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Contents

Introduction
Sapna Reheem Shaila and Mohammad Rafat Mehmood, Co-Editors-in-Chief ................... vii

The Human Rights of the Other – Law, Philosophy and Complications in the Extra-territorial Application of the ECHR
Dario Rossi D’Ambrosio ........................................................................................................ 1

Unintended Consequences of Human Rights Advocacy in Uganda
Ciara Bottomley .................................................................................................................. 49

International Law and the (De)Politicisation of Climate Change and Migration: Lessons from the Pacific
Giulia Jacovella .................................................................................................................. 76

Courting Social Change – Lessons from the CNG Case in India
Harsimran Kalra ................................................................................................................ 110

Should Truth Commissions be Viewed as Second-best Alternatives to Prosecutions?
Gemma Daly ...................................................................................................................... 176

Accountability of the UN and Peacekeepers: A Focus Study on Sexual Exploitation and Abuse
Hanna Gunnarsson ........................................................................................................... 207

Customary Law and Custom in New-Caledonia: Legal Pluralism, Citizenship and the External/Internal Sovereignty Issue
Oona Le Meur ................................................................................................................... 230

Control and Conscience: Positivist Approaches to Religion in India and South Africa
Kelvin Ma ......................................................................................................................... 260
Introduction

Sapna Reheem Shaila and Mohammad Rafat Mehmood

Co-Editors-in-Chief

Following the publication of our inaugural issue in August, it is with great pleasure that we introduce you to the first issue of the SOAS Law Journal’s second volume. In line with one of the Journal’s key aims, this February issue displays the diversity of legal interests and expertise that SOAS students and alumni harbour. Articles contained in this issue include in-depth analyses of legal systems and laws outside of Europe, touching upon topics such as the challenges to judicial intervention in policy-making in India, as well as an examination of customary law and custom within the French overseas territory of New Caledonia. A discussion on the interaction between legal positivism and religion through a comparative legal study of India and South Africa is also featured herein, as is a thought-provoking analysis of the previously enacted Ugandan Anti-Homosexuality law and the unintended consequences of human rights advocacy on the rights of LGBTI persons in Uganda.

Critical assessments on issues pertaining to international law as well as post-conflict societies are also featured. These include an analysis of the depoliticisation of anthropogenic causes of climate change and migration and the resulting victimisation of environmental migrants such as those from the Pacific Islands. An assessment of current perspectives underpinning the extra-territorial application of the ECHR and a proposal for different foundations is also displayed. A study on sexual exploitation and abuse by UN peacekeepers in post-conflict societies and a critique of the UN’s current structure and strategy to improve accountability is also presented in this issue, as well as a comparative analysis of truth commissions as an alternative to prosecutions in effecting transitional justice in post-conflict societies.

We would also like to take this opportunity to warmly welcome our new Honorary Board members. Dame Linda Dobbs DBE, former High Court judge in England and Wales, shares our deep interest in international experiences of law and we thank her for her unique insights and suggestions. We are also grateful to Professor Andrew Harding, current Professor of Law at NUS with particular expertise in Asian legal studies and former Professor of Law at SOAS, for accepting our invitation. Former SOAS law lecturer Professor Werner
Menski has contributed significantly to the further development of the Legal Systems of Asia and Africa course at SOAS amongst other legal courses pertaining to comparative law. His emphasis on the importance of viewing ‘law’ from an international perspective has been a source of inspiration for the founding of the Journal and we thank him and all of our Honorary Board members respectively for their continued interest in the Journal and valuable support.

We would also like to express our sincere gratitude to Mr Paul Kohler for encouraging the expansion of the Journal’s reach and SOAS Law Librarian Mr Bob Burns for his useful insights to the Journal’s Editorial Board. Finally, we would like to thank the SOAS Law Faculty for their continued support and guidance and the Editorial Team for working diligently to bring this issue into fruition.

Yours Sincerely,

Sapna Reheem Shaila and Mohammad Rafat Mehmood

Co-Editors-in-Chief
SOAS LAW JOURNAL
The Human Rights of the Other – Law, Philosophy and Complications in the Extra-territorial Application of the ECHR

Dario Rossi D’Ambrosio*

This Article addresses different perspectives on the extra-territorial applicability of the European Convention on Human Rights (ECHR). Section 2 focuses on the different interpretations of the concept of State jurisdiction attempted by the Strasbourg Court and academics. Through the guidance of article 31 of the Vienna Convention on the Law of Treaties, a legal interpretation of the term ‘jurisdiction’ is suggested. A conception of ‘jurisdiction’ disconnected from territorial boundaries and focused on the relationship of power between the State and the individual seems required by the meaning of the term ‘jurisdiction’ in the context of human rights law, its coherence with the object and purpose of the ECHR, and its belonging to international human rights law. Section 3 questions some of the current philosophical understandings and groundings of human rights. Departing from the idea that the groundings of current theories justifying the extra-territorial applicability/non-applicability of the ECHR are not completely justified from a philosophical perspective, the present Article tries to propose different foundations. Through the works of Arendt and Levinas and critiques to cosmopolitanism, this Article suggests different foundations for the extra-territorial application of the ECHR, in harmony with and in support of the legal interpretation proposed in Section 2. Section 4 addresses some of the practical complications deriving from the extra-territorial application of the ECHR, such as the relationship between human rights and international humanitarian law, the relationship between human rights and Occupation Law, and the risk of human rights imperialism. In conclusion, an overall appraisal of the issues covered in this Article warrants a process of extra-territorial application of the ECHR based on an actual recognition of the human rights of the Other.

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I. INTRODUCTION

International law’s energy and hope lies in its ability to articulate existing transformative commitment in the language of rights and duties and thereby to give voice to those who are otherwise routinely excluded. This can not mean fixing the law’s content permanently to definite institutional or normative structures. It is a formal idea that seeks community by understanding that every community is based on an exclusion and that therefore it must be a part of an acceptable community’s self-definition that it constantly negotiates that exclusion, widens its horizon [sic].

Martti Koskenniemi

In Al-Skeini, Lord Rodger observed that the application of the European Convention on Human Rights (ECHR) in Iraq would have been inappropriate because the Court could have run the risk of being accused of human rights imperialism. This is an interesting perspective that casts shadows on the sanctity of human rights, although in the case of Al-Skeini the argument may appear ironic. Naturally, in the research conducted on the topic of extra-territorial application of the ECHR and its potential down-side of human rights imperialism, many other and more general themes have emerged. For example, there exists the danger of the collapse of the entire building by referring to, in Douzinas’ words, ‘a strange and almost metaphysical’ existence of human rights, ‘even when they have not been legislated’. Through three different threads of research, which may at times appear incomplete or inconclusive, it is hoped that it will be possible to clutch at some hints for overcoming current obstacles to a coherent extra-territorial application of the ECHR.

Historically, rights have been limited to the members of a community, fostering dynamics of inclusion-exclusion from protection. The concept of statehood itself is essentially related to the concept of territory. Thus, human rights are

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2 R (Al-Skeini) and others v Secretary of State for Defence [2007] UKHL 26, [2008] 1 AC 153 [78].
3 As if respecting the right to life of Iraqi citizens would annihilate their cultural differences from the UK.
4 Costas Douzinas, Human Rights and Empire (Routledge 2007) 344.
5 ibid.
6 Hannah Arendt, The Origins of Totalitarianism (Schocken 2004) 341-84.
often understood as territorial rather than extra-territorial and the extra-territorial extension of human rights obligations may be considered anomalous. However, a feature of past and contemporary human rights violations is the detachment from State territory. For instance, in current times States involved in the “war on terror” use ‘extra-territorial loci’ to detain and interrogate suspected terrorists, in order to avoid public scrutiny. Significantly, the ECHR prescribes that ‘[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’. Similar provisions may be found in other treaties on civil and political rights. The reference to the word ‘jurisdiction’ and not ‘territory’ is a common feature of international human rights treaties in the post-WWII era. International supervisory bodies of certain human rights treaties agree on the point that ‘jurisdiction’ and ‘territory’ are not one and the same. Thus, mutatis mutandis and with due precaution, the analysis and main argument of this Article might be relevant for other human rights treaties.

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9 Craven, ‘Human Rights’ (n 8) 241.

10 Wilde, ‘Legal “Black Hole”? ’ (n 8) 741-52.


15 For the difference between human rights treaties and other treaties in international law, see Matthew Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11 European Journal of International Law 489. In the European context, the EComHR stated that State obligations ‘are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves’: Austria v Italy App no 788/60 (Commission Decision, 11 January 1961). As to the extra-territorial application of economic, social and cultural rights, see ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136.
This Article will focus on cases in which individuals are outside of the territorial borders of State parties to the ECHR. Indeed, what is decisive in order to determine if the application is extra-territorial, is the fact that the affected individual finds herself/himself outside of the national territory at the moment of the violation. Accordingly, the extra-territorial application of the ECHR is not relevant in cases of expulsion or extradition from the territories of State parties towards non-state parties. In these cases, affected individuals are normally still within national borders at the moment of the violation. However, similar cases may have extra-territorial relevance if the conduct happens extra-territorially, but within a State party’s jurisdiction. Correspondingly, cases of interception of migrants and transfer to third parties’ authorities may be relevant, because before the transfer, individuals are usually within the jurisdiction of a State party. Similar questions arose in cases concerning British soldiers operating abroad as victims, in particular in two cases brought before the United Kingdom (UK) Supreme Court and one case that made its way to the European Court of Human Rights (ECtHR).

Section 2 addresses different legal perspectives on the extra-territorial applicability of the ECHR. The Section focuses on the interpretation of the concept of jurisdiction attempted by the Court and by academics. At the end of Section 2, a legal interpretation of the term jurisdiction through the guidance of article 31 of the Vienna Convention on the Law of Treaties (VCLT) is suggested. A conception of jurisdiction disconnected from territorial boundaries and focused on the relationship of power between the State and the individual seems required by the meaning of the term ‘jurisdiction’ in the context of international human rights law (IHRL), its coherence with the object and purpose of the ECHR, and its belonging in IHRL.

17 Soering v UK (1989) 11 EHRR 439. For a recent example, see Othman v UK (2012) 55 EHRR 1.
19 Milanovic gives the example of transfer of Iraqi detainees to Iraqi authorities by the UK: see Milanovic, Extraterritorial Application (n 16) 8-9.
20 Hirsi Jamaa v Italy (2012) 55 EHRR 21.
22 Pritchard v UK App no 1573/11 (ECtHR, 18 March 2014) was a case which was eventually struck out of the list of cases by reason of friendly settlement.
Section 3 questions some of the current philosophical groundings of human rights. Departing from the idea that in the current legal debate the ideas proposed for the extra-territorial application/non-application of the ECHR are not justified from a philosophical perspective, the present Article tries to offer different foundations. Through critiques of cosmopolitanism and through Arendt’s and Levinas’ works, the present Article suggests a different foundation for the extra-territorial application of the ECHR, in harmony with and in support of the legal interpretation proposed in Section 2.

Section 4 addresses the practical complications deriving from the extra-territorial application of the ECHR. For example, the relationship between articles 1 and 56 of the ECHR reveals its colonial present. Moreover, the interpretative criteria applicable to solve norm conflicts arising from the interplay between the ECHR and international humanitarian law (IHL) are becoming far from certain. The interest in this particular area of the fragmentation of international law is renewed by recent judgements of the ECtHR such as Hassan v UK. Finally, Section 4 concludes with some observations about the fact that the extra-territorial application of human rights in times of armed conflict and occupation may simultaneously protect human rights and serve the political goals of the occupiers. In these scenarios, the issue of human rights imperialism may appear.

It must be noted that the division of research into three Sections does not suggest that the different matters dealt with are to be observed as separate. The main planning corresponds to the idea that law, philosophy, and praxis are, or should be, intertwined.

In conclusion, basing its legal argument on legal interpretative criteria contained in relevant laws and drawing on previous scholarship and international and regional authorities, this Article understands the concept of State jurisdiction as a relationship of power between the State and the individual, regardless of other temporal, geographical or spatial requirements. As explained in Section 3 this notion of State jurisdiction finds its philosophical foundations in the relationality of human rights. In particular, late-Arendtian and Levinasian perspectives on human rights conduct to an elaboration which allows for the co-existence of human rights both as a fact of being and as law, reconnecting physei and nomos. Additionally, this Article addresses some of the legal and political complications deriving from the extra-territorial application of the ECHR. Through the combination of legal, philosophical and political

23 Hassan v UK App no 29750/09, (ECtHR, 16 September 2014); for recent domestic case law, see, eg, Serdar Mohammed v Ministry of Defence [2014] EWHC 1369 (QB).
analyses, this Article contributes to many of the possible levels of discussion on the extra-territorial application of the ECHR.

II. LEGAL INTERPRETATIONS

2.1 NOTIONS OF JURISDICTION

The phrase ‘within their jurisdiction’ in article 1 of the ECHR functions as a trigger mechanism for the application of the Convention or, in the Court’s words, ‘a threshold criterion’.24 But jurisdiction is ‘not a simple, technical admissibility requirement’.25 In fact, the existence of the rights protected in the Convention depends on the subsistence of jurisdiction. In this context, jurisdiction is the crucial term through which States and courts perpetuate a similar ‘dilemma between outsiders and insiders’26 reproduced at the origins of every new polity. Thus, ‘jurisdiction’ is the crucial term through which the existence of the human rights enshrined in the ECHR may be recognised or not.27

Some scholars maintain that ‘the question whether an individual was in the jurisdiction of a State … is a relational or contextual matter’.28 In practice, the distinction between admissibility and merits may be blurred. In accordance with article 29 of the ECHR, the Rules of the Court explicitly allow for the possibility to examine admissibility and merits simultaneously.29 Other scholars prefer to keep a clear distinction between admissibility and merits maintaining that ‘extraterritorial application is not a question of the content of the substantive rights’.30 At any rate, it has to be noted how not only the judicial proceedings, but also the existence of substantive rights is essentially tied to the subsistence of State jurisdiction in each case.31

24 Al-Skeini v UK (2011) 53 EHRR 18, para 130.
25 Milanovic, Extraterritorial Application (n 16) 20.
27 As underlined in sub-section 2.4, ‘European’ has a particular meaning.
29 Rules of the Court, rules 54-54A.
30 Dominic McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ in Coomans and Kamminga (n 8) 41, 42.
31 Milanovic, Extraterritorial Application (n 16) 20. Eg the ECtHR deemed that ‘jurisdiction is inextricably linked to the facts underlying the allegations. As such, it must be taken to have been implicitly reserved for the merits stage’ Issa v Turkey (2005) 41 EHRR 27, para 55. Also in subsequent case law the question of jurisdiction was addressed together with the facts of the cases, Iventjoc and others v Moldova and Russia App No 23687/05 (ECtHR, 15 November 2011), paras 98-120; Al-Skeini (n 24) para 102; see also Hassan (n 23).
In one of the most controversial cases on the matter, the Grand Chamber of the European Court of Human Rights (GC) affirmed that ‘the Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part’.32 The Court maintained that in international law ‘the jurisdictional competence of a State is primarily territorial’.33 This is the main ground on which, in 2001, the ECtHR delivered its decision of inadmissibility in the Bankovic case, which involved the killing of civilians resulting from an aerial bombardment of a TV station in Belgrade by NATO forces. In this context, some scholars question the assumed identity between the notion of jurisdiction in international law and the notion of jurisdiction in the ECHR.34 In particular, the argument is made that first, there are many different concepts of State jurisdiction in international law35 and second, the notion of jurisdiction normally used in international law differs from the idea of jurisdiction employed in IHRL.36 The concept of jurisdiction in IHRL would actually mean ‘not the jurisdiction to prescribe rules of domestic law and to enforce them, but control over a territory and persons within it’.37 Otherwise, drawing on the reasoning of Bankovic, one may argue that ‘a state acting beyond its “jurisdiction” in the former sense, i.e., beyond its powers as recognized under international law, could not be held responsible for the consequences resulting from these acts under the treaties it has agreed to’.38

32 Bankovic and others v Belgium and others (Admissibility) App no 52207/99 (ECtHR, 12 December 2001), para 51.
33 Bankovic (n 32) para 58.
34 Milanovic, Extraterritorial Application (n 16) 22, 26.
36 Milanovic, Extraterritorial Application (n 16) 26. Gondek argues that the ordinary international legal notion of jurisdiction is inappropriately applied in the context of the ECHR in Gondek (n 35) 361, 367. The decision has been criticised also for a misinterpretation of the travaux préparatoires of article 1 of the ECHR: see Lawson, ‘Life after Bankovic’ (n 16) 110. In addition, in Bankovic the Court’s approach of exchanging the exception of extra-territorial jurisdiction ‘as a matter of fact’ with the exceptionality of extra-territorial jurisdiction ‘as a matter of law’ is debatable: see Ralph Wilde, ‘Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties’ (2007) 40(2) Israel Law Review 503, 515.
37 Wilde, ‘Triggering State Obligations Extraterritorially’ (n 36) 513-514.
38 Olivier De Schutter, ‘Globalization and Jurisdiction: Lessons from the European Convention on Human Rights’ in Carin Laurin and others (eds), Baltic Yearbook of International Law: Volume 6 (Koninklijke Brill 2006) 194. Wilde uses the adjective ‘perverse’ to describe such consequence: see Wilde, ‘Triggering State Obligations Extraterritorially’ (n 36) 514.
A divergence between the ‘ordinary meaning to be given’ to the concept of jurisdiction in public international law and the ‘ordinary meaning to be given’ to the term jurisdiction in the context of IHRL has been confirmed in the case law of the Human Rights Committee (HRCtee) and the International Court of Justice (ICJ). Fundamentally, the interpretation of jurisdiction by the HRCtee is that ‘the reference is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred’. Additionally, the ICJ observed that in extra-territorial cases, ‘[c]onsidering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions’. Finally, as recognised by the same ECtHR, the notion of State jurisdiction present in the ECHR differs from the ordinary meaning of State jurisdiction in international law.

2.2 THE COURT’S CASE LAW ON STATE JURISDICTION

The purpose of this Section is not to find an almost impossible path to coherence through the jurisprudence of the Court. Rather, contradictions in the case law will be highlighted. Indeed, some scholars contend that the Strasbourg Court case law does not offer legal certainty on the issue of extra-territorial application.

The relevant case law is usually classified by the Court through the distinction between a ‘spatial connection’ and a ‘personal connection’ triggering state
jurisdiction – in other words, situations of control over territory and situations of control over individuals.\textsuperscript{49} This Section aims to demonstrate that in reality the essence of jurisdiction is a relationship of power between the state and the individuals involved, regardless of the two aforementioned criteria.

The first sub-section addresses the concept of jurisdiction as effective overall control over an area, as elaborated by the Court and commentators. The second sub-section focuses on developments and regressions regarding the interpretation of jurisdiction as control over individuals. The legal argument of this Article will then be articulated in the final sub-section.

2.2.1 JURISDICTION ARISING FROM CONTROL OVER SPACE

In the case law regarding the Turkish occupation of Northern Cyprus, the GC established that jurisdiction is triggered when, as a result of lawful or unlawful military operations, the State:

\begin{quote}
[E]xercising effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.\textsuperscript{50}
\end{quote}

In 2004 the GC decided a case involving ECHR violations which occurred in the separatist Transdniestria, a region within the territory of Moldova but outside its \textit{de facto} control.\textsuperscript{51} The Court found that jurisdiction over the State’s territory is presumed. But in exceptional cases, the State is not considered to be exercising jurisdiction if it ‘is prevented from exercising its authority in part of its

\begin{flushleft}
\textsuperscript{49} Eg Al-Skeini (n 24) paras 133-140; Milanovic, \textit{Extraterritorial Application} (n 16) 54-117. Some authors refuse this categorisation and refer to the exercise of authority as the core of State jurisdiction. In this view, the division between control over territory and control over persons is useful only in order to apply a presumption of jurisdiction (control over territory): see Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 13) 877. Other authors disagree with the categorisation in spatial and personal links, proposing instead to view the ECtHR case law through the lens of a territorially-centred rule which presumes that the State is ‘exercising functions in another state’s territory which are normally associated with the acts of a sovereign state on its own territory’: Miller, ‘Revisiting Extraterritorial Jurisdiction’ (n 18) 1236. Some other scholars avoid the distinction by finding a communal transnational application of a general principle of effective control by national and international fora: see Oona A Hathaway and, ‘Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?’ (2011) 43 Arizona State Law Journal 389.
\textsuperscript{50} Loizidou v Turkey (1997) 23 EHRR 513, para 52; Cyprus v Turkey (2002) 35 EHRR 30, para 77.
\textsuperscript{51} Ilașcu v Moldova and Russia (2005) 40 EHRR 46, para 330.
\end{flushleft}
territory’.\textsuperscript{52} As examples of exceptional situations, the Court mentioned, \textit{inter alia}, ‘acts of war or rebellion, or the acts of a foreign state supporting the installation of a separatist state within the territory of the state concerned’.\textsuperscript{53} Finally, the Court recognised that the applicants fell within Russian jurisdiction at the time of the violations,\textsuperscript{54} for a number of reasons. The most interesting one is that the administration of Transdniestria was ‘under effective authority, or at the very least under the decisive influence’\textsuperscript{55} of Russia and the survival of Transdniestria was tied to Russian economic, military and political support.\textsuperscript{56}

The reference to a ‘decisive influence’ test seems to be a slightly different standard from the one elaborated in earlier case law\textsuperscript{57} and it stretches the extra-territorial reach of the ECHR. In brief, in \textit{Ilaşcu} the first innovation lies in the principle that there might be a shared jurisdiction of two States over the same area.\textsuperscript{58} The Moldovan jurisdiction was territorial, whereas the Russian one was extra-territorial.\textsuperscript{59} The second innovation is the dilution of the effective overall control over territory test, by reference to a decisive influence standard which was subsequently confirmed in \textit{Ivanțoc}.

In the decision on the admissibility of \textit{Al Saadoon}\textsuperscript{61} the control over territory standard was developed further. State jurisdiction is triggered not only when an ‘area’, but also ‘premises’\textsuperscript{62} fall under State control. In the relevant case, the ‘premises’ in question were prisons in Iraq under \textit{de facto} and \textit{de jure} UK control. As noted by Milanovic, this development may be relevant in the context of the so-called black sites built during the “war on terror”. In fact, one of the objections raised against the applicability of certain human rights treaties that rely only on the control over territory as a trigger for their application, is that

\begin{itemize}
\item \textsuperscript{52} ibid para 312.
\item \textsuperscript{53} ibid. The Court repeated the principle contained in \textit{Loizidou} (n 50), by which State obligations descend from ‘overall control’ and not from ‘detailed control over the policies and actions of the authorities in the area’. A similar principle was laid down by the Court in \textit{Assanidze v Georgia} (2004) 39 EHRR 32, para 139. In \textit{Ilaşcu} (n 51), this did not mean that Moldova was not obliged to secure the rights of the Convention, to the extent possible.
\item \textsuperscript{54} \textit{Ilaşcu} (n 51) para 394.
\item \textsuperscript{55} ibid para 392.
\item \textsuperscript{56} See \textit{Ilaşcu} (n 51) para 392. This line of reasoning was reiterated in a case involving two of the applicants of the \textit{Ilaşcu} case, but on facts occurred after the \textit{Ilaşcu} judgment. See also \textit{Ivanțoc} (n 31) paras 98-120.
\item \textsuperscript{57} Ilias Bantekas and Lutz Oette, \textit{International Human Rights Law and Practice} (CUP 2013) 586.
\item \textsuperscript{58} De Schutter, ‘Globalization and Jurisdiction’ (n 38) 226.
\item \textsuperscript{59} This is an innovation also in relation to \textit{Assanidze}, which may appear \textit{prima facie} a similar case, but it is not because no other State jurisdiction but Georgia’s was involved. See \textit{Assanidze} (n 53) paras 137-143.
\item \textsuperscript{60} \textit{Ivanțoc} (n 31).
\item \textsuperscript{61} \textit{Al-Saadoon and Mufdhi v UK} App no 61498/08 (ECtHR, 2 March 2010).
\item \textsuperscript{62} ibid para 88.
\end{itemize}
the black sites constitute mere places, not territories over which States have jurisdiction. Arguably, the criterion developed in Al-Saadoon blurs the borders between a jurisdiction based on control over space and a jurisdiction based on control over individuals, because the more the size of the area diminishes, the more it becomes artificial to imagine control over space rather than control over persons.

Finally, according to the ECtHR’s case law, jurisdiction under article 1 of the ECHR subsists whenever the State exercises control of an area (arguably ‘premises’). This spatial control may be exercised lawfully or unlawfully, directly, through armed forces, through subordinate local administrations or forces under the decisive influence of the State. It must be noted that an exclusive reliance on the spatial model of jurisdiction would lead to situations where the mere non-existence of spatial control by the State would mean the non-existence of the rights enshrined in the ECHR. Moreover, as argued by the Court, control over territory seems to be useful for establishing a presumption of jurisdiction. In other words, the establishment of the existence of control over territory by the Court may be a tool for establishing jurisdiction, but not a necessary element of it.

2.2.2 JURISDICTION ARISING FROM CONTROL OVER PERSONS

The jurisprudence of the ECtHR is constant in recognising extra-territorial jurisdiction in cases of physical control exercised over individuals, such as arrest and detention, but it is doubtful whether the interpretation of article 1 of the ECHR goes further. For example, as recently confirmed in the GC judgment Jaloud v The Netherlands, the Court has clearly refused a “cause and effect” type of jurisdiction. As shown below, this may lead to unacceptable consequences.

In Issa, the facts under scrutiny occurred in Northern Iraq during Turkish anti-terrorism military operations. The Court abandoned the limitations resulting

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63 Milanovic, Extraterritorial Application (n 16) 129-134.
64 ibid 135. The GC in Al-Skeini cited Al-Saadoon as an example of control over individuals through extra-territorial use of force: see Al-Skeini (n 24) para 136.
65 See, eg, Iliaşcu (n 51). A contrario Cyprus (n 50) para 78.
66 Jaloud v The Netherlands App no 47708/08 (ECtHR, 20 November 2014).
67 As noted by Sari, the argument made by the Netherlands that opening fire against a person in an extra-territorial setting is not sufficient to bring that person within State jurisdiction was not dismissed by the Court. Aurel Sari, ‘Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations’ (EJIL Talk!, 24 November 2014) <http://www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/> accessed 28 November 2014.
from the use of the notion of *espace juridique* elaborated in *Bankovic*. As to the foundation of its reasoning, the Court constructed a ‘diametrically opposed’ premise. In particular, citing case law from the European Commission of Human Rights (EComHR), the Inter-American Commission of Human Rights, and the two HRCtee’s *Lopez Burgos* and *Celiberti de Casariego* landmark decisions, the ECtHR agreed that ‘Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory’.

In a subsequent case, *Öcalan v Turkey*, the applicant was arrested by Turkish forces at the Nairobi airport, in Kenya. The GC held that Öcalan fell within Turkish jurisdiction as soon as he was handed over by the Kenyan officials to the Turkish authorities. This approach has been criticised by some authors for its inconsistency and unpredictability. However, it must be observed that the ECtHR jurisprudence is quite constant in recognising extra-territorial jurisdiction in cases of control over individuals in the forms of arrest or detention. The approach taken in *Issa* and *Öcalan* followed the line of previous case law and it has been confirmed by subsequent case law. For example, in 2006 the Court recognised Turkish jurisdiction in a case concerning an individual who was beaten to death by both Turkish Cypriot police and demonstrators in a UN buffer zone.

Moreover, a potentially different outcome for the interpretation of article 1 of the ECHR resulted from *Pad and Others v Turkey*. During a military operation at the border between Turkey and Iran, Turkish helicopters fired at a group of suspected terrorists in the mountains. Interestingly, the Court deemed that:

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68 *Bankovic* (n 32) para 80. The notion of *espace juridique* of the Convention has been re-interpreted by the GC in *Al-Skeini* (n 24) para 142.
69 Miller, ‘Revisiting Extraterritorial Jurisdiction’ (n 18) 1228.
70 *Issa* (n 31) para 71.
71 *Öcalan v Turkey* (2005) 41 EHRR 45, para 91. In that occasion, the Court invited to ‘see by converse implication, *Bankovic*’. This invitation is at least not justifiable, Milanovic, *Extraterritorial Application* (n 16) 166. For a previous similar case see *Ramirez Sanchez v France* (2007) 45 EHRR 49.
72 Miller, ‘Revisiting Extraterritorial Jurisdiction’ (n 18) 1229-1230.
73 The same principles have been applied to an Italian police operation in Costa Rica: see *Freda v Italy* App no 8916/80 (Commission Decision, 7 October 1980). See also *M v Denmark* (1993) 15 EHRR CD 28 (Commission Decision).
74 Although in the UN buffer zone the Court considered the individual ‘under the authority and/or effective control of the respondent State through its agents’: see *Issak v Turkey* App no 44587/98 (ECtHR, 28 September 2006).
75 *Pad v Turkey (Admissibility)* App no 60167/00 (ECtHR, 28 June 2007).
It was not disputed by the parties that the victims of the alleged events came within the jurisdiction of Turkey. While the applicants attached great importance to the prior establishment of the exercise by Turkey of extraterritorial jurisdiction with a view to proving their allegations on the merits, the Court considers that it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants’ relatives.76

It may be argued that Pad completely disregards Bankovic, because in Pad it was not important to establish the exact location of the events (whether Turkish or Iranian territory), as the killings committed by the Turkish military by firing from helicopters have been considered sufficient to draw the individuals within Turkish jurisdiction.77 This “cause and effect” criterion seems to contradict the interpretation of Bankovic, in which an aerial bombardment has not been sufficient to establish a jurisdictional link. In Pad, instead, the Court seemed to believe that the discharge of fire from helicopters was sufficient to entail State jurisdiction. It seems that in Pad, the Court has substantially overcome the limitations to extra-territorial jurisdiction designed in Bankovic, unless an aerial bombardment can be considered different from the discharge of fire from helicopters. In any case, Pad was declared inadmissible by a section of the Court whereas Bankovic was declared inadmissible from the GC. Thus, even if Pad resulted from a different interpretation of the extension of the concept of jurisdiction, the interpretation given in Bankovic still prevailed.78 Additionally, subsequent case law from the GC appears to distinguish between instantaneous acts (that are not sufficient for triggering State jurisdiction)79 and prolonged control.

In a case involving the interception in high seas and transfer to France of a Cambodian vessel believed to carry narcotics, the GC considered that France ‘exercised full and exclusive control’80 over the vessel and the crew. The Court contrasted the facts of Bankovic with the facts of Medvedyev,81 considering that in

76 ibid para 54.
77 Milanovic, Extraterritorial Application (n 16) 185.
78 Another interpretation of Pad is that, given the fact that none of the Parties contested Turkish jurisdiction, it was at any rate useless to ascertain facts, eg their location. Another counter argument against a “cause and effect” interpretation may be the fact that Turkey did not contest extra-territorial jurisdiction, therefore the point had not been decided upon by the Court. The fact that Turkey did not question its jurisdiction in the specific case would not mean that similar cases may be generally accepted as extra-territorial jurisdiction cases.
79 Instantaneous acts are similar to the ones examined in Bankovic (n 32) and Pad (n 75).
81 The comparison has been criticised because the two cases have poor commonalities, Milanovic, Extraterritorial Application (n 16) 164.
the former case the extra-territorial act was instantaneous, whereas in the latter the acts constituted a prolonged *de facto* control.\(^{82}\) Therefore, the GC differentiates between a form of prolonged control and cases such as *Bankovic*, where ‘what was at issue was an instantaneous extraterritorial act, as the provisions of Article 1 did not admit of a “cause and effect” notion of “jurisdiction”’.\(^{83}\)

Is the instantaneity of the act enough for it not to amount to authority and control over a person? Or would it be possible to carry out an instantaneous exercise of authority and control over individuals? Moreover, since it is consistent jurisprudence that arrest and detention are traditional forms of control over persons entailing State jurisdiction and that a “simple” killing does not itself generate State jurisdiction, some authors critique the approach, because practically it would encourage State actors to kill rather than carry out arrests. In fact, following this interpretation, arresting someone would trigger State jurisdiction, whereas rapidly killing an individual before arresting her/him would not trigger State jurisdiction.\(^{84}\)

In sum, the ECtHR is persistent in recognising the existence of State extra-territorial jurisdiction in cases of exercise of authority and control over individuals through acts of arrest and detention. But uncertainty remains for cases involving instantaneous acts, such as the discharge of fire from helicopters or aerial bombings. Although a section of the Court seemed to be open to a flexible approach in *Pad*, the GC implicitly overruled such an approach through a somewhat arbitrary distinction between instantaneous acts and prolonged control. In fact, the distinction between instantaneous acts and prolonged control does not hold water, in so far as it seems to encourage killings instead of arrests.

The question of jurisdiction has been a ground for contention in a case regarding the killing of six Iraqi nationals by British troops during security operations in Basrah, south-eastern Iraq.\(^{85}\) In *Al-Skeini*, with specific regard to State agent authority and control over the person cases, the GC found that extra-territorial jurisdiction exists, amongst other cases, ‘where, in accordance with custom,  

\(^{82}\) *Medvedyev* (n 80) para 67.  
\(^{83}\) ibid para 64.  
\(^{84}\) This unacceptable contradiction has been anticipated before *Issa* by Lawson, ‘Life after *Bankovic*’ (n 16) 123. See also Judge Bonello’s Separate Opinion in *Al-Skeini* (n 24) para 15.  
\(^{85}\) *Al-Skeini* (n 24). For a detailed analysis of the story of one of the applicants’ case in national and international fora, see Gerry Simpson, ‘The Death of Baha Mousa’ (2007) 8 Melbourne Journal of International Law 340. For another case on Iraq, see *Al-Jedda v UK* (2011) 53 EHRR 23, which involved an individual’s detention in a prison run by British forces. Predictably, the case demonstrated less problematic than *Al-Skeini* on the question of authority and control, although the UK claimed that the detention was to be attributed to the UN.
treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State'.\(^{86}\) The GC established that in the actual case the UK exercised certain public powers regarding security in some areas of Iraq and deemed that British soldiers exercised authority and control over individuals during security operations.\(^{87}\) Avoiding the question of territorial control and occupation, the GC concentrated on the transfer of public powers and its exercise by the UK in the relevant area. Therefore, some scholars deem that the judgment was based on a ‘"public powers’ principle of jurisdiction’, elaborated for the first time in \textit{Al-Skeini}.\(^{88}\) Following this interpretation, the GC confined the extra-territorial application of human rights to the exceptional circumstances of the case.\(^{89}\) The reference to \textit{Al-Skeini} made by the GC in \textit{Hassan} seems to allow for such an interpretation, in which the official assumption of ‘authority for the maintenance of security in South East Iraq’\(^{90}\) and the fact that ‘the relatives were killed in the course of security operations carried out by United Kingdom troops pursuant to that assumption of authority’\(^{91}\) are the reasons why State jurisdiction arose. Therefore, apart from possible labels used to define the doctrine developed in \textit{Al-Skeini}, the judgment seems to merge the two different elements of exercise of authority over a certain area and control over persons, which combined together are able to trigger State jurisdiction.\(^{92}\) In addition, two real novelties may be found in \textit{Al-Skeini}. Firstly, in stark contrast with \textit{Bankovic}, the GC maintained that the rights can be ‘divided and tailored’\(^{93}\) to the situation. Secondly, the GC endorsed a case by case approach.\(^{94}\) Thus, the GC failed to establish definite principles on the matter of extra-territorial application, especially in grey areas of the issue. But as underlined by some scholars, it appears quite sure that the GC in \textit{Al-Skeini} confirmed the rejection of a “cause and effect” type of jurisdiction.\(^{95}\)

The last part of the saga (for the time being) is represented by \textit{Jaloud}, which concerns the killing of a person passing through a vehicle checkpoint in south-eastern Iraq.\(^{96}\) In this case the GC dismissed again a “cause and effect” type of

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\(^{86}\) \textit{Al-Skeini} (n 24) para 135.

\(^{87}\) ibid paras 149-150.


\(^{89}\) Reynolds, ‘Human Rights in the Line of Fire’ (n 88) 404.

\(^{90}\) \textit{Hassan} (n 23) para 75.

\(^{91}\) ibid para 75.

\(^{92}\) If compared with \textit{Jaloud} (n 66), in \textit{Al-Skeini} the exercise of certain public powers by the UK in a given area appears to be crucial in order to determine state jurisdiction.

\(^{93}\) This approach has been confirmed by subsequent case law, \textit{Hirsi Jamaa} (n 20) paras 73-74.

\(^{94}\) \textit{Al-Skeini} (n 24) para 132.

\(^{95}\) Reynolds, ‘Human Rights in the Line of Fire’ (n 88). See also section 2.4.

\(^{96}\) \textit{Jaloud} (n 66) paras 10-16.
jurisdiction, confirming Bankovic and Medvedyev.97 Indeed, the Court found that, although it could not be defined as an occupying power in the area where the killing took place, The Netherlands exercised jurisdiction through ‘asserting authority and control over persons passing through the checkpoint’.98 However, this approach breeds a series of unanswered questions about the difference in juridical terms, for example, between a vehicle checkpoint and a patrol outside of any public powers framework.99

To conclude, in cases of control over individuals the ECtHR accepts the extra-territorial application of the ECHR within certain limits, but unfortunately the Court has not defined the concept in detail, yet. One certainty is that, as also confirmed lately by the GC in Hassan, extra-territorial arrests and detentions trigger State jurisdiction.100 In contrast, as demonstrated by the recent Jaloud judgment, it remains doubtful whether extra-territorial killings committed by State agents are able per se to entail State responsibility, since the Court does not accept a “cause and effect” type of jurisdiction. In this regard, it is still unclear how a killing that happens at a mobile checkpoint may be different from a killing that happens during a patrol operation or an aerial bombing. What is sure, for now, is that the Strasbourg Court will have a case by case approach and it will most likely continue to surprise.

2.3 THE ACADEMIC DEBATE

This sub-section outlines some of the features of the current academic debate on the extra-territorial application of the ECHR. In short, until recently the majority of scholars has criticised the Strasbourg Court’s inconsistency. In this setting, Besson tries to overcome the scepticism towards the Court’s case law with the elaboration of a conceptual framework for the justification of the Court’s jurisprudence. Drawing on the theories of Raz and Benhabib, Besson argues that the overarching principle of the Court’s case law lies in the requirement of an effective, overall and normative control or power.101 In other words, jurisdiction corresponds to a ‘normative relationship’102 and without a normative dimension, State jurisdiction does not exist. In addition, referring to Milanovic’s work on extra-territorial application of human rights treaties, Besson criticises ‘vague claims about the universality of human rights’.103 In effect, Milanovic claims that

97 Sari, ‘Jaloud v Netherlands’ (n 67).
98 Jaloud (n 66) para 152.
99 Sari, ‘Jaloud v Netherlands’ (n 67).
100 Hassan (n 23) para 80.
102 ibid 860.
103 ibid 884.
since the philosophical foundation of human rights is their universal nature, negative obligations to respect human rights should be applied regardless of territory, because this is implicit in human rights treaties. The spatial model of effective control over areas and places should be then applied for positive obligations.\footnote{Milanovic, *Extraterritorial Application* (n 16) 209-219.} Arguably, this model reconciles universality and effectiveness, which in Milanovic’s vision are the two forces that guide the interpretation in the context of extra-territorial application of treaties in general.\footnote{ibid 220-222.}

Besson’s article fostered an online debate, where Ryngaert responded by highlighting the fact that the reference to ‘normative subjectedness’\footnote{Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 13) 874.} does not clarify the notion of jurisdiction, unless one adheres to Al-Skeini’s ‘loose territorial model of jurisdiction’.\footnote{Ryngaert, ‘LJIL Symposium: Response to Samantha Besson’ (*Opinio Juris*, 21 December 2012) <http://opiniojuris.org/2012/12/21/ljil-symposium-response-to-samantha-besson/> accessed 14 September 2014.} The scholar also quite rightly underlined that the distinction between ‘mere coercion’\footnote{ibid.} and ‘normative subjectedness’\footnote{ibid.} does not hold water because generally cases of *de facto* exercise of control include a normative dimension too.\footnote{ibid.} Finally, Ryngaert proposes a model in which

[A]ny individual whose rights are compromised by a State’s actions should in principle fall within that State’s jurisdiction, whether this jurisdiction is normatively grounded or amounts to mere coercion, provided that there is a strong nexus between the individual and that State.\footnote{ibid.}

This is not far from Judge Bonello’s interpretation of jurisdiction proposed in *Al-Skeini*.\footnote{See Section 2.4.} What is different is the reference to ‘reasonableness’\footnote{ibid.} for the establishment of the ‘strong nexus’,\footnote{ibid.} that would be assessed on a case-by-case basis.\footnote{ibid.}

Finally, this online debate falls within a similar on-going broader debate. Generally, the field of discussion may be divided between “expansionists” and “restrictivists”. In sum, for the first group of scholars and practitioners the argument is that of expansion of the extra-territorial application of the ECHR in light of the speciality of human rights treaties in the realm of public international law and/or by reasons of concern for a potential lack of protection.\textsuperscript{116} For the second group, since doctrinal soundness and/or realism are more important, the restrictive consequences of a certain type of interpretation are somewhat negligible on a moral level.\textsuperscript{117} To summarise with McGoldrick words, ‘they are questions of law, not of philosophy or ethics’.\textsuperscript{118}

Although Besson’s position is “restrictivist”, the scholar implicitly acknowledges the essentiality of a philosophical foundation. This Article agrees with this first methodological point, but it draws on a different philosophical framework that eventually leads to an “expansionist” solution.

The legal model proposed in this Article is not completely new, yet in a sense, its philosophical foundations elaborated upon in Section 3 are.

\subsection*{2.4 JURISDICTION AS A RELATIONSHIP OF POWER}

This sub-section proposes a legal interpretation of the concept of jurisdiction as describing a relationship of power between State and individuals. The argument is two-fold and it is generated by the application of the criteria suggested by article 31 of the VCLT. This interpretation is reconcilable with Judge Bonello’s concurring opinion in \textit{Al-Skeini}. In order to overcome a potentially incoherent and unpredictable case by case approach to the matter of extra-territorial jurisdiction, Judge Bonello proposed a “functional” test for establishing State jurisdiction in \textit{Al-Skeini} and in subsequent case law. After summarising the ‘basic minimum functions’\textsuperscript{119} of States parties, Judge Bonello suggested that State jurisdiction exists ‘whenever the observance or the breach

\begin{multicols}{2}
\begin{enumerate}
\item Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 13); McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ (n 30); Michael O’Boyle, ‘Comment on Life after Bankovic’ in Coomans and Kamminga (n 14).
\item McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ (n 30) 42.
\item \textit{Al-Skeini} (n 24) para 10 (Judge Bonello).
\end{enumerate}
\end{multicols}
of any of these functions is within its authority and control’. In this interpretation any distinction between territorial and extra-territorial is unwarranted.

A seemingly persuasive critique of an approach which boldly disregards the distinction between territorial and extra-territorial jurisdiction, is that the clause ‘within their jurisdiction’ would become redundant if compared with the clause ‘in all circumstances’ in the Geneva Conventions of 1949. In particular, the argument was made that ‘[h]ad the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949’. However, as shown by the commentaries on the Geneva Conventions, the reference to ‘all circumstances’ was inserted in order to avoid the non-application of the Geneva Conventions in times of peace or depending on the ‘character of the conflict’. Therefore, this clause is not related to the territorial or extra-territorial scope of application of the Geneva Conventions.

Additionally, the functional approach may be criticised because it would not distinguish between the legal concept of jurisdiction and the feasibility or capability of violating human rights. For Besson, there is a clear distinction between jurisdiction as a legal concept and the feasibility of a violation. Since jurisdiction is a pre-condition of the existence of rights, they may not be violated if they do not exist. Therefore, the logic of the functional test might collapse on a theoretical level. In fact, if the existence of rights depends on jurisdiction, the feasibility of rights violations may not substitute the concept of jurisdiction. Without the existence of jurisdiction, the object of violations would be something that is not codified as a right. Ergo, the substitution of the concept of jurisdiction with the mere feasibility or capability to violate rights may result in a circle. Simply put, rights would not exist without the recognition of jurisdiction. Therefore jurisdiction must be something different from the

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120 ibid para 11.
121 Bankovic (n 32) paras 25, 40, 75. See also O’Boyle, ‘Comment on Life after Bankovic’ (n 117) 131.
122 Bankovic (n 32) para 75.
capability of violating them, for the simple fact that they do not legally exist before and outside of State jurisdiction.\footnote{126}{This reasoning uncovers a hiatus between \textit{physei} and \textit{nomos} (between reality and law) which will be addressed in Section 3 of this Article.}

Some scholars argue that jurisdiction is also different from the two ‘elements of an internationally wrongful act of a State’,\footnote{127}{ILC Draft Articles on State Responsibility, art 2; De Schutter, ‘Globalization and Jurisdiction’ (n 38) 187-88.} i.e. the ascription of the act to a State and the wrongfulness of the international act.\footnote{128}{ibid.} Although jurisdiction is a \textit{condicio sine qua non} of State responsibility,\footnote{129}{De Schutter, ‘Globalization and Jurisdiction’ (n 38) 187-88.} the distinction remains clear because ‘the imputability of a situation to a State is therefore not a substitute for this situation falling under its jurisdiction’.\footnote{130}{ibid; see also Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 13) 867.} Persuasively, it is argued that if jurisdiction should have equated responsibility, the drafters of the ECHR would have avoided inserting article 1 into the Convention.\footnote{131}{McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ (n 3) 43.}

All conceptions of jurisdiction proposed in the context of extra-territorial application, including the one proposed here, may show strengths and weaknesses at the same time. Thus, a choice arises between interpretations of the phrase ‘within their jurisdiction’ that are more focused on their own doctrinal soundness and/or political viability on the one hand, and interpretations that are more attentive to the principles as well as the purposes underpinning IHRL, i.e. the effective protection of human rights,\footnote{132}{Bantekas and Oette, \textit{International Human Rights Law and Practice} (n 57) 284.} on the other hand.

The legal foundation of the argument proposed here is that the reference to jurisdiction in the ECHR should be read in the context of the specific type of treaty.\footnote{133}{In support of this claim, López Burgos (n 41) para 12.2 and Celiberti de Casariego (n 41) para 10.2. See also Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’ (n 28) 78-80.} From a literal point of view it is worth noting how the phrase ‘everyone within their jurisdiction’\footnote{134}{ECHR, art 1.} generates a scope of application concentrated on the relationship between the State and the individual.\footnote{135}{In this sense, art 1 of the ECHR seems to be one of the permitted exceptions to the basic rule of territorial application of a treaty provided by art 29 of the VCLT. On the absorption of jurisdiction as territorial control into a conception of jurisdiction intended as exercise of authority and control by the State, see Judge Rozakis’ Separate Opinion in \textit{Al-Skeini} (n 24).}
assumption is that the ECHR, either as an instrument for individual justice or a tool of public policy, operates as a limit to State power over individuals. Consequently, interpreting jurisdiction as equal to the existence of a power relationship between State and individuals seems to fit with the overall design of the treaty, in harmony with the constitutional tradition and in accordance with IHRL. In this vision, ‘facticity creates normativity’. Following the guidance of articles 31 of the VCLT, a two-fold argument may be proposed in support of an interpretation of the phrase ‘within their jurisdiction’ which allows for the applicability of the ECHR whenever there is a relationship of power between States and individuals. This is similar to the functional approach suggested by Judge Bonello.

Firstly, the ‘ordinary meaning to be given to the term’ jurisdiction in the context of human rights appears to be the one of a relationship of power between States and individuals. In the context of the ECHR, this kind of relationship occurs between States parties and individuals, regardless of the territorial or extra-territorial character of State acts. In this sense, the Convention would be a global instrument because it is applicable wherever a State party establishes a power relationship with an individual. At the same time, the ECHR would maintain its regional character because it would be coherently applicable only to State parties. Thus, ‘European’ in the title of the ECHR is not intended as reflecting cultural-specific rights excluding outsiders, the “extra-territorials”. ‘European’ means that the obligation to ‘secure [or

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136 Basilico interprets the ECHR as similar, in this respect, to legal texts such as the Magna Carta, the Bill of Rights, and the French Declaration: see Basilico, ‘Giurisdizione’ (n 116) 19.
137 The assumption is that IHRL is designed to protect the individual. Arendt argues that ‘throughout the nineteenth century, the consensus of opinion was that human rights had to be invoked whenever individuals needed protection against the new sovereignty of the state and the new arbitrariness of society’: see Arendt, The Origins of Totalitarianism (n 6) 369.
139 Although with opposite results, the same approach has been taken by the Court (partially): see, eg, Bankovic (n 32) paras 55-66. See also Gondek, ‘Extraterritorial Application of the European Convention on Human Rights’ (n 35) 361.
140 VCLT, art 31. Art 31 requires one to interpret the meaning of terms ‘in their context’.
141 Basilico, ‘Giurisdizione’ (n 116) 19.
142 The reference to territorial jurisdiction makes sense if referred to in a factual and possibly a quantitative way. In fact, according to the interpretation proposed in this Article there is no difference between the type of jurisdiction exercised domestically and the one exercised extra-territorially.
[reconnaître] the rights and freedoms’ defined in the Convention is undertaken by European States. The term ‘human’ signifies the entitlement to those rights and freedoms for ‘everyone’ who entertains a relationship of power with States parties, even an individual killed randomly through an instantaneous act, regardless of any public powers or vehicle checkpoint kind of framework. What more than the capability of *jus-dicere* on someone’s life depicts power?

Secondly, the preamble as well as the ‘object and purpose’ of the treaty suggest that jurisdiction should be interpreted by considering ‘the universal and effective recognition and observance’ of the rights contained in the Universal Declaration of Human Rights. Likewise, the purpose of taking ‘the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’ is relevant. It appears inherently contradictory to apply the ECHR in a way that would practically trump the universal recognition of human rights in situations where States parties have the authority and control to observe or breach the rights enshrined in the Convention.

In conclusion, if the premise of *Issa* and the principle set out in *Lopez Burgos* and *Celiberti de Casariego* are true, an interpretation of State jurisdiction as power exercised by States over individuals, without further temporal (*Medvedyev*), geographical (*Bankovic*) or spatial requirements, would describe the essence of State jurisdiction. This interpretation of article 1 of the ECHR conforms with the criteria set by article 31 of the VCLT, i.e. ‘in accordance with the ordinary meaning to be given to the terms of the treaty in their context’ and ‘in light of the object and purpose of the treaty’.

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144 ECHR, art 1.
145 ibid.
146 VCLT, art 31(2).
147 Preamble of the ECHR.
148 ibid.
149 Argument similar to the main argument made in Milanovic, *Extraterritorial Application* (n 16).
150 See *Issa* (n 31) para 71: ‘Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory’.
151 See *López Burgos* (n 41) para 12.2 and *Celiberti de Casariego* (n 41) para 10.2: ‘the reference ... is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred’.
152 VCLT, art 31.
153 ibid.

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III. PHILOSOPHICAL FOUNDATIONS

In Besson’s words, this Section aims to suggest ‘a philosophical understanding of jurisdiction to bear on legal debates about the extra-territoriality of international and European human rights and so doing to contribute to the existing debate among lawyers albeit from a different angle’.

3.1 PHILOSOPHY AND LAW

The reason for this Section departs from the idea that HRL and practice is often wrongly separated from philosophy. In this sense, Jacobs’ premise is embraceable: ‘[u]ltimately, it is a question of methodology and how we perceive our role as legal scholars’. But the unnecessary consequences of that premise are partially refused:

Law is a language that has its own logic in creating meaning and predictability. While this language can of course be discarded as a fiction, like any language, I believe that any belief in the possibility of legal science must be accompanied by adopting this fiction as a methodological starting point.

Simmons underlines how theoretical discussions of human rights and human rights practice seem to be completely different worlds that do not communicate to each other. A separation of law from philosophy and the treatment of the former as sealed off from the latter, may cause, for example, unawareness ‘of the extent to which human rights may be founded on an invisible ideology that conceals an original violence’. For example, Douzinas claims that the political philosophy of cosmopolitanism supporting human rights has given the theoretical framework for imperialism to push its frontiers further and become a widely accepted phenomenon. The background of this Article is not a position for which ‘human rights grounded in universal human dignity are a good thing’, let alone that it is just ‘frustrating’ to have a gap of protection.

155 Ibid.
156 William Paul Simmons, Human Rights Law and the Marginalized Other (CUP 2011) 5.
157 Douzinas, Human Rights and Empire (n 4).
158 Ibid 5.
159 Ibid 5.
160 Ibid 5.
161 Besson, ‘LJIL Symposium: A Response by Samantha Besson’ (n 154).
The purpose of this Article, apart from legal interpretations, is the affirmation of, above all, the existence of the other. An intricate and non-theoretically-grounded body of law on extra-territorial application of human rights may serve the interest of maintaining the status quo instead of recognising the other as human through her/his inclusion in the protection provided by the ECHR. In this context, the doubt is alive that human rights ‘promotion by Western states and humanitarians turns them into a palliative: it is useful for a limited protection of individuals but it can blunt political resistance’. Therefore, it is worth engaging in a theoretical debate, which might foster a non-definitive and philosophically-based conception of human rights.

The current debate on extra-territorial application of human rights suffers from a ‘crisis of legal interpretation’, which scholars try to solve through the recourse to extra-legal values or Dworkin’s reliance on the process of interpretation itself. As suggested by Rosenfeld, Dworkin’s concept of integrity is important because it avoids the ‘reduction of law to mere politics’. At the same time, it is fundamental to highlight the fact that law is ‘not self-contained, as it borrows and incorporates elements from other social practices, and as it partially overlaps with such other practices’.

3.2 PHYSEI AND NOMOS

In the context of extra-territorial application of human rights, the dilemma of the ‘right to have rights’ elaborated by Arendt is often cited. With the

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162 Douzinas, Human Rights and Empire (n 4) 293.
163 Michel Rosenfeld, ‘Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism’ in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds) Deconstruction and the Possibility of Justice (Routledge 2008) 152.
164 Milanovic refers to ‘universality and effectiveness’ to justify its interpretation.
165 In general on the crisis of legal interpretation, see Rosenfeld, ‘Deconstruction and Legal Interpretation’ (n 163) 152-56.
166 ibid 156. An example of the tension between political decisions and legal interpretative integrity may be found in the contrast between the majority’s decision and Judge Spano’s dissenting opinion in Hassan (n 23). In this case, any kind of accuracy in the legal interpretation elaborated in order to ‘accommodate’ the simultaneous application of IHL and the ECHR has been disregarded in favour of an extra-legal values-driven decision. See in particular Judge Spano’s Dissenting Opinion attached to the Hassan judgment and Section 4 of this Article.
167 ibid 188.
168 Arendt does not limit this to a legal plane, by suggesting that ‘the calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever’: see Arendt, The Origins of Totalitarianism (n 6) 375. See also Judge Pinto’s Concurring Opinion in Hirsi Jamaa (n 20).
foundation of the State, only citizens become entitled to rights. Not all humans are entitled to human rights just because of their humanity. ‘The alien is the gap between human and citizen’.\textsuperscript{169} There is then a hiatus between \textit{physei} (the reality of the natural status of humans who possess only their humanity) and \textit{nomos} (law, in this case the interpretation of the concept of State jurisdiction that allows for the nonexistence of human rights of “extra-territorials”). In other words, Arendt tried to ‘bridge the ontic-ontological gap embodied in the notion of human rights’.\textsuperscript{170}

In the context of the extra-territorial application of the ECHR, drawing on Benhabib’s work, Besson suggests to accept with ‘courage\textsuperscript{171} the paradox of the boundaries of human rights. After all, ‘one can never hope for one state’s institutions to respect the human rights of all’.\textsuperscript{172} Otherwise, in Besson’s opinion, by interpreting jurisdiction in a way that would render the concept too thin, the entire project of democracy would be threatened and ‘\textit{our own} human rights’\textsuperscript{173} would be violated.

As for the foundations of Besson’s argument, the scholar cited Benhabib’s work based on the concept of ‘democratic iterations’,\textsuperscript{174} which, combined with a cosmopolitan human right of hospitality, should overcome the dilemma of the ‘right to have rights’.\textsuperscript{175} However, this ‘concrete universalism’,\textsuperscript{176} as noted by Simmons, might actually ‘cauterize the other’\textsuperscript{177} through an undemocratic and exclusive discursive democracy.\textsuperscript{178} In other words, the attempt to put forward a democratic proposal collapses when ‘the voiceless will not be in a position to push for their rights, and they most likely will not be given a voice’,\textsuperscript{179} in that democracy. Inclusion in a discursive community may lead those who do not speak the same “universal” idiom, accepted within the community, to lose their voice.\textsuperscript{180}

\begin{footnotesize}
\begin{enumerate}
\item Douzinas, \textit{Human Rights and Empire} (n 4) 99.
\item Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 13) 884.
\item ibid 844.
\item ibid.
\item Benhabib, \textit{The Rights of Others: Aliens, Residents, and Citizens} (n 26).
\item Simmons, \textit{Human Rights Law and the Marginalized Other} (n 157) 6-9.
\item ibid 72.
\item ibid 72-73.
\item ibid.
\item ibid 121-22.
\end{enumerate}
\end{footnotesize}
Indeed, cosmopolitan proposals often encounter limits of responsibility for the other\textsuperscript{181} and this is reflected in Besson’s article. This occurs through the conceptualisation of a ‘normative subjectedness’\textsuperscript{182} which excludes from the entitlemen to human rights whoever is not under a State’s ‘normative guidance’.\textsuperscript{183} In this sense, the responsibility towards the other reaches a limit because ‘the cosmopolitan establishment of some sphere of indifference to the other constrains the achievement of the more just and caring global order to which cosmopolitans aspire’.\textsuperscript{184} In Besson’s case, this global order is represented by one based on liberal discursive democracies, which is consistent with the Kantian tradition transmitted by Benhabib with a Habermasian touch. As highlighted below, the indifference to which cosmopolitan perspectives induce may be superseded in the Levinasian ethics of the other.

3.3 **(BEYOND) LEVINASIAN PERSPECTIVES**

A gap between physei and nomos, which corresponds to a gap in the protection of human rights, may be overcome through the adoption of combined late-Arendtian and Levinasian perspectives.\textsuperscript{185} Arendt’s late work may be used for an attempt to explore the theoretical foundation of human rights, although some scholars claim that Arendt did not deeply explore the theoretical foundations of human rights.\textsuperscript{186} Both Arendt and Levinas recognised the crucial aspect of ‘plurality and interdependence’,\textsuperscript{187} by exploring hendiadys such as ‘the Rights of Man and the Citizen’\textsuperscript{188} and ‘the Rights of Man and the Other’.\textsuperscript{189} In hendiadys, the first word is comprised in the second term.\textsuperscript{190}

As proposed by Topolski, Arendt’s notion of plurality based on the ontic and Levinas’ notion of alterity which is essentially ontological, may be combined together in order to bridge the gap between physei and nomos, between the fact that human rights seek to exist outside of the law, but at the same time they need a recognition in law. Arguably, both authors deemed that the foundation

\textsuperscript{183} ibid 872-73.
\textsuperscript{184} Jordaan, ‘Cosmopolitanism, Freedom, and Indifference’ (n 181) 84-85.
\textsuperscript{185} For the same approach in the context of the global poor, see Jordaan, ‘Cosmopolitanism, Freedom and Indifference’ (n 181).
\textsuperscript{186} Simmons, Human Rights Law and the Marginalized Other (n 157) 97.
\textsuperscript{187} Topolski, ‘Relationality as a ‘Foundation’ for Human Rights’ (n 170) 12.
\textsuperscript{188} Referring to the French Déclaration des Droits de l’Homme et du Citoyen, 1789.
\textsuperscript{189} Emmanuel Levinas, ‘The Rights of Man and the Other’ in Emmanuel Levinas, Outside the Subject (Michael B Smith tr, SUP 1993) 116-125.
\textsuperscript{190} Simmons, Human Rights Law and the Marginalized Other (n 157) 92-99.
of rights was to be found in *relationality*. Arendt elaborated an ontic political concept of plurality, Levinas an ontological transcendental concept of alterity.191 A clarification may be useful at this point:

Rather than equate plurality with terms such as pluralism, diversity or multiculturalism – all rooted in the discourse of individualism dominant in liberalism – it is fundamental to understand Arendt’s goal was to go beyond singularity and in so doing explore the possibility of plurality, a social-ontology, as a new foundation for the ‘right to have rights’.192

In other words, human rights find their essence *in between relations* among people. Arguably, this is reconcilable with the Levinasian ‘social-ontology of the other’.193 Levinas found an infinite responsibility for the other, whose rights exist before the rights of the self.194 Levinas rooted his ethics on the transcendence of the other.195 As noted by Simmons, the face-to-face relationship with the other questions all institutions, HRL included.196 Arguably, Levinas did not develop further the implications of the infinite responsibility for the other, but certainly posited ethics as ‘prior to ontology, politics, and human rights’.197 Levinas’ *a priori* may be interpreted as the ‘disinterestedness of the loving response of the ego to the face of the concrete Other’.198

### 3.4 THE EXTRA-TERRITORIALITY OF HUMAN RIGHTS

To translate these philosophical foundations in legal practice is not a simple task and, inevitably, legal fictions are needed. The argument proposed here is that, in the particular context of the extra-territorial application of the ECHR,

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191 Topolski, ‘Relationality as a ‘Foundation’ for Human Rights’ (n 170) 2.
192 ibid 4.
193 ibid 7.
194 ibid 10.
195 Simmons, *Human Rights Law and the Marginalized Other* (n 157) 91.
196 ibid 91.
197 ibid 92, 97.
198 ibid 98. As demonstrated by a radio interview to Levinas on the Sabra and Chatila massacre the transcendental, unreal, and ‘non-thematizable Other’ struggles to cope with reality’s complicated phenomena. (A transcript of the interview is published in Seán Hand, ‘Ethics and Politics’ in Seán Hand (ed), *The Levinas Reader* (Blackwell 1989) 289-97). The hiatus between the ontological other and the ontic is not yet filled. To overcome this impasse, Simmons proposes a ‘phenomenology of the Saturated Other, drawing on the work of Marion who criticised Derrida because of the unreality of the objects he used in his elaborations: see Simmons, *Human Rights* (n 157) 109.)
the State needs to recognise the existence of human rights as ontic, as a fact of being, whenever a State agent falls in a relation with the other, i.e. the individual in legal terms. It is *in between* the relationship of the State agent and others that the existence of human rights in legal terms should correspond to the ontic notion of rights as existing in the ontological alterity of the other, metaphorically triggered by the view of the other’s face. This might be a non-definitive way of allowing for a bridge between the ontic (human rights that exist in relationality) and the ontological (legal fictions that need to reconcile with the existence of rights on the transcendental level of relationality). The existence of HRL should not exist separately from the existence of human rights as a fact of being. The law (in this case the interpretation of the rule on State jurisdiction) needs to make sure legal fictions conform to *physei* and the relationality of human rights. Otherwise, exclusions and dilemmas will continue to exist in different forms, one of which is an interpretation of article 1 of the ECHR that disregards the existence of human rights whenever there is a relationship between a State agent and “an-other”. This philosophical foundation of the extra-territorial application of the ECHR enables overcoming the hiatus between *physei* and *nomos*, because in this Article, ontological law complies with ontic human rights. No formal limits are admitted when the existence of human rights is, *extra-territorial*.\(^{199}\) They are, outside the territory of the self. Not recognising human rights in any relationship, especially when State power intervenes, would create a hiatus.

In conclusion, as shown in this Section, a philosophical foundation of human rights, different from a superficial reference to universality, is needed. The paradoxes of cosmopolitanism\(^{200}\) do not allow for a comprehensive philosophical foundation of the (extra-territorial) application of the ECHR. A Levinasian perspective instead might be appropriate for reconnecting *nomos* and *physei*.

### IV. COMPLICATIONS OF EXTRA-TERRITORIAL APPLICATION

This Section focuses on issues that reveal themselves problematic in the extra-territorial application of the ECHR. Complications are often provoked by the simultaneous application of norms different from article 1 of the ECHR or laws different from HRL. The first sub-section exposes the potential collapse resulting from the interaction of articles 1 and 56 of the ECHR. The second sub-

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\(^{199}\) For an articulated understanding of the concept of extra-territoriality in Levinas, see Robert Bernasconi, ‘Extraterritoriality: Outside the Subject, Outside the State’ (2008) 35 (Supp) Journal of Chinese Philosophy 167.

\(^{200}\) Douzinas criticises cosmopolitanism as a political philosophy legitimising imperialism, Douzinas, *Human Rights and Empire* (n 4).
section explores tensions resulting from the interaction of HRL and other bodies of law, such as IHL and Occupation Law (OL). The third sub-section focuses on the risk of human rights imperialism in extra-territorial settings.

4.1 COLONIAL “REMNANTS”

Apart from article 1 of the ECHR, another highly relevant provision is article 56, that allows States parties to ‘declare … that the present Convention shall … extend to all or any of the territories for whose international relations it is responsible’. This kind of mechanism legally sanctions and fits within the typical structure of colonial powers: ‘internally divided, yet externally unitary’. The colonial clause contained in article 56 ‘represents a significant regression from the early visions of uniform Convention application by permitting the optional extension of the Convention to dependencies’ [emphasis added]. As illustrated, the presence of article 56 in the Convention clashes with the current jurisprudence on article 1, and the positioning of the ECHR in IHRL.

The overlap between articles 1 and 56 ECHR proved itself problematic. As shown by Miltner, the drafting history of both articles highlights a certain contrast between the presumptive exclusion of dependencies from the ECHR’s application under article 56 and the expansion granted by article 1. In fact, article 56 has been read narrowly as requiring States’ formal declarations in order to extend the application of the ECHR to dependencies.

As underlined by some scholars, an inconsistency may arise from the fact that, for instance, the ECHR is applicable to Northern Cyprus under article 1, whereas States with a colonial history may freely decide to apply the Convention to their dependencies. Therefore, a differentiation occurs between individuals who find themselves in dependencies for which the colonial State has not made any declaration according to article 56, and individuals who live in extra-territories within the jurisdiction of States parties under article 1.

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201 ECHR, art 56. Similar provisions can be found in the Protocols to the ECHR, eg art 4 Prot No 1, art 5 Prot No 4 and art 5 Prot No 6.
202 Matthew Craven, ‘Colonialism and Domination’ in Bardo Fassbender and Anne Peters (eds), The Oxford Handbook of the History of International Law (OUP 2012) 883.
204 ibid 722.
205 Quark Fishing Ltd v UK App no 15305/06 (ECtHR, 19 September 2006); Yonghong v Portugal App no 50887/99 (ECtHR, 25 November 1999).
206 ECHR, art 56. Milanovic, Extraterritorial Application (n 16) 16.
207 Milanovic, Extraterritorial Application (n 16) 34.
For reasons of length and scope, this sub-section refers only to *Chagos Islanders v UK*. In line with *Al-Skeini*, the ECtHR repeated that the situations falling under the scope of application of article 1 are ‘clearly separate and distinct from circumstances falling within the ambit of Article 56’. The Court dealt with a case in which the UK did not make any declaration under article 56 to extend the application of the ECHR to the relevant territory. The Court rejected the argument that the personal and territorial models of jurisdiction under article 1 may be applied also to overseas territories. In fact, the Court considered that the application of article 1 of the ECHR to situations which fall under the scope of article 56 would render the provision ‘largely purposeless and devoid of content since Contracting States generally did, and do, exercise authority and control over their overseas territories’.

Furthermore, the Court considered that:

> Anachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice. Article 56 remains a provision of the Convention which is in force and cannot be abrogated at will by the Court in order to reach a purportedly desirable result [emphasis added].

This passage clearly illustrates the tension between the need to reform a systematically incoherent norm and the “powerlessness” of the Court to interpret otherwise article 56 of the ECHR. What is certain is that it is extremely contradictory and manifestly discriminatory to consider individuals who find themselves in territories under the effective control of States parties as entitled...

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209 *Al-Skeini* (n 24) para 140.

210 *Chagos Islanders* (n 208) para 73.

211 Although in reality the situation is more complicated than this, see Milanovic, ‘Update on the Extraterritorial Application of Human Rights Treaties’ (n 208).

212 *Chagos Islanders* (n 208) para 75.

213 ibid para 74. The (unconscious?) intent to absolve inconsistency and the colonial present must be noted. It might be important to understand ‘how and why did this new international norm emerge? What forces brought it about and what are the stakes behind its adoption?’ (referring to more general norms): see Douzinas, *Human Rights and Empire* (n 4) 189. In order to put article 56 in context, Chagos is an archipelago that includes Diego Garcia, an island used for rendition CIA rendition flights: see David Vine, *Island of Shame: The Secret History of the U.S. Military Base on Diego Garcia* (PUP 2009).
to human rights and individuals who find themselves in territories for which colonial powers arbitrarily decided not to extend the application of the ECHR, as not entitled to rights. Ironically, the Court even recognised that the State exercises authority and control over the relevant territories.214 This span between physei and nomos invites to question this type of provision present in the ECHR, its colonial present and, if any, the role of the judge.

Finally, the tenability of article 56 and analogous colonial clauses in the protocols is extremely questionable. The presence of article 56 of the ECHR offers States strong legal arguments against the extra-territorial application of the ECHR. However, the artificial separation between overseas territories and newly acquired ones does not hold water from an anti-discrimination perspective. The solution seems to be reserved to a reform of the text by political actors, much needed to save the ECHR from unacceptable inconsistency and complicity with the colonial present.215

4.2 EXTRA-TERRITORIAL APPLICATION IN ARMED CONFLICT

The extra-territorial application of the ECHR becomes regularly relevant in the context of military interventions by States, whether the intervention is lawful or unlawful, whether it constitutes occupation or it amounts to international armed conflict. The framework is inevitably complicated by the relevance of IHL and OL. As demonstrated by recent case law, the uncertainty in the criteria applicable to solve conflicts between norms of HRL and other bodies of international law may, in some cases, hamper the actual application of HRL norms allowing instead for the application of weaker regimes of protection.

4.2.1 ECHR AND IHL

As for the relationship between HRL and IHL, a recurring argument is that IHRL does not apply in armed conflict because IHL is the only law applicable in this realm. The persistent claim is that since IHL is designed to set norms for armed conflict, it excludes the application of HRL that would be applicable solely in times of peace. This interpretation derives from the separation theory that starkly distinguishes the laws of war and the laws of peace.216 Although

214 Chagos Islanders (n 208) para 75.
anachronistic,\textsuperscript{217} this theory is constantly used by States to avoid the application of HRL during armed conflicts.\textsuperscript{218}

A counter-argument to this theory is that human rights treaties contain clauses, such as article 15 of the ECHR,\textsuperscript{219} that oblige States to follow procedures in order to derogate from human rights treaties. Following this line of reasoning, the conclusion is that the application of HRL ‘does not cease in times of war’,\textsuperscript{220} unless formal derogation procedures are followed by States.\textsuperscript{221} Confining HRL to times of peace would render such norms completely redundant.\textsuperscript{222} This specific point has been addressed with legally unsatisfying results in the \textit{Hassan} case, which will be briefly mentioned at the end of this sub-section.

The cumulative application of IHL and HRL recognised by different international \textit{fora} may cause conflicts between norms, arguably to be solved through the \textit{lex specialis derogat generali} maxim. The classical example of this doctrine is to be found in the \textit{Nuclear Weapons} Advisory Opinion where the concept of arbitrariness has been interpreted applying IHL as \textit{lex specialis}, with regards to the prohibition of arbitrary deprivations of life.\textsuperscript{223} The ICJ repeatedly stated that there are:

\begin{quote}
[T]hree possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of
\end{quote}

\begin{flushleft}
\textsuperscript{218} See for example, \textit{Hassan} (n 23) paras 87-88 and \textit{Al-Skeini} (n 24) para 119. See also Cerone, ‘Human Dignity in the Line of Fire’ (n 16) 1451. On more theoretical grounds, see Giorgio Agamben, \textit{State of Exception} (UCP 2005).
\textsuperscript{219} The ECHR leaves States a wide, although not unlimited, margin of appreciation in the assessment of the existence of a public emergency: see \textit{Ireland v UK} (1979-80) 2 EHRR 25 para 207 and \textit{Lawless v Ireland} (1979-80) 1 EHRR 15 paras 36-38. Provisions similar to art 15 of the ECHR can be found at art 4 of the ICCPR and art 27 of the ACHR.
\textsuperscript{220} ICJ, \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory} (n 15) paras 102-106.
\textsuperscript{221} Against this conclusion, see Michael J Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’ (2005) 99 American Journal of International Law 119, 134-38.
\textsuperscript{222} It is interesting to note that a similar argument is made for the non-application of art 1 of the ECHR to colonial dependencies. This uncovers law’s ‘formal predictability and substantive indeterminacy’: see Martti Koskenniemi, ‘Letter to the Editors of the Symposium (1999) 93 (2) American Journal of International Law 351, 355. See also Douzinas, \textit{Human Rights and Empire} (n 4) 189.
\textsuperscript{223} ICJ, \textit{Nuclear Weapons} (n 217) para 25.
\end{flushleft}
human rights law; yet others may be matters of both these branches of international law.\textsuperscript{224}

Scholars suggest avoiding blunt approaches in this context, because of the unsuitability for all situations of the \textit{lex specialis} canon. For example, some scholars warn on the fact that the interaction between IHRL and IHL may involve conflicts of norms that are not solvable solely through the application of a legal maxim, especially when the same can be interpreted in different manners.\textsuperscript{225} Some authors propose applying different principles depending on the situation: ‘the most favourable principle’\textsuperscript{226} of HRL in cases of international territorial administration; the application of HRL \textit{tout court} in internal armed conflicts;\textsuperscript{227} the use of HRL for interpreting the substance of IHL norms.\textsuperscript{228} In a more systematic fashion, other scholars propose pre-established sets of rules to assure harmony in the cumulative application of IHL and HRL.\textsuperscript{229}

Moreover, some scholars argue that merging IHL and HRL adulterates both bodies of law, by blurring definitions and introducing strange principles in the domain of HRL, e.g. military necessity.\textsuperscript{230} This critique argues that the Bush and Obama administrations ‘developed a number of legal strategies that depended on diluting the boundaries between various fields of International law and diminishing the clarity of binding rules and fields of legal application’.\textsuperscript{231}

Despite this convincing critique, in principle and from a practical perspective, the extra-territorial application of human rights standards in armed conflict seems to

\textsuperscript{224} ICJ, \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory} (n 15) para 106.

\textsuperscript{225} Milanovic, \textit{Extraterritorial Application} (n 16) 234-35.


\textsuperscript{227} ibid 275.

\textsuperscript{228} ibid 276.


provide minimal legal tools to demand that States comply with HRL through currently available legal instruments, not as clearly provided under IHL.\textsuperscript{232}

As to the purposes of this Article, the cumulative application of HRL and IHL has been confirmed by the Strasbourg Court in several occasions.\textsuperscript{233} The relevance of IHL in situations of armed conflict does not hinder, in general, the extra-territorial application of the ECHR. For instance, in the jurisprudence on the use of lethal force in internal armed conflict, the Court borrowed interpretative criteria from IHL.\textsuperscript{234} In international armed conflicts, the role of IHL may be more prominent in the interplay with European HRL, since IHL is considerably more specific than European HRL in internal conflicts.

In Al-Skeini, the GC confirmed the cumulative application of HRL and IHL through the \textit{lex specialis} canon.\textsuperscript{235} In line with the case law from international fora,\textsuperscript{236} the overall approach seems to be that HRL applies in situations of armed conflict and IHL may serve as \textit{lex specialis}. For instance, in Al-Skeini the GC deemed that the duty to investigate imposed by article 2 of the ECHR should have focused on the Rules of Engagement of British soldiers, in order to assess the legality of certain acts.\textsuperscript{237} \textit{Vice versa}, HRL might be the \textit{lex specialis}, for instance when HR standards require the investigations to be ‘independent’ and not only ‘official’.\textsuperscript{238} In conclusion, the (extra-territorial) application of the ECHR does not seem to be impeded by the applicability of IHL, but the complementarity of HRL and IHL may produce concrete mutual limitations.

In this complex legal framework, the recent GC judgment in the \textit{Hassan} case has not added clarity to the debate and apparently it is not certain anymore that the \textit{lex specialis} canon, with all its grey areas, is the criterion to be applied in case of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{232} In some instances IHL may provide higher standards of protection, but remedies are scarce: see Yoram Dinstein, \textit{The Conduct of Hostilities under the Law of International Armed Conflict} (CUP 2010) 25.
\item \textsuperscript{233} There is a tendency to use the HRL machinery to enforce IHL, see Heintze, ‘On the Relationship between Human Rights Law Protection and International Humanitarian Law’ (n 216) 798-813.
\item \textsuperscript{234} eg \textit{Ergi v Turkey} (2001) 32 EHRR 18, para 79.
\item \textsuperscript{235} \textit{Al-Skeini} (n 24) paras 90-94.
\item \textsuperscript{236} ibid.
\item \textsuperscript{237} ibid para 170.
\item \textsuperscript{238} ibid paras 168-177.
\end{itemize}
\end{footnotesize}
conflicts between norms. The issue of cumulative application of the ECHR and IHL in context of armed conflict has arisen in the Hassan case, which mainly concerned the alleged violation of the applicant’s right to liberty protected in article 5 of the ECHR. Surprisingly, the applicant’s argument on the importance of article 15 of the ECHR has not really been taken into account by the GC. The Court seemingly recognised the relevance of article 15 and the fact that ‘the United Kingdom did not purport to derogate under article 15 from any of its obligations under article 5’. In reality, following a unique approach in the realm of possible criteria of legal interpretation, the Court went on to consider that:

[B]y reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraph (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15. It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.

In practice, in this case, the so-called accommodation equals the non-application of the ECHR in favour of an IHL regime which is weaker in terms of protection

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240 Hassan (n 23) para 98.

241 ibid para 18 (Judge Spano).

242 ibid para 104.
of individuals’ rights. Indeed, as highlighted in the dissenting opinion of Judge Spano, joined by three other Judges:

[W]hatever this purported method entails, it bears reiterating that there is simply no available room to “accommodate” the powers of internment under international humanitarian law within, inherently or alongside Article 5 § 1. Furthermore, as the disapplication option is off the table, since no derogation from the Convention has occurred, this novel method of accommodation cannot be implemented in such a manner as to have effectively the same legal effects as disapplication. However, by concluding, as the majority does, that the grounds of permitted deprivation of liberty under Article 5 § 1 should be “accommodated, as far as possible”, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions, the majority, in essence, does nothing else on the facts of this case. It effectively disappplies or displaces the fundamental safeguards underlying the exhaustive and narrowly interpreted grounds for permissible detention under the Convention by judicially creating a new, unwritten ground for a deprivation of liberty and, hence, incorporating norms from another and distinct regime of international law, in direct conflict with the Convention provision.243

Finally, the extra-territorial application of the ECHR is regularly relevant in armed conflict scenarios. This entails clashes between HRL norms and IHL norms. As demonstrated by the Hassan case, there is still no certainty as to the criteria to be used to solve norm conflicts. Despite the formal recognition that the ECHR applies extra-territorially, in practice, uncertainty and methodological incoherence may cause the extra-territorial non-application of the ECHR in favour of weaker protection regimes.244

4.2.2 ECHR AND OCCUPATION LAW

In cases of simultaneous application of OL245 and extra-territorial application of the ECHR,246 the overlap between the two bodies of law may cause tensions. In

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243 Hassan (n 23) para 18 (Judge Spano).
244 See Hassan (n 23) and Judge Spano’s Dissenting Opinion.
particular, article 43 of the Hague Convention (HC) prescribes that the occupying State ‘shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’. 247

Arguably, this norm may be seen as limiting the applicability of HRL in situations of occupation because local norms may be incompatible with the ECHR. 248 However, as observed by some scholars, the Strasbourg Court did not consider OL as a general obstacle to the application of the ECHR in occupied territories, as demonstrated for instance in Loizidou and Al-Skeini. 249

It must be observed that during occupation HR may be double-edged. Although some scholars maintain that occupying Powers might genuinely establish new laws to implement IHRL, 250 it must be recognised that HRL may also be used to impose new orders and legitimise them. Indeed, one major and convincing critique is that the application of IHRL during occupation may be highly inappropriate from the perspective of the local population. 251 Modirzadeh states as follows:

[W]hile I understand the short-term gains of demanding that the British respect human rights law in their actions in Iraq (one could perhaps argue that it would result in better trials, or less torture, though again this has yet to be convincingly demonstrated by any argument about how human rights law would materially change the current panoply of rules under IHL), I do not want an occupying power that has invaded my State to be recognized by the international community as having a “rights-based” relationship with my population. I do not want that State to be in a position to argue that it has to engage in certain institutional changes in order to be able to comply with its human rights obligations back home. I do not want a State that has no relationship to civil society in my country, has no long-term understanding of my population, its

246 Possible in both cases of control over territory and control over individuals: see sub-sections 2.2.1-2.2.2.
247 HC (IV), art 43.
248 Milanovic, Extraterritorial Application (n 16) 257-59.
251 It may be argued that the invaded would correspond to Simmons’ ‘marginalized Other’, although the author warns from formulaic applications of this phenomenology: see Simmons, Human Rights (n 157) 1-16.
history, its religious values, etc., to have a hand in shaping its human rights framework simply by virtue of its choice to invade.\textsuperscript{252}

This critique is certainly embraceable and it highlights a potential conflict between the right to self-determination and new laws established after war and occupation, especially when the occupation is prolonged. In fact, the right to self-determination, which is not part of the ECHR but more generally of IHRL, should play an essential role in assessing \textit{why} and \textit{how} the ECHR might apply.\textsuperscript{253} Simplistic approaches in these situations, in both ways, may disguise a replication of colonial structures, where both the ‘full differentiation and full identification’\textsuperscript{254} of the non-European were used to expand European influence.\textsuperscript{255}

Although in certain cases HRL may appear as the emperor’s new clothes due to specious assessments of the interplay between HRL and OL,\textsuperscript{256} it is also true that, as argued by the applicants in \textit{Al-Skeini}:

\begin{quote}
[T]he duty on an occupying State under international humanitarian law to apply the domestic law of the territorial State and not to impose its own law could not be used to evade jurisdiction under the Convention, since the “effective control of an area” basis of jurisdiction applied also to unlawful occupation.\textsuperscript{257}
\end{quote}

The ECtHR’s case law on control over territory shows that the ECHR is generally applicable in occupation contexts. In fact, the criteria triggering both the application of OL and State jurisdiction under the ECHR are similar, since they depend on a spatial connection of the occupying Power with the territory. The variable overlap between the two bodies of law might depend on different interpretations of article 1 of the ECHR and article 42 of the HC. The latter prescribes that:

\begin{quote}
[T]erritory is considered occupied when it is actually placed under the authority of the hostile army.
\end{quote}

\begin{footnotes}
\item[252] Modirzadeh, ‘The Dark Sides of Convergence’ (n 230) 375.
\item[254] Koskenniemi, \textit{The Gentle Civilizer of Nations} (n 1) 130.
\item[255] ibid.
\item[257] \textit{Al-Skeini} (n 24) para 127.
\end{footnotes}
The occupation extends only to the territory where such authority has been established and can be exercised.\(^\text{258}\)

The effective overall control doctrine developed by the ECtHR surely includes situations of occupation. Moreover, the criterion developed in *Issa*,\(^\text{259}\) based on ‘whether at the relevant time Turkish troops conducted operations’ in a certain area,\(^\text{260}\) does not require the same level of authority required by article 42 of the HC. Additionally, the criterion developed in *Ilascu*, where jurisdiction was triggered by the decisive influence exercised by Russia on the separatist Transdniestria, is most likely dissimilar from the level of authority required by article 42 of the HC. Thus, the scope of extra-territorial application of the ECHR seems larger than the scope of application of OL. In other words, there might be cases where the ECHR applies extra-territorially due to the exercise of control over an area and OL does not apply; but not *vice-versa*.

### 4.3 HUMAN RIGHTS IMPERIALISM

Concerns about the inappropriateness of the application of the ECHR in extra-territorial settings have been raised in the *Al-Skeini* proceedings.\(^\text{261}\) In the House of Lords, Lord Brown observed how ‘[o]ften (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied’.\(^\text{262}\) In the same judgment, Lord Rodger affirmed:

> [T]he essentially regional nature of the Convention is relevant to the way that the court operates. It has judges elected from all the contracting states, not from anywhere else. The judges purport to interpret and apply the various rights in the Convention in accordance with what they conceive to be developments in prevailing attitudes in the contracting states. This is obvious from the court’s jurisprudence on such matters as the death penalty, sex discrimination, homosexuality and transsexuals. The result is a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world. So the idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the

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\(^{258}\) Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations, Concerning the Laws and Customs of War on Land (Signed 18 October 1907) 205 CTS 277 (HC (IV)), Art 42.

\(^{259}\) Admittedly to be read as control over territory and not over individuals.

\(^{260}\) *Issa* (n 31) para 76; Wilde, ‘Triggering State Obligations Extraterritorially’ (n 36) 524-25.

\(^{261}\) See ibid for a thorough account.

\(^{262}\) *R (Al-Skeini and others) v Secretary of State for Defence* (n 2) [129].
European court in the utterly different society of southern Iraq is manifestly absurd … If it went further, the court would run the risk … of being accused of human rights imperialism.\textsuperscript{263}

In this regard, some observations have been made by scholars. First of all, positing Islam and Europe as incompatible normative frameworks would correspond to ‘cauterize’ the Muslims who live in the Council of Europe. Secondly, States such as Iraq are bound by other treaties that enshrine most of the rights contained in the ECHR. Third, obliging the UK to respect HRL during occupation may have ‘the effect of mitigating, not exacerbating, the colonial nature of the occupation’.\textsuperscript{264} Additionally, in the context of the ECHR, the margin of appreciation doctrine may be used to accommodate distinctions between the law applicable at home and the law applicable elsewhere.\textsuperscript{265} Furthermore, the assumption that human rights and \textit{Sharia} are not compatible is one that needs be challenged, not least because it is challenged within the current academic debate on the matter.\textsuperscript{266}

Purely legalistic approaches may not achieve the goal of including the other in the protection provided by the ECHR without infringing the right to self-determination.\textsuperscript{267} Legalistic approaches risk leaving the other outside of the discussion. Discursive democracy did not seem to work either, as shown in recent affairs, although hoped for by Benhabib.\textsuperscript{268} As underlined by Simmons, if the marginalized other has no voice, it is impossible to hear her/him. As suggested by Wilde, as a closed system, the law may offer solutions to reconcile local and “external” norms. For example, the law may solve conflicts between norms through the \textit{lex specialis} doctrine, even for situations evoking a ‘clash of civilizations’,\textsuperscript{269} for example where the UK could not apply the ECHR in Iraq

\textsuperscript{263} ibid.
\textsuperscript{264} Wilde, ‘Triggering State Obligations Extraterritorially’ (n 36) 521-22. This however goes together with critiques Modirzadeh and, in a more general context, Douzinas make about the use of HRL to legitimise neo-colonial practices. Modirzadeh, ‘The Dark Sides of Convergence’ (n 230) and Douzinas, \textit{Human Rights and Empire} (n 4).
\textsuperscript{265} Wilde, ‘Triggering State Obligations Extraterritorially’ (n 36) 523.
\textsuperscript{266} On human rights and \textit{Sharia}, see eg Mashood Baderin, \textit{International Human Rights and Islamic Law} (OUP 2003).
\textsuperscript{267} For example, Judge Bonello’s Separate Opinion in \textit{Al-Skeini} (n 24) may appear too direct in this respect.
\textsuperscript{268} Simmons, \textit{Human Rights Law and the Marginalized Other} (n 157) 44-84.
\textsuperscript{269} Samuel P Huntington, \textit{The Clash of Civilizations and the Remaking of World Order} (Simon & Schuster 1996).
because it was allegedly too different from local norms. However, the application of solely legal solutions may seem too formalistic. Indeed, from the point of view of the affected, deciding in the House of Lords which is the best solution for a potential conflict between “European-imported” norms and Iraqi local norms, may seem inadequate.

V. CONCLUSION

The structure of the Article corresponds to the idea that law, philosophy and praxis should be inter-twined.

Section 2 showed how article 1 of the ECHR functions as a trigger mechanism for the extra-territorial application of the ECHR. Through the interpretation of article 1, practices of inclusion-exclusion are (inevitably) carried out. As to the Court’s interpretation, State jurisdiction means either control over territory or control over persons. The current interpretation of article 1 of the ECHR may generate inconsistencies and unacceptable consequences. A different interpretation seems required. Drawing on already existent suggestions, an interpretation that descends from the application of article 31 of the VCLT is proposed. An interpretation of jurisdiction as a relationship of power between the State and the individual seems the more natural outcome if article 1 of the ECHR is interpreted in harmony with the reality on which HRL wants to be a norm. Furthermore, the object and purpose of the ECHR and article 1 belonging to IHRL suggest the same interpretation based on a conception of jurisdiction as a relationship of power between States and individuals.

Section 3 challenged current theories underpinning the legal interpretation of article 1 of the ECHR by proposing renewed philosophical foundations for an extra-territorial application which acknowledges the relationality of human rights as a fact of being. This suggestion may bridge the gap between physei and nomos, which in the past and in current times causes the paradox of exclusive human rights. Levinasian perspectives in this context may appear helpful to overcome the limits of cosmopolitanism and provide for an ‘infinite responsibility for the other.’ Beyond Levinasian perspectives, other paths are

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271 ‘Solidarity with the Other’s proyecto’ which means ‘listening to the aneu logou and working with them to realize their rights based on their own priorities’ may be an interesting path to explore, although this may seem utopian, for example, in a situation of resistance against occupying Powers: see Simmons, Human Rights Law and the Marginalized Other (n 157) 123-25.

272 Topolski, ‘Relationality as a ‘Foundation’ for Human Rights’ (n 170).
available and worth exploring, such as the ‘phenomenology of the marginalized Other’.\textsuperscript{273} At the same time, these proposals are not to be taken as \textit{formulae}, but simply as new theoretical foundations for human rights, which need to be constantly questioned in order to evolve and adapt to new circumstances.

Section 4 has shown some of the practical complications of the extra-territorial application of the ECHR. The colonial present of the ECHR needs to be tackled, either in the political sphere or by new legal interpretations. In addition, as demonstrated by recent case law on the right to liberty in extra-territorial armed conflicts, the interplay between IHL and the ECHR may cause the extra-territorial non-application of the ECHR which would have the same practical consequences of interpretations which exclude the extra-territorial application of the ECHR. Moreover, the extra-territorial application of the ECHR in situations of occupation may generate phenomena of human rights imperialism. Also, the use of human rights to legitimise military occupations and new orders should be taken into account. These are fears that need to be considered seriously, if the credibility of human rights is a matter of concern for practitioners. Solutions attentive to the other and her/his needs are again warranted.

In conclusion, an overall appraisal of the issues covered in this Article warrants a process of extra-territorial application of the ECHR which listens to the voice of the other. When it comes to the translation into legal terms and practical solutions, following philosophical theories becomes more complicated. However, the main argument of this Article is that it is important not to lose sight of the theoretical origins of human rights and not to treat them as static, immutable or even worse, untouchable. Questioning and deconstructing foundations built in the past and norms of the present may uncover contradictions and injustices. At the same time, while allowing for more coherent understandings of the law and its origins, this process may also build concrete proposals for the present and the future.

\textsuperscript{273} Simmons, \textit{Human Rights Law and the Marginalized Other} (n 157).
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Unintended Consequences of International Human Rights Advocacy in Uganda

Ciara Bottomley*

This Article analyses the unintended consequences human rights advocacy has had on the rights of LGBTI persons in Uganda. This Article traces the criminalisation of homosexuality in former British colonies to modern day anti-homosexuality laws and discusses the interplay between LGBTI rights and state sovereignty. An analysis is provided of the background to the legislation and the role of American religious leaders in its drafting. This Article analyses the unintended consequences of both international and national LGBTI advocacy in Uganda in light of the assertion that the international non-governmental organisation movement may have done more harm than good. This Article concludes that any hope of repealing the law rests on the success of strategic litigation. Since this Article was written the Anti-Homosexuality Law has been struck down by the Constitutional Court in Uganda on the basis that parliamentary quorum was not met when the law was passed. This is a positive if somewhat perfunctory advancement as Parliamentarians have drafted a new, almost identical bill which is currently under consideration.

I. INTRODUCTION

The Anti-Homosexuality Act was passed in Uganda in February 2014. The Act received strong support from American Christian missionaries and builds upon a long history of criminalised homosexuality inherited from colonial rule.¹ Despite this, the new law has received a considerable amount of attention in Western media and international non-governmental organisations. Under the new law, promoting, funding, offering premises or ‘aiding and abetting’

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¹ Ugandan Penal Code Act 1950, s 15(2).
homosexuality carries a prison sentence of five to seven years. Directors of organisations that seek to support lesbian, gay, bisexual, trans/transgender, intersex (LGBTI) persons, if convicted, can be sentenced for up to seven years in prison and have their trading licences revoked. This provision presents a grave threat to the work of human rights defenders and violates fundamental human rights including freedom of expression, assembly and association. This law has grave implications not only for the civil and political rights of LGBTI persons, but also for their economic, social and cultural rights.

This Article seeks to determine how to defend the human rights of the Ugandan LGBTI community in this climate of fear and oppression. Past and present advocacy strategies that seek to defend the rights of LGBTI persons in Uganda will be analysed in light of the new law. To do so, this Article looks at the background of the legislation and the role of American religious leaders in its drafting. There is critique of the advocacy strategies employed by international non-governmental organisations and analysis on some of the ethical dilemmas faced. This Article concludes that any hope for change must come from Uganda itself, as international decriminalisation efforts often ignore local realities.

II. HOMOPHOBIC UGANDA?

Homosexuality was neither condoned nor condemned in the territories that are known today as Uganda. Laws regulating homosexual activity were a colonial import. The first anti-homosexuality law, section 377 of the Indian Penal Code, dates to 1860. A carbon copy of this law has also been used in other former British colonies. The British are said to have believed the laws could ‘inculcate European morality into resistant masses. They brought in the legislation, in fact, because they thought ‘native’ cultures did not punish ‘perverse’ sex enough’.

At the time of writing, there are 82 jurisdictions with laws criminalising private, consensual sexual conduct between adults of the same sex. 53 of these jurisdictions are Commonwealth countries and 80% of them criminalise

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3 ibid s 13.
homosexuality. For example, consensual sex between persons of the same sex has been a criminal offence in Uganda since 1950. According to section 145:

Any person who has carnal knowledge of any person against the order of nature; has carnal knowledge of an animal; or permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.

A Ugandan Member of Parliament, David Bahati, from the ruling party, the National Resistance Movement, introduced the Anti-Homosexuality Bill (the Bill) in September 2009. The Bill proposed the death sentence for those found guilty of homosexuality and created a public duty to report persons suspected of homosexuality. Unsurprisingly, these provisions provoked outcry from national and international non-governmental organisations (NGOs). In February 2014, the amended Bill abandoned these provisions and was signed into law by President Yoweri Museveni. Under the Anti-Homosexuality Act 2014 (the Act), engaging in a sexual act with someone of the same sex, touching someone of the same sex ‘with the intention of committing the act of homosexuality’, or marrying someone of the same sex all carry the penalty of life imprisonment.

Section 13(1) criminalises the ‘promotion’ of homosexuality. Under this section, disseminating materials, providing funds or premises, using electronic devices or acting as an accomplice for the purpose of ‘promoting’ homosexuality is punishable by a prison sentence of up to seven years. Section 13(2) criminalises the activities of organisations that promote homosexuality. On conviction, the certificate of registration of the organisation is to be revoked and the director, proprietor or promoter may be sentenced to up to seven years’ imprisonment.

Section 13 gravely undermines both individual and collective rights to freedom of expression. Without a clear definition of the criminalised material, the broad
list of offences is open to abuse. It is easy to envisage unscrupulous persons using this law to unfairly target people in the LGBTI community. The case of Robert Kayanja, an influential pastor in Uganda, who was wrongly accused of sodomy by conspirators within his ministry, serves as an example of how vexatious individuals may use the law for personal gain.\textsuperscript{15}

The Act will foreseeably censor a wide range of organisations that work in diverse fields including, \textit{inter alia}, health, education and law reform. The Act criminalises persons who counsel or advocate on behalf of LGBTI persons. This will create ramifications with regards to health service provision, particularly in relation to HIV/AIDS. This broad wording of the section may also criminalise the distribution of materials seeking to educate the public on HIV/AIDS transmission. It also creates a chilling effect among health professionals, advocates and activists who are fearful of prosecution.

In addition to the Anti-Homosexuality Act, a number of other laws have recently been passed. These laws similarly seek to curtail individual freedom in the name of morality; for example, the Anti-Pornography Act 2014, the so-called mini-skirt ban, and the reduction of public space available to Ugandan civil society by the Public Order Management Act (POMA) 2013.\textsuperscript{16} In the name of ‘safeguarding the public order’, POMA significantly limits the right to protest or hold public meetings.\textsuperscript{17} Where a public meeting is held contrary to the Act, law enforcement agencies can stop the meeting and participants in the meeting may be imprisoned for a period of up to 12 months or subject to fines.\textsuperscript{18}

These laws present serious challenges to freedom of expression and assembly, specifically with regard to the rights conferred by Article 29 of the Constitution.\textsuperscript{19} These laws are difficult to reconcile with Uganda’s obligations under the African Charter on Human and Peoples’ Rights (ACHPR).\textsuperscript{20} Furthermore, it is likely that the laws are incompatible with Uganda’s international obligations under the International Covenant on Civil and

\textsuperscript{16} Public Order Management Act 2013.
\textsuperscript{17} ibid ss 5-6.
\textsuperscript{18} ibid s 10(3).
Political Rights (ICCPR)\textsuperscript{21} and the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.\textsuperscript{22}

The 21st century LGBTI movement has been marked by a polarisation of views. This polarisation, at its most extreme, is demonstrated by the legalisation of same-sex marriage in countries such as Britain, the United States and New Zealand as compared to moves to further criminalise homosexuality as in Uganda, Russia or Nigeria. It seems that legislation regulating homosexuality to one extreme or the other has become the focal point of a culture war between the developed and so-called ‘developing’ world. In both cases, this legislation wins votes. For example, a reported 96\% of Ugandans believe that homosexuality should not be accepted by society.\textsuperscript{23} A recent survey in Britain has shown that nearly 70\% of the population are in favour of same-sex marriage, a figure that has quadrupled in the past four decades.\textsuperscript{24} These statistics do not operate in a vacuum; there is a direct relationship between wealth, religiosity and tolerance of homosexuality.

Uganda is experiencing an economic crisis, crippled by rising food prices with an estimated eight million people living below the poverty line.\textsuperscript{25} In addition, widespread corruption is reported; Transparency International has assessed Uganda as ‘highly corrupt’ every year since 1996. Uganda was ranked 144th out of 177 countries on the corruption index in 2013.\textsuperscript{26} Rising inequality has caused the mobilisation of certain groups. For example, in 2012, Activists 4 Change called on citizens to walk to work in protest.\textsuperscript{27} The protest was violently

\begin{itemize}
\item\textsuperscript{21} International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 19, 21-22.
\item\textsuperscript{22} Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (adopted 9 December 1998, entered into force 8 March 1999) 53 UNGA 144.
\item\textsuperscript{23} ‘The Global Divide on Homosexuality’ (Pew Research Center, 4 June 2013) <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/> accessed 24 April 2014.
\item\textsuperscript{26} ‘Corruption by Country/Territory’ (Transparency International) <http://www.transparency.org/country#UGA> accessed 24 April 2014.
\end{itemize}
suppressed by police and the group was subsequently declared illegal. This has prompted a wider crackdown on activism and civil society, which is most palpable with regard to LGBTI groups. Ugandan society is clearly changing. Inequality created through neo-liberal policies threatens to ‘undermine the social hierarchies and experiences of gendered and inter-generational interdependence that have long defined Ugandan sociality and selfhood’.28 This creates a fear about lost morality, which has been the subtext to the creation of the aforementioned laws.

A line of rhetoric that has developed among political and religious leaders is that homosexuality is ‘unAfrican’. This theory ignores the colonial laws that imported homophobia and declares that homosexuality is a Western phenomenon. According to McAllister, this idea draws justification from three theories: ‘a naïve naturalism, a fundamentalist reading of scripture and a nationalist idealisation of ‘authentic’ African culture’.29 The Government and certain media outlets propagate these ideas.30 Additionally, criticism from the West about the Act is condemned as neo-colonialist. The Anti-Homosexuality Act is evidently equally concerned with asserting Ugandan sovereignty as it is with curtailing individual freedom.

According to Kaoma, this is the result of the exported culture war between right-wing religious groups and their critics in the United States.31 Some extremist American religious leaders who have largely lost the battle against LGBTI rights in America have taken their message to Uganda. According to Rachelle Digges of IAM Youth Ablaze, an international missionary organisation:

There’s a very strategic position that Uganda is in. Fifty percent of the population is under fifteen years old. We can multiply ourselves

in these young people and they can reach multitudes. They can reach nations.\textsuperscript{32}

Extremists use the United States as evidence of the encroaching ‘gay conspiracy’, inciting fear, bigotry and sometimes violence among their African audiences.\textsuperscript{33} Of note is Scott Lively, the founder of Abiding Truth Ministry. Not long before the Bill was presented, Lively, an anti-homosexuality activist, visited Uganda in 2009.\textsuperscript{34} He gave various talks about the ‘gay agenda’, stirred up fear about the ‘recruitment’ of young persons by LGBTI groups, and effectively obfuscated the issues of human rights defence, homosexuality and paedophilia.\textsuperscript{35} Lively terms himself as a ‘gay expert’ and has published a number of books which call for the criminalisation of LGBTI advocacy.\textsuperscript{36} He argues that:

Homosexual activist organisations seek to recruit all young people to be their allies by styling themselves as victims needing protection. They take advantage of the humanitarian idealism of teenagers and young adults who are too immature to recognize that they are being manipulated.\textsuperscript{37}

Lively is alleged to have been crucial to the drafting of the Act and stands accused of persecution by LGBTI groups based in Uganda (this will be explored in Section 4).

Uganda has become a breeding ground for homophobic vitriol for a number of reasons; imported homophobia under colonial rule, increasing poverty, an unpopular government, the rise of religious extremism, and the presence of American religious leaders. It is important to understand the causes and context of the crisis to establish appropriate advocacy strategies.

\textsuperscript{32} \textsc{Roger Ross Williams}, ‘God Loves Uganda’ (Full Credit Productions 2013).
\textsuperscript{33} Kaoma (n 31) 5.
\textsuperscript{34} Kapya Kaoma, ‘Scott Lively Uganda Anti-Homosexuality Conference 2009’ (Political Research Associates 2014).
\textsuperscript{35} ibid.
\textsuperscript{36} \textsc{Scott Lively}, \textit{Seven Steps to Recruit-Proof Your Child: A Parent’s Guide To Protecting Children From Homosexuality and the “Gay” Movement} (Founders Publishing Corporation 1998).
III. UNINTENDED CONSEQUENCES OF INTERNATIONAL ADVOCACY

The debate on LGBTI rights in Uganda is largely being sustained by the West. As illustrated in Section 2, religious extremists fan the flames of homophobic sentiment. What role has the advocacy of international non-governmental organisations (INGOs) played in the enactment of the Anti-Homosexuality Act?

The first dilemma experienced by INGOs is the conflict between human rights and local norms. Throughout Africa, there has been strong pressure from international human rights groups to decriminalise homosexuality. In many cases, this has been met with fierce opposition leading to increased attacks on gay men and ‘corrective rape’ in some areas. Simultaneously, LGBTI organisations have proliferated across Africa. According to some critics, the increased visibility of LGBTI NGOs has led to ‘an increase in homophobic rhetoric’. There is a strong critique that cites the INGO movement as part of the problem in attempts to protect LGBTI rights.

Palestinian scholar Joseph Massad has written extensively about what he terms ‘the Gay International’, namely the International Lesbian and Gay Association (ILGA) and the International Gay and Lesbian Human Rights Commission. Massad argues that the Gay International’s failure to understand local realities has led to the imposition of a Westernised sexual identity that has served to perpetuate violence against the very people it seeks to liberate:

... [I]t is not the Gay International or its upper-class supporters in the Arab diaspora who will be persecuted, but rather the poor and nonurban men who practice same-sex contact and who do not necessarily identify as homosexual or gay.

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It is true that there is some disconnect between Western ideas of homosexuality and a localised view of men who have sex with men. It is likely that this has contributed to the rhetoric that homosexuality is ‘unAfrican’, as detailed in Section 2. Sensitive issues such as LGBTI rights in a conservative and religious country must be addressed tactfully. As most INGO headquarters are based in urban Western settings like London, Geneva or New York, it is likely that INGO advocates will experience a conflict between human rights and local norms. Advocacy for LGBTI rights in the West often take the form of high-decibel campaigns or visible demonstrations like Gay Pride. When mirrored by Ugandan activists, it results in police harassment. This begs the question of whether this approach is appropriate to Ugandan LGBTI issues.

Another conflict arises in relation to social justice and human rights. LGBTI rights are usually based on civil and political rights such as non-discrimination, privacy and human dignity. In Africa, one problem with this approach is that the rights become abstract and, to a certain extent, Westernised. Today’s human rights movement is rooted in the Universal Declaration of Human Rights (UDHR). When the UDHR was being drafted, many African countries were still under colonial rule, which limited their input. This highlights the Northern dominance over the human rights movement. As Mutua notes:

> It is this exclusionary beginning and lack of universality, the absence of major cultures and geographically specific historical perspectives that are the source of serious tensions within the human rights movement today.

The International Covenant on Civil and Political Rights (ICCPR) followed suit and created a hierarchy between civil and political rights, and economic, social and cultural rights. The Eurocentric vision of human rights failed to fully account for the interdependency of these rights, which is often reflected in INGO advocacy. In the case of Uganda, INGOs have prioritised concerns about discrimination, privacy, dignity and freedom of expression and association. In the nine statements drafted by Amnesty International (AI) from 20 December

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2013 to 24 February 2014, health is mentioned in eight. However, on each occasion, health concerns have only been mentioned toward the end of the statement or under ‘additional information’. This has been an oversight. To some critics, ‘civil and political rights can only be meaningful in Africa if addressed in the context of the denials of economic and social rights’. Failure to recognise the threat posed to economic, social and cultural rights such as healthcare, employment, and education will only serve to isolate the cause of the LGBTI community. Furthermore, it leads to accusations of selectivity and lends weight to the idea that human rights are part of an elite movement. This in turn perpetuates suspicion and mistrust with regard to Western intentions. This is demonstrated in the comments of an interviewee in Boyd’s article:

... [W]hen you come and talk about homosexuality, when there is a mother who can’t feed her children, how does this make sense? Why does the West care more about homosexuals than those who suffered under the [Lord’s Resistance Army]? This is how it seems. This is what it seems human rights is.

A similar trend has been noted in Ugandan human rights groups’ attempts to publicise the issue. Strand analysed the two largest newspapers’ coverage of the Bill in 2009 and 2010. She compared articles from New Vision, the government-owned newspaper, and the Daily Monitor, the largest privately owned newspaper in Uganda. In her analysis, she sought to identify the effectiveness of Ugandan human rights groups in influencing the media. Through interviews with activists, she identified three themes in their advocacy: the Bill was anti-public health; the Bill was anti-human rights and anti-constitutional; and the Bill had repercussions for all Ugandans.

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45 ‘Human Rights in the Republic of Uganda’ (Amnesty International) <https://www.amnesty.org/en/countries/africa/uganda/> accessed 25 April 2014; There are ten statements, however, one was not drafted by Amnesty International. It has therefore been excluded.

46 Mutua (n 44) 32.


48 Lydia Boyd, ‘The Problem with Freedom’ (n 28) 703.

Strand found that while there was a difference in how frequently the Bill was reported in the government-owned and privately owned newspapers, both newspapers were more likely to report that the Bill was ‘anti-human rights’ and ‘anti-constitutional’, rather than reporting that it posed a risk to public health or that the Bill was a matter for concern for all Ugandans. It is surprising that the ‘anti-public health’ theme was the least covered. Uganda was internationally praised for its efforts to reduce HIV/AIDS transmission, which included the identification of men who have sex with men as a group particularly at risk.\(^{50}\) The Act contains provisions which will seriously affect the work of medical practitioners and may serve to further institutionalise stigma against LGBTI people. The offence of aggravated homosexuality, which carries a penalty of life imprisonment for persons living with HIV, may prevent people from accessing the care they need and carries grave risks for the whole of Ugandan society.\(^{51}\)

INGOs are often criticised for failing to report on the structural-historic nature of the crisis. As many human rights crises take place in former colonies, understanding the impact of colonialism is important to determine an appropriate advocacy strategy. In circumstances where states face disintegration or where there is strong competition for natural resources, ‘violence and persecution can more easily take hold and systemic deprivation of basic human needs is common’.\(^{52}\) Understanding structural inequalities and the economic conditions in Uganda is vital to creating an effective advocacy strategy on behalf of LGBTI people. According to Bettinger-Lopez:

> Without an effort to understand and unpack the genesis of human rights violations, we will contribute to a human rights discourse limited to victims and perpetrators, and a depiction of barbaric regions of the world or blameworthy neighbourhoods in our communities.\(^{53}\)

Although consensual sex between same-sex couples has been illegal since 1950, the Bill caused uproar among both local and international human rights groups. Though INGOs were successful in removing the death penalty and duty to report from the Bill, the watered-down version of the Bill still became law.

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50 Strand (n 49) 927.
51 Anti-Homosexuality Act 2014, s 3(1)(b).
53 ibid 360.
INGOs have failed to highlight that the Act is built upon existing law imported by the British. The new provisions relate to the criminalisation of touching with intent to commit homosexuality (section 2), aggravated homosexuality (section 3) and promotion of homosexuality (section 13).

British Prime Minister David Cameron was lobbied to this effect in the past, but has taken no steps to acknowledge Britain’s role in implementing the original anti-homosexuality policy.\textsuperscript{54} To date, half of the articles published by Human Rights Watch (HRW) concerning Uganda in 2014 have concerned the Act. Of these articles, not one makes reference to colonialism.\textsuperscript{55} Publicising the fact that the Act is built on British colonial policy could mitigate accusations of neo-colonialism. Unfortunately, INGOs have opted for another strategy.

Naming and shaming has been central to the INGOs strategy on the Act. It is an effective strategy, but it is not a remedy for all types of abuse. For example, terror can sometimes increase after publicity.\textsuperscript{56} AI,\textsuperscript{57} HRW\textsuperscript{58} and the International Federation for Human Rights (FIDH),\textsuperscript{59} have heavily publicised the issue in their annual reports, articles, and campaigns. FIDH expressed ‘strong concern and support for all organisations defending the rights of the LGBTI community in Uganda’.\textsuperscript{60} HRW cautioned that the ‘Anti-Homosexuality Law will come at a serious cost’.\textsuperscript{61} AI condemned the law, stating that the ‘Anti-


\textsuperscript{60} ibid.

Homosexuality Bill must be scrapped’. INGOs have mobilised their members, consulted with intergovernmental organisations and lobbied governments to ensure that the issue is placed on the political agenda. HRW has been particularly vocal with regards to the US government’s funding arrangements with Uganda:

The U.S. should also review funding assistance to Uganda to ensure that U.S. funding is not used to further prosecution of anyone under the law … All U.S. funded health research, especially related to HIV, might also need to be re-reviewed by ethics committees to examine if research participants face negative consequences from the law or if health personnel are at risk of prosecution.63

In 2011 David Cameron made a statement suggesting that the United Kingdom might reduce development aid if respect was not shown for human rights. This was heavily criticised by certain African leaders; Uganda accused the UK of adopting a ‘bullying’ attitude, and former President of Ghana, John Atta Mills, said:

No one can deny Prime Minister Cameron his right to make policies, take initiatives or make statements that reflect his societal norms and ideals but he does not have the right to direct other sovereign nations as to what they should do especially where their societal norms and ideals are different from those which exist in the Prime Minister’s society … I as president of this nation will never initiate or support any attempt to legalise homosexuality in Ghana.64

This statement is indicative of the extent to which anti-gay legislation has become a focal point in asserting sovereignty. In 2009, President Museveni was quoted telling parliamentarians to ‘Go Slow’ and was reported to have told supporters of the Bill that it was not just a matter of internal policy but that it would also have implications for foreign policy.65 In a response to threats from

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63 Human Rights Watch, ‘Uganda: Anti-Homosexuality Law Will Come at a Serious Cost’ (n 61).
the British government to cut development aid, a coalition of African LGBTI NGOs wrote an open letter to David Cameron. The response stated that donor sanctions were coercive and served to reinforce power imbalances, which would not result in improved protection for the LGBTI community:

[Donor sanctions] are often based on assumptions about African sexualities and the needs of African LGBTI people. They disregard the agency of African civil society movements and political leadership. They also tend, as has been evidenced in Malawi, to exacerbate the environment of intolerance in which political leadership scapegoat LGBTI people for donor sanctions in an attempt to retain and reinforce national state sovereignty.66

Despite this, President Obama condemned the Bill as ‘odious’67 and threatened that the foreign aid relationship between the US and Uganda would become more complicated.68 HRW said that this statement did not go far enough:

While donors have voiced concerns, I’m not sure that that has actually translated into a really serious understanding in Uganda of the impact of the Bill and what that will mean for relationships. We think that it’s very important that the U.S. and others send a very strong message that there will be consequences for signing this law.69

Days later, President Museveni signed the law. This shows a worrying reluctance to listen to African NGOs and a failure to appreciate the crisis in Uganda. The threats may have actually been a driving force behind the decision to pass the law, as Museveni has since declared that he has reaffirmed Ugandan sovereignty by signing the law.70

The most substantial response to the law was the decision of the World Bank to freeze a loan of $90 million to improve health care in Uganda.\(^7\) This creates another common criticism of human rights advocacy: selectivity. Conditioning the granting of aid to ‘gay rights’ has situated the LGBTI community in the middle of crucial diplomatic debates as members are viewed as the stumbling block to access public welfare funding for health, education, shelter and other basic public amenities tied to Western funding.\(^7\) According to the Kampala Observer:

> Withdrawing healthcare funding meant to help poor Ugandans because their president has signed a law that the West does not like, is no more tolerant than signing a law to punish people whose sexual preferences we do not like … Engagement with, rather than isolation of, the Ugandan public would help the gay cause. For ultimately, this journey is more cultural than political.\(^7\)

While Ugandan authorities should be condemned for the Act, donor agencies and NGOs should continue to operate, provide assistance and work with Ugandan people. The people of Uganda should not suffer because of the draconian decisions of their government.\(^7\) Engaging in discourse about the origins of the law and dispelling the myth that homosexuality is ‘unAfrican’ will go a long way to solve this crisis. Thus far, the international strategies of naming and shaming, and threatening withdrawal of funding have at best prompted accusations of paternalism and neo-colonialism. At worst, they have served to intensify the homophobic sentiment by positioning the LGBTI community at the centre of the debate.

This analysis demonstrates a profound lack of co-ordination between INGOs and Ugandan NGOs. Strategies have directly conflicted with one another,

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particularly in relation to cutting aid. The next Section analyses strategic litigation, perhaps the only option left available to Ugandan LGBTI organisations to challenge the law.

IV. HOPE LIES IN STRATEGIC LITIGATION?

As outlined above, one of the key challenges facing LGBTI groups under the Act is that their activities have effectively been criminalised. The remaining option available to LGBTI NGOs is strategic litigation. Members of Sexual Minorities Uganda (SMUG), a coalition of LGBTI groups, have brought a number of cases to the High Court. In 2012, they issued a claim under the Alien Tort Act 1789 in an attempt to hold Scott Lively responsible for crimes against humanity. They have also recently entered a petition to the Constitutional Court. The decision to take action as organisations or in groups is important to dispel criticism that strategic litigation perpetuates victimhood or neglects the needs of the victim.\footnote{Barbora Bukovská, ‘Perpetrating Good: Unintended Consequences of International Human Rights Advocacy’ (2008) 5(9) International Journal on Human Rights 7.}

The case of Mukasa and Another v Attorney-General involves two LGBTI activists who brought a claim against the Attorney General for breaches of privacy and human dignity.\footnote{Mukasa and Another v Attorney-General (2008) High Court of Uganda AHRLR 248.} The applicants complained that government representatives had forced their way into their home and illegally searched and seized papers. The second applicant alleged she had been taken into custody, sexually harassed and indecently assaulted by officers who ordered her to undress and groped her to ‘confirm her sex’.\footnote{ibid 4.} The question before the Court was whether there had been a breach of privacy, denial of personal liberty and denial of protection from any form of torture, cruel or inhuman, and degrading treatment.

The Court specifically stated that the case concerned violations of the applicants’ human rights and was not about homosexuality.\footnote{ibid 18.} Judge Arach-Amoko found in favour of the applicants, relying on the principles of equality and human dignity.\footnote{Constitution of Uganda 1955, art 24; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 1; and Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 3.}
In the case *Kasha Jacqueline, David Kato Kisule and Onziema Patience v Rolling Stone Ltd and Giles Muhame*, the applicants sought a permanent injunction against the respondents’ newspaper to restrain them from publishing injurious information about the applicants. The applicants complained that an article published on 2 October 2010 titled ‘HANG THEM; THEY ARE AFTER OUR KIDS!!!!!! Pictures of Uganda’s 100 Homo Leak’, exposed them to:

Possible violence, ridicule, hatred and mob justice [which] would constitute a threat to the violation of the right of respect to human dignity and protection from inhuman treatment entrenched in Article 24 of the Constitution.81

The article spoke of a community that was plotting to recruit ‘at least one million members by 2012’ and included pictures of LGBTI persons with details of their home addresses.82 On two occasions, the article called for homosexuals to be hung. It was argued by the respondent that the applicants had admitted they were homosexuals. The respondent continued that since homosexuality was a criminal offence under section 145 of the Penal Code Act, the applicants had not come to court with clean hands and equity should bar them from relief.83 In coming to its decision, the Court stated that the application did not concern homosexuality *per se*, as the question before the court was whether fundamental rights and freedoms had been breached. Judge Kibuuka said that section 145 of the Penal Code Act was narrower than the respondent suggested. One was not a criminal by virtue of being gay, but one had to commit a criminal act prohibited under section 145 to be a criminal.84

In these cases, the Court has affirmed the criminality of homosexuality where homosexual acts have been occasioned. However, the judgments demonstrate that such crimes do not preclude individuals from the guarantee of protection for fundamental human rights. As there is no law in Uganda excluding LGBTI people from the scope of protection, they are protected by default, according to the principle of universal application. While these court cases represented a considerable victory for LGBTI activists, homophobic sentiment was growing

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80 *Kasha Jacqueline, David Kato Kisule and Onziema Patience v Rolling Stone Ltd and Giles Muhame*, High Court of Uganda (Civil Division) (Miscellaneous Cause No 163 of 2010).
81 ibid 4-5.
82 ibid 2-4.
83 ibid 5-6.
84 ibid 9.
outside the courtroom. Not long after the verdict, one of the applicants, David Kato, was murdered.\(^5\)

Following the introduction of the law, LGBTI activists, members of parliament (including the leader of the opposition party) and lawyers made a petition to the courts.\(^6\) The petitioners alleged a number of substantive breaches of fundamental human rights: privacy, equality and non-discrimination. They alleged that in criminalising aiding, abetting, counselling, procuring and promotion of homosexuality, sections 7 and 13:

Create offences that are overly broad, penalise legitimate debate, professional counsel, HIV related services provision and access to health services, in contravention of the principle of legality, the freedoms of expression, thought, assembly and association, and the right to civic participation.\(^7\)

Procedurally, the petitioners alleged that the Anti-Homosexuality Act 2014 was passed without quorum, in breach of Ugandan parliamentary rules and is therefore null and void. According to Fox Odoi MP, a head count was not undertaken on the day the Bill was voted.\(^8\) In August 2014, the Constitutional Court of Uganda struck down the law. The court did not make a substantive finding on the question of breach of fundamental rights but ruled on a technicality.\(^9\) It held that the law passed in February 2014 was unconstitutional because a quorum was not met.

The issue of quorum was briefly reported in Western media outlets including the BBC\(^0\) and CNN\(^1\) and by the Ugandan newspaper The Daily


\(^6\) Onyanga and others v Attorney General of Uganda, Constitutional Court of Uganda (Petition No 8 of 2014).

\(^7\) Onyanga (n 86).


Monitor. However, it was neither mentioned in HRW’s press release issued on the day, nor in the press release announcing the petition. This is a striking oversight on the part of INGOs. Highlighting the lack of quorum connects what may be perceived as an LGBTI issue to wider questions of governance and democracy. This was an opportunity to deflect attention from LGBTI groups by questioning the democratic legitimacy of the law instead. It poses wider questions about the curtailment of freedom under President Museveni and it is inextricably linked with his efforts to silence dissent, as evidenced by the POMA 2013. This failure to appreciate the issue holistically is an unfortunate example of INGOs ignoring local realities.

President Museveni has expressed his intention to appeal this decision to the Supreme Court. He also stated that if the law were to be amended to drop tough penalties on consenting adults, the law would still be tough on the ‘recruitment of children and exploiting financially vulnerable youths’. This suggests that even if some of the most draconian parts of the law are dropped, LGBTI NGOs will still be severely limited. In the absence of a finding that the law is in breach of fundamental rights, the risk of reintroducing the law is grave and measures should be implemented to ensure that this law is permanently revoked.

In March 2012, the not-for-profit US law firm, the Centre of Constitutional Rights, lodged a claim at the federal court in Massachusetts on behalf of SMUG on the basis of the Alien Tort Statute 1789 (ATS). They allege that Scott Lively, individually and as President of the Abiding Truth Ministry, is guilty of breaches of international law contrary to the ATS. His role in the anti-gay movement in Uganda, including advocacy provided to the Ugandan government prior to the enactment of the Anti-Homosexuality Law 2014, is

96 Sexual Minorities Uganda v Scott Lively, Civil Action 3:12-CV-30051 (MAP) (US District Court for the District of Massachusetts).
alleged to amount to persecution on grounds of sexual orientation or gender identity. In December 2014, the United States First Circuit Court denied Scott Lively’s application to have the case dismissed on First Amendment grounds, ruling that the trial would go ahead.97

The Alien Tort Statute 1789 is a powerful piece of legislation that allows non-US nationals to take civil claims against American citizens in order to seek accountability for human rights abuses. According to the terse provision of the ATS, ‘[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’.98

As part of their application, the claimant alleged that the defendant worked with a number of Ugandans in order to carry out his persecutory campaign. The claimant also alleged that the defendant, through advocacy and his publications, was responsible for devising strategies designed to repress and intimidate the LGBTI community and related organisations, culminating in the 2013 Bill.99 Legally, the ATS claim is pursued on the grounds of crimes against humanity of persecution, which are based on individual responsibility, joint enterprise and conspiracy.

The defendant filed two motions to dismiss the claim on a number of grounds. For the purpose of this Article, analysis is focused on the decision of the court in relation to the defendant’s assertion that ‘international norms do not bar persecution based on sexual orientation or gender identity with sufficient clarity and historical lineage to fall under the scope of the ATS’.100 The Court rejected this motion. Judge Ponsor unequivocally ruled:

… [W]idespread, systematic persecution of LGBTI people constitutes a crime against humanity that unquestionably violates international law … The fact that a group continues to be vulnerable to ...

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98 Alien Tort Statute 28 USC §1350 (US).
99 Sexual Minorities Uganda (n 96) 37.
100 Sexual Minorities Uganda v Scott Lively, Civil Action 3:12-CV-30051 (MAP) (US District Court for the District of Massachusetts), Memorandum and Order Regarding Defendant’s Motions to Dismiss Dkt NOs 21 & 30 (14 August 2013).

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persecution in some parts of the world simply cannot shield one who commits a crime against humanity from liability.\textsuperscript{101}

The judge stated that while LGBTI rights are not expressly established as part of international law, there is scope to interpret human rights law to include these rights. For an action for persecution to succeed under the ATS, it must amount to a crime against humanity, part of a widespread or systematic attack directed against any civilian population, with knowledge that the attack has the effect of ‘intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.\textsuperscript{102} Judge Ponsor stated that while LGBTI groups are not expressly listed as a protected group, statute\textsuperscript{103} and international jurisprudence\textsuperscript{104} was in favour of a broad interpretation of the categorisation of a ‘group’. Judge Ponsor ruled that the allegations were of sufficient gravity to state a claim for the commission of a crime against humanity.

If this claim is successful, it will be the first finding of persecution against LGBTI persons as a crime against humanity. It could pave the way for future claims against other clerics currently operating in the US. The most far-reaching effect of this litigation is likely to be in relation to donations to Lively’s church; such litigation will inevitably bring about negative publicity.

However, there is a risk that a ruling from an American court finding that Scott Lively is a criminal may strengthen his claim that the US government has been infiltrated by the ‘gay’ movement in Uganda. It is important for Ugandan groups to maintain ownership of the claim to avoid allegations of neo-colonialism which seek to detract from their message.\textsuperscript{105} Another risk is that the ‘crimes against humanity’ claim is quite high-profile, which has been proven to be problematic in Uganda. However, it is a welcome departure from the aforementioned paternalistic measures employed by the INGOs and Western governments. It is certainly a more innovative way to engage with human rights violations, as compared to previous strategies of condemnation and threats to cut development aid.

\textsuperscript{101} ibid 31.


\textsuperscript{103} ibid art 7(2)(h).

\textsuperscript{104} Prosecutor v Naletilic and Martinovic (Judgment) ICTY-98-34-T (31 March 2013) 636.

\textsuperscript{105} Lennox and Waites (n 54) 41.
IV. CONCLUSION

Whether any of these courses of action will have an effect on the Anti-Homosexuality Act 2014 remains to be seen. While LGBTI groups have had previous success in the Ugandan courts, there is no Ugandan precedent regarding decriminalisation.\(^{106}\) Two measures need to be employed: one regarding decriminalisation of homosexuality or declaration of unconstitutionality, and a measure which seeks to improve the situation of the LGBTI community economically, socially and culturally. The stigma attached to the LGBTI community has been exacerbated by the provisions in the new law. Unless added to a general campaign that includes other restrictive measures taken by the Ugandan government, it will be difficult for LGBTI advocates to improve the situation of the LGBTI community in Uganda in light of the section 13 restrictions.

INGO efforts had early success in relation to the Bill, but it is necessary to review the implications of their more recent strategies which ignored local realities. The battle against the Anti-Homosexuality Act will not be won by INGOs alone. There needs to be greater co-operation between Northern and Southern NGOs to have the best possible chance of achieving this goal. A public education programme must emphasise the law’s colonial nature. To defend what appears to be an American culture war being waged on Ugandan soil, LGBTI concerns must be linked to the concerns of the wider community. Local and international advocacy strategy should focus on the risks the law poses to public health. Museveni’s attempts to curtail freedom of expression and association must also form part of the dialogue. While the law may have been struck down on a technicality, there is no guarantee that the law will not be passed once again. To this effect, a leaked copy of the draft legislation in November 2014 suggested that the law will be equally, if not more, oppressive as it contains far reaching restrictions on ‘promoting’ homosexuality, revealing once again the Ugandan Government’s relentless intention to target defenders of LGBTI rights.\(^{107}\)

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International Law and the (De)Politicisation of Climate Change and Migration: Lessons from the Pacific

Giulia Jacovella*

This Article analyses how alarmist narratives have framed human mobility in relation to climate change as a new and potentially dangerous phenomenon. Instead of recognising migration as a form of adaptation to environmental changes, politicians in the Global North have further securitised state borders. Consequently, the international community has been pushed towards finding a technical, legal solution to this ‘threat’. The analysis of legal cases from the Pacific Islands shows that the anthropogenic causes of climate change and migration have been depoliticised and relegated to the realms of science and law, where the voices of communities from the Global South are often marginalised. Environmental migrants are thus brutalised, silenced and victimised, while their lands become territories for the experimentation of climate change laws and policies. Nevertheless, the populations of the Pacific reclaim their agency and empowerment as active makers of their own destiny, despite the power dynamics and inequalities still shaping North-South relations and underpinning environmental law and science.

I. INTRODUCTION

The disappearing islands … embody not a located tragedy of importance in itself but a mere sign of the destiny of the planet as a whole. Tuvalu becomes a space where the fate of the planet is brought forward in time and miniaturised in space, reduced to a performance of rising seas and climate refugees played out for those with most control over the current and future uses of fossil fuels.

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1 Carol Farbotko, ’Wishful Sinking: Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation’ (2010) 51(1) Asia Pacific Viewpoint 47, 54 (emphasis added).
As Farbotko emphasises in this quote, several political issues are involved in climate change as a discourse and phenomenon. Media coverage of natural hazards has increased dramatically in recent times and environmentally-induced migration (in short, environmental migration) has suddenly become a potential security threat for the wealthier countries in the Global North. In this Article, the expression ‘environmental migration’ is used to simplify the complex phenomenon of human mobility, the root causes of which lie, at least in part, in environmental factors, especially in climate change related events.

This Article argues that environmental migration and climate change have gradually been depoliticised and framed in an apparently neutral legal debate and security concern. This marginalises the voices of the communities and countries in the Global South that are more deeply and directly affected by climate change. De-politicisation, in Hay’s words, ‘serves to insulate politicians and their choices, immunising them from responsibility, accountability and critique’. In fact, de-politicisation in this context mainly consists of presenting technical solutions to complex problems and, as analysed in this Article, of delegating environmental and social issues, which are political in nature, to the realms of science and law.

By building on existing literature, case law and data, this Article aims to deconstruct environmental migration in order to understand its legal, political and economic underpinnings and their consequences in terms of human rights, identity and climate justice. In particular, the analysis of legal cases from the

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2 A Foucauldian meaning of discourse is adopted here as ‘ways of constituting knowledge, together with the social practices, forms of subjectivity and power relations which inhere in such knowledges and relations between them’ as in Chris Weedon, Feminist Practice and Post-Structuralist Theory (Basil Blackwell 1987) 108.

3 In this Article, Global North and Global South are considered as two discursive categories. The first envisages countries and regions like Europe, the United States of America, Australia and New Zealand that are economically ‘wealthy, technologically advanced [and] politically stable’. The second category refers to countries and regions like Africa, India, China, Brazil and South East Asia that are economically vulnerable, dependent on raw materials and politically and economically influenced by the Global North as in Lemuel E Odeh, ‘A Comparative Analysis of Global North and Global South Economies’ (2010) 12(3) Journal of Sustainable Development in Africa 338. See also Lorraine Elliot, ‘Climate Migration and Climate Migrants: What Threat, Whose Security?’ in Jane McAdam (ed), Climate Change and Displacement: Multidisciplinary Perspectives (Hart Publishing 2010).


5 Colin Hay, Why We Hate Politics (Polity Press 2013) 92.

6 ibid.

7 Anneelen Kenis and Matthias Lievens, ‘Searching for the Political in Environmental Politics’ (2014) 23(4) Environmental Politics 531.
Pacific Islands highlights how the Global North has framed and depoliticised climate change and environmental migration by using the old colonial repertoire of vulnerability, helplessness, danger and ‘blackness’. It has thus failed to recognise that environmental migration is an important form of adaptation, which should be accompanied by other measures, such as non-discriminatory immigration policies and stronger commitments by highly industrialised countries and emerging economies to change their patterns of consumption and end fossil fuels dependency.

According to the International Panel on Climate Change, adaptation means ‘an adjustment in natural and human systems’ in response to climate change. Migration is part of this process. It must not be considered as a failure of mitigation, which refers to ‘an anthropogenic intervention to reduce the sources or enhance the sinks of greenhouse gases’. Conversely, both adaptation and mitigation strategies should work in synergy to include and empower local communities.

Section 2 of this Article introduces the discourse of environmental migration by tracing the ambiguous relationship between man and nature. In particular, it looks at how this relationship is influencing and depoliticising the current legal debate on the kind of protection that the international community should ascribe to environmental migrants. Section 3 analyses two legal cases regarding an I-Kiribati and a Tuvaluan family who have sought to be recognised as ‘climate refugees’ in New Zealand. It explores the contrasting claims of Pacific governments and people with regard to the ‘refugee’ label. It also highlights how the Pacific populations and migrants have become commodities in the eyes of the Global North. Section 4 investigates climate justice claims against an ongoing (eco)colonial experimentation. It also briefly analyses the Pacific

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11 Hereinafter IPCC.


13 ibid.
Islands’ attempt to influence and re-politicise the debate through the ‘loss and damage’ mechanism under International Environmental Law.

II. ENVIRONMENTAL MIGRANTS AND INTERNATIONAL LAW

By starting from a brief excursus on the relationship between man and nature, this Section conceptualises the development of the environmental migration discourse in the Global North as a political construct tied to a so-called ‘crisis of nature’. It is argued that, by exclusively focusing on legal definitions and solutions, the international community depoliticises climate change and victimises environmental migrants as the ‘human face of climate change’.

2.1 Nature, Society and Security

Williams has successfully explored the evolution of the relationship between man and nature and how this has been marked by a continuous process of ‘Othering’ and abstraction. In attempting to define ‘nature’, he recognises that the very ‘idea of nature contains ... an extraordinary amount of human history’. It is difficult to separate nature from humanity (and vice versa) because they are deeply interrelated, both on a physical and conceptual level. Humanity has always attributed its fears, desires and visions of the world to nature, the quintessential ‘Other’. This has led to a binary tension between a romanticised idea of nature to be contemplated and protected and nature as a ‘neutral environment’ to be the object of scientific research, with its resources exploited for the benefit of humankind. This tension has been reflected in both International Environmental Law and Migration Studies. In particular, the

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16 Raymond Williams, ‘Ideas of Nature’ in Raymond Williams, Problems of Materialism and Culture (Verso London 1980) 67. ‘Othering’ is a concept used to describe identity formation. It is a multidimensional process based on the production of dichotomies, e.g. in the affirmation of oneself against the ‘Other’. See Sune Q Jensen, ‘Othering, Identity Formation and Agency’ (2011) 2(2) Qualitative Studies 63.
17 ibid.
18 ibid; Kenis and Lievens (n 7).
assertion of man’s dominion over the ‘natural environment’ has been considered as the direct result of human progress, the rejection of determinism and the increasing role of an economy based on a capitalist conception of accumulation of wealth. This absolute control over the environment has created the widespread belief that human displacement could not be caused by natural factors.

Despite the fact that environmental migration has always existed in human history as a form of coping strategy to deal with inhospitable environments, the concept has only recently gained renewed interest in light of the climate change discourse. Beck calls this a new ‘synthesis of nature and society’ that can exacerbate inequalities and vulnerabilities. Indeed, according to the IPCC Fourth and Fifth Assessment Reports, there is a strong possibility for a projected increase in human and other marine and terrestrial species’ migratory movements as a direct consequence of climate change. Therefore, the focus on environmental factors causing displacement and forced migration has become the epicentre of ‘apocalyptic’ and sensationalist narratives, such as those of Myers & Kent, Biermann & Boas and the authoritative Stern Review commissioned by the government of the United Kingdom (UK).

These narratives, whose dramatic tones are by no means ‘normatively neutral’, tend to provide high estimates of roughly about 200 million people being displaced by climate change to pressurise the international community into

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21 ibid.
22 Michele Klein Solomon and Koko Warner, ‘Protection of Persons Displaced as a Result of Climate Change’ in Michael B Gerrard and Gregory E Wannier (eds), Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate (CUP 2013); Gregory White, Climate Change and Migration: Security Borders in a Warming World (OUP 2011) 56; Piguet (n 20).
23 Beck (n 10) 171.
24 IPCC (n 12).
30 Bettini (n 26) 68.
adopting a particular agenda. Moreover, environmental and humanitarian non-governmental organisations (NGOs) like Greenpeace, Friends of the Earth, Environmental Justice Foundation and Christian Aid have been advocating, often uncritically, for a ‘refugee-like’ protection for persons displaced as a result of climate change.

Therefore, Farbotko and Lazrus have studied how representations, especially those related to ‘climate refugees’, are ‘neither static nor innocent’ but characterised by ‘fluid, ongoing claims of inclusion and exclusion’. These claims ‘depend on the interests of those engaged with them’. In fact, there is a lack of scientific evidence behind the high estimates of these potential refugees, especially in the Pacific. The aforementioned campaigns have not resulted in a stronger political commitment by highly polluting countries to fight global warming and promote sustainable development, even less so to open state borders to environmental migrants. On the contrary, mainstream political discourses in the Global North and emerging economies have primarily interpreted these sensationalist narratives of the forecasted millions of people on the move as a security threat. Consequently, there is a perceived need for tighter border controls.

White has explored the nexus between security, climate change and migration. He highlights that the environment is perceived as a threat and that this

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31 François Gemenne, ‘How They Became the Human Face of Climate Change. Research and Policy Interactions in the Birth of the “Environmental Migration” Concept’ in E Piguet and others (eds), Migration and Climate Change (CUP 2011).
33 Farbotko and Lazrus (n 14) 386.
34 ibid.
35 Jane McAdam, ‘Conceptualizing Climate Change-Related Movement’ in Climate Change, Forced Migration and International Law (OUP 2012) 32-3.
36 Elliot (n 3); Stephen Castles, ‘Afterword: What Now? Climate-Induced Displacement after Copenhagen’ in McAdam (ed) (n 3).
37 Gregory White, ‘The Securitization of Climate-Induced Migration’ in White (n 22).
perception is applied to environmental migrants, who are considered to be potentially dangerous invaders. It is worth noting that both the environment and migrants are perceived as outsiders, as the ‘Other’ par excellence. A politics of anxiety, or what Bettini calls ‘the mobilisation of fear and sense of urgency’, has reinforced the trend toward a very restrictive interpretation of humanitarian obligations and international conventions, especially the 1951 Convention Relating to the Status of Refugees and the 1949 International Labour Organization (ILO) Migration for Employment Convention.

It is clearly easier and more beneficial for politicians and policy-makers to enact security measures rather than addressing the underlying causes of migration and the relationship between climate change, environmental degradation and human mobility. Such discriminatory policies win over the electorate, while draining resources away from mitigation and adaptation strategies. Instead of challenging the anthropogenic causes of climate change and the political and economic system that sustains and reproduces these dynamics – i.e. a consumerist, polluting society that demands the perpetual production and destruction of commodities – the international community focuses on legal solutions to deal with environmental migration. This is symptomatic of the international community’s lack of consensus on the extent to which environmental factors could constitute the root cause for internal displacement and/or migration, or whether they simply have a multiplier effect on pre-existing instabilities.

2.2 The Endless Debate on Definitions

Several terms are used to identify human mobility triggered by environmental hazards, including climate change-related events. The most common expressions utilised in this context comprise, for instance, ‘environmental/ecological migrants’, ‘environmentally-induced migration/displacement’ and ‘climate change/environmental refugees’. In the context of environmental migration, clear legal definitions are paramount as they underpin (or impinge) the type of legal protection, level of recognition and empowerment that the international community provides. However, as highlighted in the literature, there is a lack of clarity and consensus on what constitutes environmental migration, and the extent to which it should be treated as a distinct form of displacement.

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38 Bettini (n 26).
40 (Revised) C97, 1 July 1949.
41 ibid.
42 ibid.
43 McAdam (n 35) 24.
44 ibid 25.
45 White (n 22) 4; Maxine Burkett, ‘Climate Refugees’ in Jahid Hossain Bhuiyan and others (eds), Routledge Handbook of International Environmental Law (Routledge 2013) 717.
community should ascribe to a seemingly growing proportion of the global population. The manner in which a phenomenon is framed can result in different interpretations and contrasting solutions.\textsuperscript{46} Consequently, due to a sociological, epistemological and methodological fracture among scholars from several disciplines (including Climate Change, Environmental Law, Refugee Law, Migration and Psychology), there is a legal impasse regarding how to define and frame environmental migration.\textsuperscript{47}

The expression ‘environmental refugees’ gained international attention with the publication of the United Nations Environmental Programme (UNEP) report in 1985.\textsuperscript{48} This ‘new’ category of people included, according to El-Hinnawi, groups or individuals who are forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.\textsuperscript{49}

It can be deduced that environmental migration has been considered ‘forced’ instead of voluntary and triggered by both environmental and anthropogenic factors. The latter include, for instance, development projects such as dam and infrastructure building, intensive agriculture, deforestation and aerosol and greenhouse gas emissions.\textsuperscript{50} However, this UNEP report is arguably neglecting the economic, political and social dimensions of migration.\textsuperscript{51} Critics also point to the fact that the very terms ‘environmental refugees’ or ‘environmental migrants’ are inaccurate for their monocausal nature.\textsuperscript{52} This is due to the fact that such categories consider environmental factors as the main, if not the only, driver of migratory movements. Therefore, it would be more accurate to speak


\textsuperscript{47} McAdam (n 3).

\textsuperscript{48} Essam El-Hinnawi, \textit{Environmental Refugees} (UNEP 1985).

\textsuperscript{49} ibid 4.


\textsuperscript{51} Jane McAdam, “Protection” or “Migration”? The “Climate Refugee” Treaty Debate’ in McAdam (n 35).

of ‘mixed migration’, which includes economic, social and political factors.\textsuperscript{53} Moreover, the concept of ‘mixed migration’ acknowledges the migrants’ agency and so stands at an intermediate point between the voluntary-forced spectrum.\textsuperscript{54}

There has been widespread reluctance on the part of the international community to broaden the category of refugees to include those displaced by natural hazards, as it emerges more clearly from the analysis of legal cases in the Pacific.\textsuperscript{55} In fact, the Refugee Convention and its related 1967 Protocol provide a rather narrow definition of refugee as someone who:

\begin{quote}
[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable ... to avail himself of the protection of that country; or who, not having a nationality ... is unable ... to return to it.\textsuperscript{56}
\end{quote}

Drafted and ratified in the aftermath of the Second World War, this Convention was conceived to protect political refugees. Other types of forced migrants, especially economic and environmental migrants, were not considered. The five grounds on which an asylum seeker can claim to be a refugee are coupled with the requirement of being outside the country of origin due to persecution and/or being stateless. It is clear that this definition is not compatible with the phenomenon of migration related to environmental changes, as many environmentally-displaced people tend to move short distances or remain within their country of habitual residence, while many others even lack the resources to move at all. This phenomenon has been called the ‘immobility paradox’.\textsuperscript{57}

Therefore, the 1998 Guiding Principles on Internal Displacement\textsuperscript{58} (GPs) have been envisaged to protect Internally Displaced Persons (IDPs), who have not

\begin{footnotes}
\item[54] ibid.
\item[55] See Section 3.
\item[56] Art 1(2) (n 39) (emphasis added).
\item[57] Findlay (n 4); E Piguet and others (eds) (n 31) 7.
\end{footnotes}
crossed state borders, by applying International Humanitarian Law and Human Rights Law. They acknowledge, among the causes of displacement, ‘armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters’. Despite being a valuable framework for the protection and enhancement of human rights, they neither bind nor impose positive obligations on states. The GPs can be considered as a starting point, but certainly not as a comprehensive instrument to protect environmental migrants, as they do not cover slow-onset environmental degradation or the subsequent loss of livelihoods. The International Organisation for Migration (IOM) has also expanded its definition to include both internal displacement and cross-border migration, but this has been criticised as being too broad and therefore difficult to apply.

The fact that the international community predominantly focuses on apparently neutral and technical legal definitions raises the question of whether the anthropogenic causes of climate change and their impacts on human mobility and security are being overlooked and depoliticised. This legal debate nonetheless remains highly political in that it de facto silences the voices of the affected communities, especially when they belong to the Global South. Moreover, the proposals analysed in the following Section are not fully supported by the Pacific Islands and other Small Island Developing States (SIDS) whose claims are analysed more in depth in the remaining Sections. Instead, the following proposals reflect the contrasting interests of a Western society and its attempt to co-opt climate change, migration and vulnerability into institutionalised hegemonic legal frameworks. As Kenis and Lievens ironically point out in relation to depoliticised discourses on environmental problems, tackling these issues nowadays means creating ‘consensus, usually around managerial and technocratic solutions that remain within the parameters of what currently exists’. This leaves no room for other grassroots approaches.

### 2.3 Tackling the ‘Problem’?

The Climate Change and Migration Coalition (CCMC) has reviewed some proposals whose basic presumption is that there is a legal gap that needs to be

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59 ibid Principle 2.
60 ibid Principle 1 (emphasis added).
62 See Section 4.
63 Kenis and Lievens (n 7) 531.
filled in order to protect people fleeing slow-onset climate change.\textsuperscript{64} There are three main approaches that respectively aim to: 1) amend the 1951 Refugee Convention; 2) add a protocol to the 1992 United Nations Framework Convention on Climate Change;\textsuperscript{65} or 3) create a new international treaty.\textsuperscript{66} However, these legal solutions are controversial and difficult to realise. An amendment to the Refugee Convention may lead to a renegotiation of the whole convention because State Parties might not be willing to spend their resources on protecting a legally undefined group of people.\textsuperscript{67} Moreover, there is the risk of draining current resources away from political refugees, traditionally considered the ‘legitimate’ refugees, to a higher number of environmental/climate change refugees, including IDPs.

The other two approaches may require decades of negotiations to reach an agreement. Significant time will also be needed in order to garner a sufficient number of signatory parties and for the agreement to enter into force.\textsuperscript{68} An additional protocol to the UNFCCC is also problematic because it would deny the multiplicity of factors underpinning migration, as it would consider climate change as the main driver of mobility. Most importantly, these approaches fail to consider migration as a form of coping strategy and adaptation measure; instead they tend to victimise and disempower people in the same way as alarmist narratives. There is an urgent need to find a legal solution, but this should be accompanied by a concrete political commitment to fight climate change and the increasing economic and social inequalities between the North and the South. Furthermore, some scholars have criticised International Law and current media coverage of environmental migration as instruments that legitimise and perpetuate hegemonic Western ideologies and power dynamics,\textsuperscript{69} hence ill-suited to represent the reality of the Global South, especially that of the Pacific Islands. There is therefore the need to elaborate

\textsuperscript{64} Climate Change and Migration Coalition & Climate Outreach and Information Network, \textit{Legal Protection, Climate Change and Migration}  


\textsuperscript{67} Christel Cournil, ‘The Protection of “Environmental Refugees” in International Law’ in Piguet and others (eds) (n 31) 366.

\textsuperscript{68} ibid 374-80.

more nuanced solutions which take into account national and regional peculiarities, instead of a one-size-fits-all approach. The case of the Pacific Islands further highlights the tension between attempts to depoliticise climate change and migration through the recourse to established legal frameworks and labels, and the resistance by the populations and governments of the Pacific to be described by and represented in Western terms and symbols.

III. ENVIRONMENTAL MIGRANTS AND THE PACIFIC ISLANDS

This Section focuses on the Pacific Islands, identified as a broad geographical zone that stretches in the Pacific Ocean from below the Tropic of Cancer up above the Equator. This area, referred to as the South Pacific, comprises island nations historically grouped into three regions – Melanesia, Micronesia and Polynesia. Each state is made up of several tropical islands and islets of volcanic origins, which usually stand only a few metres above sea level and are particularly vulnerable to global warming. By using two recent case-studies as a starting point, this Section discusses how the ‘refugee’ label is perceived and utilised in an apparently contradictory manner by local communities in the Pacific. It also explores how the recourse to de-politicisation and framing in both cases has led to the commodification of islanders.

3.1 Case Law: The ‘First Climate Refugee’

3.1.1 From Kiribati

On 8 May 2014, the Court of Appeal of New Zealand upheld the decision made by the High Court on 26 November 2013 in Ioane Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment and that of the Immigration and Protection Tribunal in AF (Kiribati). The Court held that the 1951 Refugee Convention does not include climate change among the five grounds causing refugeehood and, in Justice John Priestley’s words, ‘it is not for the High Court of New Zealand to alter the scope of the Refugee Convention … Rather that is the task … of the legislatures of sovereign

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70 Cournil (n 67) 380-82.
71 Sue Ferran, Human Rights in the South Pacific: Challenges and Changes (Routledge 2009).
74 [2013] NZHC3125/2013, hereinafter High Court.
75 [2013] NZIPT800413, hereinafter AF (Kiribati).
states’.\textsuperscript{76} Therefore, the application for leave to appeal to the High Court was dismissed and Ioane Teitiota and his family are now likely to be deported to Kiribati.\textsuperscript{77}

New Zealand thus officially closed the doors to other requests by migrants from the Pacific Islands, particularly those from Kiribati and Tuvalu, for refugee status. These so-called ‘sinking island-states’ are experiencing increasing environmental degradation due to rising ocean levels, storm surges, severe droughts, flooding and contamination of drinking water by salt water.\textsuperscript{78} These factors exacerbate existing socio-economic instabilities linked to overcrowding, lack of job opportunities for a growing population and limited infrastructure development.\textsuperscript{79}

In this case, Ioane Teitiota moved to New Zealand in 2007 with his wife because they had lost their arable lands due to seawater infiltration, high tides and coastal erosion.\textsuperscript{80} When their residence permits expired, they remained ‘illegally’ in New Zealand, where their three children were born.\textsuperscript{81} In 2010, Mr Teitiota filed a claim before the Immigration and Protection Tribunal (IPT) seeking to be recognised as a climate change refugee and, as such, avoid refoulement.\textsuperscript{82} However, both the IPT and the High Court had adopted James Hathaway’s definition of persecution as characterised by human agency causing a ‘systemic violation of core human rights’.\textsuperscript{83} Both courts found that this I-Kiribati family suffered from the same environmental problems experienced by many others in Kiribati and other Pacific Islands.\textsuperscript{84} Therefore, this family was not persecuted by an identifiable agent under any of the five Convention grounds.\textsuperscript{85} Justice Priestley also noted that:

[W]ere they to succeed [in their submissions] and be adopted in other jurisdictions, at a stroke, millions of people who are facing medium-term economic deprivation, or the immediate consequences of natural disasters or warfare, or indeed presumptive hardships

\textsuperscript{76} ibid [51].
\textsuperscript{77} Court of Appeal (n 73).
\textsuperscript{78} AF (Kiribati) (n 75) [13]-[19].
\textsuperscript{80} ibid [26]-[27].
\textsuperscript{81} High Court (n 74) [42]-[43].
\textsuperscript{83} AF (Kiribati) [53]-[54].
\textsuperscript{84} ibid [75].
\textsuperscript{85} ibid.
caused by climate change, would be entitled to protection under the Refugee Convention.86

In his decision to migrate to New Zealand, the appellant had in fact undertaken a ‘voluntary adaptive migration’ strategy, even though with some degree of compulsion, despite the Kiribati Government’s efforts to adopt measures to protect its citizens.87 Moreover, it was found that Mr Teitiota and his family could not be recognised as protected persons under either the 1984 Convention Against Torture88 or the 1966 International Covenant on Civil and Political Rights89 (ICCPR).90 They could not be protected as IDPs as they had crossed the borders of Kiribati.91 By having lived illegally in New Zealand, they were also prevented from applying for an immigration permit on humanitarian grounds.92

Mr Teitiota’s claim that the whole international community, as the emitter of greenhouse gases, should be considered as indirectly persecuting the Pacific Islands93 was dismissed by the Court of Appeal as falling outside the scope of the 1951 Convention. Although the Court added that ‘[n]o-one should read this judgment as downplaying the importance of climate change’ as it is ‘a major and growing concern for the international community’,94 it is evident that neither national and international judiciaries nor politicians are willing to seriously tackle this problem. This has a negative impact on human security and the enjoyment of economic, cultural and social rights, especially in the most severely affected regions of the Global South.

3.1.2 From Tuvalu

This second case concerns a family from Tuvalu who had moved to New Zealand in 2007 for similar reasons. However, they were granted residence visas on humanitarian grounds in a decision taken by the IPT on 4 June 2014 in

86 High Court (n 74) [51].
87 AF (Kiribati) (n 75) [88].
88 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force on 26 June 1987) 1465 UNTS 85.
90 AF (Kiribati) (n 75) [97].
91 ibid [45]-[48].
92 High Court (n 74) [43].
93 ibid [55].
94 Court of Appeal (n 73) [41].
This family had lived unlawfully in New Zealand, their visas having expired twice between 2009 and 2012, but they sought to regularise their status. Their children were also born in New Zealand. In filing the protection claim before the IPT, the appellant-parents expressed their fears regarding rising sea levels, climate change, lack and contamination of drinking water, loss of land and the impacts that these events could have on their offspring. Their claims to be recognised as refugees or protected persons were dismissed in light of *AF (Kiribati)*. The difference with the previous case is that the husband’s family had already obtained permanent residence visas in New Zealand. They had established solid ties and integrated within the communities they had settled into, including the Tuvaluan Christian Church. Therefore, in taking its decision, the IPT considered the following criteria listed in Section 207 of the Immigration Act 2009:

(a) There are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and

(b) It would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

The IPT also observed that ‘the best interest of the children’ had to be read in light of the state’s obligation under Article 3 of the 1989 United Nations Convention on the Rights of the Child. It thereby found that the family, both the parents and their children, met the requirements of the Act and were entitled to residence visas on humanitarian grounds. However, the Tribunal refused to acknowledge that their lives would be jeopardised if they returned to Tuvalu. It identified climate change and environmental problems as a cause of general humanitarian concern, but it clearly stated that such factors were not absolute determinants. Rather, they had to be considered in conjunction with an eventual disruption of extended family ties, had the decision been negative. Consequently, this case does not constitute a legal precedent for climate refugees, nor does it imply that families and individuals suffering from the

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95 [2014] NZIPT 501 370-371, hereinafter *AD (Tuvalu)*.
96 ibid [35].
97 *AC (Tuvalu)* [2014] NZIPT 800 517-520 [14]-[18].
98 *AD (Tuvalu)* (n 95) [6].
99 ibid [19]-[24].
100 Hereinafter ‘the Act’.
101 *AD (Tuvalu)* (n 95) [17]-[18] (emphasis added).
102 ibid [23]-[26].
103 ibid [32]-[33].
same problems should be granted humanitarian visas, as evidenced by *AF (Kiribati)*.104

### 3.2 Adopting or Resisting the Label?

These cases represent the most recent, but not unique, examples of environmental migrants seeking protection abroad because their lives have been threatened by climate change-related events. Although migration has been recognised as a form of adaptation, restrictive immigration policies have prevailed. Environmental stressors and the emerging rights to safe drinking water105 and a healthy environment106 have not been taken into consideration in the final judgments. Instead, it is apparent that an economic bias has underpinned both court decisions. In particular, Justice Priestly has observed that the economic conditions in New Zealand and Australia are more favourable than those in Kiribati.107 This consideration implicitly suggests that migration is triggered exclusively by economic circumstances, not by an environmental or socio-political correlation of push and pull factors.

In both cases, de-politicisation has occurred on several levels. Firstly, de-politicisation is present in the way climate change related events have been represented.108 By framing the Pacific Islands as inevitably and relentlessly disappearing due to rising oceans, the phenomenon of climate change is positioned above the realms of politics and collective choice.109 Secondly, the attempt to depoliticise climate change and migration is evident in the recourse to the law as the proper instrument to adjudicate environmental and humanitarian problems and assess the necessity to migrate from low-lying atolls to mainland New Zealand. Thirdly, de-politicisation appears in the courts’ strict compliance with well-established international norms and national immigration policies, leaving no space for innovative interpretations. Consequently, as argued by Kenis and Lievens, de-politicisation manifests itself ‘when the exercise of hegemonic power and the antagonisms that result from it are covered up’,110 as these legal cases demonstrate.

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105 *AD (Tuvalu)* (n 95) [14].
106 *AF (Kiribati)* (n 75) [60]-[71].
107 High Court (n 74) [54].
108 Kenis and Lievens (n 7) 535.
109 Hay (n 5) 67, 81.
110 ibid.
Moreover, these cases have been framed by Western media as worthy of the label ‘first climate refugees’, despite the courts’ firm rejection of altering the scope of the 1951 Refugee Convention. These cases are thus interesting because, by seeking a refugee-like protection, they openly contradict the general tendency of the populations and governments of the Pacific Islands and other SIDS to actively challenge and resist the label of ‘climate/environmental refugee’. In fact, the term ‘refugee’ evokes in the collective imaginary a series of negative connotations, such as helplessness, lack of dignity and victimisation of an uncontrolled ‘flow’ or ‘wave’ of indistinct people fleeing the South and ready to invade the North.

On a broader level, the labels of climate/environmental refugee or migrant are problematic as they position the individuals they refer to as ‘racially Other to various forms of Western, European and/or global subjectivity’. Baldwin has called this process ‘racialisation’, which is based on ‘naturalisation, the loss of political status and the trope of ambiguity’. Not only do these potential migrants risk losing their civil and political rights, especially if their homelands cease to be habitable, but they also lack a clear legal status. Most importantly, they become displaced from modernity because they are geopolitically constructed as an ‘effect of nature’, something primordial in the eyes of a ‘white subjectivity’, which is apparently detached from the natural environment.

The governments of Tuvalu and Kiribati are aware of the fact that many recognised political refugees must endure protracted situations in refugee camps, with little hope of accessing durable solutions. Consequently, the affected islanders and their governments prefer to be seen as ‘active, valued

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112 Examples are provided in Section 4.

113 Karen E McNamara and Chris Gibson, “‘We Don’t Want to Leave Our Land’: Pacific Ambassadors at the United Nations Resist the Category of ‘Climate Refugee’” (2009) 40 Geoforum 479; Carol Farbotko, We Don’t Want to Be Labelled Victims: Contestations and Effects of Climate Refugee Narratives (ICID+18 2010).

114 Baldwin (n 8) 632.

115 ibid.

116 ibid.

117 McAdam (n 64) 116.
members of a community’ who can bring a positive contribution to their host countries, such as Australia and New Zealand. Above all, SIDS want to make their voices heard in the relevant international forums and media because hegemonic discourses in the Global North overstate the security threat represented by environmental migrants, including the spread of diseases and terrorism, while downplaying the anthropogenic causes of climate change, as analysed in Section 2.

3.3 The Commodification of Pacific Populations

Why, then, are some migrants willing to turn to the courts and adopt the ‘refugee’ label? It can be argued that proving the reality of climate change before a divided and sceptical international community can constitute a barrier that requires islanders to paradoxically ‘offer themselves as evidence to a doubting public’ to foster ‘meaningful discussions about avoidance or mitigation responses’. A superficial analysis of Ioane Teitiota and AD (Tuvalu) could therefore interpret their requests for asylum as measures of last resort to avoid living in poverty and environmental degradation, while seeking to improve their quality of life through education and work opportunities abroad. In this sense, although the judgment of the High Court in Ioane Teitiota was procedurally fair, it is questionable in terms of substantive justice. In fact, it failed to take into account: 1) the suffering borne by Mr Teitiota’s family, especially by his children, were they to be returned to Kiribati where they have never lived; and 2) the historical pattern of migration among Pacific countries. It is by no means suggested that a refugee-like protection would have been desirable. However, it is clear that the courts’ discretion is indeed broad; they can produce completely different judgments regarding very similar situations.

A nuanced understanding of these two cases could nonetheless interpret seeking asylum from climate change as a strategy that relies on victimisation, as the same hegemonic framework and language of alarmist narratives is used. Although this ‘strategy’ keeps the impact of climate change on human security on the political and legal agenda, it is debatable if publicity should be gained in this way. New Zealand represents the sceptical Global North that requires evidence in the form of victims to prove the existence of climate change and its

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118 ibid.
121 Graeme Hugo, ‘Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific’ in McAdam (ed) (n 3) 23-26.
impact on human rights. Therefore, the peoples of the Pacific Islands are invited to ‘sacrifice’ themselves as test subjects before the eyes of their powerful neighbours.

The commodification of the Pacific Islands and their inhabitants appears as a fundamental component of mainstream environmental migration narratives and as a necessary symbolisation (or technical simplification, hence de-politicisation) to be offered to the legal international community. Environmental migrants are framed as ‘refugee commodities’, reproduced by the media for mass consumption in the Global North. They can be envisaged as barbarians-invaders, a security threat or humanitarian concern. For ‘Western environmental activists’, they are seen as ‘victim-commodity, providing news value, political point-scoring, and a human embodiment of climate change evidence’. The following Section continues this analysis by highlighting the attempts of Pacific communities to re-politicise climate change by claiming climate justice and advancing concrete proposals.

IV. VOICES FROM THE PACIFIC

This concluding Section explores some initiatives promoted by the Pacific Islands in recent years in order to re-politicise climate change. The way the Pacific populations perceive climate change and migration differs greatly from the Western iconography of natural disasters, loss and dispossession, which is still rooted in colonial and (eco)colonial visions of the world.

4.1 Claiming Climate Justice

Through the analysis of interviews with ambassadors from seven Pacific Islands, McNamara and Gibson have highlighted the ambassadors’ firm resistance to both the ‘refugee’ label and the international community’s exclusive focus on migration. In fact, adaptive migration has a long history in the Pacific due to the relevance of remittances in their national economies. The interviewed ambassadors fear that the international community, including many sympathising NGOs, might perceive the Pacific Islands and other SIDS as a lost cause. This perception constitutes one of the main aspects underpinning de-politicisation; by considering a phenomenon as ‘unavoidable destiny’, politicians and the international community deny both theirs and the islanders’ capacity to take action and ‘shape outcomes’. Therefore, the only solutions

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122 Farbotko and Lazrus (n 14) 386.
123 McNamara and Gibson (n 113).
124 Hugo (n 121) 23-6.
125 Hay (n 5) 67.
according to a questionable cost-benefit analysis could be either the establishment of a protection regime, resettlement or the adoption of market-based instruments to deal with climate change and migration. However, these ‘solutions’ do not challenge one of the causes of climate change: the structure of polluting, consumerist capitalist societies.

The interviewed ambassadors and the Chair of the Alliance of Small Island States (AOSIS) instead advocate for a serious discussion on mitigation. For example, they recommend a discussion on how to reduce the carbon footprints of countries like China, Russia, India, Japan and the United States, the latter having not yet ratified the Kyoto Protocol to the UNFCCC. According to McNamara and Gibson, the result of their interviews was that:

> [A]lbeit marginalized at the scale of international environmental security and diplomacy, ambassadors from small island Pacific states directed serious conceptual challenges to the manner in which places, peoples and environmental ‘problems’ are categorized in global geopolitics.

The common ground between environmental NGOs, human rights NGOs and the governments and populations of the affected countries is that there is a global distributive injustice. This happens when the countries that have historically caused less pollution are those most strongly impacted by climate change and environmental degradation. This constitutes another relevant dimension of the environmental migration phenomenon, namely climate or environmental (in)justice. It should be recalled that the Pacific Islands are heavily dependent on the ecosystem for their survival. In particular, the atolls can adapt dynamically to climate change if their coral reefs manage to grow vertically. This implies that a rise in sea temperature and ocean acidification can be fatal for coral bleaching and the subsequent adaptation of the atolls. Moreover, islands’ economies mainly rely on fishing, in addition to tourism and limited agriculture. The IPCC has reported that migratory fish stocks are

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126 For a critique see Fiona R Cameron, ‘Saving the “Disappearing Islands”: Climate Change Governance, Pacific Islands States and Cosmopolitan Dispositions’ (2011) 25(6) Continuum 873.
128 McNamara and Gibson (n 113) 482 (emphasis added).
130 Lilian Yamamoto and Miguel Esteban, Atoll Island States and International Law: Climate Change Displacement and Sovereignty (Springer 2013) 105-06.
131 ibid 113.
moving northward and this is having a negative impact on the already fragile Pacific economies.\textsuperscript{132}

In light of this, islanders are reclaiming their right to be considered as agents and makers of their own destiny. They do not want to be considered merely as victims of climate change because vulnerability does not equate to helplessness or hopelessness.\textsuperscript{133} They are asking the international community to provide scientific, technological, financial and humanitarian assistance when necessary so that they can mitigate the effects of climate change and plan an eventual ‘migration with dignity’ if they are compelled to leave their lands.\textsuperscript{134} However, resettlement is only partially contemplated as a last resort because the majority of the islanders simply do not consider relocation as ‘an acceptable future scenario’\textsuperscript{135}

The meaning of the land in the Pacific is something that is extremely difficult to describe through the use of ‘colonial languages’.\textsuperscript{136} The word \textit{fenua} (or \textit{fanua} and \textit{fonua} depending on the country) refers to land, people, island, territory and placenta and denotes a mutual relationship between humans and ‘Mother Nature’.\textsuperscript{137} However, this attachment to land does not entail that islanders should be perceived as rooted ‘plants’, contrary to the Western romanticised conception of indigenous people and islanders from the Tropics.\textsuperscript{138} It is the sense of belonging which is under threat in ‘climate refugee’ narratives, which usually imply the urgent need for recognition, protection and relocation.

It is evident that buying land in other countries, which is what Kiribati and the Maldives are allegedly doing in Fiji and Australia,\textsuperscript{139} is not the preferred solution. It denies the cultural importance attributed to the islanders’ territories and to their sense of identity. Most recently, the Solomon Islands have planned to relocate the entire town of Choiseul (Taro Island) to the nearby mainland, by partially benefiting from a United States’ funding program for Asia and the

\textsuperscript{133} Dreher and Voyer (n 120) 12-13.
\textsuperscript{134} ibid; Ilan Kelman, ‘Hearing Local Voices fromSmall Island Developing States for Climate Change’ (2010) 15(7) Local Environment 605.
\textsuperscript{135} McNamara and Gibson (n 113) 479.
\textsuperscript{136} John Campbell, ‘Climate-Induced Relocation in the Pacific: The Meaning and Importance of Land’ in McAdam (ed) (n 3).
\textsuperscript{137} ibid.
\textsuperscript{138} Farbotko and Lazrus (n 14).
\textsuperscript{139} McAdam (n 35).
Pacific. Jackson Kiloe, the Premier of Choiseul Province, approved the project because, in his words, it ‘followed the way of our tradition – talking with people, listening to people and reflecting the desires of the people’. However, Philip Haines, project manager of this strategy, noted that a strong component has been the fact that Choiseul was only established after the Second World War; hence the sense of belonging of the community is not as strong as in other areas and townships.

4.2 (Eco)Colonialism

Another important aspect to consider is that the poorest and most vulnerable regions in the world lack the economic and technological instruments to deal with climate change. This is a consequence of several factors, which cannot be explored in depth in this Article. However, in the case of the Pacific Islands, colonialism constitutes a fundamental legacy that still persists today and has shaped current migratory movements. As Otomo and Humphreys write, ‘European colonialism was premised on the exploitation of natural resources and on the maintenance of global trade in raw materials’. This has gradually led to forced urbanisation, displacement, deforestation, intensive farming, soil erosion and, in Papua New Guinea, to a change in the rainfall pattern.

Banaba represents an excellent example of such indiscriminate exploitation. The British Phosphate Company (BPC) largely exploited Banaba, incorporated into the Gilbert and Ellice Islands Protectorate (Kiribati and Tuvalu today) at the beginning of the Twentieth Century. When BPC left, its industrial plants had not been decommissioned and, as such, were full of asbestos fibres: ‘[t]he island had been devastated, huge amounts of land removed and toxic waste left

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144 Stephen Castles and Raúl Delgado Wise (eds), Migration and Development: Perspectives from the South (IOM 2007) 263.
145 Humphrey and Otomo (n 19) 13.
146 David Lamb, Regreening the Bare Hills (Springer 2011) 8, see also ch 1.
147 Campbell (n 136) 71-75.
Most importantly, the Banabans had lost sovereignty over their territory after the Empire ordered their forced relocation to another island. After the Second World War, many Pacific Islands’ territories were instead utilised by France, the UK and the US to test hydrogen bombs, with an escalation during the 1950s-60s. These experiments undoubtedly caused vast damage to islands’ ecosystems, including the complete destruction of some atolls. In particular, this long exploitation by ‘outsiders’ dramatically increased the islands’ vulnerability to extreme weather events.

It can be argued that this kind of colonial experimentation still underpins current climate change discourses in the form of ‘eco-colonialism’. It is difficult (and outside the scope of this Article) to speak on behalf of the populations of the Pacific Islands because, contrary to mainstream narratives that perceive these states as being homogeneous, their societies are stratified and complex.

There is nevertheless the tendency, especially in the Global North, to consider these islands as laboratories for climate change laws and policies. It is assumed that it is easier to evaluate the causes and impact of climate change in closed spaces, rather than on vast continents. DeLoughrey has called this assumption the ‘myth of isolation’. Others have referred to this experimentation as the ‘canary in the coal-mine’, where the caged bird was released into mines to verify the existence of noxious gases during colonial times. This powerful metaphor explains the renewed interest in the historically marginalised and exploited populations of the Pacific Islands. This time, the interest arises from using the Pacific Islands to determine environmental migration, whether the islands are ‘drowning’ and the eventual consequences for the rest of the planet. This was also evaluated by the IPT and the High Court of New Zealand in AF (Kiribati) and AD (Tuvalu).

International Environmental Law (IEL) plays an important role. IEL has become increasingly dependent on science and economics to adjudicate environmental problems. It therefore requires continuous proof of climate change claims. However, international environmental laws and policies resemble more

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148 ibid 75.
149 High Court (n 74) [13].
152 ibid 2.
153 DeLoughrey (n 150).
154 Farbotko (n 1).
155 ibid.
156 Humphrey and Otomo (n 19) 7.
economic, market-based mechanisms than effective tools to deal with environmental, social, economic and political issues.\(^{157}\) Most importantly, Pacific Islands and SIDS are hardly listened to in the relevant international forums, as analysed in the following Section.

### 4.3 Negotiating Climate Change

Environmental science, upon which Environmental Law has been built, is produced almost exclusively by Western scientists, due to their comparatively abundant financial resources which are often lacking in the Global South.\(^{158}\) Barnett and Campbell have also argued that ‘the hegemony of natural science approaches to climate change, and of modelling in particular, marginalises other approaches to generating knowledge about climate change’.\(^{159}\) This impedes any action taken at the local level by island communities since they do not feel involved in a process that directly affects them and their own territories. The Global Environmental Facility (GEF), a financial mechanism under the UNFCCC, has been utilised to promote adaptation in the Pacific. However, it has largely failed in achieving this goal.\(^{160}\) Nunn has noted that donors’ funding for climate change policies has been provided to Pacific Islands under the condition that local governments implement ‘top-down environmental legislation’.\(^{161}\) This strategy has generally proved to be highly dysfunctional, apart from the case of the Cook Islands, which have close ties with New Zealand and healthier economic conditions.\(^{162}\) In particular, such an approach has only marginally reached local and peripheral communities and, in most cases, has not been deemed culturally acceptable.\(^{163}\)

On the international stage, the AOSIS has been vocal in negotiating the right of island and coastal states to actively participate in the determination of climate and development policies within the UN.\(^{164}\) AOSIS is a coalition of ‘44 low-lying and coastal countries’, including the Pacific Islands, which are highly


\(^{158}\) Barnett and Campbell (n 151).

\(^{159}\) ibid 3.

\(^{160}\) ibid 4.

\(^{161}\) Patrick D Nunn and others, ‘Beyond the Core: Community Governance for Climate-Change Adaptation in Peripheral Parts of Pacific Island Countries’ (2014) 14 Regional Environmental Change 222.

\(^{162}\) ibid 227.

\(^{163}\) ibid.

vulnerable to the impact of climate change. It has been quite successful in advancing the interests of SIDS under the UNFCCC. For instance, the Alliance was successful in framing the Cancun Adaptation Framework in 2010.\textsuperscript{165} In the final text of the Cancun Agreements, Paragraph 14(f) acknowledges ‘climate change induced displacement, migration and planned relocation’ and requires further measures to be taken at the national, regional and international levels, according to the principle of common but differentiated responsibilities (CBDR).\textsuperscript{166} Moreover, Paragraph 25 recognises the need to ‘reduce loss and damage associated with the adverse effects of climate change’.\textsuperscript{167}

The establishment of an international mechanism for ‘loss and damage’ (L&D), one of AOSIS most important aims, has been accepted and drafted by the international community at the 19\textsuperscript{th} Conference of the Parties (COP) to the UNFCCC, held in Warsaw in November 2013.\textsuperscript{168} This instrument has been designed as an insurance against natural disasters, slow-onset degradation and vulnerability to climate change. These aims are to be achieved through dialogue, coordination, technical guidance and support, best practices and the collection and sharing of data, including gender-disaggregated data.\textsuperscript{169} From the Pacific Islands’ perspective, this could represent a partial economic solution to compensate the inhabitants for the material loss of their livelihoods, as it creates alternatives to migration for those who cannot or are unwilling to move. Environmental migration could be seen as triggered by a concrete loss or damage (of water, land, coastline, housing etc.); therefore, the right to migrate could be considered as a component of the L&D mechanism in the form of non-economic compensation.\textsuperscript{170}

\textsuperscript{165} Yanamoto and Esteban (n 130) 105-11.
\textsuperscript{167} ibid.
\textsuperscript{169} ibid.
Nevertheless, L&D in its present form does not include any clauses regarding migration and/or liability. It also does not mention that the contributions to the fund, which should finance this mechanism, should be provided on the basis of greenhouse gas emissions, as originally contemplated by AOSIS. The final draft merely ‘calls on developed country Parties to channel a substantial share of public climate funds to adaptation activities’. It is worth noting that the original proposal advanced by AOSIS also incorporated several principles of IEL, which do not appear in the final text. These were Principle 21 of the Stockholm Declaration (Principle 2 of the Rio Declaration) regarding states’ responsibility not to cause environmental damage to other jurisdictions; Principle 13 of the Rio Declaration ‘to develop further international law regarding liability and compensation’; the polluter-pays principle; CBDR; the precautionary principle; equity and international solidarity.

This unnoticed disappearance is not casual. Some of these principles, especially the polluter-pays and the liability regime, are not politically and practically tenable as they would entail a ‘judicial court on climate change’. The Warsaw mechanism on L&D thus resembles another market-based instrument to deal with the impacts of climate change, or a kind of a ‘third way’ between mitigation and adaptation. It therefore risks the further weakening of the islanders’ position during future negotiations, to the advantage of big emitters. Cameron has analysed how the current division between large and small states becomes centralised during climate negotiations as reflecting developed-developing opposition and North-South inequalities. She refers to AOSIS as being positioned on a ‘reform-oriented civic environmentalism’, which aims to advance its ‘marginalised interests … on the main stage of climate diplomacy’. However, as demonstrated by L&D, the ‘main stage’ remains in the hands of the most powerful states.

172 Decision 2/ CP. 19, (n168).
173 AOSIS (n 171) 2.
176 Cameron (n 126) 878.
177 ibid.
In conclusion, IEL, Humanitarian Law and Human Rights Law are necessary but insufficient instruments to deal with the phenomenon of human mobility in the context of climate change. In particular, as examined in this Article, de-politicisation is used to hide highly political decisions by relegating them to the domains of science and law. It is therefore important to re-politicise these topics because politics has ‘the capacity for agency and deliberation in situations of genuine collective choice’. Instead of a one-size-fits-all approach to environmental migration, there is an urgent need to effectively discuss and challenge current national development strategies and immigration policies in both the North and South. Bilateral and regional agreements could represent a first step toward a more comprehensive understanding of the anthropogenic causes of environmental degradation, natural disasters and human mobility. Most importantly, local communities and affected populations have the right to frame and participate in the current international legal debate in their own terms, which greatly differ from the negative images and measures proposed by the Global North.

V. CONCLUSION

This Article has briefly presented the much discussed phenomenon of environmental migration by analysing how two Pacific Islands cases have been framed and (de)politicised. In fact, the international community aims to neutralise the radical potential of climate change discourses and environmental migration narratives by predominantly focusing on technical solutions and definitions. The current debate on climate change demands consistent evidence to convince highly polluting countries of the necessity of a drastic cut on the usage of fossil fuels. This would imply an unwanted restructuring of consumerist and highly polluting societies and compensation to the ‘victims’ of climate change-related events in the name of climate and environmental justice.

The Pacific Islands fulfil the purpose of proving the existence of climate change; they act as laboratories for the experimentation of climate laws and policies. In the collective imaginary, reinforced by hegemonic narratives produced and reproduced in the Global North, islanders have been objectified and transformed into the ‘first’ potential climate refugees. The populations and governments of the Pacific are nonetheless challenging this postcolonial (and eco-colonial) framing by advancing their proposals on climate change and asking for the necessary assistance to plan an eventual migration with dignity. They thereby reclaim their agency and decisional power in shaping both mitigation and adaptation strategies. A more nuanced understanding of the

178 Hay (n 5) 77.
factors underpinning human mobility and climate change is urgently required in order to foster a meaningful discussion on current development and immigration policies.
International Law and the (De)Politicisation of Climate Change and Migration: Lessons from the Pacific

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Courting Social Change – Lessons from the CNG Case in India

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This Article aims to discuss the challenges to judicial intervention in policy-making and the constraints on the courts’ efficacy in bringing about social change. For this purpose, this Article focuses on the CNG case, where the Indian Supreme Court decided the fuel choice for Delhi, to enforce the right to a clean environment. This analysis is important in identifying means for Civil Society Organisations to make better use of the judicial system in effecting social change.

I. INTRODUCTION

While scholars like Trubek are optimistic about the new law and development movement,1 others such as David Kennedy continue to be sceptical.2 Kennedy argues that the rule of law approach has the impact of reducing engagement with politics and economics.3 This Article discusses these limitations of the law and development movement in as much as it encourages access to justice for development. To this end, the Article identifies the challenges to judicial intervention in policy-making and the constraints on the courts’ efficacy in bringing about social change. The Article focuses on the CNG (Compressed

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3 ibid.
Natural Gas) case, where Civil Society Organisations (CSOs) approached the Indian Supreme Court to enforce the right to a clean environment by determining the fuel choice for Delhi to be CNG.

Critics of judicial review and the judicialisation of social rights point to the institutional design of the Court as well as its political embeddedness to identify factors that constrain the Court in transforming society. This Article will contribute to the existing literature by identifying these factors and Indian CSOs’ neglect of them in India’s social movements.

The analysis is particularly pertinent to the Indian context, where the civil society has often sought judicial intervention to determine the adoption of specific technologies. Recent instances include judicial decisions on the regulation of genetically modified organisms in Aruna Rodrigues v Union of India and Others; and use of nuclear technology in G Sundarrajan v Union of India and Others. The CNG case is particularly relevant to the discussion as it involves both institutional limitations of the judicial process, and what Rosenberg points to as an oft-repeated failure of the environmental movements to adopt political methods to bring social change. The peculiar facts of the case – the lack of interest of the political class; the non-alignment of the market; limited support of the executive – highlight the limitations of the law and the strategy of development movements, which take refuge from economic analysis and political choices in law.

To analyse the role of the Court and its impact on social movements, the Article adopts a constitutional ethnographic approach developed by Scheppele which relies upon the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements. In this way, the institutional limitations of the Court are contextualised to identify its political embeddedness, which CSOs did not seek to influence in the CNG case.

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4 MC Mehta v Union of India, WP(C) 13029/1985 (Supreme Court of India).
6 Aruna Rodrigues v Union of India and Others (2012) AIR SCW 3340 (Supreme Court of India).
7 G Sundarrajan v Union of India and Others (2013) 6 SCC 620 (Supreme Court of India).
9 Kennedy (n 2) 170.
The research is guided by the ideas of law and development scholars, such as David Kennedy, Trubek, Santos, and Galanter who advance nuanced criticisms and varying degrees of faith in the movement. In order to contextualise the analysis, reliance is placed upon news reports and surveys to examine consumer preferences, awareness about pollution, media attention on pollution issues and the price of fuel. Reliance is also placed on existing literature pertaining to the changing role of the Supreme Court of India developed by Baxi, Rajamani and Sivaramakrishnan.

The Article is divided into six Sections. The second Section to this Article discusses the theoretical framework and the facts of the CNG case. The Section is supported by a timeline depicting the sequence of events. The next Section discusses reasons for Indian social movements’ preference for judicial intervention, with specific reference to the Clean Air campaign and the CNG case.

The fourth Section discusses the efficacy of judicial intervention in policy decisions by focusing on the intrinsic limitations in the Court’s abilities. Relying on criticisms developed by experts such as Galanter, Baxi, and Horowitz, the limitations faced by the Court in the CNG case, and the mechanisms it adopted to overcome these, are identified.

The fifth Section focuses on the political embeddedness of the Court, which limits it from taking bold steps to effect social change. In this Section, the failure of CSOs to adopt political means to increase the impact of social movements is highlighted within the context of the CNG case. The sixth Section concludes the Article by highlighting the lessons that the CNG case presents for social movements.

II. THEORETICAL FRAMEWORK AND FACTUAL ASPECTS OF THE CNG CASE

2.1 Theoretical Basis

Judicialisation, closely linked to the access to justice movement, is a product of the law and development movement. The core conception of the law and development movement of the 1950s and 1960s, also known as “liberal legalism”, is that legal change has the potential to bring about social change.11

The movement perceived lawyers and judges to be social engineers. On the basis of Weber’s work, this approach presumed causation between legal reform and development, whereas, as noted by Trubek, legal reform provided an environment that encouraged development, but did not result in it independently.

The movement’s initial failures have left it with a history of introspection and self-reconstruction. However, it continues to be guided by the conviction that the law and lawyers can bring about social change. Consequently, the 1980s resurgence of the movement encompassed projects that targeted legal and judicial institutions. According to scholars such as Garth, these projects failed since they were elitist, attempting to reform legal culture in developing states to reflect the culture in the west, to benefit the elite.

The relation between law and poverty has recently been reiterated by the Alffram’s report for the Commission on Legal Empowerment of the Poor, which argues that legal exclusion denies billions of the world’s poorest access to development. This understanding forms the basis of the access to justice movement. Accordingly, funds have been pumped into developing countries to achieve legal reform. For instance, the World Bank has initiated the Justice for

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14 Trubek, ‘Toward a Social Theory of Law’ (n 11) 15.
16 Trubek, ‘The “Rule of Law” in Development Assistance’ (n 1) 86.
19 Alffram (n 18) 10.
As mentioned before, the CNG case is perhaps ideal for illustrating the intrinsic and extrinsic limitations of the Court in bringing about social change, which the CSOs did not seek to address. Firstly, in relation to institutional limitations of the Court, the technical nature of the case allowed expertisation of the decision making process, and the polycentric nature of the dispute made judicial forums inadequate for negotiating a solution. Secondly, the political embeddedness of the Court was illustrated in its limited response to the problem of vehicular air pollution, which resulted from the failure of the movement to develop incentives and influence the market. Consequently, the Court brought about a policy change, but did not succeed in bringing about a change in social and governmental attitudes towards the environment and environmental rights.

In order to understand these issues, it is important to understand the nature of the problem of air pollution and vehicular fuel choice, and review the sequence of events that led to the Court’s decision. This Section first highlights the gravity of the problem of air pollution in Delhi and its causes. It then discusses governmental initiatives to address the problem. This Section is also supported by a timeline, provided in Appendix A, depicting the sequence of events that led to the Court prescribing the adoption of CNG by buses, taxis and autorickshaws.

2.2 Depleting Air Quality and Causes of Vehicular Air Pollution

Vehicular air pollution in Delhi has been a cause for concern since the 1970s. The contribution of vehicular pollution has been on the rise; from 23% in 1971, it increased to 43% in 1981 and 63% in 1991, respectively. The rise in air pollution was noted by international organisations such as the WHO, which

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21 Kennedy (n 2) 150.
22 Trubek, ‘The “Rule of Law” in Development Assistance’ (n 1) 93-94.
24 ibid.
noted that emissions of carbon monoxide (CO) in Delhi increased from 140 to 265 tonnes in the period 1980-1990. Moreover, vehicular pollution is also the most important source for some pollutants of great concern, such as nitrogen oxides, benzene and carbon monoxide.

**Vehicle population:** Urbanisation in Delhi was followed by a staggering increase in vehicular population, from 235,000 in 1975 to 2,629,000 in 1996. While Delhi’s population increased by 57%, vehicle registration increased by 142% between 1971 and 1981. The contribution of vehicular pollution to air pollution also increased to 65% in 1997. Moreover, it was estimated that over 70,000 vehicles entered Delhi every day during this period.

**Fuel choice:** Apart from vehicular population, fuel choice in India was a growing concern. In 1985, when the case was filed, Delhi and the rest of India were reliant on diesel and leaded petrol as vehicular fuels. Later, in 1995 leaded petrol was replaced by unleaded petrol in Delhi and three other metropolitan cities. However, diesel continues to be used for heavy vehicles in Delhi today.

Diesel is a particularly harmful fuel. While exhaust from diesel engines contains lower concentrations of some gaseous pollutants, it has higher concentrations of Respirable Particulate Matter (PM) which are very fine particles that settle deep into the lungs and cause respiratory diseases. It also releases large quantities of polycyclic aromatic hydrocarbons, which can cause cancer. While use of diesel has been disincentivised in various states in the United States of America

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25 World Health Organization ‘Guidelines for Air Quality’ (2000) WHO/SDE/OEH/00.02
26 World Health Organization, *Health effects of transport-related air pollution* (Michal Krzyzanowski, Birgit Kuna-Dibbert and Jürgen Schneider (eds), World Health Organization 2005).
29 Government of India Ministry of Environment, Forests and Climate Change (n 27).
30 WHO and UNEP (n 28).
33 ibid.
34 ibid 29.
through the implementation of higher taxes, diesel of the most polluted kind was still in use in India.\textsuperscript{36}

Prior to 2002, public transport in Delhi was primarily reliant on diesel. These buses, though few in comparison to the fleets of cars, generated the largest amount of pollution per vehicle kilometre, and the largest amount of nitrogen and sulphur oxides.\textsuperscript{37} However, it should be noted that the largest contribution to vehicular air pollution was by passenger cars fuelled by petrol, since these are the largest in number.\textsuperscript{38}

**Engine type:** Apart from vehicular population and fuel options, the engine type also has a bearing on the amount of pollution generated. Scooters and motorcycles were the most common form of motorised vehicles in 1981.\textsuperscript{39} This is problematic, as these vehicles run on two- and three-stroke engines, which result in larger quantities of pollution. Despite their environmental harmfulness, the contribution of these vehicles to the vehicular population in Delhi continued to rise through the 1990s – in 1997, two thirds of the vehicles in Delhi were two-wheelers operated on two-stroke engines, accounting for 70\% of hydrocarbon and 50\% of carbon monoxide emissions.\textsuperscript{40}

**Traffic congestion:** Furthermore, pollution is also dependent on road density and traffic congestion.\textsuperscript{41} This is aggravated by heterogeneity of traffic in the city. Use of roads by mixed vehicles, motor and non-motor vehicles decreases the speed of the cars and efficiency, thus increasing air pollution.\textsuperscript{42}

\begin{flushleft}


\textsuperscript{37} Central Road Research Institute, ‘Effect of Environmental Pollution due to Road Traffic on Health of Delhi Traffic Policemen’ (New Delhi, Environment and Road Traffic Safety Division: Central Road Research Institute 1991); Pandey (n 31) 2878.

\textsuperscript{38} Pandey (n 31) 2878.

\textsuperscript{39} WHO and UNEP (n 28) 101.

\textsuperscript{40} Government of India Ministry of Environment, Forests and Climate Change (n 27).

\textsuperscript{41} Pandey (n 31) 2873.

\end{flushleft}
Public transport vs. private transport: it is also significant to note that the number of personal vehicles has grown in the city.\textsuperscript{43} According to Pandey, between 1971 and 1991, the vehicle density per kilometre in Delhi increased from 24.78 to 84.08, however, the population of buses reduced.\textsuperscript{44} The trend of lower percentage of public vehicles has continued. In 2012, of the 500,000 vehicles added to the city, 400,000 were private vehicles, and only 2,562 vehicles were buses.\textsuperscript{45} Since these vehicles do not cater to public transport needs, they contribute to the increase in per passenger pollution.

Age of vehicle: Moreover, the age of the vehicle also affects its emissions. As noted by Kokaz and Rogers, the turnover period for cars in Delhi is about 20 years, as opposed to 6 to 8 years in developed countries.\textsuperscript{46} Older cars evidence higher emission rates, a situation aggravated by poor maintenance of these cars, resulting in increasing emissions.\textsuperscript{47}

Through this discussion it is amply clear that vehicular air pollution is complex and dependent on a number of technical factors.\textsuperscript{48} Thus, any attempt to reduce air pollution would undoubtedly have to adopt a multi-pronged approach and alignment of a number of interests. With this understanding, the next Section reviews government initiatives to address air pollution.

2.3 Government’s Initiative in Addressing Air Pollution

Arguably, deterioration of air quality in Delhi was on account of the government’s failure in ensuring the planned development of Delhi.\textsuperscript{49} Since India’s independence from British rule, development in Delhi was marked by inadequate planning and control,\textsuperscript{50} and resulted in the creation of new squatter

\textsuperscript{43} Pandey (n 31) 2874.
\textsuperscript{44} ibid.
\textsuperscript{46} Karolin Kokaz and Peter Rogers, ‘Urban Transportation Planning for Air Quality Management’ (2002) 1817 Transportation Research Record 42.
\textsuperscript{47} ibid.
\textsuperscript{49} Centre for Science and Environment, ‘The Leapfrog Factor’ (n 36) 1.
areas that were deficient in civic amenities. Moreover, in the 1970s, urbanisation received another push with the start of the industrial revolution in India. Thus, industrialisation, urbanisation, population explosion and poverty led to a rise in air pollution.

However, the deterioration of air quality had not gone entirely unnoticed by the government. Responding to the rise in vehicular pollution and its subsequent health risks, the government of India initiated legislative reform to curb pollution. It enacted the Air Act in 1981 to establish a mechanism to monitor and improve the quality of air. Under the Air Act, the bureaucratic structure created under a previously enacted statute, the Water Act of 1974, was allocated the responsibility of ensuring compliance with the air pollution control norms under Section 2(g) of the Air Act. The government also incentivised the use of ‘non-polluting fuels’ by making related amendments to the Motor Vehicles Act 1994.

However, despite the introduction and amendment of legislations on pollution control, the deterioration continued. By 1991, the contribution of vehicular pollution to air pollution in Delhi rose to 63%. The level of particulate matter in Delhi’s ambient air rose to 3.85 times the national standard during the late 1980s. Notably, the government did take note of pollution by two- and three-wheeled vehicles and instituted a committee to recommend emission standards. However, these were not prescribed till 1991.

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51 Thakur Das Bhargava, ‘Lok Sabha Debate Delhi Control of Building Operations Act, Lok Sabha Debates 1836-50, 1836’ (Lok Sabha Secretariat, New Delhi, 7–9 December 1955).
56 Saxena, Bhardwaj and Ghosh (n 23) 110.
57 Centre for Science and Environment, ‘The Leapfrog Factor’ (n 36) 3.
The low efficacy of the law could in fact be attributed to at least four reasons:

Firstly, the measures adopted by the government to combat air pollution were not stringent enough. For instance, with regard to the two- and three-wheelers, the emission norms were set at a level that 60% of the vehicles could meet, by merely tuning up their engines.\footnote{ibid.}

Secondly, even the limited reforms adopted were not strictly enforced. According to statistics maintained by the government of India, of the 115,000 vehicles checked every year from 1991 to 1994, more than 80% of vehicles were found to meet the emission standards.\footnote{Pandey (n 31) 2878.} However, data collected by the Automobile Association of Upper India (AAUI) reveals that in May 1995, more than 50% of vehicles in Delhi failed to comply with the prescribed standards.\footnote{ibid.}

Poor enforcement of the law resulted from inadequate infrastructure. The state transport authority for Delhi lacked adequate service stations with equipment to measure vehicular exhaust.\footnote{ibid.} This reveals that compliance with regulatory norms was in fact not achieved and vehicular maintenance continued to be an issue.\footnote{Narain and Bell (n 55) 5.} Thus, while effort was expended on the limited legislative action taken, it fell short of ensuring successful enforcement of the norms.

Thirdly, the norms targeted per unit pollution, failing to address larger issues of fuel inefficiency and public transportation trends.\footnote{ibid.} For instance, the government launched pollution control drives, but these were limited to checking the tailpipes of vehicles to see if they met emissions limits.\footnote{ibid.} This transferred the onus of compliance entirely upon the owner of the vehicle, who had little or no control over the quality of the fuel or the engine efficiency. The norms only addressed maintenance-related emissions.\footnote{ibid.} Thus, the norms fell short of identifying and addressing the larger causes of vehicular pollution.

In addition, lack of access to information on air pollution also affected the capacity of citizens to contribute towards development of effective pollution

\footnote{ibid.}
control policies. Similarly, citizens were not in a position to demand compliance with existing norms. A statement by CSE in this regard is illuminating:

> It was not possible to assess the gravity of the public health risk as our monitoring institutions were incapable of generating reliable data on air pollution and health effects. We were stuck with insufficient data, contradictory information, and considerable confusion.  

It was in these circumstances that renowned environmentalist MC Mehta approached the Supreme Court in 1985, urging it to intervene to improve air quality in Delhi. As indicated in the timeline, in the following 17 years, over the course of several hearings, the Court established expert committees and sought a deliberative process for developing a solution to air pollution. The Centre for Science and Environment, a civil society organisation, launched the Clean Air Campaign and participated in the proceedings through its Director, who was a member of the expert committees. Its reports caught the Court’s attention. Finally, in its landmark judgement of 1998, the Supreme Court ordered the conversion of all diesel buses in Delhi to CNG. The Court’s judgment of 1998 was implemented in December 2002.  

Studies noted that the quality of air in Delhi improved between 2002 and 2007. Despite the conversion of buses from diesel to CNG, which produces less gaseous and particulate emissions, the level of pollution in Delhi rose after a few years. In January 2014, the New York Times reported that Delhi’s air quality was worse than Beijing’s. In particular, it noted that the level of PM was nearly two-and-a-half times higher in Delhi than in Beijing in 2011. In a fact sheet released by CSE, it is pointed out that the PM measure is eight times higher than the standard level.

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67 ibid.


71 ibid.

Notably, the Supreme Court, in its order dated 5 May 2002, had observed that the government was responsible for ensuring that the vehicular fuel adopted was benign. In failing to do so, it held the government to be in violation of an essential norm of sustainable development – the precautionary principle. The Court, in paragraph 43 of the same decision, had further directed that the Union of India give priority to the transport sector for supply of CNG all over the country. While it set a deadline for adoption of CNG by buses, auto rickshaws and taxis, it did not set a deadline for its adoption by personal vehicles.

The disturbing pollution levels in Delhi are evidence that the CNG case is an example of winning the battle and losing the war. It also challenges CSOs’ strategy of seeking judicial intervention in policy-making. Despite such failures, why do civil society organisations seek judicial intervention? Moreover, what limits the courts from bringing about social transformation and granting piecemeal rewards instead? Are there factors that CSOs can try to address to make judicial intervention more meaningful? The following Sections attempt to answer these questions.

III. ARGUMENTS IN SUPPORT OF JUDICIAL INTERVENTION

Social movements in India have resorted to litigation to achieve legal and social change. Since the emergency period between 1975 and 1977, the Indian Supreme Court has engaged notably in law-making and law enforcement through social action litigation. This Section discusses reasons for CSOs to seek judicial intervention, by analysing the CNG case.

3.1 Judicial Intervention as a Means to Participation

Some constitutional experts, such as Waldron, do not favour constitutionalism, and therefore judicial review, as it is predicated on constraining the existing majority’s wishes. However, majoritarianism is only one of the many mechanisms by which decisions are made in a democracy. In fact, Dworkin notes that the cornerstone of democracy is political equality.

73 MC Mehta v Union of India (n 4) [9].
does not merely entail equality in the right to vote, but equality in political power and the ability to influence governments’ decisions. Courts act as platforms of participation in providing a forum to address the infringement of rights by the state and reduce the gap between nominal and actual political power, as both the state and the individual appear as equals before the courts.

In relation to the CNG case, it may be noted that slum dwellers were the most affected by vehicular pollution. However, as argued by Wit and Berner, slum dwellers have greater difficulty in mobilising and organising people collectively, and therefore effecting change. They thus face political inequality in influencing government action. To overcome the lack of resources to access law making processes, public interest litigation allows opportunities to the civil society to engage in policy-making. Thus, the use of the courts by environmentalists such as MC Mehta and Anil Agarwal was a means of grievance redress and participation in policy-making.

Moreover, as noted by Heller, the Indian state has not encouraged democratic participation and instead has relied upon administrative coercion. A review of the witness attendance before the Committee of Subordinate Legislation – a parliamentary committee that reviews executive action as a part of the parliamentary process – reveals the low level of public participation in policy-making. Between 2004 and 2011, while reviewing executive action, the two Houses of Parliament had together taken oral evidence from a total of 33 witnesses, even though they had reviewed 151 subordinate legislations. In these circumstances, courts act as important forums for citizen intervention.

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78 Macedo (n 76) 1030.
80 Ronald Dworkin, Taking Rights Seriously (Duckworth 1977) 216-17.
85 Harshimran Kalra, ‘Public Engagement with the Legislative Process’ (Background Note for the Conference on Effective Legislatures, New Delhi, PRS 2011) 2.
3.2 Lack of Responsiveness of Other Organs

As noted by Horowitz, citizens’ preference for the judiciary stems from the unresponsiveness of the other branches of government.\(^{86}\) In the context of the United States of America, Denvir argues that most public interest litigation is aimed at the more prosaic goal of attempting to force large, politically unresponsive bureaucracies to follow the clear mandate of the law.\(^{87}\) This is true even in India, where the government’s lack of responsiveness in relation to economically deprived population groups has given the Supreme Court an opportunity to expand its mandate.\(^{88}\)

In the CNG case, CSOs resorted to litigation in the wake of the bureaucratic logjam in implementation of the environmental laws. Despite the falling standards of ambient air quality, the executive did not take adequate action to address the problem of air pollution. According to CSE, the inaction is attributable to the government’s callousness.\(^{89}\) Other experts have argued that the government was in fact the lead policymaker and the Court’s role was to ensure that the government acted on its policies.\(^{90}\)

While the government had enacted laws on air pollution in 1981, as argued by Mehta and noted by the Court, it had not taken measures to enforce the rights of citizens. The first set of emission norms were introduced in 1989.\(^{91}\) Similarly, even though the government was empowered to establish expert committees for developing norms of monitoring air quality and recommending pollution control policies, the first such committees were established upon directions from the Court.\(^{92}\) It should be noted that the government did appoint the HB Mathur Committee in May 1991, soon after the appointment of the Saikia Committee in April 1991. However, these measures seem to have been precipitated by the petition.\(^{93}\)


\(^{89}\) Centre for Science and Environment, ‘The Leapfrog Factor’ (n 36) 11.

\(^{90}\) Narain and Bell (n 55) 2.

\(^{91}\) Central Pollution Control Board, ‘Status of the Vehicular Pollution Control Programme in India’ (Central Pollution Control Board Programme Objective Series, Probes/136/2010, 2010) <www.cpcb.nic.in/upload/NewItems/NewItem_157_VPC_REPORT.pdf> accessed 9 September 2014.

\(^{92}\) Narain and Bell (n 55) 5.

\(^{93}\) ibid 4.
3.3 Deliberative Process

Through the first phase of the law and development movement, its proponents had realised that the governments of developing countries did not support participation and deliberative processes. Individual rights were therefore sought to be recognised and enforced through the courts, which are seen as guided by the principles of deliberative democracy. In the CNG case, the Court in its order dated 14 March 1991, realising the importance of deliberative processes, established expert committees to develop a discussion-based solution.

Moreover, as noted by Horowitz, courts are guided by principles different from those that influence the legislators and the executive. For instance, in the CNG case, judges, who were independent of the industry, could disassociate from market trends and direct the conversion of diesel buses to CNG despite the existent non-availability of the technology or the fuel.

Similarly, while judges do not have the educational qualifications to make policy decisions, their generalist knowledge allows them to take into account a variety of issues that technical expertise obscures. For instance, the Mashelkar Committee recommended the prescription of emission norms to fuel choice. This recommendation was supported by experts at scientific organisations such as The Energy and Resources Institute (TERI). However, as noted by the Supreme Court in its order on 5 April 2002, these recommendations did not take into account the consistent failure of the executive to enforce emission norms. The courts, with their generalist approach, were in a position to make decisions on the basis of administrative efficacy.

To summarise, since courts provide a forum to participate in governance and rights enforcement, it is not surprising that social movements seek support in

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94 Trubek and Galanter (n 15) 1093.
96 MC Mehta v Union of India, WP(C) 13029/1985 (Supreme Court of India), order dated 14 March 1991 [10].
97 Horowitz (n 86) 148.
101 MC Mehta v Union of India, WP(C) 13029/1985 (Supreme Court of India), order dated 5 April 2002.
pursuing social transformation from the judiciary. However, there are numerous limitations to the efficacy of such a court-dependent strategy in effecting social change. These limitations are both intrinsic and extrinsic to the courts. They are discussed in the next Section.

IV. INTRINSIC FACTORS THAT LIMIT JUDICIAL INTERVENTION

Intrinsic limitations to the judiciary’s capability in making policy changes arise from its institutional limitations and biases. This Section identifies these limitations and their impact in the CNG case. Before undertaking this analysis, it is relevant to note that scholars have identified numerous grounds for arguing against judicial intervention in policy-making. These include the anti-majoritarian nature of the courts; judicial unaccountability; lack of expertise; polycentricity; scarcity of resources and equal priority of rights. While some of these grounds are evidenced in the CNG case, others do not find adequate support. Thus, this discussion is limited to the anti-majoritarian nature of courts, issues of polycentricity, lack of technical expertise and limits to enforcement.

4.1 Anti-Majoritarian Traits of the Court

Many fear that judicial review weakens or subverts parliamentary democracy. This is because courts are unelected bodies that are unaccountable to the people, which allows them to pursue their mandate of constitutionalism, instead of popular will. Constitutionalism is considered to be predicated on constraining the existing majority’s wishes, as one governmental body,

102 Waldron (n 75).
unelected by the people, tells the elected body that its will is incompatible with fundamental aspirations of its citizens.\textsuperscript{110}

It is argued that in cases involving interpretation of the constitution for recognition or enforcement of rights, the courts often adopt arcane interpretations of the constitution that contradict popular will.\textsuperscript{111} Graglia notes that in the USA, the courts give voice to the preferences of the cultural elite at the cost of the interests of the majority.\textsuperscript{112} This argument resonates with Trubek, who argues that judicial intervention and PILs have in fact legitimised the very processes that they sought to challenge, thereby furthering political inequality.\textsuperscript{113}

Even in India, courts have been accused of collaborating with middle class actors and audiences.\textsuperscript{114} The association of environmental movements with civil society organisations rooted in technical expertise and elitist interests casts doubts about the representation of popular interest before the courts. This prejudice is noted in a number of cases, including those relating to hazardous industries, where the Supreme Court ordered resettlement of lower-income groups instead of changing standards of care by setting norms or realigning the market.\textsuperscript{115}

The elitist inclination of the courts can be observed in the CNG case. It is evidenced in two forms relatable to the nature of the litigating parties – their experience in judicial proceedings and the interest groups they represent.

4.1.1 Experience in Judicial Proceedings and Financial Advantages

According to Galanter,\textsuperscript{116} the have–s with litigation experience or financial resources – come out ahead. This is noted in the CNG case as well. Like other socio-economic rights movements that sought court intervention, the CNG case was led by repeat players. Repeat players enjoy the benefit of experience. MC


\textsuperscript{112} ibid.

\textsuperscript{113} ibid.


Mehta, who initiated the CNG case, is a renowned environmental lawyer. He has advocated for numerous causes and played a role in as many as 40 landmark judgements delivered by Indian courts, of which several were secured by the Supreme Court.117

While the CNG case was filed by Mehta, the CSE, that claims to be a knowledge-based advocacy group, later played a significant role in the fight for a change in vehicular fuel options before the Court.118 The organisation received funds from various international donors, such as SIDA and the Ford Foundation.119 Furthermore, the presence of its directors on the expert committee established by the Court is indicative of its influence over the process.

While the case was filed by Mehta against government offices, the Society of Indian Automobile Manufacturers (SIAM), a key stakeholder to represent the interest of the automobiles industry, sought to be included in the adjudicatory process as an intervener.120 SIAM, as a representative for the automobiles industry, can be reasonably presumed to have enjoyed financial resources for the litigation process.

The access to the Court and influence exercised by these players may be contrasted with another key affected party: bus operators. Private bus operators did not enjoy similar litigating experience or the resources to participate with such a lengthy litigation. As discussed in subsequent Sections of the Article, Indian courts do not advertise on-going litigation though they affect a number of entities that are not party to the proceedings or privy to their existence.121 The


120 MC Mehta v Union of India, WP(C) 13029/1985 (Supreme Court of India), order dated 14 March 1991.

fact that the bus operators did not know about the requirement to adopt CNG for 15 months after the Court’s direction\textsuperscript{122} is itself an indicator of the lack of informational resources available to them. Moreover, in light of news reports that bus operators could not afford the penalties levied by the Court for violation of the deadline of 31 January 2002 and instead rescinded their permits it is likely that they did not have the financial resources to undertake lengthy legal proceedings.\textsuperscript{123} Without these advantages, they could not move the court system to accommodate their demands for time and financial incentives.

Thus, Galanter’s observation that the haves come out ahead holds true for the CNG case. Though civil society organisations represented an interest group that was excluded from participation in governance before other forums, it did so at the expense of another stakeholder – bus operators – who faced greater exclusion in the CNG debate.

### 4.1.2 Prejudice for the Elite

Various experts have noted the elitist bent of the Supreme Court in the CNG case.\textsuperscript{124} They argue that the Court’s decision transferred the blame of pollution and burden of improving air quality to the poorer sections of society.\textsuperscript{125} In order to substantiate the argument it is important to review the vehicle use and pollution trends in Delhi.

In its order dated 28 July 1998, the Court required buses and heavy vehicles like trucks and freight vehicles to convert to CNG. However, the vehicular population of buses as a percentage of vehicles in Delhi was low. As indicated in Figure 1 below, buses contributed to less than 2\% of the vehicular population between 1971 and 1996.\textsuperscript{126} In contrast, cars and two-wheelers contributed to over 20\% and 50\% of the vehicular population respectively through this time frame. Yet the courts only required buses to convert to CNG.

\begin{itemize}
  \item \textsuperscript{122} Narain and Bell (n 55).
  \item \textsuperscript{124} Amita Baviskar, ‘Red in Tooth and Claw? Looking for Class in Struggles over Nature’ in Raka Ray and Mary F Katzenstein (eds), Social Movements in India: Poverty, Power, and Politics (Rowman & Littlefield Publishers 2005) 161-178; Bhushan (n 114) 1770, 1774; Rajamani (n 118) 293-299.
  \item \textsuperscript{125} Rajamani (n 118) 303.
  \item \textsuperscript{126} Pandey (n 31) 2874.
\end{itemize}
In this regard, it is important to refer to the emission trends for buses as well. The Court, in its order dated 14 November 1990, noted that the emissions from the buses were more dangerous and larger in quantity since they ran on diesel. Similarly, per-kilometre emissions in grams for buses and trucks were the largest.127

This argument can, however, be countered by the growth rate of other vehicles, such as cars, during the same time, that could offset a change in the pollution levels of buses and trucks. The growth rate of cars has been on the rise since 1971.128 During 1970-1980s, while the population of Delhi grew the rate of 5-6%, Delhi’s motor vehicle fleet grew at an annual rate of 20%.129 As indicated in Pandey’s analysis in Figure 2 below, the growth rate for cars was 17.05% between 1985 and 1990.130 In the 1990s it is indicated to have increased.

Figure 1: Profile of Vehicular Population in Delhi in Percentage Terms

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Car/Jeep/Station Wagon (Petrol Driven)</td>
<td>30.4%</td>
<td>18.5%</td>
<td>21.1%</td>
<td>23.7%</td>
<td>24.1%</td>
</tr>
<tr>
<td>Scooter/Motorcycle (Petrol)</td>
<td>53.4%</td>
<td>69.3%</td>
<td>68.0%</td>
<td>66.7%</td>
<td>66.3%</td>
</tr>
<tr>
<td>3 Wheeler (Petrol)</td>
<td>5.4%</td>
<td>3.5%</td>
<td>3.6%</td>
<td>3.1%</td>
<td>3.0%</td>
</tr>
<tr>
<td>Taxis (Mostly diesel)</td>
<td>2.0%</td>
<td>0.9%</td>
<td>0.6%</td>
<td>0.5%</td>
<td>0.5%</td>
</tr>
<tr>
<td>Buses (Diesel)</td>
<td>1.5%</td>
<td>1.6%</td>
<td>1.1%</td>
<td>1.1%</td>
<td>1.1%</td>
</tr>
<tr>
<td>Goods Vehicle (Diesel)</td>
<td>7.4%</td>
<td>6.1%</td>
<td>5.6%</td>
<td>4.9%</td>
<td>5.1%</td>
</tr>
</tbody>
</table>


Figure 2: Vehicular Pollution in Delhi: Profile of Growth Rate

<table>
<thead>
<tr>
<th>Category</th>
<th>1985-1990</th>
<th>1990-95</th>
</tr>
</thead>
<tbody>
<tr>
<td>Car (petrol)</td>
<td>17.05</td>
<td>10.76</td>
</tr>
<tr>
<td>Scooter/bike (petrol)</td>
<td>12.66</td>
<td>13.96</td>
</tr>
<tr>
<td>3 wheelers</td>
<td>14.48</td>
<td>4.92</td>
</tr>
<tr>
<td>Taxis (mostly diesel)</td>
<td>2.38</td>
<td>5.92</td>
</tr>
<tr>
<td>Buses (diesel)</td>
<td>5.15</td>
<td>7.63</td>
</tr>
<tr>
<td>Goods vehicles (diesel)</td>
<td>12.09</td>
<td>5.46</td>
</tr>
</tbody>
</table>


This is particularly important, as preference between different vehicles and modes of transportation varies according to economic class. Buses are primarily used by persons in the lower-income group.131 A survey conducted by RITES on

127 ibid 2875.
128 ibid.
129 Badami, Tiwari and Mohan (n 42) 5.
130 Pandey (n 31) 2874.
131 Badami, Tiwari, and Mohan (n 42) 4.
the use of public transport in Delhi indicated that apart from walking, persons in this income group relied primarily upon buses for transport.\textsuperscript{132} Thus, after the implementation of the Court’s order, they rely upon the least polluting means of transport.\textsuperscript{133}

As noted by Kumar and Foster, non-CNG vehicles are one of the largest sources of polluting particles.\textsuperscript{134} In Delhi, per minute emissions for non-CNG cars were the highest source of pollution.\textsuperscript{135} Therefore, emission levels reduced by the CNG regulations could have been neutralised by the addition of new diesel-based cars and unchecked emission from industries and non-CNG heavy vehicles.\textsuperscript{136}

Through this discussion it is evident that, while the Court took measures against buses that were used by the lower-income groups, it did not take into account the environmental costs that were created by the higher-income groups’ vehicles of choice.\textsuperscript{137} Thus, the Court affected the consumption and pollution patterns of the poor without requiring concomitant changes in the consumption behaviour of the higher economic classes. According to Baviskar this difference in treatment and elitism is in fact the hallmark of environmentalism in India.\textsuperscript{138}

The implications of failure to curb emissions from privately-driven diesel cars were noted by the EPCA.\textsuperscript{139} However, the Court failed to take measures to combat the rise in pollution caused by diesel cars. It was only in 2014 that the Court intervened to address the impact of diesel-driven cars on air pollution in Delhi.

\subsection*{4.2 Polycentricity and Formalistic Nature of Court Proceedings}

It is argued that courts are unsuited for resolving polycentric disputes, since these require innovative solutions and negotiation. Socio-economic rights enforcement cases are considered to be polycentric. A polycentric problem is

\begin{itemize}
  \item \textsuperscript{132} RITES/ORG, ‘Household Travel Surveys in Delhi, Final Report, New Delhi and Baroda’ (Rail India Technical and Economic Services Ltd, Operations Research Group 1994)
  \item \textsuperscript{133} Badami, Tiwari and Mohan (n 42) 98.
  \item \textsuperscript{134} Naresh Kumar and Andrew D Foster, ‘Have CNG Regulations in Delhi Done Their Job?’ (2007) 42(51) Economic and Political Weekly 48, 55.
  \item \textsuperscript{135} ibid 52.
  \item \textsuperscript{136} ibid 57.
  \item \textsuperscript{137} Rajamani (n 118) 306, 320; Bhushan (n 114).
  \item \textsuperscript{138} Baviskar (n 124) 161.
  \item \textsuperscript{139} Environment Pollution (Prevention and Control) Authority (EPCA), ‘Restriction on the plying of diesel-driven (private) vehicles in the NCR’ (EPCA 1999).
\end{itemize}
one that comprises a large and complicated web of interdependent relationships, such that a change to one factor produces an incalculable series of changes to other factors.\textsuperscript{140} Since social rights, such as rights to housing, education, health and environment, involve resource allocations, any determination on enforcement of these rights would affect a multitude of interests and are therefore ‘preponderantly polycentric’.\textsuperscript{141} Polycentric disputes involve a large number of parties or interest groups whose interests are better safeguarded through negotiations and the ability to develop compromises.\textsuperscript{142} This is however hard to achieve in judicial forums.

4.2.1 Under-representative

As noted by Felstiner, Abel, and Sarat, formal adjudicatory processes exclude disputants who lack financial resources, experience, knowledge about the litigation process and social influences that are conducive to litigation.\textsuperscript{143} Under-representation of certain classes can make the courts unaware of their interests and impact the nature of the decision made by the courts.\textsuperscript{144} Thus, while polycentric disputes involve a number of interests, it is likely, that without adequate resources, only a few would be represented, even though the courts’ decision affects them all.

Moreover, courts in India do not advertise the cases before them, or the subject matter to which they relate. The problem is heightened in public interest litigation cases, where parties are not easily identifiable and impleaded.\textsuperscript{145} Parties to the proceeding may seek to implead necessary parties. However, no attempt is made by the courts to inform the public about the nature of the dispute that is brought before it.\textsuperscript{146} Robinson notes that ‘in most PILs, the public largely finds out about the case only after the court has given its directions, even though orders in these cases will frequently directly impact many people’s lives’.\textsuperscript{147}

\textsuperscript{140} Fuller and Winston (n 105) 353.
\textsuperscript{142} Fuller and Winston (n 105); Menkel-Meadow (n 105).
\textsuperscript{144} Rajamani (n 118) 306.
\textsuperscript{145} Rajamani (n 118) 293.
\textsuperscript{146} Robinson (n 121).
\textsuperscript{147} ibid.
This problem is evident in the CNG case as well. Though the case began in 1985, some of the key stakeholders were not impleaded. For instance, automobile manufacturers, who were indispensable for the implementation of the order, were only allowed to intervene in the proceedings in 1991, through the Association of Indian Automobile Manufacturers. Similarly, representatives of commercial transport service providers were not included in the policy-making process. This is particularly surprising as the private bus operators owned 62.74% of the bus fleet. A number of these were in fact run by cooperatives and ex-servicemen who could only run a maximum of five such buses.

The interests of bus operators were not kept in mind by the Court. While it directed that financial incentives be given to autos and taxis to adopt CNG, similar provisions were not made for private buses. Transport operators preferred low-sulphur diesel as neither could afford to junk their old buses and buy new ones to run on CNG, nor were they provided adequate incentives by the Court or the government. A number of bus operators in fact had borrowed loans from the government to buy diesel buses as late as 1998-99. It is likely that this was on account of the lack of availability of CNG. The low availability of CNG meant that bus operators ran into losses since buses had to queue for hours for fuel, missing out on commuter traffic while they still had loans on the buses to repay.


150 ibid 12.


152 ibid.


155 Centre for Science and Environment (n 153).

156 ibid.
Evidently, the operators required financial assistance in order to make the shift.\(^{157}\) However, without having them on board during the policy development stages, their concerns were not considered by the Court or the government.\(^{158}\) Instead, the cost to public health was transferred to them without assistance from the government.

According to Faure, bus and taxi operators were only informed of the requirement to convert to CNG 15 months after the Court’s order.\(^{159}\) This resulted in frustration amongst bus and taxi operators, who refused to abide by a decision they were not privy to. Not surprisingly, in January 2001, nearly two years after the Court’s direction, private bus operators in Delhi claimed that they had no knowledge of the litigation and the Court’s directions.\(^{160}\)

### 4.2.2 Justice-Oriented Limits to Adjudication

Since polycentric disputes involve a multitude of interests, their resolution involves prioritisation of claims, innovative solutions, and political trades. However, as noted by Nozick, courts are bound by the idea of the absolute nature of rights, which cannot be reconciled with flexibility in allocations.\(^{161}\) Developing compromises between parties requires trade-offs between them. However, as noted by Horowitz, since courts have to be politically neutral, they do not have the currency to make political compromises.\(^{162}\)

In the CNG case, the Court’s limitations were witnessed in its inability to bring about a compromise between different interest groups and their rights. The case involved, among others, the competing interests of right to a clean environment, right to health, and the right to work of residents of Delhi.\(^{163}\) In this regard, it is useful to refer to bus use trends to identify the groups that were affected and the rights that were denied.

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157 BBC (n 154).
158 Rajamani (n 118) 306, 320.
161 Nozick (n 106) 237.
162 Horowitz (n 86) 151.
163 Rajamani (n 118) 293, 319-20; Michael Jackson and Armin Rosencranz, ‘The Delhi Pollution Case: Can the Supreme Court Manage the Environment?’ (2003) 33(2) Environmental Policy and Law 88, 90.
According to RITES, 40% of bus trips are undertaken for work purposes, and 42% for education purposes.\textsuperscript{164} Given that buses are primarily used by the lower-income groups, disruption in bus services would affect them and their occupation and education most. This is aggravated by the fact that their ability to withstand the shock of inaccessibility of buses and lack of alternate modes of transport is low. The change in fuel policy, forcing buses to use CNG, was not implemented smoothly and resulted in disruptions. Consequently, the lower-income group was affected by the lack of access to buses, and suffered inconvenience in attending to their work and education.

While the Court did allow a delay in the implementation of the order, it did not seek to provide any settlement for the loss suffered by the people. By giving prime importance to environmental justice, the Court failed to recognise the non-alignment of interests in its decision-making process. This resulted not only in a refusal to implement the order by bus and taxi operators\textsuperscript{165} but also frustration among the commuters.\textsuperscript{166}

This can be contrasted with the discussion-based, inclusive process adopted in Basel, Switzerland for conversion to CNG. Here, the government, car manufacturing industry and Swiss Federal Institutes of Technology worked together to develop an alternate fuel policy with a long-term focus.\textsuperscript{167} Through this process, the government sought the opinion of the people through various tools, including opinion polls.\textsuperscript{168}

\textbf{4.2.3 Nature of Proceedings}

While policy-making requires collaboration, courts provide an adversarial forum for policy decisions. In fact, the underlying commitment of public interest lawyers ‘is not to specific platforms, whether liberal or conservative, it is rather to the adversary process system itself’.\textsuperscript{169} This limits the courts’ ability to develop a solution that is conducive in promoting all interests and easily implemented.

\textsuperscript{164} RITES/ORG (n 132); Badami, Tiwari and Mohan (n 42) 8.
\textsuperscript{166} Faure and Raja (n 159) 270-71.
\textsuperscript{167} Narain and Bell (n 55) 42.
\textsuperscript{168} ibid.
\textsuperscript{169} Sax (n 98) 82.
Tuler notes that there is a dual role for participants in policy discourse – speakers and listeners.\(^{170}\) In a monologic form of discourse, the speaker’s claims would be heard by the participants with the aim of identifying holes until the argument collapses from inconsistencies and contradictions.\(^{171}\) In contrast, in a process which is dialogical, participants will help to close the holes in the argument.\(^{172}\) Adversarial forums are monologic and do not further collaborative effort.

The limitations of the adversarial process were evident in the CNG case. For instance, there appears to have been little agreement about the gravity of the problem of air pollution even a decade after the initiation of the case. Governments at both the federal and the state level indulged in politicking over air pollution. The Chief Minister of Delhi refused to implement a Union Government order requiring the phasing out of commercial vehicles over 15 years old in the interest of residents’ health.\(^{173}\)

Moreover, even after the Court’s order for conversion to CNG, the Delhi government was not convinced about the efficacy of the new fuel to address environmental problems.\(^{174}\) The Union Government set up a committee on 13 September 2001 to examine the problem of vehicular pollution after the Court’s direction.\(^{175}\)

In fact, the Court, noting the adversarial nature of proceedings, required the establishment of expert committees for deliberation over the opinions of different participants.\(^{176}\) However, experts have argued that the process adopted was not participatory and public opinion was sought on an *ad hoc* basis.\(^{177}\) Furthermore, while the committee was charged with the responsibility of considering the opinion of participants, its recommendations were not developed by the participants collaboratively.\(^{178}\) The process resulted in the substitution of deliberation by expertisation. This was aggravated by the fact


\(^{171}\) ibid.

\(^{172}\) ibid.

\(^{173}\) Centre for Science and Environment ‘The Leapfrog Factor’ (n 36) 7.

\(^{174}\) Ibid 20.

\(^{175}\) ibid 7.

\(^{176}\) Narain and Bell (n 55) 6.

\(^{177}\) Rajamani (n 118) 304.

that the technical nature of the issue was not simplified for the masses who were affected by the change and could not contribute to the decision.\textsuperscript{179}

The working of the expert committees was thus an extension of the problem of under-representation and expertisation of political issues.\textsuperscript{180} As noted earlier, legal proceedings are attractive for reform-minded professional lawyers and lobbyists, but not for a majority of citizens who lack equal resources of time, money, skill, experience and ongoing organisational support.\textsuperscript{181} The committees established by the Court did not overcome the failings of the adjudicatory process in providing a forum for a collaborative, transparent and dialogical mechanism for policy-making.

The Court’s order to adopt CNG was therefore taken without a consensus between the parties and did not address the concerns of different disputants. While the Court adopted measures to ensure discussion between parties before the EPCA, the mechanism appears to have been inadequate in addressing the multitude of concerns involved, making the Court an unsuitable forum for policy decisions and socio-economic rights enforcement.

4.3 Lack of Expertise

Experts such as Horowitz argue that the courts’ inability to effect a change is also based on the judiciary’s lack of expertise, which is crucial for social reform.\textsuperscript{182} Reforming existing bureaucratic structures requires intensive analysis, which the courts cannot conduct, nor can they develop skills to undertake such analysis due to paucity of time.\textsuperscript{183} To some extent, this problem has been addressed through reliance upon expert committees.\textsuperscript{184} However, as is noted in the CNG case, in the event of contradictory recommendations of different committees (discussed in the next sub-section), the Court may not have the expertise to make a choice.


\textsuperscript{180} Kennedy (n 2) 170.

\textsuperscript{181} Michael W McCann, Taking Reform Seriously: Perspectives on Public Interest Liberalism (Cornell University Press 1986) 200.


4.3.1 Constraints Arising From Manner of Litigation and Legal Culture

The manner of litigation also impacts the degree of expertise at the disposal of the courts. For instance, in the United States of America, class action suits often claim damages, and lawyers are entitled to contingency fees. This provides litigants, and their lawyers, incentive to conduct independent investigations, engage experts and increase public awareness.

On the other hand, India’s legal culture acts as an impediment to empowerment of public interest lawyers in bringing evidence and expertise to court. This is because litigants in PIL cases are pro bono publico, who lack financial resources and whose prime asset is their social commitment. Secondly, under the Bar Council of India Rules 1975, charging contingency fees is prohibited in India. Thus, public interest lawyers can only seek to charge their clients for the services rendered, without a result-oriented incentive to invest financial resources, for instance, on expert evidence.

This lacuna has been addressed by the Court through assistance of expert committees. However, as noted by Koonan in another case study of public interest litigation, there are often a multitude of committees that are set up, a technique meant to side-track the process and create suspicion about the results. In the present case, the Court itself established three committees of which the Saikia and the Bhure Lal Committees are the most relevant. Apart from this, in 2001, the government too initiated its own research under the Mashelkar Committee.

Not surprisingly, the conclusion of the studies and their recommendations differed. While the Bhure Lal Committee named CNG as the clean fuel, the Mahselkar committee was of the view that emission norms should be laid out.

185 ibid.
187 Sujith Koonan, ‘Groundwater: Legal Aspects of the Plachimada Dispute’ in Philippe Cullet and others (eds), Water Governance in Motion: Towards Socially and Environmentally Sustainable Water Laws (CUP 2010) 159-98; Baxi (n 74) 107, 124.
188 Narain and Bell (n 55) 5-6.
190 EPCA, ‘Report on the Urgent Need to Augment and Restructure the Delhi Bus Transport System to Help Mitigate Air Pollution in the City’ (n 149) 21.
This view was also supported by TERI. Scientists such as Dr Rajendra Kumar Pachauri noted that the adoption of a fuel on such a scale without adequate testing was unprecedented. Various other groups identified proposals that gave public transport a push over commercial and private vehicles.

Despite these conflicting views to wade through, the Supreme Court did not allow research groups time to conclude their experiments. It instead decided to rely upon the recommendations of the Bhure Lal Committee, even though the government was not convinced about the efficacy of the fuel. In paragraph 7 of its order dated 5 April 2002, the Court reasoned that the Mashelkar Committee’s recommendations were not acceptable as it did not have a public health expert on its board.

The decision to prefer a shift to CNG over other options, such as ultra-low sulphur diesel, better technologies, or merely prescribing emission norms, has reduced the market’s flexibility to shift to cleaner technologies. In the absence of inherent expertise to choose between the contradictory recommendations, there has been significant criticism by scientists and the legal community.

The Court’s lack of expertise is also evident in the failure of the Court’s decision in addressing the problem of vehicular air pollution in Delhi. Moreover, as discussed in the following Section, the decision had unforeseen consequences for the neighbouring areas.

4.3.2 Constraints Arising From Lack of Foresight

Horowitz notes that Courts can determine policy successfully, where, among other things, the consequences of the decision are limited in scope and are generally foreseeable. However, in relation to socio-ecological disputes, the knowledge necessary to promote social adjustment does not exist as a coherent...
whole but is widely scattered across hundreds of thousands, and in some
circumstances, millions of actors, most of whom are completely unknown to
each other. Thus, judicial policy-making in such disputes is likely to be
particularly ineffective.

The failure of the Supreme Court to foresee the consequences of its decision is
evident in two ways. First, the rise in pollution within Delhi is indicative of the
failure of the Court’s policy to curtail pollution. As indicated in the timeline, the
pollution levels in the city have skyrocketed since the Court’s decision to
convert all buses to CNG. The Court did not foresee the rise in residents’
income levels and their preference for diesel cars over public transport or
petrol-driven cars.

Second, implementation of the Court’s decision was followed by a reduction in
emission and particulate matter levels in Delhi, but a rise in the same levels in
the surrounding areas. Kumar and Foster note that the levels of air pollution
within 2 km outside Delhi were significantly higher than those in the areas
within 2 km inside of Delhi’s border. They argue that relocation of polluting
vehicles from Delhi to its neighbouring areas as a result of the Court’s decision
has contributed to the rise in pollution levels in these areas.

Thus, though the Court was able to effect a change in the regulation, it was
unable to address the concerns of the social movement, or alter consumption
patterns of the rich.

4.4 Legitimation of Existing Structures and Limited Impact

Galanter argues that litigation does not lead to redistribution of tangible
resources, instead only symbolic rewards are redistributed to have-nots. Similarly, Pieterse argues that gains from judicial intervention are achievable
only progressively. Social action litigation in India has for decades, with ‘creeping jurisdiction’ of the courts, granted piecemeal rewards to the

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199 Guttikunda (n 69) 25.
200 Kumar and Foster (n 134) 52-53.
201 ibid 54.
202 ibid 50.
203 Galanter (n 116) 138.
litigants. Such rewards tend to fractionalise political action, and have the ability to decrease the capacity and drive to secure redistribution of tangible benefits.

The impact of the creeping jurisdiction of the Supreme Court is noticeable in the CNG case as well. The Court’s decision did not treat modes of transport used by different economic classes equally, resulting in fractionalisation and a premature satiation of the movement.

4.4.1 Symbolic but Intangible Rewards

The Court required buses to convert to CNG, but cars were not forbidden from use of polluting fuels such as diesel or petrol. The need to address the impending impact of an increase in diesel cars on pollution-combating strategies was not addressed by the Court, which left the executive to take decisions in this regard. Notably, the share of diesel vehicles within new car sales in Delhi has increased from 4% to about 50%, and as noted by the EPCA, it has undone the positive impact of the CNG conversion by buses.

The Court’s decision to require buses to change to CNG did bring about a change in the air pollution levels between 2002 and 2005. However, the change was insignificant in the face of a rise in diesel car population in Delhi. Thus, while the clean air campaign and Mehta’s petition aimed at addressing air pollution, the Court changed the PIL’s focus to CNG use by buses and road safety. For instance, in various orders between 2002 and 2014, the Court has been tracking the provision of CNG in the city. On other occasions, such as in its order dated 2 November 2007, the Court dealt with the hazards of hoardings and other visual clutter while driving and the mandatory requirement of wearing seatbelts. The latter is even more surprising as it has little to do with

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205 Baxi (n 74) 122.
207 Michael Lipsky, Protest in City Politics: Rent Strikes, Housing and the Power of the Poor (Rand McNally and Co 1970) 176.
208 Jackson and Rosencranz (n 163) 90.
210 EPCA, ‘Report on the Urgent Need to Augment and Restructure the Delhi Bus Transport System to Help Mitigate Air Pollution in the City’ (n 149) 6.
211 Guttikunda (n 69) 24; EPCA ‘Report on Priority Measures to Reduce Air Pollution and Protect Public Health’ (n 209) 2.
the mandate with which the petitioner had approached the Court – enforcement of the Air Act.

Thus, despite the fact that the deterioration in air quality in Delhi was highlighted by EPCA and CSOs\(^\text{212}\) no action was taken by the Court. Only on 10 February 2014, after Delhi’s pollution hazards received international attention, did the Court initiate the debate on the fuel for personal vehicles.

4.4.2 Fractionalisation of the Campaign

Following the decision of the Supreme Court, the metaphoric ‘environmental rucksack’\(^\text{213}\) was transferred from high income classes to the urban poor.\(^\text{214}\) While vehicular air pollution carries health risks for all residents, its impact on the poor is higher. This is ironic, since the poor contribute the least to vehicular pollution.\(^\text{215}\)

The National Family Health Survey for Delhi reveals that the morbidity rate for tuberculosis amongst the low-, medium- and high-income groups was 0.84, 0.62 and 0 respectively.\(^\text{216}\) Even in the case of asthma, the low-income group suffers from a morbidity rate of 0.84, while the high-income group has a morbidity rate of 0.21.\(^\text{217}\) Higher impact of air pollution on the poor is on account of lack of resources and education, as well as higher exposure to polluting environments.\(^\text{218}\) Thus, while the poor adopt the least polluting means of transport, they bear the largest burden of the risks associated with pollution.\(^\text{219}\)

Moreover, the low-income group lacks the ability to approach the courts to address non-compliance with socio-economic rights.\(^\text{220}\) Thus, while the order to convert to CNG was celebrated as a success, the health risks for the poor continued to grow, without successful representation before the Court till it


\(^{214}\) Baviskar (n 124) 173.

\(^{215}\) Tiwari, ‘Urban Transport Priorities’ (n 42) 98.

\(^{216}\) Garg (n 81) 1004.

\(^{217}\) ibid.

\(^{218}\) ibid; Badami, Tiwari and Mohan (n 42).

\(^{219}\) ibid.

\(^{220}\) McCann (n 181) 200.
took note of the EPCA report in 2014, when the international community declared Delhi unliveable.

4.5 **Implementation Glitches**

4.5.1 **Lack of Control over the Bureaucracy**

As noted by Hamilton, courts are considered the least dangerous branch of the government.\(^{221}\) This is because while the Court can issue orders, it requires support of the bureaucracy to enforce its decisions. However, the Court does not enjoy control over the bureaucracy and it risks losing its support when it enters into the domain of policy-making.\(^{222}\) While contempt proceedings can be initiated for failure to implement an order of the Court, such proceedings can be counter-productive.\(^{223}\)

The failure of the Court to implement its decisions was noted in the CNG case as well. As noted by the Chairman of the Delhi Transport Corporation (DTC), the judicial fiat requiring the setting up of CNG infrastructure to meet the demand was not taken seriously by anyone till January 2000.\(^{224}\) The establishment of the Mashelkar Committee to scrutinise the recommendations of the Supreme Court itself is an indicator of the lack of coordination between the judiciary and the executive.

The government’s response to the Court’s order did not escape the Court’s notice. It expressed distress over the executive’s stand and statements in the media in its order dated 4 April 2001. The Court stated that:

> We are distressed at certain reports which have appeared in the print and electronic media, exhibiting defiant attitude on the part of the Delhi Administration to comply with our orders. The attitude, as reflected in the newspapers/electronic media, if correct, is wholly objectionable and not acceptable.\(^{225}\)

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\(^{222}\) Rosenberg (n 8) 15-16.

\(^{223}\) Rosenberg (n 8); Balmé and Dowdle (n 108).

\(^{224}\) Mehta (n 151) 3.

\(^{225}\) MC Mehta v Union of India, WP(C) 13029/1985 (Supreme Court of India), order dated 4 April 2001 [11].
While making its observations, the Court came very close to initiating contempt proceedings. However, it settled for affidavits from government agencies about their stand on the Court’s directions and their statements to the media.

While the Court had ordered the conversion of buses to CNG in 1998 to be completed by 2001, it was not until 1 December 2002 that the order was in fact implemented. Even when the order was enforced, more than half of the city’s bus fleet had to be pulled off the streets since it did not comply with the fuel norms.

4.5.2 Lack of Coordination

Apart from not having control over the bureaucracy, the judiciary cannot coordinate with the different departments of the government. In order to keep abreast of the status of implementation of its orders, the judiciary has developed a supervisory jurisdiction. While this is a useful mechanism to ensure compliance, the judiciary is not capable of securing live updates. As is noted in the CNG case, lack of knowledge of developments in various departments led to implementation glitches and delays.

The lack of coordination was noted in a number of instances. For one, the Ministry of Petroleum had initially informed the Court that there was adequate natural gas to undertake a shift to CNG. However, bus operators complained about the lack of CNG and refused to adopt it. When the Court’s order for adoption of CNG was not implemented, it was revealed that the fuel was not available in adequate supply. In September 2001, the government informed the Court that the availability of natural gas was limited as it was required for power generation as well. Thus, the incapacity of the Court to engage with government departments on a constant basis, and multiple chains of command, led to delays and confusion in the implementation of the order.

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226 Mehta (n 151) 4.
227 BBC (n 154).
230 Mehta (n 151) 4.
4.6 Impact of Intrinsic Limitations on the Social Movement

In the CNG case, Kennedy’s words of caution about the law and development movement’s substitution of political debate with judicialisation ring true. CSOs’ adoption of judicial intervention for change impacted spaces for public participation and debate on air quality and health risks. These were shifted to the courts and the process for developing solutions was expertised. As noted by Menkel-Meadow, solutions depend on the processes through which they are developed. Consequently, in keeping with Scheingold’s apprehension, the movement was fractionalised as its decisions were not suitable to all; treated transport means differently; and had different consequences for different commuters and residents who had equal rights to environment and work. Commuters became disenchanted with the poor execution of change in fuel policy. Mass media gave little attention to the plight of the poor whose suffering increased over the years.

Thus, because social activists did not seek to overcome the institutional limitations of the courts by adopting participatory and inclusive methods, in the long run, the award was ineffective. In the following Section, it is argued that the limitations of the courts are in fact symptomatic of the contextual constraints within which it operates. Thus, CSOs that aim to bring social change should be wary of these factors and address them while seeking judicial intervention.

V. EXTRINSIC FACTORS THAT LIMIT JUDICIAL INTERVENTION

Court decisions requiring social change are not automatically implementable, and require certain circumstances to become effective. Furthermore, the courts are wary about their limitations, and refrain from putting themselves in no-win situations where their decisions would not be implemented, risking their legitimacy. Similarly, the delayed adoption of CNG and the differential treatment of public and personal transport cars can be explained by taking into account the circumstances within which the Court was operating. In order to support this argument, reliance is placed on Rosenberg’s theory that courts are effective in bringing about social change in the presence of certain factors.

231 Menkel-Meadow (n 105).
232 Rosenberg (n 8) 32.
233 ibid 19.
Rosenberg highlights four circumstances where the judiciary is effective in producing social reform: first, where other actors offer positive incentives to induce compliance; second, when other actors impose costs to induce compliance; third, when the judicial decision can be implemented by the market; fourth, where courts act as a shield for persons who are crucial for implementing the court’s order and are in fact willing to implement it. This Section highlights factors that affected two aspects of the Court’s response: first, the requirement for buses and private vehicles to adopt CNG; second, where the Court refrained from imposing strict emission norms or a similar obligation to adopt CNG on personal vehicles.

5.1 Incentives to Induce Compliance

According to Rosenberg, compliance with court decisions requiring social reform would be effective if there were rewards for compliance. Incentives may be monetary and may include benefits that accrue to the parties on compliance. In the CNG case, introduction of incentives assisted in the implementation of the order, even though these were introduced belatedly when non-compliance was imminent, and targeted only a certain class of vehicles.

Financial incentives for auto-rickshaws and taxis were effective in ensuring compliance with the order of 28 July 1998. The Bhure Lal Committee, which consisted of government representatives, had also recommended the introduction of financial incentives. The Supreme Court, in its order dated 28 July 1998, directed the government to provide financial assistance to taxi and auto-rickshaw operators. Accordingly, the government created financial incentives by way of cheap loans from the Delhi Finance Corporation for replacement of old taxis and auto-rickshaws and hastened the process of conversion to CNG.

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234 ibid 33-35.
235 ibid 33.
236 ibid 32.
238 Mehta (n 151) 3.
The government also provided sales-tax exemptions on purchase of new CNG driven auto-rickshaws and taxis. Thus, despite constraints, like non-availability of CNG auto-rickshaws and retro-fitment kits, the government of Delhi was instrumental in getting 47,000 auto-rickshaws upgraded to CNG, which constituted the bulk of CNG vehicles in 2001.

The adoption of CNG by buses did not progress with as much ease. This was on account of the lack of financial incentives. The Supreme Court, in its order dated 28 July 1998, had directed the government to provide financial incentives to bus operators. However, in 2001, the government stated that it was not in a position to give such assistance.

It appears that the CSOs that sought the change in fuel did provide active support to bus operators in their demands for financial assistance. News reports on the strikes do not evidence collaboration between the two sets of actors. Furthermore, Anil Agarwal is quoted to have said, ‘[w]e make recommendations, but who is to follow’. It appears that the CSOs believed that the onus lay on the government. They did not perceive themselves to have a role in ensuring compliance.

Not surprisingly, it took buses longer than auto-rickshaws and taxis to accept the change in fuel to CNG. For instance, during the transport strikes of 2001 and 2002, while CNG taxis and auto-rickshaw operators protested over the non-availability of CNG and increase in CNG prices, bus operators protested over the adoption of CNG itself.

239 Narain and Bell (n 55) 11, 23.
241 ibid 7; Das and Mukherjee (n 189) 133; Rajalakshmi, ‘The CNG Conundrum’ (Frontline, September 2001) <http://www.frontline.in/static/html/fl1818/18181200.htm> accessed 12 September 2014.
242 MC Mehta v Union of India, WP(C) 13029/1985 (Supreme Court of India), order dated 17 January 2001.
244 Dugger (n 229).
246 Rajalakshmi (n 241).
Despite the lack of government support in creating incentives for the bus operators, the Court created incentives by bargaining with the bus operators for a promise to adopt CNG, in lieu of an extension to ply diesel buses. In its order dated 26 March 2001, four days prior to the deadline for conversion, the Supreme Court noted that no action was taken by private bus operators, who owned over 9,000 of the 12,000 to 14,000-strong bus fleet, to comply with the order of conversion. Taking advantage of the situation, the Court creatively introduced an incentive for the adoption of CNG. It directed that the operators be granted permission to ply diesel buses till 30 September 2001, if they placed orders for CNG buses by 31 March 2001.\(^\text{247}\) According to Kathuria, the incentive of a conditional permission had a positive impact on the conversion of buses to CNG and compliance with the order.\(^\text{248}\) Thus, by allowing buses to ply using diesel, with the promise to adopt CNG, the Court bought the consent of the bus operators.

On the other hand, in relation to the personal vehicles’ sector, no such incentives were created. As noted by the Supreme Court in its order dated 27 January 2001, the government had already stated its inability to provide financial assistance to buses\(^\text{249}\) which were far fewer in number than personal vehicles.\(^\text{250}\) Moreover, in its orders dated 21 October 1994 and 26 April 1996, the Court had also noted economic unfeasibility of requiring adoption of CNG in cars. It therefore required the adoption of alternative mechanisms to reduce vehicular pollution from personal vehicles, such as catalytic converters. In this regard, the government provided incentives to two and three-wheel vehicle owners by subsidising the cost of the converter to Rs 1,000.\(^\text{251}\) The government also incentivised the use of catalytic converters by allowing registration of cars in Delhi only if they were installed with the device.\(^\text{252}\) Accordingly, the Court’s direction to use catalytic converters was successfully complied with.\(^\text{253}\)

As noted above, court decisions are effective in the presence of incentives to compliance. Thus, it is likely that the economic unfeasibility of requiring adoption of CNG by personal vehicle owners and car manufacturers, and the lack of support of the executive in providing incentives to make similar upgrades, deterred the Court from directing its use. Yet, other monetary and non-monetary benefits existed for preferring CNG to diesel and petrol. CNG

\(^{247}\) ibid.

\(^{248}\) Kathuria (n 68) 411.

\(^{249}\) United Nations Environment Programme (n 240).

\(^{250}\) Pandey (n 31).

\(^{251}\) Narain and Bell (n 55) 9.

\(^{252}\) ibid.

\(^{253}\) Iyer (n 58) 59.
has been consistently cheaper than petrol. Furthermore, use of CNG would allow residents to enjoy better air quality.

However, as will be noted in subsequent sub-sections, there were other disincentives that reduced the popularity of CNG, limiting the Court’s ability to bring social change by requiring further conversion of vehicles to CNG, resulting in the limited solution awarded by the Court.

5.2 Imposition of Costs to Ensure Compliance

Probably the greatest incentive to compliance by bus owners with the court order was the imposition of penalties for non-compliance. As noted by Rosenberg, where other actors (the transport department and traffic police in this case) impose costs, courts are in a position to bring about social reform. Thus, in order for court decisions to be effective, enforcement agencies must have the required resources to implement the order. In the event the orders require an overhaul of the existing mechanisms, it is likely that the decisions may not be enforced. Thus, court decisions are likely to provide incremental relief instead. In the CNG case, while the government had the resources to ensure conversion of buses and other commercial transport vehicles to CNG, it did not have the resources to enforce stricter standards for personal vehicles.

As is evident in the CNG case, penalties were essential for securing the compliance of bus and commercial vehicle operators. Despite the presence of incentives, such as the lower price of CNG, conversion of the public transport fleet to CNG was sluggish. As indicated in Figure 3 below, the unpopularity of CNG amongst rickshaw and bus operators grew throughout 2001.

As per news reports, two reasons are evidenced for CNG’s unpopularity. First, as noted earlier, bus operators, who comprised primarily of cooperative groups and ex-servicemen, were facing financial constraints in upgrading to CNG and did not have access to cheap loans for undertaking the exercise. Second, the availability of CNG was not assured. In its statement before the Court on 5 April 2002, Indraprastha Gas Limited, a government company which was

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255 Rosenberg (n 8) 33.
256 ibid 140.
257 EPCA, ‘Report on the Urgent Need to Augment and Restructure the Delhi Bus Transport System to Help Mitigate Air Pollution in the City’ (n 149) 12.
258 Rajalakshmi (n 241).
responsible for the supply of natural gas to the city, stated that the supply of CNG was inadequate to meet the needs of the transport sector. Moreover, the infrastructure for CNG distribution was constrained by the lack of compression capacity at refuelling stations, and the poor distribution of refuelling stations across the city.259

According to Mehta, the low availability of CNG, coupled with the sudden conversion of 2,000 buses to CNG, resulted in an acute shortage.260 DTC was incurring dead mileage of nearly 13,000 kilometres per day since there were only nine CNG filling stations whereas CNG buses are parked in 25 depots. Buses and auto-rickshaws announced several strikes, which had become a recurrent feature in the landscape of urban life in Delhi, between 2001 and 2002 (See Figure 3). Thus, securing compliance to the court order was not easy. Yet, by 1 December 2002, all of Delhi’s public transport had converted to CNG.261

Figure 3: Incidence of protests over adoption of CNG in Delhi

<table>
<thead>
<tr>
<th>Date</th>
<th>Incident</th>
</tr>
</thead>
<tbody>
<tr>
<td>27 March 2001</td>
<td>Partial strikes held by auto and taxi owners</td>
</tr>
<tr>
<td>16 April 2001</td>
<td>Bus operators go on a two day strike in Delhi</td>
</tr>
<tr>
<td>6 August 2001</td>
<td>Protest held in Delhi over CNG introduction</td>
</tr>
<tr>
<td>10 August 2001</td>
<td>All commercial vehicles go on strike in Delhi</td>
</tr>
<tr>
<td>28 August 2001</td>
<td>Bus, auto rickshaw and taxi owners strike for a day</td>
</tr>
<tr>
<td>27 September 2001</td>
<td>Bus owners engaged in hunger strike unto death</td>
</tr>
</tbody>
</table>

Sources: Kathuria 2004;262 Rajalakshmi 2001;263 The Hindu 2001;264 Dugger 2001.265

To a great extent this was possible because the executive worked towards the compliance of the order. The Bhure Lal Committee had recommended that the Court introduce a ‘deterrent financial penalty’ on bus operators that violated the Court’s order directing conversion of buses to CNG.266 Accordingly, on 6 April 2002, the Court ordered a fine of Rs 500 per day of non-compliance with the extended deadline of 31 March 2002.267

259 Rajalakshmi (n 241).
260 Mehta (n 151) 6.
261 Kathuria (n 68) 411.
262 ibid.
263 Rajalakshmi (n 241).
264 The Hindu (n 165)
265 Dugger (n 229).
266 EPCA, ‘Report on Clean Fuels: In Response to the Hon’ble Supreme Court Order Dated March 26, 2001 and April 27, 2001’ (n 237) 17.
267 Kathuria (n 68) 412.
With the support of the executive, the Court was able to ensure collection of fines and removal of polluting buses from Delhi roads. Accordingly, bus operators were forced to pay the penalty for 7,000 violating buses. The government collected a fine of Rs 12.83 lakh (Rs 1,283,000) from offending buses. Notably, 50% of the operators surrendered their permits.

In relation to personal vehicles, it must be noted that the Court was aware of the dieselisation of private cars. However, a change in fuel emission norms, as stringent as the requirement for buses to adopt CNG, would have been hard to enforce. As noted by Melnick, decisions that impose high standards on a number of actors are difficult to implement, as the executive lacks the resources – technical, political and administrative – to enforce them. The government’s failure to implement emission norms for vehicles is telling in this regard. According to Narain and Bell the government lacked adequate infrastructure to implement emission norms. This was even noted by the Court, in its order dated 5 April 2002. Thus, in relation to personal vehicles, the Court took softer measures that were easier to enforce, such as directing the use of a catalytic converter and adoption of unleaded petrol. Requiring a further change in technology by personal vehicles may have been unfeasible for the government to enforce.

5.3 Courts Act as Shields for Other Willing Actors

As noted by Rosenberg, all environmental decisions are political, and where agencies execute changes in policies through the courts, they seek to avoid the brunt of political actions. In the CNG case, in relation to the adoption of CNG by buses, Rosenberg’s argument is evident in at least two ways.

First, the nature of judicial intervention sought by the government arguably evidences the government’s interest in passing the buck to the Court. The government sought judicial intervention for making executive decisions that disgruntled corporate groups that it was reliant upon. For instance, as noted in

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268 ibid.
269 The Tribune (n 243).
270 ibid.
271 MC Mehta v Union of India, WP(C) 13029/1985 (Supreme Court of India), order dated 16 April 1999.
273 Narain and Bell (n 55) 5.
274 Rosenberg (n 8) 283.
275 ibid 284.
the order dated 5 April 2002, in the early stages of the proceedings, the government stated that there was adequate CNG to undertake a change in fuel for public transport in Delhi. However, in 2002, when the government had to reallocate the CNG from the industrial sector to transport needs, it sought judicial intervention to decide the issue, instead of making arrangements independently.

Second, there were incentives for the government to implement the courts’ decisions, especially without being seen as a forerunner of change. By distancing itself from the decision it relegated its obligation to provide incentives and compensation to affected parties. Moreover, the executive was expected to earn a windfall from the conversion of the diesel buses to CNG. As noted by Dursbeck, Erlandsson, and Weaver the combined tax levied by the central and the state government was approximately Rs 300,000 per bus. The central government charged an excise tax of 16% on the CNG chassis, while the Delhi government charged sales tax of 8% on both the chassis and the body. The EPCA had recommended the exemption of buses from the levy of sales tax by the respective governments. However, such financial incentives were not provided to bus operators. In fact, as mentioned earlier, the government had stated that it did not have the capacity to extend financial support to bus operators for the conversion. Thus, it may be inferred that the government had an added incentive to ensure the conversion of private buses to CNG.

Furthermore, the government was probably aware of political stasis and the bureaucratic logjam within which it operated and provided a cover for it to make tough decisions. According to Narain and Bell the government in Delhi wanted to address the problem of air pollution, but did not have the political will to do so. In support of this argument, she highlights the fact that the government was the first to recommend the use of CNG in public transport. In fact, the Oil and Natural Gas Corporation of India had already experimented with CNG in its own vehicles. Another public sector undertaking, BPC had also developed special cylinders for storing CNG for vehicular use.

277 EPCA, ‘Report on the Urgent Need to Augment and Restructure the Delhi Bus Transport System to Help Mitigate Air Pollution in the City’ (n 149) 20.
278 BBC (n 154).
279 United Nations Environment Programme (n 235).
280 Narain and Bell (n 55) 2.
281 ibid.
282 ibid 7.
Accordingly, the government launched a pilot programme to test the viability of CNG buses without prodding from the Court. As noted by Mehta, public sector undertaking DTC, the public sector transport corporation, was the first to order CNG buses.

Government was even engaged in policy-making and planning the shift to CNG for buses and higher standards for vehicular fuel emissions. For instance, in 1997, noting the hazardous quality of Delhi’s air, the union government launched the White Paper on Pollution in Delhi, setting out a plan to improve environmental conditions in the city. The White Paper noted that government cars had already adopted CNG in Delhi, and that the government aimed to increase the number of outlets for distribution of the fuel in Delhi. According to CSE, it was the most important measure taken by the government at the time. Thus, while the Court required the conversion of buses to CNG, its direction was based on the government’s action plan.

Similarly, the decision to not adopt equally strict norms for personal vehicles was also arguably a political one. While the government was interested in addressing pollution by public transport vehicles, it did not wish to meddle with an industry which was vital to its economic growth. This is evident from the fact that it did not take measures to influence the automobile market to nudge consumers into purchasing environmentally friendly vehicles.

For instance, even as the Court ordered, and the government implemented the conversion of diesel buses to CNG, taxes on vehicles were reduced in 2002. The excise duty on cars was lowered from 32% to 24% in that year. Consequently, from 2002 to 2007, the industry grew at an annual rate of 14.1% and the investments by the industry amounted to almost Rs 18,000 crore (Rs 180 billion). Even as the economy shrunk, the vehicular population of Delhi grew. Notably, the industry had contributed to 6% of the GDP in 2012.

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285 Mehta (n 151) 8.
286 Government of India Ministry of Environment, Forests and Climate Change (n 27).
287 ibid.
288 Centre for Science and Environment, ‘The Leapfrog Factor’ (n 36) 5.
289 DNA India, ‘Debate over Taxing Diesel Cars more is over’ (DNA India, 18 February 2013) <http://www.dnaindia.com/analysis/comment-debate-over-taxing-diesel-cars-more-is-over-1801073> accessed 30 January 2015.
290 ibid.
291 Times of India, ‘Thumping Increase, Delhi adds 5L Vehicles in a Year’ (n 45)
may therefore be inferred that the government prioritised economic development interests over environmental sustainability.

Lack of government commitment to air quality concerns is also evident in its taxation policy for public transport and personal vehicles. According to the EPCA, taxes on buses are higher than on cars. A car costing around Rs 4 lakh (Rs 400,000) to Rs 6 lakh (Rs 600,000) pays onetime lifetime road tax in the range of Rs 16,000 – 24,000; whereas, a bus pays a tax in the range of Rs 15,915 – 18,715 every year.

Furthermore, government has taken steps to subsidise diesel in order to cap inflation linked to transport costs of essential commodities and food prices. The diesel subsidy also fuels the black market for oil and corruption. The government is thus doubly incentivised to continue the diesel subsidy. Since differential prices are argued to be unfeasible, cars that run on diesel also enjoy the benefit of the subsidy. This has fuelled market distortions and an increase in sales of diesel cars.

Earlier CNG had an advantage in terms of cost effectiveness: it was significantly cheaper than diesel, making it an attractive fuel choice. However, over the years, it has lost its edge to diesel, as the price differential has plummeted to

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293 EPCA, ‘Report on the Urgent Need to Augment and Restructure the Delhi Bus Transport System to Help Mitigate Air Pollution in the City’ (n 149).


295 ibid.


298 EPCA ‘Report on Priority Measures to Reduce Air Pollution and Protect Public Health’ (n 209) 2.
about 7%.

According to news reports, 15% of the current consumption of diesel is in personal cars. Noting the reducing gap, the EPCA has demanded that the price difference between diesel and CNG be maintained at 30-35% in favour of lower prices for CNG.

Moreover, the price difference between diesel and petrol is also skewed significantly in favour of the more harmful fuel, diesel. The price of diesel and petrol in Delhi between 2002 and 2014 are compared in Figure 4 below. This has altered consumer preference in favour of diesel cars.

**Figure 4: Price of Petrol and Diesel (2002-2014)**

![Price of Petrol and Diesel (2002-2014)](image)

Source: MyPetrolPrice.com

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300 Pearson and Katakey (n 297)

301 EPCA ‘Report on Priority Measures to Reduce Air Pollution and Protect Public Health’ (n 209) 8.


Thus, it may be inferred that while the government may have been willing to support cleaner fuels for buses, it has not shown equal commitment towards cleaner fuels in personal vehicles. The environmental conditions warranted improved planning, management, and large institutional change, but political support for environmental management was sporadic and mainly in reaction to a crisis.  

Here, it must be noted that a government’s position is influenced not only by economic interests, but also by the electorate. Thus, to secure the government’s support, CSOs should adopt political measures. However, as noted by Rosenberg, environmentalists act apolitically. Similarly, in the CNG case, the CSOs missed opportunities for ensuring politicisation of the issue. Not only was the discussion on air quality hijacked by a debate on fuel choice for buses, the discussion was expertised. Thus, no effort was made to include the masses, without whose support large-scale changes in policy were not implementable. This aspect is discussed in greater detail in the next sub-section.

5.4 Markets

Rosenberg argues that the market can act to implement court decisions. In relation to the adoption of CNG in buses, the implementation of the decision was assisted by market conditions. The government’s interest in adopting CNG stemmed from the energy crisis of the 1980s. Natural gas, a cheaper fuel which was being wasted at oil refineries was thus considered particularly suitable to cut the import dependency for oil. During the court proceedings it was noted that India’s domestic supply of CNG was sufficient to convert Delhi’s public transport to CNG vehicles. Thus, fuel supply was adequate to meet public transport needs.

Moreover, Indian companies, such as TATA and Ashok Leyland, were willing to develop the technology for developing safe CNG buses. Ashok Leyland, which had a lower market share than the industry leader TATA, saw the 1998 order as an opportunity to expand its share. Indigenous technology had also

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304 Indian Express, ‘India Loses $80 Bn due to Pollution: World Bank’ Indian Express (9 October 1998).
305 Rosenberg (n 8).
306 Mathur (n 179) 20; Rajamani (n 118) 304.
been developed for safe storage of CNG for vehicular use.\textsuperscript{309} Moreover, the government had committed itself to the supply of natural gas in the city, albeit after some intervention from the Court, as discussed in sub-section 5.3.

In relation to personal vehicles, requiring the use of CNG in cars or a significantly higher emissions standard would have been unenforceable earlier, not only for the lack of technical, administrative and financial resources, but also due to the non-availability of adequate consumer options. Over the years, since the implementation of the Court’s decision on 28 July 1998, the market for CNG cars has expanded significantly. For instance, the largest indigenous automobile manufacturer, Maruti Udyog, now manufactures over four models for CNG-based engines.\textsuperscript{310} Indian Brand Equity Foundation has also noted the expected growth in the CNG market in India with the increase in access to CNG in other cities.\textsuperscript{311}

Even today, though the market share of CNG is expanding, its popularity is not commensurate with its environmental gains. Undoubtedly, the increasing attractiveness of diesel cars has much to do with this phenomenon. But blame also lies with the social movement. As noted earlier, the CSOs did not attempt to take the debate to the people.\textsuperscript{312} While organisations such as TERI supported ultra-low sulphur diesel, CSE preferred CNG;\textsuperscript{313} but the reasons for their choices were not communicated to the people adequately.\textsuperscript{314} Though lead activists in the Clean Air Movement, Anil Agarwal, and later Sunita Narain, were members of the expert committee for deciding the fuel choice, the processes adopted by them were not participatory.\textsuperscript{315} This undoubtedly affected the final recommendation of the committee, and limited the gains from the movement. Thus, as feared by David Kennedy, law replaced debates on economics and politics.

Consequently, public awareness about pollution and the impact of fuel choice has been low. This is evident in factors that influence commuter preference for

\textsuperscript{309} Times of India, ‘Compressor for using Natural Gas’ (p 283) 14
\textsuperscript{312} Mathur (n 179).
\textsuperscript{313} Sharma (n 192).
\textsuperscript{314} Mathur (n 179).
\textsuperscript{315} Rajamani (n 118) 304.
transport in Delhi.\textsuperscript{316} As per the study, commuters are influenced by concerns of cost, convenience, comfort, timeliness, frequency etc.; concern for environmental effects was not indicated.\textsuperscript{317}

Furthermore, if media attention is taken as an indicator of public interest in an issue, pollution does not appear to be of great concern for the residents of Delhi. An examination of news reports on pollution and corruption in the city reveals that pollution secures significantly smaller print space. In order to conduct the research, news articles in the national daily newspaper, the \textit{Indian Express}, for the years 2009-2014 were examined. Though the paper reports in English, it is very likely that similar content is carried in Hindi newspapers as well. The 2009-2014 period was chosen to evidence the recent trend in awareness and interest. The examination was conducted by using the search terms: ‘pollution’ and ‘Delhi’ in the first paragraph of the news report. In order to give perspective, the paper was also searched for ‘corruption’ and ‘Delhi’ within the first paragraph of the news report for the same period. Note that data for the year 2014 is only indicated till 14 September 2014.

\textbf{Figure 5: Media Coverage of Pollution in Delhi (2009-2014)}

![Graph showing media coverage of pollution in Delhi (2009-2014)](image)


Examining Figure 5, it is apparent that at least in comparison with corruption, pollution does not attract as much media attention. This is despite the fact that

\textsuperscript{316} Suresh Jain and others, ‘Identifying public preferences using multi-criteria decision making for assessing the shift of urban commuters from private to public transport: A case study of Delhi’ (2014) Transportation Research Part F 24 60–70.

\textsuperscript{317} ibid 64.
Delhi is considered one of the most polluted cities in the world by WHO.\textsuperscript{319} In the years 2010 and 2014, the reportage appears to have increased. In 2010, the increase in attention was on account of the Commonwealth Games that were hosted in the city. The rise in reportage in 2014 followed the international attention on pollution in Delhi, after the data held by the United States Embassy on pollution levels was revealed on Twitter.\textsuperscript{320}

In these circumstances, a law or direction from the Court requiring the adoption of CNG, or other commensurate burden to redress pollution would not have solved the problem by coercing choice. Without a change in price of diesel, and availability of adequate consumer options, imposing a shift to cleaner fuels is a bitter pill for the public, who, as evident from the survey, give greater preference to cost over environmental concerns.

In 2014, the Court has evidenced a renewed vigour in attending to the issue of vehicular pollution. It has taken note of international news reports and the EPCA 2014 report blaming dieselisation for air pollution.\textsuperscript{321} Here, it is pertinent to note that the judicial interest in the matter has come close upon the heels of investments by Indian companies in shale gas ventures in the US.\textsuperscript{322} It is likely, that with the support of key market players, such as automobile manufacturers and fuel suppliers, the civil society organisations may find the Court to be in a position to take bolder decisions.

5.5 \textbf{Impact of Extrinsic Factors}

From the above discussion, it is clear that there are a number of factors that restricted the Court from taking strict action against personal vehicle owners. These factors, such as market preferences, incentive structures, and the availability of alternative options were not addressed by the CSOs in the Clean Air movement. In fact, these CSOs acted in a manner to exclude large segments of the population by restricting the debate to experts, and not recognising the public as citizens with political power and consumers with market significance.

\begin{itemize}
  \item \textsuperscript{319} Gardiner Harris, ‘Cities in India Among the Most Polluted, W.H.O. Says’ \textit{(New York Times, 8 May 2014)}
  \item \textsuperscript{320} ibid.
  \item \textsuperscript{321} EPCA ‘Report on Priority Measures to Reduce Air Pollution and Protect Public Health’ (n 209)
  \item \textsuperscript{322} Kalpana Pathak, ‘RIL to Invest $5.1 bn in US Shale Gas Biz’ \textit{(Business Standard, 22 July 2013)}
\end{itemize}

www.soaslawjournal.org
In order to have a lasting and significant impact on the quality of air, and address the drawbacks of judicialisation – fractionalisation, expertisation, and fragmentation of awards – CSOs should endeavour to increase the scope of participation and awareness, collaborate with other actors to increase incentives and improve the enforcement of costs.

VI. CONCLUSION

This Article has discussed the CNG case with a view to expanding the role of the CSOs and increasing their impact. Since, like the law and development movement, its brainchild – judicialisation of social rights – appears to be here to stay, it is vital that CSOs take note of the limitations of this strategy to overcome Kennedy’s criticisms of the movement. Thus, by expanding participation, increasing public awareness, engaging with the market, developing costs and incentives to nudge participants, CSOs would have greater impact and develop effective solutions. In light of the recent change in market scenario, like the investments by the Reliance Group in shale gas reserves in the United States of America, it is likely that CSOs would be able to achieve greater gains through this round of litigation.
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## Appendix I - Timeline

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970-1980</td>
<td>Industrialisation, urbanisation, sharp rise in pollution levels. (Bowender; Atiqur Rahman and others). No vehicular emission norms in place.(^i)</td>
</tr>
<tr>
<td>1981</td>
<td>Air Act introduced.</td>
</tr>
<tr>
<td>1985</td>
<td>MC Mehta files PIL to enforce Air Act, 1981.</td>
</tr>
<tr>
<td>1986</td>
<td>Environment Act is introduced.</td>
</tr>
<tr>
<td></td>
<td>Supreme Court (SC) asks government to file a response to PIL(^ii)</td>
</tr>
<tr>
<td>1989</td>
<td>Idle emission standards become effective. Mass emission norms not in place.(^iii)</td>
</tr>
<tr>
<td></td>
<td>Government makes a public statement of its plan to phase out leaded petrol.(^iv)</td>
</tr>
<tr>
<td>5 February 1990</td>
<td>Mass and in-use emission norms prescribed under Environment Act, to address tailpipe emissions.(^v)</td>
</tr>
<tr>
<td>14 November 1990</td>
<td>The SC notes that buses, trucks and defence vehicles were main polluters; asks government to inform SC of action taken against violating vehicles.(^vi)</td>
</tr>
<tr>
<td></td>
<td>NEERI manufactures catalytic converter to reduce emissions. SC asks government to test the device.(^vii)</td>
</tr>
<tr>
<td>1991</td>
<td>Emission norms for motor-cycles and scooters were notified. These did not require a significant change in the engine efficiency or fuel quality and could not be met easily.(^viii)</td>
</tr>
<tr>
<td></td>
<td>Emission norms prescribed in 1990, are implemented.(^ix)</td>
</tr>
<tr>
<td>14 March 1991</td>
<td>Supreme Court allows the SIAM to join the proceedings as interveners.(^x)</td>
</tr>
<tr>
<td></td>
<td>Court constitutes the first expert committee to develop norms of vehicular emissions. The Committee is chaired by former Justice Saikia and includes the joint secretary of the MoEF, Chairman of the CPC Board; representatives from SIAM, and the petitioner, MC Mehta.(^xi)</td>
</tr>
<tr>
<td>25 August 1991</td>
<td>Compressors for storage of CNG ready. ONGC and GAIL make public plans to adopt CNG as vehicular fuel.(^xii)</td>
</tr>
<tr>
<td>November 1991</td>
<td>Saikia Committee recommends phasing out leaded petrol.(^xiii) This was opposed by the government before the Committee, contrary to its statement in 1989.(^xiv)</td>
</tr>
<tr>
<td>1992</td>
<td>Emission norms for diesel vehicles notified.(^xv)</td>
</tr>
<tr>
<td></td>
<td>Government launches pilot programme for use of CNG in three metropolitan cities: Delhi, Mumbai and Baroda.(^xvi)</td>
</tr>
<tr>
<td>21 October 1994</td>
<td>Court requires that only those cars that are fitted with catalytic converters be registered.</td>
</tr>
<tr>
<td>1995</td>
<td>Mandatory installation of catalytic converters in Delhi, Mumbai, Chennai and Kolkata.</td>
</tr>
<tr>
<td>Year</td>
<td>Event Description</td>
</tr>
<tr>
<td>-----------</td>
<td>------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| 1996      | Introduction of unleaded petrol and low sulphur diesel in Delhi; emission norms revised.  
             CSE releases report on vehicular pollution in Delhi titled ‘Slow Murder’. Soon thereafter Court issues *suo moto* notice to government to submit action plan on vehicular air problem in Delhi. |
| August 1997 | Government of India releases the White Paper on Pollution in Delhi; reveals the aim to extend CNG beyond the pilot programme to private vehicles. It provided the government time till 31 December 1998 for the extension of CNG use to private vehicles. |
| 1998      | Unleaded petrol made mandatory for petrol driven cars in Delhi and 45 other cities |
| June 1998 | EPCA presents its report providing a time-schedule for the implementation of CNG by April 2001. |
| 28 July 1998 | The Supreme Court directs implementation of EPCA recommendations – bus fleet to be converted to CNG by 31 March 2001. |
| 1999      | EPCA report recommends restrictions on plying diesel driven cars. |
| 16 April 1999 | Court seeks information from government on registration of diesel cars. |
| 1 February 2000 | Nation-wide mandatory adoption of unleaded petrol.  
                         Mass emission norms, Bharat 2000 equivalent to Euro I standards enforced nation-wide.  
                         Emission norms for CNG vehicles notified. |
<p>| March 2001 | Strikes in Delhi over conversion to CNG. |
| 26 March 2001 | SC provides incentive to bus operators to place orders for CNG buses by allowing them to ply diesel buses till September 2001. |
| 27 April 2001 | SC asks EPCA to consider alternatives to CNG. |
| July 2001 | EPCA presents report on clean fuel. Rejects ultra-low diesel as an alternative to CNG. Proposes LPG and propane. |
| 29 July 2001 | Diesel buses fitted with CNG kits, but do not meet safety norms. Not allowed to ply. |
| 5 August 2001 | CNG bus catches fire. Four casualties reported. |
| 6 August 2001 | Protests over shortage of CNG and lack of incentives for buses to convert. |
| 17 August 2001 | Government asks SC to extend deadline due to scarcity of CNG. |</p>
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>13 September 2001</td>
<td>Government sets up Mashelkar Committee to determine auto-fuel policy questioning use of CNG.</td>
</tr>
<tr>
<td>18 October 2001</td>
<td>Conversion deadline extended till 31 January 2002</td>
</tr>
<tr>
<td>11 November 2001</td>
<td>CNG buses catches fire. Casualties are avoided.</td>
</tr>
<tr>
<td>28 December 2001</td>
<td>Mashelkar Committee releases an interim report recommending use of alternate technologies and emission norms to address vehicular pollution.</td>
</tr>
<tr>
<td>31 January 2002</td>
<td>Conversion deadline passes without compliance.</td>
</tr>
<tr>
<td>2002</td>
<td>India’s first auto-fuel policy drawn up on the Basis of Mashelkar Committee’s recommendations. In relation to Delhi, the policy recommended Euro III be applicable from 2005, and Euro IV from 2010.</td>
</tr>
<tr>
<td>28 February 2002</td>
<td>CNG prices go up by 8%, from 12.21/kg to 13.11/kg.</td>
</tr>
<tr>
<td>5 April 2002</td>
<td>Court rejects Mashelkar Committee’s recommendation on use of emission norms with no control over fuel choice as naïve. Court directs the government to allocate CNG for transportation instead of power companies. Court also imposes fine of INR 500 for buses plying in violation of 31 January deadline.</td>
</tr>
<tr>
<td>5 April 2002</td>
<td>7,000 diesel buses go off road as bus operators could not afford the fine and gave up their permits.</td>
</tr>
<tr>
<td>22 April 2002</td>
<td>CNG Fleet augmented by 1,000 buses</td>
</tr>
<tr>
<td>09 May 2002</td>
<td>Court does not change its ruling on violating buses.</td>
</tr>
<tr>
<td>1 December 2002</td>
<td>All buses in Delhi have adopted CNG.</td>
</tr>
<tr>
<td>January 2004</td>
<td>EPCA submits report on extending CNG to 7 other critically affected cities.</td>
</tr>
<tr>
<td>17 December 2004</td>
<td>Heavy vehicles violating emission norms have been entering Delhi. Court requires MCD and Traffic Police to respond on action taken.</td>
</tr>
<tr>
<td>2005 – 2013</td>
<td>Court is engaged in overseeing the supply of CNG in Delhi NCR. Court delves into road safety and seeks EPCA’s support for recommendations on outdoor advertising policy and use of seatbelts.</td>
</tr>
<tr>
<td>2006</td>
<td>CSE releases Delhi Story on the success of the Clean Air Movement.</td>
</tr>
<tr>
<td>2007</td>
<td>EPCA submits report on dieselisation of vehicles.</td>
</tr>
<tr>
<td>2010</td>
<td>Percentage of diesel cars rose to 30% from 4% in 2000.</td>
</tr>
<tr>
<td>24 June 2010</td>
<td>Reliance spends $1.36 Billion on shale gas stake</td>
</tr>
<tr>
<td>2013</td>
<td>Reliance intends to invest $5.1bn in US Shale gas assets.</td>
</tr>
</tbody>
</table>
Courting Social Change – Lessons from the CNG Case in India

10 February 2014
Court directs government to respond to EPCA Report on Priority Measures to Reduce Air Pollution.

16 February 2014
Arvind Kejriwal, activist politician against corruption alleges links between Narendra Modi (subsequently elected as Prime Minister of India) and a natural gas company in India, Adani.

15 August 2014
Adani group is reported to be bidding to provide natural gas to 14 cities in India.

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1 Iyer (n 58) 34.
2 Narain and Bell (n 55) 3.
3 Central Pollution Control Board (n 91) 35.
4 Narain and Bell (n 55).
5 Centre for Science and Environment, ‘The Leapfrog Factor’ (n 36) 3.
6 MC Mehta v Union of India, WP(C) 13029/1985 (Supreme Court of India), order dated 14 November 1990 [3].
7 ibid [5].
8 Iyer (n 58) 34.
9 WHO and UNEP (n 28) 30.
10 MC Mehta v Union of India, WP(C) 13029/1985 (Supreme Court of India), order dated 14 March 1991 [10].
11 ibid.
12 Times of India, ‘Compressor for using Natural Gas’ (n 283) 14.
13 Central Pollution Control Board, ‘Urban Pollution Control Division: Overview of the Transport Sector in India’ (CPCB, 2005) 9
14 Narain and Bell (n 55) 6.
15 Central Pollution Control Board (n 91) 35.
16 Ashwani Gumber, ‘Challenges in Development of CNG Infrastructure - India’s Experience’ (2008) 19th World Petroleum Congress, 29 June-3 July, Madrid, Spain
17 Purwaha (n 284) 5.
18 Government of India Ministry of Environment, Forests and Climate Change (n 27) 7.
19 Times of India, ‘Four injured as CNG bus catches fire in Delhi’ (Times of India, 5 August 2001)
20 Rajalakshmi (n 241).
21 Kathuria (n 68) 411.
23 The Hindu (n 165).
25 Naseem (n 99) 173.
26 Kathuria (n 68) 412.
27 ibid.
28 The Tribune (n 243).
29 Kathuria (n 68) 412.
30 Kathuria (n 68).
MC Mehta v Union of India, WP(C) 13029/1985 (Supreme Court of India), order dated 13 August 2008.
Harris (n 70).
Should Truth Commissions be Viewed as Second-best Alternatives to Prosecutions?

Gemma Daly*

This Article provides a comparative analysis of truth commissions and prosecutions as alternative or complementary methods of transitional justice in post-conflict societies. The author considers the theoretical debates around differing aims of transitional societies, and focuses her comparison on justice, peace and truth. This Article critically analyses a complementary approach to transitional justice, whilst ultimately proposing its usefulness instead of the prevalent alternation between truth commissions and prosecutions.

I. INTRODUCTION

Transitional justice actors and commentators have extensively debated whether truth commissions (TCs) should be viewed as a second-best alternative to prosecutions. Proponents of truth commissions argue that they expose and acknowledge truth about past wrongs whilst maintaining peace; those who favour prosecutions advocate criminal trials as the best way to achieve justice. This literature has been criticised for presenting false dichotomies between truth and justice, peace and justice,¹ and truth commissions and prosecutions. Instead, recent analyses have suggested that complementary approaches should be adopted in transitional societies. I shall critically analyse both standpoints and suggest that a case-by-case approach is necessary.

I analysed existing literature to conclude that prosecutions are more likely to achieve retributive justice, whilst truth commissions seek restorative justice. In their administration, prosecutions have greater safeguards for procedural justice, but may threaten peace in fragile transitional circumstances. Truth

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commissions are able to establish a broader truth, but may be less reliable than
the facts ascertained at trial. Neither mechanism is able to achieve justice, peace,
or truth alone; I therefore agree that the dichotomous approach is unhelpful
and ultimately unrealistic for transitional societies. Whilst I am inclined to
support a collaborative approach between transitional justice mechanisms, I
acknowledge the practical difficulties of such a proposal. The approach that
should be taken will essentially involve a case-by-case examination of the
particular circumstances of each transition, with the aim of pursuing justice,
peace and truth. I strongly agree with Orentlicher that international law should
require prosecutions even though they may not be immediately realisable in all
contexts. Truth commissions should not be viewed as second-best to prosecutions
because it cannot be said that prosecutions are always best; truth commissions
can be beneficial in certain circumstances; and collaboration between a variety
of mechanisms can be more advantageous. A comprehensive approach to
transitional justice should consider the appropriateness of prosecutions, truth
commissions, reparation and other relevant measures for the case at hand.

1.1 The Transitional Justice Context

It is necessary to outline the boundaries of this discussion: the context to which
this enquiry relates, perspectives and later the outcomes being measured. This
Article will be limited in scope to exploring some key issues around truth
commissions and prosecutions. In an attempt to maintain a broad discussion of
the relevant literature, I will not focus on an individual case study but explore a
variety of contexts relevant to the arguments at hand.

Truth commissions developed as a mechanism for addressing past atrocities in
transitional societies emerging from conflict but have recently been formed in
established democracies, such as Canada, as secondary to criminal and civil

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2 Diane F Orentlicher, ‘“settling accounts” revisited: reconciling global norms with local agency’ (2007) 1 The International Journal of Transitional Justice 10, 22.
4 For example, the truth and reconciliation commission of Canada, established in 2008 as part of the Indian Residential Schools Settlement Agreement.
5 For example, former school workers prosecuted for indecent assault of children in Indian Residential Schools: See ‘ex-residential school worker convicted of abusing boys’ (CBC News, 5 November 2013) <http://www.cbc.ca/news/canada/saskatchewan/ex-residential-school-worker-convicted-of-abusing-boys-1.2415810> accessed 26 March 2014. However, prosecutions have been limited and have not been pursued against those responsible for the Indian Residential Schools and systemic human rights violations.
Should Truth Commissions be Viewed as Second-best Alternatives to Prosecutions?

Transitional societies face problems that established democracies do not: very limited resources, corrupt or weak judiciaries, damaged infrastructure, and masses of perpetrators and victims; as well as political complications such as negotiated settlements and powerful remnants of former regimes, which complicate the possibility and appropriateness of prosecutions. Therefore, I shall limit the scope of this Article to societies within the ‘standard categories of transition’, i.e. ‘states in transition from war to peace or from authoritarian rule to democracy’. Transitional justice concerns how these societies address the legacies of past abuse.

Whether truth commissions should be viewed as a second-best alternative to prosecutions will depend on the perspective we are considering. We can expect perpetrators to prefer impunity, victims to prefer justice and governments to prefer peace. In practice, transitional justice has been criticised by scholars such as Orentlicher for being state-centric, neglecting victims from policy and implementation. Zalaquett has defended state-centric transitional justice as legitimate, supposing that decisions are made democratically. I recognise the importance of involving victims in forming and implementing transitional justice policy. However, I shall not adopt a particular perspective, but instead endeavour to analyse whether truth commissions should be viewed as second-best alternatives to prosecutions on the basis of justice, peace and truth.

1.2 Examining the Question

To assess whether truth commissions should be viewed as a second-best alternative to prosecutions, we must examine the three questions inherent in

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7 For the purposes of this Article, established democracies such as Canada are not considered to be in transition, though Levinson, quoted by Kiss, says that “every society is in transition”: Elizabeth Kiss, ‘Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice’ in Robert I Rotberg and Dennis Thompson (eds), The Morality of Truth Commissions: Truth v Justice (Princeton University Press 2000) 92.
8 Mark Freeman, Truth Commissions and Procedural Fairness (CUP 2006) 4.
9 Freeman (n 8) 4; Laplante (n 3) 921.
13 I discuss criteria choice at Section 3: How to Measure Transitional Justice.
this enquiry. Firstly, are prosecutions\textsuperscript{14} the best option? Secondly, do truth commissions\textsuperscript{15} come second-best? Thirdly, should prosecutions and truth commissions be considered alternatives to each other? I shall conclude that truth commissions should not be viewed as a second-best alternative to prosecutions because none of these queries can, in all circumstances, always be answered in the affirmative.

I shall begin by discussing whether international law prioritises prosecutions or truth commissions and then critically examine which criteria should be used to measure transitional justice. I shall address each selected aim in turn to analyse the extent to which they are achievable by truth commissions and prosecutions. I shall then critically analyse arguments that propose a complementary\textsuperscript{16} approach and briefly consider other mechanisms in this context, focusing on reparation. I shall present my proposition that truth commissions and prosecutions should not be compared as alternatives. Transitional justice policy needs to be considered on a case-by-case basis\textsuperscript{17} to achieve key aims to the greatest extent possible. I seek to critically analyse dilemmas in the current literature to discuss how prosecutions and truth commissions should be viewed.

II. DOES INTERNATIONAL LAW VIEW TRUTH COMMISSIONS AS SECOND-BEST TO PROSECUTIONS?

International law does not provide a clear answer as to whether truth commissions should be viewed as second-best to prosecutions, though there is a strong emphasis on states’ obligations to prosecute the most serious crimes and gross violations of international human rights law, along with a proliferation

\textsuperscript{14} I include international, domestic, and hybrid criminal tribunals in ‘prosecutions’.

\textsuperscript{15} For the purposes of this Article, I use Hayner’s 2011 definition of ‘truth commission’: [A] truth commission (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review. See Priscilla B Hayner, \textit{Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions} (2nd edn, Routledge 2011) 11-12.

\textsuperscript{16} ‘Complementarity’ is given its natural meaning throughout this Article; it does not refer to ICC jurisdiction, unless stated otherwise.

Should Truth Commissions be Viewed as Second-best Alternatives to Prosecutions?

I agree with Orentlicher that it is beneficial for international law to require prosecutions of the most serious crimes because of the effectiveness of international legal obligations in supporting human rights advocates striving for criminal accountability.19

International law requires states to prosecute certain serious crimes but also demands state responses to atrocities that fall within other transitional justice mechanisms. States are obliged to: prosecute certain serious international crimes20 including genocide,21 crimes against humanity,22 torture23 and war crimes;24 at least investigate other human rights violations;25 provide individuals with the right to seek remedy and reparation for violations of human rights;26 and comply with victims’ and peoples’ rights to know the truth.27 International law prohibits blanket amnesties,28 but is less certain on the extent to which prosecutions must be pursued; commentators such as Robinson acknowledge that transitional

18 For example: International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), International Criminal Court (ICC); and regional courts: Inter-American Court on Human Rights (IACtHR), European Court of Human Rights (ECtHR); and hybrid tribunals: Sierra Leone, East Timor, and Cambodia.
19 Orentlicher (n 2) 22.
23 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art 7; now customary international law.
25 Under various treaties, including the International Covenant on Civil and Political Rights (ICCPR), Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) and American Convention on Human Rights (ACHR); and many national laws. See Orentlicher (n 10) 2568, pt II.
27 Orentlicher (n 12) 6-11; ECOSOC ‘Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity’ (8 February 2005) E/CN.4/2005/102/Add.1 7-8; William Schabas, Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals (OUP 2012) 170-71; OHCHR (n 17) 1.
28 Robinson (n 20) 491.
governments are not obliged to prosecute all perpetrators and prosecutions may be waived in strict cases of ‘necessity ... grave and imminent threat’.29

International law on transitional justice can also be viewed from a rights perspective, with three overarching principles: the right to know, the right to justice and the right to reparation.30 Orentlicher expands on each principle with reference to a specific mechanism: truth and truth commissions, justice and prosecutions and reparation.31 Freeman similarly understands states’ obligations to correspond to transitional justice mechanisms.32 These correlations imply that such mechanisms are best suited to satisfying each right or obligation; I shall examine whether this is correct in detail later. The connection also suggests that a complementary approach may be most appropriate to satisfy all rights and obligations under international law.

III. HOW TO MEASURE TRANSITIONAL JUSTICE

It is essential to consider what criteria are being measured to determine whether truth commissions should be viewed as second-best to prosecutions. The literature rarely discusses reasons for criteria choice, with an abundance of desired outcomes, including justice, peace, truth, reconciliation, deterrence, accountability, dignity, democracy, rule of law and human rights protection.33 Alternatively, Robins argues that victims should be central;34 however, victims’ demands are not necessarily united and may undermine justice and peace for wider society. Mendez requires specific mechanisms rather than abstract aims,35 but this is not useful for assessing truth commissions and prosecutions. I agree with Van der Merwe et al that many transitional justice goals conflict and it is impossible for any one mechanism or society to achieve them all.36

I have selected the criteria of justice, peace and truth to measure whether truth commissions should be viewed as second-best alternatives to prosecutions. My

29 ibid 493.
30 Orentlicher (n 27).
31 ibid.
32 Freeman (n 8) 6.
35 Mendez (n 26) 11-12.
36 Van der Merwe, Baxter and Chapman (n 33) 3.
reasoning is that these three aims are of primary importance to transitional societies, are pervasive in the literature and incorporate many other goals. For instance, accountability is encapsulated by justice, restoration of dignity can be necessary for justice and peace and deterrence fall within the underlying aim of peace. Societies ultimately aim for democracy, rule of law and protection of human rights for the overarching goal of ‘positive peace’. Reconciliation is discussed in the context of deterrence and ‘healing’, placing it within the broader aim of peace. Even justice and peace overlap; justice may be required to secure long-lasting peace, whilst peace may facilitate the necessary conditions for the pursuit of justice. Some definitions of justice, such as Biggar’s, define truth as part of the justice process; however, I have decided to approach truth as a separate aim because of the breadth of literature on truth and particular demand from victims for truth, independent of justice. I acknowledge that in practice any classification of aims is arbitrary because they are interdependent and it is not possible for transitional societies to separate each goal, but I find this approach useful for discussing the extent to which prosecutions and truth commissions may in turn be able to achieve justice, peace and truth.

IV. ARE TRUTH COMMISSIONS SECOND-BEST TO PROSECUTIONS FOR JUSTICE?

I shall consider whether truth commissions should be viewed as second-best to prosecutions in the pursuit of justice. It is usually assumed that prosecutions are best at achieving justice. However, without clarifying ‘justice’, this is an assumption criticised by Van der Merwe for leading to misconceptions in the current debate. Even scholars who define ‘transitional justice’ neglect to explain ‘justice’. The common assumption appears to be that justice is synonymous with criminal justice, prosecutions are understood as ‘complete justice’, but criminal justice could be retributive or restorative. Justice could be distributive or procedural, or more literally focused on fairness. But the literature continues to affiliate, if not synonymise, justice with retributive criminal justice and

37 I explore the meaning of ‘negative peace’ and ‘positive peace’ at Section 5: Are Truth Commissions Second-Best to Prosecutions for Peace?
39 Hayner (n 15) 6.
40 Orentlcher (n 2) 16.
41 Defined in each relevant Section.
42 Van der Merwe, Baxter and Chapman (n 33) 4.
43 For example, LaPlante (n 3) 921.
44 Mendez (n 26) 1; Sriram (n 1) 2.
victims demanding justice intend criminal trials; as Hayner notes, ‘[j]ustice in the courts is usually the first and most prominent of demands’. Some scholars appear to understand justice according to their preferred mechanism, but if one understands justice as criminal justice it is inevitable that this will be best served by prosecutions. Alternatively, Snyder and Vinjamuri justify amnesties because ‘justice does not lead; it follows’, without defining justice; and truth commission sympathisers do not define the ‘different kind of justice’ this mechanism can allegedly provide. More usefully, Biggar’s definition is less mechanism-specific and based on the vindication of victims, which requires acknowledgement of injury, reparation and truth. Biggar’s definition considers that non-prosecutorial mechanisms do ‘considerable amounts of the different parts of criminal justice’, including restorative, reparative and historical justice.

I shall analyse the role of prosecutions and truth commissions in the pursuit of retributive and restorative justice in turn. Distributive justice is a concern for transitional societies because of discriminatory resource-distribution as seen in apartheid South Africa, but I shall not discuss it because a ‘fair allocation of resources’ should form part of any government’s responsibilities to promote and protect individuals’ social, economic and cultural rights and I am concerned it should not be used as an alternative, or excuse for failing to provide retributive and restorative justice. I shall briefly discuss procedural justice because it is pertinent to both retributive and restorative processes.

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46 Orentlicher comments on victims’ ‘thirst’ for justice as prosecutions. See Orentlicher (n 2) 22.
47 Hayner (n 15) 8.
50 Biggar (n 38) 10-11.
51 ibid 16.
52 LaPlante (n 3) 928.
53 Michelle Malese, ‘Distributive Justice’ (Beyond Intractibility, June 2013)
54 Obligations under international and national law, for example: International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR).
4.1 Retributive Justice

Retributive justice dominates the literature and debates on transitional justice. It is consistently argued that prosecutions are best suited for retributive justice and truth commissions are second-best or not even an acceptable alternative. Retributive criminal justice seeks retribution for wrongs by holding perpetrators accountable through punishment. This accountability is the most pertinent element of retributive justice and also forms a lesser part of restorative justice demands.

Ardent criminal justice advocates propose prosecutions as the best or only way of achieving accountability and most transitional justice scholars appear to understand accountability as synonymous with trials. However, the extent to which trials in transitional societies can provide accountability may be restricted by a variety of factors: limited resources, weakened judiciaries, evidence issues and the impracticalities of prosecuting mass perpetrators and those still wielding political power. Therefore even when transitional societies do pursue prosecutions, these will not hold all perpetrators to account; often prosecutors will decide to pursue only the most serious crimes or the most culpable accused due to the constraints faced by a country emerging from turmoil. Sometimes even those who are known to be guilty are not convicted. Prosecutions may be best for holding perpetrators accountable in established democracies with stable judiciaries but they are not necessarily ideal in many post-conflict societies.

In circumstances where prosecutions were unsuitable, states have adopted a truth commission in an effort to secure some accountability. Laplante describes truth commissions as a second-best alternative to prosecutions in Latin American states where former regimes’ continued hold on power undermined the viability of prosecutions at the time. Hayner also acknowledges that truth commissions

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57 Minow (n 56) 9; Hayner (n 15) 14.
58 Sriram (n 1) 5.
60 As prescribed in the Statute of the Special Court for Sierra Leone 2002, art 1.
61 Hayner (n 15) 8.
62 Snyder and Vinjamuri (n 48) 19.
63 Kiss (n 7) 75.
64 Laplante (n 3) 917, 925.
pursue the advancement of individual accountability; however, this is not necessarily to the extent demanded by retributive justice as truth commissions will have to be as selective in their victim and perpetrator choice as prosecutions due to time, resource and expertise constraints and having lesser penal powers. Truth commissions can worryingly provide perpetrators an opportunity to justify their crimes whilst ‘avoiding serious accountability’. I find greater strength in the argument that truth commissions can play an important complementary role in the pursuit of accountability, as precursors to, or supportive of prosecutions, as suggested by Hayner.

Prosecutions are better suited for retributive justice than truth commissions, although truth commissions can play a complementary role towards accountability when trials are unfeasible. It is useful to adopt Sriram’s approach to this dilemma; transitional societies should strive for the highest ‘point on the accountability continuum’ that can be achieved at a given time. Thus it is inappropriate to order transitional societies to apply a ‘one-size-fits all prescription’, because what is possible and appropriate in each context and at different intervals in time, will vary. Instead, it should be understood that prosecutions are best-suited to deliver retributive justice, but they may not be feasible at a given time and their potential in future may be supported by a truth commission. Truth commissions should not be considered second-best as they may not secure sufficient accountability and prosecutions are not best if circumstances are not right. Meanwhile, retributive justice is problematic for transitional societies as it largely ignores victims and is difficult to effectively achieve in a post-conflict society.

4.2 Restorative Justice

Truth commissions are frequently criticised for not doing justice because of the assumption that justice is retributive; but truth commissions with victim-centred public hearings can be powerful mechanisms for restorative justice. Leebaw summarises restorative justice based on four principles: participation;

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65 Hayner (n 15) 20.
66 Twose (n 49) 1.
67 Kiss (n 7) 74-75.
68 Hayner (n 15) 92.
69 Sriram (n 1) 5.
70 ibid; See also Orentlicher (n 2) 18.
71 Kiss (n 7) 68.
personalism, reparation and reintegration, whilst Kiss notes the aims as: restoring dignity to victims, holding perpetrators accountable, promoting human rights and reconciliation.\textsuperscript{73} The key difference between restorative and retributive justice that is common to all definitions is restorative justice’s focus on victims compared to retributive processes’ punishment of offenders as retribution for wrongs.\textsuperscript{74}

Prosecutions largely neglect victims from the trial process; this neglect can be heightened at geographically removed international tribunals, such as the ICTR.\textsuperscript{75} However, the ICC provides for victim involvement, keen to pursue both restorative and retributive justice.\textsuperscript{76} Involving victims in truth-telling can restore some dignity.\textsuperscript{77} However, apparently, victim-focused truth commissions have not always satisfied victims; for instance, apartheid victims’ families challenged the legality of the South African Truth and Reconciliation Commission (SATRC) in the Supreme Court because they felt that justice would not be done without prosecutions.\textsuperscript{78} Restorative justice can be compromised at truth commissions because perpetrators are not required to apologise, the East Timor Commission being an exception,\textsuperscript{79} undermining arguments that truth-telling can be ‘healing’ for victims and society. However, the evidence for ‘healing’ powers is inconclusive;\textsuperscript{80} Leebaw criticises analogy to therapeutic justice as undermining restorative justice\textsuperscript{81} and this train of argument unduly overemphasises the SATRC, around which most discussions on ‘healing’ revolve.\textsuperscript{82}

Reconciliation is often assumed to be within truth commissions’ capabilities and, according to Kiss, is outside the restorative reach of trials.\textsuperscript{83} However, I am

\textsuperscript{73} Bronwyn Anne Leebaw, \textit{Judging State-Sponsored Violence, Imagining Political Change} (CUP 2011) 120; Kiss (n 7) 79.
\textsuperscript{74} Hayner (n 15) 22.
\textsuperscript{75} Located in Arusha, Tanzania; UNSC Res 977 (22 February 1995) UN Doc S/RES/977.
\textsuperscript{77} Minow (n 56) 60; Hayner (n 15) 22.
\textsuperscript{78} Azanian Peoples Organization (AZAPO) & Others v President of the Republic of South Africa & Others (CCT17/96) [1996] ZACC 16.
\textsuperscript{80} Twose (n 49) 6.
\textsuperscript{81} Leebaw (n 73) ch 5.
\textsuperscript{82} For discussions on healing and truth commissions, see: Leebaw (n 73) ch 5; Hayner (n 15) ch 11; Minow (n 70) 61-83; Charles Villa-Vicencio and Fanie Du Toit (eds), \textit{Truth & Reconciliation in South Africa: 10 Years On} (David Philip 2006).
\textsuperscript{83} Kiss (n 7) 79.
wary of the assumption that truth commissions contribute to reconciliation because firstly, there is no accepted definition for reconciliation and secondly, there is insufficient empirical evidence. Even Archbishop Tutu acknowledged in the SATRC report that ‘reconciliation is both a goal and a process’ not achievable by a truth commission alone. Furthermore, reconciliation is not always the goal of truth commissions, exemplified by Hayner explicitly excluding reconciliation from her definition and to understand it so would be a gross overemphasis of the SATRC.

Restorative justice processes have been criticised for not being the retributive justice victims actually want and for raising concerns of procedural fairness; the SATRC has been subject to further specific criticisms. Problematically, many criticisms and alleged successes of truth commissions for restorative justice are limited to the SATRC, which are unlikely to be transplantable elsewhere. We must be wary not to overemphasise the capacity of TCs by reference to the SATRC; before this project it was not even common for truth commissions to hold victim-centred public hearings. Whilst restorative justice may be a desirable goal for transitional societies and their victims, it is less clear whether truth commissions are generally able to deliver this form of justice; more empirical research is needed on the goals and successes of restorative justice at truth commissions and prosecutions.

4.3 Procedural Justice

Issues of procedural justice arise in the context of how trials and truth commissions are executed. Prosecutions have the most stringent procedural standards with due process rules and fair trial guarantees, some of which are universal. However, transitional justice trials have been criticised for failing to

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85 Hayner (n 15) 183-90; Van der Merwe, Baxter and Chapman (n 33) ch 5; Twose (n 49) 9.
86 Truth and Reconciliation Commission of South Africa (n 84).
87 Hayner (n 15) 11, 23.
88 It is not within the scope of this Article to delve further into reconciliation. For an authoritative discussion, see Hayner (n 15) ch 13.
89 Anthea Jeffery, The Truth About the Truth Commission (South African Institute of Race Relations 1999); Freeman (n 8). I discuss procedural fairness in-depth under ‘procedural justice’.
90 Kiss (n 7) 83-90.
91 Ibid 91.
92 Freeman (n 8) 24.
93 Rights of fair trial and due process guarantees are legislated nationally, as well as in international treaties such as the International Covenant on Civil and Political Rights 1966 (ICCPR), arts 14-15. For in-depth analysis of international standards, see: Freeman (n 8) 89-108.
meet these standards. For example, the Nuremberg trials were criticised as ‘victors’ justice’ with selective prosecutions for crimes implemented retroactively against the rule of law.\textsuperscript{94} Furthermore, judiciaries in post-conflict societies may be corrupt or weak and thus unable to provide procedural justice.\textsuperscript{95} Strict procedural rules are necessary in criminal trials because defendants’ rights and liberty are at stake.

Truth commissions have been criticised for not following such strict procedural guidelines and undermining procedural justice in their processes. However, there are lesser risks at stake. For instance, Jeffery condemns the SATRC for distorting truth\textsuperscript{96} due to flawed methodology lacking satisfactory procedural safeguards.\textsuperscript{97} However, it is important to realise that truth commissions do not have the same powers as courts to order criminal or civil penalties; although as Freeman acknowledges, there are undoubtedly other impacts on the accused.\textsuperscript{98} I agree with Freeman that it would be ‘unreasonable, as well as illogical, to hold truth commissions up to the standards of full due process’,\textsuperscript{99} because of the lack of binding criminal or civil sanctions. It is logical that the greater the sanction at risk, the more stringent the procedural safeguards must be. Freeman proposes a flexible methodology of procedural fairness\textsuperscript{100} because the ‘guiding principles’ can conflict, so truth commissioners must employ discretion whilst ensuring to ‘place a premium on fairness’.\textsuperscript{101} Truth commissions do need to ensure a greater level of procedural fairness, but not to the same standards as prosecutions. Meanwhile, transitional justice trials must adhere to the rules for procedural justice.

V. ARE TRUTH COMMISSIONS SECOND-BEST TO PROSECUTIONS FOR PEACE?

Prosecutions are often seen to be best for retributive justice, but if they threaten peace, truth commissions may be considered as a second-best alternative. Many politicians, activists and scholars have argued that prosecutions in fragile new democracies can threaten stability, especially where ‘spoilers’ wield political

\textsuperscript{94} Minow (n 56) 27-47; Schabas (n 27) chs 2-3.
\textsuperscript{95} Hayner (n 15) 8-9.
\textsuperscript{96} I discuss criticisms of truth commissions’ truth below at Section 6: Are Truth Commissions Second Best to Prosecutions for Truth?
\textsuperscript{97} Jeffery (n 89).
\textsuperscript{98} Freeman (n 8) 71.
\textsuperscript{99} ibid 109.
\textsuperscript{100} ibid 131.
\textsuperscript{101} ibid 154-55.
power and oppose criminal trials. Conversely, human rights advocates and lawyers defend prosecutions’ capacity to re-establish the rule of law and democracy and deter future abuses, playing a stabilising role in the long-term. I consider it essential that each situation be considered on a case-by-case basis, as whether prosecutions are best for a society scarred by atrocity will depend on the particular circumstances and whether it appears possible that peace can endure criminal trials.

Peace should be understood as more than just the absence of violence, known as ‘negative peace’; to truly prevent further conflict a society needs to strive for ‘positive peace’, which entails eliminating the root causes of war, violence and injustice. However, ‘positive peace’ is a great feat that has not been truly achieved by any modern society. Transitional justice literature discusses the appropriateness of prosecutions in relation to ‘negative peace’ and separately, the goals of nation-building, rule of law and democracy, which I incorporate into ‘positive peace’. I suggest that both should be taken into account; prosecutions may be inappropriate if they would spur the outbreak of further conflict, but may be necessary to secure long-term ‘positive peace’. My position is that prosecutions will not necessarily be the best immediate response for addressing past wrongs if they are likely to threaten peace but may be necessary long-term goals. International law appropriately requires prosecutions for serious international crimes and gross human rights violations, but allows flexibility in circumstances of necessity.

Firstly, let us consider whether it is correct that prosecutions can threaten peace, such that alternative transitional justice mechanisms may need to be considered. If a former regime still maintains power, for example when a democratic government emerges from a negotiated settlement, they may threaten further outbreaks of violence if not granted impunity. Arguments are then made for abandoning prosecutions and adopting truth commissions. In these circumstances, I do not see truth commissions as second-best, because if prosecutions threaten peace they are not the best option. Orentlicher has argued that because prosecutions are required by international law, this reduces their potentially

102 Sriram (n 1) 8.
103 ibid; Orentlicher (n 10) 2542.
104 Orentlicher (n 2) 18; Sriram (n 1) 12.
107 Orentlicher (n 2) 11-13.
destabilising effect. I am not satisfied that former regimes would accept punishment because international law prescribes it; in fact, I am more concerned, though not convinced, by the argument that if international law demands prosecutions then repressive regimes are less likely to relinquish power. Instead, I favour Orentlicher’s recent position that international law should require prosecutions because this can assist societies in eventually securing trials.

Outgoing Latin American juntas provided themselves with self-amnesties and threatened violence if these were not subsequently adhered to. For example, in Chile, Pinochet and his right-wing military threatened a coup if their impunity was challenged with prosecutions. Chilean leaders had to measure their response to past atrocities against the threat of breach of peace, which meant they could only secure partial justice, responding with the Truth and Reconciliation Commission. Prosecutions were not the best option for transitional justice in Chile at the time, because there was a very high chance that pursuing criminal accountability would have thrown the country into another civil war, undermining both peace and justice. Similarly, in Argentina, President Alfonsin had to abandon prosecutorial goals because of violent military resistance. Argentina’s Truth Commission became the ‘acceptable way to fill the gap left by compromised criminal justice’. Though recognised as second-best, many now see truth commissions as being more than just that; Laplante comments that TCs were considered ‘at least as important as criminal justice in the transitional justice movement’. It seems that TCs do not risk the same threat to immediate ‘negative peace’ as prosecutions but may limit long-term ‘positive peace’ if they are not followed with retributive justice.

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108 Orentlicher (n 10) 2606.
109 Snyder and Vinjamuri (n 48).
110 Orentlicher (n 2) 22.
111 ibid 11.
113 LaPlante (n 3) 925.
114 Sutil (n 112) 1464-85.
115 ibid 1463.
117 LaPlante (n 3) 924.
118 ibid 928.
119 Hayner (n 15) 14.
It is apparent that in some circumstances prosecutions may not be the best immediate response to atrocities. Transitional societies should not neglect prosecutions altogether however, as they can play an important role in the pursuit of justice and ‘positive peace’. There should be a flexible approach to the timing of transitional justice; prosecutions may become possible and desirable at a later date and can be facilitated by the progress of peace and stability. Argentina had to abandon trials in the 1980s. It conducted a Truth Commission and was then subsequently able to prosecute crimes committed during the “Dirty War” fifteen years after transition. Similarly, Chile lifted Pinochet’s immunity and began the process of prosecution ten years after his dictatorship. It is important that even if trials are not undertaken during transition, they remain a future aim and that other transitional justice mechanisms work towards accommodating prosecutions, due to the justice achievable once impediments of a new democracy have decreased. Therefore I do not support arguments that defend amnesties, such as those proposed by Snyder and Vinjamuri, because this tells victims, society and perpetrators that prosecutions are not an aim. Instead, I can accept putting prosecutions informally on hold, until developments facilitate trials as appropriate in future. I agree with Orentlicher that it is appropriate for international law to require prosecutions, because even though there are situations where these ‘norms cannot be enforced, it has seemed preferable to say ‘not yet’ than to reframe global norms in terms that suggest prosecuting atrocious crimes is nothing more than an option.

Pro-trial advocates have defended prosecutions as securing long-term peace by acting as a deterrent to future serious crimes. I could consider advocating this position only in circumstances where ‘spoilers’ do not directly threaten peace. However, it is unlikely that prosecutions will deter perpetrators who have acted for political motives that they continue to see as justifiable. Critics also argue that history has taught us that prosecutions can perpetuate the ‘us vs. them thinking’ that divides a society, preventing reconciliation and long-lasting peace and accordingly ‘perpetuating societal schisms’. For example, Snyder

122 Kritz (n 121) 32.
123 Snyder and Vinjamuri (n 48) 5-44.
124 Orentlicher (n 2) 22.
125 Sriram (n 1) 8-9.
126 ibid.
127 ibid 7.

SOAS LAW JOURNAL
and Vinjamuri’s examination revealed that domestic trials may only play a marginal deterrent role and the ICTR and ICTY did not deter subsequent atrocities.\footnote{Snyder and Vinjamuri (n 48) 20-25.} I appreciate the potential problem that prosecutions may perpetuate divisions, but rather than impunity I suggest that there may need to be passing of time before prosecutions become feasible and beneficial. In the meantime, other mechanisms to address divisions should be employed. It may thus be necessary to have truth commissions that expose and acknowledge past abuses, reparation and other measures as precursors to prosecutions in fragile democracies.

VI. ARE TRUTH COMMISSIONS SECOND-BEST TO PROSECUTIONS FOR TRUTH?

Truth commissions are held up as the best mechanism for realising the truth, whilst prosecutions are defended as providing more reliable facts. The desirable outcome of truth in transitional societies involves two components: firstly, the realisation of a true and accurate account of past crimes and systematic human rights violations; and secondly, official acknowledgement of this truth.\footnote{Minow (n 56) 58.} Truth should be an aim of transitional societies because victims repeatedly requested it,\footnote{Hayner (n 15) ch 3.} exposing the truth can affect the ‘social understanding and acceptance of the country’s past ‘so as to change policies and practices in the future’,\footnote{ibid 11.} and acknowledging the true narrative may restore some victims’ dignity.\footnote{ibid 8.} Many commentators would also argue that truth-telling can be healing for victims and potentially even a nation, but the evidence is conflicting.\footnote{Discussed under restorative justice at Section 4.2: Restorative Justice.} Truth is inextricably linked to justice and peace;\footnote{Paul Gready, The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond (Routledge 2011) 22.} both retributive and restorative justice require some truth-telling,\footnote{Minow (n 56) 87.} and acknowledging the truth about the past can contribute to long-term peace.\footnote{Press Release of the Secretary-General, ‘Long-Term Peace, Stability Require Acknowledging Past Wrongs, Secretary-General Tells General Assembly Debate on Role of Criminal Justice in Reconciliation’ (10 April 2013) SG/SM/14933-GA/11356 <http://www.un.org/News/Press/docs/2013/sgsm14933.doc.htm> accessed 12 April 2014.} The extent to which truth-telling and acknowledgement is important in a society will depend on the nature of its past; societies emerging

128 Twose (n 49) 2.
129 Snyder and Vinjamuri (n 48) 20-25.
130 Minow (n 56) 58.
131 Hayner (n 15) ch 3.
132 ibid 11.
133 ibid 8.
134 Discussed under restorative justice at Section 4.2: Restorative Justice.
136 Minow (n 56) 87.
from secretive regimes are more likely to demand and benefit from truth-realising mechanisms, as with South Americans’ forced disappearances. In societies where abuses were well-known but perhaps denied, the acknowledgement of history will be pertinent.\textsuperscript{138} Thus in post-apartheid South Africa, the general population was aware of the atrocities that had taken place, even if some specific details remained unknown, but the SATRC allowed victims to tell their own stories and receive acknowledgement of their history that had been denied under National Party rule.\textsuperscript{139}

International law plays a role in the requirement for truth in transitional societies, by way of individuals’ and peoples’ right to truth, but it does not require a particular mechanism to be employed by states to fulfil this obligation. Peoples, victims and victims’ families, have an ‘inalienable right to know the truth vis-à-vis gross human rights violations and serious crimes under international law’,\textsuperscript{140} confirmed in Principles one, two and four of the ‘Updated UN Principles for the promotion and protection of human rights through action to combat impunity’. This right to know the truth has developed from international humanitarian law\textsuperscript{141} into customary international law for both international and non-international armed conflicts, as well as human rights law.\textsuperscript{142} The right to truth is a state obligation in cases of gross human rights violations and serious crimes, which OHCHR reports can be satisfied by establishing and pursuing national prosecutions, international trials, truth commissions, inquiries, national human rights institutions, or other bodies.\textsuperscript{143} OHCHR does not suggest a particular mechanism to be best at fulfilling the right to truth and international law is unclear; it does not prefer prosecutions, truth commissions or other mechanisms. In the \textit{Barrios Altos} \textsuperscript{144} case, the violation of the right to truth was satisfied by a judicial finding against the state.\textsuperscript{145}

I support the view that truth commissions are more likely than trials to contribute to the realisation of truth, because it is inherent in their mandate to

\begin{thebibliography}{9}
\bibitem{138} Gready (n 135) 20.
\bibitem{139} ibid 21.
\bibitem{141} Additional Protocol I to the Geneva Conventions 1949, art 32.
\bibitem{142} OHCHR (n 140) 5.
\bibitem{143} ibid 13-15.
\bibitem{144} Chumbipuma Aguirre and others v Peru (Barrios Altos Case) Inter-American Court of Human Rights Series C No 87 (30 November 2001).
\bibitem{145} ibid [47]-[49].
\end{thebibliography}
seek to establish a full narrative of past events. In contrast, prosecutions may only coincidentally draw out such fact, and are thus unlikely to establish a full history, as they focus on individual perpetrators and crimes. However, truth commissions have been criticised as providing less reliable truth than that of a criminal court. Due process guarantees cannot possibly be achieved by truth commissions, which some commentators allege undermines reports’ reliability. Although there have been errors in previous truth commission processes that undermine the truth established, there is potential for a greater understanding of historical truth by way of truth commission than criminal prosecutions. I agree that procedural fairness needs to be tightened at truth commissions, but I do not consider this to entirely undermine truth commissions’ potential for truth. A review of past truth commissions shows how very different they can be; some great successes, others condemned as absolute failures and as a result have not contributed effectively to truth.

Truth commissions may arguably be better than trials for establishing a historical truth narrative, but this does not necessarily mean that they are better at acknowledging the atrocities exposed. Truth commissions acknowledge truth in their final report, which may also include recommendations for public acknowledgement in the form of apologies and memorialisation. Prosecutions acknowledge the truth that a perpetrator had committed a crime by convicting and sentencing guilty defendants, followed by the possibility of governments publicly apologising. However, just as the truth established at trial will be limited to specific crimes and individual perpetrators, acknowledgement of guilt will similarly be restrictive in scope. Trials cannot generally acknowledge systematic human rights abuses, though reference may be made in judicial obiter dicta. Truth commissions provide arguably less reliable, broader truth, whilst prosecutions produce limited, but strictly tested facts.

\[146\] Minow (n 56) 59-60.
\[147\] Hayner (n 15) 8.
\[148\] Jeffery provides a condemning criticism of truth commissions’ truth, see Jeffery (n 89).
\[149\] This is discussed in the context of procedural justice at Section 4.3: Procedural Justice.
\[150\] See Jeffery (n 89).
\[151\] This is also discussed in the context of procedural justice at Section 4.3: Procedural Justice.
\[152\] Hayner compares five successful TCs with others. See Hayner (n 15) chs 5-6 & Appendix 1.
\[153\] See Hayner (n 15) Chart 6, 280-84.
\[154\] For example, Guatamela’s Supreme Court ordered governmental apology following Montt’s conviction for genocide and crimes against humanity. See Mike McDonald, ‘Guatemala Government Must Apologize After Rios Montt Verdict’ (Reuters, 13 May 2013) <http://www.reuters.com/article/2013/05/13/us-guatemala-riosmontt-idUSBRE94C13V20130513> accessed 12 April 2014.
\[155\] Obiter dicta are not legally binding, merely persuasive judicial comments.

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VII. SHOULD TRUTH COMMISSIONS AND PROSECUTIONS BE VIEWED AS ALTERNATIVES OR COMPLEMENTARY?

Having analysed the literature and arguments on whether truth commissions are second-best to prosecutions for the pursuit of justice, peace and truth, it is now necessary to consider whether it is actually appropriate to dichotomise transitional justice mechanisms in this way. Some staunch advocates of prosecutions argue that they should not be considered as alternatives because prosecutions cannot be replaced with truth commissions whilst others criticise the dichotomy on the basis that a complementary approach to transitional justice should be adopted. I am concerned about whether a complementary approach should be adopted for the purposes of justice, peace and truth. The above discussion leads to my initial conclusion that truth commissions should not be viewed as a second-best alternative to prosecutions, because it is untrue that prosecutions are always the best; truth commissions may not be second-best; and it is unhelpful for these mechanisms to be considered as alternatives because no one mechanism can achieve all societies’ aims.

7.1 Complementarity for Justice, Peace and Truth

As discussed above, prosecutions in transitional societies face many obstacles, which may be best addressed by complementarity rather than alternative approaches to transitional justice. I have discussed how truth commissions can complement prosecutions when they function as precursors in fragile democracies and may also be able to function complementarily alongside each other in the pursuit of justice and maintenance of peace. Truth commission records can be relied on years later in domestic or international courts, as truth commissions usually intend to strengthen prosecutions. OHCHR does not condone truth commissions replacing prosecutions, but acknowledges how truth commissions that take place when prosecutions are impossible may strengthen future trials. Teitel is another scholar who sees truth commissions as leaving open the possibility for future criminal justice. Truth commissions can support prosecutions by revealing patterns of systematic human rights violations.

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156 LaPlante (n 3) 982; Hayner (n 15) 8; Philip Alston and Ryan Goodman, International Human Rights: Text and Materials, The Successor to International Human Rights in Context (OUP 2013) 1441.
157 Van der Merwe, Baxter and Chapman (n 33) 3.
158 Hayner (n 15) 13, 22.
159 ibid 6.
160 ibid 13.
161 OHCHR (n 17) 27.
violations, identifying perpetrators, naming names of individuals to be investigated by prosecutors and even recommending prosecutions.

Schabas suggests that the gap in historical record and truth left by prosecutions may be complemented by a truth commission; similarly, Mendez requires prosecutions to function alongside other policies for truth-telling. Schabas explores how a truth commission was employed to complement prosecutions in Sierra Leone; he acknowledges some tension between the two institutions at first, but concludes that the relationship was ‘broadly complementary’. Stahn adopts a similarly positive view of the complementarity of truth commission and prosecutions in East Timor, where he interprets the East Timor TRC as an ‘integrated part of the East Timorese judicial system’. Stahn determines that: ‘[T]ruth commissions have gradually developed into justice-supportive machinery, designed to complement rather than replace national or international prosecutions’. Olsen et al recommend complementarity for the purpose of improving human rights because their research concludes that truth commissions employed alone negatively impact human rights, but used with trials and amnesties can be beneficial for the improvement of standards.

However, I am seriously concerned with the risk of conflict between truth commissions and prosecutions for both truth and justice. Schabas is surprisingly unfazed that the Sierra Leonean TRC and Special Court resulted upon different historical understandings of the causes of conflict. In fact, Schabas considers that ‘diversity in perspectives should be a generally healthy phenomenon’, because no institution should ‘stifle’ the reassessment of past events. Alston and Goodman are less optimistic about differing truths and raise concerns that ‘competing narratives can undermine the legitimacy of both institutions and the goals they serve’. I am similarly unable to dismiss two conflicting official truths as merely acceptable historical discussion. A similar conflict has arisen in terms of justice; for example the SATRC found truth in

163 Schabas (n 27) 168-69; See also 19-22.
164 Mendez (n 26) 4.
165 Schabas (n 27) 169.
167 ibid 954.
168 Olsen and others (n 120) 457-76.
169 Schabas (n 27) 170.
170 ibid 172.
171 Alston and Goodman (n 156) 1442.
allegations against perpetrators cleared of the crimes by a criminal court.\textsuperscript{172} Such conflicts may suggest that truth commissions and prosecutions cannot function complementarily and should be alternatives; though this is not my own conclusion.

I am inclined to suggest that these early dilemmas should not lead us to disregard the entire complementarity exercise. These issues of conflict may be resolvable with greater clarity of distinct roles between institutions and, or, improving working relationships between truth commissions and prosecutions. There is currently insufficient research to know whether these conflicts can be resolved because the literature tends to ideologically recommend complementarity without discussion of practical implementation, or condemn collaboration as impractical without endeavouring to expose potential solutions. Therefore, further discussion and research is needed to identify whether a complementary approach to transitional justice should be employed on a case-by-case basis. If these obstacles can be overcome then collaborative transitional justice mechanisms could fill many of the voids left by individual measures.

7.2 Criticisms of Complementary Transitional Justice

There are some obvious practical criticisms as to why it may not be possible to view truth commissions as complementary to prosecutions. Primarily, there is concern that it is unlikely that perpetrators will contribute to commission proceedings if their names or evidence can be passed onto prosecutors\textsuperscript{173} because conditional amnesty following truth-telling is unique to the SATRC and, to a limited extent, the TRC in East Timor.\textsuperscript{174} Tepperman raises this concern and criticises Hayner and Boraine’s complementary approach because he sees no evidence that truth commissions support prosecutions.\textsuperscript{175} For example, South Africa has conducted very few successful prosecutions of perpetrators who were denied amnesty at the TRC or did not come forward and Guatemala’s record is even worse.\textsuperscript{176} This then raises questions of whether a TC that only included evidence from victims could provide reliable truth; it would certainly be less likely to achieve accountability and justice.

Furthermore, there are issues of due process and rights to fair trial, including rules of evidence and the overlap of alleged perpetrators between courts and

\textsuperscript{172} Jeffery (n 97) 129-46.
\textsuperscript{173} Alston and Goodman (n 156) 1442.
\textsuperscript{174} Stahn (n 166) 962-65.
\textsuperscript{175} Tepperman (n 59).
\textsuperscript{176} ibid.
TCs. In Sierra Leone, a dispute over whether a defendant before the Special Court could attend a public hearing at the TRC created conflict between the two institutions. The Special Court ruled on appeal that the defendant, Norman could testify to the TRC and concluded that the TRC and Court’s work should be complementary and accommodate each other.177 Justice Robertson did, nevertheless, require certain measures178 to be taken to reduce the possibility of the defendant using the TRC as an opportunity to influence witnesses or ‘affect the integrity of court proceedings’.179 As with other complementarity issues, it is difficult without further research and practice to know whether these obstacles can be overcome.

7.3 Complementarity with Other Mechanisms

Truth commissions should not be viewed as alternatives to prosecutions and may be able to function complementarily; but even working collaboratively there will be gaps in transitional societies’ goals. Many truth commissions and prosecutions complement other transitional justice mechanisms, including reparation. It is the state’s obligation to ensure that victims of human rights violations have a right to reparation.180 Reparation is most commonly understood as financial compensation, but it also includes restitution, rehabilitation, satisfaction and guarantees of non-repetition, which include reforms. States frequently blame failures to provide reparation on limited resources, but as Hayner criticises, this is no excuse; ‘there may be creative, non-financial reparations’ such as memorialisation or public apologies.

If reparation is the only response to atrocity, then it is unlikely to satisfy victims’ needs.182 In Brazil financial reparation without prosecution was seen as ‘blood money’.183 Reparation is best fulfilled alongside and in collaboration with other forms of transitional justice; both prosecutions and truth commissions can contribute to effective reparation.184 Whilst prosecutions can result in compensation for victims in some national contexts185 and the ICC has a

177 Prosecutor v Samuel Hinga Norman (Decision on Appeal of TRC Request for Public Hearing with Chief Norman) (2003) Case No SCSL-2003-08-PT (Special Court for Sierra Leone) [44].
178 Such as prohibiting the TRC hearing from being public.
179 Prosecutor v Samuel Hinga Norman (n 178) [41].
180 Orentlicher (n 27) 16 (Principle 31); UNGA Res/60/147 (n 26) [VII], [IX].
181 Hayner (n 15) 163-64.
182 ibid 178.
184 Freeman (n 8) 72-73.
185 ibid 79.
limited Trust Fund for Victims,\textsuperscript{186} generally truth commissions are more closely associated with reparation because ‘[m]ost truth commissions recommend reparations for victims’.\textsuperscript{187} The Moroccan truth commission even had the unique power to award reparation.\textsuperscript{188} However, truth commission recommendations have a terrible implementation record;\textsuperscript{189} in most cases governments have ‘responded slowly or with tepid interest’\textsuperscript{190} on a smaller scale to TC’s recommendations. Nevertheless, Hayner considers it unlikely that many reparation programmes would have been established without prior truth commissions;\textsuperscript{191} for example, victims received compensation as a result of truth commissions in South Africa and Chile.\textsuperscript{192} Even when not implemented, according to Freeman, truth commission recommendations can form a ‘... benchmark and a focal point for victim advocates’.\textsuperscript{193}

States’ obligations to guarantee non-recurrence of human rights violations require undertakings of institutional reforms;\textsuperscript{194} ‘both trials and truth commission can make valuable contributions [to reform]’.\textsuperscript{195} Freeman explains how ‘plans to hold criminal or civil trials can prompt immediate reformation to the justice sector’\textsuperscript{196} and Hayner discusses commission reports that have recommended judicial, political and armed forces reforms.\textsuperscript{197} Wielbelhaus-Brahm criticises poor implementation of recommendations, but nevertheless finds truth commission recommendations to provide a ‘blueprint for change’.\textsuperscript{198} Truth commissions are more directly linked to reparation, including reform, though prosecutions can contribute to a reparation-friendly political environment. It is not useful to dichotomise truth commissions and prosecutions in their contributions to reparation, but see all three as mechanisms that can collaboratively contribute to transitional justice.\textsuperscript{199}

\textsuperscript{186} ibid 80.
\textsuperscript{187} Hayner (n 15) 163; Chart 5, 274-79.
\textsuperscript{188} Freeman (n 8) 80; Hayner (n 15) 172.
\textsuperscript{190} Hayner (n 15) 163.
\textsuperscript{191} ibid.
\textsuperscript{192} Wielbelhaus-Brahm (n 189) 146.
\textsuperscript{193} ibid.
\textsuperscript{194} Wielbelhaus-Brahm (n 189) 146.
\textsuperscript{195} ibid.
\textsuperscript{196} ibid.
\textsuperscript{197} ibid.
\textsuperscript{198} Wielbelhaus-Brahm (n 189) 146.
\textsuperscript{199} It is not within the scope of this Article to discuss reparation further. See Max du Plessis and Stephen Pete (eds), \textit{Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses} (Intersentia 2007).
VIII. CONCLUSION

I have analysed the literature around prosecutions and truth commissions in the context of transitional justice, highlighting conflicting analyses and presenting my own proposition that there is no ideal typology to be applied in the aftermath of conflict; instead a case-by-case approach should be adopted that seeks to achieve justice, peace and truth to the greatest extent possible. It is thus inappropriate to understand either truth commissions or prosecutions as the best or second-best. While prosecutions that threaten peace may not be appropriate at the time, truth commissions have the capacity to establish a broader truth. However, they cannot satisfy the demands of retributive justice to the extent that criminal trials can. There are problems with procedural justice that need to be addressed in the implementation of both mechanisms and distributive justice should remain a key aim of all governments. I have discussed the potential benefits of a complementary approach to transitional justice, as well as the limitations that have emerged. Meanwhile, I have suggested that there are problematic assumptions in the literature that need to be clarified and require further empirical research to justify. I support the focus of international law against impunity for serious crimes and gross violations of human rights, because I agree with Orentlicher that it is ‘preferable to say ‘not yet’ than to reframe global norms in terms that suggest prosecuting atrocious crimes is nothing more than an option’. Therefore, a flexible temporal approach should be adopted by post-conflict societies in the pursuit of justice, peace and truth.

My discussion has been limited to being focused on prosecutions and truth commissions, in a broadly comparative analysis. There are many topics of contention in transitional justice literature that I have only been able to touch on briefly, or have no scope to discuss at all. Within the context of the prioritisation of truth commissions or prosecutions, it would be particularly interesting for there to be further study on two specific enquiries: how victims view these two mechanisms and the extent to which complementary approaches have succeeded in achieving the aims of justice, peace and truth in transitional societies.

Truth commissions are not second-best to prosecutions, because neither trials nor truth commissions are in all circumstances always best or second-best. These principal transitional justice mechanisms should not be viewed as alternatives because they do not provide the same outcomes and no single

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200 Orentlicher (n 2) 22.
mechanism can satisfy post-conflict goals. Instead, a complementary approach may better fulfil justice, peace and truth. Despite some practical difficulties that have emerged in early attempts at complementarity, these do not negate the possibility that collaboration may best serve transitional societies as they recover from their past and prepare for the future.
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Accountability of the UN and Peacekeepers: A Focus Study on Sexual Exploitation and Abuse

Hanna Gunnarsson*

By the time I had reached the end of this eye-opening collection of smart articles, I had concluded that it requires a truly exceptional combination of skills and attributes to hold all the actors in peacekeeping operations accountable for implementing all parts of resolution 1325 – that is, in order to hold these officials accountable for turning a deaf ear to the voices of girls and women and for their accompanying refusal to challenge (others’ and their own) masculinized cultures and practices.¹

I. INTRODUCTION

The purpose of peacekeepers in post-conflict societies is not solely for the carrying out of combatant disarmament, but also ‘... the rebuilding of communities and longer-term conflict prevention’² for a more sustainable peace. The sexual exploitation and abuse (hereafter SEA) by peacekeepers represent the failures in protecting the very people that the UN, NGOs and international organisations are meant to protect. Whilst the international community has attempted to impose strategies, which address this catastrophe, the purpose of this Article is to find ways to improve the accountability of peacekeepers who commit such crimes. This will be done by analysing the feasibility of different approaches, such as incorporating women’s experiences of war in existing strategies or even developing new strategies that specifically target accountability. The aim and desired outcome of these strategies are to significantly reduce, and in the long-term eliminate, peacekeepers’ perpetration of these serious crimes in the mission’s host and neighbouring countries.

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This analysis will be based on the idea that women’s experiences of war exist in a continuum. Since ‘war is seen as a creation and creator of the social reality in which it thrives ...’, the violence brought by war becomes part of this continuum of violence that women are subjected to. Thus, war in that perspective does not start by the first bullet and end by the last. In that regard, the pre-existing intersectional factors affecting structures of power before war need to be altered in order for the power imbalances during- and post-war to do so as well. This is fundamental when thinking about what constitutes or should constitute a serious crime, and what strategies are most effective in combating SEA in post-conflict societies to enable a long-lasting, all-encompassing and sustainable approach.

To address the ways in which accountability can be improved and imposed on peacekeepers when involved in acts of SEA, this Article will firstly identify what these serious crimes actually are. This will be followed by an in-depth analysis on the fundamental issues regarding the construction of the UN. The predominantly patriarchal, heteronormative and racially hierarchical structure can be reasoned to ultimately have an impact on the actions of peacekeepers and their attitude through the focus on gender analysis. To end with, this Article will seek to identify the existing strategies, and assess their effectiveness, or lack thereof, in achieving accountability.

II. WHAT ARE THESE ‘SERIOUS CRIMES’?

For the purpose of this Article, ‘serious crimes’ which are perpetrated by peacekeepers will be limited to SEA. There will also be a brief discussion on ‘sexual violence’ to illustrate how these crimes affect the justification for peacekeeping missions. As an initial step towards fully understanding what needs to be done in order to increase accountability and reduce the perpetration of the aforementioned crimes, it is essential to provide some background information on what constitutes these crimes.

2.1 Sexual Exploitation and Abuse (‘SEA’)

According to the UN definition, sexual exploitation is defined as:

[A]ny actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not

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3 For the purpose of this Article, the term ‘continuum’ will specifically allude to the continuous sequence of sexual and gender based violence women endure pre-, during- and post-conflict.
4 Carol Cohn, ‘Women and Wars: Toward a Conceptual Framework’ in Carol Cohn (ed) (n 2).
limited to, profiting monetarily, socially or politically from the sexual exploitation of another ... [whilst] the term “sexual abuse” means the actual or threatened physical intrusion of a sexual nature, whether it is by force or under unequal or coercive conditions.5

This includes consensual (such as ‘survival prostitution’) and non-consensual sexual contacts by UN personnel, or other personnel from parties to the conflict.6 The concern and reports regarding the abusive nature of sexual relationships by peacekeepers is ‘nothing new’7 but has significantly increased since the early 2000s.8 Grady made two important observations regarding SEA and peacekeeping operations. First, that ‘no peacekeeping operation has been exempt’9; secondly, there have been a disproportionately higher number of SEA allegations in Africa because of the larger concentration of missions.10

Women’s experiences of war are often seen as inevitable consequences of the breakdown of a state. However, whether or not SEA is a natural or inevitable consequence is highly contentious, with some referring to it as a ‘conscious political act deeply rooted in the political economy of war’.11 Grady argues that there are two dominant trends behind the existence of SEA in post-conflict societies. Firstly, the political act of using ‘... SEA has emerged as a consequence of the development of ‘transborder shadow economies’’.12 In other words, the so-called black market has enabled human trafficking and prostitution as ‘those seeking to oppose or replace the state in a violent manner engage in asset accumulation through parallel or shadow economies, including trafficking in minerals, gems, timber, gold, illegal drugs and humans’.13 Such illegal markets offer a quicker way to earn money than that of the state-based post-war economy.14 For this reason, the SEA of women in an arena of conflict is

7 Jacobson (n 2) 221.
8 Grady (n 6) 218.
9 ibid.
10 ibid.
11 ibid 216.
12 ibid.
13 ibid 216-17; Dyan Mazurana, ‘Gender and the Causes and Consequences of Armed Conflict’ in Dyan Mazurana, Angela Raven-Roberts and Jane Parpart (eds), Gender, Conflict and Peacekeeping (Rowman & Littlefield Publishers 2005) 32 (emphasis added).
14 Grady (n 6) 217.
an essential element of the war economy created to supply resources to the different warring factions.\textsuperscript{15}

Secondly, the existence of SEA is the result of tactical methods in political and economic exploitation during and after war. As mentioned above, SEA can be seen as an “overtly political act” that continues into the post-conflict society in the regions where peacekeeping forces have been dispatched.\textsuperscript{16} It is important to remember that SEA does not necessarily end because bullets have stopped falling and it should be tied into our understanding of women’s continuum of experiences in war. The UN recognised that ‘often the same figures that were in a position to exploit war-time economies are in a position to move quickly into high revenue, illicit goods and service economies in post-conflict environments’.\textsuperscript{17} Grady adds that this includes human trade,\textsuperscript{18} which illustrates that SEA can become part of an illicit organisation for the purpose of gaining money and power.\textsuperscript{19}

Seeing SEA as a political act means that there are ‘... financial and propagandist benefits for the warring parties’.\textsuperscript{20} Thus, we see SEA being used in conflict for propaganda purposes to intimidate the enemy.\textsuperscript{21} Women in many societies are representatives of the nation’s honour and reproduction. Some academics argue that the use of SEA in this way feminises the enemy and humiliates as well as scars men who feel that they have failed to protect their women.\textsuperscript{22} This feminisation of the enemy is based on the idea of hegemonic masculinities where men who do not meet the ‘hyper masculinity’ standard become subordinate to those who do.\textsuperscript{23} Therefore, propaganda about SEA is used to manipulate perceptions\textsuperscript{24} but it can also, as noted by Grady, be used to bring the allies closer together and create distrust in the enemy when their participation in SEA is exposed.\textsuperscript{25} For example, films portraying the rape of alleged Serbian

\textsuperscript{15} ibid.
\textsuperscript{16} ibid.
\textsuperscript{18} Grady (n 6) 218.
\textsuperscript{20} Grady (n 6) 215.
\textsuperscript{21} ibid 217.
\textsuperscript{22} ibid.
\textsuperscript{23} Cohn (n 4).
\textsuperscript{24} Grady (n 6) 217.
\textsuperscript{25} ibid.
women were used as propaganda to stir up Serb nationalism, when in fact the films were fabricated and depicted non-Serbian women.\textsuperscript{26}

The use of propaganda however, does not necessarily diminish with peace as distrust between parties continues, particularly if a group is unsatisfied with the peace negotiations. Consequently, ‘the systems, infrastructure and attitudes that operate during a conflict …’ are most likely to continue even after the signing of a peace agreement.\textsuperscript{27} This reverts back to the idea of war being part of a continuum of experiences.

The use and effects of propaganda revolving around SEA can also be used by local actors to diminish the support for the UN’s participation in peace building. The participation of peacekeepers in SEA means that those opposing the UN’s presence in post-conflict societies can influence other citizens to distrust the UN and resist the presence of peacekeeping missions. This creates a highly volatile situation, as the UN’s presence in a post-conflict society must be based on trust for the mission to have a chance of accomplishing its aims. Once again, creating accountability is a possible solution, as will be discussed in the following sections.

Jennings also argues that the economies, which develop around peacekeeping missions, stimulate the continued existence of SEA in the host country and its neighbouring countries. Even though they might not be the sole actors in allowing for the existence and flourishing of SEA economies, it can be argued that peacekeeping economies lay the foundation for their thriving success. Accordingly, to address this issue, they should take responsibility through preventative measures and a corporate social responsibility should be imposed on the UN. Some may argue that to do so would require resources that they do not have. This in turn provokes an array of questions as to why measures that could potentially contribute to the protection and awareness building of women’s rights are often afforded less funding.

### 2.2 Sexual Violence

With reference to Cohn’s conceptualisation of women’s experiences of war existing in a continuum, Ndulo recognises that ‘s\textsuperscript{e}xual violence happens during war for the same reasons it happens during peacetime. It is a phenomenon rooted in inequality, discrimination, male domination, poverty,\textsuperscript{26} ibid; Catharine A MacKinnon, ‘Rape, Genocide and Women’s Human Rights’ (1994) 17 Harvard Women’s Law Journal 5, 14.

\textsuperscript{27} Grady (n 6) 218.
aggression, misogyny and the entrenched socialization of sexual myths’. Rape and other forms of sexual violence have become a ‘tactic of war’ used systematically to repress and feminise one’s enemies. This tactic, referred to by Anderson as a ‘new frontline’, causes women and girls to become particularly vulnerable as a result of being displaced. In other words, when they are displaced, women and girls are being marginalised due to multiple different views on rape and sexual violence; the views of their home state and of the state where they are displaced. Willett argues that this sexual violence persists even after the conflict ends. The social normalisation of sexual violence then causes women to become humiliated, victimised, and degraded, and precludes their participation from public life, thereby enforcing a belief both conceptually and practically of women being held as subordinate.

Ndulo asserts that combating sexual violence requires the enforcement of a long-term strategy that eradicates ‘... cultural norms that undermine the dignity of women’. Despite the fact that these “tactics of war” are not being committed by peacekeepers with that specific purpose in mind, it is worth mentioning as these SEA occurrences still contribute to women’s experiences of war. The failure in holding peacekeepers accountable by offering them immunity for their participation in SEA also affects how we address the punishment of sexual violence as a war tactic. By treating the latter as a punishable crime and giving the former immunity, an imperial dichotomy of “us and them” is created. This threatens the effectiveness and the acceptance of UN peacekeeping strategies, which will be analysed further in the following Section. According to Willett, the UN’s conventional strategies that focus on a responsibility to protect fail to ‘... provide effective protection for those women who live under the shadow of sexual violence’.

On that account, peacekeepers’ involvement in sexual violence and SEA contradicts their role and purpose in post-conflict societies, i.e. to empower women through gender mainstreaming.

30 ibid 154.
31 ibid 159.
32 Willett (n 29) 154.
III. THE FUNDAMENTAL ISSUES WITH THE CONSTRUCTION OF THE UN AND THEIR HAMPERING EFFECT ON ACCOUNTABILITY

SEA came to the fore of public attention some years ago through Resolution 1325, which led to much analysis and discussion on how to improve and create strategies that aim to impose accountability and hinder these crimes. However, little has been done to create real long-lasting improvements. The reasons for this are deeply rooted in the construction of the UN as a patriarchal heteronormative and racially hierarchical structure; in order to accurately address and create accountability for these crimes, the unequal structure of the UN that negates and hampers the creation of accountability strategies must be critically deconstructed. The effects of these characteristics will be analysed together with potential solutions to the underlying issues.

3.1 The UN as a Patriarchal Structure

The misleading conception that the organisational structure of the UN is neutral\(^{33}\) is premised on the UN’s inability to examine itself because of the failure of peacekeeping accountability. Many academics, when applying gender analysis to the UN, argue that it is a patriarchal institution. More specifically, the “able-bodiedness” of UN personnel and fighters in war are based on the male norm of capacity;\(^{34}\) the yardstick for capability is set from the perspective of a strong, tough, courageous, aggressive and violent man; and therefore, a ‘... ‘good soldier’ [is] synonymous with having the characteristics of being a ‘real man’’.\(^{35}\) If anyone falls below this norm of hegemonic masculinity, they are automatically seen as subordinate and less able-bodied to participate in war.\(^{36}\) Consequently, in order to achieve a “gender-neutral” UN, we must look beyond the strategies taken to achieve formal equality and seek to achieve transformative equality by changing how we view “able-bodiedness”. Furthermore, Cohn recognises that as militaries have a significant effect on deploying ideas about femininity as well,\(^{37}\) to deconstruct this, it is important to recognise that ‘femininity need not be incompatible with strength and capacity for protection’\(^{38}\)

\(^{33}\) Cohn (n 4) 16.
\(^{34}\) ibid 17.
\(^{35}\) ibid 22.
\(^{36}\) ibid 17-18.
\(^{37}\) ibid 19.
\(^{38}\) Lesley J Pruitt, ‘All-Female Police Contingents: Feminism and the Discourse of Armed Protection’ (2013) 20(1) International Peacekeeping 67; Cohn (n 4) 2.
Previous UN responses to pressing situations also highlight the patriarchal nature of the institution. For example, in the aftermath of a conflict, issues directly affecting women are sidestepped for other issues considered more pressing. The issues affecting women include their ‘physical security, resettlement, protection of their productive assets, access to decision-making, land-rights, health and reproductive care’. Moreover, peace negotiators often ignore local female peacemakers when discussing issues of peace and future security, turning instead ‘... to the leaders of local militias and notorious warlords’. The consequence of this is the creation of peace agreements that do not appreciate and incorporate the experiences and needs of women post-conflict. The lack of incorporation of issues that affect women renders their experiences and agencies invisible despite the fact that women still suffer the effects of war even though the bullets have stopped raining. If we ignore and marginalise women’s concerns in this manner, it can lead to grave backlashes in women’s rights in the future. These backlashes vary in form throughout history and within different cultures and socio-economic regions, but two types can be identified as being ‘[a]n anti-woman discourse associated with restrictions on women’s choices in the social political and personal spheres [and] the continuation, and even expansion, of gender-based violence’. This backlash has a tremendous effect on women’s empowerment in post-conflict societies; if issues creating this backlash are not addressed early on in the peace processes, they will become difficult to combat later on in the transitional justice phase of reconstruction and development of post-conflict societies.

In addition, the hegemonic masculine structure of UN peacekeeping forces is an inevitable consequence since they ‘... are recruited from the highly masculinized security forces of UN member states’. A social construction is created within the UN regarding the ‘natural bond’ between the ‘protector’ and the ‘protected/victim’. Assumptions infused within military forces tend to be filled with ‘... masculine privilege, the prestige and acumen of the warrior and their role as the protector of women and children’. This construction creates a distorted dichotomy of power relations between the protector, who is often

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39 Willett (n 29) 156.
40 ibid 147.
41 ibid 151; even though Resolution 1325 art 8 calls for more women being present in peace negotiations.
42 ibid 156.
43 ibid.
44 ibid.
45 ibid 146-47.
46 ibid 147.
47 ibid.
masculinised and claims to speak for the protected, and the protected, who are feminised in the structure of liberal peace.48 Thus, the peacekeepers think that they, compared to the victims they are protecting, can see the bigger picture because they are stronger.

There is a benefit to this discourse; ‘[t]hose who have an investment in peacekeeping have a stake in portraying the world as a dangerous place, that justifies interventions, in which the spectre of suffering women and children is inevitably used to mobilize public support for peacekeeping’.49 Be that as it may, it is very detrimental because it does not always represent the de facto situation of post-conflict citizens, and therefore does not offer genuine protection; ‘peacekeepers may become sexual predators on local women’s vulnerabilities, they collude to make the insecurity of women in conflict situations and post-conflict societies invisible, they ignore the proactive voices of women’s peace groups and in many scenarios they collude with warlords and military commanders to reinforce male privilege and power and enforce women’s subordination in the aftermath of war’.50 This illustrates the UN’s role in trumping cultural relativism when accepting this discourse by omission.

However, there has been a slight change towards a more gender-neutral approach in the UN. Feminists dedicated to gender analysis in the 1990s, along with non-governmental women’s groups motivated by liberal understandings of feminism, actively lobbied the UN Security Council to bring attention to the consequences and impacts of war on women and girls, and the issues of gendered inequality in international efforts to contain conflict.51 Resolution 1325 and the following Resolutions focusing on gender, sexual violence and SEA can be seen as a result of this lobbying for empowerment of women. While this remarkable step towards shedding some light on women’s experiences of war should not be downplayed, it is insufficient for several reasons. For instance, it is based on liberal feminist assumptions and fails to unpack those inequalities entrenched in societies due to cultural differences. Therefore, it can be seen as out-dated, as it does not provide for transformative equality. Consequently, as aforementioned, institutions conveniently rely on specific perceptions about gender in order to operate, thereby producing ideas about ‘... appropriate

49 Willett (n 29) 147.
50 ibid.
masculinities and femininities – and these, in turn, have cultural and structural impacts beyond the bounds of the institution itself’.\textsuperscript{52} This issue needs to be deconstructed so that more appropriate strategies can be formed.

This analysis is important to keep in mind when creating accountability principles as it sets out the defects of the already existing strategies. If we are aiming to improve or create new strategies to increase peacekeepers’ accountability, we must first deconstruct these unequal structures and the UN must take responsibility in doing so. The UN has a responsibility to incorporate transformative equality in order to show that its respect for women lies at the core of its institution because this can set precedence for its personnel in terms of how to treat women. This arguably bold request requires extensive work by the UN to change its deep-rooted patriarchal structure, which implies that it is most likely not going to take place in the near future. Nevertheless, we must ask ourselves: why should we accept any less? Perhaps we should not stop with the accountability of peacekeepers but go on to question the accountability of the UN as a whole.

3.2 The UN Is a Hierarchical Heteronormative Structure

This hegemonic masculine structure is also very heteronormative as seen in the Security Council Resolutions. Whilst they aim at protecting women and girls from SEA and sexual violence, they ignore the considerable evidence that indicates that men and boys also experience these horrible crimes in armed conflict and post-conflict societies. As indicated by Sivakumaran, ‘what remains unknown is the precise extent to which this occurs’.\textsuperscript{53} This omission silences male experiences of war and must be properly addressed, like the SEA of women and girls, in order to build a sustainable post-conflict society and to ensure all-encompassing accountability.

Resolution 1820 demands ‘the immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians with immediate effect’.\textsuperscript{54} There was a slight change in the terminology, which placed an emphasis on civilians rather than women and girls in an attempt to foster more gender inclusivity. Sivakumaran acknowledges that despite this change, the

\textsuperscript{52} Cohn (n 4) 19.


\textsuperscript{54} UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820, para 2.
Resolution is still highly focused on women and girls and not enough weight is given to include a more gender sensitive approach.\textsuperscript{55} In other words, he implies that even though men and boys are sometimes included in the Resolutions’ language, it does not necessarily imply gender neutrality and is still not enough to address and combat the structural violence experienced across gender borders. Accordingly, this brief recognition has not translated into concrete efforts on behalf of male victims, be they mechanisms for raising awareness of the problem, focused research agendas on the issue, or strategies for prevention.\textsuperscript{56} Sivakumaran also highlights that although Resolution 1888 is highly gender neutral and inclusive in its language, the Resolution’s focus on civilians fails to address the sexual violence happening against combatants.\textsuperscript{57}

The heteronormative structure of the UN affects peacekeepers’ accountability makes assumptions about their behaviour and can lead to legitimisation. As Cohn has stated:

\begin{quote}
\textit{[I]f prevalent gendered meanings include constructions of male sexuality as heterosexual and as a constant overwhelming force that “naturally” must have an outlet – and this is combined with a vision of women as objects of male desire rather than subjects of their own, and with a normative belief that sees women as lesser beings than men – it is easier for men to feel legitimate in committing acts of sexual violence.} \textsuperscript{58}
\end{quote}

Furthermore, the UN does not itself stand as a gender-neutral structure, thereby creating an imperial discourse when it asks host countries to be more inclusive and potentially trumps cultural relativism.

\section*{3.3 The UN Is a Racially Hierarchical Structure}

Not only is the UN a hegemonic masculine and heteronormative structure, but it can also be seen as highly racially constructed.\textsuperscript{59} This affects peacekeeping missions, as most commanding positions are held by white men of the Global North, whilst lower positions are held by citizens of the Global South.\textsuperscript{60} This leads to complications as it creates a discourse of “able-bodiedness” based on

\textsuperscript{55} Sivakumaran (n 53).
\textsuperscript{56} UNSC Res 1888 (19 June 2008) UN Doc S/RES/1888, paras 4, 8, 10.
\textsuperscript{57} ibid.
\textsuperscript{58} Cohn (n 4) 31.
\textsuperscript{59} ibid 9.
\textsuperscript{60} ibid 9.
white hegemonic masculinities. Thus, the structure of peacekeeping operations is formed to accommodate white men, rendering the work and ideas of women and men from the Global South automatically subordinate. The UN is consequently conceptualised as an imperial structure lacking cultural relativism.

In order to form a more all-encompassing accountability strategy that stands to include the versatile experiences of the world, this racially hierarchical structure needs to be addressed or else it will trump cultural relativism and make essentialist assumptions about the experiences of victims. As Thobani stated in her speech that received considerable attention for its bold and controversial statements after 9/11:

[T]hird World women, I want to say for decades, but I need to say for centuries, have been making the point that there can be no women’s emancipation, in fact no liberation, unless the fundamental divide between the north and the south, between Third World people and those in the West, who are now calling themselves ‘Americans,’ is transformed. There will be no emancipation for women anywhere on this planet until the Western domination of the planet is ended.61

3.4 The Reporting Process

Another issue that affects the way in which the UN deals with SEA is the way in which it reports on peacekeepers’ involvement in the acts. Grady noted two problems with the reporting. Firstly, once allegations had been made, there was then little follow-up on whether these were substantiated. Secondly, sometimes victims fail to report occurrences because of shame or fear, or because in some cases they have chosen to engage in sexual activities such as prostitution. As a result, there are unquestionably numerous cases that have never come to light. In conclusion, the number of incidents is undeniably higher than those documented by the UN.62

There are various reasons for the irregularities and lack of sufficient reporting. It is primarily important to remember that there is not one UN army but several Troop Contributing Countries (TCC) from all around the world that supply the UN with personnel.63 One reason why it might be difficult to obtain accurate

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62 Grady (n 6) 218-19.
63 ibid.
information from the UN is that they are in a vulnerable position and need to give ‘political weight’ to the fact that if they choose to release that information, they risk losing military and police personnel by the TCC whose personnel is accused of this involvement.\textsuperscript{64} The UN might not afford such risk since it is already difficult to encourage countries to become TCCs.

Another irregularity in the reporting process involves the authenticity of media reports on TCCs. For example, the definition of peacekeeper has been broadly defined in reports on SEA. This affects the accuracy of the reports because they then tend to not only include UN personnel but also civilian staff, police or military personnel. As illustrated by Grady, ‘… the authenticity and accuracy of many of these reports cannot be independently determined. This is particularly problematic given that the issue can be manipulated for propaganda purposes’.\textsuperscript{65} It has also been observed that focusing on the actual figures regarding UN personnel’s involvement in SEA can brand peacekeepers as ‘more part of the problem than the solution’.\textsuperscript{66}

Despite the predicament of the UN’s dependence on good relations with TCCs and national and international security, there is something to gain from accurate reporting; it makes more people involved in the accountability process and acts as checks and balances to keep the UN and its personnel in line with their duties. Thus, proper reporting would greater add to the process of UN accountability and might deter further peacekeepers’ involvement in SEA.

IV. EXISTING STRATEGIES ON INCREASING PEACEKEEPERS’ ACCOUNTABILITY AND HOW THEY CAN BE IMPROVED

There have been many suggestions on strategies to reduce, eliminate and impose accountability on peacekeepers for their participation in SEA. There is the zero tolerance approach which the UN has currently taken, which means that peacekeepers on duty cannot engage in any kind of sexual activity with locals, whether consensual or not. The approach illustrates that gender sensitive training of the UN personnel to prevent SEA has not been taken seriously.\textsuperscript{67} It has additionally been condemned for removing the agency of the women of the

\textsuperscript{64} ibid 219.
\textsuperscript{65} ibid.
\textsuperscript{66} DPKO (n 17) para ii; Grady (n 6) 219.
\textsuperscript{67} Willett (n 29) 152.
Global South, and confirms the status of the UN as a heteronormative masculine racially hegemonic structure.\textsuperscript{68}

Another measure is Grady’s impartiality/neutrality concept, which implies that there needs to be a fundamental change in how the UN sees itself as impartial and neutral. She contends that peacekeepers’ involvement in SEA makes them partial;\textsuperscript{69}

By taking part in the sex trade, peacekeepers and humanitarian aid workers support economies that maintain instability in the region, perpetuate abuses of women’s, girls’ and boys’ human rights, further entrench systems of inequality and exploitation, and, thus, thwart a return to real peace and human security.\textsuperscript{70}

Furthermore, she argues that the political consequences flowing from their involvement makes it difficult to maintain ‘... the cooperation of the parties to the conflict in the search for a peaceful solution’.\textsuperscript{71} If impartiality is crucial to the UN’s philosophy of peacekeeping, any threat to it should not be accepted. Therefore, ‘framing SEA as a threat to peacekeeping impartiality ...’ gives feminists a greater voice at the UN.\textsuperscript{72}

In addition to the aforementioned academics, Ferstman observed that there has been a lot of rhetoric on the issue of SEA, yet little has been done to actually fill the gap of responsibility. This gap is seen in the limits of extra-terrestrial jurisdictions of courts as many accusations against peacekeepers are dropped due to lack of jurisdiction. She argues that a solution to this would be to create a court within the UN, which could aid and assist the national post-conflict societies that would otherwise be inadequate to do so. She also suggests that one should use the existing resolutions to create a ‘... more precise set of principles for troop-contributing countries to be signed off before UN acceptance of their troops’.\textsuperscript{73} She contends that all actors should be involved in

\begin{flushleft}
\textsuperscript{69} Grady (n 6) 223.
\textsuperscript{70} ibid; Mazurana (n 13) 34-35.
\textsuperscript{71} Grady (n 6) 224.
\textsuperscript{72} ibid.
\textsuperscript{73} Carla Ferstman, ‘Criminalizing Sexual Exploitation and Abuse by Peacekeepers’ (\textit{United States Institute of Peace Special Report} 335, 2003) 13.
\end{flushleft}
the process of enhancing accountability: the UN, the peacekeepers and the victims. As stated in Resolution 1888:

[End]ning impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses, drawing attention to the full range of justice and reconciliation mechanisms to be considered, including national, international and ‘mixed’ criminal courts and tribunals and truth and reconciliation commissions, and noting that such mechanisms can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the rights of the victims.74

Ferstman also suggests that a more detailed reporting procedure, where both TCCs and the UN would be more involved, would increase the check and balances and lead to greater transparency.75 It has also been suggested that the UN should prohibit TCCs from sending peacekeepers who have previously been accused of committing SEA, as forcing TCCs to take actual steps towards combatting the current lack of punishment could be an effective step towards increasing accountability. Nonetheless, the approach that will be afforded most attention in this analysis is the effect of gender mainstreaming peacekeeping operations, which demonstrates the fundamental issues with the inherent construction of the UN.

4.1 Gender Mainstreaming Peacekeeping Operations

There is wide debate about the concept of gender but for the purposes of this analysis it is understood as multiple social structures of power that interact with various factors, i.e. intersectionality,76 which is constantly produced and reproduced.77 In other words, there is a ‘... necessity seeing that there are not only power differentials between each category, but also within each ... intersection of these structures that produce multiple masculinities and femininities, and concomitant power differentials, within each category’.78

This definition is important to bear in mind when reading and interpreting Resolution 1325, as the Resolution can be interpreted to be based on liberal

75 Ferstman (n 73) 10.
76 Cohn (n 4) 3, 4.
77 ibid 9-10.
78 ibid. 5.
feminist definitions of gender, and therefore the gender mainstreaming processes suggested therein are based on their idea of achieving formal rather than transformative equality. It is also important to remember that gender is sometimes interpreted synonymously with ‘woman’,\(^79\) in which case gender issues actually refer to women’s issues. This can be highly problematic because it does not accurately address the core of the problem and creates a hegemonic masculine discourse.\(^80\)

Sustainable gender mainstreaming in peacekeeping refers to changing the relationship between the masculinised protector and the feminised protected, i.e. the aforementioned dichotomy of power relations. To create a working concept of accountability, one must first define how gender mainstreaming changes the view and treatment of victims of SEA; and the ‘key goal is to ensure that the ideas of masculinity and femininity that are linked to violent behaviour are not uncritically carried over in post-conflict situations as part of daily life’.\(^81\)

Additionally, the extent to which the UN has succeeded in its attempt to reduce SEA by employing more female peacekeepers will be analysed. Notwithstanding that the below analysis does not specifically identify the individual peacekeeper’s accountability, it addresses how the UN deals with its vicarious responsibility to make sure that SEA is reduced.

Resolution 1325’s ‘... approval marked a milestone in the struggle for greater gender equality at all levels of peacekeeping, peacemaking, peacebuilding and post-conflict reconstruction and it was significant because the UN had fully identified women as constructive agents of peace, security and post-conflict reconstruction’.\(^82\) Despite the fact that Resolution 1325 was seen as a breakthrough for gender equality, it is important to remember that it is not a treaty\(^83\) and the language used can be interpreted rather vaguely. In paragraph 5, the UN merely expresses ‘... its willingness to incorporate a gender perspective into peacekeeping operations, and urges the Secretary-General to ensure that, where appropriate, field operations include a gender component’.\(^84\) There has also been ‘[a] general lack of operational coherence for implementing the UN’s 1325 commitments. Partly, this can be attributed to the fact that there has been no lead agency within the UN tasked with implementing 1325’.\(^85\) The

\(^79\) Willett (n 29) 150.
\(^80\) ibid 150-51.
\(^81\) Pruitt (n 38) 69.
\(^82\) Willett (n 6) 142.
\(^83\) ibid.
\(^84\) UNSC Res 1325 (30 October 2000), UN Doc S/RES/1325.
\(^85\) Willett (n 6) 142-43.
responsibility ascribed to all of the UN departments to implement the gender-mainstreaming tool proved faulty due to the lack of accountability that followed a failure to implement.\textsuperscript{86} This has resulted in many academic and UN writings on the problems of SEA and gender mainstreaming, but minimal action has been taken to ensure the implementation of the strategies in the Resolution. Willet sees the ‘state-centric, patriarchal and militaristic’ structure of the UN as one of the obstacles to that implementation.\textsuperscript{87} Even so, establishing the UN’s efforts on stimulating gender equality is a small step forward to addressing the major problems with gender mainstreaming within peacekeeping missions.\textsuperscript{88}

The Resolution is of importance when analysing accountability as it ‘[c]alls upon the UN and its member states ... to train peacekeepers and local security forces in gender awareness; to provide greater funding for measures to protect women during armed conflict; to rebuild institutions that provide essential services to women; and to support women’s organizational efforts in conflict prevention and peacemaking’.\textsuperscript{89} Hence, the UN should automatically be vicariously responsible for SEA crimes perpetrated by peacekeepers. To add on, it should not be possible to circumvent this responsibility on the basis of providing gender training as this could lead to a gap in responsibilities.

Pruitt lists several recognised benefits of the gender mainstreaming of peacekeepers. According to the UN, having more women in peacekeeping helps reduce conflict and confrontation, improves the access and support for local women, empowers women, provides a safer environment for women, shows the UN’s commitment to diversity, and broadens the skills of the peacekeeping mission.\textsuperscript{90} Research shows that female police and mission staff have calmed dangerous situations, reduced cases of HIV, and brought about more civilised behaviour among staff. For example, ‘Indian all-women formed police units ... not only managed to reduce incidences of rape and sexual harassment in Liberia’\textsuperscript{91} but also inspired the launch of more women peacekeeping contingents. The Indian FFPU has helped reshape attitudes around women’s

\textsuperscript{86} ibid 143.
\textsuperscript{87} ibid 149.
\textsuperscript{88} ibid 143.
\textsuperscript{89} ibid 142.
\textsuperscript{90} Pruitt (n 38) 68.
\textsuperscript{91} Malathi de Alwis, Julie Mertus, and Tazreena Sajjad, ‘Women and Peace Processes’ in Carol Cohn (ed), Women and Wars (Polity Press 2013) 185-86.
role in peace and security by highlighting ‘... that femininity can include strength and the capacity for protection’.

The inclusion of women adds legitimacy and effectiveness to the mission. This is supplemented by evidence that shows that ‘the presence of women peacekeepers can and does foster a change in male behaviour when women are deployed in PKOs’. With reference to the UN’s attempt to increase accountability for SEA, all-female police support operations (PSO) have been deployed. The unit was seen as a success for openly challenging ‘... gender norms that suggest that women are unsuited to security work’. These women’s capabilities were measured from the yardstick of masculine able-bodiedness, and many have highlighted that they managed their tasks effectively despite being women.

Regardless of the aim to gender mainstream peacekeeping missions, reports show that the results are still relatively meagre. In 2008, only 1.98% out of the 77,492 peacekeeping troops were women, most of which came from the Global South and held lower positions. According to Willett, this is because of ‘... the resilience of male-dominated power structures within the UN ... In the 60 years of UN peacekeeping (1949–2009) only seven women have ever held the position of special representative to the Secretary-General (SRSG)’. The situation is further aggravated by the significant abuse and discrimination faced by female peacekeepers, discouraging prospective female volunteers. Female peacekeepers can face the double burden of having to protect victims whilst simultaneously being put in danger of sexual violence and SEA themselves.

The increase of women in peacekeeping should not be overlooked as it can potentially foster change. ‘Women have been encouraged to join PKOs as ‘sexual violence problem-solving forces’, bearing the complex role of ‘protectors’ of local women, from local men and from male peacekeepers’. In acquiring this role of ‘protector’, female peacekeepers also run huge career risks if they decide to challenge their colleagues and superiors who commit SEA.

92 ibid 71.
93 ibid 68; Jacobson (n 2) 222.
94 Pruitt (n 38) 70
95 ibid 71-72.
96 Willett (n 29) 151-52.
97 ibid 151.
98 ibid 152.
99 Pruitt (n 38) 69.
100 Willett (n 29) 152.
101 Jacobson (n 2) 222.
Furthermore, the essentialist assumption that women can relate more easily to each other because of their gender is a flawed one; this is illustrated in the example of female Norwegian peacekeepers, who have reported that people react to their uniform and not their sex.\(^{102}\) Unfortunately, the idea of “more women” as a solution has been criticised for ‘... masking some other vital areas’.\(^{103}\) These all-female troops have arguably entrenched heteronormative gender stereotypes and neglected the intersectionality of the women involved.\(^{104}\) The all-female troop sent to Liberia did not merely entrench existing gender stereotypes but actually reclaimed the meaning of words like “girls”, “mother” and “ladies”. In fact, they did not merely act in the capacity of male able-bodiedness but they, with their agency, shifted the gendered meaning of the concept ‘female peacekeeper’.\(^{105}\) While not enough research has been conducted on the benefits of having an all-female peacekeeping unit,\(^{106}\) there have still been some positive effects of the debate on how the UN deals with gender.\(^{107}\) This is important as it leads to criticism of the UN’s infrastructure and might in the long run pressure the UN to make changes to its institution in order to make it more gender-neutral.

As some might argue, there is danger in focusing on SEA because it diverts attention away from women’s other experiences of war. It is critical that the UN keeps in mind the interconnected web of rights that affects each other and should be properly protected. Simply put, in order to reduce SEA, the UN needs to address the multiple issues leading to the inequality of women in conflict. By accurately addressing women’s basic human needs and rights in the aftermath of conflict, for example, “survival prostitution” might be reduced. So, ‘those who are most affected by insecurities and injustices must be empowered and enabled to participate in their own problem-solving’.\(^{108}\)

In short, even though gender mainstreaming is extremely important when including women's roles and experiences of war in peace-building strategies, it essentially depends on the type of constructed gender being mainstreamed. When using gender mainstreaming to include women’s continuum of experiences of war, the concept of gender should be deconstructed in order to avoid entrenching gender stereotypes in a framework meant to deconstruct

\(^{102}\) Pruitt (n 38) 68.
\(^{103}\) Jacobson (n 2) 222.
\(^{104}\) Pruitt (n 38) 69.
\(^{105}\) ibid 74.
\(^{106}\) ibid 69.
\(^{107}\) ibid 76.
\(^{108}\) Willett (n 29) 157.
gender. Post-conflict citizens should not merely be considered as victims, but should be given the potential to fully recognise their capacity as agents of their own lives. Not until this is done can one address the lopsided power dynamics of the world, and deconstruct the current imperial globalisation that the North has over the South that has justified the neglect of effectively dealing with peacekeepers’ accountability. It is appalling how little progress gender mainstreaming has actually had since the creation of Resolution 1325. Academics argue that this is because the Resolution was ‘... grafted onto existing power structures’ and was therefore never going to be wholly successful. Therefore, the gendered construction of the ‘protector’ and ‘protected’ discussed above implies that the ‘... gender mainstreaming within the UN can do little to challenge the epistemological underpinnings of the dominant masculanist and militaristic discourse’.

Furthermore, using an all-female PSO to reduce peacekeepers’ participation in SEA has been founded on a heteronormative basis and does not afford long-lasting change because it does not address the root of the problem. This is not a way to increase accountability, but rather a way to sidestep the issue by ‘... diverting responsibility to female peacekeepers’. As seen in the above analysis, there is a danger that such a strategy further entrenches stereotypical gendered assumptions instead of eradicating them. As women become protectors of other women and intersectionality is ignored, transformative equality is hampered. Without addressing the constructions of masculinity, femininity, heteronormativity and race that are formed within the UN itself, the strategy fails to allocate responsibility on the UN for its personnel’s illicit acts.

V. CONCLUSION

The outrage written by Enloe in “Afterword” revolving around the creation of Resolution 1325 and endless military memos is the same outrage that one feels when discovering the gravity of some of the crimes committed by peacekeepers. While there has been much work and literature produced to bring attention to SEA in post-conflict societies, there is also the outrage from realising that those who could have actually had an impact have done so little to combat the issue.

109 ibid 143.
110 ibid 144.
111 ibid 152.
112 Enloe, ‘Afterword’ (n 1).
The UN cannot ignore women’s experiences of war anymore; ‘Ten years on, Security Council Resolution 1325 remains more of a rhetorical than practical commitment. As the following contributions illustrate, for the most part the implementation of 1325 has been woefully inadequate’. 113 The lack of effective strategies to combat SEA is premised on a fear that greater accountability will threaten the willingness of countries to deploy peacekeepers. While the sensitive and burdensome position of the UN should be acknowledged, it does not sufficiently justify a neglect to punish peacekeepers involved in sexual violence and SEA. If the UN fails to enforce long-lasting and real changing strategies or evaluate its own infrastructure for more gender and race inclusivity, then it stands to lose its own purpose as it might lose the justification for its existence. By omitting to make a real effort to change the setting for sexual violence and SEA in post-conflict societies, the UN ignores the experiences of the victims of these crimes. This Article has suggested that we might not need new strategies per se to create a better process of accountability of peacekeepers. An alternative would be to work on improving the UN’s infrastructure itself to effectively implement the already existing strategies. Only then can we turn our outrage into action.

113 Willett (n 29) 156.
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WEBSITES AND OTHER SOURCES
Customary Law and Custom in New-Caledonia: Legal Pluralism, Citizenship and the External/Internal Sovereignty Issue

Oona Le Meur*

This Article will focus on the complex relationship between custom and Customary Law, through the example of New-Caledonia. Indeed, this French overseas territory has a unique sui generis status with regard to the French Constitution and its principle of indivisibility. In the contemporary history of the Island, several layers of law have always coexisted, forming a complex legal pluralism that has resulted, during the second half of the 20th Century, in the institutionalisation of a legal dualism – hence the recognition of a Customary Law that is on an equal footing with the Common Law. This is one of the accomplishments claimed by the Kanak ‘independantistes’, who also promoted a cultural identity quest, which especially acquired a renewed importance attributed to custom and customary practices. Given the necessary changes and adaptations that both custom and Customary Law have been going through for almost forty years, they have never been clearly differentiated. This Article will argue that these two disciplines do not pertain to the same register of enunciation (Latour, 2006), and that if both are hybrid entities, then Customary Law is more law than custom. I will support this argument by showing that Customary Law extensively uses Common Law technicalities, principally through the mobilisation of legal fiction (Thomas, 2011), producing recombinant effects (Strathern, 2005).

I. INTRODUCTION

As New Caledonia is on the verge of deciding, by referendum, if there will be a definitive separation or an irreversible continuation of its existence as part of the French Republic, there are many issues that surround both possible outcomes. While official independence would require an important in-depth strengthening of the already sketched institutions, retaining New Caledonia

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within the French institutional framework would signify the pursuit of a unique status of autonomy. No matter what result the referendum holds, the current level of autonomy cannot be diminished – unless it is through a Constitutional amendment. This is not the first time that France has had to deal with an established legal dualism within its otherwise very centralised legal framework. Indeed, the Noumea Accord (1998) established an institutionalised legal dualism where French Statutory Law and the Customary Law had to coexist.

The issues at stake here are numerous and varied. One of them is the all too often neglected complex relationship between Customary Law and custom. This point will be the focus of this Article, by trying to emphasise the difference between custom and Customary Law in the light of the recent Caledonian history. It is important to stress how, contrary to the current designation and common understanding, they are very different repertoires (or registers). Custom is indeed ‘something else’, an ‘enunciation register’ probably closer to politics than to judicial language. Customary Law is clearly inventing itself through hybridisation processes, dealing with colonial heritage and contemporary Common Law standards. While the transformation of custom into (Customary) Law tends to essentialise it and to change its ‘nature’, custom’s processes usually tend to be those of negotiability – including power struggles within socio-political hierarchies. Custom, as a concept, belongs to the anthropological sphere, but Customary Law is of a hybrid nature. I will argue that it is probably closer to law than to custom. As for custom and politics, the tension which lies between the individual and the collective (be it society or a community), is managed through the search for a social balance. Whilst in law (as in Customary Law), the opposition is drawn between custom and rules, that is to say tradition and laws. Additionally, law is about individuals. Only individual cases are judged, and one can imagine the legal difficulty in dealing with collective responsibility for instance. Thus, both Customary Law and custom are going through a process of re-conceptualisation, or evolution, through the interaction between processes of decolonisation and the rise of an autochthonous discourse; this can be phrased in terms of external/internal sovereignty and identity quest.

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This Article aims to analyse how these processes interact and play with one another, even though they happen in very different public domains. In order to do so, an academic literary review of anthropologists and historians, as well as jurists that have looked into related subjects, will be discussed. Moreover, in order to situate the Article within the context, some contemporary judicial cases will be studied in depth and primary-source materials, such as the Charter of the Kanak People or the Accord de Noumea, will be critically analysed.

The main concepts mobilised will be the legal fiction that Thomas, in particular, defined as being a technicality as well as a source of power of the law. It is the voluntary and official deformation of Truth, in order to translate – and thereby create - the facts, instead of revealing them. Thomas additionally postulates that law is, in a way, a disparate assemblage of texts without authors, very analogous to customs. Through the study of a chosen selection of cases, we will see that Customary Law uses this technicality at least as efficiently as Common Law. The second important notion is Strathern’s powerful ‘recombinant effect’, which is the ability to reassemble old facts or traditions in a new innovative way. It is the capacity to present the new in the frame of the old and vice versa. If law is not the only discipline to possess this quality, it is the discipline where this occurrence is most deliberate. I will focus on the recombinant effect of Customary Law on family organisation through specific judicial cases.

From here, I will start with a review of the historical background in the first part, reviewing the basis of traditional law and the survival of the custom despite the Régime de l’Indigénat and the Reservations. Following this is the rise of a particular civil status, through the institutional re-evaluation of the Accords de Matignon and Noumea of customary practices and lifestyles. This recognition of custom does not always happen smoothly and it will be important to mention the different issues surrounding the efforts of preservation and unification of the custom. The clearest examples are the written work of the Customary Senate on the Common Values of the Kanak People and the Charter

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4 Yan Thomas in Olivier Cayla and others (eds), Les Opérations du Droit (EHESS-Gallimard-Seuil 2011).
5 Marilyn Strathern, Kinship, Law and the Unexpected: Relatives are Always a Surprise (CUP 2005).
6 I will use the terms ‘particular status’, ‘particular civil status’ and ‘customary status’ interchangeably.
7 Sénat Coutumier ‘Synthèse Finale: Socle Commun des Valeurs Kanak’ (Senat Coutumier de la Nouvelle-Calédonie, 2013) <http://www.senat-coutumier.nc/images/sampledata/pdf/SOCLE_2014.pdf> accessed 7 July 2014. This is a collective research study commissioned by the Customary Senate and pursued in conjunction with the Chiefdoms and the Councils of Elders during eight months from May to December 2013; resulting in the adoption of the Charter of the Kanak People in April 2014.
of the Kanak People. The second part presents the main argument which is that Customary Law is law because of two major truths: the ‘recombinant effect’ of Customary Law on customary practices, family organisation in particular, as well as the use of legal fictions.

II. HISTORICAL BACKGROUND: FROM NEGATION TO RECOGNITION

2.1 Traditional Law

Jean-Loup Vivier reminds us that the Kanak People used to be a hierarchical society, where life was governed by precise rules referred to as ‘the custom’. These customary norms ruled aspects of life that French Law would not take into account and made custom something very different to law. It uses a different register of enunciation, closer to politics, as the importance of speech and words demonstrate, than to law.

If the customary rules were frequently formulated and respected by the clan, bigger sanctions were decided by the elders, in a context where wars and greater violence were a frequent alternative to cordial exchanges or agreements between groups. As a consequence, the distinction between conflicts that should have been ruled customarily or through a power struggle was very uncertain.

2.2 Indigénat and Reservations: The Colonial Effect

In the French imperial context, nationality was divorced from citizenship, with the Indigénat established for the first time in Algeria in 1856. The same was done in New Caledonia because it was presumed that the civil code could not be

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9 Strathern (n 5).
10 Thomas (n 4).
12 Latour (n 2).
applied to indigenous people whose customs were seen as archaic.\textsuperscript{14} As a result, a law was promulgated on 18 July 1887 in Noumea which, passing from extension to extension, would define the juridical boundaries of the \textit{Régime de l’Indigénat}, sometimes erroneously called \textit{Code de l’Indigénat}, while not even constituting a homogeneous codified ensemble. It was more of a disparate assemblage of legal texts adapted to local particularities, particularly repressive in New Caledonia, which can be defined as a ‘permanent temporary situation’.\textsuperscript{15}

However, the pretence of a ‘civilising mission’ justifying the establishment of the \textit{Indigénat} was not really a goal, as the inflexibility of status – closely linked to racial stereotypes – dismissed any attempts at assimilation.\textsuperscript{16} An official definition of ‘\textit{Indigène}’ was only made by Decree n° 681 on 3 September 1915, thus making it the occasion to reinforce the regime.

This dissociation between nationality and citizenship opened a gap in the juridical space where the principle of exceptionality governed, neglecting the fundamental republican principle of equality. It was the creation of passive subjects unto an imposed sovereignty.\textsuperscript{17}

Paradoxically, no mention of a personal or particular status was officially made in New Caledonia for the Kanak People before 1930.\textsuperscript{18} Prior to this, the mention of a particular status was only made to prevent the intervention of Common Law and the application of the civil code in indigenous matters. Similarly, accession to French citizenship was not possible before 1932.

The \textit{Indigénat} was always criticised within the Parliament, particularly during the 1900-1914 period. Merle denounces the non-respect of the separation of powers, especially because it was the colonial administration that made justice and had punitive powers under the \textit{Code de l’Indigénat}, making arbitrary

\textsuperscript{14} Emmanuelle Saada, \textit{Les Enfants de la Colonie: Les Métis de l’Empire Français, Entre Sujétion et Citoyenneté} (La Découverte 2007).
\textsuperscript{17} Isabelle Merle, ‘Du Sujet à l’Autochtone en Passant par le Citoyen. Les Méandres, Enjeux et Ambiguités de la Définition du Statut des Personnes en Situation Coloniale et Postcoloniale. Pour Exemple, la Nouvelle-Calédonie’ in Elsa Faugère and Isabelle Merle (eds), \textit{La Nouvelle-Calédonie vers un Destin Commun ?} (Karthala 2010) 21-24.
\textsuperscript{18} ibid.
decisions routine. Mamdani referred to this as ‘colonial despotism’, namely the absence of the separation of powers.

In the meantime, a decree from 1898 restructured the administration of the tribes, giving extensive powers to the Chiefdoms and reorganising them according to a colonial recreation of the custom. However, this happened without any attempt at codification. One could suggest that the spatial and racial segregation replaced the need for codification. The territory was divided into districts ruled by Big (or administrative) Chiefs, who were responsible for the maintenance of public order in their respective areas. Their duties were to collect taxes or provide a workforce for example and they were backed by compelling punitive powers. The Chiefs were established as a relay between the ‘subjects’ and the colonial police. The Chiefs could be sanctioned if they did not obey the Administration of Indigenous Affairs (‘Syndic des Affaires Indigènes’) and this happened quite often. The decree also established ‘small’ tribal Chiefs and a ‘council of elders’ in each village.

The tribe was considered as a collective moral person, held responsible for offences committed by its members, and they were circumscribed to the reservation that they could not leave without official authorisation. However, despite the colonial rearrangement of the Chiefdoms and a new spatial organisation, internal indigenous matters were not taken into consideration. There was no serious attempt at the codification of custom, as was done in African colonies for example. There was strong evidence to suggest that the administration was more or less waiting for the ‘natural extinction’ of the Kanak People, as the population had been severely diminishing since the beginning of colonisation, reaching its smallest demographic level around 1917, the year of the last major Kanak revolt. This position of non-interference in Kanak interrelations concerning all private law matters, in particular, allowed

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19 Merle (n 15) 158.
22 Merle (n 15).
23 These punitive powers were to be exercised by the police force (Gendarmerie), which was more generally responsible for the surveillance of indigenous populations.
24 Bensa and Salomon (n 12) 172.
25 Merle (n 15) 28-30.
26 Muckle (n 16) 40-44.
the Kanak People to continue living according to custom, thereby preserving a strong cultural identity.27

2.3 The Preservation of Custom Despite Colonisation (Secrecy, Orality, Reservations)

The reservations and the non-codification of custom have allowed the latter to remain almost intact. Demmer shows how the importance of the secrecy and the orality of custom facilitated this preservation by permitting greater flexibility.28 Kanak Chiefdoms were hence political spaces, neither completely autonomous nor frozen in a precolonial model, but constantly evolving and negotiating between different sources of legitimacy. Demmer also observes that the ritual dimension of the Chiefdoms tended to weaken in practice but the symbolism of the chief’s incarnation of the group was still important.29 She adds that a political configuration is never fixed or completely changeable. What makes the permanence possible in the long term is the upholding of the secrets of the past. It is widely known that the Chiefdoms were not always like they are today and that the impact of colonisation indeed consecrated a new social order, but keeping secret the rites and the custom is what confers upon them their strength. Furthermore, it is through the manipulation of the secret that changes can still happen or be prevented. Arguably, what works for the Chiefdoms could work for Customary Law, to a certain extent. As has been made evident through the example of the Kanak People, it seems essential to maintain some secrecy through the non-codification and the maintenance of orality in its processes. Otherwise the original flexibility would be lost.

Conversely, it was the very Chiefdoms that felt a need for a written document in order for custom to be unified through common customary values and to go back to the roots of the custom and reaffirm its strength. It was a specific identity movement, also linked to a context of economic development around the fast growing mining exploration requiring the Chiefdoms to change so as to ‘conform to the norm’ of the development process. The Charter of the Kanak People, ratified on 16 April 2014, is proof that deep changes have occurred in the expression of custom and regarding the conditions of its very existence.

Similarly, Trépied notes that power structures in the Kanak world are largely based, on the one hand, on colonial influences; and also, on the other influences

28 Demmer (n 21) 7-9.
29 ibid.
suitable to the Kanak world. The complex articulation between colonial configurations and Kanak political logics was the entry pass to the electoral tribunes for some important Kanak chiefs and notables. This mix of influences was certainly the key to autonomist claims and a new space for the Kanak People on the political and institutional scene. Customary Law is probably the best example to illustrate this.

2.4 The Revival of Custom For Recognition Claims (From Indigeneity to Autochthony)

The abolition of the Regime de l’Indigénat in 1946 initiated a new dynamic between local and national power relations. The Kanak People, still in Reservations, became French citizens, but of a distinct kind. It is interesting to note how the emancipatory struggle of the Kanak People went through semantic changes. The ‘Kanak discourse’ of the 1970s precedes the ‘autochthonous discourse’ of the 1990s; which was based on the contemporary United Nations (UN) definition of the term and not as a euphemism of the term ‘indigenous’ in the 1950s. Melanesian ethnic groups were replaced by unified autochthonous claims. The ‘Indigène’ was replaced by the ‘autochthon’; the ‘Canaques’ by the ‘Kanak’; and the traditional by the customary.

The term ‘autochthon’ expresses the idea of the anteriority of a certain population’s presence on a territory. In the UN definition, it is closely linked to a political and/or economic situation of domination (often of a colonial nature), leading to claims related to identity, economy and politics. Hence, the ‘autochthonisation’ of independence claims aims to seek support on the international stage, where guarantees and human rights are offered to autochthonous minorities. Mokkadem also studies how the revolutionary actions of one nationalist leader, Éloi Machoro, unified indigenous groups into the Kanak People. It is a microanalysis through a personal political trajectory on a national movement, of a gradual identification of a population claiming

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30 Benoît Trépied, “Deux Couleurs, un Seul Peuple?” Les Paradoxes de l’Union Calédonienne pré-Indépendantiste dans la Commune de Koné’ in Elsa Faugère and Isabelle Merle (eds), La Nouvelle-Calédonie vers un Destin Commun? (Karthala 2010).
32 Kanak was originally a pejorative term that was re-appropriated by the nationalist movements. The two ‘k’s are important because no word in French starts or finishes with the letter ‘k’.
the sovereignty of a country. To Graff the reaffirmation of the custom and the recognition of a Kanak identity go hand in hand with the replacement of negotiations about independence, through the promotion of an ‘internal sovereignty’ or ‘autonomy’ propositions. As Povinelli has shown for Aboriginals, with the proclamation of the Native Title Act in 1993, after the end of the *Mabo* case, recognition can also be a way to reassert state sovereignty and the supremacy of liberalism. In their struggle for independence, the Kanak People had to use Western tools in order to be heard, especially international ones as the UN. Nevertheless, the UN’s golden rule of non-interference further contributed to the shift from independence claims to internal self-determination claims. However, this shift in the semantic domain does not mean that the tenants of the autochthonous discourse completely abandoned the idea of independence. Once the shift from *Indigènes* to autochthons was made, the French State tended to create or recognise customary institutions, supposedly to allow a certain representativeness and visibility of this civilisation on the territory.

The Customary Senate was created in 1988 and named as such in 1998. It is a consultative organ. The Congress of New Caledonia had to plead for the Customary Senate as existing for all the ‘*lois du pays*’ (law of the land). It was through this that the Treaty of Nainville-les-Roches defined the abolition of colonialism as the recognition of the fact that the Melanesian Civilisation was equal to the other civilisations and to put in place customary institutions to

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35 Graff (n 31).
36 For further details on this case, please see *Mabo and others v Queensland* (No 2) HCA 23, (1992) 175 CLR 1.
38 The Kanak People managed to be inscribed on the UN list of countries to be decolonised for the first time in 1946. France asked New Caledonia to be withdrawn from this list after the promotion of a new statute for New Caledonia in 1947. However, the ‘waltz of the statutes’ tended to be more and more repressive, taking rights back as soon as they were given. Kanak leaders asked to be re-inscribed on the list of countries to be decolonised on 2 December 1986, emphasising the right to self-determination of the Kanak People.
39 The *Accord de Matignon-Oudinot* established a ‘*Conseil Consultatif Coutumier*’ (Consultative Customary Council).
40 The *Accord de Nouméa* makes the change from the Consultative Customary Council to a Customary Senate.
41 12 July 1983. Treaty negotiated between the ‘*Indépendantistes*’, represented by Jean-Marie Tjibaou, the ‘*Loyalists*’, represented by Jacques Lafleur and the French government, represented by Georges Lemoine, State Secretary of the Oversea Territories. It recognises the Kanaks as the first occupants of New Caledonia and reassesses their inherent and active right to independence (‘droit actif et inné à l’indépendance’); Isabelle Leblic, ‘Chronologie de la Nouvelle-Calédonie’ (2003) 117(2) Le Journal de la Société des Océanistes 299.
make the Kanak visible on the institutional landscape of the territory.\textsuperscript{42} It was also through this treaty that the leaders of the Kanak Independence Movement recognised the status of ‘victimes de l’Histoire’ with regards to the descendants of the settlers, which opened the way for the political project of a common destiny. After the physical re-conquest during the nationalist insurrection that happened between 1984 and 1988,\textsuperscript{43} the affirmation of a Customary Law became more about institutional conquest. However, Graff observes that this process of ‘autochthonisation’ subtly made the possibility of a complete independence obsolete by promoting a strong autonomy instead, through the concept of ‘internal sovereignty’.\textsuperscript{44} In particular, the Accord de Nouméa insisted on the fact that the recognition of Kanak sovereignty is a step towards a common sovereignty, not a separation\textsuperscript{45} (even if the ambiguity of the text allows for several interpretations).

\section*{III. RECOGNITION OF AND ISSUES SURROUNDING CUSTOM}

\subsection*{3.1 The Institutional Recognition of Custom (Accords De Matignon and Nouméa)}

As Thomas\textsuperscript{46} noted in his effort to identify the operations of laws: in order to be inviolable, the law either negates other laws for its own account, or negates itself for the sake of other laws or principles.\textsuperscript{47} In this case, French Law had to refute its principle of indivisibility in order to grant the autonomy required by the Accord de Matignon (1988), and later by the Accords de Nouméa-Oudinot (1998). Similarly, in order to reinterpret Article 75 of the French Constitution and to have the possibility of recognising a customary status, and consequently to establish legal pluralism for overseas territories, the principle of the unity of

\begin{footnotesize}
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\item \textsuperscript{42}Graff (n 31).
\item \textsuperscript{43} Called ‘Les Évènements’, like the Algerian war of independence. Nonetheless, there are some literary debates about how to name this period exactly. As the violence happened mainly between three actors – that is to say the State, the Kanak People and the ‘Caldoches’ (or white settlers) – I would argue that ‘nationalist insurrection’ would be the most appropriate term.
\item \textsuperscript{44}ibid.
\item \textsuperscript{45} Accord de Nouméa, 5 May 1998, Preamble, s 4: ‘Dix ans plus tard, il convient d’ouvrir une nouvelle étape, marquée par la pleine reconnaissance de l’identité kanak, préalable à la refondation d’un contrat social entre toutes les communautés qui vivent en Nouvelle-Calédonie, et par un partage de souveraineté avec la France, sur la voie de la pleine souveraineté’ (Ten years later, it has become necessary to move on to the next step, characterized by the full recognition of the Kanak identity, prior to the refoundation of a social contract between all the communities living in New-Caledonia and to share sovereignty with France, on the way to full sovereignty) (emphasis added).
\item \textsuperscript{46}Thomas (n 4).
\item \textsuperscript{47} Yan Thomas, ‘De la “Sanction” et de la “Sainteté” des Lois à Rome. Remarques sur l’institution juridique de l’inviolabilité’ in Thomas (n 4).
\end{itemize}
\end{footnotesize}
French Law had to be annulled. Like the recognition – or perhaps the invention – of the Native Title Act in 1993 in Australia that the Mabo Case would later trigger, the Accord de Nouméa finally gave sovereignty back to the Kanak People, recognising their particular civil status. As the Australian government did a few years earlier, the French government did its ‘historical laundry’ by using law and order to re-evaluate the past in the shaping of the future. Finally, by recognising a sovereignty for the Kanak People – which was more theoretical than practical, as it was not synonymous with independence – the Accord de Nouméa is another illustration of Povinelli’s future-perfect theory, ‘we will have been wrong,’ that modifies or attenuates the effects of the past in order to guarantee the future. The restitution of a ‘confiscated identity’ is conditional to the integration of this identity in a shared ‘common destiny’. As such, this treaty is a triangular power structure edged by politics, law and history. This structure produces a hybrid composition of Kanak logic reinforced with European technocratic rationalities. It is a sort of social contract that suspends the conflict by putting aside the possibility of an immediate independence, replacing it with a ‘shared sovereignty’.

It is interesting to note that Customary Law is not the only part of traditional society reprocessed in the light of the Accord de Nouméa. The attempts at codification similarly touch upon the linguistic issue, given the fact that today there are 28 Kanak languages. The institutional re-evaluation of these foundations of traditional society (language, law, education etc.) is probably the starting point of a process of normalisation of customs and traditions. What is important to note is that the Charter of the Kanak People and the formalisation of a Kanak language are Kanak claims but expressed in a French legal context. This means that all these recreations of Kanak customs are to be processed in the context of the Accord de Noumea and the strict juridical exigencies of

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48 Povinelli (n 37) ch 4.
49 ‘La colonisation a porté atteinte à la dignité du peuple Kanak qu’elle a privé de son identité. Des hommes et des femmes ont perdu dans cette confrontation leur vie ou leurs raisons de vivre. Des grandes souffrances en sont résultées. Il convient de faire mémoire de ces moments difficiles, de reconnaître les fautes, de restituer au peuple kanak son identité confisquée, ce qui équivaut pour lui à une reconnaissance de sa souveraineté, préalable à la fondation d’une nouvelle souveraineté, partagée dans un destin commun’ (Colonisation harmed the dignity of the Kanak people, and deprived it of its identity. Great suffering resulted from this. It is important to remember those difficult moments, to acknowledge the faults, to restitute to the Kanak People its confiscated identity, which means a recognition of its sovereignty prior to the foundation of a new sovereignty, shared in a common destiny). Preamble of the Accord de Nouméa (1998) para 3.
50 Mokkadem (n 34) 133.
professionalism. Yet being invested in such a mission is to retain the power of creating the customs – concerning law or languages – and to impose a certain vision of the criteria on the edge of the Kanak identity. Hence, to Salaün, any discourse on Kanak identity is necessarily performative; it never only aims to legitimise it but always aims to impose a certain definition of that identity.\footnote{ibid.} This is even more important as the Noumea Accord draws an allusive link between identity and sovereignty. Since the 1970s, the unveiling and the ‘construction’ of a discourse on this culture had as much an internal role as an external one. This also brings in the legitimacy issue with regard to the customary procedures of representation of the Kanak People. The Customary Senate, for example, which has to be consulted regarding any project concerning the Kanak identity, has already been accused of being conservative and promoting patriarchal values, leaving aside dominated people in the Kanak hierarchy.\footnote{Christine Demmer and Christine Salomon, ‘Droit Coutumier et Indépendance Kanak - L’Écriture d’un Droit Coutumier: une Volonté Partagée par l’Ensemble des Kanak?’ (Vacarme, 22 June 2013) <http://www.vacarme.org/article2263.html> accessed 7 October 2013.} The debates about the ‘invention’ or ‘creation’ of the contemporary Kanak culture, or even the evaluation of the degree of ‘authenticity’ of the contemporary custom, are probably not relevant here. It is sufficient to show how it is difficult for the Kanak People to think of themselves outside of the categories historically attributed to them; from indigenous/native (colonial formulation) to autochthon (United Nations formulation).

In the Charter of the Kanak People, custom is understood as encompassing spiritual values, lifestyle rules and customary practices. The need to have a definition and some common values was confirmed by the Customary Senate, which launched a research group founded on ‘common Kanak values’ (Socle Commun des Valeurs Kanak) that would, from now on, constitute the custom. While the importance of the secrecy and the orality of the custom was highlighted earlier, a century and a half of deep disruption have left the traditional custom in a grey area. It is surprising that the custom, which is older than French democratic institutions, has to use the tools of these very institutions to acquire legitimacy. It is a step further towards the unity of a varied Kanak population, divided into eight customary areas since the Accord de Nouméa. It is part of the process of reconstructing an identity by adapting it to contemporary times while securing traditions. The Charter aims to assert the underlying unity of the custom, despite a large variety of practices and degrees of engagement.

To further examine this simple argument that Custom is not easy to define, Filer’s study on the relationship of custom and law in Papua New Guinea is
useful.\textsuperscript{54} He observes how, in the local language, law and custom are represented by something possibly translatable as ‘roads’, which are very close to what is thought of as ideologies. He also notes that ‘traditional law’ was in fact replaced by ‘customary law’, strongly tainted by colonial and neo-customary influences. The law is indeed being constructed, including some non-legal notions or concepts. The custom is dissociated from the law, but is, in parallel, including new elements associable to ‘invented traditions’ or a ‘re-evaluation of ancestral law’, mainly in order to make land claims. Law and Custom are thus are two distinct ‘roads’ which, for Filer, ‘reify social relations’:

In that sense, the reality behind each metaphorical road is a form of public performance which reveals, displays, and dramatizes the social relations of everyday life, and thus provides a stage for the construction of male authority ... The Road of Custom is a form of public performance with its own rules, qualities and outcomes.\textsuperscript{55}

Although the situation is quite different from that which can be found in New Caledonia, some commonalities are striking. As in Papua New Guinea, New Caledonia is going through a re-evaluation of its law and custom. If the Customary Law is clearly in construction, as the Customary Law as such comes from a colonial typology; the custom is being reprocessed, not only in order to reactivate some traditional principles, but also in order to modernise it and make it ‘acceptable’ in the public sphere. It is a display, a performance being played out for internal needs – to the ends of an identity quest and external needs – in order to access a hypothetical independence or at least a complete autonomy. Arguably, the drafting of the Charter of the Kanak People is a good illustration of this process: firstly because its written form automatically makes it a cultural hybrid object; and secondly because it is a specific effort for a specific self-representation to be portrayed. It is therefore not merely a way to fight a colonial legacy or to resist capitalism. It is an act of translation and not an ideology, as Filer finally concludes, but maybe a ‘cult’. The cult is the performative identity that the Kanak People are defining and is expressed in public ceremonies.

As we have seen, custom is difficult to define; not only because it has various sources (colonial, precolonial, ‘invented traditions’ etc.) but moreover because it is characterised by a variety of uses and interpretations. It is time to move on from a debate between two simple oppositions, domination against resistance, or between tradition and inventions, as Le Meur suggests, to see the custom as a

\textsuperscript{54} Filer (n 1).
\textsuperscript{55} ibid 73.
governmental instrument problematising the relationship of the Kanak People with decolonisation, state-making and development. 56

3.2 The Issues Surrounding Custom

For this discussion, I will use the example of the Bouillant épouse Kothi c/. Bearune case. 57 This case highlights the difficulties of collaboration, which judges encounter in some cases with customary assessors. 58 The problematic cases usually touch upon biological families and other social matters that are traditionally not recognised by the custom. In order to protest or indicate their disagreement, absenteeism is the main strategy implemented. 59 The first audience was due on 19 March 1999 but one of the two customary assessors – whose presence was compulsory – did not attend. As a result, the audience was cancelled. Two new customary assessors were nominated on 3 May 1999 but neither of them showed up for the audience of 31 May 1999. That audience was also cancelled. The judgment of 21 June 1999 again nominated two new assessors and rescheduled the hearing for 2 August 1999. On this date, the two customary assessors claimed that this case did not concern them as the two parties were not customarily married and no customary ritual was ever made with regard to their relationship. They declared with honesty that they were not willing to assess this case. The judge’s answer was that the presence of two customary assessors is mandatory in cases concerning individuals under this particular civil status and that the subject matter of the case does not necessarily have to relate to custom. The judge stated that there was no way for her to force the assessors to attend, or to sanction those who did not come and as such, prejudice the investigation; there still remained an obligation to pass judgment however. The judge therefore declared that the case would be judged under the Common Law dispositions.

56 Pierre-Yves Le Meur, ‘Réflexions sur un oxymore. Le débat du “cadaster coutumier” en Nouvelle-Calédonie’ in Elsa Faugère and Isabelle Merle (eds), La Nouvelle-Calédonie vers un destin commun? (Karthala 2010).
57 Bouillant épouse Kothi c/. Bearune, Civil Tribunal of Noumea (judgment no 2082 of 30 August 1999).
58 The ruling of 15 October 1982 instituted the recourse to customary assessors in New Caledonia in the Court of first instance and in the Court of Appeal. Their mission is to assist the tribunal in the case of a dispute between persons of a particular status. The ‘customary tribunal’, constituting one civil judge and customary assessors (always in majority in the first instance) rules on conflicts that happen daily in tribes or clans. The customary assessors’ rulings are equal to a professional judge’s pronouncement. Concerning the Court of Appeal, their decisions also have the same weight as the professional magistrates’ decisions; Régis Lafargue, La Coutume Judiciaire en Nouvelle-Calédonie. Aux Sources d’un Droit Commun Coutumier’ (Rapport pour la Mission De Recherche Droit et Justice, 2002) <http://www.gip-recherche-justice.fr/?publication=la-coutume-judiciaire-en-nouvelle-calédonie-aux-sources-dun-droit-commun-coutumier> accessed 7 October 2013. 
59 Lagargue (n 58); Bensa and Salomon (n 13).
Even though the main concern of this Article is not the evaluation of custom and does not aim to express any opinion about it, it is important to mention how the renewed attention given to custom does not go without tensions and polemics. As the Charter of the Kanak People mentions in its very first articles, Kanak society is organised by a patriarchal principle. Even with divergent interests between the clans and within them, authority is primarily founded on masculinity and seniority dominations. To avoid these, a certain amount of hierarchically disadvantaged Kanak persons tend to take advantage of the ‘Whites’ Justice’, notably women and young people. Among them are those who renounce their particular status in order to commit to the Common Law. Amongst them will be the socially marginalised or even those excluded from their familial groups. In their study on the relationship between the Kanak People and the French judicial system, Bensa and Salomon suggest that it is the increasing judicial power of Chiefs during the Indigénat period that reinforced the domination of already disadvantaged people in the Kanak hierarchy – once again, mainly young people and women.

A virulent debate started in the summer of 2013 when an article written by eight of the most renowned social scientists of the area heavily criticised the process of institutionalisation of the Customary Law and the resultant identity politics. While Salomon and Hamelin, in 2010, had already denounced the Customary Senate as a ‘bastion sexiste’ while writing on the conditions for Kanak women in relation to the custom and Customary Law; the Vacarme article again denounced the conservative order that the Customary Senate promotes. The collective of authors fear an essentialisation of a discriminatory Kanak custom that would privilege a noble and male hierarchical order, at the expense of a reality of claims of multi-affiliation. Several studies on Kanak youth from the eighties to recent times show how their aspirational lifestyle standards tend to be closer and closer to Western ideals, and how these young people

60 Sénat Coutumier, ‘Charte du Peuple Kanak: Socle Commun des Valeurs Kanak et Principes Fondamentaux de la Civilisation Kanak’ (n 8), s2 para 1: ‘La société Kanak est une société paternalacale. Son système social fonctionne à partir d’une transmission des droits, des pouvoirs et des responsabilités basée sur l’homme’ (The Kanak society is a patriarchal society. Its social system is based on transmission of rights, power and responsibilities based on the man).
61 Bensa and Salomon (n 13).
62 Demmer and Salomon (n 53).
63 Christine Salomon and Christine Hamelin, ‘Vers un Changement de Normes de Genre’ in Elsa Faugère and Isabelle Merle (eds), La Nouvelle-Calédonie vers un destin commun ? (Karthala 2010).
sometimes feel constrained by the customary order. This is part of the reason for an increased recourse to the Common Law system from the 1960s, particularly for divorce cases, as they do not exist as such in the custom. Only a ‘dissolution of marriage’ is possible if the two clans agree to it. For Bensa and Salomon, as for the authors of the Vacarme article, the increasing recourse to the French legal system is the sign of a change in the social norms and a greater openness to alternative models of justice, as well as a new ideal of equality. Furthermore, Nicolas shows how the constant rise in the level of education of girls tends to transform gender roles and aspirations. Women complain more and more about the customary principles of non-participation of women in the public sphere and the principle of submission to men. However, Nicolas specifically says that Kanak female activists are in favour of an evolution of the custom rather than a systematic recourse to French institutions and Common Law (the ‘Whites’ Justice’ as found in Bensa and Salomon) concerning gender issues (principally conjugal violence). This is, similarly, the argument of the two responses made to this article by Poigoune, President of the League of Human Rights of New Caledonia and Isabelle Merle. The latter specifically regrets the underlying assumption that Common Law is better suited to protect disadvantaged groups. As Poigoune notes, the custom has already evolved a lot, as proven by the extension of the jurisdiction of Customary Law to new family organisations, for example; and as the number of cases rise, it is not impossible to think that the jurisprudence will still evolve towards a greater adaptation to modernity. Furthermore, as this Article argues, the recombinant power of law exercised through legal fictions makes Customary Law more law than custom.

65 Hélène Nicolas ‘Emporter un Diplôme dans son Sac: Les Transformations de la Socialisation Sexuée à Lifou (1946-2004)’ in Elsa Faugère and Isabelle Merle (eds), La Nouvelle-Calédonie vers un Destin Commun ? (Karthala 2010).
66 Bensa and Salomon (n 13).
67 Salomon showed in her article “Mettre au tribunal”, “Claquer un procès”: les Nouvelles ripostes des femmes Kanak en Nouvelle-Calédonie’ (2002) 24(1) Archives de Politique Criminelle 161, that Kanak women tend to resort increasingly more to Common Law, renouncing their particular status in order to get reparations, especially for divorces, sexual crimes and conjugal violence.
70 Lafargue (n 58).
IV. CUSTOMARY LAW IS NOT CUSTOM BUT LAW

4.1 The Beginnings of Customary Law

For the French to recognise Customary Law, some old and strong colonial legal fictions first had to be fought. The most obvious one was that which initially impeded any decolonisation, namely the principle of indivisibility of the French territory and of its colonies.

It went hand in hand with another principle hindering the recognition of any regional particularism, which was created at the period of the French unification, the principle of equality of all citizens. If this principle was largely overruled during the colonial era, it was a major obstacle for the recognition of Customary Law and what Garde calls ‘le fait Kanak’71 (‘the Kanak concept’), that is to say the importance of the custom that one cannot deny in the Kanak world. Since the Accord de Matignon, there was an effort to redefine the classic notions of liberty and equality in order for republican principles to adapt to the cultural, religious or even legal heritage of some communities. However, if this effort of institutionalisation of the Customary Law is presented as a successful multicultural acceptance, the reality is a bit different. While Lafargue often speaks of the necessity for the legal system to take into account the ‘réalité sociologique’72 (the ‘sociological reality’), the affiliation to excessively hermetic juridical categories could have the effect of an instrument of ethnic segregation. The result could be more of ruptured relationships rather than social harmony. Hence, the image of multiculturalism that the Customary Law serves could, at first glance, be a sort of ‘distorting mirror’ which would occult the real ethnocultural situation, polarised by two competing groups, leaving the other groups behind.

The other issue raised by Lafargue is that the ultimate aim of the recognition of the status was at first assimilation.73 The renunciation of the particular status was indeed irrevocable and univocal. A parent renouncing their particular status would deprive their children of the possibility of acquiring this status. Yet the renunciation of this status had exceptional repercussions in the social order. It could be seen as the desire to avoid the customary authority, whose legitimacy is thereby contested. The will of one individual would contradict the customs and the collective good of the clan. In this case, the renunciation of the particular civil status was possible only for persons that had already completely

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71 François Garde, Les Institutions de la Nouvelle-Calédonie (L’Harmattan 2001).
72 Lafargue (n 58).
73 ibid.
broken away from their ancestral way of life and integrated into the dominant society. As the renunciation of the particular status could be interpreted as a challenge to the customary authority, it would risk exposing the individual to marginalisation. The Melanesian society is already confronted by the constant erosion of its custom and could not react in any other way to this constitutional dispositive measure, perceived as a call for social desertion and disobedience.

In order to avoid these issues, the jurisprudence made some arrangements. First of all, the renunciation of the personal civil status is no longer irrevocable. It is possible to re-access the personal status under certain conditions. Secondly, the univocal character of the status is modified; it will still depend on filial relationships, but also on lifestyle. If a parent renounces their personal status for example, it is no longer automatically applicable to their children. Additionally, there is a universal jurisdiction regarding this status which follows the individual wherever they go. This application of the customary status is not limited to the territory of New Caledonia. Finally, even if a person renounces their personal status, jurisprudence has confirmed that a change in status would not necessarily lead to the application of the civil code, in accordance with the principle that no one can choose one’s judge or Law. For De Dekker, what has allowed for these changes that have diminished the pre-eminence of the Common Law over the Customary Law, was the link made between statutory affiliation and the notion of respect of private life and the right to dignity, highlighted in the European Convention on Human Rights. As a result of these new dispositions; what will truly determine the prevalence of one law over the other in the case of a conflict of norms? Will it be a legal fiction, so as to redefine the configuration of power?

This whole debate on statutory affiliation is paradoxical, as it tends to define the very affiliation of the individual to his or her tribe. While traditionally one’s status was determined by birth and the family into which one is born, the particular status tends to polarise the condition of membership. Therefore, its renunciation is frequently followed by marginalisation, if not exclusion, from the tribe. Hence, the particular customary status is simultaneously determined by, but also determinant of, the identity of a person.

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75 Paul De Dekker and Jean-Yves Faberon (eds), *Custom and the Law* (Asia Pacific Press 2001).
Another fiction would be that Customary Law is developed only through customary principles found in the ‘authentic’ precolonial traditional law, which is what gives it legitimacy. However, Lafargue\textsuperscript{76} points out that there are not one but three legal sources of Customary Law; namely the Oral (traditional law), the Common Law – (a palliative in case of ignorance of the traditional law), and the jurisprudentially-constructed Customary Law.

4.2 The Charter of the Kanak People: The Written Component

As such, the Charter is the basis of Customary Law. It is a work, not of mere codification, but of the identification of fundamental principles, maybe even ‘constitutional’ values, allowing for the construction of a ‘Kanak Law’. It is the literal systematisation, re-creation and sometimes re-discovery of Kanak customary values. Still, even if the comparison with a constitution is tempting, the Charter affirms several times that it aims for a ‘cooperative legal pluralism’. It is more a tool to upgrade the Customary Law to the level of legitimacy of the Common Law, rather than a tool of separation or independence. It is a translation of customary principles in an intelligible form for Western institutions. Thomas, in an article on the Roman ideas on the origin and the transmission of the law, reminds us how important the written form was for the Romans.\textsuperscript{77} While the origin of the law was seen as unimportant and never really explicated, the emphasis was put on the continuity and the transmission of the law. What mattered was the impersonality of law displayed in all the myths and legends, as well as the historical fictions that were supposed to explain its foundations. No name of a founder was associated to it, there was barely the recognition of some famous stages in the development of the law, but those few new developments merely reinitialised the temporal flux, inscribing themselves better in it and reminding us of the continuity principle.

The link with the Charter of the Kanak People is obvious from here. Of importance is that it is a written document. Even if this Charter aims to preserve the flexibility of Customary Law, it had to adapt its principle of orality and secrecy in order to be appreciated. Again, this written document corresponds exactly to the usual layout of official law documents; there is a Preamble, there are chapters, there are paragraphs corresponding to articles, it was ratified in the end by the Chiefdoms of the eight customary areas, etc. For all that, by submitting to the exigencies of standardisation and the proceedings of ‘good practice’, is this document not in danger of falling into the ‘bullet-point

\textsuperscript{76} Lafargue (n 58).

\textsuperscript{77} Yan Thomas, ‘Idées Romaines sur l’Origine et la Transmission du Droit’ in Thomas (n 4).
scheme? If documents indeed have a special agency, even stranger to traditional customary practices, what will be the consequences of this document on customary practices? Is the document not symbolically more important than the text itself? Knowing that the agency of the bullet-point is not information or knowledge but lies elsewhere, could the same be said for this Charter? For example, could it not be said that this document is an aversion tactic to deflect the enemy’s aim, or to reflect back the will of the opponent? Is this document not a false mirror device reflecting the fear of a fading custom that the Kanak People think they see in the French technocrats’ intentions? For Strathern, bullet-points are not about information but about self-presentation, to oneself especially. It is about the constitution of a special persona aiming to please the audit. It is even more convincing in light of the fast development process which demands that Kanak identity fits the standards.

I will argue that by reaffirming and redesigning some aspects of the custom, it avoids a pure and simple codification of the Customary Law, which would alter its flexibility. The orality and the secrecy of Customary Law act like legal technicalities enabling the recombinant effect of Customary Law.

4.3 Jurisprudential Law: The Recombinant Power of Law (Family)

Until now, Customary Law was based, overall, on Jurisprudential Law. Lafargue, amongst others, observes on this subject that the judicial custom creates the applicable law but also designates for itself its domain of application, contributing to the enlargement of the restricted jurisdiction of the custom. He notably develops the example of the family. For example, the Customary Law literally created out of nothing a customary status for natural families, heavily remodelling the status of the legitimate family. In traditional law, the natural family is indeed not recognised and sometimes even condemned. Traditionally, customary weddings are the union of two clans, more so than the union of two individuals. Weddings are usually arranged when the individuals are quite young, not necessarily with their consent and divorce does not exist. There was a possibility of a dissolution of a marriage, but it was subject to the condition that the two clans of the two spouses would agree. Yet, sometimes, even if the separation was a factual reality, the

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78 For Strathern, the bullet point image symbolises a process of simplification, where the aesthetics of the document are more important than the text itself. Strathern links these processes to the standardisation of legal texts and the frame of "good practices". See Marilyn Strathern, ‘Bullet-proofing. A tale from the United Kingdom’ in Annelise Riles (ed), Documents: Artifacts of Modern Knowledge (University of Michigan Press 2006).
79 Strathern (n 5) ch 1.
80 Lafargue (n 58).
dissolution would not be pronounced in order to put pressure on the partners to get back together. Once more, the interest of the group was more important than the individual interest. A marriage being an alliance between two tribes, dissolving the marriage means dissolving the alliance and thus disrupting the social balance.

Notwithstanding, the tendency is one of an individualisation of rights, including in matters concerning the choice of a partner and separations. Influenced by Western values, marriage is considered more and more as the union of two consenting individuals. On that account, the increasing liberty of dissolving an unwanted union goes hand in hand with the affirmation of a liberty once denied, namely that of marrying the partner of one’s choice. Indeed, jurisprudence has confirmed that if the two clans did not consent to the mutual desire for separation of the spouses, there is a judicial alternative, which is the equivalent to the creation of a right to separation. Consequently, without questioning the duality of the treatment of a ‘familial’ and a ‘judicial’ action, a genuine individual right to solicit the dissolution of a wedding has been created. This new right certainly goes hand in hand with the progressive affirmation of a right to marry – with a chosen partner and at a chosen time – that the traditional law used to deny. As such, the natural family is a legal fiction for the traditional law, if not an anomaly, being the result of a manifested contempt by the individual towards the familial authority. The jurisprudence has progressively extended its limited jurisdiction to the natural family, taking advantage of the fact that there was no mention of it in the Organic Law of 1999. If this position was contested by some customary assessors, the Customary Senate has recently rendered a recommendation for the Appeal Court of Nouréa in the case Teimboanou c/ Tein Mala (of 26th November 2001) comforting the tendency81.

Another example would be the custody of children with respect to a separated couple. As free unions are not recognised by the traditional law, for the custody to be transferred to one of the two partners, the various members of the interested clans have to consent to it. The customary formalities that aim to collect the consent of all the members composing the clan are not dispensable. In the Thidjite c/ Pibee case,82 the judge of Koné had to decide on the custody of a

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81 Customary Senate, Recommendation of 13 August 2001: ‘entrent dans le champ du statut civil coutumier les litiges concernant l’enfant naturel reconnu coutumièremen par le père d’une part, et l’enfant naturel reconnu coutumièrement par le père préalablement à un mariage des parents d’autre part’ (the litigations falling under the jurisdiction of the customary status are those concerning a natural child recognised by the father on the one hand, and of a natural child customarily recognised by the father prior to a marriage on the other hand); Lafargue (n 58).

82 Thidjite c/ Pibee, Tribunal of Koné (judgment no 38 of 20 April 1994).
child whose transfer had not respected the customary formalities. The child was given according to customary rituals from the mother’s family to the family of the father. However, the child was returned without any customary formality to the family of the mother, not long after, by a member of the paternal clan who did not agree to this exchange. In the end, the child was reclaimed by both clans at the same time. The judge finally chose a solution that reintroduced – in a customary disguise – Common Law, by opting for joint parental custody. The child would be left with the mother’s family but an alimony was fixed for the father to participate in the child’s education. In this case, the natural family not being recognised or ruled by the traditional law, the judge – in conjunction with customary assessors – created the law without referring to an auxiliary law. He chose a solution convergent with the Common Law in order to protect the child’s best interests – in the sense the Common Law conceives it.

Based on these few examples, it seems that Customary Law has a very similar effect to Common Law, as described by Strathern,83 in family and kinship matters. It could mean the affirmation of a new model of family organisation through customary jurisprudence. Strathern defines ‘recombinant’ as:

[I]n the sense that in taking apart different components of motherhood and fatherhood one is also putting them together in new ways, in both conception procedures and in rearing practices, and then all over again in combinations of the two.84

It is the fact of ‘cutting and splicing so that elements work in relation to one another in distinct ways’85. In the case that has been discussed, the Customary Law manages to insert the concept of joint custody; which implies at the same time the recognition of a free union, the separation of this union, and an equal right and duty of both parents to contribute to the education of the child. It is a re-evaluation of the consequences of individual choices at the collective level and a reaffirmation of individual rights (to choose one’s partner, to put an end to a relationship and to have children out of marriage). It is a redefinition of the family, now including natural families. Customary Law is here, in the very same way as Common Law, offering a cultural facilitation that consists in re- as well as de-traditionalising ways to deal with the family. It presents the new in the frame of the old and vice versa, and by doing this it absorbs the anxiety surrounding the uncertainties generated by the erosion of an old status created by these new tendencies. The particularity here is that this recombinant effect,

83 Strathern (n 5).
84 ibid 25.
85 ibid.
as it touches the family organisation, necessarily also changes the custom. So could it be said that Customary Law is the new vector of change in the custom?

4.4 The Legal Technicalities: *Fictio Legis* (To Enlarge Its Jurisdiction)

In order to develop this point of the Article, it would be useful to review Thomas’ definition of the legal fiction.\(^{86}\) Thomas observes in the Roman Law that one of the law’s main techniques is the legal fiction, or *Fictio Legis*. He defines the fiction as a voluntary and official deformation of Truth, as it does not even undertake the research of Truth (contrary to the presumption for example). As soon as an obstacle comes in the way of the law, a legal fiction – positive or negative\(^{87}\) – is created in order to bypass it. It is a simple way of changing the law without contradicting the former norms. It is a very conservative process, as it consists of adapting the new to the old by giving the new the appearance of the old, instead of abandoning outdated notions or establishing new institutions. It allows for the conciliation between innovation and preservation by permitting only a half-measure progress. Thomas’ article is a discreet critique of lawyers’ visions of law, with a long-standing assumption that law discovers the fact instead of (re)creating it. Law does not make statements revealing the world. Rather Thomas argues that the world is the world in accordance with how law frames it through legal fictions. It is an ‘as if’ made up world because both sides of the distinction – law and facts – are being made up. This thesis is one of an exceptional artificiality of law, where law has a special power of commanding the real by changing it. By freeing law of any contradiction, practitioners invent the law and give it its autonomy. This echoes the thesis of Hermitte, who thinks of law as a one-direction translation into its own categories.\(^{88}\) It is a process of abstraction but still has an impact on reality. It changes the natural order through its abstractions and hence constitutes ‘another world’.

This returns us to the principal thesis of this Article, that custom and Customary Law play on two different registers of enunciation. While custom is more about politics, Customary Law is primarily law. By explicitly integrating the normative source in Customary Law (while Common Law often draws on different sources, including customs, without quoting them), it could be said that maybe Customary Law is just a different way of drafting and practising law. It might be a different ‘translation mechanism’ with its own categories.

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\(^{86}\) Yan Thomas, ‘Fictio Legis. L’Empire de la Fiction Romaine et ses Limites Médiévales’ in Thomas (n 4).

\(^{87}\) A positive fiction is the reality that one invents, whereas the negative fiction is the pure and simple negation of a reality.

Adding to the shifting practice of custom through the increasing number of written documents and the recombinant effect that was detected in Customary Law’s practice, attention must now be drawn to the use of legal fictions, largely implemented in order to introduce Common Law principles in the guise of custom.

The examples presented are of two consecutive judgments from the same day (20th April 1994) and both are judged by the decentralised section of the Koné Tribunal: Oudodopoe ép. Bova c/ Daoulo (n° 37)\(^9\) and Thidjite c/ Pibee (n° 38).\(^9\) Both cases concerned the duty to financially support children of separated parents. The approach followed by the judge was to link typical modern institutions, such as the divorce procedures, to the principles and spirit of the traditional law. In both cases, the Koné tribunal fixed alimonies for the natural father, founding that solution on the existence not of customary principles, but on a natural right. In a general manner, he nevertheless makes reference to the Customary Law to fix the amount of the contribution of the fathers, stating that the custom does value the ‘responsibility of education and of assistance’\(^9\). This approach became reliable jurisprudence, re-applied by the Tribunal of Lifou in 1997.\(^9\)

What this example shows is that Customary Law, when it falls short on customary principles to apply, does not hesitate to look to other sources of inspiration in order to enlarge its jurisdiction and adapt to new social or familial configurations. Here, the legal fiction resides in the invention of a natural right to assistance and education, applying even to children. This legal fiction allows the judge to rule in a situation where the traditional law would not have been able to intervene. Even if this newly created ‘natural right’ – supposedly greatly inspired by the naturalist approach prevailing at a time for human rights – is a pure abstraction, it has implications for the reality, even more so given the fact that Customary Law is mainly jurisprudential. As Roman practitioners did in their time, the legal fiction here allows for the recognition of the natural family without having to change the custom. It places the new in the frame of the old, giving it a traditional flavour.

V. CONCLUSION

The (re)construction process of the custom, as well as that of the Customary Law, are essential parts of the development of a New Caledonian citizenship. These two processes, however, take place on very different levels, as has been

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\(^9\) Thidjite (n 82).
\(^9\) Lefargue (n 58).
\(^9\) Iwame c/ Ua, Lifou Tribunal (judgement no 117 of 10 December 1997).
demonstrated; they also aim for very different goals, even if they interact closely with one another. While the custom is clearly an identity quest and a manner of dealing with the colonial past, the Customary Law is already a step towards a more mixed New Caledonian citizenship, taking into account ethno-cultural differences. Both registers are going through a certain hybridisation and have to adapt to contemporary issues. The question of the use that will be made of the evolution of the Customary Law, with regards to potential independence, is left for future evolutions. Be that as it may, the whole process of affirmation of common Kanak values does not really take into account the national context in which it is inscribed. The assertion of the Kanak as a unified people is probably linked to the international context of the protection of indigenous rights that, as Coombe has noted, is a moment of fiction on the role of indigenous people and their expectations.  

93 One cannot help but notice that this process is one of essentialisation of indigenous peoples, who are entitled to maintain their cultural differences in order to maintain diversity. They become the ‘custodians’ or ‘stewards’ of the biodiversity of their areas, which has been made very clear in the Propositions of Orientations and Development for New Caledonia, from now until 2025.  

94 However, the People’s active participation in politics and development projects, especially in the North Province and the Loyalty Islands, implies that they will not be the marginalised key players they are supposed to be. Strathern and Greene even tend to claim that there is no such thing as authenticity but only performativity, so as to put together strategies cohering to an identity, which makes a claim irrefutable. If this is true for environmental claims and natural resources management, could it be similarly true for the claim to independence? Is the ‘autochthonisation’ and the ‘customarisation’ of Kanak identity quest a strategy to make the independence claim irrefutable?

I am conscious that the entire process cannot be reduced to this, but it is worth considering in relation to the multicultural pretensions that New Caledonian political leaders have for the island. For strong autochthonous claims and multiculturalism can be an explosive mix in a bad sense, as well as in a very productive way.

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Control and Conscience: Positivist Approaches to Religion in India and South Africa

Kelvin Ma*

Legal positivism and religion are sometimes seen to be mutually exclusive. This Article begins with a challenge to this belief on a theoretical basis, demonstrating that morality exists in positivism but also raises doubts over the viability of fixing inherently flexible religious laws in time via codification. This is developed with a study of India and South Africa, two diverse jurisdictions which have attempted positivism in different ways, namely codification and accommodation. In analysing the approaches and outcomes in both countries, it comes to the conclusion that positivism is ultimately possible and the answer lies in the more implicit attitude adopted by South Africa. Codification as seen in India faces the theoretical and practical issue of fixing flexible religious and customary practices in time, whereas accommodation strikes a balance between flexibility of religion and the maintenance of the authority and integrity of positive law.

I. INTRODUCTION

Legal positivism and religion are sometimes considered mutually exclusive. One appears to be indifferent to values of morality, while the other is inseparable from them. This view is enthusiastically supported by Lord Justice Laws.¹ He states that the role religion plays in the law amounts to the control of thought and action and thus the law should be independent of it. This Article seeks to counter this view with the assertion that positivism does offer a viable approach to religion. This will be explored on two fronts. Firstly, discussion will revolve around the theoretical question of whether it is possible, or even preferable, to fix religious law in time, with evolvement only permitted through the avenue of statutory amendment. Secondly, the practical examples of incorporating religion and customary law in the common law jurisdictions of India and South Africa will be analysed and presented as evidence of successful

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positivist approaches to religion, with the conclusion that a positivist approach to religion is possible, with the accommodation and implicit positivism displayed in South Africa being the most effective path in achieving this aim.

II. CONTROL, CONSCIENCE AND CODIFICATION

The orthodox and widely accepted view of legal positivism is characterised by the recognition of an exclusive source of legal authority, the state. This is distinguished from natural law, which looks to morality and religious texts as sources of law. In the tradition of the former, law is binding because it is posited; for the latter, law is posited because it is binding. Religious law adopts the natural law position, with a set of codes relating to morality and ethics that govern the actions of believers. This supposed demarcation between state-derived law and constantly evolving standards of morality in religion gives rise to a key issue; whether or not it is possible to codify the fluid nature of religion to form comprehensive legislation.

In order to do so, we must first clarify the relation between law and morality. It is important to dismiss the claim that for legal positivists there is no link between law and morality, it is merely a question of authority also known as the separability thesis. This issue arises because they do not recognise a law on the basis of its merits, only on its validity. In spite of this, any question regarding the law is a question about morality, since the results and possible implementation of solutions contrived during their discussion will have morally important consequences for someone. As interpreted by John Gardner, legal positivism is ‘agnostic’ about whether or not a law is worth having or following, but crucially it does not amount to a complete denial of the role law plays in shaping morality, a feature acknowledged by H.L.A Hart himself, who endorsed a ‘minimum content of Natural Law’ since its absence would offer citizens no reason to voluntarily obey the law.

We can thus see that the positivist approach accepts the presence of an element of morality in the law-making process. Developing upon this moral aspect is the relationship between state law and religion, particularly in scenarios where the state’s intention contrasts with a religious view and/or doctrine. This scenario was played out in the case of Bull and another v Hall and another, in which a

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3 J Gardner, Law as a leap of faith (OUP 2012) 161.
5 Bull and another v Hall and another [2012] 2 All ER 1017.
homosexual couple were denied an overnight stay at a B&B owned by a Christian couple. The claimants were eventually awarded damages by the Supreme Court. Such conflicts between religious beliefs and state positive law raise the question of whether the two can be reconciled.

Reconciliation can occur, but only to a limited extent. One such explanation is that there is a distinction, as highlighted by Gary Watt, between basic rational capacity and a particular ‘rationality’. In this context, rational capacity is the ability to ascribe some meaning to experience and action. This is to be contrasted with ‘rationality’, which is a description of particular ways of ascribing meaning to experience and action. It is indeed the ‘rationality’ aspect that contains the problem of the fluid nature of religion, since it is subject to change not only across different religions, but often within one, either through different denominations or more importantly for legal positivism, when a religion adopts a different ‘rationality’ over time. The state must incorporate the need to respect the beliefs of religious groups within its own positivist framework and codification is a possible solution to this. Though at first glance statutory and scriptural interpretation may seem radically different, there are in fact several uniting features between the two. Both treat texts as repositories of hidden or esoteric meanings, as well as authoritative for our own decisions and conduct; and finally treat a diversity of seemingly disparate texts as forming a ‘harmonious, univocal whole’. The process of interpreting the relevant scriptures and their subsequent codification could theoretically, through emphasising the similarities between legal and scriptural interpretation, be less contentious than is often presumed.

However, as noted above, the existence of significant discrepancies within various religions is a major issue. Codification would have to tread a very fine line between various conflicting religious schools of thought, whilst simultaneously holding onto state authority. This contention is further compounded by the dynamic nature or ‘rationality’ aspect of religion, with precise codification amounting to an impossible attempt to step into Heraclitus’ philosophical river twice. Any codification must take a very open form, allowing for the courts to interpret it within the confines of both state positive law and the ever-changing religious laws. This would fit into Watt’s proposal for a relationship between state positive law and religion based on reciprocity. Reciprocity would provide religious groups the right to seek legal recognition and set out their opposition to the state, but the state also reserves the power to

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deny granting legal recognition where it does not correspond to its own values or rationality. This power of recognition, explored further in the South African example, preserves the vital element of state authority that is inherent in legal positivism, but the flexibility of recognition prevents the state from becoming completely ignorant of the moral consequences of ostracising religions, avoiding the trap of dismissing H.L.A Hart’s ‘minimum content of Natural law’. Limited positivism would be a direct consequence of such a liberal approach to codification, but it remains that codification is at least theoretically possible.

III. INDIA: A CAUTIONARY TALE OF STATUTORY INFLEXIBILITY

An example of the consequences of codifying religion into law was demonstrated in India when it enacted the Hindu Succession Act (HSA) 1956. As part of the newly independent nation’s commitment to a secular state, it sought to incorporate the Hindu laws and customs followed by the majority into state law. An explicit approach was adopted – the Act adhered to the Mitakshara school of thought and codified the particular rule which declares that maintenance of the family property lies with the eldest brother, effectively excluding women taking on the role of coparcener. This enforcement of gender inequality was mitigated by the abolishment of women’s limited rights via the granting of full ownership of property, but nevertheless it represented an uneasy balance between India’s secular constitution and its centuries-old traditional laws. Such uneasiness may have arisen due to the status of the Hindu Law, which has been argued not to fit into a positivist framework. According to Werner Menski’s Triangle, Hindu law fits into the middle of the triangle away from positivism and state-structured law, falling within the realm of legal pluralism. This model suggests that the aim to codify a fundamentally pluralistic form of law was flawed from the beginning, considering religion is a continually evolving concept and statutory change would always fall behind the practical socio-legal reality, strengthening the notion that the state cannot codify a fluid concept.

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8 Watt (n 6) 62-63.
9 Hart (n 4).
An attempt to amend mistakes to the law occurred with the Hindu Succession (Amendment) Act 2005, which after forty years addressed gender inequalities. It amended Section 6 of the Hindu Succession Act 1956, providing equal rights for daughters of the deceased along with sons. This highlighted two flaws in the codification option with regards to positivising religious law. Firstly, the time it took for the state to address the issue demonstrates the inflexibility and inefficiency of codifying religious law, resulting in a widening gap between the state’s intentions and the socio-legal reality of religious communities, which in turn led to a failure to successfully incorporate the practical application of their law into the positivist framework. The second flaw is rooted in the nature of this particular form of codification. With statutory amendment as the sole venue for change, the evolution of religious law is now firmly in the hands of legislators who may or may not be well informed of the changes that are taking place in certain communities. Gradually, the state begins to shape the ‘religious’ in its own image, and the state becomes deified in its newly granted position as a religious lawmaker. This can be said to negate the exchange of reciprocity that is a prerequisite of a positivist approach to religion. In doing away with the notion that religious law derives from a divine source, the state has effectively adopted merely the customary practices of the religious law, but not the core nature of the religion. Codification has thus enabled the balance to swing too far in the favour of legal positivism. Furthermore, legislators and the state have replaced the role once played by senior clerics and the sacred texts and scriptures of religions.

Nevertheless, the state’s approach to religion may in fact reflect the true nature of Hindu law. It is proposed that Hindu law is in fact inherently positivist in nature, and the problems arising out of the Indian scenario was due to a misunderstanding of the importance natural law plays in Hindu law. Donald Davis argues that the primary importance of the Vedas is in fact symbolic and ideological. As a result, the element of natural law in the Vedas is present, yet weak. The substantive context of dharma has got little in common with the Vedas’ provisions. The power to determine what dharma is, is displaced onto individuals who are knowledgeable and trained in the Vedas. Once the authority for the determination and creation of dharma is shifted to persons, the natural law quality of Hindu law is undermined. Hence Menski’s assumption that Hindu law represents a culture-specific form of natural law must be re-evaluated. Whereas natural law maintains the superiority of natural law, Hindu jurisprudence admits the superiority of social facts in the determination of law.

14 Menski (n 11) 194.
of dharma and law despite any contravention of Vedic ‘natural law’. Rules of dharma are centred on the social authority of elites in a variety of social groups. As a result Hindu law can be described as positivist. The specificity of legal decision-making is a hallmark of Hindu law, meaning that dharma is continually predetermined in every separate case.

Though it can be said that the codification of Hindu law amounted to the shifting of authority to the state, this reassessment of Hindu law sheds light on the possibility of a positivist approach to Hindu law by emphasising its inherent positivist aspects. This draws parallels with the previously mentioned similarities between scriptural and legal interpretation which further compounds the notion that emphasising the overlapping principles between positive law and religion, as opposed to their differences, has the potential to develop into a more inclusive legal system, one which promotes understanding of religion and its nuances. The example of India can be seen as a cautionary tale; the approach was correct, but the execution and handling of the issue was far from satisfactory, owing as much to the application of positivism and the inherent problems that arise out of codification.

Whilst the inefficiency of the reform system was startling, it is not solely the fault of positivism. In the spirit of Davis’ positivist interpretation of Hindu law, a committee of Hindu/Sanskrit experts could have been employed by the state in order to maintain a level of gradual and continuous change to religious laws, avoiding the decades long delay of an amended Hindu Succession Act, and proverbially tackling the two flaws regarding delay and authority in codification.

IV. SOUTH AFRICA: IMPLICIT AND INCLUSIVE

An alternative but still positivist approach to changing concepts was attempted in the rainbow nation of South Africa. The implicit positivism employed here successfully avoided the overly rigid nature of codification and its accompanying problems. This Article recognises it as a more preferable venue for positivism to incorporate religion into the framework of state law. One important point to note is that whilst South Africa used its implicit positivism to resolve its relationship with customary law, not religious law, both have very prominent similarities. These include their dynamic and evolving nature, not originally being part of the state positive legal system in addition to being occasionally viewed as operating in parallel with state law, placing both firmly...
within the second tier of *unofficial law* in Masaji Chiba’s tripartite model of law.\(^\text{15}\)

Echoing India’s independence from British colonial rule, South Africa was also emerging from the shadow of Apartheid.

This new Constitution sought to promote racial and gender equality, though two obstacles stood in its way, namely the tainted status of the state law inherited from the apartheid regime and the patriarchal nature of customary law in the country.\(^\text{16}\) Approaching the question of patriarchy is common across customary and religious law, and indeed this has been explored with regards to the gender imbalances in the Hindu Succession Act. Faced with a similar problem, the South African government decided to adopt an implicit but still positivist position. In *Shilubana v Nwamitwa*, \(^\text{17}\) the Court was called to consider the appointment of a female chief in the Valoyi tribe, in conflict with the traditional practice of male primogeniture. It was held that traditional leaders reserved the authority to develop their own customary law and in this scenario their unanimous decision to depart from male primogeniture (in appointing Ms. Shilubana as chief) was in line with the Constitution’s principles of non-discrimination and on the path towards gender equality.

This implicit accommodation did not amount to a weak state, the case of *Bhe v Khayelitsha Magistrate*\(^\text{18}\) showcased the South African courts’ determination to refuse recognition of a customary rule that conflicted with the Constitution. This not only fulfilled the criteria of maintaining authority of the state for legal positivism, it also avoided the trap of slow and unpredictable statutory amendments experienced in India. An additional consequence of the *Shilubana* case was that of a stern message; if tribes were reluctant to reform their practices and traditions in line with the official Constitutional position, the courts would respond in kind and be equally reluctant in granting recognition.\(^\text{19}\) The importance of this cannot be overstated. It is a radical departure from either the complete exclusion of religion and customs proposed by Laws LJ, as well as the growing perception of courts kowtowing towards all religious practices irrespective of their conflicts with principles of human rights and equality, particularly in the EU.\(^\text{20}\)

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\(^{15}\) Menski (n 11) 119.


\(^{17}\) (CCT 03/07) [2008] ZACC 9; [2008] 9 BCLR 914 (CC); [2009] 2 SA 66 (CC).

\(^{18}\) *Bhe and Others v Khayelitsha Magistrate* (CCT 49/03) [2004] ZACC 17; [2005] 1 SA 580 (CC); [2005] 1 BCLR 1 (CC).

\(^{19}\) *Shilubana* (n 17) 2.

Like the bird-cage theory proposed by the Chinese political leader Chen Yun, where the economy was allowed to roam free within the restrictions of central planning, the South African position asserts that unofficial laws are free to evolve provided that it is within the confines of the Constitution. This approach was echoed in a recommendation to post-war Nepal, as well as the UK during the case of Ghai v Newcastle City Council, wherein the courts successfully accommodated Hindu burial beliefs while still ensuring that it complied with the English law meaning of ‘building’ governed by the Cremation Act 1902. The accommodation of religious and customary beliefs within a positivist framework underlies the success of this implicit approach, since it effectively satisfies the wishes of religious believers, provided they adhere to the laws of their respective state, thereby simultaneously maintaining the integrity of legal positivism.

V. CONCLUSION: RECONCILIATION BY ACCOMMODATION

Theoretically speaking, positivism and religion are not mutually exclusive; positivism is capable of recognising morality, and religion is able to reciprocate this by operating within the confines of State law. The question then posed pertains to what approach would result in the maintenance of the integrity of both sides. On purely legal terms, explicit codification is a viable option, and the example in India highlighted the importance of recognising positivist aspects in religions such as Hinduism. Yet the slow pace of change effectively erases the dynamic nature of religions, making this positivist approach impossible in practical terms. Conversely, South Africa’s implicit position, founded upon their Constitution, allows for an environment of change that not only recognises State authority, but also induces religious groups to develop their practices in line with the principles of equality enshrined in the Constitution. This reconciliation of religious beliefs with State law by accommodation thus offers a viable, efficient and principled positivist approach to religion.

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