl Benson, VATICAN DIPLOMATIC PRACTICE AS AFFECTED BY THE LATERAN AGREEMENTS (1936).

\(^{10}\) In this regard, it has signed, ratified, or acceded to such agreements as: The Geneva Conventions of August 12, 1949 (along with the two additional Protocols of 1977); the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958; two of the Law of the Sea Conventions of 1958; the Vienna Convention on Diplomatic Relations of April 18, 1961; the Vienna Convention on Consular Relations of April 24, 1963; the Vienna Convention on the Law of Treaties of May 23, 1969; the Vienna Convention on Succession of States with Respect to Treaty s of August 22, 1978; the International Convention on the Elimination of All Forms of Racial Discrimination of December 21, 1965; the Convention on the Rights of the Child of November 20, 1989; the Convention Relating to the Status of Refugees of April 22, 1954; the Convention on Long-Range Transboundary Air Pollution of November 13, 1979; and the Ottawa Convention (Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction) of March 1, 1999. In addition, the Holy See has also assisted in drafting and signing the 1975 Final Act (Helsinki Accords) of the Conference on Security and Co-Operation in Europe (now the Organization for Security and Co-Operation in Europe), and it is a member of the Organization. The Holy See is also a signatory to the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of March 14, 1975.

\(^{11}\) In the context of bilateral agreements, the Holy See and Spain entered into a variety of treaties involving common interests in the Holy Land (December 21, 1994), economic issues (October 10, 1980 and January 3, 1979), religious assistance to the Spanish armed forces (August 5, 1980), and education and cultural matters (January 3, 1979). Due to their significance, two other instruments involving the Holy See need to be considered. The first is the December 30, 1993 agreement between Israel and the Holy See addressing the issues of freedom of religion and conscience, condemnation of anti-Semitism, protection of sacred places and pilgrims, cultural exchanges, freedom of expression, freedom to carry out charitable works, and provisions addressing property, economic and fiscal matters. See the Basic Agreement Between the Holy See and the State of Israel, December 30, 1993, 33 I.L.M. 153 (1994). A second important bilateral agreement is the understanding signed by the Holy See and the Palestine Liberation Organization addressing the questions of human rights and inter-religious dialogue, the respect for a status quo concerning Christian holy places, the freedom of the Catholic Church to carry out its mission, and the Catholic Church’s right to its legal personality. See the Basic Agreement Between the Holy See and the Palestine Liberation Organization, Feb. 15, 2000.
or limit the exercise of its jurisdiction over its own citizens.”12 When carefully examined, it is evident that their content covers issues typical of any agreement between two sovereigns. While it may be argued that concordats cover issues which exclusively concern the Catholic Church and matters situating the other contracting party, concordats include provisions that not only address internal Church matters but also those dealing with moral issues, public religious observance, education, matrimony, and other family issues identified in the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and the International Covenant of Economic, Social, and Cultural Rights. Moreover, concordats often deal with State aid to Church-affiliated hospitals and schools in addition to the resolution of property disputes. As Archbishop Roland Minnerath has stated in regard to concordats being agreements of international law, they have legal force because they are treaties between two subjects of international law, each one sovereign in its own sphere, and they are negotiated, executed, and ratified according to the modalities of international practice.13

While a detailed discussion could be pursued regarding the similarities and differences between concordats and treaties, an important study by Professor Tiyanjana Maluwa has demonstrated why any distinction between concordats and other treaties is really a matter of form rather than substance.14 As will be seen, my present discussion will have a bearing on the recent developments within the European Union and concordats between the Holy

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13 See Roland Minnerath, supra note 6 at 467-68.
See and States of the European Union (EU). But it must first be pointed out that there is an important matter of which we need to be aware regarding concordats. While some states have unilaterally walked away from concordat responsibilities and broken off diplomatic relations with the Holy See, the Holy See has scrupulously practiced the revered international legal principle *pacta sunt servanda* (the agreement must be obeyed). The importance of the sanctity of international agreements was reinforced in the Church’s own law, the 1983 Code of Canon Law, which expressly states that any provision in the Code, even though it is the most serious of Church law, cannot “abrogate or derogate from the pacts [concordats, treaties, other international agreements, etc.] entered upon by the Apostolic See with nations or other political societies.”

Moreover, the International Law Commission (ILC) has concluded that treaties (and concordats) entered into by the Holy See substantiate its status as an international personality which is competent to negotiate and enter into treaties and other international agreements with temporal sovereigns. During the early drafting sessions of the Vienna Convention on the Law of Treaties in 1959, the ILC offered a number of significant observations about the Holy See including its conclusion that even without a significant territorial possession over which it exercised its temporal jurisdiction, the Holy See possesses

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16 1983 Code c.365, § 1. This same canon continues by stating: “[These pacts] therefore continue in force as presently, notwithstanding any prescriptions of this Code to the contrary.” *Id.* The Commentary to this canon states that the Code only regulates the “internal life” of the Church, and that: “[I]t does not apply to international legal relations. The activities of the Church among the family of nations and its participation in international organizations are subject to the general norms of international law. Since the Holy See is an international juridic person, it has the capacity to conclude agreements with other such persons, i.e., all sovereign states and international associations and organizations formed by them.... Should there ever be a conflict between the canons and the pacts, the pacts must stand.” *Id.* In addition, Canon 365 reminds pontifical legates that they must act in accordance with the “norms of international law.” 1983 Code c.354.
treaty-making capacity.\(^\text{17}\)

Within the past few years, the Holy See has entered into a number of agreements with other sovereigns on developing issues. A crucial matter falling within the scope of these agreements is the protection of right to conscientious objection for vulnerable classes of citizens that, at least in the theory of international human rights instruments, exists. Prior to considering the concerns that have recently surfaced about the agreements between the Holy See and EU Members and Candidates, it would be useful to examine briefly the matter of conscience (Section III) and then consider the protection of its exercise under international law (Section IV). I will then present the emerging problem dealing with the protection of the exercise of conscience from within the European Union stemming from concordats that the Holy See has entered or is trying to enter with Member and Candidate states (Section V).

### III. WHAT IS CONSCIENCE AND WHY IS IT IMPORTANT?

For centuries, the questions of conscience and whether its exercise would be protected under the law have had a prominent role when conflicts between individuals and the civil authorities have arisen over the extent to which an individual would have to publicly endorse particular views favored by the state.\(^\text{18}\) Famous individuals from history like Socrates, Thomas More, and Rosa Parks all objected to something that the state required of them in its enforcement of the law. Each was brought before the law because of the objection they had with some position that the state sought to enforce. While

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\(^{18}\) For an earlier treatment of these issues by the present author, see Robert John Araujo, Conscience, Totalitarianism and the Positivist Mind, 77 Miss. L.J. 571 (2007). The present essay develops some of the discussion in this earlier essay by offering further comments necessitated by post-2007 occurrences.
their respective approaches were different, these individuals all held their ground, relying on the force of reason and the right to conscience that was impartially formed and not unduly influenced by subjectivism. Socrates objected to the state’s critique of how he taught the youth of Athens; Thomas More was prosecuted for his refusal to swear to the oath required by the Act of Succession that would separate England and the Roman Catholic Church; and Rosa Parks was targeted for her insistence to sit in any area of public transportation since she paid the same fare as the white passengers. Each of them resisted, in the exercise of conscience, laws that they considered were wrong, not because some inner voice said so but because the objective reason they exercised led to no alternative conclusion.

Conscience is that core of the person who, with the exercise of right reason guided by the quest for objective truth, deliberates and discerns regarding what is right and what is wrong and formulates the belief that guides his path in life. The path chosen and the choices made along the way clearly have an impact on the individual and his life; however, they often have a bearing on the lives of other individuals and communities. The exercise of conscience endorsed here is not one that permits a person to conclude that he or she has the right to do whatever her conscience instructs simply because this conscience decides this. The peril inherent in this practice

19 The significance of right or practical reason and the law was relied upon and developed by Thomas Aquinas in his Treatise on Law, where he stated, as the first principle of the law, that “good is to be done and pursued, and evil is to be avoided.” THOMAS AQUINAS, SUMMA THEOLOGIAE, I-II, q. 94, art. 2 (Fathers of the English Dominican Province, trans., Benzinger Brothers 1947). Right reason is a search for truth that is not only conceptual but also practical. The search for truth is inextricably combined with the application or implementation of the truth undistorted. In this way, the rational and the moral merge through the exercise of right reason. For a more contemporary explanation of right reason, see AUSTIN FAGOTHEY, RIGHT AND REASON: ETHICS IN THEORY AND PRACTICE 99-101 (6th ed 1976). See also Second Vatican Council, Guadium et Spes [Pastoral Constitution on the Church in the Modern World] ¶ 63 (1965), wherein the Second Vatican Counsel stated, “the Church down through the centuries and in the light of the Gospel has worked out the principles of justice and equity demanded by right reason both for individual and social life and for international life, and she has proclaimed them especially in recent times.”
of conscience is that it is purely subjective and makes no provision for considering, by going beyond the self, the objective truth needed to determine what is right and wrong not only “for me” but for everyone who may be affected by the exercise of individual conscience. Otherwise the exercise of conscience risks confusing falsehood and wrong with truth and right. One has the right to express the view of his conscience to say the other person is wrong. In doing so, the first individual who has sought the objective truth may have to be prepared to be persecuted. But the threat of persecution or the persecution itself is not sufficient to preclude the right of conscience as so understood and practiced. Surely there is a need for public peace and security and the common good, but when properly understood and used, conscience, objectively formed, poses little or no threat to these legitimate objectives.

For the individuals I have identified—Socrates, More, and Parks—and for many others, conscientious objection became the defense that was relied on when the law and its rules went in one direction but the person whose beliefs and positions were based on a well-formed conscience chose to proceed in a different way. In other contexts, it may appear to be a mechanism by which an individual defends resistance to the law in a private or public manner. Let us consider in more detail the case of Rosa Parks. She was like many others in her community; she needed to rely on public transportation such as buses. But as a woman of color, she was required by the law to sit in the back of the bus. If the rear of the bus was crowded, but the front reserved for white passengers was not, could she sit toward the front where there was more room but where she was forbidden to ride? Could she elect to defy convention and the law to make a point and sit in the front to
demonstrate that it is a public conveyance to be used by all members of the public? She quietly challenged the law, and her action was based on the exercise of conscience. There had been a need to demonstrate that the law and its application were wrong, and she and others concluded that she was right in defying the law.

Thomas More exercised his conscience by taking a different tack. He took no action, as did Ms. Parks, in defiance of the law. He merely asked not to do a public act—swearing an oath—which the law required of citizens, especially prominent citizens. Rosa Parks chose action, but Thomas More chose silence. He had no public quarrel with Parliament or the King, and he said nothing about the propriety or impropriety of the Act of Succession until after he was convicted of treason. He recognized that both the King and Parliament had a proper role in the making of law—human law. If Parliament declared that Henry VIII was no longer king, he probably would not have intervened nor registered concern or complaint. But when Parliament said the King rather than the Pope was head of the Church and commanded More to publicly declare his agreement by taking an oath which would conflict with his convictions about the respective authorities of the Church and the King, he could not do this out of conscience for he was also subject to God’s law which said such a declaration would violate the higher law that is beyond the competence of the state.

While societies need law to govern excesses and deficiencies in what people will do on their own, there is a limit to what the law can and should expect of those whom it is designed to serve. This is all the more plausible when we consider that in the western democracies, the state is and must be the servant, not the master, of the citizenry. But when the law reaches beyond
its permissible mandate, wrong may triumph over right. It is in this kind of context where conscience may help develop the law or its meaning through exception or amendment so that the right result prevails over the wrong one.

In the present age, the law is often a means to promote the common good and the general welfare even though it may cause inconvenience to some individuals (e.g., driving a motor vehicle on the prescribed side of the road) or outright frustrations to others (e.g., legal prohibitions against homicide). It is, moreover, often thought that good laws respect human dignity. One does not have to look very far in today’s world to realize that many laws are geared to promoting rights and liberties that are to be exercised and enjoyed in an ordered fashion. It is also clear that laws are designed to apply general formulations to specific cases. But as a citizen, lawmaker, administrator, or judge, all come to realize that the enterprise of the law often requires interpretation in applying the general norm to a specific circumstance.

But there is evidence today in the international sphere of the western democracies that obedience to law demands that some persons must compromise on principles that they hold because these principles are grounded in rectitude and virtue. However, the civil authorities are not satisfied in mandating that citizens who wish to object out of their well-formed consciences must simply think that the state’s way is correct and leave it at that (for then the person could go on thinking as before). The government authority now insists, “You must do it this way, and if not, you will have to face consequences that are not of your liking.” This was the predicament that Thomas More and Rosa Parks faced in the past, and it is the
predicament that good men and women with well-formed consciences are beginning to face across the globe including those states that pride their democratic institutions as guardians of human rights, especially those that have been deemed non-derogable under the law. And now, at this point we must consider what international law says about the right to conscience and why this right is non-derogable.

IV. THE IMPORTANCE AND PROTECTION OF CONSCIENCE UNDER INTERNATIONAL LAW

One might think that the right to exercise conscience is under no threat in the contemporary democratic societies of the early twenty-first century. After all, the totalitarian state where the exercise of conscience was in peril is a thing of the past, or so it seems. The strongly positivist law of the totalitarian regimes of the twentieth century that crushed conscience does not seem to be on par with any of the restrictive laws that may be found among the western democracies. We need to acknowledge that in virtually all of the democratic societies today, lawmaking is the law that the lawmaker posits. But this method is not positivism where the culture and citizenry have no critical, objective evaluation of what the lawmaker says the law is. Positivism generates a type of human-worship that knows only the mind of the lawmaker and what this person or group sees as the end of the human purpose. It is the “dominant prejudices of the moment” rather than some objective and moral compass that guides society.21 As the world emerged from the Second World War, it became clear that the dominant prejudices of National Socialism in Germany and the positivist state that it generated led the world into an avoidable conflagration. Moreover, the devastation that this

storm left in its wake became the catalyst for the Universal Declaration of Human Rights (UDHR) and its juridical progeny, the International Covenant on Civil and Political Rights (ICCPR).

It is the positivist state, and the mind that guides it, where the law is geared to some end or result desired by the state or ruling party without asking what happens along the way. This approach is the basis of the totalitarian state’s legal positivist system. But surely the world of today does not have to worry about such matters, does it, as it did during World War II and its immediate aftermath? And if it did, would not the exercise of conscience, a right identified under the UDHR and the ICCPR (which the latter declares non-derogable) and the ability to object through its exercise as guaranteed by domestic and international laws make this problem disappear?22

The opponents of the well-formed conscience may, as Judge Michael McConnell has argued, suggest that the conscientious objector has in mind all sorts of brutal acts that will be detrimental to society, but, in reality, the conscientious objector wants to obey the fundamental laws of the state since it is usually a lawful authority that acts within its proper competence as a servant of all the people it serves.23 A problem arises when the law and conscience are headed on a collision course because the legitimate goals of the

22 This point is illustrated by the Massachusetts Supreme Judicial Court in the 2003 Goodridge case where a majority of the court asserted that “civil marriage is an evolving paradigm” and redefined marriage to include those between homosexual couples. See, Goodridge v. Department of Public Health, 440 Mass. 309, 339; 798 N.E.2d 941, 967 (2003). The majority did state in footnote 29 that, “Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.” Id. at 337; 965. But the court’s dicta would not impose any restriction on the Massachusetts legislature from enacting a law to this effect.

law could be achieved in some other fashion and the state’s purpose in opposing the conscientious objector is of “a distinctly lesser order.”

The protection of the well-formed conscience deals with the critical matter of where no government authority should go—into the innermost convictions of those who are its citizens, subjects, and ultimately masters. Of course, totalitarian regimes do not understand life—both its public and private dimensions—in this way. But for those accustomed to democratic states, government authorities are not and can never become omnipotent; rather, they have limited authority prescribed by the rule of law and the sovereignty of all the people. What the rule of law dictates is for no one individual or authority to determine by itself. An important justification for this vital principle is that the exercise of a well-formed conscience is vital to the robust health of a strong democracy. The state may properly ask for citizens’ allegiance on issues of public import affecting the common good, but the state ought not to go any farther. Conscience is a fundamental right, as the law of democratic states and the international order assert. The state does not confer the right of conscience; its source is not the state. Its source is in human nature that is given by the Creator. For those who make no claim to and even deny belief in theism, it is important to recall the inexorable truth that the state did not create us; it is neither our author nor final master. What the state cannot give, the state cannot lawfully retrieve even though it may attempt to do so on occasion. These were issues of concern that the drafters of the UDHR understood well and subsequently addressed in their work.

24 Id.

The substantive discussion concerning conscience in the international legal realm needs to begin with consideration of Article 18 of the UDHR which states: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

The rights conferred by this article have public and private dimensions. There is the private component of “innermost conviction,” and there is the public expression of it.

Article 18 of the ICCPR duplicates, with some minor adjustments, this provision from the UDHR. Of course, it must be pointed out that unlike the UDHR, the ICCPR contains a limitation on the exercise of the right. Article 18.3 of the ICCPR indicates that there can be some restriction on the right to religion and beliefs that are (1) prescribed by law and (2) “are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” But this limitation must be understood under the “non-derogation” provisions of Article 4 of the ICCPR which specifically applies to the provisions of Article 18, which I submit tempers the meaning of the restriction contained in Article 18.3.

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27 The article reads in its entirety: “1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.” International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966.
By way of appreciating the meaning of conscience in international law, we need to focus any study on the drafting history of the UDHR. The Lebanese delegate, Charles Malik, who was a principal drafter of the UDHR, argued the position that the article of the UDHR addressing religious freedom and conscience must acknowledge the right of different human convictions “to exist in the same national entity” as obligated by international law. Following the guidance of Malik, the drafters took steps to emphasize that these rights were not only private but also had a civic or public component—i.e., that religious liberty and the right to exercise one’s conscience have little meaning unless they can be exercised publicly with other members of society. The drafters essentially agreed that the substance of Article 18 of the UDHR respects “pluralism and openness to different perspectives.” Nevertheless, the protections afforded by this provision lose meaning if the underlying rights of religious freedom and conscience cannot be outwardly manifested with like-minded believers.

The drafters of the UDHR realized that no one could ever really know what beliefs or thoughts a person had (unless of course they were extracted by unlawful means such as torture), but they also acknowledged that a person’s innermost convictions would mean little if the holder had to endorse in a public forum a contrary position. As Professor Morsink concludes in his insightful study of the travaux préparatoires of the UDHR, “Behind this seemingly innocuous right [protected by this Article] lies the profound right

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28 See generally Glendon, supra note 25.
29 Morsink, supra note 25.
30 Id.
31 Id.
not to be compelled to profess a belief or ideology which one does not hold.”

The drafters of the UDHR concurred with René Cassin, a French delegate and member of the drafting committee, that a person should not be compelled to do something indirectly that which one could not be forced to do directly. And this brings the present discussion to a recent development within the EU that, in spite of statements to the contrary, conflicts with these important principles that protect thought, conscience, and religious belief across the world.

V. THE EMERGING PROBLEM IN THE EUROPEAN UNION

On December 14, 2005, the EU Network of Independent Experts on Fundamental Rights (Network) issued an opinion, No. 4-2005: “The Right to Conscientious Objection and the Conclusion by the EU Member States of the Concordats with the Holy See.” The European Commission requested the opinion of the Network in July of 2005 on the legal status of religious conscientious objection in existing and future concordats between EU Member States and the Holy See. The European Commission, in its request to the Network, posed three questions: (1) do these agreements take primacy over national law, including national constitutions; (2) what are the means by which concordats produce effects and how might they be terminated; and, (3) do conscience clauses in concordats create incompatibilities with fundamental rights of individuals and the law of the EU? While the first two questions are

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32 Id. at 261.

33 Id.

34 The Network was established in 2002 by the European Commission in response to a recommendation in a European Parliament’s report on the state of fundamental rights in the EU, (2000/2232 INI). The Network’s membership includes an expert per Member State of the EU.

35 E.U. Network of Independent Experts on Fundamental Rights, The Right to Conscientious Objection and the Conclusion by the EU Member States of Concordats with the Holy See, Opinion Nº 4-2005 (December 14, 2005) [hereinafter referred to as “Opinion Nº 4-2005”].
important regardless of the context in which they are examined, the last one is crucial to the theme of this essay and will be studied here in some depth. The answers offered by the Network follow in a moment.

But first, the following details must be disclosed about the Network’s opinion. First of all, it equates the right of conscience exercised by one person with any other “rights claim” that another person could make, including the “right” to reproductive health services that embrace access to abortion. While giving lip service to the right to conscience of the person to object to specific acts by others including access to abortion, the opinion takes the position that abortion access, which is not mentioned as a “right” in the UDHR, the ICCPR, or any other human rights instrument, is nonetheless equivalent to a person’s right to conscientiously oppose abortion.

In making this argument, the Network relies on a peculiar interpretation of the applicable instruments and the UDHR while at the same time ignoring an important aspect of the one right that they specify, i.e., the right to life that surely is the proper claim of any new member of the human family. In the one instance where the opinion mentions the right to life protected by Article 6 of the ICCPR, it does so not in the context of human life in utero but in the dangers of “illegal abortions performed in unsafe conditions.” The Network insists that there is an “emerging consensus” that there exists a right to interrupt a pregnancy, and this claim is based on the advocacy of the Center for Reproductive Rights in a legal challenge involving

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36 Id. at 27, 30-31.
37 Id. at 34.
38 Id. at 19.
39 Id. at 19.
Poland, a country where a large majority of the population happens to be Catholic. It becomes clear that in the estimation of some “human rights” organizations, the right to life and freedom of religion and conscience are expendable when it comes to the “human right” of abortion access.

With regard to the first question raised by the European Commission and identified earlier in this section, the Network does not establish how it might have the competence to judge whether any treaty, including a concordat, takes precedence over national law. However, the Network offers some opinion on this matter and suggests that concordats can take precedence over national law. By the same token, the Network offers its view that “international law” and EU law can trump the law making authority of its Member States, and this would include the substance of bilateral treaties which Member States enter. Hence, treaties and concordats can, in the view of the Network, be trumped by EU and “international” law as the Network erroneously understands these bodies of law.

Concerning the second question, the Network concedes that the Holy See is a subject of international law and is legally competent to conclude international agreements that have the status of treaties. This should be evident from the analysis provided in Section II, supra. Moreover, the Network also concedes that the Holy See’s diplomatic relations reinforce its competence to make treaties or concordats. It would appear to follow that the Network concedes that concordats are binding instruments of

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40 Id. at 19 n.52.
42 Id.
43 Id.
44 Id.
45 Id.
international law, which a party can breach or terminate in accordance with applicable provisions of international law. Again, this accords with the analysis given in Section II.

It is the third issue, i.e., whether concordats containing provisions protecting the right to religious conscientious objection are compatible with the protection of “fundamental rights” and EU law, which raises serious consequences for the Holy See and the integrity of its concordats. The Network concludes that the concordat clauses it reviewed are incompatible with “international” and EU law and the “fundamental rights” to be enjoyed thereunder.46

In making this remarkable assertion, the Network concedes that conscience is a right that is protected under various human rights instruments and the law of the EU;47 however, it is only one of several rights that are to be legally protected, and the protections accorded to conscience, including claims to conscience based on religious beliefs, are therefore not absolute.48 The Network asserts that the limited right to conscience based on religious belief must be balanced with other rights that address concerns of other individuals who make claims for recognition of: same-sex unions;49

46 Id.
47 Id.
48 Id.
49 In early February, 2006, it was reported that a federal panel of judges in Spain rejected the petition of a justice of the peace in Valencia to abstain from presiding at “civil marriages” between same-sex partners. By a vote of 3-2, the federal panel refused to acknowledge the justice’s right to conscientious objection and ruled that “Judges and Magistrates can never exercise the right to conscientious objection, as they are obliged to follow the rule of law.” The justice in Valencia has no other recourse to abstain from presiding at homosexual unions. Last December a justice of the peace in the city of Pinto opted to resign rather than preside at such ceremonies. Interestingly, Spain is a party to the ICCPR. See CatholicNewsAgency.com, Federal Court Orders Justice of the Peace in Valencia to Preside at Homosexual Weddings, http://www.catholicnewsagency.com/new.php?n=5963 (last visited on Feb. 17, 2009).
“reproductive health rights”; abortion; euthanasia; artificial fertilization; and artificial contraception.\textsuperscript{50}

The Network examines the exercise of conscience under many of the EU Members States’ national laws, and it concludes that the protection of conscience is but one consideration in protecting the rights of persons under national and international law.\textsuperscript{51} While the Network does not claim the competence of judging legal questions solely under the law of Member States, it asserts the competence to determine how national laws addressing the exercise of conscience are to be interpreted under international law and EU law. In addition to the European Convention on Human Rights (ECHR), the Network further bases its opinion on elements of the two 1966 human rights instruments, the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR); and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).\textsuperscript{52} In relying on international instruments, the Network spends a great deal of time with Article 18 of the ICCPR and Article 9 of the ECHR, both of which recognize the right of thought, conscience, and religion.\textsuperscript{53} With regard to religious beliefs, the Network makes the distinction between internal private belief, which seems to enjoy unlimited protection, and external manifestations where the private beliefs are translated into words or actions, which receive less protection in that these exercises must be balanced with the exercise of other “rights.”\textsuperscript{54}

\textsuperscript{50} Opinion N° 4-2005, supra note 35 at 22-23.
\textsuperscript{51} Id. at 16.
\textsuperscript{52} Id. at 15.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 15-16.
The Network contends that while religious conscientious objection is protected by reasonable accommodation, the protection of this exercise is not unlimited. The Network bases its claim on the argument that the exercise of religious conscientious objection can conflict with other rights that are also recognized under international law. The Network opines that: when rights conflict, a balance between competing claims “must be struck.” The Network then “strikes this balance” when the conscientious claims that emerge from Catholic teachings conflict with other rights.

Relying on the jurisprudence of the Human Rights Committee, which exercises certain functions under the ICCPR, the Network states that it is necessary to determine if the exercise of religious conscientious objection would cause any discrimination infringing on the exercise of some other protected right(s). If there is “discrimination” generated by the claim to conscience based on religious belief, a balancing of the conflicting claims is necessary to avoid conflict between the competing claims asserted by different parties. The Network then looks at religious conscientious objection in the context of access to abortion services that might be affected by respecting a person’s exercise of conscience. What appears to be taking place here is this: the “right” to abortion trumps the right to conscientious objection to abortion. But it must be kept in perspective that the abortion seeker will be able to get her abortion from some provider whose conscience is not bothered by the moral implications of snuffing out nascent human life.

55 Id. at 16.
56 Id.
57 Id.
58 Id. at 17.
59 Id. at 16.
60 Id. at 17-18.
But the doctors and nurses and other medical professionals who, out of the
exercise of their well-formed consciences, seek to avoid complicity with
abortion that is designed to destroy human life rather than protect it may not
be excused. In both of these contexts, the abortion seeker achieves what she
wants but at the cost of the conscientious objector having to sacrifice his or her
right to avoid complicity in the taking of vulnerable human lives.

With regard to access to lawful abortion services, the Network begins
its “balancing” by targeting “restrictive” national abortion laws.\textsuperscript{61} The
Network reflects the position of the UN Human Rights Committee, as
demonstrated in the latter’s country-specific reports, that countries with
restrictive abortion legislation are violating women’s “reproductive rights.”\textsuperscript{62}
For example, the laws of Poland are subjected to the Network’s probing
critique because of that country’s strict regulation of access to abortion.\textsuperscript{63} The
Network endorses the Human Rights Committee’s determination that Poland
“should liberalize its legislation and practice on abortion.”\textsuperscript{64} The Network
points out that Polish laws dealing with abortion are influenced by
“conservative parties linked with anti-abortion policy propagated by the
Catholic Church…”\textsuperscript{65} A part of this “problem” for the Network is the
existence of conscientious objection clauses that are an integral element of
Poland’s laws.\textsuperscript{66}

The Network is careful to note that the European Court of Human
Rights, in interpreting the ECHR, has not yet concluded that there is a general

\textsuperscript{61} Id. at 18.
\textsuperscript{62} Id. at 18-22.
\textsuperscript{63} Id. at 21-22.
\textsuperscript{64} Id. at 18.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
“right to seek abortion.”

However, the Network does not conceal its preference that “the right to seek interruption of a pregnancy must be recognized to women where the continuation of pregnancy would threaten their health.” In essence, the Network, purportedly relying on “the current state of international human rights law,” asserts that the right to life contained in Article 6 of the ICCPR must be used to protect women who have no alternative but an “illegal abortion performed in unsafe conditions.”

No mention is made about extending the same Article 6 protections to the right to life to the child who would be the object of the abortion—be the abortion a legal and “safe” one or not. The more we think about all abortions, the more we come to realize that they are all unsafe for the child whose life will be terminated by the procedure. The Network also asserts that not providing an abortion where it is lawful constitutes an infliction of inhuman and degrading treatment prohibited by Article 7 of the ICCPR. The Network then relies on the recent “report” of the Human Rights Committee involving the matter of KL v. Peru.

In that proceeding, The Human Rights Committee concluded that Peru had violated the claimant’s rights under ICCPR Articles 2 (discrimination), 6 (right to life), 7 (torture or cruel, inhuman or degrading treatment or punishment), 17 (arbitrary or unlawful interference with privacy), and 24

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67 Id.
68 Id. at 19.
69 Id.
70 Id. The text of Article 7 of the ICCPR reads: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” It is clear that no nascent human life gives his or her consent to a medical procedure intended to snuff out his or her life.
The claimant in this matter was considered to be a child because she became pregnant when she was 17 (any person under 18 is viewed as a child). The child she was carrying was diagnosed with a fetal abnormality that could lead to an early death of the infant. While one attending physician recommended termination of the pregnancy, the hospital indicated that an abortion was not permitted under the applicable Peruvian law due to the advanced stage of the pregnancy and the conditions under which a termination of pregnancy is legally permitted.

Two of the arguments made by the claimant through her legal counsel, the Center for Reproductive Rights (the same NGO which supplied assistance to the Network in its opinion), addressed the mother’s “right to life” under Article 6 and her “right to protection as a child” under Article 24. At no time did the Committee or legal counsel extend these rights to the baby who, incidentally, survived for four days after her birth. The Committee agreed with the mother’s legal counsel that the right to life “cannot be interpreted in a restrictive manner”—even though her life was never threatened by the pregnancy. The mother’s counsel also claimed that Peru denied her a “safe termination of pregnancy” citing the ground that the fetus was not viable. The facts of the case demonstrate this was not true since the baby was delivered and lived for four days; moreover, the mother breast-fed her baby

72 Id.
73 Id. at 4.
74 Id. at 2-3.
75 Id. at 6-7.
76 Id. at 4.
77 Id.
during this period. Although the Committee applied the Convention on the Rights of the Child to the mother, it failed to apply this instrument to the infant who, under Article 6, was also entitled to the right to life; who, under Article 19, was the beneficiary of Peru’s law designed to protect children from violence; and who, under Article 23, was entitled to protection as a disabled child. The Committee, moreover, failed to consider Article 41 of the Convention on the Rights of the Child which required Peru to protect the rights of all, not just some, of the children involved in this proceeding.

Here a few words are in order about the efforts of the NGO Center for Reproductive Rights to sabotage the concordat between the Holy See and the Slovak Republic. In its own words, the Center declared:

The Center for Reproductive Rights presented to the Network documentation on the effect such concordats have on women’s access to legal abortion. The Network, in its opinion, relied extensively on the Center’s analysis of the human rights dimensions of conscientious objection. It concluded that EU member states have an obligation under international human rights law to regulate providers’ invocation of conscientious objection so as to ensure that no woman is deprived of an abortion in circumstances where the procedure is legal.

The Center also noted its cooperation with the organizations Pro-Choice Slovakia and Catholics for a Free Choice (CFFC) in its advocacy efforts before the European Parliament. More will be said later about the CFFC. In its self-congratulatory message, the Center announced that these combined efforts led to the issuance of the Parliament’s request for the opinion of the

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78 Id. at 3.

79 The text of Article 41 states: “Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) the law of a State party; or (b) international law in force for that State.” Convention on the Rights of the Child, G.A. Res. 44/25, ¶ 41, U.N. Doc. A/RES/44/25 (Dec. 12, 1989).

80 This quote appeared at http://www.reproductiverights.org/ww_eu_slovakia.html in 2005. It has been taken down since that time but most of the quotation can still be found at http://www.c-fam.org/publications/id.441/pub_detail.asp.

81 Id.
Independent Experts vis-à-vis the concordat’s compliance with the European Union Charter on Fundamental Rights. In the estimation of the Center, the opinion rendered by the Independent Experts is significant because its views extend beyond the issues dealing with the Slovak Republic and address the question of conscientious objection in all member States of the European Union.

In writing its opinion on the status of concordats, the Network also took into account General Recommendation No. 24 under the CEDAW regime which considers it discriminatory when State Parties refuse to provide “reproductive health services for women.” One reproductive health service is abortion, at least in those States where it is legal. The Network explains how the mosaic of human rights law is to be applied when competing rights claims fundamentally conflict:

In sum, whether the right to religious conscientious objection is recognized explicitly in a concordat, or whether it is derived from the guarantee of freedom of religion stipulated in international human rights instruments, in the national Constitution or in specific legislation, this right should be regulated in order to ensure that, in circumstances where abortion is legal, no woman shall be deprived from having effective access to the medical service of abortion. In the view of the Network, this implies that the State concerned must ensure, first, that an effective remedy should be open to challenge any refusal to provide abortion; second, that an obligation will be imposed on the health care practitioner exercising his or her right to religious conscientious objection to refer the woman seeking abortion to another qualified health care practitioner who will agree to perform the abortion; third, that another qualified health care practitioner will be indeed available, including in rural areas or in areas which are geographically remote from the centre. Such a regulation should thus accommodate the right to religious conscientious objection, which is derived from the freedom of religion, while ensuring that the exercise of this right will not lead to others either being deprived of access to certain services in principle available to all in the State concerned, or being treated in a discriminatory fashion.

It is clear from the Network’s opinion that the right to claim conscientious objection based on religious belief is at best a qualified right

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82 Id.
83 Id.
84 Opinion Nº 4-2005, supra note 35 at 20.
85 Id. (emphasis added).
because all rights need to be considered in the light of competing “rights” that address “reproductive rights,” which appear to have or enjoy a preferred status. Thus, any State law that includes a conscience clause in a concordat with the Holy See is subject to being “corrected” to ensure that no discrimination exists against women who choose to exercise their legal “reproductive health rights.”

With regard to “other fundamental rights,” conscience clauses may also be subject to regulation under the views of the Network. The Network quickly passes over matters involving “euthanasia” and “assisted suicide,” since they have not been declared by the European Court of Human Rights as a fundamental right (for the time being). However, the Network notes that a partial decriminalization of euthanasia and assisted suicide would necessitate the re-examination of conscience clauses dealing with these subjects since no one should be deprived of a right that exists under the law; therefore, it would once again be necessary to “balance” conflicting rights. The grip on the exercise of conscience tightens when the Network states in its opinion that in those States where euthanasia and assisted suicide are “partially decriminalized,” conscientious objectors should not be protected in a way that deprives “any person from the possibility of exercising effectively his or her rights as guaranteed by the applicable legislation.”

The Network also seems inclined to place restrictions on the rights of pharmacists who, based on conscience, claim exemption from selling contraceptives including “morning after” pills. The Network is much clearer.

86 Id. at 22.
87 Id.
88 Id.
89 Id. at 23.
about matters involving sexual orientation. The Network comes close to endorsing the Netherlands position that “any form of discrimination on the basis of sexual orientation… should not be tolerated…”\textsuperscript{90} As it stated in its opinion under examination:

The Network would also emphasize that in no circumstance could it be justified for a church or a religious organization to discriminate against a person on the basis of his or her sexual orientation, whatever the condemnation of homosexuality, on religious grounds, by those organizations. … [E]ven where it may be justified to consider religion or belief as a genuine occupational requirement, this may not justify discrimination based on another ground. Neither could [a specified EU conscience] Directive… be relied upon by a church or a religious organization to justify not employing, or otherwise discriminating in employment and occupation, a person on the basis of his or her sexual orientation, whether that sexual orientation is hidden or not. Although churches may exercise rights such as freedom of religion or freedom of expression—and in that sense, among the ‘rights and freedoms of others’, are the rights of those organizations—, any invocation of freedom of religion or of freedom of expression in order to seek to justify discrimination against homosexuals constitutes an abuse of rights, in the meaning of Article 17 of the European Convention on Human Rights.\textsuperscript{91}

To reinforce its view, the Network relies on the “Diversity and Equality Guidelines” issued in February of 2005 by the Catholic Bishops’ Conference of England and Wales.\textsuperscript{92} In the context of sexual orientation, Guideline 6 states in part: “Only a person’s qualifications and ability to do their job should determine decisions about recruitment, retention and promotion.”\textsuperscript{93} The manner in which the Network misreads this text from the English Church would support the view that the Church has the right to insist that a candidate for the priesthood be Catholic; however, it has no right to discriminate against him based on his “sexual orientation.” The fact that the guidelines of the English Church were written in the context of “employment” would probably have little bearing on arguments made by the Church that the ordination of priests is not a question of employment—it is a

\textsuperscript{90} Id. at 22-23.
\textsuperscript{91} Id. at 26 (emphasis added).
\textsuperscript{92} Id.
\textsuperscript{93} Id.
call to a religious vocation. But in the Network’s estimation, the only legitimate occupational qualification concerns whether the candidate is a Catholic; the sexual orientation of the candidate would not be a legitimate inquiry for the Church to pursue or consider.

It is relevant to note that the opinion of the Network was requested approximately four months before the Instruction Concerning the Criteria for the Discernment of Vocations with Regard to Persons with Homosexual Tendencies in view of their Admission to the Seminary and to Holy Orders dated November 4, 2005 was issued by the Congregation for Catholic Education. In this important document, the Catholic Church addressed the question of “whether to admit to the seminary and to holy orders candidates who have deep-seated homosexual tendencies.” The Congregation for Catholic Education concluded that, in light of the Church’s teachings, men who “practice homosexuality, present deep-seated homosexual tendencies or support the so-called ‘gay-culture’” cannot be admitted to seminaries or be ordained into the priesthood. In presenting this view, the Congregation noted that the Church profoundly respects these men; nevertheless, they cannot be prepared for nor be admitted to holy orders. The Opinion of the Network was released on December 14, 2005, and the Instruction was released on November 29, 2005. While it would be speculative to reach a conclusion about the Network’s actual view on the Instruction at this time, the Network’s statement quoted

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94 The Congregation for Catholic Education is the office of the Roman Curia of the Catholic Church, headquartered in Rome, responsible for exercising the Church’s authority that pertains to the work of Catholic educational institutions including seminaries.


96 Id.

97 See Id. The instruction is also available at http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccate
duc_doc_20051104_istruzione_en.html.
above regarding the protection of “sexual orientation” strongly indicates how it might deal with the matter of the “legality” of the Instruction should it ever arise. It would be logical to conclude that the Church’s Instruction would, in the Network’s view, violate the law regarding the rights of homosexuals.

The Network concludes its opinions by raising “certain fears” concerning the concordat between the Holy See and the Slovak Republic on conscientious objection by Catholics.98 After briefly commenting on points it made earlier, the Network states that “the most serious threat” posed by the conscientious objector language in the concordat with the Slovak Republic is “its potential impact on the right to have access to certain medical services” without specifying what these services would include.99 While noting that both individual Catholics and the Church itself have the right to conscientious objection, the Network places a definite restriction on this non-derogable right in the context of using conscience to deny “certain medical services.” In presenting its perspective, the Network questions the soundness and validity of a 1989 decision by the European Commission on Human Rights enabling a Catholic hospital in Germany to adopt sanctions against one of its doctors who had publicly criticized the Church on its abortion stance.100 The Network makes the point of saying it could not predict whether the European Court of Human Rights would reach this conclusion today if a similar case were to come before it.101 But in the estimation of the Network, it appears that this past outcome would likely not be repeated today. The Network asserts that,


99 Opinion Nº 4-2005, supra note 35.

100 Id.

101 Id.
unless the State is able to guarantee alternatives to the patient so that the patient can receive lawful “reproductive health services,” the right to exercise the objection based on conscience “goes counter to the international undertakings” of EU Members. This means that the conscientious objector would probably have to provide information to the patient as to where she could go to receive the services the objector declines to provide. This would make the objector an accomplice to the thing objected to, rather than a participant. But this too would conflict with the right to exercise one’s conscience for such an individual would be contributing to the very thing that his or her conscience objects. In short, the conscientious objector would be required to perform a role in providing access to abortion—the very thing that the conscientious objector seeks to avoid.

The Network casts one final shadow on the conscience clauses that have been incorporated in recent concordats. In its view such clauses can enable State Members of the European Union (and candidate countries such as the Slovak Republic) to violate international obligations (this of course depends on accepting the Network’s interesting but flawed interpretation of international instruments). The alleged violations, according to the Network, would surface from restrictions on access to reproductive health counseling and related medical services including abortion and contraception “which disproportionately affect women.” Although the Opinion of the Network by itself is not a legally binding text, it is a forecast of things that may be in the future. At the least, the Opinion reflects the views of influential voices within the EU today. The Network’s Opinion suggests that coercion, a

102 Id.
103 Id.
104 Id.
method used by totalitarian regimes of the not-too-distant past, may be a tool of the modern state or union of states to address and restrict the exercise of conscience. If there is merit to this argument, it would be relevant to consider whether a new form of totalitarianism is emerging in the world of the early twenty-first century, particularly where longstanding rights, such as the right of conscience, are being defeated by claims in support of new “rights.” These new “rights” are, in effect, nothing more than the views of political activists, such as the Center for Reproductive Rights and CFFC, which they wish to force upon the rest of society.

The Network had assistance from other organizations to promote its campaign against the concordat as previously noted. As mentioned earlier, the CFFC sponsored a letter campaign to pressure Slovak government officials to revoke the conscience protection agreement with the Holy See. In its lobbying, CFFC initiated its campaign to lobby officials of the Slovak Republic to “urge them to reconsider this dangerous and unconstitutional Treaty.” The CFFC did not specify what made the concordat dangerous or unconstitutional. Since I have argued earlier that the very subject matter of the concordat is protected under law, CFFC’s claim should be without merit. The CFFC did attach a copy of a suggested letter to send officials of the Slovak government, but several of their assertions about violating the separation of

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106 Id.

107 The text of the suggested letter reads as follows:

As religious, women’s rights and human rights leaders from across the globe, we write to express our deep concern about the “Treaty between the Slovak Republic and the Holy See on the Right to Exercise Objection of Conscience.” The right of individuals to exercise objections of conscience and not to be forced to engage in actions they consider immoral or unethical is a right we all support; however, we recognize that there are occasions when that right may come into conflict with needs and
Church and state are mischaracterizations. The concordat protects conscientious objection; it does not impose a state-sanctioned or supported religion as the campaign erroneously implies. Nor does the suggested letter acknowledge that religious liberty and freedom of conscience are protected by law which asserts that these rights are non-derogable. It thus appears that the efforts of the Independent Experts and sympathetic NGOs are less of an

rights of other citizens -including those granted by Slovak la- as well as with their personal ethical values. Our concern is that this specific treaty creates serious legal problems and insufficiently addresses these possible conflicts. We ask you [sic] reconsider plans to sign and ratify this Treaty. The Treaty will set a dangerous precedent in legal history. If ratified, the Treaty will become an “international human rights treaty,” taking precedence over both Slovak law and the judiciary. As a result, Catholic teaching may encroach on Slovak law and the judicial process, violating the impartiality of the courts. The Treaty violates the Slovak principle of separation of the state and church. The first article of the Slovak Constitution affirms the separation of the state and church. The ratification of this Treaty would transform The Slovak Republic from a relatively secular state into a state where the dogma of one religion-Roman Catholicism-dominates all public spheres. If the proposed Treaty is ratified, the Holy See-a subject sui generis of international law that does not qualify for membership to the Council of Europe because its political structure and its legislation contradict the European Convention of Human Rights-would be able to impose its moral doctrine onto the citizens of the Slovak Republic, regardless of their religious beliefs or faith. If ratified, the Treaty would grant the Holy See the privilege to be a co-legislator in the Slovak Republic. The Treaty violates Slovak commitments to Convention on Elimination of all forms of Discrimination against Women (CEDAW) and the International Conference on Population and Development Programme of Action (ICPD). The Slovak Republic has committed to work on eliminating all forms of discrimination against women and to respect and promote women’s sexual and reproductive rights. The moral doctrine of the Catholic church [sic], however, opposes contraception and abortion, even to save the life of a woman. This severely curtails women’s basic human rights. It should be noted in the context of the Treaty that for ICPD, several attempts were made by the Holy See to introduce language regarding the right to conscientious objection. These efforts were rejected by the full conference as overreaching and a burden to access to reproductive health services, as they went beyond guaranteeing the right to objection to individuals by seeking to give that right to institutions as well. This Treaty is unnecessary. Article 10 of the Charter of Fundamental Rights of the European Union, which will soon be ratified through the European Constitution [which failed to be adopted by the EU], guarantees the freedom of conscience and of conscientious objection. This will be legally binding on The Slovak Republic. Other less limiting methods of granting the right to conscientious objection are available through legislation, a more democratic root than an international treaty. In the name of the universal right to the freedom of religion, of thought and of conscience, for the honor of the Slovak Republic and for the well-being of the Slovak people, we urge you to reject this Treaty.
exercise of democracy and more of an attempt to impose a totalitarian understanding of acceptable versus unacceptable “human rights.”

VI. THE TOTALITARIAN SURGE TO ELIMINATE CONSCIENCE PROTECTION

In large part, the world of international law has become a realm of positive law. One prominent illustration of this is the drafting of modern treaties that become the law posited by the states that engage in the negotiations of treaties (including concordats with the Holy See). This is an accepted way of engaging in the making of international law in democratic cultures. I am not arguing that positive law is necessarily a flawed mechanism for it is the vehicle by which human law is made. Positive law is, after all, the vehicle by which the natural law of right reason and objectivity is implemented. As Professor Blake Morant has argued, human, i.e., positive, law can augment or complement the natural law’s goal of properly ordering society for the benefit of one and all.\(^\text{108}\) As he has stated, “positive laws can provide a utilitarian functionality to natural law principles.”\(^\text{109}\)

The difficulty that I am attempting to address is that a singular reliance on positive law, unchecked by the application of right reason, leads to positivism, and, this raises the concern addressed by Professor Hart in his discussion of the Nazi regime and post-war Germany where he stated, “[w]icked men enact wicked rules which others will enforce.”\(^\text{110}\) Even Hart, a strong advocate for positive law, conceded that in dealing with such an abuse of power and law making authority, obedience is not simply contingent on


\(^{109}\) Id. at 981.

\(^{110}\) HART, supra note 20 at 206.
“legal validity,” it may also require some kind of moral scrutiny that is beyond the official system.\textsuperscript{111}

Morant’s analysis comes back into play. But in his study, he did not address Nazi Germany but Tudor England and the conflict between King Henry and Thomas More. Morant argued that More refused to endorse Henry’s positive law that altered or displaced the natural law that previously gave order to society.\textsuperscript{112} From More’s perspective, it was not only possible, but necessary, for the law the King and Parliament made to reflect the harmonious relationship between human law and the law of right reason (the natural law). In More’s mind the connection between the two bodies of law was both necessary and compatible. But the Act of Succession, sought by the King and enacted by Parliament, unsettled this balance. More decided to ignore the Act, which would continue on its course without any further expression of opinion from him—as More wisely suggested, exclaiming, “why that thing in my conscience should make any change.”\textsuperscript{113} With this statement, More rhetorically asked that if the legitimacy of the Act was no longer in doubt, what could his humble opinion offer at this stage in the political and legal developments of King Henry’s imposition of a totalitarian regime?

Perhaps that would have been to Thomas More’s liking; however the King demanded a public endorsement and therein lay the problem. Not the reason for the law, but rather the King’s and Parliament’s ability to enforce it became the justification to obey the law. As Morant has noted, in a positivist

\textsuperscript{111} Id.

\textsuperscript{112} Morant, supra note 108 at 981-82.

\textsuperscript{113} WILLIAM ROPER, A MAN OF SINGULAR VIRTUE 91 (Folio Society 1980).
sense, there is no problem with this approach. But the dilemma begins to emerge when this approach is subject to moral scrutiny. The King and Parliament would not permit this, and they concluded that private views critical of the Act had to be neutralized by public oaths of allegiance proclaimed by the citizens, and certainly those in prominent positions within society like Thomas More. They were intended to prevent More from exercising his conscience and would not let him object in conscience.

The oath that Thomas More refused to take would expose his innermost conviction that the Act was seriously flawed. If no one knew this, the law and More’s life could both continue. But when his public allegiance became a crucial element of the Act’s success and the uniform belief that King Henry wished to impose, More was then confronted with the mandate to promulgate his conscience objection. In short, Henry’s England became a totalitarian state in which conscience was no longer a protection for inner conviction. For the King, this circumstance was “a canker in the body politic, and he would have it out.”

In this segment of the investigation of conscience I consider totalitarianism as a type of modern dictatorship that relies on a centralized, universal control of all aspects of life including “innermost convictions.” The totalitarian state can conjure up means of ensuring public endorsement of its control, demanding uniform support by all over whom it exercises dominion. In a way, the oath required by the Act of Succession might be

114 Morant, supra note 108 at 982-83.
115 A Man for All Seasons, Columbia Pictures (1966).
considered an early illustration of this because there could be no departure from disagreeing with the law, and to ensure this, the oath was required. The oath guaranteed the cohesion within society that is an important component of the totalitarian State. Nonetheless, in spite of this effort at universal, central control, there often remain elements of the society that preserve a moral force and function as a counterpoint to the pressure of this state. In the context of Nazi Germany and the Soviet Union there were religious and intellectual groups who served as counterpoints. By pursuing their goals, the members of these groups faced persecution and annihilation if discovered by the state’s enforcement mechanisms.

Christopher Dawson, who spent a career studying conscience, religious faith, and public life noted that in more modern times (and much of his work had as a backdrop the totalitarian States of Nazi Germany and the Soviet Union), Christianity needed to become an underground movement. But in reality, Dawson concluded that Christianity as a way of life and the exercise of conscience that accompanies the practice of Christianity cannot always be concealed. He recognized that both the totalitarian state and the modern democratic state may “not [be] satisfied with passive obedience; it demands full co-operation from the cradle to the grave.” In some contexts, this obedience is necessary to avoid being “pushed not only out of modern culture but out of physical existence.” Dawson’s investigation of the first half of the twentieth century may be an accurate prophecy for the democracies of the early twenty-first century that exist under the framework of both domestic and international law.

118 Id.
119 Id.
The views and beliefs of conscience that are targeted today need not be held by a few isolated individuals since they can and likely are held by many other persons. With regard to the question of the legitimacy of abortion, most western societies find themselves divided by this issue. In this context, the hallmark of the totalitarian regime is its plan to eradicate beliefs and acts that may be held by many individuals and are often considered mainstream but conflict with the views of the state or those political interests that effectively lobby the state in its law-making function. Surely this is the case with perspectives on abortion, same sex marriage/unions, euthanasia, and the “emergency contraception” that are more and more becoming not only the policies, but the requirements of the modern democratic state that is a subject of international law.

In addition to the EU Experts discussed in Section V, supra, another organization attempting to subvert the sanctity of concordats and the protection of conscience is an organization called “Concordat Watch.” 120 When one visits its menu listing entitled “About Us,” 121 there is no information that identifies who (either persons, organizations, or both) constitutes “Concordat Watch.” Nonetheless, one statement attributed to a Muriel Fraser states, “The contributors have diverse viewpoints, but we are united in the conviction that separation of church and state is urgently needed to ensure human rights for all.” 122 It becomes clear as one further examines the pages of “Concordat Watch” that its “contributors” are allied with individuals who espouse secular humanism and are opposed to the Roman

122 Id.
Catholic Church’s involvement in the international order. Many of the claims made by these “contributors with diverse viewpoints” display anything but diverse viewpoints. The words chosen to express opinions differ, but they are united in the project of denying the Church its proper role in civil society and the rights of persons who seek conscientious objection protection. The claim of Ms. Fraser that “separation of church and state is urgently needed to ensure human rights for all” is clearly false when one considers the legal protections afforded to religious liberty and conscience that I have previously addressed in this section.

But one further thing is clear, with regard to the proposed concordat between the Holy See and the Slovak Republic, the group earlier identified as “Catholics for a Free Choice” had a hand not only in the EU Experts’ Opinion but also in the ongoing campaign of “Concordat Watch.” As the “About Us” page states: “…in 2005 the Catholics for a Free Choice helped concerned Slovaks inform the world about plans for an unprecedented ‘conscience concordat’ which threatened basic freedoms there.”123 What in fact is really the case is that those opposed to the Slovak Republic concordat were those ones who “threatened basic freedoms there.” An objective examination of the website will disclose the strident animosity toward the Holy See and to those who have supported the conscientious objection provision of the proposed Slovak Republic concordat. Access to “reproductive health” services is unfettered but the protection of conscience becomes questionable.

One of the more scurrilous contentions of “Concordat Watch” is that the proposed concordat with the Slovak Republic was of “a new kind” that was “audacious” but “led to protests both inside and outside Slovakia, and on

123 Id.
6 February 2006 caused the fall of the government.”124 A connection is then made to the “Catholics for a Free Choice” in a letter, bearing the address of this organization in Washington, D.C., that is the source of the protests.125 The president-emerita of “Catholics for a Free Choice” is listed as a signatory. Notwithstanding these developments, neither the Holy See nor the new government have abandoned efforts to promulgate the conscientious objector protection in a concordat; however, these efforts have been described by “Concordat Watch” as “steady pressure” to implement a “morality pact.”126 As negotiations proceed, it will be important that the right to conscience of all will be protected. Contrary to the implications of “Concordat Watch,” those who wish to participate in morally offensive activities will be able to continue on their paths; however, those who object to them need not be compelled into doing something to which they object out of conscience. And this is something that “Concordat Watch” and those behind it do not seem to understand. But if they do, they apparently do not want this protection to exist as it would conflict with their totalitarian objective of “reproductive health rights” first, conscience second, if at all. Uniformity with their views rather than protection of the legitimate right to the exercise of conscience is what is at stake.

VII. CONCLUSION

If society today would approve of the doctor who, in the exercise of his conscience, refused to conduct some scientific experiment upon an unwilling subject that is encouraged or required by the law of the state, why would that

126 See supra note 124.
same society disapprove of the doctor who, also in the exercise of conscience, refused to terminate a life at its early stages or a later stage? Put simply, this society’s action would make no sense if it insists on being called democratic and liberal. It would be guided by subjective whim and caprice. It would, notwithstanding its democratic claims, be a totalitarian society. As Pope John Paul II once said, “the value of democracy stands or falls with the values which it embodies and promotes.” What values are being promoted today by Western “liberal democracies” within the realm of international law that provide the guarantees of conscience and its protection? Are they truly consistent with the principles, including the right to conscience, that undergird them?

Thomas Aquinas’s first principle of the law is to do good and avoid evil, and it offers a foundation to answer this important question. Of course, it is crucial to identify correctly the good associated with the proper exercise of conscience. Otherwise, as Dr. Edmund Pellegrino has stated, errors of conscience can occur when individuals or groups relying on the conscience defense misidentify the good. If the good is misidentified, the subsequent acts based on conscience, be it an active or passive exercise, can also be flawed. But even when the identification of the good can be debated by moral individuals who rely on an objective rather than subjective determination of the good, there may still be disagreement about whether the underlying good has been correctly identified or not. It may be, then, that some proper measure of prudence is needed before the claim to conscience is

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127 John Paul II, *Evangelium Vitae*, n.70. In his earlier encyclical letter *Centesimus Annus* of 1991, he made a related observation: “As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism.” *Id.* at n.46.

128 *Aquinas*, supra note 19.

made and that the law reserves to itself some flexibility in assessing the legitimacy of the claim and whether a right to conscientious objection exists and should be protected.

Recognizing that there can be a potential problem in justly dealing with claims of conscience, some cases offer clear distinctions about competing claims to the good and the exercise of conscience that follows. For example, the highest court of the United States declared in 1973, that the physician, in the exercise of his professional judgment, could determine if nascent human life could be taken or sacrificed. Some would applaud this as a legitimate exercise of conscience. However, others would assert that this exercise is flawed because of the result being mistakenly identified as a good when it is in fact not a good from the perspective of the baby who is aborted. But what would happen to the second physician who, in the exercise of her professional judgment and conscience, concluded “I cannot take this life?” This is the issue at stake in the concordat that was subjected to the withering critique of the EU’s Independent Experts. The society and its regime of “human rights” that these experts have in mind has begun its metamorphosis toward becoming a totalitarian society. In this case, the admonition attributed to Edmund Burke needs to be taken into account: “All that is necessary for the triumph of evil is that good men do nothing.”

Some may view my labeling the liberal democratic state which removes conscience protection under the argument of “international human rights” a harsh and unsubstantiated conclusion. But is this labeling unfair when one considers that this type of state may be pursuing a well-crafted plan that dictates which convictions and actions based on those convictions are

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130 A quotation often attributed to Edmund Burke but not found in any of his works. See http://www.bartleby.com/73/560.html (last visited Feb. 17, 2009).
permitted and which are not? When the modern state begins to insist on a uniform view on controversial subjects such as abortion, same-sex marriage, and euthanasia, has not the state engaged in dictating what all must believe and do with no opportunity for dissent? When reason declares that people may differ about the propriety of abortions, same-sex unions, and the permissibility of assisted suicide, should the state demand in these circumstances that all must comply with its rules on these subjects knowing that there are those who will offer, even gladly, these services to which others object through the exercise of objective reason and conscience?

In the early twenty-first century we seem to be remote from the attitude of the German camp guard or camp commander who, when asked, “Where was your conscience?” replied that he was simply following orders. We may not be so removed from this circumstance as we might like to think. Physicians may begin to wonder that if they raise objections to whatever the state mandates of them, would they be given a license at all? And, if they have a license, would it be stripped from them when they refuse out of conscience to engage in these procedures?

But again, the problem does not stop here. Let us assume that the state is willing to respect the exercise of conscience of this physician but then insists that this doctor provide the patient with the identity of those physicians willing to perform the services to which the first doctor objects on conscience? The physician’s conscience has still been violated, but this time indirectly because the doctor is mandated to compromise his or her conscience indirectly rather than directly. It is one thing for the physician to turn over a file to a patient who requests its release; it is quite another for the physician to
be required to search for the doctor who will perform the objectionable procedure.

The “liberal democracy” continues on its path, either by itself or after heavy lobbying by special interest groups such as CFFC or the Center for Reproductive Rights, of mandating compliance with a uniform regime. As the “liberal democracy” becomes more totalitarian in its outlook, all will have to comply whether this is necessary or not. In the case of performing abortions or euthanasia, assisting in state-sanctioned suicides, distributing poisons to destroy nascent human life, sanctioning same-sex unions (be they in the name of God or of the state), there can be no diversity or tolerance of opposing views—there is insistence that all comply whether the need for universal compliance is necessary.

Today’s reality demonstrates this. In the context of abortion, euthanasia, assisted suicide, morning-after cocktails, or same-sex unions, there are people willing to comply with the expectations for services to which others object. 131 But the totalitarian state insists universal compliance simply because there can be no different voice, there can be no diversity of opinion on matters that previously one could hold as a matter of conscience.

In the past experience of the twentieth century, one totalitarian state demanded adherence to the view that not all persons were equal on fundamental points of human nature—some were subhuman and could be annihilated. But reasoned opinion said otherwise. That is why the international community responding by promulgating the UDHR and its recognition of the need to protect conscientious objection. This was and

remains the objective of the Holy See’s efforts to promulgate conscientious objector protection in concordats. If it cannot stop morally problematic medical procedures that destroy life, should it not be able to protect those who, in the exercise of well-formed conscience, choose not to cooperate in them?

The views that are suppressed by the totalitarian-democratic state need not be unpopular ones. In fact, they may demonstrate that a society is deeply divided on certain issues—such as abortion, euthanasia, morning after pills, and same-sex unions. The views that are the subject of the suppression may be widely held, even by a majority of the polity.

Thomas More demonstrated the essence of his identity as a prudent man whose final act must be guided by a well formed conscience. On the one hand, he searched for ways of remaining the faithful citizen, but on the other, he knew well there was a boundary beyond which he could not pass, for if he did a far more basic law binding all humanity would be crossed. And for Thomas More, crossing that law would be against his nature and his conscience. He was quick to point out that by exercising his conscience, he could not demand how others should exercise theirs.\textsuperscript{132}

It was the style of More to keep his exercise of conscience an individual, even private, matter by not advocating others to follow his example. But on the other hand, his life was a very public act that had great impact on others. His silence proclaimed where he stood when the law demanded what his conscience would not permit: to profess the oath that betrayed his well-formed conscience. Thomas More understood well that he must be prepared to meet his final judge.

\textsuperscript{132} Id.
Conscience, therefore, was not exercised for the convenience of the continuation of his earthly life; it was exercised to determine the righteousness of how he would live this life as he prepared for the eternal one. His guidance may just be what the world needs to avert the totalitarianism that beckons the present age and threatens the legitimate exercise of conscience, which still retains its legal protection that must not be compromised for the sake of all.
ESSENTIAL PRINCIPLES OF CONTRACT AND SALES LAW IN THE NORTHERN PACIFIC:
FEDERATED STATES OF MICRONESIA, THE REPUBLICS OF PALAU AND THE MARSHALL ISLANDS, AND UNITED STATES TERRITORIES

Hon. Daniel P. Ryan†

This text includes international standards governing contract and sales law and summarizes the general contract and sales law that applies in the geographic region identified as the Northern Pacific. It is unique because it is the only text compiling the statutes and case law for contract and sales in one source for this particular region. Consequently, it is essential reading for members of the judiciary, academics, practitioners, law students, and businesses both within and outside the region.

The Northern Pacific region, which includes Micronesia, the State of Hawaii, the American territories of Guam, the Commonwealth of the Northern Mariana Islands and American Samoa, and the Republics of Palau and the Marshall Islands, either follows or are heavily influenced by the Anglo-American common law tradition and statutes governing contract and sales. Islands in this region have made efforts to adopt recognized uniform international contract

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standards, particularly the *Restatement (Second) of Contracts*, but customary law and traditional rights still have a significant impact upon the development of contract and sales law creating a unique amalgam of substantive law in the Northern Pacific region.

Although the focus of the text will be on those independent nations in the Northern Pacific that are developing their own unique substantive law identity, the text also will include a comparison to contract and sales law that is prevalent in the United States and applicable in its Northern Pacific State of Hawaii and in its Pacific territories of Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Other U. S. territories in the Northern Pacific include Midway, Wake, Johnston Atoll, Baker, Howland and Jarvis, Palmyra, and Kingman. Due to the lack of population and reported cases, these islands are outside the scope of this text.

The article will emphasize any divergence, and highlight regional anomalies in the substantive law of contract and sales. It will also examine the inter-relationship between customary and traditional law and the law of contract and sales. This anthropological approach will highlight how regional custom and traditional law have interacted with Anglo-American concepts of contract and sales law to produce a unique blend of contract and sales law in this Northern Pacific region.

As a result of the research for this text, two significant developments were noted: 1) that the American Law Institute’s *Restatements of Law* have been elevated from simply persuasive authority to the rule of decision in some of these Pacific Island nations, and 2) that the anthropological implications of local
custom and traditional law in substantive contract and sales law have created a unique regional amalgam.

As a baseline of analysis, the text will initially compare and contrast contract and sales law in the Northern Pacific region to international standards of contract and sales law set forth in the Uniform Commercial Code (UCC), which has been adopted in Hawaii, Guam, the Commonwealth of the Northern Mariana Islands, and, in part, by the Federated States of Micronesia. Additionally, this article will explore the Revised Uniform Commercial Code (Revised UCC) and the Restatement (Second) of Contracts, which is the current statutory rule of decision in Palau and Micronesia (and formerly the rule of decision in the Marshall Islands). Lastly, where applicable, the text will compare and contrast regional contract and sales law to the United Nations Convention on the International Sale of Goods (CISG), and the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts.

I. GENERAL REGIONAL HISTORY

The Federated States of Micronesia (FSM) is the largest of the Northern Pacific island groups formerly known as the Eastern and Western Caroline Islands. The Republics of Palau and the Marshall Islands are much smaller island groups in this same island chain.

In 1947, after World War II, these island nations became a United Nations Trust Territory under the supervision of the United States. In 1979, the Federated States of Micronesia formed a constitutional government still under supervision of the Trust Territory. Four of the Trust Territory districts (Kosrae,
Pohnpei, Truk, and Yap) decided to form a single federated Micronesian state in 1979. Palau and the Marshall Islands did not participate initially, officially declaring individual sovereignty later.

Although they adopted their constitutions in 1979, Micronesia and the Republic of the Marshall Islands did not officially become independent sovereign nations until 1986. Although declaring independence and adopting a constitution approximately the same time as Micronesia and the Marshall Islands, the Republic of Palau followed even later after a series of referenda officially becoming an independent sovereignty in 1994.

Other Pacific islands such as American Samoa, Guam, the Northern Mariana Islands, and Hawaii have continued their affiliation with the United States becoming a State, commonwealth, or territory of the United States. As such, they apply and follow the substantive common law of contract and sales as set forth in such authorities as the *Restatement (Second) of Contracts* and the UCC, which are applied in the United States. Appeals from the courts of these United States territories, commonwealths, or States are assigned either to the United States Ninth Circuit Court of Appeals or appealed directly to the United States Supreme Court.
A. FEDERATED STATES OF MICRONESIA

Micronesia is a fledgling democracy in the north Pacific eight degrees north of the equator. Its estimated population in 2004 was 108,155 scattered over 607 islands and nearly one million square miles of ocean. Total land mass is about 271 square miles or 702 square kilometers.

The Federated States of Micronesia are a former Trust Territory and Protectorate of the United States known previously as the Eastern and Western Caroline Islands. The Federated States of Micronesia became an independent sovereign nation on May 10, 1979 when it formed its own constitutional government. Authority was gradually transferred from the Trust Territory government to the new constitutional government from 1979 to 1986, and the FSM officially became independent on November 3, 1986. The UN Security Council officially terminated trusteeship on December 22, 1990.

Since September 17, 1991, Micronesia has had its own seat on the United Nations. The Federated States of Micronesia is the largest group of islands among the former Trust Territory and consists of four island states: Kosrae, Pohnpei, Chuuk, and Yap.

Under a Compact of Free Association, originally negotiated in November 1986 with the United States and recently renewed in December 2003, the United

States provides economic assistance and for the defense of these islands. English is the official and most commonly used language, although Trukese, Ponapean, Yapese, Kosrean, Ulithian, Woleaian, Nukuoro, and Kapingamarangi are spoken as well. The official currency of the Federated States of Micronesia is the United States dollar (USD).

B. REPUBLIC OF THE MARSHALL ISLANDS

The Republic of the Marshall Islands (RMI) consists of two archipelagic island chains (the Ratak or “Sunrise” chain and the Ralik or “Sunset” chain) of 29 atolls and 1,225 islands covering an area of 181.3 square kilometers. The estimated population of the Marshall Islands in July 2004 was 57,738. The Marshall Islands lie to the northeast of Micronesia and are located about halfway between Hawaii and Australia.

The Marshall Islands adopted their Constitution on May 1, 1979. Like Micronesia, the Trust Territory gradually transferred authority to the constitutional government. The Marshall Islands officially became an independent nation in October 1986. Although independent, the Marshall Islands Compact of Free Association with the United States was extended for another twenty years in January 2004. The Marshall Islands officially became independent from the U.S. administered UN Trusteeship on October 21, 1986.

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The currency utilized in the Marshall Islands is the USD. The labor force of the Marshall Islands is primarily service based (57.7 percent) followed by agricultural (21.4 percent) and industry (20.9 percent). The Republic of the Marshall Islands also has favorable tax, maritime registration, and incorporation laws drawing offshore investment.

C. THE REPUBLIC OF PALAU

The Republic of Palau (ROP) is a group of islands in the Northern Pacific Ocean located southeast of the Philippines covering an area of 458 square kilometers or roughly 190 square miles. The estimated population of the Republic of Palau in 2004 is 20,800. It is the westernmost archipelago in the Caroline chain consisting of six island groups totaling more than 300 islands. These 300 islands are divided into sixteen states. English and Palauan are the official languages in all but three of these states.

The Republic of Palau adopted its Constitution in 1979, and became the Republic of Palau on January 1, 1981. The Trust Territory gradually transferred authority to the newly formed constitutional government. After 1986, Palau was

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4 Aimeliik, Airai, Angaur, Hatohobei, Kayangel, Koror, Melekeok, Ngaraard, Ngarchelong, Ngardmau, Ngatpang, Ngchesar, Ngeremlengui, Ngiwal, Peleliu, and Sonsorol.

5 Sonsorol (English and Sonsorolese); Hatohobei (English and Hatohobei); and Angaur (English, Japanese, and Angaur).
the only remaining part of the U.S. Trust Territory until it adopted the Compact of Free Association with the United States in 1994 after a series of referenda. Palau officially became an independent sovereignty from the U.S. administered UN Trusteeship on October 1, 1994.

Although independent, the Republic of Palau signed the Compact of Free Association with the United States in 1982. The Compact went into effect twelve years later in October 1994, but only after eight referenda and an amendment to the Constitution. The Compact of Free Association with the United States was for a fifteen-year term, and is due to expire in 2009.

The official currency of the Republic of Palau is the United States USD. Like its neighbors, the Republic of Palau operates on a trade deficit. However, Palau’s economic outlook is somewhat brighter than that of its island nation neighbors; its population enjoys a per capita income twice that of the Philippines and much higher than the neighboring island nations of Micronesia and the Marshall Islands. An estimated fifty thousand tourists visited Palau in 2000-2001. The prospects for the long-term tourist trade have been enhanced with expansion of air travel in the Pacific, the prospering economy of East Asian countries which border the region, and the willingness of foreigners to invest in infrastructure improvements.

D. OTHER TRUST TERRITORY ISLANDS AND UNITED STATES POSSESSIONS IN THE NORTHERN PACIFIC REGION

The remaining islands, Saipan, Rota, and other islands of the former United Nations Trust Territory, have become a commonwealth of the United States and are collectively referred to as the Commonwealth of the Northern
Mariana Islands (CNMI). Other U. S. territories in the Northern Pacific include: Midway, Wake, Johnston Atoll, Baker, Howland and Jarvis, Palmyra, and Kingman. American Samoa, which is south of the equator but on the cusp of the Northern Pacific region, is an unorganized, unincorporated territory of the United States.\(^6\) Hawaii became a U.S. State. Guam, which is also in the Northern Pacific region, remains an American territory. All of these United States territories and the State of Hawaii apply and follow American substantive law, and, as it particularly relates to this text, they apply the Anglo-American common law tradition in contract and sales law; employ the *Restatement (Second) of Contracts* and other texts as persuasive authority; and, in the case of the State of Hawaii, Guam and the Commonwealth of the Northern Mariana Islands, have statutorily adopted the original version of the Uniform Commercial Code, which will be addressed in general terms throughout this text.

II. GOVERNMENT AND JUDICIAL BRANCH STRUCTURE

Like the federal, state, and territorial governments of the United States, the Federated States of Micronesia, the Marshall Islands, and Palau are divided into three co-equal branches of government: judicial, executive, and legislative. The Republic of Palau and the Micronesian State of Yap also recognize an equivalent “fourth” branch of government, a “Council of Chiefs,” which reflects the strong influence of customary or traditional law in the region.

\(^6\) A good basic source of information regarding American Samoa can be found at the American Samoa Bar Association Web site at http://www.asbar.org.
III. INTERRELATIONSHIP BETWEEN THE CONSTITUTION, STATUTORY RULES OF DECISION, AND CUSTOMARY LAW

The next section of the text will explore the interrelationship between Constitutional provisions, statutory rules of decision, and traditional rights and customary law in each jurisdiction.

A. FEDERATED STATES OF MICRONESIA

Article XI of the Micronesia Constitution, which addresses creation of the judicial branch, also contains a Judicial Guidance provision. It requires that Micronesian courts are to give equal consideration in the decision making process to the Constitution, Micronesian custom and tradition, statute or prior decision of the court, and the social and geographical configuration of Micronesia7.

When analyzing the constitution, Micronesian courts are required by Article XI, §11 to first look to the words of the Constitution and go no further if the Constitution resolves the issue.8 If that review does not resolve the issue, the courts can look to other sources of Micronesian law including the Journal of the Micronesian Constitutional Convention.9

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7 CONSTITUTION OF THE MARSHALL ISLANDS, art. VI, § 1(1) (1979) provides: “The judicial power of the Republic of the Marshall Islands shall be independent of the legislative and executive powers and shall vest in a Supreme Court, a High Court, a Traditional Rights Court, and such District Courts, Community Courts, and other subordinate courts as are created by law . . . .”


9 See, e.g., Alfons v. FSM, 5 FSM Intrm. 402, 404-05 (App. 1992); Robert v. Mori, 6 FSM Intrm. 394, 397 (App. 1994); Nena, 5 FSM Intrm. at 422; Tipen, 1 FSM Intrm. at 82.
If ambiguity or doubt still exists, the Micronesian courts may look to decisions of the U.S. Supreme Court and other U.S. federal courts at the time the Micronesian Constitution was ratified in 1979 to determine its intent since the Micronesian Constitution is patterned on the U.S. Constitution.\(^{10}\) The FSM Supreme Court has indicated, however, that it does not “slavishly” follow interpretations of similar language by the United States and may look to the law of other nations, especially other Pacific nations, to determine whether approaches there may prove more useful in determining meaning of particular provision with the Micronesian Constitution.\(^{11}\)

The Federated States of Micronesia have also adopted a rule of decision statute, 1 F.S.M.C. §203, which indicates that the rules of the common law as expressed in the American Law Institute’s *Restatement of Laws* shall be the rule of decision in the courts of Micronesia. This rule of decision statute is a vestige of the Trust Territory Code, particularly 1 T.T.C. §103. The statutory adoption of the *Restatement of Laws* as the rule of decision is a unique regional development.

Where the language of the FSM Constitution differs from the U.S. Constitution, it is presumed that the framers of the Micronesian Constitution intended to take another path.\(^ {12}\) Where distinctions exist between the FSM Constitution and the U.S. Constitution, Micronesian courts are free to depart

\(^{10}\) See, e.g., Paul v. Celestine, 4 FSM Intrm. 205, 208 (App. 1990); Laion v. FSM, 1 FSM Intrm. 503, 523 (App. 1984); Jonas v. FSM, 1 FSM Intrm. 322, 327 n.1 (App. 1983); Lonno v. Trust Territory of the Pacific Islands (I), 1 FSM Intrm. 53, 69-70 (Kos. 1981); Ponape Transfer & Storage v. Federated Shipping, 4 FSM Intrm. 37, 41 (Pon. 1989); Etpison v. Perman, 1 FSM Intrm. 405, 414 (Pon. 1984); Ponape Chamber of Commerce v. Nett Mun. Gov’t, 1 FSM Intrm. 389, 394 (Pon. 1984); In re Iriarte (I), 1 FSM Intrm. 239, 249 (Pon. 1983); Suldan, 1 FSM Intrm. at 345.

\(^{11}\) See, e.g., Fed. Bus. Dev. Bank v. SS Thorfinn, 4 FSM Intrm. 367, 371 (App. 1990); Lonno, 1 FSM Intrm. at 69 n.11, 71; Aisek v. FSM Foreign Inv. Bd., 2 FSM Intrm. 95, 98 (Pon. 1985); Tipen, 1 FSM Intrm. at 83.

from foreign precedent and develop their own body of law consistent with the Constitution, Micronesian custom and tradition, and the social and geographic configuration of Micronesia.\(^{13}\)

Tension exists between the Micronesian Constitution’s Judicial Guidance Provision and the rule of decision statute requiring application of the American Law Institutes’ *Restatements of Laws* as was noted in *Rauzi v. FSM*.\(^{14}\)

In *Rauzi*, the court observed that 1 F.S.M.C. § 203,\(^{15}\) with its sweeping mandate that the *Restatements* and other common law rules as applied in the U.S. be the ‘rules of decision,’ would draw the courts in a direction other than required by the Constitution’s Judicial Guidance Provision. The *Rauzi* court noted that FSM Const. Article XI, § 11 identifies the fundamental guiding principle of all Micronesian court decisions and that the judicial guidance provision requires that judicial decisions must be consistent with the Constitution, Micronesian custom and tradition, and the social and geographical configuration of Micronesia and not the *Restatements* of the American Law Institute or the decisions of the U.S. Courts concerning the common law as specified in statute.\(^{16}\)

\(^{13}\) See Luda v. Maeda Road Constr., 2 FSM Intrm. 107, 112 (Pon. 1985).

\(^{14}\) 2 FSM Intrm. 8 (Pon. 1985).

\(^{15}\) 1 F.S.M.C. § 203 states:

The rules of the common law, as expressed in the *Restatement* of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Trust Territory in applicable cases, in the absence of written law under section 201 of this chapter or local customary law applicable under section 202 of this chapter to the contrary and except as otherwise provided in section 205 of this chapter; provided, that no person shall be subject to criminal prosecution except under the written law of the Trust Territory or recognized customary law not consistent therewith.

\(^{16}\) *Rauzi*, 2 FSM Intrm. at 14. The *Rauzi* case echoes some of the concerns similarly stated by Justice Scalia while expressing his concern with the use of foreign precedent in constitutional
B. REPUBLIC OF PALAU

Article V of the Constitution of the Republic of Palau addresses customary law and traditional rights. As mandated by the Palau Constitution, statutes, and customary law are considered equivalent, but in case of conflict between the two, traditional rights are ultimately superior to statute.17

Section 2 of Article V of the Constitution of Palau specifically states:

Statutes and traditional law shall be equally authoritative. In case of conflict between statute and traditional law, the statute shall prevail only to the extent that it is not in conflict with the underlying principles of the traditional law.18

Like Micronesia, the rule of decision for the courts of Palau is established by statute.19 According to the rule of decision statute, the rule of decision for the courts of the Republic of Palau is the common law as expressed in the Restatement of Laws published by the American Law Institute, and it is understood and applied in the United States. The statutory elevation of the Restatements to the level that the Restatements are the rule of decision is a unique regional development and a remnant of the Trust Territory Code, 1 T.T.C. § 103.


19 1 P.N.C. § 303 (1990) states:

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law applicable under section 301 of this chapter or local customary law applicable under section 302 of this chapter to the contrary, and except as otherwise provided in section 305 of this chapter; provided that no person shall be subject to criminal prosecution except under the written law of the Republic or recognized local customary law not inconsistent therewith.
This regional adoption is unique because in the United States the *Restatements of Law* are not the rule of decision and are just one of many sources of persuasive authority often advocating minority views or developing trends.\(^{20}\)

The rule of decision statute, 1 P.N.C. § 303, is applicable to the extent that the rule of decision statute does not conflict with principles of traditional law and the constitutional mandate of Article V, Section 2.

As observed in numerous cases,\(^ {21}\) the courts of Palau are bound by the rule of decision statute, 1 P.N.C. § 303, to apply the common law of the United States as expressed in the *Restatements of Law* in the absence of written law or local customary law to the contrary.

However, where local or customary law or written statute exist or conflict with the *Restatement of Laws*, or where there is a conflict between the rule of decision statute, 1 P.N.C. § 303, and Article V of the Constitution requiring application of the customary or traditional law, the Constitutional provision is superior and prevails; and customary or traditional law is to be considered superior to the rule of decision statute and the American Law Institutes’ *Restatements of Law*.

**C. REPUBLIC OF MARSHALL ISLANDS**

Similar to Micronesia and the Republic of Palau, customary law is expressly recognized as a formal source of law in Article X, § 1 and § 2 of the

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\(^{20}\) It is for this reason that Chief Judge Carl Ingram indicated that the Marshalls Islands deleted the rule of decision statute from subsequent code revisions but why Justice Alexandro Castro of CNMI favors the *Restatements* and their minority positions which may be better suited for these small island nations.

\(^{21}\) For example, see such recent cases as Winterthur Swiss v. Socio Micronesia, 8 ROP Intrm. 169 (2000); Jiangsu v. Ho, 7 ROP Intrm. 268, 272 n.5 (1998).
Constitution of the Marshall Island. However, the scope and impact of traditional law in the Marshall Islands is significantly narrower than found in its island nation counterparts.

Article X of the Constitution of the Marshall Islands explicitly preserves traditional rights particularly as it relates to traditional rights of land notwithstanding those protected in the Bill of Rights or to transfers or contracts for the sale, mortgage, lease, license, or otherwise of land rights.\(^{22}\)

Another provision of the Constitution for the Marshall Islands establishes a Council of Chiefs to consult with the legislative body, the Nitijela, to ensure that legislation conforms to customary or traditional law.\(^{23}\)

Article XIII of the Marshall Islands Constitution perpetuates existing law until repealed or revoked and subject to any amendment which was in force on

\(^{22}\) CONSTITUTION OF THE MARSHALL ISLANDS , art. X, Section 1(1) (1979) provides:

Nothing in Article II shall be construed to invalidate the customary law or any traditional practices concerning land tenure or any related matter in any part of the Marshall Islands, including, where applicable, the rights and obligations of the Iroijlaplap, Iroijedrik, Alap and Dri Jerbal.

Section 1(2) further states:

Without prejudice to the continued application of the customary law pursuant to Section 1 of Article XIII, and subject to the customary law or to any traditional practice in any part of the Marshall Islands, it shall not be lawful or competent for any person having any right in any land in the Marshall Islands under the customary law or any traditional practice to make any alienation or disposition of that land, whether by way of sale, mortgage, lease, license or otherwise, without the approval of the Iroijlaplap, Iroijedrik where necessary, Alap and the Senior Dri Jerbal of such land, who shall be deemed to represent all persons having an interest in that land.

\(^{23}\) See MARSHALL ISLANDS CONSTITUTION, art. III (1979) which creates the Council of Iroij and Article X, Section 2 that requires the legislative body to enact legislation consistent with or as a supplement to the rules of customary law or take into account traditional rights. Once the legislative body, the Nitijela, has declared customary law, the High Court has not been inclined to substitute its judgment for that of the legislature. For example, see the High Court December 1, 1993 order in Kabua Kabua v. Kabua Family Defendants, C.A. No. 1984-98 and C.A. No. 1984-102 (consolidated), slip op. at pp. 23-29.
or after the effective date of the Constitution. One particular provision in effect at the time of the Constitutional adoption was 1 T.T.C. § 103, which provided that the rules of the common law as expressed in the Restatement of Laws shall be the rule of decision in the Marshall Islands. This provision statutorily mandated application of the Restatement of Laws as the rules of decision in the Marshall Islands until the Code was amended in 1988, and the equivalent of 1 T.T.C. § 103 was deleted effective January 1, 1989. An interesting issue arises as to whether the Restatements are perpetuated in light of cases such as Likinbod and Alik v. Kejlat, which indicate that the Constitution’s framework of governance has through the judiciary continued the common law in effect at the time of adoption as the governing law in the Marshall Islands, subject to customary law, traditional practice, or constitutional or statutory provisions to the contrary.

When interpreting constitutional or substantive law, the courts of the Marshall Islands frequently look to decisions of courts of other countries. In RepMar v. Sakaio, the Supreme Court noted that when interpreting and applying the Constitution, the courts of the Marshall Islands are required by Article I, § 3(1) to look to, but shall not be bound by, decisions of courts of countries similar in relevant respect.

In regard to statutory interpretation, the Marshall Islands Supreme Court indicated In the Matter of P.L. Nos. 1993-56 and 1994-87, that when challenging the validity of a statute under the Marshall Islands Constitution, the court can

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refer to, but is not bound by, the decisions of the United States courts if the challenged statute and the Constitutional provisions are similar in nature.

In *Kabua v. Kabua*, the Supreme Court expanded the scope of inquiry beyond the United States indicating that if the constitution or constitutional provisions of other countries are not sufficiently similar, a court in the Marshall Islands may consider constitutions of states that are part of a federation, like their island nation neighbors, that have adopted common law if the constitutional provisions in those states are similar in relevant respect to the provisions of the Marshall Islands’ Constitution.

In *Likinbod and Alik v. Kejlat*, the Marshall Islands Supreme Court addressed the relationship between the common law and traditional law with the Constitutional framework. The court indicated that the common law tradition continued within the framework of governance by the Constitution, and that the Constitution perpetuates the common law which would include the substantive law of contract in effect as the governing law, as long as customary law, traditional practice, and the constitution or statute are not in conflict.

In 1988, the Marshall Islands issued a re-codification effective January 1, 1989 of its national code and repealed by omission 1 T.T.C. § 103 with its reference to the American Law Institute’s *Restatement of Law*. The Marshall Islands Code was recently modified again in 2003. It continued to repeal by omission the equivalent of 1 T.T.C. § 103. The 2003 revisions modified the

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29 Id. at 66.
30 See 1 M.I.R.C. § 2(b)(viii); § 3(1); § 6(1)(a)(1); § 6(2); § 12(1) and (2) (1989).
section numbering style to conform to the new code format. Despite these statutory omissions, cases such as Likinbod and Alik v. Kejlat 31 hold that the Restatement of Laws would still be applicable, if not mandated, although not by statute as the “rule of decision,” because the framework of governance provided by the Constitution under Article XIII continues the common law in effect as the governing law at the time the Constitution was adopted in the absence of customary law, traditional practice, or constitutional or statutory provisions to the contrary.

When analyzing the applicability of customary law within the constitutional framework, a two-step analysis is required. When delineating the two-step process in Lobo v. Jejo,32 the Marshall Islands Supreme Court observed that custom and tradition have the force of law if adopted by the court or statute. The Court stated:

Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense.33

IV. SOURCES OF REGIONAL CONTRACT AND SALES LAW

Contract and sales law in the Northern Pacific region is an amalgam of common law, legislation, and traditional or customary law. Contract law is generally considered common law evolving from judicial decisions. Because of perceived inadequacies in the common law relating specifically to contracts for the sale of goods, the Sale of Goods Act was promulgated in England in 1893 and

33 1 MILR (Rev.) at 226.
the Uniform Commercial Code was subsequently formulated in the United States. Sales law in the Northern Pacific region is generally governed by statutes patterned on the original English Sale of Goods Act in the Marshall Islands,\textsuperscript{34} or by the Uniform Commercial Code in Hawaii, Guam,\textsuperscript{35} and the Commonwealth of the Northern Mariana Islands.\textsuperscript{36} American Samoa has its own unique and abbreviated Commercial Code, which is not patterned upon either the Sale of Goods Act or the UCC. In the absence of such statutes, such as in the Federated States of Micronesia, sales law is governed by the common law of contract.

Although there has been a statutory effort to rescind Spanish, German, and Japanese law in Micronesia,\textsuperscript{37} it is still applicable and has residual effect particularly regarding contracts for the sale, lease or transfer of land.\textsuperscript{38}

Otherwise, the Northern Pacific region draws heavily upon the English

\textsuperscript{34} English Sale of Goods Act, 1893, 56 & 57 Vict., c. 71.

\textsuperscript{35} Guam adopted the UCC in its entirety on January 1, 1977 and it is cited \textit{GUAM CODE ANN.}, tit. XIII, § 10101 (2007).

\textsuperscript{36} 5 C.M.C. § 1-101 et seq.

\textsuperscript{37} 1 F.S.M.C. § 204 (1997) provides:

\begin{quote}
All laws, regulations, orders and ordinances heretofore enacted, issued, made, or promulgated by Spanish, German, or Japanese authority which are still in force in the Trust Territory are hereby repealed except as provided in section 205 of this chapter; provided, however, that nothing in this code shall change the effect of local custom which may have been included within the scope of the laws, regulations, orders, or ordinances enacted, issued, made or promulgated as aforesaid.
\end{quote}

This statute is anthropologically significant in that it expressly acknowledges that local custom and tradition may have integrated with foreign imposed law, regulations, orders or ordinances imposed by the Spanish, German or Japanese authorities that previously controlled the region.

\textsuperscript{38} 1 F.S.M.C. § 205 (1997) states

\begin{quote}
The law concerning ownership, use, inheritance, and transfer of land in effect in any part of the Trust Territory on December 1, 1941, shall remain in full force and effect to the extent that it has been or may hereafter be changed by express written enactment made under authority of the Trust Territory.
\end{quote}
and American precedent, statutes governing sales, and the common law of contract tradition; however, the region is beginning to establish its own unique identity, in part, as it is anthropologically being assimilated into local traditional or customary law.

V. COMMON LAW PRINCIPLES

A. REPUBLIC OF THE MARSHALL ISLANDS

The Supreme Court of the Marshall Islands is obliged to follow the common law in the absence of any constitutional provision, legislative act, or any custom or traditional practices of the Marshallese people to the contrary.\(^{39}\) Thus, as mandated by the rule of decision provision in the Marshall Islands Constitution, the Marshall Islands primarily rely on the Anglo-American common law tradition stated in the Restatements or as generally understood in the former Trust Territories.\(^{40}\)

The rule of decision statute mandating application of the American Law Institute’s Restatement was effective through January 1, 1989 but it was repealed by omission in the re-codification of the Marshall Islands Code in 1988. This de-emphasis of the American Law Institute’s Restatement of Laws in the Marshalls differs from the Federated States of Micronesia and the Republic of Palau, which have statutorily perpetuated the Trust Territory rule of decision statute, 1 T.T.C. § 103. The Restatement of Laws is still persuasive authority as noted in cases such as Likinbod v. Kejlat, 2 MILR 65 (1995); RepMar v. Waltz, 1 MILR (Rev.) 74, 77 (1987). See also 1 T.T.C. § 103 (1980).


\(^{40}\) Constitution of the Marshall Islands, art. XIII perpetuates 1 T.T.C. § 103 (1980) for the Former Trust Territory which incorporates American law as expressed in the American Law Institute’s Restatement or as generally understood in the former Trust Territories.
as *Likinbod and Alik v. Kejlat*, which provide that under the Constitutional framework, the common law applicable at the time the Constitution was adopted continues in effect in the absence of customary, traditional law, constitutional, or statutory provisions to the contrary. Since the *Restatements* were the common law at the time of Constitutional adoption, they are perpetuated.

Although there is a strong American common law tradition, there is also a significant English statutory and common law influence as well. For example, Marshall Islands Sale of Goods Act of 1986 is patterned identically after the English Sale of Goods Act of 1893, with just minor linguistic alterations.

Further, there appears to be some substantive law diffusion occurring in the development of contract law and its alternatives in the Marshall Islands as reflected in a recent case that applied a mix of American, Canadian, and English common law. Several factors contribute to this diffusion. First, High Court

41 2 MILR 65 (1995).

42 Captain John Marshall of England was the first European to “discover” those islands which bear his name and English influence is perpetuated today through case law and application of the Marshall Islands Sale of Goods Act of 1986. An additional source of this English influence was the direct result of a Sri Lankan being retained as legislative counsel during the formative years of the Republic. See *Balos v. Tennekone*, 1 MILR (Rev.) 137 (1989) where the parties sought a writ of prohibition barring High Court Chief Justice Tennekone from hearing a case addressing the constitutionality of a statute based upon the Ceylonese Commission of Inquiry Act that he had drafted when he was legislative counsel.


44 In Pacific International v. United States, 2 MILR 244 (2004), the Supreme Court of the Marshall Island held that the operation of military bases is a purely governmental function and sovereign in nature citing United States v. Public Service Alliance of Canada, [1992] 2 S.C.R. 50, ¶42, 91 D.L.R. (4th) 449, 1992 Carswell Nat. 1005 (Can.) (with respect to a military base in Canada leased by the United States, the Supreme Court of Canada stated, “I can think of no activity of a foreign state that is more inherently sovereign than the operation of such a base.” As such, the United States government must be granted the unfettered authority to manage and control employment activity at the base.); *Holland v. Lampen-Wolfe* [2000] 3 All E.R. 833, [2001] I.L. Pr. 49, 2000 WL 976034 (HL) (the maintenance of the base itself was plainly a sovereign activity. As Hoffman L.J. (Now Lord Hoffman) said in *Littrell v. United States* (No. 2), “this looks about as imperial an activity as could be imagined”); and *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961) (“the governmental function...here was...to manage the internal operation of an important federal military establishment. In that proprietary military capacity, the Federal Government, as has been pointed out, has traditionally exercised unfettered control.”) Consequently, the
Chief Judge Carl Ingram was legally trained in the United States while Associate High Court Judge Richard Hickson was legally trained in Australia. The lawyers practicing in the jurisdiction have also trained in varying traditions and multiple jurisdictions. Second, the Constitution of the Marshall Islands contributes to this diffusion of contract and sales law by permitting the appointment of Judges from outside the Republic of the Marshall Islands to sit as visiting Supreme Court Justices by designation of the Cabinet.45 This appointment process lends itself to a regional blend or diffusion of the development of the common law in the Marshall Islands.


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46 2 MILR 120 (1998).
48 2 MILR 244 (2004).
The *Pacific International* case is particularly interesting from a diffusion perspective in that United States judges sitting by assignment were citing Canadian and English precedent in support of the ultimate conclusion in the case while formulating the common law for the Marshall Islands.\(^4^9\)

This diffusion of the substantive law is not unique to contract law or to the Marshall Islands;\(^5^0\) one sees judges from other jurisdictions serving as visiting judges in the appellate courts of other island nations in the region. These regional cross assignments usually are a result of conflict or necessity due to the lack of available regional judicial resources.

**B. REPUBLIC OF PALAU**

Under the rule of decision statute, the Republic of Palau relies upon the Anglo-American common law of contract as set forth in the American Law

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\(^4^9\) *Id.* Although *Pacific International*, 2 MILR 244, is not a constitutional law case and contract cases in the United States in its formative days frequently cited English precedent, in several recent decisions, U.S. Supreme Court Justice Antonin Scalia has been critical of the use of foreign precedent, English precedent excepted, and abandonment of national sovereignty in the interpretation of substantive constitutional law in exchange for an “internationalist” approach being adopted by federal courts and some of his colleagues on the United States Supreme Court. *See* Justice Scalia’s dissents in *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, 536 U.S. at 347-48, Justice Scalia observed: “Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people. ‘We must never forget that it is a Constitution for the United States of America that we are expounding….’” Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.” (Quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868-69, n.4 (1988). *See also* *Lawrence v. Texas*, 539 U.S. at 598. (Scalia, J. dissenting) (“Constitutional entitlements do not spring into existence because some states chose to lessen or eliminate criminal sanctions on behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct.”)

Institute’s *Restatement (Second) of Contracts*.\(^{51}\) As observed in numerous cases,\(^{52}\) the courts of Palau are bound by statute to apply the common law of the United States in the absence of written law or local customary law to the contrary.\(^{53}\) Where local or customary law or written statute exists or conflicts, however, the Palau Constitution requires that local or customary law or statute would take precedent over American common law of contract and sales.\(^{54}\)

C. FEDERATED STATES OF MICRONESIA

Likewise, the Federated States of Micronesia is statutorily required to apply the Anglo-American common law of contract as set forth in the American Law Institutes’ *Restatement (Second) of Contracts*\(^{55}\) in the absence of any contrary statutes, decisions of the constitutional courts of Micronesia, or custom and tradition within Micronesia which would then take precedent.\(^{56}\)

Although there has been an effort to repeal Spanish, German, and Japanese laws in effect in Micronesia to the extent that they have not already been integrated into local custom,\(^{57}\) the effects of prior colonization still linger in

\(^{51}\) 1 P.N.C. § 303 (1990).
\(^{52}\) For example, see recent cases such as Winterthur Swiss v. Socio Micronesia, 8 ROP Intrm. 169 (2000); Jiangsu v. Ho, 7 ROP Intrm. 268, 272 n.5 (1998).
\(^{53}\) 1 P.N.C. § 303 (1990).
\(^{55}\) 1 F.S.M.C. § 203 (1997).
\(^{56}\) CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA, art. XI § 11 (1979). In Semens v. Continental Airlines, 2 FSM Intrm. 131 (Pon. 1985), the court looked to the intention of the parties to determine whether the contract was to be governed by customary law. In the absence of such an express intent, the court applied the common law of the United States. *See also* FSM v. Ocean Pearl, 3 FSM Intrm. 87, 90-91 (Pon. 1987) (The court indicated that the common law decisions of the United States are an appropriate source of guidance for the FSM Supreme Court for contract issues which are unresolved by statutes, decisions of constitutional courts or custom and tradition within the FSM).
\(^{57}\) 1 F.S.M.C. § 204 (1997).
that Spanish, German, and Japanese laws in effect as of December 1, 1941, which involve contracts for the ownership, sale, lease, or transfer of land currently remain in effect until statutorily modified.\textsuperscript{58}

\section*{VI. REGIONAL LEGISLATION}

In addition to the common law, contract and sales law is also governed by various pieces of regional legislation. In those instances where it exists, as outlined below, legislation governing the sale of goods supplants the common law of contract.

\subsection*{A. REPUBLIC OF MARSHALL ISLANDS}

In the Marshall Islands, the law of contract is also governed by the American Law Institute’s \textit{Restatement of Contracts}, as mandated by the former Trust Territory Code which had an effective termination date of May 1, 1979;\textsuperscript{59}

\textsuperscript{58} 1 F.S.M.C. § 205 (1997). \textit{See also} Etscheit v. Adams, 6 FSM Intrm. 365 (Pon. 1994) in which Supreme Court Justice Andon Amaraich sitting as a trial judge eloquently addresses the socio-cultural anthropological impact of Spanish, German and Japanese culture and its conflict with Micronesian culture in this complex land partition case arising out of a land purchase in 1903 at a public auction conducted by the German government who had acquired the land from Spain several years earlier. The contract and deed contained standard German primogeniture provisions. To complicate matters, the purchaser died during the period of Japanese occupation, transferring the property to his heirs. The Japanese government largely ignored these German patrilineal primogeniture provisions and allowed ownership and division of land by both men and women. These German provisions, however, are contrary to local Micronesian matrilineal custom and the court concluded that these German rules of patrilineal primogeniture should not be applied to the land in question.

\textsuperscript{59} \textit{Constitution of the Marshall Islands} art. XIII perpetuates 1 T.T.C. § 103 (1980) for the Former Trust Territory which incorporates American law as expressed in the American Law Institute’s \textit{Restatement} or as generally understood in the former Trust Territories.

The Restatement (Second) of Contracts continued as the rule of decision in the Marshall Islands until January 1, 1989 when it was repealed by omission from the 1988 re-codification. The Restatement (Second) of Contracts remains persuasive authority because the common law in effect at the time of Constitutional adoption is perpetuated under the constitutional framework as noted in Likinbod and Alik v. Kejlat.⁶⁴ In a recent conversation with High Court Chief Judge Carl Ingram,⁶⁵ he indicated that one of the reasons that 1 T.T.C. §103 was omitted from the re-codifications was that the members of the Marshall Islands judiciary did not favor mandating the Restatements as the sole source for the rules of decision, particularly because the Restatements either took minority views or adopted developing trends.⁶⁶ Deleting this limitation opened the door for the judiciary to consult other sources of authority as well.

According to regional sources, the Sale of Goods Act of 1986 for the Marshall Islands has no legislative history and was drafted by legislative counsel

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⁶⁶ On the other hand, Associate Supreme Court Justice Alexandro C. Castro of the Commonwealth of the Northern Mariana Islands recently indicated that the Restatement is preferred in the region because of its minority positions and that these minority positions are sometimes better suited for these island nations than they would be on Main Street USA. Interview with Alexandro C. Castro, Associate Supreme Court Justice, Commonwealth of the Northern Mariana Islands, Pacific Judicial Conference in Koror, Palau (Jun. 6-8, 2005).
from Sri Lanka, a former British colony.\textsuperscript{67} Although the Marshall Islands may be influenced by the American common law of contract and sales in reviewing the Sale of Goods Act of 1986, it is readily apparent that the Marshall Islands’ Sale of Goods Act of 1986 was patterned identically after the English Sale of Goods Act of 1893.\textsuperscript{68}

\section*{B. Micronesia and Palau}

In the absence of legislation comparable to the UCC or English Sale of Goods Act, the Republic of Palau and the Federated States of Micronesia are primarily common law jurisdictions as it relates to the law of contract and sales. The substantive law of contract was previously governed by the former Trust Territory Code, which has been supplanted by the adoption of national codes in each respective jurisdiction.\textsuperscript{69} As it relates to contract law, the former Trust Territory Code directed both of these jurisdictions to the American Law Institutes’ \textit{Restatement of Contracts}.

Although they have miscellaneous pieces of legislation in place, Palau and Micronesia have not enacted any legislation directly governing the sale of goods equivalent to the Sale of Goods Act utilized in the Marshall Islands; Article 2 of

\begin{footnotesize}
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\item \textsuperscript{67} Correspondence from Chief Justice Carl Ingram, High Court, Republic of the Marshall Islands, dated 10/12/04.
\item \textsuperscript{68} English Sale of Goods Act, 1893, 56 & 57 Vict., c. 71. An example of a deviation would be the deletion of English pounds in the statute of frauds provision.
\item \textsuperscript{69} 1 F.S.M.C. § 203 (1997) in Micronesia and 1 P.N.C. § 303 (1990) in Palau perpetuate 1 T.T.C. § 103 (1980) for the Former Trust Territory which incorporates American law as expressed in the American Law Institute’s Restatement or as generally understood in the former Trust Territories. Although the Federated States of Micronesia has nationally adopted 1 T.T.C. § 103 (1980) as 1 F.S.M.C. § 203 (1997), the individual States of Yap and Kosrae have effectively repealed this provision by adoption of codes that do not include this provision. In the State of Chuuk, this provision has not yet been repealed or deleted and still has some vitality as long as its application is not inconsistent with Chuuk custom or tradition or with the Chuuk Constitution or statutes.
\end{itemize}
\end{footnotesize}
the UCC applicable in the United States (including Hawaii); its territories (Guam, the Commonwealth of the Northern Mariana Islands); an abbreviated Commercial Code similar to that utilized in American Samoa; or comparable international standards promulgated by the United Nations Conference of the International Sale of Goods (CISG) or the UNIDROIT Principles of Contract Law. In the absence of such legislation, the common law of contract as set forth in the Restatement (Second) of Contracts prevails in Palau and Micronesia as long as it is not in conflict with local custom or tradition.

Title 33 of the Micronesia Code, which addresses Commercial Law, tracks the UCC provisions but reserves for future development a number of chapters which would directly govern contracts for the sale of goods including Chapter 2 for Sales and Chapter 3 for Commercial Paper. Although these particular chapters have been reserved for future development, Micronesia has adopted a portion of the UCC, which has minimal bearing upon sales or contract law. Specifically, Micronesia has adopted UCC Chapter 8, which addresses Investment Securities\(^\text{70}\) and UCC Chapter 9 governing Secured Transactions\(^\text{71}\).

The version of UCC Chapter 9 adopted by the FSM is rudimentary and truncated. This creates some irony in that Article 9 provides for security interests in goods, but there is no provision governing the sale of goods, i.e. Article 2, and there is no system for recording security interests contained in the statute so virtually all “secured interests” in goods are “secret liens” and thus unenforceable against third parties.\(^\text{72}\)

\(^{70}\) 33 F.S.M.C. §§ 801-808 (1997).

\(^{71}\) 33 F.S.M.C. §§ 901-933 (1997).

\(^{72}\) See, In re Engichy, 11 FSM Intrm. 520, 530 (Chk. 2003); UNK Whole Sale v. Robinson, 11
In addition to the common law of contract and to the extent applicable, the law of contract and sales law in Micronesia and Palau are also governed piecemeal by the Consumer Protection Act,\(^73\) the Anticompetitive Practices Act,\(^74\) or Unfair Business Practices Act,\(^75\) and the Usurious Interest Act.\(^76\) The individual States of Pohnpei in Micronesia\(^77\) and the Republic of Palau have also adopted the Statute of Frauds.\(^78\)

C. UNITED STATES TERRITORIES, COMMONWEALTHS, AND STATES

In addition to the common law, the Northern Mariana Islands, Guam, and the State of Hawaii have comparable legislation governing contract and sales law. Legislation governing contracts and sales in American Samoa is different than in the other United States Territories and commonwealths. Contract and sales law in the Commonwealth of the Northern Mariana Islands is governed by

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\(^{74}\) See generally Micronesia Anticompetitive Practices Act, 32 F.S.M.C. § 301.


\(^{76}\) See generally Palau Usurious Interest Act 11 P.N.C.A. § 301; Micronesia Usury Act, 34 F.S.M.C. § 201. A Micronesian case raising a usury defense is Richmond Whole Meat v. Kolonia Consumer Coop Ass’n, 7 FSM Intrm. 387 (Pon. 1996) in which plaintiff Richmond provided a product to defendant and defendant was supposed to pay. The dispute over a difference of $20.80 escalated to $1039.99 with compounding interest. The Plaintiff moved for summary judgment which the trial court granted in part and denied in part, indicating that the only issues for trial were the amount of the one invoice in dispute and whatever interest the Plaintiff may claim. Id. at 389-90.

\(^{77}\) The Micronesian State of Pohnpei has adopted the Statute of Frauds in Pon. S.L. No. 2L-38-80. However, Yap and Kosrae have not adopted the Statute of Frauds. Further, there is no Statute of Frauds recognized in Chuuk and has been expressly rejected as being inconsistent with Chuuk tradition and culture. Marcus v. Truk Trading Corp. 10 FSM Intrm. 387, 389 (Chk. 2001). See also Marcus v. Truk Trading, 11 FSM Intrm. 152 (Chk 2002).

\(^{78}\) See 39 P.N.C. § 501.
the Uniform Commercial Code, a Statute of Frauds, and a Consumer Protection Statute. Similarly, Guam has also adopted the Uniform Commercial Code, a Statute of Frauds, and a Consumer Protection Statute, which regulate contracts in that particular U.S. territory. The State of Hawaii also utilizes the Uniform Commercial Code and has adopted the Statute of Frauds and a Consumer Protection Act. Lastly, American Samoa has adopted a Consumer Protection Act creating a Commission to investigate consumer complaints, a Warranties Act, a Statute of Frauds, and an abbreviated version of a Commercial Code. The American Samoa Commercial Code is far different than the UCC and the Marshall Islands Sale of Goods Act, which are applicable in the region.

VII. INTERRELATIONSHIP BETWEEN REGIONAL CUSTOMARY OR TRADITIONAL RIGHTS AND CONTRACT AND SALES LAW

The interrelationship between customary law, traditional rights and contract and sales law in this region will also be explored in this text. There are a

79 57 C.M.C. § 1101.
80 2 C.M.C § 4912.
81 4 C.M.C. § 5101.
85 HAW. REV. STAT. § 490-10 (2004).
89 Id. at § 27.0701-0704.
90 Id. at § 27.1530.
91 Id. at § 27.1501.
number of leading socio-cultural anthropological texts which have engaged in cross-cultural comparative studies of legal systems but there have been very few which have focused on the Northern Pacific island region. Although the relationship between anthropology and law have been described by some as a “balanced reciprocity,”92 relationships based on customary law and traditional rights do not necessarily correspond with traditional concepts of contract law and conflict does arise. Where there is conflict, the traditional concept of contract law is either adopted in lieu of local customary or traditional law, assimilated with local custom or tradition creating a unique regional blend, or rejected.

Societies based on custom and traditions have been described as “status based” societies where rights and duties are defined by a person’s place in society rather than by agreement. As societies progress, there is also an anthropological metamorphosis or assimilation that occurs. This evolutionary process was described by Maine in Ancient Law, as “a movement from Status to Contract.”93 In The Cheyenne Way, Llewellyn and Hoebel, while discussing the

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92 JAMES M. DONOVAN & H. EDWIN ANDERSON III, ANTHROPOLOGY & LAW (Berghahn Books 2003). Adopts a theory of “balanced reciprocity.” It is defined as follows:

Balanced reciprocity means that neither discipline is independent of, parasitic upon, or subordinate to, the other. Anthropology, to realize its own vision, needs a collateral discipline of jurisprudence; law, in order to achieve its goal of justice and social order, requires the theoretical grounding and empirical conclusions of anthropology. Id. at 2.

93 HENRY SUMMER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS (Beacon Press 1963). Maine stated:

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of persons were derived from, and to some extent are still colored by, the powers and privileges ancienly residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract. Id.
necessary integration of any legal system in order to be successful and the informal pressures on and integration of the individual, observe:

The extension of the sphere and importance of observable law in the more highly developed societies is not in itself an index of social progress. It is merely an index of a greater complexity of the society and hence of the norms or imperatives to be observed, and hence, finally, of an increasing difficulty in obtaining universal adherence to such norms. Conversely, this means that the less call there is for law as law, and upon law as law (relative to the degree of complexity of a society), the more successful is that society in attaining a smooth social functioning.\(^{94}\)

Anthropologically, there is both evidence of integration and divergence in regard to contract and sales law in the Northern Pacific region. These cases will be discussed at various points in the text. To the extent that these island nations diverge due to the impact of customary or traditional law in the areas of contract formation, performance, and enforcement, this text will identify and attempt to explain the differences between the concepts of customary law and contract law.

Despite the potential for conflict and differences between concepts of traditional rights or customary law and traditional notions of contract law, the two concepts do anthropologically integrate and assimilate or, at a minimum, achieve a “balanced reciprocity,” as these societies move from status based relationships toward societies governed by contractual relationships.

A. REPUBLIC OF THE MARSHALL ISLANDS

Customary law is expressly recognized as a formal source of law in the Marshall Islands.\(^{95}\) To the extent that customary law is recognized as a formal

\(^{94}\) KARL N LLEWELLYN & E ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (University of Oklahoma Press, 1941).

source of law, it may be considered superior to the common law of contract or sales in matters of a local or traditional culture. There are a number of Marshall Islands cases in which contracts, particularly for the sale or transfer of land, have been declared void because they have violated traditional rights.96

The implication of traditional rights and customary law is more constitutionally limited in the Marshall Islands than in its neighboring Pacific Island nations. The language of the Marshall Islands Constitution specifically restricts the impact of traditional law to contracts for the sale, lease, or transfer of land. Although limited, the relationship between customary law and the law of contract and sales is still significant, especially with local construction contracts involving land development and foreign property investors. To the extent that the courts in the Marshall Islands apply custom and tradition to cases involving contract creation, interpretation, enforcement or breach of contract, local custom, and tradition is equivalent to and has the force of law.97

Where contract and sales law, and customary and traditional law intersect, two inquiries must be made in the Marshall Islands:

Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense.98

Where the contractual matter is not of a local or traditional nature, the Sale of Goods Act of 1986, the common law of contract in effect at the time of

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96 For example, see Tobeller v. David, 1 MILR (Rev.) 81 (1987); Jack v. Hisaiah and Hisaiah, 2 MILR 206 (2003).

97 See Jack, 2 MILR (Rev.) at 206; Gushi Bros. v. Kios, 2 MILR 120 (1998); Hermios v. Minister of Internal Affairs, 2 MILR 127 (1998); Tobeller, 1 MILR (Rev.) at 81.

98 Lobo v. Jejo, 1 MILR (Rev.) 224, 226 (1991); See also Zaion, et. al., v. Peter and Nenam, 1 MILR (Rev.) 228, 331 (1991).
Constitutional adoption as set forth in the *Restatement (Second) of Contracts*, or comparable international standards would apply since the rule of decision statute has been repealed through subsequent omission.

**B. Federated States of Micronesia**

Anthropologically, there are two significant cases which address the interrelationship between customary and traditional law and the law of contract and sales in Micronesia: *Semens v. Continental Airlines (I)*\(^{99}\) and *Etscheit v. Adams*.\(^{100}\)

The interrelationship between the Constitutional Judicial Guidance Clause in Article XI, § 11, the statutory requirements of 1 F.S.M.C. § 203, and contract law were initially addressed in *Semens v. Continental Air Lines, Inc. (I)*\(^{101}\) which established the framework for all cases which have followed. The *Semens* court indicated that where traditional or customary law conflicts with the rule of judicial decision statute requiring the Micronesian courts to apply the American Law Institute’s *Restatement of Laws*, including the *Restatement (Second) of Contracts*,\(^{102}\) the Constitution mandates that traditional law and customary rights are both superior sources of law.\(^{103}\)

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\(^{101}\) *Semens*, 2 FSM Intrm. 131. *See also* FSM v. Ocean Pearl, 3 FSM Intrm. 87, 90-91 (Pon. 1987) (Common law decisions of the United States are an appropriate source of guidance for the FSM Supreme Court for contract issues unresolved by statutes, decisions of constitutional courts, or custom and tradition within the FSM. Like *Semens*, the *Ocean Pearl* court concluded that the activity involved was not the kind that historically would fall within the principles of custom and tradition. *Id.* at 91.)

\(^{102}\) 1 F.S.M.C. § 203 (1980).

The *Semens* case arose out of a personal injury accident, which occurred at the airport in Pohnpei in which the Plaintiff claimed personal injury damages were incurred while working for a subcontractor unloading cargo from a Continental Airlines plane.

In establishing a hierarchy of law, the *Semens* court initially observed that the Constitution was the supreme law of the land. According to the court, the next source of law in the hierarchy was not the common law of contracts, but traditional or customary law. The Court emphasized that before going (as required by the rule of decision statute) to the common law decisions from the United States, which would be authoritative for the Supreme Court regarding tort and contract issues, the court must determine that the issues are not to be resolved by: 1) local custom or tradition within Micronesia, 2) by statutes, or 3) by prior decisions of the Micronesian constitutional courts.\(^\text{104}\)

The court indicated:

> Common law decisions of the United States are an appropriate source of guidance for this court for contract and tort issues unresolved by statutes, decisions of constitutional courts here, or custom and tradition within the FSM. Review of decisions of courts of the U.S. or any other jurisdictions, must proceed however against background of pertinent aspects of Micronesian society and culture.\(^\text{105}\)

The *Semens* court noted that even where the parties have not asserted that any principle of custom or tradition applies, the court still has a constitutional

\(^{104}\) *Semens*, 2 FSM Intrm. at 140. *See also* FSM v. Ocean Pearl, 3 FSM Intrm. 87, 90-91 (Pon. 1987).

\(^{105}\) *Semens*, 2 FSM Intrm. at 140. *See also* Black Micro v. Santos 7 FSM Intrm. 311 (Pon. 1995), which was a collection case in which the FSM court found that the U.S. common law rule regarding the assignment of debts is appropriate source of guidance and appropriate for application in the FSM and in this case when assessed against a background of pertinent aspects of Micronesian society and culture for issues unresolved by statutes, decisions of the FSM constitutional courts, or by FSM custom or tradition. *Id.* at 314-15.
duty or obligation to consider custom and tradition *sua sponte*. Although the court has a duty to inquire, the *Semens* court indicated that the level of traditional or customary law inquiry is reduced if the business activity is not local or traditional in nature and the place of employment itself is markedly non-local or international in character.

Under the facts and circumstances of that particular case, the *Semens* court stated that the court did not need to conduct an intense search for applicable custom or traditional rules if none had been asserted by the parties. However, if the activity is local or traditional in nature, the *Semens* court indicated that customary law and traditional rights are so significant in the decision making process that a court must raise the issue on its own initiative, even if it has not been raised by those involved in the litigation.

Lastly, the court observed that the Judicial Guidance Clause requires the imposition of a “reasonably intelligent Micronesian” standard as opposed to a more objective standard or legal principle utilized in the international business community. The legal standard crafted by the *Semens* court superficially appears to favor Micronesians over others similarly situated in the international business community. The *Semens* court noted:

> A message of the Judicial Guidance Clause is that a court, when interpreting a contract, may not simply assume that reasonably intelligent Micronesians will perceive the same meaning as would reasonably intelligent Americans…. Courts may not blind themselves to pertinent aspects of Micronesian society, such as less facility in the English language, less exposure to business concepts, and the paucity of legal resources, which might cause a reasonably intelligent

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106 *Semens*, 2 FSM Intrm. at 140.
107 *Id.*  See also *FSM v. Ocean Pearl*, 3 FSM Intrm. 87, 91 (Pon. 1987).
108 *Id.*
109 *Id.*
110 1 F.S.M.C. § 203.
Micronesian to perceive a meaning differently than would a person from some other nation.111

The Semens case established the framework in which to resolve a conflict between the Constitution, the statute requiring imposition of the common law of contract in the United States and traditional rights, which have been cited numerous times in other Micronesian cases. However, because the activity involved in Semen’s was not traditional or local in nature, the court was able to circumvent such a conflict.

The court was not able to avoid conflict between the substantive law and local customary or traditional law in Etscheit v Adams,112 which is a second case of significant anthropological import. The trial court decision in Etscheit addresses a number of contract issues such as conditions precedent, unjust enrichment and implied contracts, but here, it is noteworthy to discuss the case for its anthropological value.

The Etscheit case is anthropologically significant because conflict arises between the German rule of primogeniture and local customary law. Primogeniture requires property to pass to the first-born son, despite writings or wills indicating otherwise. The controversy explored how the German rule of primogeniture was subsequently treated by the Japanese and Americans, and tested the power of local customary or traditional law surfaced by a 1903 land purchase.

This case is a time capsule of Micronesian history over the last 100 years. The Etscheit case highlights the anthropological and substantive law issues,

111 Semens, 2 FSM Intrm. at 149.
which span the German, Japanese, and American occupations of Micronesia. The *Etscheit* court was required to address these issues as they relate to each period of occupation. This case is a microcosm that synthesizes some of the historical impact of colonial influences of the German, Japanese, and American occupations in the region. Ultimately, the court concludes, that local or customary law, which is superior under the constitution, is inconsistent with the German rule of primogeniture.

Dominique Etscheit purchased land in Pohnpei from the German Government at a public auction in 1903. The deed did not contain any limitations on alienation. In 1911, the German Government implemented land reforms over a three-year period in which all deeds from the German Government contained a primogeniture provision restricting transfer of property to the first-born son, which was consistent with German law at the time. These land reforms ended in 1914 when the Japanese took control of the islands. In 1919, the Japanese Government, which then controlled the islands, seized the Etscheit property in a forced sale. Dominique died in 1925 leaving a will naming his wife, Florentine, as his sole heir and indicated that she could freely dispose of the estate, but that when Florentine died all of her land still in existence and was to be distributed among his five children, with one son receiving a double share because he was blind.

In 1927, two years after Dominique died, the Japanese Government returned the property it had seized in the forced sale to the bereaved family of Dominic Etscheit on behalf of “Flore Etscheit.” During World War II, the land was again confiscated by the Japanese only to be once again returned in 1957 by the Trust Territory Government to Florentine Etscheit.
In 1956, before the land had been officially returned in 1957 by the Trust Territory, Florentine quit claimed the property to her five children without specifying portions. Florentine died in 1973 leaving no will. Ultimately, there was a dispute among the surviving heirs as to their rights to the property.

Plaintiffs in *Etscheit* sought summary judgment based upon the German law of primogeniture contained in all German deeds, citing examples of Japanese enforcement of the 1911 German deed restrictions and case law from the Trust Territory, which enforced the German rule of primogeniture. The defendants sought summary judgment dismissing this claim. They argued that the German rule of primogeniture was not applicable to the Etscheit land because such a restriction was not expressly contained in the 1903 deed for the property.

Citing and employing the framework established in *Semens v. Continental Airlines*, the *Etscheit* court reviewed in length the rules of primogeniture imposed in German deeds. Next, the court reviewed Japanese and American treatment (or lack of treatment) of the German deed restrictions limiting transfer of land to the eldest son despite contrary terms in contract or in one’s will. The *Etscheit* court noted that after the formal recognition of Japan’s mandate in 1920, the Japanese disregarded the German Land Title Code almost totally. It was found that the Japanese even recognized the rights of females to hold title to land, which was a significant cultural divergence from the German rule of primogeniture and did not adhere to the inheritance patterns recognized by the Germans.

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113 *Id.* at 373-81.
114 *Id.* at 376-77.
The court noted that when applied by the Japanese and Americans, the German rule of primogeniture was limited only to those instances where the rule was expressly included in the deed. After its lengthy review of the inconsistent application of rule of patrilineal primogeniture under German, Japanese, and American occupations, the *Etscheit* trial court concluded that the German rule of primogeniture was inconsistent the with customary Pohnpeian title system which permitted women to own land and was primarily matrilineal.\(^{115}\)

An interesting aspect of the *Etscheit* decision was the court’s reliance upon anthropological research in reaching its decision in this case. Citing District Anthropologist John Fischer’s reports, the *Etscheit* court observed that there was difficulty with anthropological assimilation of the German rule of primogeniture:

The German rule of primogeniture appears to be inconsistent with the customary Pohnpeian title system, which not only permitted women to own land, but which was according to Fischer, ‘primarily matrilineal….’ Fischer notes: ‘[Primogeniture] appears to have been chosen on some purely theoretical basis without much study of the social system of the Ponapeans. According to the older Ponapeans the inheritance provisions caused much contention while the society was adjusting to them….’ Given this, the primogeniture provisions on the standard form German deeds should be given narrow application under the FSM Constitution Article XI, Section 11, which states that decisions of this Court should be consistent with local custom. Certainly, this Court will not apply the primogeniture restrictions more broadly than the Germans, Japanese, and Trust Territory governments did.\(^{116}\)

The *Etscheit* court also expressed cultural concerns that the rule of primogeniture was discriminatory; it allowed only men to inherit and discriminated against younger male offspring by allowing only the eldest to inherit. The court observed that the rule of primogeniture was also inconsistent

\(^{115}\) *Id.* at 381. In reaching this conclusion, the *Adams* trial court referred to two studies written by John L. Fischer who was District Anthropologist for Pohnpei during the Trust Territory period. *Id.* The Trust Territory government published one version of Fischer’s *LAND TENURE PATTERNS: TRUST TERRITORY OF THE PACIFIC ISLANDS* in 1951 and a second version in 1958, which are virtually identical. *Id.* at 394 note 7, note 8.

\(^{116}\) *Id.*
with principles of fairness evident in the FSM and the FSM Equal Protection Clause.117 For these reasons, the Etscheit trial court denied the Plaintiffs’ motion for summary judgment on the issue of primogeniture and granted summary judgment to defendants on the issue.118

Another significant anthropological issue of Etscheit involved a counter-claim based upon the substantive property law concept of adverse possession.119 Plaintiffs sought to dismiss Defendant’s claim to the land at issue under a theory of adverse possession. Although adverse possession was recognized under the former American Trust Territory, plaintiffs argued that adverse possession is not fully recognized in Pohnpei. Furthermore, plaintiffs argued that adverse possession should not be applied because of varying rules of land ownership that existed during the various colonial administrations, and because it was contrary to Pohnpeian customs that encouraged landowners to allow others to work on their land.120 Although the trial court did not set aside the prior Trust Territory cases, particularly in a case where the defendants did not factually meet the 20-year requirement for adverse possession, the Etscheit court did express cultural reluctance to adopt the foreign concept of adverse possession especially when involving family. The court noted:

However, the Court believes that, to the contrary, the defendants’ rule is the inequitable one. Under the defendants’ rule landowners who, in keeping with Pohnpeian custom, see Pohnpei Public Lands Bd. Of Trustees v. Yeneres, PCA No. 31-90, Order (Pon. Sup. Ct. March 3, 1992), did not object to others making use of their land for living or farming could be penalized by having their land taken

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117 Id at 381. MICR. CONST., art. IV, § 4.
118 Etscheit, 6 FSM Intrm. at 382.
119 Id. at 389-90.
from them, even if during most of the period there was no way of knowing that such generosity could be used against them.\textsuperscript{121}

The \textit{Etscheit} case is an example of the implementation of the constitutional framework created by \textit{Semens} to resolve the conflict between foreign legal concepts and local custom and traditional rights. \textit{Etscheit} differs from the \textit{Semens} case in that traditional rights and local custom apply and ultimately prevail over foreign legal concepts.

\section*{C. \textsc{Republic of Palau}}

In Palau, Article V, § 2 of the Palau Constitution recognizes the existence of traditional rights or customary law, and emphasizes that customary law may, in some circumstances, be superior to statute.\textsuperscript{122} Where traditional or customary law conflict with the rule of judicial decision statute that requires the Palau courts to apply the \textit{Restatement (Second) of Contracts},\textsuperscript{123} the Constitution mandates that traditional law and customary rights are superior. It states:

\begin{quote}
Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law.\textsuperscript{124}
\end{quote}

The difficulty in application of this “equally authoritative” standard is that it establishes the potential for deadlock when assessing priority between statute and traditional law. However, the second sentence of Article V clearly delineates that traditional law is superior to statutory law in the event of conflict. Consequently, where traditional rights conflict with a statute mandating

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\textsuperscript{121} \textit{Id.} at 390.
\textsuperscript{122} \textsc{Constitution of the Republic of Palau}, art. V, § 2 (1979).
\textsuperscript{123} 1 P.N.C. § 303.
\textsuperscript{124} \textsc{Constitution of the Republic of Palau}, art. V, § 2.
\end{flushright}
application of the Restatement (Second) of Contracts, traditional law prevails under the Constitution.

VIII. INTERNATIONAL CONTRACT STANDARDS AND MODEL LEGISLATION

There have been a number of efforts to unify contract law, particularly with respect to the sale of goods on a national and international level with the adoption of such standards as the English Sale of Goods Act, the Uniform Commercial Code, the Revised Uniform Commercial Code, the United Nations Sales Convention and the UNCITRAL Model for E-Commerce, and the UNIDROIT Principles of Contract Law. These model rules are intended to unify law governing commercial transaction and to expedite commercial practice. The rules do not replace common law rules of contract law or equity or those principles recognized under custom or traditional rights.

This text will also examine significant provisions in the United Nations Sales Convention (CISG) and UNCITRAL Model for E-Commerce because Micronesia and the Republics of the Marshall Islands and Palau are members of the United Nations even though they have not yet adopted this Model Law or ratified this Convention to date. Because these nations are member nations and the potential for future adoption exists, these model laws will be reviewed in this text and compared to existing regional contract and sales law. An additional reason for CISG inclusion is that the United States Pacific territories, state, and

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125 The historical background contained in the following section is a summary of a more extensive treatment which can be found in numerous sources including MURPHY, SPEIDEL & AYERS, STUDIES IN CONTRACT LAW, 6th ed. (Foundation Press 2003); CALAMARI & PERILLO, CALAMARI AND PERILLO ON CONTRACTS, 5th ed. (West 2003); FARNSWORTH, YOUNG & SANGER, CONTRACTS CASES AND MATERIALS, 6th ed. University Casebook Series, (Foundation Press 2001); and in E. ALLEN FARNSWORTH & WILLIAM YOUNG, SELECTIONS FOR CONTRACTS, (Foundation Press 2003). As an aside, Professor Farnsworth was a Reporter for the RESTATEMENT (SECOND) OF CONTRACTS.
other regional trade partners have adopted the UN Sales Convention governing international contracts for the sale of goods between member nations.

Because these Northern Pacific jurisdictions heavily rely upon the common law of contract and sales from the United States (and the common law of the United States is influenced or codified by the Uniform Commercial Code, the Revised Uniform Commercial Code, and the Restatement (Second) of Contracts) this text will also address and include those rules to the extent they influence regional contract and sales law in the Northern Pacific. Additionally, for purposes of obtaining a better understanding of the interrelationship of these international standards to the common law of contracts and contract and sales law of the Northern Pacific region, a brief historical background for each of these international standards, model rules or legislation is provided.

A. UNIFORM COMMERCIAL CODE

Efforts to develop the Uniform Commercial Code began in the United States shortly after England adopted its Sale of Goods Act governing the law of sales in 1893. The adoption of this act in England was soon followed by adoption of the act in the colonies and territories which were part of the British Empire at the time including those islands in the Pacific region.

In the United States, the National Conference of Commissioners for Uniform State Laws responded to the promulgation of the English Sale of Goods Act by assigning the task of producing a comparable statute to Professor Samuel Williston. The result of Professor Williston’s efforts was the Uniform Sales Act which was produced in 1906 and ultimately adopted by thirty states. Professor

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Williston also served as the Reporter for the first *Restatement of Contracts*, which was later published in 1932.

Both the English Sale of Goods Act and the Uniform Sales Act were good first efforts but deficient because they failed to adequately address problems arising out of the sale of goods where the common law still controlled. Over the next fifty years, a number of additional attempts were made to revise, amend or replace the Uniform Sales Act in the United States. In 1945, the American Law Institute ultimately combined its efforts with the National Conference of Commissioners for Uniform State Laws to draft the Uniform Commercial Code (UCC), which was ultimately completed in 1952.

Professor Karl Llewellyn was Chief Reporter of the UCC, and was assisted in this task by Soia Mentschikoff as Associate Chief Reporter. Pennsylvania was the first state to adopt the UCC in April 1953 with an effective date of July 1, 1953. By 1961, thirteen states had adopted the 1958 version of the UCC.

In 1961, a Permanent Editorial Board was established which adopted further revisions into the 1962 Official Text of the UCC. Except for Louisiana and the District of Columbia, this version has ultimately been adopted by all states in the United States including the State of Hawaii. In the Northern Pacific region, Guam and the Commonwealth of the Northern Mariana Islands have also adopted identical versions of the Uniform Commercial Code. For simplicity

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127 For example, a Federal Sales Act was proposed in Congress in 1940 but the National Conference of Commissioners on Uniform State Laws successfully lobbied for its postponement.

128 Hawaii adopted the U.C.C. effective January 1, 1967 and Hawaii’s version can be found at HAW. REV. STAT. §§ 490-10.


130 The Uniform Commercial Code adopted by the Mariana Islands can be found at 5 C.M.C. § 1101.
sake, this text will cite the general UCC provision instead of each individual state or territory’s statutory number.

The Federated States of Micronesia has statutorily adopted only a part of the UCC applicable in the United States and its territories (except American Samoa). Specifically, Micronesia has adopted a rudimentary and truncated version of UCC Article 9 applicable to Secured Transactions, Sales of Accounts and Chattel Paper, that does not provide a vehicle for recording those security interests and has reserved those sections which would have been equivalent to Article 2 addressing Sales.131 Palau has not adopted the UCC or its equivalent. In lieu of the UCC, the Republic of the Marshall Islands has adopted the Sale of Goods Act of 1986 which is virtually identical to the English Sale of Goods Act of 1893.132 Lastly, American Samoa has its own abbreviated Commercial Code, which is unlike any other in the region.

The UCC continues to be revised, most recently in 2003 when revisions to Articles 1 and 2 were approved. The 2003 revisions to Article 1 and Article 2 make three primary changes: (1) the adoption of gender neutral language to replace the pronoun “he” which was prevalent in prior versions, (2) replacement of the word “writing” with the term “record” in order to reflect the development and accommodate e-commerce, and (3) adoption of several enhanced consumer protection provisions. Although Hawaii, Guam, and the Commonwealth of Northern Mariana Islands have adopted the UCC they have not yet adopted the most recent 2003 revisions.

131 See generally 33 F.S.M.C. § 901.
The primary objective of the UCC in the United States is to complement the common law. It provides a statutory text, which includes many of the rules relating to the sale of goods omitted by the Sale of Goods Act and Uniform Sales Act, which had been left largely to the common law. Where it has been legislatively adopted, the UCC has generally supplanted the common law of contract and sales and has the force of law in those states in the United States, including Hawaii and territories such as Guam and the Northern Mariana Islands, which have adopted it statutorily.

B. UN SALES CONVENTION

The United Nations Sales Convention for the Sale of International Goods of 1980 (CISG) is the international equivalent of the UCC and governs contracts for the international sale of goods between entities or individuals of member nations that are signatories. Under CISG, the parties have freedom to negotiate, exclude, or vary from its provisions. In addition to recognizing freedom to negotiate and contract, CISG, more importantly, does not displace rules of national common law or statute that relate to “the validity of the contract or of any of its provisions or of any usages.” For example, the UCC would still

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134 See CISG, supra note 133, art. 6.

135 CISG, supra note 133, art. 4(a).
apply to internal contractual disputes involving the sale of goods where applicable.

Work on CISG began as early as the 1930’s when the Institute for the Unification of Private Law in Rome, under direction of the League of Nations, began work on a uniform law for international sales. This work was disrupted by World War II. After the war, the Dutch Government continued the earlier efforts at drafting international standards governing sales contracts and convened a conference at The Hague in 1964. The end product of this 1964 conference was the approval of a Uniform Law on the International Sale of Goods (ULIS) and a companion uniform law on the formation of international contracts for the sale of goods. Although not adopted by the United States, ULIS was adopted by eight nations giving it effect in international transactions between entities or individuals of those ratifying countries.

During the ratification process of ULIS, the United Nations renewed the prior efforts of the League of Nations and the Institute for the Unification of Private Law, which had been interrupted by World War II, creating a United Nations Commission on International Trade Law (UNCITRAL) in 1966. Because of some concerns that member nations like the United States had with certain provisions of ULIS, the intent of UNCITRAL, which is comprised of representatives from thirty-six member nations, was to reconcile and unify international contract and sales law while eliminating any legal barriers to the free flow of trade among member nations. In an effort to accomplish this
objective, UNCITRAL has subsequently convened a number of conventions and also drafted several model laws.\textsuperscript{136}

The UNCITRAL Working Group on Sales was created in 1969 to consider making changes to ULIS, in an attempt to make it more acceptable to various civil and common law countries. Over the next 11 years, the Working Group formulated a draft that was ultimately presented at a diplomatic conference in Vienna in 1980. After lengthy negotiation, the sixty-two countries participating in the convention adopted CISG. CISG took effect on January 1, 1988 when signed by 10 member nations.\textsuperscript{137} The intent of the CISG Convention was to establish “a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract.”\textsuperscript{138}

On October 9, 1986, the United States Senate ratified CISG upon the request of the President. Since January 1, 1998, American exporters and importers dealing with trade partners from other signatory member nations have been subject to terms of CISG.


\textsuperscript{137} See http://www.uncitral.org/english/texts/sales/salesindex.htm.

\textsuperscript{138} See Id.
As of April 2004, approximately sixty-three member nations have ratified CISG including China, Australia, New Zealand, and the United States, which are all major trade export and import partners in the Northern Pacific region. However, Japan, which is also one of the major trade export and import partners in the region, has yet to ratify the CISG. Additionally, the Republic of the Marshall Islands, the Federated States of Micronesia, the Republic of Palau, the United Kingdom and many other member nations also have not yet ratified CISG. At a recent conference in Majuro, RMI, Chief Justice Yosiwo George of the Kosrae State Court (who served as United Nations Ambassador for the FSM from 1992 to 1995) noted that many of the countries that ratified CISG did so before the FSM, the Republic of Palau, and the Republic of the Marshall Islands became member nations in the early to mid 1990’s, and that the failure of these island nations to adopt CISG can be attributed to benign neglect. The possibility of future adoption of CISG for enhanced international trade practice is certainly noteworthy.

C. UNCITRAL MODEL FOR E-COMMERCE

In addition to CISG, UNCITRAL has published a number of Model Laws to facilitate international trade including the Model Law on Electronic

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139 As of December 2009, the list of CISG ratifying countries: Argentina, Australia, Austria, Belarus, Belgium, Bosnia/Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Columbia, Croatia, Cuba, Czechoslovakia, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Mongolia, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Republic of Moldova, Romania, Russian Federation, St. Vincent and the Grenadines, Serbia/Montenegro, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Venezuela, and Zambia. For information on ratification, accession, approval, acceptance, succession, and entry into force dates, see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

140 Pacific Islands Legal Institute, Majuro, Marshall Islands, February 7-11, 2005.
As the use of e-commerce expands, UNCITRAL advocated for the establishment of procedural rules and regulations which may be promulgated by the adopting country or state. As internet use and e-commerce expands in the Pacific Island region, these model laws may be increasingly beneficial to the region due to its geographic isolation and would potentially facilitate and promote commerce.

Further, a number of trade partners of the Northern Pacific region have adopted legislation implementing the Model Law on Electronic Commerce including Australia in 1999, the Philippines in 2000, and New Zealand in 2002. Many individual states, provinces, bailiwicks, and territories have also adopted legislation equivalent to the Model Law on Electronic Commerce.142
The Model Code is divided into two parts. The first part addresses issues of e-commerce generally. The second part is intended to address specific areas of e-commerce but currently only addresses carriage of goods and transport documents.

The intent of the Model Law is:

[T]o facilitate the use of modern means of communication and storage of information, such as electronic data interchange (EDI), electronic mail and telecopy, with or without the use of such support as the Internet. It is based on the establishment of a functional equivalent for paper-based concepts such as ‘writing’, ‘signature’, and ‘original’. By providing standards by which the legal value of electronic messages can be assessed, the Model Law should play a significant role in enhancing the use of paperless communication. In addition to general norms, the Model Law also contains rules for electronic commerce in specific areas, such as carriage of goods. With a view to assisting executive branches of Governments, legislative bodies, and courts in enacting and interpreting the Model Law, the Commission has produced a Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce.143

Although the Marshall Islands,144 the Federated States of Micronesia,145 and Palau146 are member nations of the United Nations, there has been no effort to adopt either CISG or the Model Law on Electronic Commerce in the region. The Model Law for E-Commerce may be a significant economic development tool and of future interest to member island nations such as Micronesia, the Marshall Islands, and Palau. As internet use increases in the region, the geographic realities of isolation, and the full effects of e-commerce begin to have an impact in these countries. There will be either pressure to adopt the Model Code legislatively or, alternatively, the judiciary will be forced to take an ad hoc

common law approach in a case by case analysis basis to address the substantive issues addressed by the Model Code. In that event, the Model Code may still be effective in serving as a reference tool for conflict resolution.

In 2001, the United Nations also adopted a resolution promoting the adoption of the Model Law on Electronic Signatures\textsuperscript{147} which is intended to supplement Article 7 of the Model Law on E-Commerce by establishing a presumption that electronic signatures shall be treated the same as handwritten signatures if they meet certain criteria of technical reliability.\textsuperscript{148} In response to such efforts as the UNCITRAL Model Rules, the Revised Uniform Commercial Code, which is widely utilized in the United States, has taken similar steps to facilitate e-commerce by modifying original provisions by changing the “writing” requirement to a “record” requirement and by adding new provisions that particularly address the sale of goods through e-commerce.\textsuperscript{149} As noted previously, a number of states in the United States, however, have legislatively adopted the equivalent to the Model Rules for E-Commerce and the necessity of adopting the Revised UCC has been minimized and would be potentially redundant at this point.


\textsuperscript{149} For example, Revised U.C.C. § 1-201(31) defines “Record” as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. The authors of the Revised UCC also add additional provisions after U.C.C. § 2-313. These new U.C.C. provisions are entitled: U.C.C. § 2-313A “Obligation to Remote Purchaser created by Record Packaged with or Accompanying Goods” and U.C.C. § 2-313B “Obligation to Remote Purchaser created by Communication to the Public.” These new provision are intended to extend seller’s warranty to “records” sent through e-commerce. See also UNCITRAL Model for E-Commerce, art. 6, § 1 which provides: “Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.”
D. RESTATEMENT (SECOND) OF CONTRACTS

The first Restatement of Contracts was published in 1932 by the American Law Institute, which was formed in 1923. Professor Williston, author of the earlier Uniform Sales Act, was the Reporter responsible for preparing the drafts. A few decades later, in 1962, the American Law Institute began its efforts in preparation of a Restatement (Second) of Contracts. The Reporters for the Restatement (Second) of Contracts were Professor Robert Braucher and Professor E. Allen Farnsworth, who completed the task in 1980. The Restatements are intended to set forth black letter rules or general principles of contract law with supporting authority, comments, or examples. The Restatements generally do not have the force of statute or law and serve as “common law ‘persuasive authority’ with a high degree of persuasion.”

Although utilized predominantly as persuasive authority in the United States and its territories, the Republics of Palau, the Marshall Islands (until January 1, 1989), and the Federated States of Micronesia have elevated its status. These islands are required by statutory rules of decision to employ the Restatement (Second) of Contracts, when applicable, as persuasive authority in case law.

An exception is the Virgin Islands Code which provides that “The rules of the common law, as expressed in the restatements of law approved by the American Law Institute . . . shall be the rules of decision . . . in cases to which they apply, in absence of local laws to the contrary.” V.I. CODE ANN. tit. 1, § 4.

JUDGE HERBERT GOODRICH, RESTATEMENT AND CODIFICATION, David D. Field Centenary Essays 241, 244-45 (1949). See also, Brewer v. Erwin, 600 P.2d 398, 410 n.12 (Or. 1979) (a recent Oregon Supreme Court case distinguishing between Restatement and statutory authority).

There are numerous cases from the Northern Pacific jurisdictions, which this text will include and will specifically cite and rely upon particular provisions of the Restatement (Second) of Contracts (1979). The text will include those significant cases and provisions of the Restatement (Second) of Contracts (1979). In a recent conversation, Associate Chief Justice Alexandro Castro indicated that the Restatement and its minority or developing trends are
There is some irony in the fact that the legal realists and anthropologists like Llewellyn (who drafted the *Restatements*) were concerned with local practice. However, the rule of decision statutes requiring application of the *Restatements* in Palau, Micronesia, and formerly in the Marshall Islands, is mandated and appears to supplant local practice. To the extent that they do not conflict with local custom or tradition, the rule of decision statutes appease concerns of the legal realists and anthropologists; however, one wonders whether this is what the legal realists envisioned when drafting the *Restatements*.

The statutory adoption of the Uniform Commercial Code and the promulgation of state and federal consumer protection acts in the United States arguably supplant and minimize the necessity of the *Restatements*, the *Restatement (Second) of Contracts*, and the common law of contract. However, there are many who argue that the *Restatements* and the common law continue to have independent significance.\(^{153}\) This is particularly true since many contracts are non-goods contracts, such as contracts for personal services and construction contracts, where the *Restatement* would continue to play a critical role in determining formation, interpretation, and enforcement.

E. UNIDROIT PRINCIPLES OF CONTRACT LAW

Based in Rome, the International Institute for the Unification of Private Law (UNIDROIT) was founded in 1926 under charter of the League of Nations. It began work on drafting international standards governing sales, but was interrupted by World War II. UNIDROIT began work on the Principles of International Commercial Contracts in 1971 and these Principles were ultimately published in 1994.\(^{154}\)

The UNIDROIT Principles draw from many sources of contract and sales law including CISG, the UCC, the Restatement (Second) of Contracts, and generally recognized principles of civil law and common law systems. The relationship between the UNIDROIT Principles of Contract Law and CISG is similar to the relationship between the UCC and the Restatement (Second) of Contracts. The UNIDROIT Principles are comparable, in effect, to the Restatement (Second) of Contracts because they serve as persuasive authority.\(^{155}\) The UNIDROIT Principles of International Commercial Contracts are intended to serve as a corresponding or supplemental document to the United Nations Sales Convention (CISG) but do not have the force of law.\(^{156}\)

The UNIDROIT Principles parallel CISG in many respects, but are broader in scope than CISG in the areas of pre-contractual liability, excuse for

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\(^{154}\) For a general discussion of the development of the UNIDROIT Principles, see FARNSWORTH & YOUNG, SELECTIONS FOR CONTRACTS, (Foundation Press 2003); E. ALLAN FARNsworth, FARNsworth ON CONTRACTS, Section 1.8a (2d ed. 1998); and BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (3d ed. 1997).

\(^{155}\) Except in those jurisdictions like Palau and the FSM where the Restatements have been statutorily elevated to rules of decision.

nonperformance based on hardship, specific performance, and liquidated or stipulated damages. The UNIDROIT Principles also differ from CISG in that the UNIDROIT Principles recognize concepts such as freedom of contract,\textsuperscript{157} enforcement or observation of contract,\textsuperscript{158} fairness,\textsuperscript{159} and good faith.\textsuperscript{160}

The UNIDROIT Principles are not only broader in scope than CISG, but also in application of CISG, which is narrowly limited to the international sale of goods. While CISG is limited to the international sale of goods, the UNIDROIT Principles are more relevant in resolving disputes arising under international service or other international contracts.

CONCLUSION

Two important developments have been noted in this text: 1) the American Law Institute’s Restatement of Law has been elevated from persuasive authority to a statutory rule of decision in some of these Pacific island nations, and 2) the anthropological implications of local custom and traditional rights on substantive contract and sales law have resulted in a unique regional amalgam. Still, contract and sales law in the Northern Pacific region has yet to develop its own identity and is in a state of transition as these societies move from status based relationships to relationships based on contract. Anthropologically, the region is a mix of assimilation and conflict, which creates a unique amalgam of contract and sales law.

As Llewellyn and Hoebel have observed:

\textsuperscript{158} UNIDROIT Principles Art. 6.2.1.
\textsuperscript{159} UNIDROIT Principles Art. 3.10 and 2.20.
\textsuperscript{160} UNIDROIT Principles Article 1.7.
Insofar as the system is an integrated part of the web of social norms developed within a society’s culture (with due exception for imposition by some organized minority force) it will be accepted as a parcel of habit-conduct patterns in the social heritage of the people. 161

As noted by Donovan and Anderson, the “[I]law, in order to achieve its goal of justice and social order, requires the theoretical grounding and empirical conclusions of anthropology.” 162

In the Northern Pacific Region, contractual based relationships are interpreted and enforced by foreign, externally imposed international standards. These standards are, for the most part, applied by foreign born or foreign trained judges applying international standards of contract and sales law, such as the Restatement (Second) of Contracts and the Anglo-American common law tradition of contract and sales law.

It appears from judicial decisions that these foreign standards are consistent with or have begun to successfully integrate into the web of social norms developed within the Northern Pacific culture and are blending into the social heritage of the people.

Ultimately, the Northern Pacific region appears to be trending toward cultural assimilation of Anglo-American concepts of contract and sales law. Hawaii, Guam, and the Commonwealth of the Northern Mariana Islands have (to the greatest extent) anthropologically assimilated Anglo-American concepts of contract and sales law and have supplanted the common law of contracts with the adoption of the Uniform Commercial Code governing contracts for the sale of goods. American Samoa, the southern most and only territory of the United States below the equator, has an abbreviated commercial code, applies case law

161 LLEWELLYN & HOEBEL, supra note 94, at 239.
162 DONOVAN & ANDERSON, ANTHROPOLOGY & LAW, supra note 92, at 2.
from the United States in contract and sales disputes, but clings to vestiges of local traditional rights or customary law. Because the United States is a signatory to the UN Sales Convention, international contractual disputes between commercial entities in these American states, territories, and commercial entities in other UN member nations are governed under the terms of the UN Sales Convention if the commercial entities are in member nations who are also signatories. Conversely, the Marshall Islands have statutorily omitted the American Law Institute’s *Restatement (Second) of Contracts* from their rule of decision statutes. Micronesia has adopted Article 9 of the UCC but has reserved Article 2 in the Uniform Commercial Code. Consequently, contractual disputes in Micronesia, particularly those involving the sale of goods, are governed by the *Restatement* and the common law. Contractual disputes in the Marshall Islands would be governed by the common law and the English Sale of Goods Act, which was adopted by the Marshall Islands in 1986.

Traditional rights or custom and tradition remain a significant factor in assessing issues arising in contract formation, interpretation, enforcement, and breach in the Marshall Islands, Micronesia, Palau, and in the American territories and protectorates. In many cases, judges of the Northern Pacific region unwittingly integrate traditional and customary law and contract and sales law giving it a unique local character.

In these island nations, socio-cultural relationships are still governed primarily by customary and traditional law, but it is clear that these relationships are being influenced by foreign concepts of traditional contract and sales law. As these countries transition from a society based on tradition to one based on contract, they have retained the right to apply traditional rights or customary
law. Under their constitutions or rule of decision statutes, traditional rights and customary law are superior to the common law of contract and sales in the event of conflict. However, these island nations recognize the value of anthropological assimilation despite language in some cases that they will not “slavishly” follow Anglo-American precedent. As it relates to contract and sales law, these island nations are at the same time making significant efforts, as noted in the Semens decision, to adopt or assimilate the rule of law recognizing uniform international contract and sales standards facilitating trade and commerce to attract international investments. As blatantly stated by the FSM court in Semens, there are several significant reasons for this anthropological assimilation:

‘Common law’ is a label identifying a widespread historical legal process tracing its origins back to medieval England. This is a trial and error process in that common law judges base current decisions upon earlier precedents but, where those precedents are at odds with current accepted notions of social justice, the judges are free to modify or overrule earlier precedent. This system is now employed by numerous independent sovereignties throughout the world including Great Britain, the United States, India, and nations in Africa and throughout the Pacific. Alaphonso v. FSM, 1 FSM Intrm 209,220 (App. 1982). By linking ours to that long-established and widely used system of justice, we draw on the experience insights and improvements gained through hundreds of years of application in numerous cultural contexts. Moreover, our system of justice thereby becomes more recognizable and predictable. Hence, it is more familiar to other nations in this part of the world and less threatening to potential investors. This in turn creates a better climate for economic development, an important goal of this new nation.164

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163 Semens, 2 FSM Intrm. 131, 141-42 (Pon. 1985).
164 Id.
Peking University School of Transnational Law: 
A New Venture in International Legal Relations

Howard Bromberg†

In the last week of December 2008, I sat on a bench in Shenzhen, China as 54 first-year law students, pair-by-pair, argued whether the descendants of African-American slaves should receive reparations from the United States government as a matter of law and justice. The site was the beautiful Peking University School of Transnational Law in Shenzhen, opened only a few months before. Sitting with me on the bench was Thomas Weidenbach, a lecturer in residence at the School. We were playing the role of United States Commissioners appointed by the United States Congress to determine whether the United States Treasury should issue such payments in reparations.¹

The students were playing the role of lawyers appearing before the Commission, presenting their points in the form of classic appellate oral

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¹ The issue of reparations in relation to slavery in the United States is of great historical interest. The first plans for reparations were made directly after the Civil War—with contrasting proposals to compensate southern slave owners for the loss of their “property” interest in slaves and to compensate slaves for their years in bondage. The idea of compensating former slave owners was permanently eliminated by the Fourteenth Amendment to the United States Constitution (“neither the United Sates nor any state shall assume or pay...any claim for the loss or emancipation of any slave”). House Resolution 29 introduced on March 11, 1867 into the first session of the 40th Congress by Thaddeus Stevens, proposed providing former slaves with forty-acres of land as compensation. It was also defeated. The last few decades has seen a growing but controversial movement to obtain reparations for slavery by African-American descendents of former slaves—in private lawsuits against companies that had some connection to antebellum slavery and in public payments from the United States government. See Should America Pay: Slavery and the Raging Debate on Reparations, edited by Raymond Winbush (New York: Harper Collins, 2003) for articles in favor and opposed to reparations, and historical and current background on the issue. In 1997, Congressman John Conyers introduced a bill titled “Commission to Study Reparations Proposals for African-Americans” to the U.S. Congress proposing that the government form a commission to look into the proposal for reparations. (H.R. 40, introduced to the first session of the 105th Congress on January 7, 1997). Mr. Weidenbach and I were playing the role of commissioners appointed by Congress to perform that role.
argument, as the commissioners peppered them with questions. It was a variation of a moot court exercise common to American law schools, but in this format—in English, assessing legal and ethical questions of American history, it was almost certainly a first in the People’s Republic of China. The students’ arguments were well-prepared and at times even brilliantly presented. They argued such points as: “Slavery and the slave trade were part of an international phenomenon; there should be an international remedy”; “Reparations have been paid to Jewish survivors of the holocaust and to Japanese American citizens interred by the American government in World War; why not here?”; “The legacy of slavery endured through the Jim Crow era and must be addressed even today. But leading African-Americans, such as newly elected President Barack Obama, themselves oppose reparations as the correct legal remedy to lingering injustices faced by African-Americans.” As I watched the enthusiastic young students, not one of whom I believe has ever been to the United States, debating the role of law in perpetuating, resolving, and repairing the injustices of American slavery, I remember thinking, “Only in China, only in modern China!”

I.

The School of Transnational Law (STL) is largely the work of two men of vision, Hai Wen, Vice-President of Peking University, and Jeffrey Lehman, former Dean of the University of Michigan Law School and President of Cornell University. Both were instrumental members of the Joint Center for China-U.S. Law and Policy Studies Institute (the Joint Center), founded in 2005, whose mission is to “nurture harmony between the Chinese and American legal systems through the dissemination of knowledge.” Hai and Lehman aspired to create a law school that would integrate China’s bold entry into global business
and international diplomacy with a commitment to the rule of law as it has been developed in Western, and especially American, legal systems. The School of Transnational Law was opened in August 2008 as a division of the Shenzhen Graduate School of Peking University. Peking University (commonly known as “Beida”) dates back to the 1898 reform movements initiated during the Ching Dynasty. It has played a central role in most of the new intellectual movements in 20th-century China. Peking University’s graduate school in Shenzhen is its only campus outside Beijing and is located in a specially constructed university town, which also includes the graduate and professional schools of Tsinghua University and Harbin Institute of Technology. Courses at STL take place in six-week modules: the first three modules go from September through January; the second three modules from February through June. Hai is the chancellor of the Shenzhen Graduate School of Peking University. Lehman is the chancellor and founding dean of STL. As the former president of a great American university, and current president of the Joint Center, with an honorary doctorate from Peking University, Dean Lehman is well placed to realize the vision of a Chinese graduate school immersed in a global study of law.

Of the over 600 law schools in China, STL is the only one that takes the American law curriculum as its operating standard.² American legal education is

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² A precursor of STL was the Soochow University Law School (Soochow), also known as “The Comparative Law School of China,” which was founded in Shanghai, China in 1915, shortly after the founding of the Republic of China. Soochow Law School was funded by American lawyers to teach Chinese law students comparative law with a focus on Anglo-American legal systems. Students enrolled in a standard program of first-year American law school courses, with a comparative law curriculum in the upper years. Graduates of the school were deemed to be able to work as lawyers in both Western and Chinese legal systems. By the 1930’s the School had risen to prominence in both Chinese and international legal circles. Although Soochow was closed in 1952, shortly after the founding of the People’s Republic of China, a successor school was eventually founded in Taiwan. The leading historian of Soochow is Professor Alison Conner. See e.g. Alison W. Conner, Training China’s Early Modern Lawyers: Soochow University Law School, 8 J. CHINESE L.1 (1994); Alison W. Conner, Lawyers and the Legal Profession During the Republican
widely considered one of the most successful—and influential—modes of higher education developed in the last two centuries. Its focal point was the introduction of the case method of education into Harvard Law School by Dean Christopher Langdell Columbus in 1878. The case method—in which law students learn the content, methods, and processes of American law through a “Socratic” analysis of appellate cases—was well-suited to a study of the intricacies of the Anglo-American common law system. By the turn of the century, it was adopted in every leading American law school. The case method helped form American legal education into a method widely perceived to help develop skills of acute analysis, to formulate different approaches to a particular problem, and to discover the common principles underlying a wide array of legal decisions and systems.

China, heir to one of the great cultural traditions of the world, has made great advances in the last decade. Its emergence as an economic superpower is well known. Likewise, the government, aware of the turmoil created in past decades by such extravagant and reckless undertakings as the Cultural Revolution, and the consequent hardships imposed on the Chinese people, has committed itself to a legal system marked by the rule of law—the central principle of the legal systems of western and Anglo-American democracies.³

As a “transnational” law school, seeking to train lawyers who can work across borders with the various legal systems of the world, STL bases its

³ STL is dedicated to providing learning in a spirit of cooperation and freedom necessary for a modern university.
curriculum on the American model. Students take first-year courses in Torts, Contracts, Criminal Law, Property, Civil Procedure, Legal Practice, and Economics. Upper level courses include a wide array of commercial, administrative, and procedural courses. Over the course of a three or four-year program, the students are thoroughly grounded in both the Anglo-American common law and the continental civil law system. In addition, students take a year’s worth of courses in Chinese law, including a course in Marxist Political Theory required of all Peking University graduates.

STL’s entering class consists of 54 students. English is the language of instruction at the School; students needed to be fluent in written and spoken English to be admitted to the entering class. Given the demands of the school, only top college graduates can matriculate, although their Bachelor of Arts degree can be in any subject.

II.

I taught at the University of Michigan Law School during Dean Lehman’s tenure as dean. I was honored when he asked me to teach as a visiting professor at the new school and direct its Legal Practice Program and Summer Writing Institute. I was inspired when he shared with me his heartfelt vision of the school’s future—shared with Hai Wen and approved by China’s education ministry—of a law school that would train students to participate in the new global economy, while promoting the rule of law in Chinese society. I was moved when he described to me his experiences interviewing all of the prospective students for the first class, learning of their challenges in making their way in Chinese society, studying English, making the remarkable decision to learn legal norms of foreign cultures so that they could become exemplary
lawyers, judges, and public officials in their own, and I was challenged by the thought of establishing a legal practice program that could play a vital role in this new school, taught by western lawyers who could only be novices in Chinese culture.

Legal practice is the first-year law school program that trains students in the rudiments of legal research, writing, and advocacy. Students learn to write memoranda, briefs, and the other legal documents central to a lawyer’s practice. They learn to conduct legal research in the library and through commercial online databases such as Westlaw and LexisNexis. They learn the art of common law analysis, how to write predictive and persuasive legal arguments, and how to conduct an oral argument before a panel of appellate judges. By its nature, a legal writing program requires instructors who are well versed in legal practice, who are experts in writing, and who are eager to lavish individual attention on the students. In thinking through the elements of constructing a legal practice program for STL, Dean Lehman and I were immediately faced with two problems.

First of all, I am a full-time Clinical Assistant Professor at the University of Michigan, and was only able to develop and teach in the Legal Practice Program during my vacation breaks from Michigan. Second, every legal practice or legal writing program I know of in the United States is staffed by several instructors to facilitate the close individual contacts with students that this course demands. These demands include correcting and grading student memoranda and briefs, conferencing with students, and judging their oral arguments.

In solving these problems, I was fortunate to be able to draw on outstanding colleagues from Ave Maria School of Law (AMSOL) to staff STL’s
Legal Practice Program. Anne Burr had been an outstanding professor in AMSOL’s Research, Writing, and Advocacy Program and had just become Director of Wayne State’s Legal Writing program. James Parry Eyster is a clinical professor at AMSOL; Eyster and I worked closely together in helping to build AMSOL’s Asylum and Immigrant Rights Law Clinic. Dean Lehman agreed that we would constitute STL’s legal writing faculty. We all had to plan carefully during the 2008 summer break, and teach in condensed units during our 2009 vacation breaks; during the regular academic year we had to give our first priority to the American law schools where we teach. Fortunately, we would also be assisted by Christine Han, Julie Johnson, Andrea Shaw, and Christopher Yap, four top graduates of American colleges who were spending a fellowship year of teaching and residence at STL.4

Professors Burr, Eyster, and I met throughout the summer of 2008 to plan our curriculum. The Legal Practice course at STL would meet in the third and sixth six-week module. We decided to follow a somewhat conventional first-year curriculum in legal writing—predictive writing and production of office memoranda in the first six-week module, and persuasive writing and production of appellate brief in the second—but adapted for the purposes and unique situation of the students. To accomplish this we decided against using a standard legal writing textbook. Instead we prepared our own materials designed to accentuate the roots of the common law and the American legal experience while getting directly to the heart of writing the modern legal memoranda and brief.

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4 The four teaching fellows work closely with the STL students throughout the year on English writing and expression.
STL was launched in the latter half of August 2008 with a week-long orientation. Dean Lehman had decided on a dramatic beginning for the school—a staged reading of the great Greek play *Antigone* by Sophocles. The play is ripe with questions that go back to the basis of Western Civilization and its concept of law. Following the staged reading, we put on a moot court involving the characters in the play, with roles played by the STL students. It was an ideal medium for a bonding experience in the school, for raising legal and moral questions embedded in the roots of Western culture, and for introducing the practice skills component of a legal education. Professor Eyster conducted the orientation week.5

The actual Legal Practice course began in December 2008, with Professors Eyster and Burr in residence; I arrived in mid-December. We began with a series of cases on the development of the tort of intentional infliction of emotional distress (IIED) in Florida. This series of cases was chosen to accomplish several purposes. They illustrate the rise of a new cause of action under the common law. IIED was not a clearly recognized cause of action in Florida until mandated by court decisions in the decades between 1965 to 1985. The cases also present difficult issues of common law analysis ideal for first-year students. We set the students’ first memorandum assignment in this area of law; the hypothetical facts of the problem concern a little league baseball player who is subjected to severe reprimands and mockery by his coach. Does the coach’s tirade constitute intentional infliction of emotional distress of the young player? To address this

5 Eyster, who also has professional experience in drama, is writing an article on his experience teaching orientation week through the staged reading and moot court of *Antigone*. 
issue, the students need to carefully apply several common law rules and factors that are embedded in the line of Florida cases.

Throughout the year, Mr. Weidenbach, the teaching fellows, and I also conducted a one-credit course in “The Lawyer Across History.” Taking off from the Antigone moot court in orientation, the course explores the role lawyers have played in ancient Greece, the American law of slavery and civil rights, medieval law, and the Nuremberg trials of Nazi lawyers and judges. The course is intended to raise ethical and historical questions of the legal professions, while the students gain experience in lawyering skills. They write critical pieces on what they are learning, reviewed by the teaching fellows. They also conduct oral arguments on questions of international law. These include whether reparations should be paid for slavery, as already noted, and on what legal authority did the Allies base their convictions of Nazi war criminals.

III.

How do I assess the course of STL and the small part it may play in improving international legal relations? So far, I think it has been a great success. This article has focused on the Legal Practice Program, which is of course only one component of STL’s operation. Dean Lehman has hired world-renowned professors to teach the first-year courses. A similarly distinguished faculty has been assembled for upper-level courses. STL has now finished its equivalent of the first semester—the first three modules—and the performance of the students has been terrific. STL has received funding from various sources, including a

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generous gift from the Starr Foundation. Enthusiasm for the school remains high at the Shenzhen campus and throughout Chinese legal circles.

I expect that the first fruit of the school will be its outstanding graduates. Given their training in American law and Chinese government, they will be uniquely qualified to take up positions as public officials dealing with questions of international law and relations, as domestic lawyers enriched by a comparative legal education, and as international lawyers working in Chinese law firms and offices. STL students will be experts in the two great legal systems of the world—common law and civil law; I expect some to work in Western and Asian law firms with an expertise in Chinese legal relations. Most of all, I am hoping that the School, in its small way, can fulfill its promise of being a bridge between modern legal systems and the great Chinese nation and culture. Both Western law and Chinese law can benefit from the unique perspective STL students will gain from their studies. Following, perhaps, in the footsteps of the Soochow School of Law, STL can make a small but significant contribution to the professionalization of Chinese law and the promotion of Chinese international legal relations, as China takes its place as one of the world’s great powers.

Rosani da Cuhna Gomes† and Geoffrey Strickland‡

Indeed, we must be aware that water - an essential and indispensable good that the Lord has given mankind in order to maintain and develop life - is considered today, because of the pursuit and pressure of multiple social and economic factors, as a good that must be especially protected by means of clear national and international policies, and used in accordance with sensible criteria of solidarity and responsibility. The use of water - that is valued as a universal and inalienable right - is connected with the growing and peremptory needs of people who live in poverty, taking into account that inadequate access to safe drinking water affects the well-being of a huge number of people and is often the cause of disease, suffering, conflicts, poverty and even death. With regard to the right to water, moreover, it should be stressed that this right is founded on the dignity of the human person; it is necessary in this perspective to examine attentively the approach of those who consider and treat water merely as an economic commodity. Its use must be rational and supportive, the result of a balanced synergy between the public and private sectors.1

-Pope, Benedict XVI

As these words of the Holy Father echo throughout the world, the eyes of all turn toward Brazil. Brazil is located in the eastern central part of South America, bordering all South American countries, with the exception of Ecuador and Chile. Bathed by the Atlantic Ocean, it has innumerable beaches, cliffs, marshes, dunes, reefs, bays, and lagoons, and enjoys year-round favorable conditions.

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Brazil is very rich with water, having within its territory a large part of the Amazonian Water Basin, which is considered the largest in the world. Unfortunately, human beings do not give this gift its due value, polluting it in various forms, and bringing harmful consequences to the environment and to human health. With these urgent consequences in mind, the mission of the Brazilian Ministério Público (literally “Public Ministry”) plays an important role in society: that of combating and holding responsible those who degrade nature and specifically, those who abuse Brazil’s water supply. Sensitive to this urgency, the National Constitutional Legislation granted the Ministério Público the task of defending the environment. For example, the Ministério Público of Rio de Janeiro safeguards the Paraíba do Sul River, a water source depended upon by millions of Brazilians. This essay provides a brief glimpse into the Ministério’s important work.

**The Fundamental Right of Water: To Care for Water is to Care for Life**

In 2004, with the growing awareness among the international community of the right to water, the National Confederation of Catholic Bishops of Brazil launched the theme of “Water, Source of Life” for their annual Fraternity Campaign.\(^2\) The objective of this campaign was to solicit discussion in the Brazilian civil society about the current use of this resource found so generously in nature. This was done with the hope that the Brazilian people might realize that they are privileged to live in these lands, and because of this privilege, have a great responsibility to know how to preserve and use the resources rationally.

One can consider the right to water from different legal standpoints. Article VI of the Federal Constitution established that health is one of the Social Rights. To have water is vital to the health of all living beings. Article 225 of the *Magna Carta* states that “all have the right to an ecologically balanced environment, a good of common use of the people, essential to the healthy quality of life, imposing on the Public Power and the collectivity the duty to defend it and preserve it for present and future generations.” These constitutional norms suggest that water should be considered a fundamental human right. From these norms comes a necessity to adopt means to take care of water and the environment, and thus the mission of the Ministério Público is manifest.

**The Ministério Público as Defender of Life and Society**

In the 1988 Federal Constitution, which is still in use, the Ministério Público was inserted into the chapter regarding the Essential Functions of Justice, independent of the Judicial, Executive, and Legislative Powers. With divisions operating on both the federal and state levels, it was configured as one of the mediums through which the state manifests its sovereignty, incapable of being extinguished or having its functions passed off to other institutions. Article 127 establishes that, “The Ministério Público is a permanent institution, essential to the jurisdictional function of the State, charged with the defense of the democratic regime and the indispensable social and individual interests.”

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4 *Id.*

5 *Id.*
The 1988 Constitution integrated a rich historical development of the office, and conferred on the Ministério Público diverse privileges, all of which are indispensable to the independent exercise of its relevant functions. This provided adequate protection against the retaliations of those with corrupted political or economic interests.

From a constitutional standpoint, the principal characteristic specific to the Ministério Público that distinguishes it from the other national departments is its institutional principles of unity, indivisibility, and functional independence. We now turn to the significance of each principle.

The principle of unity holds that the Ministério Público is a unique institution whose members constitute one body with one will. Therefore, the position of each individual constituent will always have merit and an opportunity to be heard, particularly when encountering differing positions.

As to the principle of indivisibility, by merit of the principle cited above, the members of the institution are able to substitute for one another when necessary, as happens in cases of a holiday, excused absence, impediment, etc., without being prejudiced in the exercise of ministerial activity.

The functional independence guarantees that the members of the Ministério Público are not intellectually or ideologically subordinate to those who may be hierarchically superior for the sake of hierarchy. In other words, there is freedom to offer critique without fear of illegitimate hierarchical pressures. They act in harmony with the juridical ordering, explaining the foundations of their positions to contribute to the fluidity of the institution in its role.
The role of the Ministério Público is not just to be the guardian of the law, though its roles in this capacity are diverse, accumulating the missions of defending the city, the environment, public patrimony, and the Democratic State of Law against those in opposition. Contrary to the Judicial Power that acts only through provocation, the Ministério Público can also take action by its own initiative as long as it protects a valid social interest that is legitimately threatened. This type of action is illustrated in the following example of the Ministério Público’s work.

The Action of the Ministério Público in Safeguarding the Paraíba do Sul River

In the State of Rio de Janeiro, the Paraíba do Sul River runs through thirty-seven municipalities, extending for 500km, which is almost half the State territory. Its strategic importance for the fluminense population can be seen by the fact that the Paraíba do Sul River is the only source of water supply for more than twelve million people. This includes eighty-five percent of the inhabitants of the metropolitan region. It is also the means of capturing related streams in the localities as well as the Guando River, which receives water from the Paraíba do Sul for utilization in hydroelectric power.

To further emphasize its vital importance, the Paraíba do Sul is designated as a river within federal jurisdiction, extending through three states of the Federation. Since the 1980s, the environmental management of the Paraíba do Sul River is performed by the Executive Committee of Integrated Studies of the Hydrographic Basin of the Paraíba do Sul River (Comitê Executivo de Estudos Integrados da Bacia Hidrográfica do Rio Paraíba do Sul – CEIVAP).

The evolution and diversification of the productive activities in the Paraíba do Sul River Basin gave rise to conflict among the users of the water.
When the water resources were abundant in relation to the demand, the same with priority of use for the production of electric energy, there were no conflicts over the use of the water in the Paraíba do Sul River Basin. However, this situation has changed with the development of the region, and the necessity to accommodate to multiple users of the water, and the different social actors involved, further complicate resource management.

As a downstream recipient, the State of Rio de Janeiro was impacted by the conflicting uses of the Paraíba do Sul River. On one hand, water was destined for the public supply, and on the other, it was subject to the high growth demand for electric energy, final destinies for wastes and industrial and agricultural effluences, etc.

The considerable demographic expansion and the intense and diversified industrial development that occurred in the recent decades in the Southeastern Region have impacted the quality of the water in the Paraíba River. It has increasingly more significant sources of pollution of industrial, domestic, and agricultural origin. This is beyond the pollution resulting from accidents in its basin. The Paraíba do Sul River basin is especially subject to accidents, not only from the express concentration of industries with great potential to pollute, but also from the dense mesh of bus and train stations servicing the area. With their intense movement of dangerous loads through the highways of Presidente Dutra (Rio-São Paulo), BR-040 (Rio-Juiz de Fora), and other passageways, the area is particularly vulnerable.

Yet another problem is deforestation. Deforestation in the marginal areas of the Paraíba do Sul hydrographic basin is primarily responsible for the accumulation of sand in the river. The sand, accumulating as a result of erosion
caused by the diverse forms of occupation and soil use, has greatly altered the vegetation of the Paraíba do Sul River Basin.

Considering all of these problems, the most notorious and harmful sources of pollution in the Paraíba do Sul River Basin are the domestic wastes and solid residues originating in the cities with mid to large sized ports located along the banks of the river. The only action capable of changing this situation is the preparation and construction of waste receiving and treatment stations that can counteract the effects.

**An Integrated Defense Requiring Solidarity**

Since the Paraíba do Sul River runs through the states of São Paulo, Minas Gerais, and Rio de Janeiro, an integrated plan of action began to take form in the mid 1990s and was ultimately established among those in the committee for the Integration of the Hydrographic base of the Paraíba do Sul River and those states. An interstate decision making process was envisioned regarding actions affecting the river. A fruit of the Ministério Público’s action was the “GT” (Grupo de Trabalho/Work Group), which was created to marshal forces from the diverse actors in the collective defense of the Paraíba do Sul River through legal arrangements with the National System of Water Resources and the different organs and institutions responsible under its execution.

The principle focus of the project is the development of conditions for the integrated and interstate action of the Ministérios Públicos of the aforementioned states, and to foster discussion of the pollution of the waters of Paraíba do Sul River. To create these conditions the project established the following goals.

a) Motivate, link, prepare, and organize the Departments of Public Prosecution of the Ministérios Públicos of the States of São Paulo, Rio
de Janeiro, and Minas Gerais that act in Judiciary Districts of the Rio Paraíba do Sul Basin and have interest in the environmental area for integrated action in the solution of the environmental problems, particularly in reference to the quality of water in this basin.

b) Create mechanisms for planning, coordination, and control of these actions.

c) To guarantee the continuity of this process, until the environmental recovery of the Basin is assured.

The plan of work contemplated the following stages:

1) Survey of the Environmental Context
   1.1 - Characterization of the hydrographic basin.
   1.2 - Survey, compilation, and synthesis of the water management and environmental impact studies completed regarding the Hydrographic Basin of the Paraíba do Sul.
   1.3 - Survey of the institutional and legal context.
   1.4 - Identification of the Judiciary Districts, Departments of Public Prosecution, and institutions of other interested states in the water quality and environmental preservation of the basin.
   1.5 - Systemization and divulgence of materials and information regarding the Basin.
   1.6 - Organization of an agenda to facilitate the meeting of the State Ministério Públicos.

2) Elaboration of the Plan of Action
   2.1 - Finalizing information regarding the actual situation of Paraíba do Sul River Basin, its challenges, and the situation and actions contemplated in the state and municipalities concerned.
   2.2 - Preparation of materials and presentations for the meeting.
   2.3 - A meeting of the State Ministerio Públicos for the preservation of the environment and water quality of the Paraíba do Sul River Basin.
   2.4 - Elaboration of the Integrated Plan of Action of the State Ministérios Públicos and Judicial Districts.
   2.5 - Identification of and specification for monitoring instruments and assessment of results.

3) Identification of Social Innovation Projects
   3.1 - Identification of the municipalities, populations, and economic sectors that will be potentially affected by the actions of environmental preservation of the Paraíba do Sul River Basin.
   3.2 - Formulation and directing the competent institutions in the projects that can mitigate these impacts.

4) Realization of the Plan of Action
   4.1 - Regional meetings for the dissemination of the Plan of Action.
Moving Toward a Rational and Supportive Use

The coordinated efforts and procedures revealed that in 2004, degradation was caused by:

a) Billions of liters of released untreated domestic waste;
b) Industrial Pollution from organic effluents, heavy metals and toxic agents;
c) Flooding caused by inadequate disposal of solid residue, leading to erosion and causing sand accumulation in the rivers;
d) Abusive extraction of minerals and sand without the needed repair or replenishment;
e) Inadequate use of agrotoxin;
f) Disordered occupation of the land;
g) Predatory fishing; and
h) Lack of environmental consciousness.

Starting from these principle sources of pollution, the State Environmental Engineering Foundation (Fundação Estadual de Engenharia do Meio Ambiente - FEEMA) is registering the industrial polluters, and demanding that they conform to and abide by environmental legislation. For their part, the Ministério Público has adopted the administrative and judicial responses necessary to safeguard the compliance with these environmental norms by the guilty parties, due to the information and evidence gathered in this investigation.

However, to go one step further, the Federal Government launched the program “Sanitation for All” (“Saneamento para Todos”) that finances credit operations for the execution of basic sanitation actions. States and municipalities can solicit financing for the implantation and amplification of water supply and sanitation networks exceeding that of the present sources and services management. This program is being launched in the State of Rio de Janeiro with the vision of reducing the release of wastes in water systems to minimize the negative environmental impacts in the Paraíba do Sul River and other rivers.
Once again, the Ministério Público stands ready to ensure proper compliance in fulfillment of these efforts.

**Conclusion: The Hope of a Balanced Synergy**

Considering that water is a fundamental right to all living beings and that Brazil is most richly endowed with aquatic resources, the responsibility of the society and government grows for reason of the valor involved. The Ministério Público, according to the Constitutional text and the legal norms that guide the institution, has the mission to defend the environment, and to guarantee a better quality of life for present and future generations. To this end, investigatory proceedings and judicial actions against those who cause environmental damage must be implemented so as to ensure that this hope becomes a reality.

In the case of the Paraíba do Sul River Basin, the principle source of water supply for the States of Rio de Janeiro, São Paulo, and Minas Gerais, this protective action is illustrated by the coordinated efforts of the diverse legal actors involved with the Ministério Público, the foundation of the project. We can conclude that the action of the Ministério Público in the defense of Brazilian society and its water rights are fundamental, striving to meet the objective of the recent Campanha da Fraternidade: “Water, Source of Life.”