

SOAS LAW JOURNAL

VOLUME 2 - ISSUE 2 - AUGUST 2015



SOAS
University of London

SOAS
LAW JOURNAL

VOLUME 2 – ISSUE 2

AUGUST 2015

ISSN: 2055-2068

<http://www.soaslawjournal.org/>

Published in the United Kingdom
By the © SOAS LAW JOURNAL

Supported by the School of Law, SOAS, University of London.

Faculty of Law and Social Sciences
SOAS, University of London
Thornhaugh Street, London WC1H 0XG

No part of this publication may be reproduced, transmitted, in any form or by any means, electronic, mechanical, recording or otherwise, or stored in any retrieval system of any nature, without the prior written permission of the publisher. Articles must be attributed and cannot be altered or used for commercial purposes. All rights reserved.

The views expressed by the authors are not necessarily those of the Editorial or Honorary Board of the SOAS Law Journal, nor of its sponsors, the Academic Board or the SOAS, University of London School of Law. While every effort has been made to ensure the information within this Journal is correct, the Editorial Board cannot accept any responsibility for any errors or inaccuracies.

Volume 2 – Issue 2 (August 2015)
ISSN: 2055-2068 (Online)
ISSN: 2057-3006 (Print)

© SOAS LAW JOURNAL

Editorial Board

Executive Board

Mohammad Rafat Mehmood **Co-Editors-in-Chief** Sapna Reheem Shaila

Executive Editors

Arta Azemi
Natasha Anne Hermans
Abid Khan
Bamidele Owolabi Popoola

Managing Editors

Bakhtawar Awan
Joshua Chan
Elizabeth Jane Lawrence
Yu Tong Lee
Jun Sean Wong

Editorial Staff

Content Editors

Khalid Hayat Farisha Khan Aderayo Sanusi
Najat Jebari Noorzadeh Salman Raja

Senior Editors

Seema Agrawal Ahmed Hegazi
Rory Gordon Sabah Khan

Associate Editors

Aliya Al-Yassin Kay Lee Su Mei See
Muhammad Umar Ali Cristal Smart
Taqbir Huda Paloma Rao Norman Yap

Academic Board

Mr Paul Kohler

Professor Mashood Baderin

Professor Matthew Craven

Professor Philippe Cullet

Professor Kevin Jon Heller

Professor Martin Lau

Dr Paul O'Connell

Professor Carol Tan

Honorary Board

The Hon Dame Linda Dobbs DBE

Professor Anne Griffiths

Professor Andrew Harding

Professor Mohammad Hashim Kamali

Professor Duncan Kennedy

Professor Werner Menski

Dr Richard Small

Professor David Takacs

Professor Robert A. Williams

Contents

Introduction

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

Monumentalities

Clement Tan 1

The Role of Food Banks on a UK Right to Food

Gemma Daly 19

Politics of Electoral Reform: Delimitation Deadlock in India

Aditi 46

Discourse Analysis of Whaling Regulation and the Influences on Perceptions of Morality

Charlotte Klinting 70

Scope and Limits of Ijtihad for the Continued Evolution of Islamic Law

Tiphonie Bedas Tueni 93

The Criminalisation of Piracy – Between Heinousness and Imperialism

Amira Nassim 113

International Oil Companies and Petroleum Legal Policy in Iran: Evolution in the Shadow of Resource Nationalism, 1951-1980

Charlotte Joy Trudgill 128

Introduction

Sapna Reheem Shaila and Mohammad Rafat Mehmood

Co-Editors-in-Chief

It is our great pleasure to introduce you to the August issue of the SOAS Law Journal's second volume. In keeping with former issues, this issue touches upon a broad spectrum of thought-provoking legal topics and disciplines, such as international legal theory, whaling regulations and petroleum legal policy.

Since its inaugural issue published just a year ago, the SOAS Law Journal has continued to see significant growth in its reputation and activities. Most recently, the SOAS Law Journal built relations with the editorial team of the UNAM Law Review, University of Namibia. We are especially grateful to Professor Werner Menski for supporting us in this initiative. This development forms part of the Journal's intention to network with students of law worldwide and we look forward to forging relationships with other universities in the near future.

We are also pleased to announce the creation of an Academic Board consisting of academic staff at the SOAS School of Law, which will provide the Journal with additional oversight. We are grateful to the Academic Board for their insights and would like to thank Mr Paul Kohler for leading the Board this issue.

We would finally like to thank our Honorary Board and the SOAS Law Faculty for their continued support and suggestions and the Editorial Team for their consistent efforts.

Yours Sincerely,



Sapna Reheem Shaila and Mohammad Rafat Mehmood

Co-Editors-in-Chief
SOAS LAW JOURNAL

Monumentalities

Clement Tan*

Theorisations of international law have evolved from functionalism, to structuralism, and then to post-structuralism, contending at each phase with the anxieties and opportunities faced by its contemporary thinkers. This Article attempts to chart these developments in an imaginative way, illustrating the intellectual parallels between international legal theorists' conceptualisation of their work with the seemingly disparate field of architectural theory. Inspiration is drawn from Barthes' deconstruction of the Eiffel Tower. His insights will be applied to structuralist and post-structuralist readings of international law, and this Article culminates with a confrontation of Koskeniemi's conceptualisation of international law as embodying an irreconcilable tension.

I. INTRODUCTION

The League of Nations, being indisputably a permanent contractual union of independent States having for its principal object the preservation of peace and protection against aggression, and possessing a permanent organisation for the realisation of these ends, is a confederation.

Corbett¹

In order to satisfy this great oneiric function, which makes it into a kind of total monument, the [Eiffel] Tower must escape reason. The first condition of this victorious flight is that the Tower be an utterly *useless* monument.

Barthes²

* Clement Tan obtained his BA (Law) from Queens' College, University of Cambridge, and his LLM in Law, Culture and Society from SOAS, University of London. He wishes to thank his writing group (Thomas Kemp, Lizzy Willmington, Rosy Mack, Emily Yael-Palmer and Isabella Mighetto) for their patience, insight and companionship throughout the writing process for this Article.

¹ Percy Ellwood Corbett, 'What is the League of Nations' (1924) 5 *British Yearbook of International Law* 119, 147.

² Roland Barthes, *The Eiffel Tower and Other Mythologies* (Richard Howard tr, Hill and Wang 1979) 5.

There is a tendency amongst international legal theorists to conceptualise international law in architectural terms, to visualise it as a concretised edifice in physical space. Many theorists, when describing international law's organisation, even make reference to the existence of an actual 'architecture of international law' itself.³

Gabriella Blum for example, describes legal institutions and regimes as 'building blocks',⁴ emphasising their relational existence as elemental components of international law's 'overall architecture'.⁵ Graeme Dinwoodie speaks of a 'classical architecture'⁶ of international intellectual property law as being built upon 'basic conceptual and institutional pillars'.⁷ This architectural articulation of international law has started to trickle into everyday discourse. In the United Nations Global Compact's publication in 2013, titled 'Architects of a Better World', various 'building blocks'⁸ necessary for its success were prominently highlighted.

My intention in this Article is to take this metaphor seriously by examining the ways in which architecture and international legal theory overlap. It is contended that their analytical frameworks are not only broadly similar, but that their developments over time also demonstrate stark parallels. Using Percy Corbett's article, 'What is the League of Nations?', and Roland Barthes' essay, 'The Eiffel Tower', I aim to construct an overarching narrative within both disciplines, one that traces an intellectual development away from functionalism towards structuralism.⁹

By juxtaposing these developments, I hope to demonstrate how meaningful insights can be gained about international legal theory, its intellectual history, and its evolving relationship with the global order. At the end of this Article, I

³ Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43(1) *Virginia Journal of International Law* 1; Gabriella Blum, 'Bilateralism, Multilateralism, and the Architecture of International Law' (2008) 49(2) *Harvard International Law Journal* 323.

⁴ Blum (n 3) 324.

⁵ *ibid* 369.

⁶ Graeme B Dinwoodie, 'The Architecture of the International Intellectual Property System' (2002) 77 *Chicago-Kent Law Review* 993, 994.

⁷ *ibid*.

⁸ United Nations Global Compact, 'Architects of a Better World: Building the Post-2015 Business Engagement Architecture' (United Nations Global Compact 2013) 1.

⁹ This Article seeks to chart the theoretical movements away from 'use' towards 'meaning', and in this respect explicitly avoids the question as to which of these texts I found the most useful. In a manner similar to that of structuralist analysis, I focus instead on deriving meaning from their oppositional relationship.

also seek to draw upon these understandings of architectural theory in order to articulate new possibilities for international law.

II. FORM AND FUNCTION

[F]orm ever follows function, and this is the law. Where function does not change, form does not change.

Louis Sullivan¹⁰

Up until the early 19th century, dominant understandings of architecture were pre-occupied with aesthetic principles inherited from the era of Classical Antiquity. Vitruvius's fundamental principles of architecture – the triadic formula of strength, utility and beauty – were so embedded into consciousness that architectural theory was only ever based on, or was in dialogue with them.¹¹ Even as the nineteenth century bore witness to a period of stylistic interpretations and variations, it was observed that this Vitruvian triad was 'difficult to supersede or displace'.¹²

2.1 'Form Ever Follows Function'

At the turn of the twentieth century, however, a paradigmatic shift in conceptualisations of architecture began to take place, illuminating practice and eventually culminating into what is now known as the period of Early Modern architecture. One of the most significant of these contributions is that of architectural functionalism, the philosophy that all constructed forms had to express their functions as purely as possible. Chicago architect Louis Sullivan, in particular, has been widely credited as the movement's originator, and is remembered for coining the oft-invoked credo 'form follows function' that has permeated our cultural consciousness. His convictions were that 'organic' organisation and form could only ever be achieved through a contemplation of a building's functions – constituted through 'natural, social and intellectual factors' – which are then subsequently expressed into honest materiality.¹³ His essential concern was to use architecture to 'express human functions and needs, not structural laws'.¹⁴

¹⁰ Louis Sullivan, 'The Tall Office Building Artistically Considered' (Lippincott's Magazine March 1896) 408.

¹¹ Hanno-Walter Kruft, *A History of Architectural Theory: From Vitruvius to the Present* (Ronald Taylor, Elsie Callander and Antony Wood trs, Princeton Architectural Press 1994) 21–24.

¹² Kate Nesbitt, *Theorizing a New Agenda for Architecture: An Anthology of Architectural Theory, 1965-95* (Princeton Architectural Press 1996) 18.

¹³ Kruft (n 11) 357.

¹⁴ *ibid.*

Sullivan's immensely influential functionalist theorisations have since been used as an epistemological framework for modern approaches to architectural design, interpretation and criticism. The discipline has become ineluctably linked to a teleological methodology, such that it is now deeply invested in inquiries of use and utility and can only conceive of buildings using that framework. Le Corbusier expresses this paradigm best when he proclaimed that a house was essentially 'a machine for living in'.¹⁵

Roland Barthes also recognises that period's dedication to '[r]ationalisations under the rubric of use' when he notes how Gustave Eiffel had to justify the design of his tower by 'scrupulously list[ing] all the future uses of the tower', uses that were all scientific in nature.¹⁶ When the Tower first began to emerge in the Parisian skyline in 1888, Eiffel notably countered his critics by defending it on technical grounds, arguing that its aesthetic beauty would simply follow from its 'perfect appropriateness to its use'.¹⁷ Its wide base and elegant curves were motivated not by the desire to convey strength and beauty, but by its resistance to wind. When the Tower faced calls for demolition in the early 1900s, Eiffel was said to have saved it again by gesturing towards its utility; he attached a radio transmitter at the top and offered it as a communications base to the French Ministry of War.¹⁸

2.2 'This is the Law'

As the theoretical shifts towards architectural functionalism were occurring, a similar movement can be observed within international law from the early 20th century onwards. Positivism, which was perceived as too high-minded and too abstract for the post-World War I period, was deemed to be irrelevant. International lawyers began to turn towards realist accounts instead, increasingly looking towards the relationship between sociopolitical forces and international law in order to illuminate their work.

Hans Morgenthau was one such theorist. He sought to articulate an alternative account of international law by emphasising the importance of paying attention to the 'psychological and sociological laws governing the actions of men in the

¹⁵ Le Corbusier, *Toward an Architecture* (John Goodman tr, Getty Research Institute 2007) 151.

¹⁶ Barthes, *The Eiffel Tower and Other Mythologies* (n 2) 5–6.

¹⁷ Caroline Weber, 'Lightning Rods and Sideshows' (*The New York Times*, 29 May 2009) <http://www.nytimes.com/2009/05/31/books/review/Weber-t.html?_r=0> accessed 11 June 2015.

¹⁸ Ulys H Yates, "'Temporary' Eiffel Tower 70 Years Old' (*The Milwaukee Sentinel*, 4 April 1959) <https://news.google.com/newspapers?id=_LOVAAAIBAJ&sjid=ug8EAAAIBAJ&pg=6101,1717690&hl=en> accessed 11 June 2015.

international sphere'.¹⁹ In doing so, he admitted that his 'realist' jurisprudence was in truth a 'functional' one – it was premised on the understanding of international law as the 'function of the civilisation in which it originates', made 'real' because it was guided by pragmatic and utilitarian considerations.²⁰

International law is therefore not merely characterised as architectural design, it is architectural design *by function*; it characterises itself as an instrument of social order, constructed around particular social purposes and appreciated for those utilities that it provides. Elements of this functionalist theorisation can be seen even today. Just as Eiffel based the design of his tower around his concerns about wind resistance, Gabriella Blum worries about the design of the 'right legal architecture' in terms of its 'effectiveness, efficiency, and compliance'.²¹ Mario Giovanoli similarly wonders if the soft law character of the international financial standards regime is merely 'fair weather architecture',²² ineffective and unreliable during crisis situations.

Perhaps the most prominent example of functionalist theorisations in architecture and international law, however, can be seen in the ways in which theorists have attempted to classify and taxonomise. Both disciplines articulate a set of necessary principles and distinctions to make analysis possible, and they do so on the basis of functional definitions. A particularly salient example of this can be seen in the everyday ways in which we think about the buildings around us, such as the office, the bank, the residence, the school, and the museum. Each is essentially linked to the functional aspect that constitutes its identity. Even within these buildings themselves, we continue to erect walls and organise the space into functional sections, separating the kitchen from the study, and the lobby from the boardroom.

In international law, the tendency to categorise and essentialise by function is evident, particularly in the context of increased specialisation within the global order. As the International Legal Commission (ILC) observed in its Report on Fragmentation,²³ what once appeared to just be 'general international law' is now a diversity of specialist regimes such as 'trade law', 'human rights law', 'environmental law', and 'law of the sea'. They also noted that these self-

¹⁹ Hans J Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34(2) *American Journal of International Law* 260, 283.

²⁰ *ibid* 274.

²¹ Blum (n 3) 362.

²² Mario Giovanoli, 'The Reform of the International Financial Architecture After the Global Crisis' (2009) 42 *International Law and Politics* 81, 84.

²³ ILC, 'Report of the International Law Commission Report on the Work of its 58th Session' (2006) UN Doc A/61/10.

contained regimes did not emerge accidentally, but were instead 'seek[ing] to respond to new technical and functional requirements'.²⁴

This functionalist analysis is frequently displayed when international lawyers attempt to classify individual legal phenomena or institutions. Percy Corbett's inquiry into the 'legal character' of the League of Nations, which is premised on a criteria of essentialist attributes he believes are possessed only by sovereign States, is a conspicuous example.²⁵

In his investigation, the League's various rights and obligations that appear to conform to this criteria are qualified by reference to its functions. For example, its right of legation is explained by recourse to the fact that '[a]ny international organisation established for purposes such as those which [it] was destined to serve' must 'inevitably' have such a power.²⁶ Its right to intervene between its Members in order to prevent hostilities, is similarly traced back to its functional origins as an 'organisation of States for the preservation of peace'.²⁷ Corbett makes similar appeals to the League's purposive design when seeking to distinguish it from said criteria. In his argument that the League does not have duties and powers over the Saar Basin and the mandated territories amounting to that of sovereignty, he directs our attention to an analysis of the 'the functions assigned to the League in connexion with [those territories]'.²⁸

Corbett's conclusion that the League should be classified as a confederation is buttressed by identifying the core functional attributes belonging to institutions in that genus: that of being established in order to 'comprise an indefinite number of self-governing political communities'.²⁹ Since the League was 'established to perform tasks which would otherwise have been incumbent upon a small number of States', it is, according to his analysis, such an entity.³⁰ In sum and in substance, the unique purposes for which the League has been established to serve justify its status as an institution with a distinct 'legal character'.

This alignment of use, function and purpose, in both architecture and international legal thought, has significant epistemological implications; these disciplines become reimaged as essentially *instrumental* projects, whose works

²⁴ *ibid* [247].

²⁵ Corbett (n 1).

²⁶ *ibid* 122.

²⁷ *ibid* 136.

²⁸ *ibid* 127.

²⁹ *ibid* 148.

³⁰ *ibid* 147.

are meaningful insofar as they are capable of serving as a means to an end. Their impetus emanates from the perception of some social or human need that needs fulfilment.

The paramount project for these disciplines, therefore, is to identify and reveal what this unrealised social purpose is. This is what Morgenthau speaks of when he described that the task ahead for international lawyers was to discover 'the laws which govern the social relations of men' – just as natural scientists had to first discover the 'laws governing nature' – before attempting to master them.³¹

This process, however, is not an untroubled one. Functionalist social theory offers the promise of a scientific methodology, the possibility of an empirical analysis that can be used to identify essential needs, realise essential functions and classify essential characters. However, as Martti Koskenniemi pertinently notes:

Reducing international law to a mechanism to advance functional objectives is vulnerable to the criticisms raised against thinking about it as an instrument for state policy: neither regimes nor states have a fixed nature or self-evident objectives.³²

The determination of human needs, in other words, is not a technical science, but is a site of struggle and contestation.

III. STRUCTURES AND SIGNS

In the ongoing semiotic bricolage of daily life, we orchestrate and combine anything and everything at our disposal to create a significant world, or simply to get a message across.

Donald Preziosi³³

Around the mid to late 20th century, a new generation of architects became increasingly disenchanted with modern architecture's preoccupations with function and utility.

Philosopher and aesthetic theorist Ernst Bloch, for example, condemned the sobriety of functionalist architecture as the product of a society that was

³¹ Morgenthau (n 19) 284.

³² Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) *Modern Law Review* 1, 1.

³³ Donald Preziosi, *Architecture, Language, and Meaning: The Origins of the Built World and its Semiotic Organization* (De Gruyter Mouton 1979) 1.

emotionally impoverished and bereft of humanity.³⁴ Architectural historian Joseph Rykwert similarly resisted what he saw as the 'rationalist predilections of high modernists' and called upon architects to explore the 'emotional power' of their work.³⁵ Charles Moore also expressed the opinion that modern designs were giving 'little in return besides the shelter of a cubical cocoon'.³⁶

3.1 'Semiotic Bricolage'

During this period of critical re-examination, an influential group of post-functionalists attempted to reinvigorate their oeuvre by steadily pushing back against, and redefining, disciplinary boundaries. They drew upon theoretical and methodological perspectives from various fields, such as literature and semiotics, studied the ways in which meaning was carried in these disciplines, and then translated these insights into architecture. Their goal was to challenge modern functionalism's wilful sparseness of symbolic meaning and revive an interest in architectural signification.³⁷

Roland Barthes' explorations into the semiology of architecture and urban landscapes have been particularly influential in this respect. Use, he proclaims, 'never does anything but shelter meaning', and its status as the sole basis for methodology must be displaced.³⁸ Instead, semiologists must 'read' their objects of study in order to unravel meaning, similar to the way in which a literary critic 'reads' a poem, and it is only through this perennial process of unfolding signifiers that we are able to truly decipher its 'language' and make it sing.³⁹

Barthes' approach to architecture is distinctly demonstrated in his eponymous essay on the Eiffel Tower, in which he semiotically explores this 'pure', 'ineluctable' and 'inevitable' *sign*, and coaxes out the various *signified* meanings that lurk underneath it.⁴⁰ He lingers over its vertical scale, noting how, like the mad project of the Sun Tower and the legendary Tower of Babel, the Eiffel Tower similarly symbolises the human aspiration for ascension, the fascination

³⁴ Hilde Heynen, *Architecture and Modernity: A Critique* (Massachusetts Institute of Technology 1999) 118–28.

³⁵ Harry Francis Mallgrave and David J Goodman, *An Introduction to Architectural Theory: 1968 to the Present* (Wiley-Blackwell 2011) 39.

³⁶ Kent C Bloomer and Charles Willard Moore, *Body, Memory, and Architecture* (Yale University Press 1977) 105.

³⁷ Mallgrave and Goodman (n 35) 43.

³⁸ Barthes, *The Eiffel Tower and Other Mythologies* (n 2) 7.

³⁹ Roland Barthes, 'Semiology and the Urban' in Neil Leach (ed), *Rethinking Architecture: A Reader in Cultural Theory* (Routledge 1997).

⁴⁰ Barthes, *The Eiffel Tower and Other Mythologies* (n 2) 4.

with connecting heaven and earth through summit and base.⁴¹ With regards to the Eiffel Tower's offering of a panoramic vision of the city of Paris, he finds meaning in the ways this promise of ocular sight can be compared to the possibility of an intelligible city, made coherent by our contemplative and constitutive gaze.⁴² Even the boundedness of the Eiffel Tower – the enclosure of its *inside* away from the *outside* – and the human process of entering and exploring that space is subject to Barthes' semiotic unravelling; the tamed space of comfort and pleasure is likened to a 'world away from the world', and the gesture of touristic visitation is likened to a procession within this spectacular realm.⁴³

Gustave Eiffel's own functionalist justifications – those same appeals to utility that inspired its original design and authorised its birth – now 'seem quite ridiculous alongside the ... human meaning which it has assumed throughout the world'.⁴⁴

The theoretical explorations undertaken in the 1970s, despite occurring during a period regarded as the apogee of semiotic interest amongst architects, were still seen as lacking the rigours of a 'real methodology', suitable only for criticism.⁴⁵ Architectural theorists responded by intensifying their interdisciplinary projects, drawing upon structuralist analyses of linguistics in order to articulate an epistemological 'grammar' for the architectural process.⁴⁶ What had previously been understood as only a metaphor – that is, the idea that architecture was a language in itself – became approached literally.

Drawing upon Saussurean linguistics, architectural theorists and semiologists began to approach the subject under a structuralist paradigm, which posited that the meaning behind certain phenomena (the *langue*) could only be made intelligible by synchronically examining the interrelations between such phenomena (the *parole*).⁴⁷ In other words, '[t]hings do not have true essences which can be studied; their existence is defined by their relationship to other things'.⁴⁸ One of the implications of this structuralist analytical framework is that it avoids 'stress[ing] the genius of the architect or the autonomy of the

⁴¹ *ibid* 4–7.

⁴² *ibid* 8–14.

⁴³ *ibid* 14–17.

⁴⁴ *ibid* 6.

⁴⁵ Mallgrave and Goodman (n 35) 43.

⁴⁶ Nesbitt (n 12) 34.

⁴⁷ The term *parole* refers to acts of speech, which are merely the surface appearance of language. *Langue* refers to the socially constituted code in which *paroles* receive meaning.

⁴⁸ David Kennedy, 'Critical Theory, Structuralism and Contemporary Legal Scholarship' (1986) 21(2) *New England Law Review* 209, 250.

artistic tradition', something that functionalist approaches, with their emphasis on mobilising architecture as an *instrumental* discipline, cannot achieve.⁴⁹ Its goal is not to focus on the architectural object itself, but to examine its relationship with other objects in order to reveal the meanings that it expresses, and the underlying cultural machines that produce those meanings.

Umberto Eco, for example, developed on Barthes' work on signs by writing extensively about architecture as a *system* of those signs. To him, architectural objects were not only capable of *denoting* functions through their form, but also symbolically *connoting* underlying meanings such as 'family', 'security' or 'familiarity'.⁵⁰ These denotative and connotative elements, he argues, are correspondingly ordered via an architectural 'code-language' that makes them coherent and meaningful.⁵¹ Charles Jencks evinces a similar approach with his views on 'architectural semiotics', the idea that architecture could be conceptualised as a language itself possessing syntax, semantics and metaphors that have the capacity to communicate certain meanings.⁵² In his book, *The Language of Post-Modern Architecture*, he proposes a structuralist framework for the interpretation of these meanings, an analysis that he argues makes clear the ways that they are inherently expressions of cultural assumptions, institutions and values.⁵³

The significance of these theoretical developments within the architectural discipline is best understood when they are juxtaposed against functionalist approaches. Whereas functionalist approaches conceive of an architectural object's meaning as determined *a priori* in relation to its intended purpose, structuralist approaches conceive of architectural objects as possessing no inherent meaning, only the meanings that emerge from its *relations* with other objects. Under the functionalist paradigm, the architectural discipline asks if an architectural object is instrumental in fulfilling an existing social need. Under the structuralist paradigm, however, the architectural discipline asks what kind of social meaning it *expresses*, intelligible only through a synchronic analysis.

3.2 'A Significant World'

It was observed above that the tendency for international lawyers to conceptualise their work as architectural in nature was more than just

⁴⁹ William Whyte, 'How Do Buildings Mean? Some Issues of Interpretation in the History of Architecture' (2006) 45(2) *History and Theory* 153, 166.

⁵⁰ Neil Leach (ed), *Rethinking Architecture: A Reader in Cultural Theory* (Routledge 1997) 178.

⁵¹ *ibid* 182.

⁵² Charles Jencks, *The Language of Post-Modern Architecture* (Rizzoli 1977).

⁵³ *ibid*.

metaphorical; the ways in which both disciplines theorise their subject-matters and articulate their intellectual approach also illustrates stark parallels. Several pertinent questions begin to emerge in light of the developments in architectural theory. Can these new theoretical paradigms be transposed into the context of international law? If so, what kind of insights do we potentially gain?

An examination of the development of international legal theory in the mid to late 20th century reveals that the trajectory of its development broadly parallels that of the discipline of architecture. Just as architects despaired over the lack of meaningful engagement in their work, international legal theorist David Kennedy noted how when he was entering the field in the late seventies, '[n]o one seemed to think that international law was intellectually rich', and '[n]o one seemed to think that international institutional structures looked forward or provided socially and culturally engaged lives for their inhabitants'.⁵⁴

Over the course of a decade, however, a new generation of international legal theorists – united under the banner of 'New Stream' scholarship, and afterwards, 'Critical Legal Studies' – began to introduce into the discipline a diverse array of methodological approaches from other fields.⁵⁵ These interdisciplinary projects were so prolific that by the late eighties, 'one [could] hardly peruse a law journal without encountering references to what once seemed the obscure texts of divergent disciplines'.⁵⁶

This new outcropping of scholarship also demonstrates a similar turn towards structuralism, with clear influences from the field of linguistics and semiotics. Kennedy's theses about international legal discourse, which was motivated by a perceived disconnect between international legal theory and practice, and his desire to see the law bridge the 'gap between ought and is', was articulated upon within an explicitly structuralist framework.⁵⁷ In order to do so, Kennedy consciously concentrates on international legal discourse, through which he seeks to reveal the 'hidden ideologies, attitudes and structures which lie behind [it]'.⁵⁸ Martti Koskenniemi, whose own work was influenced by Kennedy and whose own ideological project was similarly aligned, also examines

⁵⁴ David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7(1) *Wisconsin International Law Journal* 1, 6.

⁵⁵ *ibid*; Nigel Purvis, 'Critical Legal Studies in Public International Law' (1991) 32(1) *Harvard International Law Journal* 81, 88-90.

⁵⁶ Kennedy, 'Critical Theory, Structuralism and Contemporary Legal Scholarship' (n 48) 210.

⁵⁷ David Kennedy, 'Theses about International Law Discourse' (1980) 23 *German Yearbook of International Law* 353, 357.

⁵⁸ *ibid* 355.

international legal discourse using the methodology of structural linguistics.⁵⁹ To him, 'express international legal arguments, doctrines and 'schools' are a kind of *parole* which refers back to an underlying set of assumptions, capable of being explicated as the *langue* or 'deep-structure' of the law'.⁶⁰ By studying particular legal arguments, Koskenniemi's goal is to explicitly reveal this 'deep-structure', the set of grammatical rules that govern the production of 'conventionally acceptable' legal arguments and constrain possibilities for those who work within it.⁶¹

Both Kennedy and Koskenniemi engage in detailed examination of international legal argumentation, tracing the various rhetorical manoeuvres that it makes and revealing the common themes that resonate within its various sub-discourses. Kennedy observes how, even in seemingly disparate doctrinal practices within international law, one is still able to discern 'echo[ing] themes and references familiar to one another'.⁶² Koskenniemi goes even further and claims that all international legal argumentation can be exhaustively designated into two broad patterns of justification.⁶³ The first, which is premised on the understanding that international law *determines* State obligations, gains argumentative purchase from notions such as 'justice', 'common interest' or 'world community', to which it relies upon to establish normative superiority over State behaviour.⁶⁴ The second, which is premised on an understanding of State behaviour *as a determinant* of international law, gains its rhetorical power on the basis of its construction around 'factual' State behaviour.⁶⁵

Koskenniemi then argues that these 'descending' and 'ascending' patterns of justification evince two different ways of conceptualising international law.⁶⁶ On one hand, it can be understood as a *normative* project distinct from international politics, whilst on the other, it can be approached as something *concrete* and *objective* instead, distinguishable from natural morality. These conceptualisations are, in a sense, the communicated meanings of a particular sign-image of international law, and as such can be correspondingly understood as its *signified* content, finally made intelligible through synchronic analysis. Like Barthes' semiotic unravellings of the Eiffel Tower, these meanings

⁵⁹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006).

⁶⁰ *ibid* 8.

⁶¹ *ibid*.

⁶² Kennedy, 'A New Stream of International Law Scholarship' (n 54) 37.

⁶³ Koskenniemi, *From Apology to Utopia* (n 59) 59.

⁶⁴ *ibid*.

⁶⁵ *ibid*.

⁶⁶ *ibid* 17.

must be seen as fully constitutive of – and also inseparable from – the social fabric. In this case, Koskenniemi recognises them to be representative of contemporary tensions in the wider social and political world, reflecting the anxieties inherent in trying to understand the current character of the global order whilst also simultaneously trying to understand how it can be shaped within a liberal framework.⁶⁷ By acknowledging how the ‘social life-process’ constitutes our conceptualisations of international law, we understand why the discipline is structured on such strong oppositional dichotomies, always presenting itself through an unmediated bifurcation of ‘descending/ascending, normative/concrete, utopian/apologist, or naturalist/positivist’ perspectives.⁶⁸

IV. MONUMENTS AND MYTHOLOGY

[A]rchitecture is always dream and function, expression of a utopia and instrument of a convenience.

Barthes⁶⁹

The ways in which we derive meaning from the world around us, whether through constructed edifices or doctrinal expressions of international relations, are paradigms that are constantly subject to change.

By juxtaposing these changes within architecture and international law, I have sought to demonstrate how these methods of theorising and conceptualising actually evince more commonality than difference. Further, by exploring in detail at least two of these paradigms – functionalism and semiotic structuralism – I have sought to illustrate the ways in which they not only shape disciplinary methodology, but also potentially articulate disciplinary worldviews about the wider social and political fabric.

To the extent that structuralist-inspired scholarship in international law seeks to make clearer this connection to broader ideological discourses, I find these accounts to be more insightful in understanding the global order than functionalism. Note, however, that neither paradigm can ever truly claim to be *the* ‘correct’ approach to understanding international law and its role within global social life, because a choice between two paradigms is a choice between which approach offers the best possibilities in realising a political goal. Just as functionalism enabled international law to emancipate itself from the perceived irrelevance of positivism, structuralism enabled international law to search for a

⁶⁷ *ibid* 5.

⁶⁸ Purvis (n 55) 104.

⁶⁹ Barthes, *The Eiffel Tower and Other Mythologies* (n 2) 6.

broader social meaning within its own self-image. Correspondingly, no paradigm can, or ought to, have a monopoly over the way we witness the world.

To which I then ask: are there other kinds of ways in which we can conceive of international law? Through what other means *do* we want to think about international law? I do not seek to offer a comprehensive theory or a new analytical framework. Rather, I intend only to make a comment on a particular moment in David Kennedy's and Martti Koskenniemi's structuralist scholarship and to modestly build upon it.

Recall Koskenniemi's interpretation of international law as embodying both a 'normative' and an 'objective' self-image.⁷⁰ Kennedy makes a similar observation about the 'moral dilemma' faced by international law, a choice between 'individual national particularism and community', or 'authoritative and cooperative identities'.⁷¹ Both writers understand these meanings not just as being in ideological opposition to one another, but also as mutually exclusive and irreconcilable. Indeed, Koskenniemi understands international legal arguments that are based on these conceptualisations as meaningful precisely *because* of this mutual exclusivity.⁷²

For both of them, this inability to reconcile the 'normative' and 'objective' conceptions of international law is perceived as a moment of crisis. Kennedy opines that neither understanding of the law is sufficient; the 'normative' without the 'objective' suffers from incapacity of determinative application, whilst the 'objective' without the 'normative' is insecure in its normative legitimacy.⁷³ Koskenniemi similarly characterises international law's position between politics and natural morality as a 'terrain of irreducible adversity'.⁷⁴

These characterisations of crisis are indicative of Kennedy and Koskenniemi's own political biases. Conceptual irreconcilability is not problematic per se, and is only seen as such because it disrupts their own visions as to what international law should be. Although not explicitly expressed by either of them, it is clear that they seek to (re)create an international law whose theory continues to speak to doctrine, whose professions continue to be relevant in today's world, and whose distinct identity as a discipline is retained. In other words, a coherent, sensible and 'real' international law.

⁷⁰ Koskenniemi, *From Apology to Utopia* (n 59).

⁷¹ Kennedy, 'Theses about International Law Discourse' (n 57) 371.

⁷² Koskenniemi, *From Apology to Utopia* (n 59).

⁷³ Kennedy, 'Theses about International Law Discourse' (n 57) 383.

⁷⁴ Koskenniemi, *From Apology to Utopia* (n 59) 597.

4.1 'Expressions of Utopia'

As I consider this point, I am drawn back towards Barthes' essay on the Eiffel Tower, which I think has the potential to hold key insights regarding this 'problem' of conceptual irreconcilability.

Barthes' intellectual background, it should be noted, is not strictly structuralist. Despite identifying himself as such in his earlier works, he later evinced a transition towards a more post-structuralist outlook in his semiological work. Some evidence of this can be seen in his own attempts to read into the 'overwhelming myth' of the Eiffel Tower, where he acknowledged the impossibility of any fixed or finite understanding of it.⁷⁵ The Eiffel Tower, which is characterised as an infinite cipher whose meanings are indeterminate, elusive and bottomless, is explored by Barthes within the realm of the 'great human dream in which movable and infinite meanings are mingled'.⁷⁶

The fact that these various meanings might be incompatible with one another, and thus constitute the Eiffel Tower as a 'paradoxical monument', is not seen as an event of imminent failure. Instead, it is precisely because of the Eiffel Tower's escape from rational existence – its ability to be seeing yet be seen, to be open yet enclosed, to be spectacular yet familiar, and to be something yet nothing – that enables it to become the 'total monument' capable of satisfying its 'great oneiric function'.⁷⁷ Its ability to embody the paradoxical and the irrational is the very reason why it continues to inspire and live on in our imaginations. It offers the impossible dream.

It is within this space of untroubled impossibility that I am reminded of the concept of utopia, which describes the very kind of dream-like, aspirational quality that the Eiffel Tower embodies, even though it quite literally indicates in its name that 'no such place' can ever exist. I am also reminded of the object of the 'monument' itself, which exemplifies this notion of impossible existence through its etymology; until relatively recently, the word was used to refer to a burial place,⁷⁸ thereby illustrating its ability to paradoxically be the *presence* demarcating an *absence*.

Do their paradoxical existences necessarily compel us to crisis? Do their illogicalities demand that we solve them like an eternal riddle? I am

⁷⁵ Barthes, *The Eiffel Tower and Other Mythologies* (n 2) 5.

⁷⁶ *ibid* 7.

⁷⁷ *ibid* 5.

⁷⁸ Maurice Waite (ed), *Oxford Paperback Thesaurus* (4th edn, OUP 2012).

unconvinced. There is something to be said that it is their very impossibility itself that defines them and ensures their continued existence.

In light of this, perhaps we should see international law's conceptual irreconcilability as its defining feature. Its inability to resolve itself should not evoke anxiety but imagination. Its paradoxical self should be seen as offering the prospect of transcendence.

BIBLIOGRAPHY**BOOKS**

- Barthes R, *The Eiffel Tower and Other Mythologies* (Richard Howard tr, Hill and Wang 1979)
- — ‘Semiology and the Urban’ in Leach N (ed), *Rethinking Architecture: A Reader in Cultural Theory* (Routledge 1997)
- Bloomer KC and Moore CW, *Body, Memory, and Architecture* (Yale University Press 1977)
- Corbusier L, *Toward an Architecture* (Goodman J tr, Getty Research Institute 2007)
- Heynen H, *Architecture and Modernity: A Critique* (Massachusetts Institute of Technology 1999)
- Jencks C, *The Language of Post-Modern Architecture* (Rizzoli 1977)
- Koskenniemi M, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006)
- Waite M (ed), *Oxford Paperback Thesaurus* (4th edn, OUP 2012)
- Kruft H-W, *A History of Architectural Theory: From Vitruvius to the Present* (Taylor R, Callander E and Wood A trs, Princeton Architectural Press 1994)
- Leach N (ed), *Rethinking Architecture: A Reader in Cultural Theory* (Routledge 1997)
- Mallgrave HF and Goodman DJ, *An Introduction to Architectural Theory: 1968 to the Present* (Wiley-Blackwell 2011)
- Nesbitt K, *Theorizing a New Agenda for Architecture: An Anthology of Architectural Theory, 1965-95* (Princeton Architectural Press 1996)
- Preziosi D, *Architecture, Language, and Meaning: The Origins of the Built World and its Semiotic Organization* (De Gruyter Mouton 1979)

JOURNAL ARTICLES

- Blum G, ‘Bilateralism, Multilateralism, and the Architecture of International Law’ (2008) 49(2) *Harvard International Law Journal* 323
- Corbett PE, ‘What is the League of Nations’ (1924) 5 *British Yearbook of International Law* 119
- Dinwoodie GB, ‘The Architecture of the International Intellectual Property System’ (2002) 77 *Chicago-Kent Law Review* 993
- Giovanoli M, ‘The Reform of the International Financial Architecture After the Global Crisis’ (2009) 42 *International Law and Politics* 81
- Kennedy D, ‘A New Stream of International Law Scholarship’ (1988) 7(1) *Wisconsin International Law Journal* 1
- — ‘Critical Theory, Structuralism and Contemporary Legal Scholarship’ (1986) 21(2) *New England Law Review* 209
- — ‘Theses about International Law Discourse’ (1980) 23 *German Yearbook of International Law* 353
- Koskenniemi M, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70(1) *Modern Law Review* 1
- Morgenthau HJ, ‘Positivism, Functionalism, and International Law’ (1940) 34(2) *American Journal of International Law* 260

- Purvis N, 'Critical Legal Studies in Public International Law' (1991) 32(1) *Harvard International Law Journal* 81
- Raustiala K, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43(1) *Virginia Journal of International Law* 1
- Whyte W, 'How Do Buildings Mean? Some Issues of Interpretation in the History of Architecture' (2006) 45(2) *History and Theory* 153

REPORTS

- ILC, 'Report of the International Law Commission Report on the Work of its 58th Session' (2006) UN Doc A/61/10

WEBSITES AND OTHER SOURCES

- Sullivan L, 'The Tall Office Building Artistically Considered' (*Lippincott's Magazine* March 1896)
- United Nations Global Compact, 'Architects of a Better World: Building the Post-2015 Business Engagement Architecture' (United Nations Global Compact 2013)
- Weber C, 'Lightning Rods and Sideshows' (*The New York Times*, 29 May 2009) <http://www.nytimes.com/2009/05/31/books/review/Weber-t.html?_r=0> accessed 11 June 2015
- Yates UH, "'Temporary' Eiffel Tower 70 Years Old' (*The Milwaukee Sentinel*, 4 April 1959) <https://news.google.com/newspapers?id=_L0VAAAIAIAJ&sjid=ug8EAAAIAIAJ&pg=6101,1717690&hl=en> accessed 11 June 2015

The Role of Food Banks on a UK Right to Food

Gemma Daly*

The proliferation of food banks in the UK has spurred various reports and investigations into the causes of food poverty and food insecurity in Britain, linked to critiques of the coalition and majority Conservative governments' austerity policies. This Article uniquely focuses on the need for this debate to move towards a UK right to food, due to the useful legal tools available, as opposed to the vaguer frameworks of food security and food poverty. The author provides a critical analysis of the negative role food banks themselves are playing on the potential for a UK right to food, with some comparative analysis to long-term food aid in other developed countries. The author proposes greater advocacy and campaign work by food banks for a long-term right to food in Britain, alongside necessarily short-term, emergency-only food aid.

I. INTRODUCTION

Charitable provision of food aid in the United Kingdom (UK) has risen dramatically in recent years, with food banks now well established across the country. The role of charities in providing basic necessities has been criticised as concealing the government's socio-economic obligations; one food bank even shut down so as to not be complicit in government cuts to local authorities' emergency funds.¹ This Article shall explore the role of food banks in relation to the right to food (RTF) in the UK; how food aid might undermine government obligations, and the requirement of a stronger advocacy approach for a UK RTF.

* Gemma Daly graduated from the University of Bristol in 2012 with a first class honours LLB and is currently a SOAS student completing an LLM specialising in Human Rights, Conflict and Justice. Gemma is also a specialist welfare rights adviser and food bank volunteer. She would like to thank Professor Lynn Welchman for her continued support, Tom Ashdown for the many hours spent as a springboard for her ideas, and all the clients who have contributed to her increasing understanding of the impact of welfare reform and food banks.

¹ Jonathan Owen, 'Busy Nottingham Food Bank to Close in Protest at Harsh Council Cuts' (*The Independent*, 26 November 2014)

<<http://www.independent.co.uk/news/uk/politics/busy-nottingham-food-bank-to-close-in-protest-at-harsh-council-cuts-9885641.html>> accessed 26 February 2015.

1.1 Background: The Emergence of UK Food Banks

There is general consensus in the literature that the existence of food banks and food aid in the UK has increased exponentially since the 2008 financial crisis and post-2010 coalition government,² linked by reputable sources to austerity measures, welfare reforms, central and local government funding cuts and low wages.³ Whilst the UK Conservative Party originally commended food banks as the “‘big society’ at work’,⁴ they have become ‘increasingly defensive about the impact of their own policies’⁵ and controversially suggested that food banks ‘generate a supply-led demand’.⁶ This contradicts available research,⁷ including the report commissioned by the Department for Environment, Food and Rural Affairs (DEFRA), which found no evidence that supply of food aid increases demand.⁸ The UK is increasingly witnessing an institutionalisation of food banks, akin to the USA,⁹ Canada¹⁰ and Australia.¹¹ The role of the British welfare state has been gradually eroded since 1980s Thatcherism and according to Lansley and Mack, there is consensus among the current Conservative Party government and the Labour Party opposition for a ‘leaner state’.¹² This is substantiated by recent Labour guarantees that ‘Labour would be tougher than

² Graham Riches and Tiina Silvasti (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014) 4; Elizabeth Dowler, ‘Food Banks and Food Justice in “Austerity Britain”’ in Graham Riches and Tiina Silvasti (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014) 160; Stewart Lansley and Joanna Mack, *Breadline Britain: The Rise of Mass Poverty* (Oneworld Publications 2015) 213; Just Fair, ‘Going Hungry? The Human Right to Food in the UK’ (Just Fair 2014) 4.

³ Lansley and Mack (n 2) 213; Dowler (n 2) 161–2; Just Fair (n 2); Rachel Loopstra and others, ‘Austerity, Sanctions, and the Rise of Food Banks in the UK’ (2015) 350 *BMJ* h1775.

⁴ Lansley and Mack (n 2) 209.

⁵ *ibid.*

⁶ Dowler (n 2) 169.

⁷ Hannah Lambie-Mumford and others, ‘Household Food Security in the UK: A Review of Food Aid’ (Food Ethics Council and The University of Warwick 2014) 5.

⁸ *ibid.*

⁹ Janet Poppendieck, ‘Food Assistance, Hunger and the End of Welfare in the USA’ in Riches and Silvasti (n 2) 181–190.

¹⁰ Graham Riches and Valerie Tarasuk, ‘Canada: Thirty Years of Food Charity and Public Policy Neglect’ in Riches and Silvasti (n 2).

¹¹ Sue Booth, ‘Food Banks in Australia: Discouraging the Right to Food’ in Riches and Silvasti (n 2).

¹² Lansley and Mack (n 2) 214, 217.

the Conservatives on cutting the benefits bill',¹³ despite pledging welfare reforms to reduce food bank usage.¹⁴

Food aid in the UK comes in a variety of forms; including breakfast clubs and other school-based support¹⁵ and there have been limited alternatives proposed, such as a renewal of the 'self-supporting' wartime 'communal kitchens'.¹⁶ The scope of this Article, however, is limited to the particular phenomenon of food banks due to the prevalence of this model. For this Article, the definition in the DEFRA-commissioned report is employed: 'projects which provide parcels of food stuffs for people to take away and prepare and eat at home'.¹⁷ The FareShare food waste model is considered to a limited extent in the context of institutionalisation of food banks.¹⁸

1.2 Proposal: The Need for Food Bank Advocacy

There have been many reports on food banks over the past few years by the third sector,¹⁹ an all-party Parliamentary inquiry,²⁰ DEFRA,²¹ Greater London Assembly,²² and Scottish Parliament,²³ which consider causes of food aid and sometimes criticise food banks' inadequacies and unintentional concealment of

¹³ Amelia Gentleman, 'Labour Vows to Reduce Reliance on Food Banks if it Comes to Power' (*The Guardian*, 17 March 2015) <<http://www.theguardian.com/society/2015/mar/17/labour-vows-to-reduce-reliance-on-food-banks-if-it-comes-to-power>> accessed 19 March 2015.

¹⁴ Patrick Butler, 'Labour Pledges to End Dependency on Food Banks with Welfare Reforms' (*The Guardian*, 25 March 2015) <<http://www.theguardian.com/politics/2015/mar/25/labour-promises-end-food-bank-dependency-welfare-reforms>> accessed 26 March 2015.

¹⁵ Health and Environment Committee, 'A Zero Hunger City: Tackling Food Poverty in London' (Greater London Authority 2013) 20–24; Lambie-Mumford and others (n 7) 45.

¹⁶ Bryce Evans, 'Here's a Better Alternative to Food Banks – Subsidised National Kitchens' (*The Conversation*, 24 February 2015) <<http://theconversation.com/heres-a-better-alternative-to-food-banks-subsidised-national-kitchens-37928>> accessed 26 February 2015.

¹⁷ Lambie-Mumford and others (n 7) 19; Cecilia Rocha, 'A Right to Food Approach: Public Food Banks in Brazil' in Riches and Silvasti (n 2).

¹⁸ At Section 4.4.

¹⁹ For example: Just Fair (n 2); Jane Perry and others, 'Emergency Use Only: Understanding and Reducing the Use of Food Banks in the UK' (Child Poverty Action Group (CPAG), The Church of England, Oxfam GB and the Trussell Trust 2014); Niall Cooper, Sarah Purcell and Ruth Jackson, 'Below the Breadline: The Relentless Rise of Food Poverty in Britain' (Church Action on Poverty, Oxfam and The Trussell Trust 2014).

²⁰ All-Party Parliamentary Group on Hunger and Food Poverty, 'Feeding Britain: A Strategy for Zero Hunger in England, Wales, Scotland and Northern Ireland' (The Children's Society 2014)

²¹ Lambie-Mumford and others (n 7).

²² Health and Environment Committee (n 15).

²³ Welfare Reform Committee, *Food Banks and Welfare Reform (second report)* (Scottish Parliament 2014, Session 4, SP Paper 537).

gaps in State provision.²⁴ I intend this Article to contribute to existing literature by focusing on the oft-neglected approaches: a RTF framework²⁵ and attention to the more beneficial role that food banks and charities may play on the right to food through advocacy. I shall invoke many of the existing criticisms around the normalisation of food banks and instead support their existence on a temporary basis with greater emphasis required on emergency-only use and exit strategies, alongside RTF advocacy.

There are two potential criticisms of this approach that warrant immediate consideration. Firstly, criticism of charitable provision as altogether undesirable to those who believe that charity can hinder long-term change²⁶ and to disability rights activists who call for 'rights not charity'.²⁷ To an extent, my proposal acknowledges both critiques. I adopt a RTF framework, and whilst I do not propose the end of these charities, I recognise that food banks can conceal State inadequacies and thus recommend food aid as temporary, accompanied by advocacy. Secondly, this approach could be criticised for focusing on rights. Scholars such as David Kennedy warn of the harm of a rights-focus;²⁸ cultural relativists dismiss human rights as illegitimate Western liberal ideals;²⁹ and theorists such as Scheingold may accuse this Article of overestimating law and the 'myth of rights', although I support Scheingold's emphasis on social mobilisation.³⁰ Stephen Hopgood dismisses the entire rights endeavour as not "'fit for purpose'".³¹ Despite these critiques, a specific RTF approach is advocated for by academics in a number of jurisdictions facing

²⁴ Olivier De Schutter, 'Food Banks Can Only Plug the Holes in Social Safety Nets' (*The Guardian*, 27 February 2013) <<http://www.theguardian.com/commentisfree/2013/feb/27/food-banks-social-safety-nets>> accessed 6 March 2015; Riches and Silvasti (n 2); Lansley and Mack (n 2) 213.

²⁵ Which is adopted by Just Fair (n 2).

²⁶ Traditionally expressed by Oscar Wilde, *The Soul of Man under Socialism* (first published 1891, The Floating Press 2009).

²⁷ Ian Parker, 'Spitting on Charity' (*The Independent*, 9 April 1995) <<http://www.independent.co.uk/arts-entertainment/spitting-on-charity-1614885.html>> accessed 27 March 2015; Lawrence Mute, 'A Question of Rights, Not Charity' (*Open Society Foundations*, 6 February 2013) <<http://www.opensocietyfoundations.org/voices/question-rights-not-charity>> accessed 27 March 2015.

²⁸ David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004).

²⁹ Makau W Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) *Harvard International Law Journal* 201.

³⁰ Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd edn, University of Michigan Press 2004).

³¹ Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013) 2.

similar food bank institutionalisation.³² This Article's approach is based on the unfortunate reality that the UK is not fulfilling its international RTF obligations and as a result, many are going hungry.³³ It proposes that food banks need to put greater emphasis on the temporary nature of food aid alongside increased advocacy strategies towards a long-term goal of an adequate RTF. The inadequacies of constitutional rights guarantees alone in Brazil and South Africa³⁴ demonstrate the need for advocacy towards not only a legal RTF framework but also genuine application of a RTF.

1.3 Outline

It is necessary to analyse RTF in the UK at the outset, as a specific right and within the broader context of collective social, economic, and cultural rights. We can then consider if the UK is adequately fulfilling that right or breaching its obligations and if there are remedies available. The crux of this Article is a critical analysis of the role of food banks in the UK, leading to the proposal that food banks may be able to play a more beneficial role for a UK RTF by engaging in greater advocacy.

II. UK RIGHT TO FOOD OBLIGATIONS

Just Fair concludes that 'the UK has violated the human right to food and breached international law',³⁵ calling upon 'the Government to take immediate action to ensure that the [sic] no one in the UK is denied their most basic right to sufficient and adequate food'.³⁶ To critically analyse this conclusion, it is necessary to consider the extent of a UK RTF; the government's obligations and remedies for breach. Interestingly, the Just Fair report is one of the only recent publications on food poverty in the UK explicitly framed in RTF terms.³⁷ A RTF framework is important as it clearly affirms that food accessibility and availability is a right, which the State has obligations to respect, protect, and fulfil; rather than framing food aid as a charitable gift. For this reason, the focus

³² Booth (n 11); Riches and Tarasuk (n 10); Tiina Silvasti and Jouko Karjalainen, 'Hunger in a Nordic Welfare State: Finland' in Riches and Silvasti (n 2); Poppendieck (n 9).

³³ Just Fair (n 2).

³⁴ Although Brazil's 'Zero Hunger strategy' has been commended. Tiina Silvasti and Graham Riches, 'Hunger and Food Charity in Rich Societies: What Hope for the Right to Food?' in Riches and Silvasti (n 2) 195. Sheryl L Hendriks and Angela McIntyre, 'Between Markets and Masses: Food Assistance and Food Banks in South Africa' in Riches and Silvasti (n 2). On Brazil see: Rocha (n 17).

³⁵ Just Fair (n 2) 4.

³⁶ *ibid.*

³⁷ 'The framing of food poverty in terms of justice and rights is not new in the UK but also not widely explored'. Dowler (n 2) 172.

of this Article is on the right to food, not food security, food poverty, or food sovereignty,³⁸ though at times these other terms are necessary to engage with the literature. Whilst the various frameworks overlap, the importance of RTF lies in its legal basis as one that establishes State obligations.³⁹

The right to food is established under international human rights law, ratified by the UK in Article 11(1) of the International Covenant on Economic, Social, and Cultural Rights⁴⁰ (ICESCR): 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food ...' The Committee on Economic, Social and Cultural Rights (CESCR) expanded on the right to food in 1999 General Comment 12, importantly correlating RTF as 'indivisibly linked' with other economic, social and cultural, as well as civil and political rights.⁴¹ Thus, RTF fulfilment links to the rights to health; life; water; housing; education; work and social security; information and freedom of association; freedom from torture, cruel, inhuman or degrading treatment; and freedom from child labour.⁴² The engagement of various rights means that 'food security is an issue of relevance across Government Departments'.⁴³

³⁸ 'Food security': 'when all people at all times have access to sufficient, safe, nutritious food to maintain a healthy and active life'. Food security includes physical and economic access to food, as with the RTF. World Health Organization, 'Food Security' (*World Health Organization*) <<http://www.who.int/trade/glossary/story028/en/>> accessed 21 March 2015; Food and Agriculture Organization of the United Nations (FAO), 'Food Security' (FAO, 2006) <<http://www.fao.org/forestry/13128-0e6f36f27e0091055bec28ebe830f46b3.pdf>> accessed 21 March 2015.

'Food poverty': 'the inability to afford, or to have access to, food to make up a healthy diet'. Department of Health, 'Choosing a Better Diet: A Food and Health Action Plan' (Department of Health 2005) 7; London Assembly, 'Food Poverty in London' (*London Assembly*) 1 <http://www.london.gov.uk/sites/default/files/Food%20poverty_Call%20for%20views%20and%20information_0.pdf> accessed 21 March 2015.

'Food sovereignty' is a 'concept according to which peoples define their own food and own model of food production...' OHCHR and FAO, 'The Right to Adequate Food' (United Nations 2010) Fact Sheet number 34 4.

³⁹ OHCHR and FAO (n 38) 4.

⁴⁰ International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁴¹ CESCR, 'General Comment 12: The Right to Adequate Food (Art.11)' (12 May 1999) E/C.12/1999/5 (General Comment 12) [4].

⁴² OHCHR and FAO (n 38) 5-6.

⁴³ Lambie-Mumford and others (n 7) 22.

The CESCR acknowledged RTF issues are not unique to developing countries,⁴⁴ defining 'the core content of the right to adequate food':⁴⁵

The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.⁴⁶

As discussed in detail below,⁴⁷ it is clear that food aid provided by food banks in the UK is not necessarily adequate, available, and nutritionally sufficient and food banks are inherently non-sustainable or physically and economically accessible.⁴⁸

The UK's ICESCR rights obligations must be 'progressively realised'.⁴⁹ Whilst this allows some flexibility for implementation, the CESCR has been clear in General Comment 3 that States have 'an obligation to move as expeditiously and effectively as possible towards that goal'.⁵⁰ The Committee categorises ICESCR rights as having 'minimum core obligation[s]':

... [A] State party in which any significant number of individuals is deprived of essential foodstuffs ... is, prima facie, failing to discharge its obligations under the Covenant.⁵¹

Whilst this minimum core takes into account the limited resources of individual States, the Committee has stressed that limited resources, including as a result of financial crisis and austerity measures (as in the UK), do not nullify the State's obligations.⁵²

In addition to these general obligations for States to progressively realise ICESCR rights, the CESCR specifically elucidated State Parties' obligations to

⁴⁴ General Comment 12 (n 41) [5].

⁴⁵ *ibid* [8].

⁴⁶ *ibid* [8].

⁴⁷ In Sections 3.1 and 4.

⁴⁸ General Comment 12 (n 41) [13].

⁴⁹ ICESCR, Art.2(1); CESCR, 'General Comment No.3: The Nature of States Parties' Obligations (Art.2, para.1)' E/1991/23 (General Comment 3).

⁵⁰ General Comment 3 (n 49) [9].

⁵¹ *ibid* [10].

⁵² *ibid* [12].

'respect, to protect and to fulfil' the right to food in General Comment 12.⁵³ In the context of resource constraints:

... [T]he State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.⁵⁴

The CESCR acknowledged a 'margin of discretion' in how States approach implementation of the right to food,⁵⁵ but nevertheless emphasised the requirement that 'each State party take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food'.⁵⁶ Finally, if State obligations are breached, 'a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels'.⁵⁷

III. IS THE UK VIOLATING THE RIGHT TO FOOD?

The UK is subject to RTF obligations under the ICESCR; however, the government uses its dualist legal system to prevent the justiciability of the right to food in the UK.⁵⁸ The Committee has criticised this approach:

Affirming the principle of the interdependence and indivisibility of all human rights, and that all economic, social and cultural rights are justiciable, the Committee ... strongly recommends that the State party re-examine the matter of incorporation of the [ICESCR] in domestic law.⁵⁹

⁵³ General Comment 12 (n 41) [15].

⁵⁴ *ibid* [17].

⁵⁵ *ibid* [21].

⁵⁶ *ibid* [21].

⁵⁷ *ibid* [32].

⁵⁸ International law, which is not customary, needs to be incorporated into domestic UK law. Eileen Denza, 'The Relationship Between International and National Law' in Malcolm Evans (ed), *International Law* (3rd edn, OUP 2010). CESCR, 'Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: United Kingdom of Great Britain and Northern Ireland' (12 June 2009) E/C.12/GBR/CO/5 [13]; Geraldine Van Bueren, 'Should We Have an Enforceable Right to Food? - Professor Geraldine Van Bueren Q.C.' (*UK Human Rights Blog*, 2013) <<http://ukhumanrightsblog.com/2013/10/18/should-we-have-an-enforceable-right-to-food-professor-geraldine-van-bueren/>> accessed 20 February 2015.

⁵⁹ CESCR, 'Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: United Kingdom of Great Britain and Northern Ireland' (5 June 2002) E/C.12/1/Add.79 [24].

The Committee reiterates its recommendation that, irrespective of the system through which international law is incorporated in the domestic legal order ... following ratification of an international instrument, the State party is under a legal obligation to comply with it and give it full effect in its domestic legal order.⁶⁰

The very fact that the UK has not legislated for RTF in accordance with the Covenant contradicts the principle that 'States should consider the adoption of a *framework law* as a major instrument in the implementation of the national strategy concerning the right to food'.⁶¹ The UK has 'no such rights-based food strategy currently'.⁶² However, there is no applicable enforcement mechanism for the ICESCR's principle framed in merely advisory terms. Therefore, the RTF cannot be enforced in UK courts, notwithstanding UK's international obligation to give effect to the RTF under the ICESCR in collaboration with other human rights.

This analysis allows us to affirm Just Fair's conclusion: the UK government is not fulfilling its right to food obligations under the ICESCR.⁶³ Unfortunately, without justiciability before UK courts, or UK ratification of the Optional Protocol⁶⁴ to permit individual complaints to the CESCR, there is currently no direct redress mechanism for individuals or groups who allege that their right to food has been violated.⁶⁵ The UK is not fulfilling the CESCR's requirement that 'victim[s] of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels'.⁶⁶ Unfortunately, the weak wording of this provision and the lack of an enforcement mechanism means that there is no direct legal action that can be taken to address the UK's inaction, which is why this Article emphasises the need for advocacy and social mobilisation through food banks for a RTF.

⁶⁰ CESCR, 'Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: United Kingdom of Great Britain and Northern Ireland' (n 58) [13].

⁶¹ General Comment 12 (n 41) [29].

⁶² Just Fair (n 2) 21.

⁶³ *ibid* 4.

⁶⁴ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted by the General Assembly 5 March 2009) A/RES/63/117.

⁶⁵ This also means that individuals cannot submit individual communications to the CESCR regarding any ICESCR violations, though victims of certain other social, economic, and cultural rights violations may have redress mechanisms available nationally if this right has been implemented in national law as justiciable; for example, the right to education.

⁶⁶ General Comment 12 (n 41) [32].

3.1 Could Food Banks Fulfil the Right to Food?

Food banks cannot fulfil the right to adequate food where the State fails, because they are inherently unable to guarantee adequate availability of food and users require food aid for the very reason that they lack access to food. Many of the practical inadequacies of food aid shall be discussed below,⁶⁷ but it is relevant to note that RTF obligations enunciated in ICESCR Article 11 and General Comment 12 are primarily State parties' responsibilities. Whilst there is acknowledgement in General Comment 12 that 'local communities, non-governmental organizations, civil society organizations, as well as the private business sector – have responsibilities in the realization of the right to adequate food', it is State parties who are 'ultimately accountable for compliance'.⁶⁸ As the UK has failed to implement a national legislative framework for the RTF, food banks have stepped in to provide food aid, but not to RTF standards. In the next Section, this Article considers the role of food banks' food aid on RTF, and whether they may be masking the government's failure to fulfil its obligations.

IV. THE ROLE OF FOOD AID ON THE RIGHT TO FOOD

The most obvious role of food banks is their provision of food aid. Whilst there is no doubt that food banks and their volunteers have good intentions, there are some important criticisms of their provision of food on RTF that must be analysed. Firstly, the food provided by food banks is not necessarily within the RTF definition of 'available'. Secondly, and of immediate relevance to this Article, food banks may potentially mask the State's RTF failures, facilitating government cuts and policies that erode economic, social, and cultural rights. To ensure that short-term food aid benefits are not undermined by unintended consequences on RTF, food banks must ensure that they provide emergency food only, implement exit strategies, and undertake advocacy for the RTF alongside food provision.

4.1 Availability: Inadequate Food?

The 'availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals'⁶⁹ is a tenet of the RTF and links to food security, which is achieved 'when all people at all times have access to sufficient, safe, nutritious food to maintain a healthy and active life'.⁷⁰ Riches and Silvasti apply the food

⁶⁷ In Section 4.1.

⁶⁸ General Comment 12 (n 41) [20].

⁶⁹ *ibid* [8].

⁷⁰ World Health Organization (n 38); FAO, 'Food Security' (n 38).

security definition to developed countries to conclude that '[f]ood banks, soup kitchens and breadlines are not socially accepted ways to acquire food for oneself or for the family ...'⁷¹ and the DEFRA-commissioned report found that food aid does not improve food security.⁷² Similarly, food banks do not satisfy the right to food because the quantity and quality of food parcels is not necessarily nutritionally adequate and available.⁷³ Food banks are only able to distribute non-perishable foodstuffs, are reliant on ad hoc donations as to what food is available, and there is a lack of choice.⁷⁴ Riches and Silvasti also report that '[m]any food banks run out of food and turn clients away ...'⁷⁵ Furthermore, the distribution of food by charities depends on 'vague criteria decided by the charity agencies or even individual voluntary workers',⁷⁶ who do not conceive food as a universal human right. Former United Nations Special Rapporteur on the Right to Food, Olivier De Schutter,⁷⁷ emphasised the link between State RTF obligations, social security levels and a living wage.⁷⁸ The Special Rapporteur also criticised the UK specifically:

For developed countries ... resources are evidently more plentiful – and the failure to eradicate poverty is that much less excusable ... [food banks] are charity-based, not rights-based, and they should not be seen as a substitute for the robust social safety nets to which each individual has a right.⁷⁹

Thus, food banks cannot satisfy the availability requirement of the RTF; 'only the state is able to guarantee funds and resources and to ensure that these are, permanently and without stigmatization, available for all'.⁸⁰

⁷¹ Riches and Silvasti (n 2) 6.

⁷² Lambie-Mumford and others (n 7) viii.

⁷³ Steven Morris, 'Long-Term Food Bank Users Risk Nutritional Problems' (*The Guardian*, 18 March 2015) <<http://www.theguardian.com/society/2015/mar/18/long-term-food-bank-users-nutritional-problems-balanced-diet>> accessed 20 March 2015.

⁷⁴ Silvasti and Riches (n 34) 203. Lack of choice links into the issue of food sovereignty, which is outside the scope of this essay. On food sovereignty see: La Via Campesina, 'Food Sovereignty and Trade' (*La Via Campesina*) <<http://viacampesina.org/en/index.php/main-issues-mainmenu-27/food-sovereignty-and-trade-mainmenu-38>> accessed 21 March 2015; and La Via Campesina, '2013 Annual Report' (La Via Campesina 2014).

⁷⁵ Riches and Silvasti (n 2) 10.

⁷⁶ Silvasti and Riches (n 34) 203.

⁷⁷ Hereafter 'Special Rapporteur'.

⁷⁸ UNHRC 'Report of the Special Rapporteur Olivier De Schutter on the Right to Food: Mission to Canada' (2012) A/HRC/22/50/Add.1.

⁷⁹ De Schutter (n 24).

⁸⁰ Silvasti and Riches (n 34) 204.

4.2 Accessibility: Concealing State Inadequacies?

While food banks can prevent these people hitting rock bottom, they can never be more than a stop-gap, and can only offer basic subsistence from day to day – not a route out of poverty. They cannot therefore be used as a substitute for real measures to address underlying poverty and inequality and the food insecurity they generate. Instead, social protection systems – including unemployment and child benefits – must be set at levels that take into account the real cost of living and ensure adequate food for all, without compromising on other essentials. And governments should not be allowed to escape their obligations because private charities make up for their failures.⁸¹

The role of food banks has been criticised as concealing State inadequacies and ‘de-politicizing’ hunger.⁸² We can interpret this as failing the RTF requirement of accessibility: food banks are unable to affect economic accessibility to food, and certain groups have difficulty physically accessing food banks, such as the elderly.⁸³ Ensuring economic accessibility is the role of the State, through regulation of the minimum wage, employment law, and social security (welfare benefits). The existence of food banks on the scale that they are currently required in the UK is evidence of the State failing to ensure economic accessibility to food. Food banks can demonstrate how and where a system is broken,⁸⁴ but also conceal the political nature of hunger and government’s obligations ‘because private charities make up for their failures’.⁸⁵ Food banks do not fulfil the adequate right to food, but as they satiate hunger to a limited extent, this conceals the ‘underlying problems’⁸⁶ of inadequate social, economic and cultural rights, which the State is legally obliged to fulfil. It is of concern that ‘[f]ood banks are just one area where charities have been stepping in’,⁸⁷ because even when charities perform successfully, they ‘risk giving a green light to government to outsource even more of the task of poverty relief, forcing the welfare system into an increasingly residual mould’,⁸⁸ whilst they ‘can never do more than patch up a system frayed by slump, austerity, and the steady transfer of economic and social risks from business and state to the

⁸¹ De Schutter (n 24).

⁸² Riches and Silvasti (n 2).

⁸³ Health and Environment Committee (n 15) 6; Lambie-Mumford and others (n 7) 50.

⁸⁴ De Schutter (n 24).

⁸⁵ *ibid.*

⁸⁶ Lansley and Mack (n 2) 213.

⁸⁷ *ibid* 209.

⁸⁸ *ibid* 226.

individual'.⁸⁹ Food banks are not 'socially or politically sustainable'.⁹⁰ Instead, the UK requires 'a coherent anti-poverty strategy ... based more closely on universal and inclusive principles of social protection'.⁹¹ Food banks should be wary of allowing 'governments ... to turn a blind eye despite the fact that [States] have ratified the right to food'.⁹² Charitable food provision should not be a 'component of food security, but [recognised] as part of the problem in addressing domestic hunger and food poverty'.⁹³

4.3 'Emergency use only'

Many of the critiques of food banks propose recommendations for government action because the State is failing in its ICESCR RTF obligations. Additionally, it is proposed that food banks may themselves be able to play a more beneficial role and remedy some of the unintended consequences of their activities. Food banks should exist as temporary measures, ensuring that they do not become embedded in the British society. To achieve this, this Article recommends that food banks provide emergency-only food, implement effective exit strategies and pertinently engage in advocacy work to lobby the government into action on the protection and fulfilment of RTF and linked socio-economic rights. This fits with the FAO 2005 Voluntary Guidelines⁹⁴ requiring that '[f]ood aid should be provided with a clear exit strategy and avoid the creation of dependency',⁹⁵ and the Rome Declaration understanding that food aid should not be long-term.⁹⁶

Some food banks already endeavour to function for 'emergency use only',⁹⁷ but in many cases their temporary nature needs to be more firmly entrenched in governing documents with thought-out exit strategies and public portrayal of this temporary existence. For example, the Trussell Trust limits clients to three vouchers over a six month period for three days' worth of emergency food,⁹⁸

⁸⁹ *ibid.*

⁹⁰ *ibid* 229.

⁹¹ *ibid.*

⁹² Riches and Silvasti (n 2) 10.

⁹³ *ibid* 12.

⁹⁴ FAO, 'Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security' (Adopted by the 127th Session of the FAO Council November 2004, FAO 2005).

⁹⁵ *ibid* 27.

⁹⁶ Rome Declaration on World Food Security and the World Food Summit Plan of Action (Rome Declaration), FAO 'Report of the World Food Summit' (Rome, 13-17 November 1996, FAO) [5]; Olivier De Schutter and Kaitlin Y Cordes (eds), *Accounting for Hunger: The Right to Food in the Era of Globalisation* (Hart Publishing 2011) 245.

⁹⁷ Perry and others (n 19).

⁹⁸ *ibid* 15.

‘signpost[s] people to agencies able to solve the longer-term problem’ and ‘has advised [Trussell Trust] food banks against entering into contractual service level agreements with local authorities’.⁹⁹ However, there are reports of practices undermining this official approach: discretionary food parcels without vouchers,¹⁰⁰ and ‘extra support on a discretionary basis in certain circumstances’.¹⁰¹ Whilst it is entirely understandable that food banks may feel compelled to provide more than emergency-only assistance, it is imperative for a UK RTF that food banks ‘retain a role only as providers of emergency food aid’;¹⁰² ‘food banks should not and cannot be expected to fill what appears to be a gap in state provision’.¹⁰³

Despite the Trussell Trust’s apparent awareness of the potentially damaging effects of institutionalising food banks, civil society and Parliament generally do not seem to have grasped this problem. In fact, the All-Party Parliamentary Inquiry into Hunger recommended incorporating food banks into a ‘national network’ to address hunger,¹⁰⁴ which was strongly criticised by Graham Riches for increasingly embedding food banks and not addressing the problem from a right to food perspective.¹⁰⁵ Whilst this Article agrees with Riches’ critique, it is relevant to note that the All-Party Parliamentary Inquiry reluctantly reached this conclusion, as they ‘do not believe food banks should take the place of statutory welfare provision’.¹⁰⁶ Alternatively, this Article suggests it is necessary that food banks have exit strategies in place to reaffirm their existence as temporary and to allow them to close down once the underlying problems have been addressed, or if their negative consequences outweigh their benefits. One food bank in Nottingham demonstrated the capacity to end food aid provision when their role was considered more damaging than beneficial, ‘legitimising council spending cuts’.¹⁰⁷ It is unclear whether other food banks, especially as they become increasingly institutionalised, would be able or willing to take similar action. Food banks must publicly promote themselves as temporary, for emergency use, and have exit strategies, to be seen as short-term help whilst advocating for a long-term RTF.

⁹⁹ Trussell Trust, ‘A Response to Inaccurate and Misleading Reports about the Trussell Trust’ (*Trussell Trust*) <<http://www.trusselltrust.org/rumour-response>> accessed 20 February 2015.

¹⁰⁰ Lansley and Mack (n 2) 226.

¹⁰¹ Health and Environment Committee (n 15) 18.

¹⁰² *ibid* 19.

¹⁰³ *ibid* 18.

¹⁰⁴ All-Party Parliamentary Group on Hunger and Food Poverty (n 20) 46.

¹⁰⁵ Graham Riches, ‘Food Banks Don’t Solve Food Poverty. The UK Must Not Institutionalise Them’ (*The Guardian*, 8 December 2014)

<<http://www.theguardian.com/commentisfree/2014/dec/08/food-banks-poverty-uk-canada-right-to-food>> accessed 22 February 2015.

¹⁰⁶ All-Party Parliamentary Group on Hunger and Food Poverty (n 20) 20.

¹⁰⁷ Owen (n 1).

4.4 Institutionalisation and Food Waste for the Food Poor

Evidence that food banks are being institutionalised in the UK includes the parliamentary inquiry proposing food banks as part of a national strategy,¹⁰⁸ councils utilising food banks instead of emergency funding,¹⁰⁹ and links with the Global Foodbanking Network (GFN) and European Federation of Food Banks (EFFB).¹¹⁰ FareShare is the only UK member of GFN and EFFB,¹¹¹ distributing otherwise waste food donated by supermarkets to charities and organisations where meals can be prepared for clients to eat on the premises.¹¹² This model raises diverse concerns from Trussell Trust-style food banks collecting donations of in-date non-perishable food and distributing it in food parcels to be prepared in people's homes.¹¹³ Silvasti and Riches raise concerns with the FareShare model, questioning 'who is really benefitting from corporatized food charity, and in practice how effective is this food charity model?'¹¹⁴ '[H]ow appropriate is it that globalized corporate food charity seeks to twin the issues of hunger and food waste?'¹¹⁵ They are critical of corporate supermarkets' motives in donating food, as they receive benefits such as 'tax deductibility of donations as well as possibilities to reduce costs for storage, transport and landfill charges'.¹¹⁶ The DEFRA-commissioned inquiry acknowledged similar concerns that 'the joint intertwining of interests of those providing food aid and the corporate sector can lead to entrenching the provision and normalising the system as a solution'.¹¹⁷

¹⁰⁸ All-Party Parliamentary Group on Hunger and Food Poverty (n 20).

¹⁰⁹ Owen (n 1).

¹¹⁰ Silvasti and Riches (n 34) 197.

¹¹¹ European Federation of Food Banks, 'Countries: United Kingdom' (*European Federation of Food Banks*) <<http://www.eurofoodbank.eu/countries/72-united-kingdom>> accessed 8 March 2015; The Global FoodBanking Network, 'Food Banks Around the World' (*The Global FoodBanking Network*) <<http://www.foodbanking.org/food-banking/global-food-bank-community/>> accessed 8 March 2015; FareShare, 'FareShare: Fighting Hunger, Tackling Food Waste' (*FareShare*) <<http://www.fareshare.org.uk/>> accessed 8 March 2015.

¹¹² FareShare (n 112); Other local organisations, and the charity Kids Company, engage in similar food aid provision through meals eaten in their premises. Jay Rayner, 'How Kids Company Feeds Britain's Hungry Children' (*The Guardian*, 15 February 2015) <<http://www.theguardian.com/society/2015/feb/15/how-kids-company-feeds-britains-hungry-children>> accessed 20 February 2015.

¹¹³ Lambie-Mumford and others (n 7) 19.

¹¹⁴ Silvasti and Riches (n 34) 197.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ Lambie-Mumford and others (n 7) 57.

Furthermore, conflating the separate issues of food waste and food poverty ignores the conception of a right to adequate food. It also reiterates the ‘social construction of hunger as a matter for charity’,¹¹⁸ with an aura of ‘public legitimacy promoted by positive mass media attention’.¹¹⁹ Dowler issues similar criticism:

The challenge in the increasing institutionalization of charitable responses, particularly in the linking of ‘food waste’ as a solution to ‘food poverty’, is that the fundamental issues become de-politicized, and solutions are located in the responsible use of resources at local levels, enabling both the state to retreat from responsibilities and food businesses to gain from improving corporate social responsibility (CSR) and reduced landfill taxes.¹²⁰

The DEFRA-commissioned inquiry also reported on problems that institutionalisation can ‘normalis[e] informal provision of food as a sufficient – and indeed, only – response to the problems’¹²¹ and that the involvement of the corporate sector ‘may contribute to entrenching a “hand-out” response to meeting immediate needs, which fail to address root causes of household food insecurity’.¹²² The coalition government, under which the need for food banks had multiplied, deflected the issue as ‘surplus food is going to waste’.¹²³ It is concerning that a State failing in its RTF obligations uses the conflation of food waste and hunger to excuse its inadequacies. Food banks need to resist institutionalisation and reconstruct food aid as emergency-only whilst advocating for a UK RTF.

V. THE ROLE OF FOOD BANKS IN ADVOCATING FOR THE RIGHT TO FOOD

This Article proposes that food banks are ideally positioned to advocate for the right to food in the UK, as they identify areas of food poverty¹²⁴ and are uniquely able to collect statistics.¹²⁵ Some food banks already engage in campaign work, examples being the reports published by the Trussell Trust and

¹¹⁸ Silvasti and Riches (n 34) 202.

¹¹⁹ *ibid* 203.

¹²⁰ Dowler (n 2) 173.

¹²¹ Lambie-Mumford and others (n 7) 60.

¹²² *ibid* 61.

¹²³ Patrick Wintour and Patrick Butler, ‘Tories Seek to Avert Rift with Church of England over Food Bank Report’ (*The Guardian*, 8 December 2014) <<http://www.theguardian.com/uk-news/2014/dec/08/tories-avert-rift-church-food-bank-report>> accessed 20 February 2015.

¹²⁴ De Schutter (n 24).

¹²⁵ There are ‘no official statistics’. Dowler (n 2) 166; Lambie-Mumford and others (n 7) vi.

other charities.¹²⁶ However, the role of food banks in advocating specifically for a UK RTF has been rather muted. This Article will analyse reasons for limited public campaigning and propose that food banks could and should increase advocacy on a UK RTF. For the purposes of this Article, a broad understanding of ‘advocacy’ is adopted; it may include legal advocacy through the courts, data collection and report publishing, public demonstrations, awareness-raising and social mobilising activities. The key point is that advocacy must promote a UK RTF, which could result in legal reform and a rights-based food strategy, as suggested by the ICESCR,¹²⁷ and genuine RTF implementation.

5.1 Restrictions on Food Bank Advocacy

Some food banks and charities have spoken out about food poverty and the rise of food aid in the UK, though very infrequently in RTF language. However, the former Conservative-led coalition government had made its view explicitly clear that charities should ‘stick to knitting’, providing food parcels and not legal and political advocacy.¹²⁸ This government message, which included threats to funding, forced some food banks to step back into the role of food aid and reduced advocacy. For example, the Secretary of State for Work and Pensions, Iain Duncan Smith MP, severely criticised the Trussell Trust’s advocacy as ‘scaremongering’.¹²⁹ His senior aide was additionally accused of threatening to close the Trussell Trust for its “‘politicisation of poverty’”.¹³⁰ These threats from senior government officials worryingly resulted in the Trussell Trust chair Chris Mould ‘admitt[ing] that the charity had decided to become less vocal about food poverty in the wake of the incident’.¹³¹ Perhaps Chris Mould felt restricted by funding needs not to agitate donors and government.¹³² Although ‘the Trussell Trust does not receive any government funding’,¹³³ their food banks may be ‘subsidised’ by local councils,¹³⁴ or there may be concerns that the government’s response may be off-putting to

¹²⁶ For example: Perry and others (n 19); Cooper, Purcell and Jackson (n 19); Just Fair (n 2).

¹²⁷ General Comment 12 (n 41) [29].

¹²⁸ Lansley and Mack (n 2) 222.

¹²⁹ *ibid* 210.

¹³⁰ Jonathan Owen, Oliver Wright and Charlie Cooper, ‘Exclusive: Food Bank Charity ‘Was Threatened with Closure by Iain Duncan Smith’s Aide’ (The Independent, 13 June 2014) <<http://www.independent.co.uk/news/uk/politics/exclusive-food-bank-charity-was-threatened-with-closure-by-ministers-aide-9533456.html>> accessed 12 March 2015.

¹³¹ *ibid*.

¹³² *ibid*.

¹³³ Trussell Trust (n 100).

¹³⁴ ‘Councils Spending £3m on Food Poverty and Food Banks’ (BBC News, 3 March 2014) <<http://www.bbc.co.uk/news/uk-26369558>> accessed 22 March 2015; ‘Funding for Food Banks’ (Public Sector Executive, 15 April 2014) <<http://www.publicsectorexecutive.com/Poverty-and-inequality/funding-for-food-banks>> accessed 22 March 2015.

'individual donors, independent grant making bodies and businesses'.¹³⁵ Lansley and Mack conclude that the increased role of charities can involve 'clear conflicts ... Charities which provide services with state funding *and* engage in lobbying, risk losing financial help ...'¹³⁶ The government's response gives weight to the critique that 'charities are encouraged to step in – and help provided they don't ask too many uncomfortable questions of government at the same time ... The big society, it seems, comes with strings attached, a duty of acquiescence'.¹³⁷ This uncooperative approach also caused the Conservative-led coalition government to clash with the Church of England's advocacy.¹³⁸

The coalition government's criticism of charity advocacy may raise freedom of expression concerns, furthered by new limitations on charitable spending before elections,¹³⁹ and Oxfam's 2014 referral to the Charity Commission for its advocacy on food.¹⁴⁰ Charity campaigning is not permitted by UK charity law if it is 'party political' and threatens the perception of a charity as independent.¹⁴¹ This does not prohibit advocacy on a UK RTF, and in the circumstances the Charity Commission recognised that Oxfam 'had no intention to act in a party political way ... [but] should have done more to avoid any misperception of political bias ...'¹⁴² However, the threat of referral to the Charity Commission and government reprisals for charitable advocacy may warn some food aid providers off engaging in advocacy work.

¹³⁵ Trussell Trust (n 100).

¹³⁶ Lansley and Mack (n 2) 224.

¹³⁷ *ibid* 225.

¹³⁸ Lansley and Mack (n 2) 223; Wintour and Butler (n 124). Examples of Church-linked reports: Cooper, Purcell and Jackson (n 19); Church Action on Poverty, 'Britain Isn't Eating - the Message Will Hit the Road' (*Church Action on Poverty*) <<http://www.church-poverty.org.uk/news/britainisnteating>> accessed 12 March 2015; All-Party Parliamentary Group on Hunger and Food Poverty (n 20).

¹³⁹ Regulated by the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014. See also Rowena Mason, 'Lobbying Bill Passes Through House of Lords' (*The Guardian*, 28 January 2014) <<http://www.theguardian.com/politics/2014/jan/28/lobbying-bill-passes-house-lords>> accessed 10 April 2015.

¹⁴⁰ Lansley and Mack (n 2) 211; Charity Commission, 'Operational Case Report: Oxfam (202918)' (Charity Commission 2014).

¹⁴¹ *ibid*; Charity Commission, 'Speaking Out: Guidance on Campaigning and Political Activity by Charities' (Charity Commission 2008). Under the Charities Act 2011, s 2–3, a charity must have purely charitable purposes; this does not include political purposes.

¹⁴² Charity Commission, 'Operational Case Report' (n 141).

5.2 Food Banks could and should do more RTF Advocacy

This Article maintains that despite the issues identified that may restrict food banks' capacity and willingness to engage in advocacy for a UK RTF, food banks could and should play a greater role in RTF advocacy. The DEFRA-commissioned report surmised from international evidence that, despite problems in food banks' food aid provision, 'civil society, which is where most food aid providers are located, can have an important and constructive role to play in terms of advocacy and lobbying ...'¹⁴³ Similarly, in 2014 Dowler identified potential for UK charities to advocate for 'people's voices to be heard', whilst reserving concern that the coalition government was not open to 'engagement'.¹⁴⁴ Dowler's critique continues to apply to the current majority Conservative government. Importantly, the State needs 'political will to adopt the ICESCR into domestic law',¹⁴⁵ which could be advocated for by food banks. The potential restrictions on food bank advocacy are not severe enough that they prohibit mobilisation. Governmental criticism may threaten funds, but food banks ought not to sacrifice long-term RTF goals for short-term food aid donations; as the impacts of unintended consequences of food aid can be damaging. Whilst some food banks already engage in advocacy, as well as charities campaigning on food poverty in the UK, food banks could do more to campaign specifically on the RTF. A rights-based approach outlines clear State obligations and a focus for a UK RTF.

VI. CONCLUSION

In post 2007-recession Britain, food banks have proliferated to provide food aid to the increasingly hungry society. Whilst it is undeniable that the obligations to protect, respect, and fulfil the right to food rest with the State, it is food banks that have been attempting to ease the damaging consequences of an absent UK RTF. Unfortunately, the well-meaning third sector has unintentionally contributed to the concealment and mitigation of State inadequacies, whilst being unable to provide an adequate RTF that is both available and accessible. To counter these unintended consequences, food banks must ensure that they perform and promote themselves as having a role that is emergency-only; prepare genuine exit strategies; and advocate for a long-term RTF. The UK government has ratified the RTF and its correlative social, economic and cultural rights in the ICESCR, but has failed to implement RTF obligations and a rights-based food strategy. This lack of implementation of international

¹⁴³ Lambie-Mumford and others (n 7) xi.

¹⁴⁴ Dowler (n 2) 175.

¹⁴⁵ Silvasti and Riches (n 34) 205.

human rights law is an example of the problems with a rights framework,¹⁴⁶ but nevertheless, it is asserted that the current debate framed around food poverty and food insecurity lacks clearly defined legal obligations that society can demand from the State. Food banks need to better engage in RTF advocacy and social mobilisation to play a more valuable role in developing a UK RTF.

¹⁴⁶ Emilie M Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) *American Journal of Sociology* 1373.

BIBLIOGRAPHY**BOOKS**

- Booth S, 'Food Banks in Australia: Discouraging the Right to Food' in Riches G and Silvasti T (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014)
- Denza E, 'The Relationship Between International and National Law' in Evans M (ed), *International Law* (3rd edn, OUP 2010)
- De Schutter O and Cordes KY (eds), *Accounting for Hunger: The Right to Food in the Era of Globalisation* (Hart Publishing 2011)
- Dowler E, 'Food Banks and Food Justice in "Austerity Britain"' in Riches G and Silvasti T (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014)
- Hendriks SL and McIntyre A, 'Between Markets and Masses: Food Assistance and Food Banks in South Africa' in Riches G and Silvasti T (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014)
- Hopgood S, *The Endtimes of Human Rights* (Cornell University Press 2013)
- Hospes O and Meulen BVD, *Fed Up With the Right to Food?: The Netherlands' Policies and Practices Regarding the Human Right to Adequate Food* (Wageningen Academic Publishers 2009)
- Kennedy D, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004)
- Kõre J, 'Hunger and Food Aid in Estonia: A Local Authority and Family Obligation' in Riches G and Silvasti T (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014)
- Lansley S and Mack J, *Breadline Britain: The Rise of Mass Poverty* (Oneworld Publications 2015)
- Poppendieck J, 'Food Assistance, Hunger and the End of Welfare in the USA' in Riches G and Silvasti T (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014)
- Riches G and Silvasti T, 'Hunger in the Rich World: Food Aid and Right to Food Perspectives' in Riches G and Silvasti T (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014)
- Riches G and Tarasuk V, 'Canada: Thirty Years of Food Charity and Public Policy Neglect' in Riches G and Silvasti T (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014)
- Rocha C, 'A Right to Food Approach: Public Food Banks in Brazil' in Riches G and Silvasti T (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014)
- Scheingold SA, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd edn, University of Michigan Press 2004)
- Silvasti T and Karjalainen J, 'Hunger in a Nordic Welfare State: Finland' in Riches G and Silvasti T (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014)

- Silvasti T and Riches G, 'Hunger and Food Charity in Rich Societies: What Hope for the Right to Food?' in Riches G and Silvasti T (eds), *First World Hunger Revisited: Food Charity or the Right to Food?* (2nd edn, Palgrave Macmillan 2014)
- Stuckler D and Basu S, *The Body Economic: Why Austerity Kills* (Basic Books 2013)
- Wilde O, *The Soul of Man under Socialism* (first published 1891, The Floating Press 2009)

JOURNAL ARTICLES

- Garthwaite KA, Collins PJ and Bambra C, 'Food for Thought: An Ethnographic Study of Negotiating Ill Health and Food Insecurity in a UK Foodbank' (2015) 132 *Social Science & Medicine* 38
- Hafner-Burton EM and Tsutsui K, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) *American Journal of Sociology* 1373
- Lang T, 'Crisis? What Crisis? The Normality of the Current Food Crisis' (2009) 10(1) *Journal of Agrarian Change* 87
- Loopstra R, Reeves A, Taylor-Robinson D, Barr B, McKee M and Stuckler D, 'Austerity, Sanctions, and the Rise of Food Banks in the UK' (2015) 350 *BMJ* h1775
- Macmillan T and Dowler E, 'Just and Sustainable? Examining the Rhetoric and Potential Realities of UK Food Security' (2012) 25(2) *Journal of Agricultural and Environmental Ethics* 181
- Mares TM, "'Here We Have the Food Bank": Latino/a Immigration and the Contradictions of Emergency Food' (2013) 21(1) *Food and Foodways* 1
- Mutua MW, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) *Harvard International Law Journal* 201
- Tarasuk V, Dachner N, Hamelin A, Ostry A, Williams P, Bosckei E, Poland B and Raine K, 'A Survey of Food Bank Operations in Five Canadian Cities' (2014) 14(1234) *BMC Public Health* 1

STATUTES

- Charities Act 2011
- Human Rights Act 1998
- Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014

INTERNATIONAL LAW SOURCES AND TREATIES

- CESCR, 'General Comment 12: The Right to Adequate Food (Art.11)' (12 May 1999) E/C.12/1999/5 (General Comment 12)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)
- Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)
- ICESCR, Art.2(1); CESCR, 'General Comment No.3: The Nature of States Parties' Obligations (Art.2, para.1)' E/1991/23 (General Comment 3)
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted by the General Assembly 5 March 2009) A/RES/63/117

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR)

REPORTS

All-Party Parliamentary Group on Hunger and Food Poverty, 'Feeding Britain: A Strategy for Zero Hunger in England, Wales, Scotland and Northern Ireland' (The Children's Society 2014)

CESCR, 'Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: United Kingdom of Great Britain and Northern Ireland' (5 June 2002) E/C.12/1/Add.79

— — 'Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: United Kingdom of Great Britain and Northern Ireland' (12 June 2009) E/C.12/GBR/CO/5

Charity Commission, 'Operational Case Report: Oxfam (202918)' (Charity Commission 2014)

Church Action on Poverty and others, 'Time to Rethink Benefit Sanctions' (Methodist Publishing 2015)

Cooper N, Purcell S and Jackson R, 'Below the Breadline: The Relentless Rise of Food Poverty in Britain' (Church Action on Poverty, Oxfam and The Trussell Trust 2014)

Environment, Food and Rural Affairs Committee, *Food Security: Demand, Consumption and Waste* (HC 2014–15, 703)

Food and Agriculture Organization of the United Nations (FAO), 'The Right to Food Guidelines: Information Papers and Case Studies' (FAO 2006)

— — 'Report of the World Food Summit' (Rome, 13-17 November 1996, FAO)

Health and Environment Committee, 'A Zero Hunger City: Tackling Food Poverty in London' (Greater London Authority 2013)

House of Commons Library Standard Note, *The Voluntary Sector and the Big Society* (SN/HA/5883, 2015)

Just Fair, 'Going Hungry? The Human Right to Food in the UK' (Just Fair 2014)

Knuth L and Vidar M, 'Constitutional and Legal Protection of the Right to Food around the World' (Food and Agriculture Organization of the United Nations (FAO) 2011)

La Via Campesina, '2013 Annual Report' (La Via Campesina 2014)

Lambie-Mumford H, Crossley D, Jensen E, Verbeke M and Dowler E, 'Household Food Security in the UK: A Review of Food Aid' (Food Ethics Council and The University of Warwick 2014)

OHCHR and FAO, 'The Right to Adequate Food' (United Nations 2010) Fact Sheet number 34

Perry J, Williams M, Sefton T and Haddad M, 'Emergency Use Only: Understanding and Reducing the Use of Food Banks in the UK' (Child Poverty Action Group (CPAG), The Church of England, Oxfam GB and the Trussell Trust 2014)

- Welfare Reform Committee, *Food Banks and Welfare Reform (second report)* (Scottish Parliament 2014, Session 4, SP Paper 537)
- Welfare Reform Committee, *The Cumulative Impact of Welfare Reform on Households in Scotland* (Scottish Parliament 2015, Session 4, SP Paper 657)
- Work and Pensions Committee, *The Role of Jobcentre Plus in the Reformed Welfare System* (HC 2013–14, 479–I)
- UNHRC 'Report of the Special Rapporteur Olivier De Schutter on the Right to Food: Mission to Canada' (2012) A/HRC/22/50/Add.1

WEBSITES AND OTHER SOURCES

- Barrow Cadbury Trust, 'UK Government Is Violating the Human Right to Food' (*Barrow Cadbury Trust*, 2014)
<<http://www.barrowcadbury.org.uk/uk-government-is-violating-the-human-right-to-food/>> accessed 20 February 2015
- Butler P, 'Breadline Britain: Councils Fund Food Banks to Plug Holes in Welfare State' (*The Guardian*, 21 August 2012)
<<http://www.theguardian.com/society/2012/aug/21/councils-invest-food-banks-welfare-cuts>> accessed 22 March 2015
- — 'Food Poverty 'Puts UK's International Human Rights Obligations in Danger'' (*The Guardian*, 18 February 2013)
<<http://www.theguardian.com/society/2013/feb/18/food-poverty-uk-human-rights-obligations>> accessed 20 February 2015
- — 'Labour Pledges to End Dependency on Food Banks with Welfare Reforms' (*The Guardian*, 25 March 2015)
<<http://www.theguardian.com/politics/2015/mar/25/labour-promises-end-food-bank-dependency-welfare-reforms>> accessed 26 March 2015
- Charity Commission, 'Speaking Out: Guidance on Campaigning and Political Activity by Charities' (Charity Commission 2008)
- Church Action on Poverty, 'Britain Isn't Eating - the Message Will Hit the Road' (*Church Action on Poverty*)
<<http://www.church-poverty.org.uk/news/britainisnteating>> accessed 12 March 2015
- Conservative Party, 'Big Society Not Big Government' (*Conservative Party*)
<<https://www.conservatives.com/~media/Files/Downloadable%20Files/Building-a-Big-Society.ashx>> accessed 20 February 2015
- Cooper C, 'UN Official Alarmed by Rise of Food Banks in UK' (*The Independent*, 17 February 2013)
<<http://www.independent.co.uk/news/uk/home-news/un-official-alarmed-by-rise-of-food-banks-in-uk-8498791.html>> accessed 6 March 2015
- 'Councils Spending £3m on Food Poverty and Food Banks' (*BBC News*, 3 March 2014)
<<http://www.bbc.co.uk/news/uk-26369558>> accessed 22 March 2015
- Department of Health, 'Choosing a Better Diet: A Food and Health Action Plan' (Department of Health 2005)

- De Schutter O, 'Food Banks Can Only Plug the Holes in Social Safety Nets' (*The Guardian*, 27 February 2013) <<http://www.theguardian.com/commentisfree/2013/feb/27/food-banks-social-safety-nets>> accessed 6 March 2015
- Dugan E, 'The Food Poverty Scandal That Shames Britain: Nearly 1m People Rely on Handouts to Eat – and Benefit Reforms May Be to Blame' (*The Independent*, 16 April 2014) <<http://www.independent.co.uk/news/uk/politics/churches-unite-to-act-on-food-poverty-600-leaders-from-all-denominations-demand-government-uturn-on-punitive-benefits-sanctions-9263035.html>> accessed 20 February 2015
- Evans B, 'Here's a Better Alternative to Food Banks – Subsidised National Kitchens' (*The Conversation*, 24 February 2015) <<http://theconversation.com/heres-a-better-alternative-to-food-banks-subsidised-national-kitchens-37928>> accessed 26 February 2015
- European Federation of Food Banks, 'Countries: United Kingdom' (*European Federation of Food Banks*) <<http://www.eurofoodbank.eu/countries/72-united-kingdom>> accessed 8 March 2015
- FareShare, 'FareShare: Fighting Hunger, Tackling Food Waste' (*FareShare*) <<http://www.fareshare.org.uk/>> accessed 8 March 2015
- Food and Agriculture Organization of the United Nations (FAO), 'Food Security' (*FAO*, 2006) <<http://www.fao.org/forestry/13128-0e6f36f27e0091055bec28ebe830f46b3.pdf>> accessed 21 March 2015
- — 'Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security' (Adopted by the 127th Session of the FAO Council November 2004, FAO 2005)
- 'Funding for Food Banks' (*Public Sector Executive*, 15 April 2014) <<http://www.publicsectorexecutive.com/Poverty-and-inequality/funding-for-food-banks>> accessed 22 March 2015
- Gentleman A, 'Labour Vows to Reduce Reliance on Food Banks if it Comes to Power' (*The Guardian*, 17 March 2015) <<http://www.theguardian.com/society/2015/mar/17/labour-vows-to-reduce-reliance-on-food-banks-if-it-comes-to-power>> accessed 19 March 2015
- Geraldine Van Bueren, 'Should We Have an Enforceable Right to Food? - Professor Geraldine Van Bueren Q.C.' (*UK Human Rights Blog*, 2013) <<http://ukhumanrightsblog.com/2013/10/18/should-we-have-an-enforceable-right-to-food-professor-geraldine-van-bueren/>> accessed 20 February 2015
- Henley J, "Recessions Can Hurt, but Austerity Kills" (*The Guardian*, 15 May 2013) <<http://www.theguardian.com/society/2013/may/15/recessions-hurt-but-austerity-kills>> accessed 28 March 2015
- Keep the Safety Net Campaign, 'Local Welfare Provision in 2015/16: Response to the Consultation by Keep the Safety Net Campaign' (*Child Poverty Action Group*, 2014) <<http://www.cpag.org.uk/sites/default/files/uploads/CPAG-Keep-the-Safety-Net-LWP-response-Nov2014.pdf>> accessed 26 February 2015

- La Via Campesina, 'Food Sovereignty and Trade' (*La Via Campesina*)
 <<http://viacampesina.org/en/index.php/main-issues-mainmenu-27/food-sovereignty-and-trade-mainmenu-38>> accessed 21 March 2015
- Lawrence Mute, 'A Question of Rights, Not Charity' (*Open Society Foundations*, 6 February 2013)
 <<http://www.opensocietyfoundations.org/voices/question-rights-not-charity>> accessed 27 March 2015
- London Assembly, 'Food Poverty in London' (*London Assembly*)
 <http://www.london.gov.uk/sites/default/files/Food%20poverty_Call%20for%20views%20and%20information_0.pdf> accessed 21 March 2015
- Mason R, 'Lobbying Bill Passes Through House of Lords' (*The Guardian*, 28 January 2014) <<http://www.theguardian.com/politics/2014/jan/28/lobbying-bill-passes-house-lords>> accessed 10 April 2015
- Morris S, 'Long-Term Food Bank Users Risk Nutritional Problems' (*The Guardian*, 18 March 2015) <<http://www.theguardian.com/society/2015/mar/18/long-term-food-bank-users-nutritional-problems-balanced-diet>> accessed 20 March 2015
- Nandy L, 'In the UK Food Banks Are a Waste of Charitable Resource' (*The Guardian*, 9 December 2014)
 <<http://www.theguardian.com/voluntary-sector-network/2014/dec/09/uk-food-banks-waste-charity-resource-lisa-nandy>> accessed 22 February 2015
- Owen J, 'Busy Nottingham Food Bank to Close in Protest at Harsh Council Cuts' (*The Independent*, 26 November 2014)
 <<http://www.independent.co.uk/news/uk/politics/busy-nottingham-food-bank-to-close-in-protest-at-harsh-council-cuts-9885641.html>> accessed 26 February 2015
- — Oliver Wright and Charlie Cooper, 'Exclusive: Food Bank Charity 'Was Threatened with Closure by Iain Duncan Smith's Aide'' (*The Independent*, 13 June 2014) <<http://www.independent.co.uk/news/uk/politics/exclusive-food-bank-charity-was-threatened-with-closure-by-ministers-aide-9533456.html>> accessed 12 March 2015
- Parker I, 'Spitting on Charity' (*The Independent*, 9 April 1995)
 <<http://www.independent.co.uk/arts-entertainment/spitting-on-charity-1614885.html>> accessed 27 March 2015
- Rayner J, 'How Kids Company Feeds Britain's Hungry Children' (*The Guardian*, 15 February 2015) <<http://www.theguardian.com/society/2015/feb/15/how-kids-company-feeds-britains-hungry-children>> accessed 20 February 2015
- Riches G, 'Food Banks Don't Solve Food Poverty. The UK Must Not Institutionalise Them' (*The Guardian*, 8 December 2014)
 <<http://www.theguardian.com/commentisfree/2014/dec/08/food-banks-poverty-uk-canada-right-to-food>> accessed 22 February 2015
- Ryan F, 'Mind the Gap: How Charities Are Mopping up after the Government's Failure to Care' (*NewStatesman*, 5 February 2015)
 <<http://www.newstatesman.com/politics/2015/02/mind-gap-how-charities-are-mopping-up-after-government-s-failure-care>> accessed 26 February 2015

- Stewart H, 'Low-Pay Britain, Where Working Families Have to Rent a Fridge' (*The Guardian*, 15 February 2015)
<<http://www.theguardian.com/society/2015/feb/15/low-pay-britain-working-families-rent-fridge>> accessed 20 February 2015
- The Huffington Post UK, 'One Million Brits Now Using Food Banks, Charities Say UK Has Violated 'Human Right to Food'' (*The Huffington Post UK*, 16 April 2014)
<http://www.huffingtonpost.co.uk/2014/04/15/food-banks-used-by-one-million-brits_n_5152005.html> accessed 20 February 2015
- The Global FoodBanking Network, 'Food Banks Around the World' (*The Global FoodBanking Network*) <<http://www.foodbanking.org/food-banking/global-food-bank-community/>> accessed 8 March 2015
- Trussell Trust, 'How a Foodbank Works' (*Trussell Trust*)
<<http://www.trusselltrust.org/how-it-works>> accessed 8 March 2015
- — 'A Response to Inaccurate and Misleading Reports about the Trussell Trust' (*Trussell Trust*) <<http://www.trusselltrust.org/rumour-response>> accessed 20 February 2015
- — 'Trussell Trust Foodbank Statistics' <<http://www.trusselltrust.org/stats>> accessed 28 March 2015
- Wintour P and Butler P, 'Tories Seek to Avert Rift with Church of England over Food Bank Report' (*The Guardian*, 8 December 2014)
<<http://www.theguardian.com/uk-news/2014/dec/08/tories-avert-rift-church-food-bank-report>> accessed 20 February 2015
- World Health Organization, 'Food Security' (*World Health Organization*)
<<http://www.who.int/trade/glossary/story028/en/>> accessed 21 March 2015

Politics of Electoral Reform: Delimitation Deadlock in India

Aditi*

Electoral processes bear the responsibility of creating the foundation of a functional democracy. However, leaving the legal framework of such processes under the domain of normal legislation may generate aberrations due to partisan political interests. This Article discusses one such case regarding delimitation of constituencies in India. Section 2 analyses the relationship between partisan politics and the process of electoral reform in the theoretical background of rational choice theory as contrasted with Pippa Norris' policy cycle model. Section 3 focuses on the issue of delimitation and traces the political developments in this regard to analyse the current legal framework, whilst Section 4 evaluates the rationale given by the legislature for the current aberrations in delimitation in India. Section 5 involves quantitative analyses of the implications of the current constitutional deadlock regarding delimitation on the Indian democracy. Finally, concluding observations have been made, suggesting resolution of the issue through revitalisation of Norris' constraining elements in the political process. An active involvement of the voters in amending the issue by creating awareness regarding its effects has been suggested.

I. INTRODUCTION

In politics, when principle collides with self-interest, principle tends to retreat with a bloody nose.

Peter Kellner¹

Electoral laws play a vital role in moulding the political framework of a democracy.² However, considering their close proximity to political actors who

* Aditi is currently studying her LL.M. at SOAS, University of London. She graduated with a B.A. LL.B. (Hons) degree from the National University of Juridical Sciences, Kolkata in 2009. The Author would like to thank Prof. Alexander Fischer for his valuable insight and guidance.

¹ Peter Kellner, 'Electoral reform: Principle or self-interest?' (1995) 33(2) Representation 23.

² DW Rae, V Hanby and J Loosemore, 'Thresholds of Representation and Thresholds of Exclusion: An Analytic Note on Electoral Systems' (1971) 3 Comparative Political Studies 479.

form the direct target group of their influence, these laws are not only the causal elements in a political system, but also a consequence of it.³ Hence, in some instances, political influence in the legislative process supersedes the underlying principle and produces results which might be beneficial to certain political actors, but not in the general democratic interest. This has been aptly illustrated by the process of delimitation of constituencies between states in India, or, more accurately, by the lack thereof.

A key element of democracy is to ensure an equality of the voting share of all the electors, ensured by proportional allocation of seats to a house of people through the process of delimitation. However, in India, owing to a constitutional freeze on delimitation since 1971, there is an increasing gap in representation between various states, which cannot be rectified at least until the year 2031 after the 91st Constitutional Amendment. This Article attempts to study the political linkages in the enforcement and continuance of this constitutional freeze. It will also examine the interplay between political self-interest and electoral reforms.

The second Section analyses the elements of electoral change in the Indian context and the crucial role partisan politics play in this regard. In doing so, a comparison has been drawn between the rational choice theories of electoral change, in particular Benoit's seat-maximizing model⁴ as well as constraining elements from Norris' policy cycle model.⁵

The third Section of the Article traces the process of delimitation after independence and studies legal developments in this regard in their respective political contexts, thus bringing to surface the political linkages at issue. The legal puzzle plaguing the process of delimitation in India is introduced and analysed in context of the theoretical framework. Due to the constraints of scope, delimitation here refers to the proportional apportionment of seats between states according to the population, as this is the dimension that has been most contested and most affected by the constitutional freeze.⁶

³ Kenneth Benoit, 'Electoral Laws as Political Consequences: Explaining the Origins and Change of Electoral Institutions' (2007) 10 Annual Review of Political Science 363.

⁴ Kenneth Benoit, 'Models of electoral system change' (2004) 23(3) Electoral Studies.

⁵ Pippa Norris, 'Cultural Explanations of Electoral Reform: A Policy Cycle Model' (2010) John F Kennedy School of Government, Harvard University Working Paper RWP 10-022 <<http://dash.harvard.edu/handle/1/4449095>> accessed 5 August 2015.

⁶ Alistair McMillan, 'Delimitation, Democracy, and End of Constitutional Freeze' (2000) Economic and Political Weekly 1271.

Further, the political justifications in favour of the constitutional freeze on delimitation have been discussed and questioned in the fourth Section so as to scrutinise their legitimacy for justifying the delimitation freeze.

The fifth Section analyses the consequences of the constitutional freeze and the resultant distortions in representation caused by it. Data from the 1991, 2001 and 2011 censuses has been analysed to illustrate the current differences in representation and the increasing gravity of aberrations in the democratic principle of equality of vote. The proportionate apportionment of seats in accordance with population change has been calculated according to the Webster method of apportionment, advocated by McMillan.⁷

Finally, initialisation of the process of resolution is proposed through active involvement of Norris' constraining elements in the political process. A movement to create public awareness and consensus on the issue is proposed, so as to pressurise the legislature to resolve the legal deadlock at hand.

II. THEORY OF ELECTORAL REFORM: INDIAN CASE

The question of what drives electoral reform cannot be answered comprehensively through a single variable. However, there is a central element recognised as having the most influence on the process, i.e. partisan self-interest. This assertion forms the basis of the rational choice theories of political reform, which regard policy change as an elite level game among partisan interests.⁸ According to one such theory, electoral reform would occur only when it provides for better political prospects for the political actors in power by further maximising their seat shares. If the party or coalition of parties with the power to adopt a potential reform does not stand to gain from it, it will not be adopted.⁹ This is not to diminish the significance of policy in the political framework. However, self-interest precedes policy considerations as the maximisation of seat shares essentially ensures that the respective policy will be enforced gradually.¹⁰

This theory has special significance in countries such as India where the legislative competence of adopting reform lies with the people most affected by

⁷ Alistair McMillan, 'Delimitation in India' in Lisa Handley and Bernard Grofman (eds), *Redistricting in Comparative Perspective* (OUP 2008) 83.

⁸ Benoit, 'Electoral Laws as Political Consequences' (n 3); Benoit, 'Models of electoral system change' (n 4).

⁹ Benoit, 'Models of electoral system change' (n 4).

¹⁰ Barbara Geddes, 'A Game Theoretic Model of Reform in Latin American Democracies' (1991) 85(2) *American Political Science Review* 371.

it. Article 327 of the Indian Constitution¹¹ vests the power of formation of laws regarding elections in the legislature. This was done to keep the electoral processes free from executive interference, so as not to give the ruling party an unfair advantage in the functioning of the electoral system.¹²

However, in India, the deadlock of electoral reform is not just created by the ruling actors¹³ but all the political parties involved, whether or not in power, in furtherance of their common interest.¹⁴ Most parties find themselves plagued by the same issues and the same power interests. Hence, no matter which party comes to power, there is a high motivation to maintain the status quo and the doors to electoral reform remain closed. This has resulted in the control of politics being vested in politics itself,¹⁵ thereby creating a deadlock in reformative processes in electoral laws.

The rational choice theories explain the linkages of ruling parties with regard to deadlock in electoral reform. As for the parties in opposition, or the parties which stand to gain from such reforms, the closest justification for inaction can be found in the arguments forwarded by Andrews and Jackman¹⁶ who contend that changes in electoral laws and processes makes the political parties prone to risk, as they cannot predict their future implications. The role of ideas or values¹⁷, tradition¹⁸ and institutions¹⁹ is also acknowledged in bringing about electoral change. However, political actors' self-interest is still believed to be the

¹¹ The Constitution of India 1949.

¹² Election Commission of India (ECI), 'Debate in Constituent Assembly on Part XIII – Article 289' (*Election Commission of India*, 1949) <http://eci.nic.in/eci_main/eci_publications/books/miscell/Debate_in_Constituent_Assembly_On_Elections.pdf> accessed 5 August 2015.

¹³ Lakshmi Iyer and Maya Reddy, 'Redrawing the Lines: Did Political Incumbents Influence Electoral Redistricting in the World's Largest Democracy?' (2013) Harvard Business School Working Paper 14-051 <http://www.hbs.edu/faculty/Publication%20Files/14-051_6beba5c6-4c63-455d-9f02-0f6bd9364877.pdf> accessed 5 August 2015.

¹⁴ Joginder Kumar Chopra, *Politics of Election Reforms in India* (Mittal Publications 1989).

¹⁵ Heather K Gerken, 'The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics' (2007) 6(2) *Election Law Journal* 184.

¹⁶ Josephine T Andrews and Robert W Jackman, 'Strategic Fools: Electoral Rule Choice under Extreme Uncertainty' (2005) 24(1) *Electoral Studies* 65.

¹⁷ Sarah Birch and others, *Embodying Democracy: Electoral System Design in Post-communist Europe* (Palgrave Macmillan 2002).

¹⁸ Pippa Norris, 'Introduction: The Politics of Electoral Reform' (1995) 16(1) *International Political Science Review* 3.

¹⁹ Takayuki Sakamoto, 'Explaining Electoral Reform: Japan versus Italy and New Zealand' (1999) 5(4) *Party Politics* 419.

central variable.²⁰ When self-interest acts as the collective force of consensus against change, electoral reform becomes all the more difficult to realise.

The policy cycle model of electoral change, as argued by Norris, identifies a broader framework, with other institutions such as constitutional courts, judicial review or a broader political culture having a constraining effect on the self-motivated actions of political parties.²¹ This has been witnessed in the Indian context as well.²² However, with regard to certain issues, even the constraining effect of these institutions is nullified. This is what aggravates the gravity of the issue of delimitation reform in India, as is discussed in the following Section.

III. DELIMITATION IN INDIA

3.1 Historical Development and Self Interest

Delimitation facilitates proportional apportionment of constituencies in accordance with the 'one person, one vote' principle which, according to Ross, is the 'direct and inevitable consequence of universal suffrage',²³ as it embodies the principle of equality of all the electors. Non-adherence to this principle has been regarded as ethically unjustifiable.²⁴ Given these strong normative claims about malapportionment, it is surprising that India, the largest democracy in the world, has ignored its significance for so long.

The importance of the delimitation process was well recognised by the framers of the Constitution, who referred to it as the 'soul of all elections'.²⁵ This is inherent in the institutional framework provided by the Constitution in this regard. The Constitution of India provides for a periodic exercise of delimitation under Articles 81 and 82 after every census, that is, after every 10 years. Article 327 confers upon the Parliament the power to make laws in relation to delimitation.

²⁰ Carles Boix, 'Setting the Rules of the Game: The Choice of Electoral Systems in Advanced Democracies' (1999) 93(3) *American Political Science Review* 609.

²¹ Norris, 'Cultural Explanations of Electoral Reform' (n 5).

²² Soli Sorabjee, 'Right of Negative Voting' (*Indian Express*, 1 March 2009)

<<http://archive.indianexpress.com/news/right-of-negative-voting/429335/>> accessed 5 August 2015.

²³ Charles Edwards, 'Theoretical and Comparative Aspects of Reapportionment and Redistricting: With Reference to Baker v. Carr' (1962) 15 *Vanderbilt Law Review* 1265, 1269.

²⁴ G Gudgin and PJ Taylor, *Seats, Votes, and the Spatial Organization of Elections* (Pion 1979).

²⁵ ECI (n 12) 106 (Sardar Hukam Singh).

Different versions of delimitation of provinces had been introduced in India with the Government of India Acts of 1919 and 1935 respectively.²⁶ However, the first delimitation of independent India was initiated in 1950, a challenge due to its huge magnitude, owing to universal adult franchise, and the lack of resources to undertake it.²⁷ Therefore, the delimitation power for the first general elections was vested in the office of the President under Sections 6 and 9 of the Representation of the People Act 1950.²⁸

The first delimitation was carried out by the Election Commission under the office of the President, with the resultant proposals being laid before the Parliament for approval. Hence, political interference in the process started early, as the decisions finally reached in the process were said to be influenced by the short term considerations of the members of the House rather than by considerations of general interest.²⁹

To curb this political interference, the idea of an independent body to conduct delimitation was conceived. The Parliament, on the suggestion of the Election Commission, passed the Delimitation Commission Act 1952.³⁰ The composition of the commission was more or less judicial in nature. However, the crucial point here was the concept of associate members to assist the commission, who were to be nominated by the speaker.³¹ These associate members, who were invariably from a political background, though lacking voting rights in the commission, acted as a backdoor entry to political influence even in the new system.³² Furthermore, the gradual increase in the number of these associate members implied the significance of their presence to the members of the Parliament.³³

After the first delimitation commission, two successive commissions were set up at regular intervals in 1962 and 1972 for readjustment of the number of seats in accordance with the latest census. It was after the 1972 delimitation that a freeze on further readjustment until 2001 was imposed by the 42nd amendment to the Constitution in 1976 under the Indira Gandhi regime. The justification forwarded for imposing the freeze was that it unfairly punished those states

²⁶ Government of India Act 1919; Government of India Act 1935; Chandra Pal Singh, 'A century of constituency delimitation in India' (2000) 19(4) Political Geography 517.

²⁷ Singh (n 26).

²⁸ Representation of the People Act 1950 ss 6 and 9.

²⁹ Nagesh Jha, 'Delimitation of Constituencies: A Plea for Some Effective Criteria' (1963) 24(2) The Indian Journal of Political Science 129, 132.

³⁰ Delimitation Commission Act 1952.

³¹ Iyer and Reddy (n 13).

³² RP Bhalla, *Elections in India (1950–1972)* (S Chand and Co 1973).

³³ McMillan, 'Delimitation in India' (n 7).

that had successfully implemented the family planning initiatives.³⁴ The justification holds ground for those who argue that high population rates should not determine the leverage of a state in the Parliament.³⁵ However, the argument lacks logical coherence, as will be discussed in the following Section. Furthermore, the political roots of the decision cannot be disregarded.³⁶

The idea of maximisation of seat share is aptly illustrated by the political developments leading to the freeze. The greater political influence of Congress in the southern areas made subsequent delimitation reducing the seats in the south much less attractive. This was coupled with a strong opposition sentiment in the northern states owing to the casualties of the forced implementation of the National Population Policy Statement in 1976,³⁷ thus making the freeze a means for Congress to maximise its seat share. This assertion can be supported by the performance of Congress in the 1977 elections, especially in the southern states.³⁸

In 2001, when the freeze was set to expire, the political context had changed, with a BJP led NDA government. Resuming delimitation would have been politically favourable to the BJP at this point, as it would have had the effect of increasing seats in the northern Hindi speaking states, where the BJP held a strong ground.³⁹ However, instead of rectifying the aberration, the freeze was further extended till the year 2026. The justifications given were similar, advocating a federal balance between the northern and southern states.⁴⁰ However, considering the composition of the National Democratic Alliance, the real political motivations can be argued to be the pressures exerted by the southern regional parties which were a part of the coalition and crucial for its survival.

As a result, owing to the self-interests of the political actors, this major distortion in the democratic process of India has been constitutionally given a

³⁴ AK Verma, 'Issues and Problems in India's Delimitation Exercise' (2002) 63(4) *Indian Journal of Political Science* 371.

³⁵ Rakesh Kalshian, 'Fertility is Power: Mother of All Paradoxes' (*Outlook India*, 8 March 1999) <<http://www.outlookindia.com/article/Fertility-Is-Power-Mother-Of-All-Paradoxes/207088>> accessed 5 August 2015.

³⁶ KC Sivaramakrishnan, 'North-South Divide and Delimitation Blues' (2000) 35(35-36) *Economic and Political Weekly* 3093.

³⁷ PK Majumdar, *India's Demography: Changing Demographic Scenario in India* (Rawat Publications 2013) 425.

³⁸ McMillan, 'Delimitation, Democracy, and End of Constitutional Freeze' (n 6).

³⁹ *ibid.*

⁴⁰ Alistair McMillan, 'A Constitutional Fraud? The Ninety First Amendment and the Boundaries of Indian Democracy' (2001) *Economic and Political Weekly* 1171.

lifeline of 60 years, with a possibility of rectification only after the census in the year 2031.

3.2 Norris' Constraining Elements in the Indian Context

One would expect the constraining elements, according to Norris' policy cycle approach, to forge a balance in this regard. In the particular case of delimitation, with its direct effect felt only in political circles, the role of general public and even broader political culture is reduced significantly, more so in countries like India where pressing socio-political issues eclipse the 'technical' issue of delimitation.

However, the judiciary can still step in and prevent abrogation of the democratic principle, as was done by the judiciary in the United States with the *Baker v Carr*⁴¹ decision and then again in *Reynolds v Sims*⁴² where the importance of the principle of 'one man, one vote' was reaffirmed.

However, the Indian judiciary suffers an express constitutional bar on interfering with any law regarding delimitation under Article 329 of the Constitution. It is difficult to understand the position adopted by the constitutional framers, due to the lack of comprehensive debate on this position in the legislative assembly.⁴³ However, contextual analysis brings forth the *Colegrove v Green*⁴⁴ judgment in the US deciding the same question. The 'political question' argument given in the judgment can be argued to have formed the basis of the Indian constitutional position in this regard and has been considered in subsequent cases regarding delimitation.

However, the US judiciary stepped forward in the aforementioned subsequent decisions to rectify degenerating aberrations in this regard.⁴⁵ This is in direct contrast to the Indian judiciary, which passively dealt with the issue in cases like *RC Poudyal and others v Union of India and others*,⁴⁶ while using the argument of implausible mathematical equality from *Reynolds* to justify deviations in the Indian case.⁴⁷ Furthermore, the Supreme Court, while holding the right to uniform value of one's vote as non-justiciable, expressly rejected the idea of proportionate appropriation of seats as being a part of the Basic Structure of the

⁴¹ *Baker v Carr* [1962] 369 US 186.

⁴² *Reynolds v Sims* [1964] 377 US 533.

⁴³ ECI (n 12).

⁴⁴ *Colegrove v Green* [1946] 328 US 549.

⁴⁵ Edwards (n 23).

⁴⁶ *RC Poudyal and others v Union of India and others* AIR (1993) SC 1804.

⁴⁷ *ibid* [22]–[29].

Constitution,⁴⁸ thus closing doors for any provisions of Constitutional entrenchment relating to the practice of delimitation, in the future as suggested by Jennings.⁴⁹

Indeed, the contextual specificities of these particular cases, which were not directly linked to the apportionment of seats between states, cannot be ignored. However, the precedence created by these decisions, one of which declared the right to equal vote as non-justiciable and not a part of the basic structure of the Constitution, can be argued to have had a discouraging effect on opting for litigation as a means of resolution in this issue. As one judge mentions, there is less consensus among the theorists regarding judicial activism in the electoral processes⁵⁰ and this can be seen as a reiteration of this approach.

However, a point of significance that can be picked from the judicial rulings is the argument of historical considerations⁵¹ and rational relation.⁵² These were made to justify departure from the 'one man, one vote' principle, derived from the Reynolds case and its threshold of 'legitimate considerations incident to the effectuation of a rational state policy'.⁵³ As such, the legitimacy of the present freeze on delimitation and the resultant discrepancies in representation can be scrutinized on the basis of this standard.

IV. DELIMITATION FREEZE: DEBUNKING THE JUSTIFICATIONS

As discussed above, the main argument given at the fore in defence of the freeze is twofold – to prevent the loss of representation of states effectively enforcing measures of population control, and to maintain the federal balance of the country. These justifications have been reiterated by the National Population Policy 2000 that was 'drafted and discussed almost entirely within a closed circle of the government'.⁵⁴ A critical analysis of these justifications reveals the influence of political interests and questions their 'rational relation' to the freeze.

⁴⁸ *J&K National Panthers Party v Union of India* (2011) 1 SCC 228.

⁴⁹ Ivor Jennings, *Some Characteristics of the Indian Constitution: Being Lectures Given in the University of Madras During March 1952 Under the Sir Alladi Krishnaswami Aiyer Shashtiabdapoorthi Endowment* (OUP 1953).

⁵⁰ *RC Poudyal and others* (n 46) [24] (Justice Venkatachalliah).

⁵¹ *RC Poudyal and others* (n 46); *J&K National Panthers Party v Union of India* (n 48).

⁵² *State of Madhya Pradesh v Bhopal Sugar Industries Ltd* (1964) 6 SCR 846 850.

⁵³ *Reynolds v Sims* (n 42) [579] (Chief Justice Warren).

⁵⁴ Gita Sen, 'India's National Population Policy 2000: A Comment' (2000) 27(2) *Populi* 16.

4.1 Population Control

Fear of potential loss of representation should not be a deterrent to effective population control policies in the states, and the states not enforcing these policies effectively should not be unfairly rewarded with a higher representation in the Parliament.⁵⁵ This is the general essence of the defence. However, the significant point here is that state policies are not the sole factors determinant of population in a particular state.

Studies have highlighted a number of involuntary variables in different regions that influence population rates even when other factors are accounted for.⁵⁶ As such, the inference that states would modify their reproductive behaviour in the context of the distribution of seats seems superficial. The correlation drawn between the delimitation freeze and population control fails to take into account the complex social, economic and historical determinants with regard to population growth.⁵⁷ References have also been made to the specific cultural traditions of the 'Sanskritized and Islamized' north and 'Dravidian' south to play an important role in fertility rates, among other socio-cultural factors.⁵⁸

In light of these arguments, the 'rational relation' between population control and delimitation freeze does not seem proximate enough to warrant legitimacy for malapportionment. As such, using this argument to create aberrations in a democratic principle of this significance is not sound.

4.2 Federal Imbalance

It is strange that proportionality in the Lok Sabha (House of the People) is being resisted on federal grounds, when the basic elements of federalism include proportional representation.⁵⁹

It has been argued that proportional apportioning of seats would lead to the southern states losing representation, which would tilt the balance in the Parliament in the favour of the 'Hindi Heartland States' like Bihar, Uttar

⁵⁵ Rami Chhabra, 'Baking a Bigger Pie: Linking Women's Reservation with Delimitation' (2000) 121 *Manushi* 32.

⁵⁶ Mamta Murthi, Anne-Catherine Guio and Jean Drèze, 'Mortality, Fertility and Gender Bias in India: A District Level Analysis' (1995) 21(4) *Population and Development Review* 745.

⁵⁷ McMillan, 'A Constitutional Fraud?' (n 40).

⁵⁸ Christophe Z Guilmoto, 'The Geography of Fertility in India (1981-1991)' in Christophe Z Guilmoto and Alain Vaguet (eds), *Essays on Population and Space in India* (Institut Français De Pondichéry 2000) 40.

⁵⁹ Arend Lijphart, 'Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories' (1985) 15(2) *Publius: The Journal of Federalism* 3.

Pradesh and Rajasthan. This may disturb the federal balance of the country, diluting the bargaining power of the southern states.

The first point to consider here is whether the principle of federal balance between northern and southern states is an inherent feature of the Indian democratic system, specifically the Lok Sabha. Furthermore, now that the delimitation process is frozen, is the federal balance being maintained?

It was pointed out by the US Supreme Court in *Reynolds* that, 'Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies'.⁶⁰ The functioning of federal democracies across the globe points out that separate measures to ensure equal bargaining power among different states is not essential in the House of the People.⁶¹ Representation of states can be ensured through the upper house, that is, the Council of States.⁶² The House of the People embodies the elected representatives of the people and the crucial concern to be addressed in its function is the equal representation of all people, rather than the states, which makes delimitation indispensable.⁶³

The distribution of seats, as it currently exists, does not ensure a perfect balance in representation of different states, still demonstrating a tilt towards the north.⁶⁴ Article 81 of the Constitution makes it clear that this was never the intention of the framers, by providing for equal representation of all citizens. As such, the question of maintaining the federal balance in the Lok Sabha should not arise. If such a balance has to be introduced in the Lok Sabha, freezing a system of proportional allocation of seats is hardly the ideal way to ensure it. Furthermore, the Rajya Sabha (Council of States), should be responsible for ensuring equal representation of federal units, rather than the Lok Sabha, which is the House of the People and does not embody 'federal balance' as its principle of composition.⁶⁵

The argument of federal imbalance in the Lok Sabha is often justified on policy grounds, especially regarding central financial allocations. Demographer Ashish Bose argues that federal imbalance in the Lok Sabha may lead to skewed

⁶⁰ *Reynolds v Sims* (n 42) [567] (Chief Justice Warren).

⁶¹ cf Ace Project, 'Boundary Delimitation' (Ace Project 2002).

⁶² McMillan, 'Delimitation in India' (n 7); Lijphart (n 59).

⁶³ David Samuels and Richard Snyder, 'The Value of a Vote: Malapportionment in Comparative Perspective' (2001) 31(4) *British Journal of Political Science* 651.

⁶⁴ McMillan, 'Delimitation, Democracy, and End of Constitutional Freeze' (n 6).

⁶⁵ McMillan, 'A Constitutional Fraud?' (n 40).

distribution of central financial allocations to the states.⁶⁶ The poor efficiency of the northern states in utilising their allocated funds questions the prospective increase in their representation in the Parliament, which may lead to further enhancement in their financial allocations, making them a liability for their southern counterparts.⁶⁷

The economic significance of this argument cannot be questioned. However, linking it to the question of delimitation does not appear to be a rational course of action. Considering this issue in the context of the beneficiaries, the northern states, owing to their poor socio-economic development and high population growth rates, legitimately warrant a higher allocation of funds. Their poor efficiency in implementation can be attributed to a variety of socio-political factors and no doubt needs to be resolved.⁶⁸ However, a state cannot be penalised for its representation in the Parliament as a consequence of it. Denying representation for poor governance would only worsen the implementation gaps, as the existing representatives would have a larger constituency to manage,⁶⁹ with comparatively fewer resources in proportion to its beneficiaries. In addition, using this argument to justify delimitation freeze again implies a deterrent effect in the northern states with regard to population control, which, as discussed above, cannot be held to be a sound assertion.

Further, this issue can be tackled by putting forth alternative solutions to resolve the north-south power imbalance, which may include a shift of balance of powers from the centre to the states. As McMillan argues, such efforts of formalising a constitutional balance would, in turn, have the effect of freeing the flow of revenue from the centre to the states from partisan control. As such, the fears flowing from the argument of a federal imbalance can be assuaged to an extent, without risking the political manipulation of the composition of the House of People.⁷⁰

The real motivation here can be seen as a power imbalance; not a federal one, and this concerns political parties rather than the general interests of the states.⁷¹ This assertion can also be supported by the fact that some of the north-

⁶⁶ Kalshian, 'Fertility is Power' (n 35).

⁶⁷ *ibid.*

⁶⁸ Navi Radjou, 'India's Biggest Economic Challenge' (*Harvard Business Review*, 2 June 2009) <<https://hbr.org/2009/06/indias-biggest-economic-challe>> accessed 5 August 2015.

⁶⁹ Sanjay Kumar, 'Delimitation of Constituencies' (*The Hindu*, 17 September 2001) <<http://www.thehindu.com/2001/09/17/stories/05172524.html>> accessed 5 August 2015.

⁷⁰ McMillan, 'Delimitation in India' (n 7).

⁷¹ Sivaramakrishnan (n 36).

eastern states, despite prospectively losing half their representation from the next delimitation, are seldom mentioned as a part of the federal imbalance argument.

In addition, even if the concern of loss of representation of southern states is considered, a temporary freeze in delimitation, thereby corroding the basic principle of democratic elections, seems, at best, a way to avoid the question rather than address it. It does not ensure a balanced representation of the states, and prevents balanced representation of the people.

This assertion is strengthened by the reasoning behind the year 2026 being the cut off year for delimitation as put forth by the National Population policy. This year has been identified as one when the country shall reach the level of replacement population growth, thereby causing population rates to stabilise, and making delimitation more feasible. This argument is based on a mere speculation and ignores the fact that the disparities are going to be much harder to cement as the delimitation exercise is postponed further.⁷² Further, the concern of federal imbalance will not necessarily be redressed by this approach. As such, this might open the doors for yet another extension in the constitutional freeze, as the political concerns would still be present, with a potentially starker effect.⁷³

V. MAPPING THE EFFECTS

Since the last delimitation exercise based on the 1971 census, there have been four population censuses, the latest one in 2011. A study of the data reported by these censuses points out the gravity of distortion caused by the delimitation of seats between states and the increasing contrast over time. Figure 1 below compiles the population data of different states according to the 2011 census and compares the proportionate allocation of Lok Sabha seats (done in accordance with the Webster method of apportionment) to the actual number of seats allocated to each state. While states like Tamil Nadu and Kerala are over represented to a great extent, having 7 and 5 seats more than their proposed proportionate allocation, northern states like Uttar Pradesh, Bihar and Rajasthan are under represented by as high as nine seats. 21 states out of 35, that is, 60% of states exhibit a certain degree of deviation in representation in comparison to their populations. Thus there exists a stark inequality in voting strength across various states.

⁷² Verma, 'Issues and Problems in India's Delimitation Exercise' (n 34).

⁷³ McMillan, 'Delimitation in India' (n 7).

Figure 1				
States	Population (2011 Census)	Proportionate Allocation (2011)*	Actual Number of Seats	Difference between actual and proportionate allocation (2011)
Jammu and Kashmir	12541302	6	6	0
Himachal Pradesh	6864602	3	4	1
Punjab	27743338	12	13	1
Chandigarh	1055450	1	1	0
Uttarakhand	10086292	4	5	1
Haryana	25351462	11	10	-1
NCT of Delhi	16787941	7	7	0
Rajasthan	68548437	30	25	-5
Uttar Pradesh	199812341	89	80	-9
Bihar	104099452	46	40	-6
Sikkim	610577	1	1	0
Arunachal Pradesh	1383727	1	2	1
Nagaland	1978502	1	1	0
Manipur	2570390	1	2	1
Mizoram	1097206	1	1	0
Tripura	3673917	2	2	0
Meghalaya	2966889	1	2	1
Assam	31205576	14	14	0
West Bengal	91276115	40	42	2
Jharkhand	32988134	15	14	-1
Odisha	41974218	19	21	2
Chhattisgarh	25545198	11	11	0
Madhya Pradesh	72626809	32	29	-3
Gujarat	60439692	27	26	-1
Daman and Diu	243247	1	1	0
Dadra and Nagar Haveli	343709	1	1	0
Maharashtra	112374333	50	48	-2
Andhra Pradesh	84580777	38	42	4
Karnataka	61095297	27	28	1
Goa	1458545	1	2	1
Lakshadweep	64473	1	1	0
Kerala	33406061	15	20	5
Tamil Nadu	72147030	32	39	7
Puducherry	1247953	1	1	0
A and N Islands	380581	1	1	0
India	1210569573	543	543	0

*Calculated using a divisor of 2255000, with a minimum allocation of 1 seat.

Compiled by the author using the Webster Method of apportionment of seats. For detailed analysis, please refer to Appendix I.

This distortion has amplified in the last couple of decades, as the population growth rate of the northern states is higher than that of the south. Figure 2 shows this gradual increase in the gap with every census since 1991. Andhra Pradesh, for instance, did not exhibit any disproportionality in representation according to the 1991 census data. However, the distortion starts in 2001 with it being overrepresented by 2 seats. The effect is magnified further in the year 2011 where the gap raises to 4 seats. Similarly, in case of Rajasthan, the underrepresentation is expanding from 3 seats in 1991 to 4 in 2001 and 5 in 2011.

Thus, it can be inferred that by the time the current freeze expires and the delimitation exercise is finally undertaken after the 2031 census, the aberrations would be even more difficult to bridge. The effect would seem all the more stark and the political reconciliations would become all the more difficult to achieve.⁷⁴ More states are starting to exhibit a disproportionality in representation, with Gujarat and Punjab joining in 2011.

⁷⁴ Verma, 'Issues and Problems in India's Delimitation Exercise' (n 34); AK Verma, 'Fourth Delimitation of Constituencies: An Appraisal' (2008) 43(11) *Economic and Political Weekly* 12; McMillan, 'Delimitation in India' (n 7).

Figure 2⁷⁵				
States	Actual Number of Seats	1991 proportionate Allocation	2001 Proportionate allocation	2011 Proportionate Allocation
Jammu and Kashmir	6	5	5	6
Himachal Pradesh	4	3	3	3
Punjab	13	13	13	12
Chandigarh	1	1	1	1
Uttarakhand	5	-	4	4
Haryana	10	10	11	11
NCT of Delhi	7	6	7	7
Rajasthan	25	28	29	30
Uttar Pradesh	80	88 (85)*	87	89
Bihar	40	55 (54)*	43	46
Sikkim	1	1	1	1
Arunachal Pradesh	2	1	1	1
Nagaland	1	1	1	1
Manipur	2	1	1	1
Mizoram	1	1	1	1
Tripura	2	2	2	2
Meghalaya	2	1	1	1
Assam	14	14	14	14
West Bengal	42	43	42	40
Jharkhand	14	-	14	15
Odisha	21	21	19	19
Chhattisgarh	11	-	11	11
Madhya Pradesh	29	41(40)*	31	32
Gujarat	26	26	26	27
Daman and Diu	1	1	1	1
DNH	1	1	1	1
Maharashtra	48	50	51	50
Andhra Pradesh	42	42	40	38
Karnataka	28	29	28	27
Goa	2	1	1	1
Lakshadweep	1	1	1	1
Kerala	20	18	17	15
Tamil Nadu	39	36	33	32
Puducherry	1	1	1	1
A and N Islands	1	1	1	1
India	543	543	543	543

*Actual number of seats in brackets. Three new states were formed out of Uttar Pradesh (Uttarakhand), Madhya Pradesh (Chhattisgarh) and Bihar (Jharkhand) in 2000.

⁷⁵ Source for 1991 and 2001 proportionate allocation data, McMillan, 'Delimitation in India' (n 7).

In addition to these anomalies, the delimitation of seats for reservation of Schedules Castes and Schedules Tribes in 2008, according to the 2001 census, creates yet another issue. Due to the usage of two different censuses, the percentage of reservation of seats is being calculated in accordance with the increased population of scheduled castes and scheduled tribes, while the base seats remain frozen. As such the increase in the reserved seats would be at the cost of general seats, thereby making the distortions in representativeness even more complex.⁷⁶

VI. THE WAY FORWARD

The Indian position on the issue of delimitation seems like a desperate attempt to avoid a politically sensitive situation rather than establishing a clear standpoint. Even if the justifications for delimitation are given due consideration, no active attempts to resolve the concerns in this regard have been made. As a result, the democratic foundations of equal representation are being mutilated, with the gap becoming harder to bridge with time. Therefore, the need to end the dormancy of Norris' constraining elements is becoming increasingly significant in this case.

Delimitation witnesses an acute lack of awareness and common consensus outside the core political and academic circles. The voters as well as elements of the civil society fail to identify delimitation as an essential part of the representative character of the Indian democracy. Civil society platforms like Association for Democratic Reforms (ADR) and People's Union for Civil Liberties (PUCL), while playing an active role in the formulation of a common consensus regarding various dimensions of electoral reforms, yield zero results on their web portals with respect to delimitation. This illustrates ignorance around the issue of delimitation, arguably due to the fact that the general population is more concerned with day to day life issues than building an 'ideal' democracy.⁷⁷

Due to this ignorance, an argument can well be advanced that the past attempts to recommence delimitation, including the recommendations of the Dinesh Goswami Committee (1990) and the resultant Constitution 71st amendment bill (1992), and the Constitution 80th amendment bill (1996), could have taken effect

⁷⁶ Verma, 'Fourth Delimitation of Constituencies: An Appraisal' (n 74).

⁷⁷ Trilochan Sastry, 'Civil Society, Indian Elections and Democracy Today' (2004) Indian Institute of Management Bangalore Working Paper No 465, 15
<<http://www.iimb.ernet.in/research/sites/default/files/WP%20No.%20465.pdf>> accessed 5 August 2015.

if not for the lack of public awareness and attention with respect to this issue, which gave political self-interest free reign.⁷⁸

A parallel can be drawn with the first phase of the policy cycle model of electoral change which involves an agenda setting stage. In this phase, various stakeholders including the public, the political parties, the civil society organisations, the NGOs and the media are engaged with a particular issue, which highlights the key problem to be addressed and pushes forward for an institutional reform for its resolution.⁷⁹ This step is clearly being ignored in the case of delimitation in India, which has resulted in deadlock. Thus, it can be argued in the present case that the failure to generate public attention, debate and consensus on this issue has had an effect of strengthening the influence of partisan interests in the election reform process, while diluting constraining elements of pressure from political culture.

Political representation involves three key processes of identification, mobilisation and adjudication.⁸⁰ To initiate electoral change, especially with reference to delimitation, the goals and means to attain equal voting share needs to be identified. Further, civil society organisations and the media, together with international standards and ideologies⁸¹ can be utilised to generate awareness and create a common consensus among the voters as to the resolution of this issue.⁸² These elements can play a vital role in reaching the third process of adjudication where the deadlock is finally resolved.

In the process, the central role of the election commission should be duly considered. The Election Commission of India has recognised the significance of delimitation through the years of constitutional freeze, although quite passively, arguably owing to a strong consensus in political circles.⁸³ The commission should recognise its central position in this issue and can play the role of an instigator in bringing it to surface. The constitutional framework does not confer a direct legislative power on the election commission in this regard. However, its central position in the electoral process may prove vital in creating a persuasive socio-political environment for the legislature to take steps in

⁷⁸ Sivaramakrishnan (n 36).

⁷⁹ Norris, 'Cultural Explanations of Electoral Reform' (n 5) 7.

⁸⁰ Peter A Hall and others, 'Introduction: The Politics of Representation in the Global Age' in Peter A Hall and others (eds), *The Politics of Representation in the Global Age: Identification, Mobilization, and Adjudication* (CUP 2014).

⁸¹ International Foundation for Electoral Systems, 'Challenging the Norms and Standards of Election Administration' (International Foundation for Electoral Systems 2007) 59–74.

⁸² Heather M Creek, 'Who Cares about Electoral Reform?' (University of Maryland American Politics Workshop, 26 March 2010).

⁸³ McMillan, 'Delimitation in India' (n 7).

order to resolve the democratic distortions at hand,⁸⁴ as it did in the 'None of the Above' issue, among others.⁸⁵

Public awareness, coupled with a clarity of methodology and rules to be employed in the process would ensure transparency by direct participation of the voters in the policy making process on this issue. In addition, it would also encourage innovation in the academic circles to formulate a system of delimitation that considers the ancillary interests of power balance among others, so as to make it compatible with the current political context and ensuring its enforcement. Such efforts could play a vital role in instigating the process of electoral change in this regard.

VII. CONCLUSION

Given the close interface between politics and electoral processes, political influence in the development of electoral laws can hardly be mitigated. However, it should not be strengthened to such an extent that the basic principles of democratic governance are threatened, as in the case of delimitation in India. The significance of an issue of procedural connotation, such as the one at hand, is hard to realise in the face of more pressing substantive issues with a more proximate influence on democracy. However, it should be remembered that invisibility of the foundation does not nullify its significance.

Democratic governance is a system in which choices are made and compromises forged among competing interests. In order to resolve the delimitation crisis in India, a strand of competing interests needs to surface in order to balance the partisan interests which remain the dominant determinant in the delimitation process. The status quo merely pursues a short sighted, politically motivated policy aimed at avoiding a crucial question rather than resolving it, thereby making it more complex for future considerations. As such, an intervention by non-party actors within the frameworks of politics is required to initiate a process of resolution in this regard, with the aim of ensuring a fairer democratic setup.

⁸⁴ Lloyd I Rudolph and Susanne H Rudolph, 'Redoing the Constitutional Design: From an Interventionist to a Regulatory State' in Atul Kohli (ed), *The Success of India's Democracy* (CUP 2001).

⁸⁵ Sorabjee, 'Right of Negative Voting' (n 22).

BIBLIOGRAPHY**BOOKS**

- Birch S, Millard F, Williams K and Popescu M, *Embodying Democracy: Electoral System Design in Post-communist Europe* (Palgrave Macmillan 2002)
- Bhalla RP, *Elections in India (1950–1972)* (S Chand and Co 1973)
- Chopra JK, *Politics of Election Reforms in India* (Mittal Publications 1989)
- Gudgin G and Taylor PJ, *Seats, Votes, and the Spatial Organization of Elections* (Pion 1979)
- Guilmoto CZ, 'The Geography of Fertility in India (1981-1991)' in Guilmoto CZ and Vaguet A (eds), *Essays on Population and Space in India* (Institut Français De Pondichéry 2000)
- Hall PA, Jacoby W, Levy J and Meunier S, 'Introduction: The Politics of Representation in the Global Age' in Hall PA, Jacoby W, Levy J and Meunier S (eds), *The Politics of Representation in the Global Age: Identification, Mobilization, and Adjudication* (CUP 2014)
- Jennings I, *Some Characteristics of the Indian Constitution: Being Lectures Given in the University of Madras During March 1952 Under the Sir Alladi Krishnaswami Aiyer Shashtiabdapoorthi Endowment* (OUP 1953)
- McMillan A, 'Delimitation in India' in Handley L and Grofman B (eds), *Redistricting in Comparative Perspective* (OUP 2008)
- Rudolph LI and Rudolph SH, 'Redoing the Constitutional Design: From an Interventionist to a Regulatory State' in Kohli A (ed), *The Success of India's Democracy* (CUP 2001)

JOURNAL ARTICLES

- Andrews JT and Jackman RW, 'Strategic Fools: Electoral Rule Choice under Extreme Uncertainty' (2005) 24(1) *Electoral Studies* 65
- Benoit K, 'Electoral Laws as Political Consequences: Explaining the Origins and Change of Electoral Institutions' (2007) 10 *Annual Review of Political Science* 363
- — 'Models of electoral system change' (2004) 23(3) *Electoral Studies*
- Boix C, 'Setting the Rules of the Game: The Choice of Electoral Systems in Advanced Democracies' (1999) 93(3) *American Political Science Review* 609
- Chhabra R, 'Baking a Bigger Pie: Linking Women's Reservation with Delimitation' (2000) 121 *Manushi* 32
- Edwards C, 'Theoretical and Comparative Aspects of Reapportionment and Redistricting: With Reference to Baker v. Carr' (1962) 15 *Vanderbilt Law Review* 1265
- Geddes B, 'A Game Theoretic Model of Reform in Latin American Democracies' (1991) 85(2) *American Political Science Review* 371
- Gerken HK, 'The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics' (2007) 6(2) *Election Law Journal* 184
- Jha N, 'Delimitation of Constituencies: A Plea for Some Effective Criteria' (1963) 24(2) *The Indian Journal of Political Science* 129
- Kellner P, 'Electoral reform: Principle or self-interest?' (1995) 33(2) *Representation* 23
- Lijphart A, 'Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories' (1985) 15(2) *Publius: The Journal of Federalism* 3

- Majumdar PK, *India's Demography: Changing Demographic Scenario in India* (Rawat Publications 2013)
- McMillan A, 'A Constitutional Fraud? The Ninety First Amendment and the Boundaries of Indian Democracy' (2001) *Economic and Political Weekly* 1171
- — 'Delimitation, Democracy, and End of Constitutional Freeze' (2000) *Economic and Political Weekly* 1271
- Murthi M, Guio A-C and Drèze J, 'Mortality, Fertility and Gender Bias in India: A District Level Analysis' (1995) 21(4) *Population and Development Review* 745
- Norris P, 'Introduction: The Politics of Electoral Reform' (1995) 16(1) *International Political Science Review* 3
- Rae DW, Hanby V and Loosemore J, 'Thresholds of Representation and Thresholds of Exclusion: An Analytic Note on Electoral Systems' (1971) 3 *Comparative Political Studies* 479
- Sakamoto T, 'Explaining Electoral Reform: Japan versus Italy and New Zealand' (1999) 5(4) *Party Politics* 419
- Samuels D and Snyder R, 'The Value of a Vote: Malapportionment in Comparative Perspective' (2001) 31(4) *British Journal of Political Science* 651
- Sen G, 'India's National Population Policy 2000: A Comment' (2000) 27(2) *Populi* 16
- Singh CP, 'A century of constituency delimitation in India' (2000) 19(4) *Political Geography* 517
- Sivaramakrishnan KC, 'North-South Divide and Delimitation Blues' (2000) 35(35-36) *Economic and Political Weekly* 3093
- Verma AK, 'Issues and Problems in India's Delimitation Exercise' (2002) 63(4) *Indian Journal of Political Science* 371
- — 'Fourth Delimitation of Constituencies: An Appraisal' (2008) 43(11) *Economic and Political Weekly* 12

CASES

- Baker v Carr* [1962] 369 US 186
- Colegrove v Green* [1946] 328 US 549
- J&K National Panthers Party v Union of India* (2011) 1 SCC 228
- RC Poudyal and others v Union of India and others* AIR (1993) SC 1804
- Reynolds v Sims* [1964] 377 US 533
- State of Madhya Pradesh v Bhopal Sugar Industries Ltd* (1964) 6 SCR 846

CONSTITUTIONS

The Constitution of India 1949

STATUTES

- Delimitation Commission Act 1952
- Government of India Act 1919
- Government of India Act 1935
- Representation of the People Act 1950

WEBSITES AND OTHER SOURCES

- Ace Project, 'Boundary Delimitation' (Ace Project 2002)
- Creek HM, 'Who Cares about Electoral Reform?' (University of Maryland American Politics Workshop, 26 March 2010)
- Election Commission of India (ECI), 'Debate in Constituent Assembly on Part XIII – Article 289' (*Election Commission of India*, 1949)
<http://eci.nic.in/eci_main/eci_publications/books/miscell/Debate_in_Constituent_Assembly_On_Elections.pdf> accessed 5 August 2015
- Government of India Ministry of Home Affairs, 'Census of India Website: Office of the Registrar General & Census Commissioner' (*Government of India Ministry of Home Affairs*) <<http://censusindia.gov.in/>> accessed 6 August 2015
- International Foundation for Electoral Systems, 'Challenging the Norms and Standards of Election Administration' (International Foundation for Electoral Systems 2007)
- Iyer L and Reddy M, 'Redrawing the Lines: Did Political Incumbents Influence Electoral Redistricting in the World's Largest Democracy?' (2013) Harvard Business School Working Paper 14-051
<http://www.hbs.edu/faculty/Publication%20Files/14-051_6beba5c6-4c63-455d-9f02-0f6bd9364877.pdf> accessed 5 August 2015
- Kalshian R, 'Fertility is Power: Mother of All Paradoxes' (*Outlook India*, 8 March 1999)
<<http://www.outlookindia.com/article/Fertility-Is-Power-Mother-Of-All-Paradoxes/207088>> accessed 5 August 2015
- Kumar S, 'Delimitation of Constituencies' (*The Hindu*, 17 September 2001)
<<http://www.thehindu.com/2001/09/17/stories/05172524.html>> accessed 5 August 2015
- Norris P, 'Cultural Explanations of Electoral Reform: A Policy Cycle Model' (2010) John F Kennedy School of Government, Harvard University Working Paper RWP 10-022 <<http://dash.harvard.edu/handle/1/4449095>> accessed 5 August 2015
- Radjou N, 'India's Biggest Economic Challenge' (*Harvard Business Review*, 2 June 2009)
<<https://hbr.org/2009/06/indias-biggest-economic-challe>> accessed 5 August 2015
- Sastry T, 'Civil Society, Indian Elections and Democracy Today' (2004) Indian Institute of Management Bangalore Working Paper No 465, 15
<<http://www.iimb.ernet.in/research/sites/default/files/WP%20No.%20465.pdf>> accessed 5 August 2015
- Sorabjee S, 'Right of Negative Voting' (*Indian Express*, 1 March 2009)
<<http://archive.indianexpress.com/news/right-of-negative-voting/429335/>> accessed 5 August 2015

Appendix I – Apportionment of Seats According to Webster Method (2011 Census)

States	Population (2011 Census)	Divisor (Total Population/ Total Seats)	State Quota (State Population/ Divisor)	Proportioned Seats by Rounding Off	State Quota according to the Adjusted Divisor*	Proportioned Seats by Rounding Off (Adjusted Divisor)	Actual No. of Seats	Difference between Actual and Proportionate Allocation (2011)
Jammu & Kashmir	12541302	2229409.895	5.625390839	6	5.561552993	6	6	0
Himachal Pradesh	6864602	2229409.895	3.079111659	3	3.044169401	3	4	1
Punjab	27743338	2229409.895	12.44425176	12	12.30303237	12	13	1
Chandigarh	1055450	2229409.895	0.473421241	1	0.46804878	1	1	0
Uttarakhand	10086292	2229409.895	4.524198095	5	4.472856763	4	5	1
Haryana	25351462	2229409.895	11.37137772	11	11.24233348	11	10	-1
NCT of Delhi	16787941	2229409.895	7.530217318	8	7.444763193	7	7	0
Rajasthan	68548437	2229409.895	30.74734581	31	30.39841996	30	25	-5
Uttar Pradesh	199812341	2229409.895	89.62566348	90	88.60857694	89	80	-9
Bihar	104099452	2229409.895	46.69372475	47	46.16383681	46	40	-6
Sikkim	610577	2229409.895	0.273873818	1	0.270765854	1	1	0
Arunachal Pradesh	1383727	2229409.895	0.620669623	1	0.613626164	1	2	1
Nagaland	1978502	2229409.895	0.887455467	1	0.877384479	1	1	0
Manipur	2570390	2229409.895	1.15294635	1	1.139862528	1	2	1
Mizoram	1097206	2229409.895	0.492150861	1	0.486565854	1	1	0
Tripura	3673917	2229409.895	1.64793249	2	1.629231486	2	2	0
Meghalaya	2966889	2229409.895	1.330795654	1	1.31569357	1	2	1
Assam	31205576	2229409.895	13.9972358	14	13.8383929	14	14	0
West Bengal	91276115	2229409.895	40.94182734	41	40.47721286	40	42	2
Jharkhand	32988134	2229409.895	14.79680075	15	14.62888426	15	14	-1

States (continued)	Population (2011 Census)	Divisor (Total Population/ Total Seats)	State Quota (State Population/ Divisor)	Proportioned Seats by Rounding Off	State Quota according to the Adjusted Divisor*	Proportioned Seats by Rounding Off (Adjusted Divisor)	Actual No. of Seats	Difference between Actual and Proportionate Allocation (2011)
Odisha	41974218	2229409.895	18.82750144	19	18.6138439	19	21	2
Chhattisgarh	25545198	2229409.895	11.45827784	11	11.32824745	11	11	0
Madhya Pradesh	72626809	2229409.895	32.57669627	33	32.20701064	32	29	-3
Gujarat	60439692	2229409.895	27.11017482	27	26.80252417	27	26	-1
Daman & Diu	243247	2229409.895	0.109108245	1	0.107870067	1	1	0
Dadra & Nagar Haveli	343709	2229409.895	0.154170393	1	0.152420843	1	1	0
Maharashtra	112374333	2229409.895	50.40541591	50	49.8334071	50	48	-2
Andhra Pradesh	84580777	2229409.895	37.93863892	38	37.5081051	38	42	4
Karnataka	61095297	2229409.895	27.40424591	27	27.09325809	27	28	1
Goa	1458545	2229409.895	0.654229177	1	0.646804878	1	2	1
Lakshadweep	64473	2229409.895	0.028919312	1	0.028591131	1	1	0
Kerala	33406061	2229409.895	14.98426156	15	14.81421774	15	20	5
Tamil Nadu	72147030	2229409.895	32.36149178	32	31.99424834	32	39	7
Puducherry	1247953	2229409.895	0.559768306	1	0.553415965	1	1	0
A & N Islands	380581	2229409.895	0.170709299	1	0.168772062	1	1	0
All India	1210569573		543	550		543	543	0

*Calculated using a divisor of 2255000, with a minimum allocation of 1 seat. This has been done to keep the total seats constant.

Discourse Analysis of Whaling Regulation and the Influences on Perceptions of Morality

Charlotte Klinting*

This Article tracks the historical development of whaling regulations and the simultaneous development of discourses, which aided by public perceptions of morality, have led to the creation of opposing value spectrums with irreconcilable differences within the International Whaling Commission. Section II presents a historical perspective on the development of the whaling industry and of the International Convention for the Regulation of Whaling. The accompanying discourses of this development show shifts from industry to science and to ethics as our relationship with nature changes. Section III discusses the politics of whaling and the discursive influence of public opinion by animal rights, media and direct actions; the insistence on whaling based on culture; and lastly, analyses the discourse applied in the 2014 ICJ case of Whaling in the Antarctic (Australia v Japan: New Zealand Intervening),¹ which aims to demonstrate the tensions between pro- and anti-whaling nations.

I. INTRODUCTION: PERSONAL WHALING ENCOUNTERS AND CHANGING RELATIONSHIP TO NATURE

Walking along in the harbour of Iceland's capital, Reykjavik, is a thought-provoking experience, as the heart of the town's fishing industry confronts an interesting paradox of conservation and industry. A friend points to a boat, and says: 'See that one? That's the whale watching boat'. Then he points to the boat next to it and continues: 'And that one, that's the whaling boat'. After a moment of stunned silence, I wondered why it came as such a shock that these two polar opposites should co-exist in a country like Iceland. It makes sense, considering

* Charlotte Klinting received a BA (Hons) in Law and Development Studies from SOAS, University of London in 2015 and is continuing her studies within environmental law and marine systems policy. She wishes to thank Dr Yoriko Otomo for her guidance during the writing process and for the support in exploring this area of interest.

¹ *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* [2014] <<http://www.icj-cij.org/docket/files/148/18136.pdf>> accessed 20 April 2014.

the importance of whales to the country's tourism as well as industry and food culture, which I experienced, when I was served minke whale for dinner. Yet, that felt morally wrong.

Why is this? Humans have a peculiar relationship with nature; although we do not associate or have any contact with ocean giants, we presumably treasure them for their intelligence, sociability, natural beauty, and maybe as one of the last remnants of 'pure' nature. Paul Watson, Captain of the Sea Shepherd (a vessel belonging to the direct-action anti-whaling organisation of the same name) even says that whales are the one species with which we have a real possibility of establishing communication.² The organisation depends on emotional arguments and I believe our revulsion at the idea of killing whales has much to do with the influence of the media and public opposition to whaling in the name of animal welfare. This represents a shift in our relationship with nature, as the idea of conservation just for the sake of the animal is a relatively new idea, seeing as animals were primarily considered as resources. Nature, as Raymond Williams³ describes it, has become commodified and privatised over the centuries and whales are no exception. Knowing nature is about knowing how it can generate value and whaling was an industrial activity, albeit governed by issues of economics. Since the 1960s, however, it has undergone a transformation, from being an industry that provides basic necessities, to a practice that has become a public barometer of human civility. With this transformation, discourse has simultaneously shifted, both within the realms of legislators and of the public. We have moved away from purely scientific evidence to a discourse governed by ethics, morality and guilty conscience. Nature has become external and what is left of it must be enclosed and protected. By exploring the idea of our shifting relationship with nature, this Article aims to show how whaling legislation and the accompanying discourse has influenced the public perception of ethics and morality, and vice versa.

1.1 Critical Discourse Analysis

The approach of this Article, Critical Discourse Analysis (CDA), applied on whaling discourse and policy, concerns the way power is used to define the parameters of particular questions,⁴ such as the question of whether whaling should be banned outright; set rules for whaling practices; or shape agendas of whaling countries. The method focuses on ways discursive structures enact,

² Jeff Goodman, 'Black Harvest' (BBC 1986).

³ Raymond Williams, *Problems in Materialism and Culture* (Verso 1980).

⁴ *ibid.*

confirm, legitimise, reproduce or challenge relations of power and dominance in society.⁵ The assumption of CDA is that discourse is historical and representative of society and culture, as well as interpretative and explanatory.⁶ Power and dominance is associated with specific social domains, such as media, politics and law, where groups or institutions have access to or control over public discourse – a journalist is able to control media discourse, a politician may control policy discourse and legislators, the legal discourse.⁷ However, the discourse is not simply about the language, but must be seen as textual, discursive and social.⁸ Critical linguistics analysis and discursive text interpretation aims to show how discourse represents a social process; reproduction or upholding hegemonic discursive or social practices; and how this compares to the prevalent conditions.⁹

II. FROM INDUSTRY TO CONSERVATION: DEVELOPMENT OF INTERNATIONAL WHALING REGULATION, SHIFTING DISCOURSES AND THE ISSUE OF SOVEREIGNTY

The first part of this Article adds a historical perspective to the analysis of whaling regulation in order to demonstrate the shifting rhetoric and changing attitudes towards nature, which have influenced whaling policies. The whaling discourse by policy makers, nations and anti-whaling forces has been dominated by three distinct periods of argumentation: first, it was centred around economic and industry interests; it then shifted to a scientific consensus; and finally, to a period based on moral and ethical belief by pressure.

2.1 Whaling as a Common Practice for Common Purposes

Whaling has, throughout history, been an accepted practice for common purposes. Whales have been hunted for their fat, meat, bones, baleen and/or teeth since the eleventh century; first by indigenous people – who caught whales near coasts for their own subsistence (aboriginal whaling) – and later by settlers working for themselves or for companies, using technology that enabled whaling on the high seas in the mid-nineteenth century, making it a

⁵ Teun A Van Dijk, 'Critical Discourse Analysis' in Deborah Schiffrin, Deborah Tanne and Heidi E Hamilton (eds), *The Handbook of Discourse Analysis* (Blackwell 2001) 353.

⁶ *ibid.*

⁷ *ibid* 356.

⁸ 'Critical Discourse Analysis' (*University of Strathclyde*)

<<http://www.strath.ac.uk/aer/materials/4dataanalysisineducationalresearch/unit9/criticaldiscourseanalysis/>> accessed 22 March 2014.

⁹ *ibid.*

commercial venture.¹⁰ Whalers went out on expeditions with catching vessels accompanied by a 'floating factory' where the whales were processed to make whale oil, which was both edible and used as an illuminant.¹¹ Whales, specifically sperm whales, were hunted for their oil to be used for candle wax and burning oil, as it burned brightly with minimum odour.¹² This oil gained more uses throughout time in the textile industry, for explosives, in medicine, industrial lubricants, and cosmetics and when margarine was invented in the 1860s, it consisted of whale oil churned with milk and salt.¹³ Whale oil production reached 15 million gallons per year by the end of the 1840s and the intensity of the hunt increased, while the whale populations decreased, driving up the prices for the oil, which in turn encouraged the industry's continuing exploitation.¹⁴ Due to the decrease in prices caused by an oversupply of whale oil, there had been attempts before the Second World War to regulate the industry. The Lever Brothers co-created the trade association 'Whale Oil Pool' in 1912 and Unilever – having the largest quota – delivered whale oil soap and margarine for war supplies.¹⁵ The Convention for the Regulation of Whaling was held in 1931 and 1937 with the aim of protecting certain depleting species, but due to important whaling nations such as Japan and Russia not ratifying the agreements, nothing was achieved.¹⁶ It was not until after the Second World War that international regulations were set in place to guide the recommencement of whaling.¹⁷

2.2 The International Convention for the Regulation of Whaling

In 1946, 19 whaling nations adopted the International Convention for the Regulation of Whaling (ICRW), which created the International Whaling Commission (IWC) including regulations on commercial, aboriginal and scientific whaling, all of which shall be discussed in subsequent sections.

¹⁰ Sebastian Oberthür, 'The International Convention for the Regulation of Whaling: From Over-Exploitation to Total Prohibition' (1998/99) Yearbook of International Cooperation on Environment and Development 29.

¹¹ *ibid.*

¹² Samuel T Pees, 'Whale Oil' (*Oil History*, 2004)

<<http://www.petroleumhistory.org/OilHistory/pages/Whale/whale.html>> accessed 23 March 2014.

¹³ Martyn Gorman, 'Whale Oil Uses – Margarine' (*Scran*, 2002)

<http://www.scran.ac.uk/packs/exhibitions/learning_materials/webs/40/margarine.htm> accessed 22 March 2014.

¹⁴ Samuel A Van Vactor, *Introduction to the Global Oil & Gas Business* (PennWell 2010) 134.

¹⁵ JN Tønnessen and AO Johnsen, *The History of Modern Whaling* (C Hurst & Co Publishers 1982) 240.

¹⁶ PJ Clapham and CS Baker, 'Whaling, Modern' in WF Perrin, B Würsig & JGM Thewissen (eds), *Encyclopedia of Marine Mammals* (Academic Press 2002) 3.

¹⁷ Oberthür (n 10) 29.

In terms of discourse, looking at the preamble for the ICRW is telling, as it demonstrates contrasting objectives. Firstly, it claims to be protecting whales from overexploitation by recognising the need for protection from overfishing of areas and species and 'safeguarding for future generations the great natural resources represented by the whale stocks'.¹⁸ However, it goes on to emphasise a clear pro-industry approach by 'recognising ... that the increases in size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources'.¹⁹ Equally, it goes on 'recognising that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress'.²⁰ Lastly, the Convention sees as its main objective 'to provide for proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'.²¹

The order of these words suggests that the convention sees its primary purpose as conservation and its secondary purpose as enabling the whaling industry to develop towards a status quo where stocks have recovered sufficiently to be able to sustain controlled exploitation.²² The relationship with nature and with whale stocks is not one of protection but one of control in order to have effective conservation for the benefit of future generations and continual exploitation.

The nature of the ICRW and IWC poses a number of problems; for instance, there is significant contestation and disagreement over scientific findings, not to mention consideration of consumers and the whaling industry accentuates the pro-industry approach within the Convention. The IWC can amend the Schedule of the ICRW, which contains the detailed regulations governing this dichotomy of protection and exploitation under Article V of the Convention. The IWC can amend which species are defined as protected: open and closed seasons and waters, including sanctuary areas; size limits for each species; time, methods, appliances and intensity of whaling, including the maximum catch of whales in a season; methods of measurement; and statistical and biological records. However, in order to amend the Schedule, it 'shall be based on scientific findings' and amendments can only be made when 'necessary to carry

¹⁸ International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*

²² Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (2nd edn, CUP 2010) 152.

out objectives and purposes of this Convention' and 'the interests of the consumers of whale products and the whaling industry shall be considered'.²³

The Schedule also deals with sovereign jurisdiction. Traditional legal norms hold that states can take ocean resources outside territorial limits²⁴ but the Convention has established a geographical scope of 'all waters', including coastal areas. Here, whaling is carried out by factory ships and by land stations of whale catchers.²⁵ This is arguably against the Law of the Sea Convention,²⁶ which ensures a nation's coastal rights. Within the current geographical scope, the ICRW is able to control the practices of each signatory and aims at having a process of collective, rather than independent, decision-making.²⁷

2.3 The 'Whalers' Club' versus the 'Save the Whales Club' in the IWC: A Clash of Interests

Returning to the issue of discourse development and shifting perceptions of nature, the IWC has gone through different phases since the industry-interest approach driving its creation in 1946. The original whaling states, which the Convention was created by and intended to serve – the so-called 'Whalers' Club' – complied with the negotiated regulations when it served short-term economic interests and tended to drop out of the Convention when quotas fell below preferred outcomes.²⁸ In the early years, scientific and moral arguments were absent from the debates within the IWC and during its first 15 years, an unprecedented number of whales were killed. This is attributed to the 'Blue Whale Unit' (BWU) system, which measured the amount of oil gained from a blue whale as a yardstick for how many whales could be killed across the species; one blue whale was the equivalent of two fin whales, two and a half humpbacks or six sei whales.²⁹ This measurement failed to control the harvest of different species and it was not until the late 1960s that a more conservationist approach emerged following consensus that whale stocks were grossly depleted.³⁰ Quotas were then negotiated based less on economic interests, but with scientific evidence and whale stocks in mind under the 'New Management Procedure', which was more or less accepted by members.

²³ International Convention for the Regulation of Whaling (n 18) art 5, s 2.

²⁴ Ronald B Mitchell 'Discourse and Sovereignty: Interests, Science, and Morality in the Regulation of Whaling' (1998) 4(3) *Global Governance* 275, 277.

²⁵ Bowman (n 22) 155.

²⁶ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

²⁷ Mitchell (n 24) 277.

²⁸ *ibid.*

²⁹ Bowman (n 22) 164.

³⁰ *ibid.*

However, while the Convention was created by the whaling nations, from the 1970s onward, several countries signed the Convention with the express purpose of ending whaling with the backing of environmental NGOs and the new discourse became increasingly morality-based.³¹

The BWU was abandoned in favour of species quotas, and the 1972 UN Conference on the Human Environment recommended a ten-year moratorium on commercial whaling, in order to allow the whale stocks to replete. It was not until 1982 that the IWC agreed to the moratorium – or rather, had enough votes, as a sufficient amount of new members recruited by anti-whaling forces had joined the IWC to pass the resolution for a temporary ban.³² When the moratorium came into effect in 1986, it was partly the result of the morality-based discourse, advocated by the ‘Save the Whales Club’, the growing number of non-whaling members, who had somewhat ‘hijacked’ the IWC and pressured it to adopt conservation measures.³³

The concept of sovereignty has an effect on the acceptance and enforcement of the moratorium on commercial whaling. Any amendment by the IWC can be avoided by a state-party by using the ‘Objection’ procedure, which has been used in the past to undermine several decisions made by the IWC, including the moratorium. The USSR and Norway registered lasting objections and were therefore not bound by the ban.³⁴ Commercial whaling was supposed to be reinstated through the Revised Management Procedure (RMP), accompanied by extensive scientific data on stock recovery, but the anti-whaling members rejected this in 1992 when the moratorium was revised. The whaling nations that had complied with the moratorium, expecting it to be temporary, felt betrayed³⁵ and Iceland withdrew, boldly stating that ‘the IWC was set up both to conserve and exploit whales ... in recent years it has switched solely to conserving them. This change gives Iceland the right to leave’.³⁶ Upon re-joining in 2002, Iceland actually entered with a legal reservation to the ban and was able to recommence commercial whaling in 2006 since the condition of progress within the RMP had not been met.³⁷

³¹ Mitchell (n 24) 277.

³² William Aron, William Burke and Milton MR Freeman, ‘The Whaling Issue’ (2000) 24 *Marine Policy* 179, 190.

³³ *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* [2014] ICJ CR 2013/12 [32]-[33] 48.

³⁴ Bowman (n 22) 163.

³⁵ [2014] ICJ CR 2013/12 (n 33) [45] 51.

³⁶ *ibid.*

³⁷ Bowman (n 22) 166.

In general, the addition of protectionist states to the IWC has created a lot of debate and controversy between such states and the pro-whaling nations of Japan, Norway and Iceland. The Chair of the Scientific Committee at the time of Iceland's withdrawal resigned in protest, since their recommendations were being treated with contempt.

In 2003, in spite of a significant minority among the whaling states, the IWC founded their Conservation Committee. The 20 out of 45 states who voted against argued that it is inappropriate to consider the Convention as a predominantly protectionist instrument when looking at its preamble, which is meant to strike a balance between conservation and orderly development of the whaling industry.³⁸ Norway opened the 53rd IWC meeting by stating that:

Instead of serving its purpose of being an organisation to provide for the management of whaling activities, [the IWC] has turned into an instrument for activists seeking to prohibit whaling as a matter of principle.³⁹

The shift in rhetoric to include a moral element pitted the economic interests of the whalers against the interests of environmental groups. This debate, which contributed to the moratorium, subsequently spurred a resistance to the very notion of 'conservation' and whaling nations became convinced that the moratorium was grounded in moral discourse.⁴⁰ Despite rejecting the moral arguments, however, the whaling states complied with the moratorium due to economic and political pressure,⁴¹ as well as the confidence that the ban was temporary and would be lifted based on future scientific evidence. This principled discourse was later rejected, as the whaling states reached the consensus that whales could be hunted at limited levels without threatening the species, which conflicted with the moral principles of conservationists and anti-whaling states. Thus, the whaling states became convinced that future IWC policy would be grounded in ethics and that it would be unresponsive to scientific discourse.⁴² The increasing use of moral and ethical arguments has decreased states' commitment to collective decision-making and efforts to circumvent IWC regulations has become common.⁴³

³⁸ *ibid* 153.

³⁹ *ibid*.

⁴⁰ Mitchell (n 24) 287.

⁴¹ *ibid* 286.

⁴² *ibid* 287.

⁴³ *ibid* 277.

2.4 Special Permit and Aboriginal Whaling: An Issue of Power

The moratorium on commercial whaling excluded aboriginal and scientific whaling, which have become loopholes to the whaling ban, and after the moratorium came into effect, whaling states have sought special permits for scientific programmes. Notwithstanding any other provisions and regulations set out by the IWC, each state still retains sovereignty in matters of granting permits for scientific whaling. While the number of permits given need to be reported, the IWC has no authorisation to remove or ban permits granted by sovereign states.⁴⁴ This becomes problematic in matters of public opposition and perception of morality, as the 'scientific' label is deemed just that – a cover to continue overexploitation of whaling stocks, or as Mr Pellet in the ICJ case of *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* phrased it: 'fig leaves for commercial whaling ... issued for economic gain'.⁴⁵ This is part of the accusations made by Australia, which believes Japan to be exploiting the loophole that allows whales to be killed for 'science'.⁴⁶

The second exception, aboriginal whaling, allocates indigenous people a catching quota each year for the sole purpose of meeting nutritional, subsistence and cultural needs.⁴⁷ This was recognised in the agreements that preceded the IWC and in the original Schedule of 1946, in articles such as:

The taking of bowhead whales from the Bering-Chukchi-Beaufort Seas Stock by aborigines is permitted, but only when the meat and products of such whales are to be used exclusively for local consumption by the aborigines.⁴⁸

This grants the native populations of Greenland, the Russian Federation, USA and St Vincent and the Grenadines rights to catch a yearly reviewed quota of certain species, determined on the whale stock.⁴⁹ This displays a recognition of the needs of indigenous groups in maintaining a part of their cultural heritage; however this has proved controversial. Governments and international

⁴⁴ Bowman (n 22) 175.

⁴⁵ *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* [2014] ICJ CR 2013/23 [23] 11.

⁴⁶ 'Australia Appeals to Japan to Reconsider its 'Scientific' Whale Slaughter' (*Australian Antarctic Division*, 8 November 2005)

<<http://www.antarctica.gov.au/news/2005/australia-appeals-to-japan-to-reconsider-its-scientific-whale-slaughter>> accessed 3 April 2014.

⁴⁷ Bowman (n 22) 170.

⁴⁸ International Convention for the Regulation of Whaling (n 18) s 13(b)(1).

⁴⁹ Canada withdrew from the IWC in 1982 due to the whaling ban and their indigenous populations are not bound by this.

regulations imposing their values on indigenous peoples have caused backlash, specifically in the case of Bowhead whales in Alaska, which had been hunted to the edge of extinction by commercial whaling and consequently aborigines have to stop hunting them as well.⁵⁰ This type of discourse is dominated by a power relationship in which the indigenous people are the weak parties, who halt the agenda pushed forward by the IWC and its interest groups. In 1980, the US was tasked with writing a report on assessing the needs of the eskimos of Alaska in terms of history, culture and nutrition, attempting to define how many whales they should be allowed to catch and if they needed any at all or if they had access to other food sources without nutritional consequences.⁵¹ This kind of assessment made by a government entity is rather subjective and arbitrary, as the report is written with a goal in mind – to allow the lowest level of catches as possible. The power is in the hand of the legislators, as it is in their power to allow aboriginal whaling and such a permit can just as easily be removed when the prevailing public policy changes.

This loophole of aboriginal whaling does not include the concept of ‘cultural whaling’, which several countries adhere to, i.e. whaling traditions are not linked to aboriginal culture, but rather a product of the country’s immediate natural environment, such as in Iceland and the Faroe Islands. There is therefore a lack of coherence in policies for whaling in aboriginal cultures versus traditional national cultures. The definition requires an aboriginal community to be a ‘cultural minority without elaborate political structure who have been oppressed by invaders ... [possessing] only simple technologies, have little economic sophistication and be largely outside the market economy’.⁵² The argument of ethics is clear in the acceptance of aboriginal whaling if we view them as oppressed and helpless – at present, it is the responsibility of the former oppressors to help them. However, this means that communities with a cultural heritage are excluded from this definition. It is often under this argument several whaling nations make their case for continuous whaling activities.

The prevailing motivation of many anti-whaling states and entities appears to be largely based on ethics and governments accommodate this wish by voting for whale protection at a low cost.⁵³ Many countries that voted for the

⁵⁰ Ray Gambell, ‘International Management of Whales and Whaling: An Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling’ (1993) 46(2) *Arctic* 97, 102.

⁵¹ Robert William Garner, ‘Animal Welfare, Ethics and the Work of the International Whaling Commission’ (2011) 7(3) *Journal of Global Ethics* 279.

⁵² Arne Kalland, *Unveiling the Whale: Discourses on Whales and Whaling* (Berghahn Books 2009) 111.

⁵³ Oberthür (n 10) 33.

moratorium were former whaling states whose whaling industries were failing as there was no longer any use for whale oil which, after all, had been the primary purpose of whaling. It is therefore easy to change to a conservationist policy. An example of the influence of public opinion is the adoption of an anti-whaling policy by Australia in the 1970s while the country was still whaling – lobbying organisations and increasing public interest spurred the ‘Frost Report’ in 1978.⁵⁴ This report was based on the Australians’ attitudes towards whaling, including petitions and opinion polls, demonstrating that the killing of whales is wrong in their eyes and its continuation would outrage a significant portion of the population.⁵⁵ It went on to recommend that Australia should remain a member of the IWC, as it was the best forum in which to pursue an anti-whaling position, regardless of the original purpose of the Convention.

However, basing decisions on environmental ethics is not commonly accepted, as shall become visible in Section 3 of this Article. Where anti-whaling forces have applied moral arguments as the basis for the permanent moratorium, pro-whaling nations counter this by appealing to cultural rights, an insistence on scientific proof and a refusal to give in to direct actions when their sovereign rights have been challenged. The morality argument is also the reason for Iceland leaving the Convention, Norway’s objection and resumption of whaling, the creation of the North Atlantic Marine Mammal Commission in 1992⁵⁶ and the seeking of loopholes within legislation. States will question their own involvement in a treaty, where the ethical arguments are shared only by part of the world’s societies,⁵⁷ thereby having their policies dictated by imposed values and discourse founded on a ‘New World’ Western morality.

III. POLITICS AND REALITIES OF WHALING: INFLUENCES ON PUBLIC OPINION AND PERCEPTION OF MORALITY

On an international level, very few people are involved in whaling and no one knows anyone who would personally suffer if whaling ended. It is a political ‘freebie’ and a way for people to feel good and establish themselves as environmental advocates with very little personal sacrifice.⁵⁸

⁵⁴ Australian Whale Conservation Society, ‘About Us’ (*Australian Whale Conservation Society*, 2013) <<http://www.awcs.org.au/about-us>> accessed 8 April 2014.

⁵⁵ [2014] ICJ CR 2013/12 (n 33) [25] 46.

⁵⁶ Iceland, Greenland, Faroe Islands and Norway.

⁵⁷ Oberthür (n 10) 33.

⁵⁸ Mitchell (n 24) 290.

We are representing the concerns of millions of people around the world who want the killing of whales to come to an end, they want them to be protected and they want this kind of barbaric behaviour to be shut down once and for all.⁵⁹

If such a statement is accompanied by images of blood-red water and dead whales, it is rather powerful. It is due to these types of arguments and public involvement that the whaling industry and its regulation are under so much public pressure. Since its inception, the IWC has been influenced by many different factors, be it campaigns, lobbying, scientific evidence, etc. Whaling nations which are not subject to the IWC suffer stigma and are pressured by campaigns on animal welfare. This third Section of the Article explores the different confrontations and issues within the IWC that have affected public opinion and are grounded in morality-based arguments within the 'World-Wide Court of Public Opinion'.⁶⁰

3.1 Politics and Public Opinion

As referred to in Section 2, the signatories to the ICRW are able to use the 'Objection' clause of the treaty within 90 days of a regulation being passed, which exempts a member from the given regulation. By giving the members the right to disassociate themselves from collective decisions in case they feel it infringes their sovereign rights, most whaling takes place outside of IWC influence.⁶¹ It is estimated that the IWC only regulates 5% of the whales and cetaceans hunted each year on a global scale.⁶² This compromises the purpose of the Convention, especially after Iceland was granted an opt-out of the whaling ban. The activities by the whaling nations are not illegal, but they take place outside the non-legal, non-binding decisions of the IWC. The reason for these actions may stem from the fact that the treaty was meant to facilitate the 'orderly development of the whaling industry', a goal which has never been changed in the Schedule, and anti-whaling nations are working towards subverting this intention by pushing for a complete ban. Anti-whaling nations assert that public opinion world-wide oppose the commercial hunting of whales at present,⁶³ while whaling nations claim that there has never been any evidence to support these assertions. However, public opinion polls indicate

⁵⁹ Goodman (n 2). Captain Paul Watson of the Sea Shepherd.

⁶⁰ Patrick Ramage, 'Finally Whales Have Their Day in Court in The Hague' (*International Fund for Animal Welfare*, 26 June 2013) <<http://www.ifaw.org/united-states/news/finally-whales-have-their-day-court-hague>> accessed 15 April 2014.

⁶¹ Mitchell (n 24) 288.

⁶² *ibid.*

⁶³ *ibid.*

that people of western nations show concern about endangered species and are willing to support the protection of such species, while at the same time possessing little knowledge about the whale stock or the fact that not all whale species are endangered.⁶⁴ This makes sense, since it is 'Save the Whales' and not 'Save those particular whale stocks that are being threatened by overhunting' that dominate the public's image. Furthermore, those involved in promoting anti-whaling sentiment are not interested in informing the public about the whalers wanting to hunt non-endangered or abundant whales.⁶⁵

3.2 Animal Welfare or Anthropocentric Conservation?

Ever since non-whaling states constituted the majority in the IWC, there has been a growing pressure to include animal welfare in policy making. As it is, the IWC has no direct mandate to consider this and is not required to collect data on the matter.⁶⁶ However, while animal welfare is a persistent and reasonable argument of anti-whaling advocates, this discourse is quite contentious.

The IWC is an anthropocentric treaty which sees the value of whales through the value it brings to humans; it is another example of our commodification of nature – the treaty is meant to protect the whale stocks, not the whales. The anthropocentric conservation approach displays an indirect ethical duty towards the animal: the intrinsic value of whales is not recognised and their protection depends entirely on whether it is in the interest of humans to do so.⁶⁷ This position provides arguments for a whaling ban: while it was in the humans' interest to replete the whale stocks, the whales were protected as a consequence. Or in the case of whale watching, humans derive pleasure from observing them, so we must protect them. Prohibition of whaling is also possible to justify based on the negative emotions humans experience when seeing a whale being killed. These are all examples of our indirect ethics of animal welfare. Should we move away from this type of conservation and give whales a moral standing, there would be extreme inconsistencies between this approach and how animals are treated in general. By 'animal welfare', we essentially mean their well-being before being killed and their right to minimal suffering and humane killing. However, it does not seem to matter when the Faroe Islands officially state that according to their own animal welfare legislation, whales must be killed as quickly and with as little suffering as possible with a special whaling knife that 'is used to sever the spinal cord,

⁶⁴ *ibid* 289.

⁶⁵ *ibid*.

⁶⁶ *ibid* 279.

⁶⁷ *ibid* 280.

which also severs the major blood supply to the brain, ensuring both loss of consciousness and death within seconds'.⁶⁸ This assurance means very little in the public's eyes, in spite of humans' general dependence on meat.

Animal welfare matters because of the categorisation of animals that we humans tend to create in our minds, where we care more for the ones who are 'like us', mostly mammals, majestic and representing the kind of nature we like. The aforementioned Frost Report 1978 emphasised that whales were unique and unlike other animals who were bred for slaughter, and killing such a significant animal like the whale would be wrong.⁶⁹ Indeed the American Association for the Advancement of Science has gathered support for a Declaration of Rights for Cetaceans, granting them a right to life,⁷⁰ and India has passed a law giving whales legal protection as 'non-human animals'. The question is whether this is useful in the conflicting discourses between the ones who want whales completely protected and those who still hold onto the practice of whaling.

3.3 Cultural Insistence on Whaling

We are not going to let them slaughter these intelligent creatures for no reason at all; economically it makes no sense, it's to satisfy the people's bloodlust.⁷¹

If this is true, and whaling has no place in the contemporary world, why do some nations insist upon it? Iceland, Norway, Japan and the Faroe Islands are not covered by the exception of 'aboriginal' whaling; their population's activities are better classified as 'cultural' – they have access to alternative food sources and are economically sophisticated. The question often asked in the media is: when most nations today have successfully adjusted to a non-whaling existence, why can't they discontinue the practice?⁷²

It comes down to a difference in the reasons for whaling of the pre-1970s whaling states, where the majority whaled in order to procure whales for industrial purposes, and were able to stop whaling fairly easily when it became

⁶⁸ 'Whaling in the Faroe Islands in Brief' (*The Government of the Faroe Islands*, October 2013) <www.government.fo/media/5343/whaling-in-brief-october-2013-1.pdf> accessed 5 April 2014.

⁶⁹ [2014] ICJ CR 2013/12 (n 33) [26] 46.

⁷⁰ Tim Ecott, 'Why We Should Let Faroe Islanders Hunt Whales' (*The Spectator*, 1 February 2014) <<http://www.spectator.co.uk/features/9126932/why-we-should-let-faroe-islanders-hunt-whales/>> accessed 10 April 2014.

⁷¹ Goodman (n 2). Captain Paul Watson of the Sea Shepherd.

⁷² Mitchell (n 24) 287.

redundant. Those countries did not include whale meat in their diet, as this was a mere by-product.⁷³ However, the cultural whalers are nations that are dependent on fisheries, which whaling is a part of. Traditionally whale meat has been a stable protein source in their diet and this is no accident, considering their locations and climates. In the Faroe Islands, whaling is a reminder of their intimate connection to the elements, where whale meat was necessary for survival. Anthropologists also acknowledge the importance of food as part of culture, aptly phrasing it as 'we are what we eat'.⁷⁴ Even today, whaling grants security to coastal fishing communities, such as the Faroe Islands, when fish prices fluctuate by being able to provide food without cost for the community all year round. Furthermore, in Japanese whaling communities, there is a degree of ancestral responsibility to continue the family's occupational traditions, and if unable to do so, they experience personal failure and shame.⁷⁵ Despite the somewhat 'reminiscent' arguments of heritage, whaling communities are very pragmatic in their defences and rather modest. The Faroese government stresses that the catch is sustainable with an average annual catch of fewer than 1,000 (some years the catch is zero) representing less than 1% of the whale stock.⁷⁶ Japan is requesting an interim reinstatement of coastal minke whaling, which has been met positively with the IWC Scientific Committee. This is not to say that some do not exploit the black market or pay lip service⁷⁷ to animal welfare commitments, but the cultural and sustainable practices are being met with cynicism or prejudice and are voted down in the IWC or fought against through direct action, since it is assumed that all people who whale today are bad people.

3.4 Discourse of Media and Direct Actions

The idea that those who whale are bad people is most clear in the media portrayals of the battles by organisations such as Sea Shepherd:

In the Northern Atlantic Ocean between Iceland and Scotland, lies an idyllic land lost in time. With tiny wooden houses and rolling green hills, the Faroe Islands look like the setting of a fairy tale ... But a dark shadow has been cast over this beautiful land. The shadow is

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid* 288.

⁷⁶ Mitchell (n 24).

⁷⁷ Justin McCurry, 'Japanese Company named as biggest online retailer of ivory and whale meat' (*The Guardian*, 18 March 2014)

<<http://www.theguardian.com/environment/2014/mar/18/japan-rakuten-biggest-online-retailer-ivory-whale-meat>> accessed 25 March 2014.

called the grind. The Faroese herd pilot whales to their shallow shores and kill them with sharp hooks and knives ... But now, a storm is coming to the Faroe Islands – a storm which has nothing to do with the weather.⁷⁸

Followed by bloody images, this is how the trailer to 'Whale Wars – Viking Shores', a cable TV show on Animal Planet, introduces the bad guys whom the Sea Shepherd is off to fight, or rather the hero, Paul Watson, is going to confront his old nemesis.

In such an outlet, the makers of the documentaries or TV shows have control over the discourse, which in this case vilifies the Faroe Islands, but it could just as well be, and often has been, about Iceland or Japan. This is a socially constructed narrative where the viewer of footage or photos is being told how to feel about whaling because if you can look at blood red water and dying whales with horrific adjectives thrown about, you are a bad person. This is the kind of bias countries with any kind of insistence on whaling face, and it is this bias that the defendant of the following case is facing.

3.5 'So-Called' Scientific Whaling: Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)

Whenever one reads about Japan's whaling activities, the words 'so-called' or 'alleged' are consistently added to describe the Japanese pursuits of 'scientific whaling' in the Antarctic. Australia brought a case against Japan to the International Court of Justice,⁷⁹ with support from New Zealand to challenge these activities. Under the IWC Article 8, any contracting government 'may grant to any of its nationals a special permit authorising that national to kill, take and treat whales for purposes of scientific research'. However, the Australian government believes that Japan's whaling in the Antarctic is commercial and not for any scientific purposes and has asked the court to withdraw all whaling permits from the Japanese fleet:⁸⁰

Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II') [was] in breach of

⁷⁸ 'Whale Wars – Viking Shores' (Animal Planet 2012).

⁷⁹ *Whaling in the Antarctic (Australia v Japan)* Order of 13 July 2010, ICJ Reports 2010, 400.

⁸⁰ Justin McCurry, 'It's Australia v Japan over Whaling in the Antarctic' (*The Guardian*, 25 June 2013)

<<http://www.theguardian.com/environment/2013/jun/25/australia-japan-whaling-antarctic-challenge>> accessed 24 March 2014.

obligations assumed by Japan under the International Convention for the Regulation of Whaling ('ICRW'), as well as its other international obligations for the preservation of marine mammals and the marine environment.⁸¹

Most interestingly for the purpose of this Article, the oral proceedings represent several themes: 1) cultural imperialism; 2) influence of public opinion; 3) the politicisation of science; and 4) a confrontational status quo between pro- and anti-whaling members. It also seems that Japan has had enough of being the prime target of being constantly vilified and has now gotten a chance to tell its version of the story. Australia's position in the case is based on Japan having deliberately, and in bad faith, abused the right given by Article 8 of 'Special Permits' in order to:

... [E]nable a vast, open-ended program of data collection, underpinned by a hope that some person might, at some future date, do something which might lead to an output which might be termed scientific.⁸²

A further imputation is that the research programme JARPA II does not satisfy the essential requirements for scientific research; rather, 'Japan has 'retro-fitted' a 'scientific' programme around parameters which have already been fixed by the true purpose of continued commercial whaling'.⁸³ The rhetoric adopted is accusative and absolute:

... [F]ew believe that the true purpose of JARPA II is science, involving as it does the killing of hundreds of whales per year. It, simply, is not science ... The contrived language that Japan displays on its vessels as yet another dead whale is hauled up the slipway – "Legal Research under the ICRW" – speaks volumes of a nation trying to convince itself and others that what it is doing is lawful. It is not lawful.⁸⁴

Australia calls Japan's strategy as seeking 'to cloak its on-going commercial whaling in the lab-coat of science'.⁸⁵ In essence, Japan is being accused of,

⁸¹ *Whaling in the Antarctic (Australia v Japan)* ICJ Press Release 2010/16

<<http://www.icj-cij.org/docket/files/148/15953.pdf>> accessed 24 March 2014.

⁸² *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* [2014] ICJ CR 2013/7 [49] 36.

⁸³ *ibid* [50] 36.

⁸⁴ *ibid* [19] 24.

⁸⁵ *ibid* [18] 24.

intentionally deceiving an international treaty for the past thirty years. Australia also enforces a conservationist interpretation of the Schedule of the IWC, by stating that 'the primary object and purpose of the Convention is the conservation and recovery of whale populations'⁸⁶ – a position disputed by Japan, which sees it as conservation and management of whale stocks with a view to sustainable exploitation.⁸⁷ Japan, in turn, argues that the scientific programmes were not launched in order to circumvent the moratorium but to help persuade members of the IWC to lift the moratorium partially on the basis of the best scientific advice,⁸⁸ as this was a requirement for the comprehensive review in 1992. It goes on to say that scientific evidence should be the only consideration, but 'Australia and its friends have replaced those requirements with ideological considerations'.⁸⁹

Japan is being portrayed as a rogue state, and in spite of statements denying this, there are continual references to cultural imperialism and the positing of values and truths from Australia onto Japan, which confronts this several times during oral proceedings:

Leaving aside any moral, ethical, cultural or metaphysical bias, no one can claim that Australia has a monopoly on clear and indisputable scientific truth.⁹⁰ ... It is not your responsibility ... to pass judgment on the substantive merits of particular scientific positions: this is not the medieval Inquisition.⁹¹ [Australia] ... prides itself, like some omniscient deity, on being able to distinguish good from evil.⁹²

The days of civilizing missions and moral crusades are over. In a world with diverse civilizations and traditions, international law cannot become an instrument for imposing the cultural preference of some at the expense of others. Whether JARPA II offends Australian public opinion or not, it is clearly within Japan's rights under Article VIII of the Convention.⁹³

⁸⁶ *ibid* [20] 29.

⁸⁷ *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* [2014] ICJ CR 2013/23 [30] 17.

⁸⁸ *ibid* [26] 12.

⁸⁹ *ibid* [27] 13.

⁹⁰ *ibid* [33] 15.

⁹¹ *ibid* [21] 10.

⁹² *ibid* [10] 6.

⁹³ [2014] ICJ CR 2013/12 (n 33) [84] 63.

The case represents irreconcilable differences on several levels. It represents differences on the meaning of 'scientific', jurisdiction and sovereignty, the interpretations of the IWC and the authority to say what is right and wrong. The discourses of animal welfare, cultural politics, public opinion, ethics, science and conservation are all to be found within these proceedings. It is a simplified discourse, which is part of a political process and politicisation of science. The case against Japan was an election promise in the 2010 federal elections, where Prime Minister Rudd promised to take Japan to court if he won, and opinion polls showed that the public wanted the government to take legal action to stop whaling.⁹⁴

During the proceedings, Japan turned the argument around and called Australia on its bias towards them through public pressure, politics and the 'no compromise' and 'zero tolerance' policies towards Japan in the IWC, in spite of support from the Science Committee. In turn, because Japan is convinced of Australia's attitude towards them as cultural imperialists, they will hear nothing about their definitions of science and conservation. With this discourse, no one is going to win.

IV. CONCLUSION: SOCIALLY CONSTRUCTED SCIENCE IN 'AN ARENA FOR TOURNAMENTS OF VALUE'

Throughout the evolution of the IWC, from protecting the industry to the commercial whaling ban, the discourse and debates between the different opposing groups have become polarised and a culture of 'us versus them' has developed between pro- and anti-whaling states. Two different value spectrums have developed within the discourse from the different actors; one based on moral arguments from those who have no material interest in supporting the continuation of whaling⁹⁵ and the remaining whaling nations who have a commercial interest, hold onto cultural traditions, or insist on their sovereign rights. If whaling nations are being told to stop whaling based on principles they do not share without any material incentives for acceptance, moral discourse will fail to convey their message and contribute to further alienation of the parties. Whaling discourse has become two parallel roads; while those with material incentives might be able to accept parts of a moral argument, the ethical standpoint will always see whaling on any account as wrong. The IWC was supposed to have collective decision-making, however as Japan notes:

⁹⁴ *ibid* [79] 62.

⁹⁵ International Convention for the Regulation of Whaling (n 18) 285.

If the hijacking of the Convention continues, if the politicization of science persists, if the traditions and cultures of people are sacrificed to appease other people's sentiments and selective moral judgment, if international law continues to be disregarded, soon there will be no whaling nations at the IWC.⁹⁶

The power of the international regulations has alienated many actors, who choose to withdraw rather than await compromise, and the IWC has lost legitimacy. The worldview put forth by the IWC in the beginning has been challenged. There have been distinct shifts in the value discourse; from prizing the economic aspect of whaling, to respecting scientific data, to a reliance on moral and ethical considerations. The IWC meetings have become 'an arena for tournaments of value';⁹⁷ a place for like-minded groups on both sides to compete for the higher power with the most convincing discourse. Thus, the IWC no longer deals with the whaling issue pragmatically. The whaling narrative by the public and politicians is a socially constructed science, where those involved construct their own narrative and evidence no longer matters. It no longer matters if a country uses scientific data to support the opportunity of sustainable whaling or the necessity for their whaling activities, as public opinion is influenced by the one who talks the loudest and appeals to our emotions. It is now a symbolic discourse for much greater questions of: sovereignty of states versus international cooperation; exploitation versus sustainability; and modernisation versus traditions.

On 31 March 2014, the judgment of the ICJ case was passed in Australia's favour. This might be the catalyst for Japan to leave the IWC, as other whaling nations have previously looked for alternative cooperative methods for sustainable whaling. Without bilateral cooperation, we might even have the undesirable result of a 'Whaling Commission' and an 'Anti-Whaling Commission'.⁹⁸ However, it seems that the discourse presented in the ICJ decision has taken a different turn. Despite the tone of the proceedings, the Court remained completely focused on whether or not the Japanese research programmes were reasonable and for the purposes of scientific research, concluding that Japan had not been able to establish this and that the special permits granted to the JARPA II programme are not for purposes of scientific research. The many references to practices, diet, history, morality and cultural imperialism were not addressed in the judgment which was refreshing to see, as it could therefore not be interpreted as an attack on Japanese culture and

⁹⁶ *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* [2014] ICJ CR 2013/21 [42] 31.

⁹⁷ Australian Antarctic Division (n 46) 118.

⁹⁸ [2014] ICJ CR 2013/21 (n 96) [42] 31.

their cultural and sovereign rights, and nor was it taken that way by the ICJ delegation.⁹⁹ The judgment was of course welcomed with open arms by environmental and animal rights groups, and while it could still be driven by political or cultural convictions, it may well be the first step towards a discourse, which looks purely at the facts and evidence to determine the scale of whaling activities in the future.

⁹⁹ Justin McCurry, 'Japan Told to Halt Antarctic Whaling by International Court' (*The Guardian*, 31 March 2014)

<<http://www.theguardian.com/environment/2014/mar/31/japanese-whaling-halt-antarctic-international-court>> accessed 1 April 2014.

BIBLIOGRAPHY**BOOKS**

- Bowman M, Davies P and Redgwell C, *Lyster's International Wildlife Law* (2nd edn, CUP 2010)
- Clapham PJ and Baker CS, 'Whaling, Modern' in Perrin WF, Würsig B & Thewissen JGM (eds), *Encyclopedia of Marine Mammals* (Academic Press 2002)
- Dijk TAV, 'Critical Discourse Analysis' in Schiffrin D, Tanne D and Hamilton HE (eds), *The Handbook of Discourse Analysis* (Blackwell 2001)
- Kalland A, *Unveiling the Whale: Discourses on Whales and Whaling* (Berghahn Books 2009)
- Tønnessen JN and Johnsen AO, *The History of Modern Whaling* (C Hurst & Co Publishers 1982)
- Vactor SAV, *Introduction to the Global Oil & Gas Business* (PennWell 2010)
- Williams R, *Problems in Materialism and Culture* (Verso 1980)

JOURNAL ARTICLES

- Aron W, Burke W and Freeman MMR, 'The Whaling Issue' (2000) 24 *Marine Policy* 179
- Gambell R, 'International Management of Whales and Whaling: An Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling' (1993) 46(2) *Arctic* 97
- Garner RW, 'Animal Welfare, Ethics and the Work of the International Whaling Commission' (2011) 7(3) *Journal of Global Ethics* 279
- Mitchell RB 'Discourse and Sovereignty: Interests, Science, and Morality in the Regulation of Whaling' (1998) 4(3) *Global Governance* 275
- Oberthür S, 'The International Convention for the Regulation of Whaling: From Over-Exploitation to Total Prohibition' (1998/99) *Yearbook of International Cooperation on Environment and Development* 29

CASES

- Whaling in the Antarctic (Australia v Japan)* ICJ Press Release 2010/16 <<http://www.icj-cij.org/docket/files/148/15953.pdf>> accessed 24 March 2014
- Whaling in the Antarctic (Australia v Japan)* Order of 13 July 2010, ICJ Reports 2010
- Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* [2014] ICJ CR 2013/7
 — [2014] ICJ CR 2013/12
 — [2014] ICJ CR 2013/21
 — [2014] ICJ CR 2013/23
- Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* [2014] <<http://www.icj-cij.org/docket/files/148/18136.pdf>> accessed 20 April 2014

INTERNATIONAL LAW SOURCES AND TREATIES

- International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72
- United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3

WEBSITES AND OTHER SOURCES

- 'Australia Appeals to Japan to Reconsider its 'Scientific' Whale Slaughter' (*Australian Antarctic Division*, 8 November 2005)
<<http://www.antarctica.gov.au/news/2005/australia-appeals-to-japan-to-reconsider-its-scientific-whale-slaughter>> accessed 3 April 2014
- Australian Whale Conservation Society, 'About Us' (*Australian Whale Conservation Society*, 2013) <<http://www.awcs.org.au/about-us>> accessed 8 April 2014
- Ecott T, 'Why We Should Let Faroe Islanders Hunt Whales' (*The Spectator*, 1 February 2014)
<<http://www.spectator.co.uk/features/9126932/why-we-should-let-faroe-islanders-hunt-whales/>> accessed 10 April 2014
- Gorman M, 'Whale Oil Uses – Margarine' (*Scran*, 2002)
<http://www.scran.ac.uk/packs/exhibitions/learning_materials/webs/40/margarine.htm> accessed 22 March 2014
- McCurry J, 'It's Australia v Japan over Whaling in the Antarctic' (*The Guardian*, 25 June 2013)
<<http://www.theguardian.com/environment/2013/jun/25/australia-japan-whaling-antarctic-challenge>> accessed 24 March 2014
- — 'Japanese Company named as biggest online retailer of ivory and whale meat' (*The Guardian*, 18 March 2014)
<<http://www.theguardian.com/environment/2014/mar/18/japan-rakuten-biggest-online-retailer-ivory-whale-meat>> accessed 25 March 2014
- — 'Japan Told to Halt Antarctic Whaling by International Court' (*The Guardian*, 31 March 2014)
<<http://www.theguardian.com/environment/2014/mar/31/japanese-whaling-halt-antarctic-international-court>> accessed 1 April 2014
- Pees ST, 'Whale Oil' (*Oil History*, 2004)
<<http://www.petroleumhistory.org/OilHistory/pages/Whale/whale.html>> accessed 23 March 2014
- Ramage P, 'Finally Whales Have Their Day in Court in The Hague' (*International Fund for Animal Welfare*, 26 June 2013)
<<http://www.ifaw.org/united-states/news/finally-whales-have-their-day-court-hague>> accessed 15 April 2014
- 'Critical Discourse Analysis' (*University of Strathclyde*)
<<http://www.strath.ac.uk/aer/materials/4dataanalysisineducationalresearch/unit9/criticaldiscourseanalysis/>> accessed 22 March 2014
- 'Whaling in the Faroe Islands in Brief' (*The Government of the Faroe Islands*, October 2013)
<www.government.fo/media/5343/whaling-in-brief-october-2013-1.pdf> accessed 5 April 2014

FILMS

- Goodman J, 'Black Harvest' (BBC 1986)
- 'Whale Wars – Viking Shores' (Animal Planet 2012)

Scope and Limits of Ijtihad for the Continued Evolution of Islamic Law

Tiphanie Bedas Tueni*

This Article addresses the plethora of opinions stirred by the debate with regard to the closure of the gate of ijtiḥād. Some scholars argue that ijtiḥād, or creative endeavour by jurists, came to a halt during the third century of the Muslim era so much so that its gate was closed, 'never again to be reopened'.¹ This standpoint implies that the law froze so that only legal conformism could ensue. In contrast, others assert that the gate of ijtiḥād never closed, either in theory or in practice. Some authors abide by neither theories and believe that even if an event such as the closure of the gate of ijtiḥād did occur, they find no objection as to why that gate may not be reopened so as to adapt the law to present-day human relations. Following an overview of what ijtiḥād entails in Section 2, this Article analyses the wide range of accounts for the closure of ijtiḥād in Section 3. Based on this aperçu of the divergent standpoints, the author suggests an equation that best suits the continued evolution of Islamic Law in Section 4.

I. INTRODUCTION

One of the characteristics of Islamic law lies in its distinction between the revealed sources and the law.² The former contains the latter, which are not self-evident and must be discovered by the jurist through the arduous task of *ijtiḥād*.

* Tiphanie Bedas Tueni obtained a Master's Degree in International Law from Université Panthéon-Assas, Paris and an LLM in Law of the Middle East with Merit from SOAS, University of London. She holds the Professional Lawyer's Certificate from the Paris Bar School. She wishes to thank Professor Mashood Baderin and Mr Ian D Edge for their invaluable support and guidance.

¹ Hamilton Alexander Rosskeen Gibb, *Modern Trends in Islam* (University of Chicago Press 1947) 13.

² The first source of Islamic law is the *Quran*: the revealed words of God. These were revealed to the Prophet Muhammad over a period of 23 years (from the age of 40 until his death at the age of 63: 609-632 AD). The Meccan verses, which contain moral and religious exhortations, refer to the revelations made to Muhammad by God through the angel Gabriel from 609 AD to 622 AD. Due to persecutions, Muhammad had to run to Medina in 622 AD. He received further revelations known as the Medinan verses, which dealt with social and legislative issues.

With its literal meaning to 'endeavour', *ijtihad* is the process by which the jurist puts his utmost effort into independent reasoning to interpret the *Quran* and the *Sunnah*³ which together form the *Sharia* – or immutable and divine sources of Islamic law.

As *ijtihad* amounts to a human endeavour, its outcome is prone to change in accordance with time, place and social realities. In the strict sense, the process of *ijtihad* comprises four levels. First, *al-ijtihad al-mutlaq al-mustaqil*, being the absolute and independent *ijtihad* carried out by the founders of the four Sunni schools of law. Second, *al-ijtihad al-mutlaq al-muntassab*, the absolute *ijtihad*, but affiliated to a school of law, such as that undertaken by Abu Yusuf or Muhammad al-Shaybani in the Hanafi school. Third, *al-ijtihad fi al-madhab*, which is the *ijtihad* carried out within a school of law. Lastly, *al-istinbat fi ba'dh-il-masail faqat*, which consists of developing a specific point of law within a school of law.

Thus, when an author states that the gates of *ijtihad* closed at the end of the third century AH, one cannot be implying that *all* levels of *ijtihad* has come to a halt, to the extent that no reasoning on any given point of law has been undertaken since the fourth century of the Hijra. This is however what most Western scholars have asserted: that the law has not changed and from that point onwards, jurists may only claim to have undertaken *taqlid* (legal conformism) in order to establish juristic positions. Some authors have gone so far as to employ medical terminology to describe the legal activity of *muqallids* (a jurist practicing *taqlid*). For instance, Joseph Schacht, one of the most prominent Western scholars on Islamic law, made use of the term 'anchylosis'.⁴ According to Schacht, Islamic law has become so rigid, to the point that legal activity has become solely characterised by imitation and a lack of originality.⁵

Writings from Schacht,⁶ Coulson,⁷ JND Anderson,⁸ and HAR Gibb,⁹ among others have been met with criticism, challenging whether the closure of *ijtihad*

³ The *Sunnah* are the practices of the Prophet. They consist of his sayings, his deeds and his tacit approvals and are partially divine.

⁴ Joseph Schacht, 'Classicisme, traditionalisme et ankylose dans la loi religieuse de l'Islam' in Robert Brunschvig and Gustave von Grunebaum (eds), *Classicisme et déclin culturel dans l'histoire de l'Islam* (Maisonneuve et Larose 1977).

⁵ *ibid* 141.

⁶ Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1965) 70–75.

⁷ Noel Coulson, *A History of Islamic Law* (first published 1964, Edinburgh University Press 1994) 81–82; Noel Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago Press 1969) 42–45.

⁸ James Norman Dalrymple Anderson, *Law Reform in the Muslim World* (Athlone Press 1976) 59.

⁹ Gibb, *Modern Trends in Islam* (n 1) 12–13.

ever took place. Responding negatively to his article entitled 'Was the gate of *ijtihad* closed?', Professor Hallaq demonstrates that *ijtihad* has continued to exist long after the Islamic golden age.¹⁰ Professor Kamali took a different tone and claimed that *ijtihad* manifests itself through 'statutory legislation, judicial decision and learned opinion (*fatwa*), and scholarly writings'.¹¹

Some authors have adopted an indecisive stance, neither affirming that the gate was tightly shut nor defending that it had always remained open. They acknowledge *ijtihad*'s finer degrees and conclude that the closure is not true of all forms of *ijtihad*. One point on which they concur is that there may never have been an '*ijma*'¹² of jurists deciding to put an end to *all* forms of legal endeavour. Bernard Weiss thus writes, that 'the notion that at the end of the Third Century the doctors of Islam reached an immutable consensus of opinion that further *ijtihad* was unnecessary is untenable'.¹³

The question of the closure of the gate of *ijtihad* is one that has stirred numerous discussions and filled many a volume. Central to the issue is one's definition of *ijtihad*, which may be used in either of two ways: to prompt the reader into believing that the gate was irreversibly slammed, or to lead him to a finer understanding of Islamic law as an evolutionary legal system. Equally as important is one's account of the closure of the gate. Some authors believe its causes to be *intrinsic* to Islamic law, such as *ijma*, thereby excluding the possibility that evolution may ever come from *within* the legal system, which sealed itself. Some scholars who argue that extrinsic factors must be taken into consideration acknowledge that Islamic law is capable of evolution. Thus behind the argument in favour or against the closure of the door of *ijtihad* lies a specific understanding of Islamic law as a rigid legal system, stuck in the past and impermeable to development, or as a body of law capable of evolving and renewing itself in accordance with its day and time. Following our critical overview of the various stances and what they entail with regards to the evolution of Islamic law, we shall envisage which position grants jurists the largest scope of action, all the while retaining the legal system's conservative, but not petrified, character.

¹⁰ Wael B Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle Eastern Studies 3, 13.

¹¹ Mohammad Hashim Kamali, 'Law and Society: The Interplay of Revelation and Reason in the Shariah' in John L Esposito (ed), *The Oxford History of Islam* (OUP 1999) 117.

¹² *Ijma* is defined by George F Hourani as 'the unanimous opinion of the Sunnite community in any generation on a religious matter' in 'The basis of Authority of Consensus in Sunnite Islam' (1964) *Studia Islamica* 21, 13.

¹³ Bernard Weiss, 'Interpretation in Islamic Law: The Theory of Ijtihad' (1978) *American Journal of Comparative Law* 199, 208.

II. *IJTIHAD*, THE INSTRUMENT OF ARGUMENTATION: FROM DEFINITIONAL DISCREPANCIES TO A PRACTICAL APPRECIATION

In this Section, we shall see that the definition of *ijtihād* is pivotal to one's appreciation of Islamic law either as a legal system bound by the past or as one open to change and development. The broader the definition, the greater the impact of the closure of the gate on legal activity and the easier it is to portray Islamic law as a rigid legal system. Likewise, erratically evoking *ijtihād*'s different levels without specifying on which one the gate was closed might lead the reader into believing that *all* forms of *ijtihād* have ceased. In contrast, the more precise the definition of *ijtihād* is, the less consequential the effect of the closure on legal reasoning. Thus if one asserts that the gate did close and broadly defines *ijtihād* as 'legal interpretation', it then leaves little room, if any, for the eventuality that a jurist may have undertaken *ijtihād* ever since. Defining *ijtihād* and accounting for its closure are far from being neutral and objective undertakings, as they are incidental to whether one views Islamic law as an evolutionary or historical science.

2.1 Extending the *Sharia's* Atemporal Fixedness to Islamic Law

Prominent Orientalist writers such as Noel Coulson, Joseph Schacht and JND Anderson, who argue that the door of *ijtihād* has closed, leave little room for *ijtihād* carried out by the founders of the four Sunni legal schools. As they omit to precisely defining the concept and never agree on its content, the reader gets the general impression that *ijtihād*, as understood in *all* its acceptations, has ceased toward the end of the third century AH. Such an appreciation of *ijtihād* thus obliterates any prospect of evolution of Islamic law.

Schacht, a Western reference in Islamic law, devotes an entire chapter to the question of 'The Closing of the Gate of Independent Reasoning' in *An Introduction to Islamic Law*. Although his introductory and conclusive remarks appear to be coherent, the same may not be said of the body of his argument, which incoherently evokes several degrees of *ijtihād*. Although he states that 'by the beginning of the fourth century of the hijra, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled',¹⁴ he contradicts himself when he later states that 'whatever the theory might say on *ijtihād* and *taklid*,¹⁵ the activity of the later scholars, after the 'closing of the door of *ijtihād*', was no

¹⁴ Schacht, *An Introduction to Islamic Law* (n 6) 71.

¹⁵ *Taklid* (also spelt *Taqlid*) refers to legal conformism to past views and opinions of jurists.

less creative than that of its predecessors. This activity was carried out by the *muftis*.¹⁶ Thus, at this point in the chapter, the reader is perplexed with regards to Islamic law's evolution. How could the *muftis* have been 'no less creative' than their predecessors, when there had been a consensus that from the mid-third century AH onwards that no one could carry out independent reasoning?

Adding to the reader's confusion, Schacht first states that 'the final doctrine of a school inevitably goes far beyond the opinions held by its founder' and that 'even during the period of *taklid*, Islamic law was not lacking in manifestations of original thought'. Here, the reader is tempted to conclude that Schacht distinguishes *ijtihad* carried out by the founders of the Sunni schools which, according to the author came to a halt in the third century AH, from *ijtihad* carried out by jurists *within* a particular school which continued after the schools were established. Schacht even seems to qualitatively compare the two forms of *ijtihad* when he states that the latter 'inevitably goes far beyond' the former. However, he immediately adds 'but this original thought could express itself freely *in nothing more than systematic constructions* which affected neither the established decisions of positive law nor the classical doctrine of the *usul al-fiqh*'.¹⁷ Once more, the reader is confused. How is it possible that the final doctrine of a school may simultaneously 'go far beyond the opinion held by its founder' and yet be 'nothing more than systematic constructions'? In the space of a single paragraph, Schacht acknowledges the occurrence of *ijtihad* at the level of a legal school, and then annihilates it completely. The reader thus gets the sense that *ijtihad* by the founders of the four Sunni schools *and* by jurists within a legal school is dead letter.¹⁸

Overall, Schacht's account of the closure of *ijtihad* lacks coherence on two levels. First, he alternates 'opinions held by a school's founder', 'the final doctrine of a school' and *ijtihad* at the individual level ('all scholars'). Secondly, his argument is misleading as he admits, and then refutes, the possibility that there may have been creative legal endeavour on jurists' behalf. As a result of these definitional and substantive vacillations, the reader risks interpreting the author's final statement as encompassing *all* forms of *ijtihad*: 'Islamic law, which until the early Abbasid period had been adaptable and growing, from then onwards became increasingly rigid and set in its final mold'.¹⁹ Thus Schacht omits to specify with regards to which form of *ijtihad* the closure occurred.

¹⁶ Schacht, *An Introduction to Islamic Law* (n 6) 73 (emphasis added).

¹⁷ *ibid* 71-72. *Usul al-fiqh* refers to the principles of Islamic jurisprudence.

¹⁸ 'Dead letter' refers to a law that is no longer enforced but has not been formally repealed.

¹⁹ Schacht, *An Introduction to Islamic Law* (n 6) 75.

Such an account of Islamic legal history categorically annihilates any prospects of evolution and gives Islamic *law* the same immutable quality as the *Sharia*, an amalgamation deemed unacceptable by jurists of Islamic law. Diagnosed with ‘ankylosis’, Islamic law is depicted as immune to any form of development whatsoever. Hence when making a statement with such serious consequences as ‘the gate of *ijtihad* was closed, never to be reopened’,²⁰ it is one’s duty to specify which *ijtihad* one is addressing so as not to mislead the reader into believing that Islamic law is altogether resistant to evolution. Likewise, it is the reader’s duty to be aware of an academic’s background: thus Coulson and Schacht, both Western scholars, wrote at a time of colonial domination of Muslim lands by European powers during which the latter propagated their own doctrines and legal codes. This is heightened by the fact that Western authors were influenced by each other’s respective publications.²¹

2.2 A Finer Understanding of Islamic Legal Concepts

For a finer understanding of *ijtihad*, one may turn to Bernard Weiss’ article entitled ‘Interpretation in Islamic Law: The Theory of Ijtihad’, in which he explains that *ijtihad* comprises of three levels ranging from that which is ‘directed at a particular question of law, to *ijtihad* confined solely to the limits of one’s particular *madhahib*, and to the “absolute” *ijtihad* exemplified by the founders of the great schools’.²²

It is precisely these different degrees of *ijtihad* which Coulson and Schacht have omitted in their definitions, thus misguiding the appreciation of Islamic law in the West. In stating that ‘some types of legal texts accommodated change and growth in legal doctrine, while others were fairly impermeable’,²³ Judith E Tucker recognises that there may be room for legal evolution depending on the text in question. Quoting Baber Johansen, she stresses:

²⁰ Gibb, *Modern Trends in Islam* (n 1) 13.

²¹ Coulson’s bibliography is illustrative of the disproportionality between Western sources and Arabic or Islamic sources: the former include works by Joel Anderson, Neil Benjamin Edmonstone Baillie, Georges-Henri Bousquet, Carl Brockelmann, Noel Coulson, Edmond Fagnan, Maurice Gaudetroy-Demombynes, Ignaz Goldziher, Gustave E von Grunebaum, Charles Hamilton, Henri Laoust, Reuben Levy, Louis Milliot, Count Leon Ostrorog, James Douglas Pearson, Jules Roussier, David Santillana, Joseph Schacht, Émile Tyan etc. whilst the latter include writings by Kemal Faruki, Majid Khadduri, Sobhi Mahmassani, I Mahmud, Abdur Rahim, and Abd-ar-Rahman.

²² Weiss (n 13) 208. *Madhahib* (singular *madhhab*) refers to the schools of Islamic law.

²³ Judith E Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (University of California Press 1998) 11.

Western scholars who based their theory of the steady-state character of Islamic law on their readings of *mutun* [textbooks that summarised the doctrine of a jurist's legal school] were not mistaken in their claims of continuity and conservatism. When we come to the *shuruh* texts [commentaries on legal doctrine in relation to specific situations or problems], however, we begin to see some room for maneuver.²⁴

Tucker's criticism may, to a certain extent, be true of most academics that have never gained experience in legal practice, as their research focuses on theory at the expense of actual practice. This is true of any legal system, those who seek to understand the French or Islamic legal systems will undoubtedly view them both as rigid and overtly conservative if they only look into the Napoleonic Code or *mutun*. To truly appreciate a legal system, one must understand how jurists and legal practitioners bring it to life.

2.3 A Practical Appreciation of *Ijtihad*

In order to refute Western scholarship's justification of the closure of *ijtihad*'s gate, authors such as Professor Hallaq, Professor Kamali and Professor Gerber have thus written about how the finer degrees of *ijtihad* were put into practice.

Gerber argues that while Islamic law in the post-classical period was based largely on following the footsteps of the past masters, it contained an important element of openness and flexibility. He examines the fatwa collection of seventeenth century Palestinian *mufti* (Islamic scholar) al-Ramli, who understood the term *ijtihad* to bear four different meanings; choosing a particular verse or tradition; extracting the law in the absence of a solution from the revealed sources; making an effort to derive the law from the sources in which 'no objective aid' existed; and a *mufti* or *qadi*'s (judge's) experience.²⁵ If one takes into account al-Ramli's first understanding of *ijtihad*, that is, choosing a verse or tradition over another, it would be incoherent to affirm that *ijtihad* ever ceased. Although there were diverging views surrounding a *mufti*'s role in 17th century Syria and Palestine, the fact that al-Ramli openly practiced *ijtihad* suffices to discredit Schacht's depiction of the gate's closure as irrefutable.

In his article entitled 'Was the Gate of *Ijtihad* Closed?' Hallaq demonstrates that *ijtihad* was widely accepted both in theory as well as in practice, and that it has been carried out throughout history. In theory, he argues that because *ijtihad* is

²⁴ *ibid* 13.

²⁵ Haim Gerber, 'Rigidity versus Openness in Late Classical Islamic Law: The Case of the Seventeenth-Century Palestinian Mufti Khayr al-Din al-Ramli' (1998) 5(2) *Islamic Law and Society* 165, 182.

the only means by which Muslims may classify their acts as obligatory, forbidden, recommended, permissible or disapproved, jurists could not have simply done away with it. Regarding the practice of *ijtihad*, Hallaq states that whether the door of *ijtihad* had been closed was contingent on 'two elements that complete each other: the existence or extinction of *mujtahids*,²⁶ and the jurist's consensus'.²⁷ He notes that the rapid growth of *fatwas* appeared and continued to grow 'rapidly from the fourth/tenth century onwards'²⁸ and after analysing the legal practice and literature, he concludes that jurists fulfilling the requirements to carry out *ijtihad* existed at all times and that 'up to ca. 500 A.H. there was no mention whatsoever of the phrase '*insidad bab al-ijtihad*'.²⁹ Weiss puts the question of the existence of *mujtahids* into perspective and stresses that it is one thing to discuss whether a generation of Muslims could have been without a *mujtahid*, yet another to affirm that the gate of *ijtihad* had been forever closed.³⁰

To illustrate that Islamic law is not a thing of the past, but a legal system that is very much alive and prone to development, Kamali brings to light legal practices of Muslim States, namely 'statutory legislation, judicial decision and learned opinion (*fatwa*), and scholarly writings'.³¹ He provides examples of each practice to support his statement: legal reforms of family law, particularly those curtailing the husband's right to polygyny and divorce, which derive 'some support from the jurists' doctrines of the Maliki and Hanafi schools, but [are reforms] essentially based on novel interpretation of the Quran's relevant portions'.³² He then points out instances of *ulamas'* (Islamic scholars') independent reasoning, such as that of 'Muhammad Rashid Rida in the 1920s and those of the late shaykh of Azhar, Mahmud Shaltut, in the 1950s'.³³ As an example of judicial *ijtihad*, Kamali turns to the 1967 case of *Khursid Bibi v Muhammad Amin*,³⁴ in which the Supreme Court of Pakistan validated *khula* (divorce at the wife's initiative) even without the consent of the husband.³⁵ With regards to scholarly activity, Kamali refers to the writings of Egyptian scholar

²⁶ Under Islamic Law, a *mujtahid* undertakes *ijtihad* or creative legal endeavour.

²⁷ Hallaq (n 10) 21.

²⁸ *ibid* 18.

²⁹ *insidad bab al-ijtihad* that is, closure of the gate of *ijtihad*; *ibid* 4.

³⁰ Weiss (n 13) 208: 'Writers on *usul al-fiqh* (theory of law) discuss whether it is possible for any generation of Muslims to be without a *mujtahid*, but are far from being in agreement on an answer. In any case, to affirm that a generation of Muslims could exist without a *mujtahid* is not the same as affirming that the 'gate of *ijtihad*' has been irrevocably closed'.

³¹ Kamali (n 11) 117.

³² *ibid*.

³³ *ibid*.

³⁴ *Khurshid Bibi v Muhammad Amin* PLD (1967) SC 97.

³⁵ Kamali (n 11) 118.

Yusuf al-Qaradawi, who carried out *ijtihad* so as to legalise travel by women unaccompanied by male relatives.³⁶ As Kamali explains, 'according to the rules of fiqh that were formulated in premodern times, women were not permitted to travel alone'.³⁷ Al-Qaradawi based his conclusion on the analysis that the initial ruling was intended to ensure women's physical and moral safety, and that modern air travel fulfils this requirement. Kamali notes 'he further supported this view with an analysis of the relevant *hadiths* [reports of what the Prophet said] on the subject and arrived at a ruling better suited to contemporary conditions'.³⁸ This is a perfect example of human interpretation of the *Sharia* through *ijtihad* in an evolutionary manner that takes into account novel conditions.³⁹

Thus, the importance of defining *ijtihad* and other legal concepts when discussing the closure of the gate cannot be emphasised enough. Whereas Orientalist scholars have tended to avoid defining *ijtihad*, defining it too broadly or incoherently evoking a different examination, scholars such as Weiss, Tucker and Kamali have exerted more effort in their appreciation of the concepts at hand. Authors who unequivocally argue against the eventuality of the closure of *ijtihad*, such as Hallaq and Gerber, have gone so far as to give practical occurrences of *ijtihad*, be it at the level of the *madhhab* or at an individual level, as illustrated by al-Ramli's interpretation of *ijtihad*. The main area of contention surrounding the debate lies in the irreversible character of the closure of the gate. Stating that the gate was closed 'never to be reopened' may mislead the reader to wrongfully annihilate any prospects of evolution coming from within Islamic law. Equally as important as defining *ijtihad* is how one accounts for it.⁴⁰

III. ACCOUNTING FOR THE CLOSURE OF *IJTIHAD*: AN INEVITABLY TENDENTIOUS TASK

Just as defining *ijtihad* is far from being a neutral, objective undertaking, so is the way one accounts for (or against) the closure of the gate of *ijtihad*. Some of the authors who argue that the gate of *ijtihad* closed towards the end of the third century AH bring forward causes *intrinsic* to Islamic law such as *ijma'*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Novel issues such as the monthly payment of *zakat* (alms giving) fall under the category of *fiqh an-nawazil* which consists of tackling new issues based on the *Sharia* for which there are no precedents.

⁴⁰ Gibb, *Modern Trends in Islam* (n 1) 13.

while others, less categorical about the likelihood of the event, admit that events *extrinsic* to Islamic law played a role in the stagnation of law.

3.1 The Closure of the Gate of *Ijtihad*: Intrinsic or Extrinsic to Islamic Law?

The majority of Western scholars hold that *ijma'* led jurists to cease all activity which may have amounted to *ijtihad*. Coulson thus writes that 'the doctrine became settled and ratified, at least within each school, by the general consensus, and the belief gained ground, in the circles of jurists, that the process of *ijtihad* had run its full course'.⁴¹ However, there is a significant inconsistency between Coulson's *A History of Islamic Law* and his subsequent work *Conflicts and Tensions in Islamic Jurisprudence*. In the former, Coulson immediately excludes the Mongolian invasions of Islamic territories as an anachronistic justification, stating that 'historically the phenomenon (of the closure of *ijtihad*) occurred some three centuries before this'.⁴² He further states that the 'phenomenon' was thus:

... [T]he result not of external pressures but of *internal causes* ... [T]he material sources of the divine will ... had been fully exploited. An exaggerated respect for the personalities of former jurists [and *ijma's*] spread ... [W]hen the consensus of opinion in the tenth century asserted that the door of *ijtihad* was closed, Islamic jurisprudence had resigned itself to the inevitable outcome of its self-imposed terms of reference.⁴³

Coulson contradicts himself however, as he later affirms that 'apart from the fact that the cessation of *ijtihad* is explicable as the inevitable result of the historical development of *Shari'a* law, a *universal consensus to this effect had never existed*'.⁴⁴ He undermines the probability that a consensus on the closure of the gate of *ijtihad* may have occurred, arguing that 'in fact, the Hanbalis had consistently maintained the impossibility of any real consensus after the generation of the Prophet's contemporaries – on the ground that it had become impracticable to ascertain the views of each and every qualified jurist, and in the fourteenth century, the Hanbali scholar Ibn-Taymiyya had himself claimed the theoretical right of *ijtihad*'.⁴⁵ He even goes as far as to discredit *ijma'* on the

⁴¹ Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (n 7) 42.

⁴² Coulson, *A History of Islamic Law* (n 7) 81.

⁴³ *ibid* (emphasis added).

⁴⁴ *ibid* 202 (emphasis added).

⁴⁵ *ibid* 202–203.

ground that its authority was 'laid down by classical Muslim jurisprudence and not by any unequivocal dictate of divine revelation'.⁴⁶

In *Conflicts and Tensions in Islamic Jurisprudence*, published five years after *A History of Islamic Law*, Coulson gives yet a different account for the closure of *ijtihad*: after rejecting the Mongolian invasion as a 'fanciful and unnecessary' factor in the closure of *ijtihad* as he had done in his *History*.⁴⁷ He states that 'the fact is that Muslim lawyers⁴⁸ were creatures of precedent, for whom the essential purpose of law was to stabilize the social order'.⁴⁹ This account of the closure of *ijtihad* is far from that which Coulson gives in his *History*. He goes on to write that:

... [T]his was essentially because *Islamic society itself remained relatively static throughout this time* [during "the legal tradition of ten centuries"]. There was in fact *no real social impetus to challenge the authority of the medieval legal manuals* until the past few decades of the present century. However now, when Islamic society has come to accept different values and standards of behaviour, the traditional doctrine has been challenged and the principle of *taqlid* called more and more into question.⁵⁰

Not only does Coulson portray Islamic law as rigid, he goes so far as to characterise its society as such, which is an unacceptable amalgamation and generalisation. His argument would perhaps have been more tangible had he connected the need for social order to the aftermath of the Mongolian invasion. Moreover, had Islamic society played such a crucial role in the stagnation of the law, why had Coulson not mentioned it five years earlier in *A History of Islamic Law*?

Writing almost 20 years prior to Coulson, HAR Gibb provides yet another account of the closure of *ijtihad*, which he understands as the 'striving to discover the true application of the teachings of Koran and tradition to a particular situation'.⁵¹ According to Gibb:

⁴⁶ *ibid.* Thereby ignoring the Hadith according to which the Prophet said "my community will not collectively agree on an error".

⁴⁷ Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (n 7) 44.

⁴⁸ The term 'lawyer' here is anachronical and incorrect, as legal representation does not exist under traditional Islamic law.

⁴⁹ Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (n 7) 44.

⁵⁰ *ibid.* (emphasis added).

⁵¹ Gibb, *Modern Trends in Islam* (n 1) 12.

The orthodox theologians, fearing that to recognise the legitimacy of *ijtihad* might open the door to individual reinterpretation and schism, have always done their best to limit its scope. According to the classical doctrine, the range of *ijtihad* was progressively narrowed down, as successive generations of doctors, supported by 'consensus', filled up the gaps in the doctrinal and legal systems. Finally, no more gaps remained to be filled, or only very insignificant ones, and thereupon "the gate of *ijtihad* was closed", never again to be reopened.⁵²

Surprisingly, the same author provides yet another justification for the legal stagnation in *Mohammedanism: An Historical Survey* which he owes to the political turmoil that followed the decline of the Abbasid Caliphate (having an *extrinsic* effect on Islamic law):

... [H]owever seriously the political and military strength of the vast Empire might be weakened, the moral authority of the Law was but the more enhanced and held the social fabric of Islam compact and secure through all the fluctuations of political fortune.⁵³

Thus, Gibb shifts from an internal factor (*ijma'*) to an external one (the decline of the Abbasid Caliphate): in the first case, the legal stagnation is irreversible (unless another *ijma'* decides to open the gate of *ijtihad*) yet in the second case it is contingent on the historic-political situation, hence susceptible to change.

In addition to *ijma'*, Schacht lists several other factors which restricted the 'freedom to exercise one's own judgement independently'⁵⁴ all of which are intrinsic to Islamic law:

[T]he formation of groups or circles within the ancient schools of law, the subjection of unfettered opinion to the increasingly strict discipline of systematic reasoning, and last but not least the appearance of numerous traditions from the Prophet (and from his Companions), traditions which embodied in authoritative form what had originally been no more than private opinions.⁵⁵

⁵² *ibid* 12–13 (emphasis added).

⁵³ Hamilton Alexander Rosskeen Gibb, *Mohammedanism: An Historical Survey* (OUP 1969) 7–8.

⁵⁴ Schacht, *An Introduction to Islamic Law* (n 6) 70

⁵⁵ *ibid*.

Stephen Humphreys gives a plausible explanation for Western authors' account of the closure of *ijtihad's* gate:

Until very recently historians of Islam have been extremely reluctant to regard law and jurisprudence as a significant source for social and economic life. For anyone familiar with the importance of law in the study of Roman or English history, such behaviour must seem simply obtuse. Yet there are reasons for it. First of all, Western scholars have been more interested in the theoretical jurisprudence of Islam (*usul al-fiqh*) than in the practical application of the principles of law to specific cases (*furu' al-fiqh*). Most Orientalists, after all, are not lawyers but students of culture. Thus they have tended to approach Islamic law as a religious orientation and a mode of thought rather than as a body of rights, obligations and rules of procedure.⁵⁶

As previously mentioned, one must always distinguish between the *Sharia* and Islamic law (the latter being the *result* of the former's interpretation) on the one hand, and between legal theory and legal practice on the other. Amalgamating these concepts carries the risk of grossly misrepresenting the Islamic legal system as 'petrified' or 'inflexible'.

One might also agree with Moors who states that 'the concentration of Orientalists on the texts composed by the founders of the legal schools and the summaries of their doctrines has probably contributed to the notion of Islamic law as a closed and static system'.⁵⁷

Perhaps a point on which scholars who adopt a mitigated stance with regards to the closure of the gate of *ijtihad* as well as those who refute it completely

⁵⁶ R Stephen Humphreys, *Islamic History: A Framework for Inquiry* (Princeton University Press, 1991) 209 (emphasis added); 'As the founder of Islamic legal studies in the West, Christiaan Snouck Hurgronje, pointed a century ago: *Fiqh is distinguished from modern and Roman law in that it is a doctrine of duties in the broadest sense of the word, and cannot be divided into religion, morality, and law. It deals only with "external" duties – i.e., those which are susceptible to control by a human authority instituted by God. However, these duties are without exception duties toward God, and are based on the unfathomable will of God Himself. All duties that men can perceive being carried out are dealt with ...* Profound as this insight was, it had the unfortunate consequence of establishing a highly idealized view of *fiqh* – as if it embodied only the vain dreams of aged *ulama* cloistered in their mosques and did not hope to mould the affairs of everyday life'.

⁵⁷ Annelies Moors, 'Debating Islamic Family Law: Legal Texts and Social Practices' in Margaret L Meriwether and Judith E Tucker (eds) *A Social History of Women and Gender in the Modern Middle East* (Westview Press 1999) 144.

concur is the improbability that there ever was a general consensus of jurists putting an end to *ijtihād*.

3.2 The Practical Improbability that an *Ijma'* Froze *Ijtihad*

In *A History of Islamic Law*, Coulson finds *ijma'* to be the root cause of the closure of the gate of *ijtihād*, stating that 'once formed the *ijma'* was infallible. As the acknowledged sphere of the *ijma'* in this broad sense spread, the use of independent judgment or *ijtihād* eventually disappeared altogether. *Ijma'* had thus set the final seal upon the process of increasing rigidity in law'.⁵⁸ Although *ijma'* has the same legal value as *nass* (text), what Coulson fails to appreciate is that unlike the *Quran*, it is not infallible. Thus, an *ijma'* can undo a previous *ijma'*. Weiss further clarifies the notion of *ijma'*, stating that 'consensus may arise out of the *ijtihād* of jurists, but once it is established it becomes a starting point for further *ijtihād*. *Ijtihad* is the on-going process which yields the virtually inexhaustible Law of God'.⁵⁹

Supposing an *ijma'* had effectively put an end to *ijtihād*, it would not have been irreversible, as Coulson implies. In practical terms, however, an *ijma'* at the end of the third century of the Hijra would have been highly unlikely if not impossible, as the Abbasid Empire covered too vast an area for jurists to physically gather in one place at a given time. Weiss makes clear that it is impossible that the closure of the gate of *ijtihād* may have come from *within* Islamic law when he states that:

The 'closing of the gate of *ijtihād*' and the corresponding general shift to *taqlid* was more *an accident of history than a requirement of theory*. The notion that at the end of the Third Century (or shortly thereafter) the doctors of Islam reached an immutable consensus of opinion that further *ijtihād* was unnecessary is untenable.⁶⁰

Weiss then refutes *ijma'* as the 'primary cause of legal conservatism'⁶¹ and downplays the role attributed to it by Western authors: 'While there is a tendency among Islamicists⁶² to regard the Consensus as a compendium of juristic interpretation that the Community considers to be absolute and immutable, *the actual role of the Consensus is more modest*'.⁶³

⁵⁸ Coulson, *A History of Islamic Law* (n 7) 80 (emphasis added).

⁵⁹ Weiss (n 13) 208.

⁶⁰ *ibid* (emphasis added).

⁶¹ *ibid*.

⁶² i.e. Orientalists.

⁶³ Weiss (n 13) 208 (emphasis added).

Finally, one may argue that there may never have been an *ijma'* forbidding further *ijtihad* as there has never in fact been a consensus regarding what *ijma'* itself amounts to.

Although the aforementioned authors represent a wide range of opinions, perhaps the only point on which they concur, regardless of whether they argue for or against the closure of the gate of *ijtihad*, is that since the end of the third century AH, no other Sunni legal school was created.

3.3 “Absolute *Ijtihad*”: A Common Denominator

One point which scholars may not refute regardless of their stance on the closure of the gate of *ijtihad*, is that of *al-ijtihad al-mutlaq al-mustaqîl*. That is, ‘absolute’ *ijtihad* as carried out by Abu Hanifa, Malik, al-Shafi’i and Ahmad ibn Hanbal, came to a halt towards the end of the third century AH. As Hallaq points out, ensuing scholars’ activity, however creative, had to be contained in a certain school’s doctrine: ‘in essence all teachings had to be attributed to one eponym or another’.⁶⁴ Thus, creative jurists such as Abu Yusuf, Shaybani and Muzani had to link their doctrines to a great master. Hence, Hallaq concludes that ‘in the last three or four decades of the fourth/tenth century a comprehensive but implicit agreement on the illegality of establishing new schools and of any ‘separatist’ tendencies was reached’.⁶⁵ Likewise, George Makdisi concludes that: ‘The fourth/tenth century put an end to new *madhhabs*, but not to *ijtihad*’.⁶⁶ Both Hallaq and Chibli Mallat agree that the causes of the narrowing down to the four Sunni legal schools are unknown. Mallat thus states that ‘the reasons why the several hundred schools which were extant in the early centuries have vanished to give way to only four recognized schools in Sunnism are still unclear’.⁶⁷ Nevertheless, there is a difference between asserting that no other legal school was created and affirming that the gate of *ijtihad* forever closed itself on *al-ijtihad al-mutlaq al-mustaqîl*: the former statement does not exclude the possibility that absolute *ijtihad* may one day be exercised and leaves such an eventuality out of man’s reach, whereas the latter statement implies that man has taken control of his religious legal destiny.

Based on our aperçu of the divergent standpoints regarding the closure of the gate of *ijtihad*, we henceforth suggest a solution that best suits the continued evolution of Islamic law.

⁶⁴ Hallaq (n 10) 10.

⁶⁵ *ibid* 11.

⁶⁶ George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh University Press 1981) 290.

⁶⁷ Chibli Mallat, *Introduction to Middle Eastern Law* (OUP 2007) 111.

IV. THE IDEAL EQUATION FOR THE CONTINUED EVOLUTION OF ISLAMIC LAW: BALANCING *TAQLID* AND “EVOLUTIONAL” *IJTIHAD*

4.1 Refuting the Gate’s Closure, but only for the Better

Arguing against the occurrence of the closure of *ijtihad* does not necessarily imply adopting an evolutionary view of Islamic law, as one may take that stance all the while claiming a purely literal interpretation of the *Sharia*. Thus, Muhammad ibn Abd al-Wahhab, founder of the 18th century reformist movement, rejected the closure of the gate of *ijtihad* and was extremely critical of *ijtihad* undertaken by the other Sunni scholars. He believed that the way in which the *Sharia* had been interpreted withdrew the Muslim community from the Quranic teaching and argued in favour of the strictest reliance on the *Quran* and *Sunnah*. This purely historical perspective rejected anything that diverged from the *Sharia* or from the principle of *tawhid*, which refers to the oneness of God. Such a position may legitimately be qualified using the semantic field of rigidity such as ‘ankylosis’, stiffness and so forth.

Although they also call for a return to Quranic principles, Reformists believe that jurists have a duty to carry out *ijtihad* to make law relevant to the modern times. An example of this is Bourguiba’s Tunisian family code of 1956, which outlawed polygamy.⁶⁸ As Ahmad Qadri illustrates, such an interpretation of the *Sharia* is respectful of what Islamic jurists asserted: ‘though God has given us revelation He also gave us brains to understand it; and He did not intend to be understood without careful and prolonged study’.⁶⁹ Thus, the best way for the jurist to honour God’s word is to invest his outmost effort to interpret it, *not* to follow it in a systematic manner nor interpret it so as to limit the *Sharia* to the first century AH when in reality God intended for it to be timeless.

Thus, *ijtihad* is a perpetual necessity and an inescapable endeavour which even jurists themselves cannot refute. As Mallat points out, claiming that the door of *ijtihad* was closed is in and of itself a form of interpretation: ‘one easy rebuttal of such a strange theory is the simple fact that a ‘legal closure’ in any society or civilisation, since silence itself is an interpretation, cannot be sustained’.⁷⁰ Equally vital to Islamic law (and for that matter to any legal system), is a minimum amount of consistency and continuity.

⁶⁸ See 1956 Tunisian Code of Personal Status, art 18.

⁶⁹ Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World* (Taj Co 1986) 199.

⁷⁰ Mallat (n 67) 110.

4.2 *Taqlid: Like Ratio Decidendi and Stare Decisis, a Legal Necessity*

Authors who have categorically argued for or against the closure of the gate of *ijtihad* have inaccurately portrayed *taqlid* (legal conformism). Thus, in *A History of Islamic Law*, Coulson states that ‘the right of *ijtihad* was replaced by the duty of *taqlid* or “imitation”. Henceforth every jurist was an “imitator” (*muqallid*), bound to accept and follow the doctrine established by his predecessors’.⁷¹ Such statements depicting *taqlid* as blind imitation provoked a defensive reaction on behalf authors such as Hallaq, who felt compelled to demonstrate that jurists never ceased to be active *mujtahids*. While conservatism is a healthy characteristic inherent to every legal system (without which there would be no legal system as such), rigidity is clearly impracticable.

Providing a much more accurate understanding of *taqlid*, Weiss states that ‘although *taqlid* is contrasted to *ijtihad*, it is not totally passive because it entails introspection and an exercise of conscience’.⁷² In other words, and as Professor Baderin illustrates in his article entitled ‘Understanding Islamic Law in Theory and Practice’, *taqlid* amounts to ‘conforming to or following the jurisprudential rulings of *Fiqh* books of any one of the Schools of jurisprudence’.⁷³ Thus, legal conformism is a necessity at the lower court level and without it there would be no legal system as such: ‘[a]lthough many contemporary scholars have challenged the notion of the closing of the gate of *Ijtihad*, the practice of *Taqlid* still prevails amongst lay judges of the lower *Shari’ah* courts in Muslim countries’.⁷⁴ *Taqlid* may therefore be compared to the British *ratio decidendi* or the American *stare decisis* as an indispensable activity that takes place in lower *Sharia* courts as well as, for instance, in the magistrate’s court. Just as an English judge must demonstrate his legal reasoning, so is *ijtihad* based on *dalil* or evidence. If conservatism was a sign of ‘anhylosis’ and rigidity, then the American and British legal systems may be described as such too.

Perhaps the ideal equation lies in Gerber’s statement according to which:

Without a large dose of conservatism no legal system can function, for if decisions are not based on previously existing rules, the result will be arbitrariness. But conservatism may turn into rigidity if it is not alloyed with a measure of flexibility.⁷⁵

⁷¹ Coulson, *A History of Islamic Law* (n 7) 80–81.

⁷² Weiss (n 13) 207.

⁷³ Mashood Baderin, ‘Understanding Islamic Law in Theory and Practice’ (2009) 9(3) *Legal Information Management* 186, 189.

⁷⁴ *ibid.*

⁷⁵ Gerber (n 25) 173.

Thus there must be room for evolutionary *ijtihad* (as opposed to blind conservatism) in a 'back-and-forth' approach, which allows jurists to meet the needs of the society in which they live, all the while remaining faithful to the revealed sources. Moreover, it permits a flexible understanding of Islamic law respectful of the variety of social realities that make up the *Ummah* (the Muslim community).

V. CONCLUSION

It goes without saying that the debate around the closure of the gate of *ijtihad* has stirred a plethora of debate and interpretation. Depending on how much importance one wishes to attribute *ijtihad*, it has led to a wide range of views regarding Islamic law, which is portrayed either as a 'petrified' system, as a conservative one just as any other legal system, or as a perpetually innovative body of law.

The practice of Islamic law – from the process of extracting *Ahkam al-Sharia* (Islamic law) to its application to concrete situations – is most accurately reflected by the middle view which acknowledges that although there may have been a legal stagnation following the formative period, it never prevented jurists from carrying out *ijtihad*. What is more, without *taqlid* there would be no legal system proper. The only form of *ijtihad* which has not been exerted is *al-ijithad al-mutlaq al-mustaqil*, that is 'absolute *ijtihad*' as carried out by Abu Hanifa, Malik, al-Shafi'i and Ahmad ibn Hanbal.

Thus, whether one argues in favour or against the closure of the gate of *ijtihad*, legal endeavour is exercised throughout the Muslim world and has been integrated into the nation-states' branches of government: from the apex of the judicial branch (such as Pakistan's Supreme Court) to statutory reforms in legal areas ranging from family law to finance. In particular, a judge who is qualified to carry out *ijtihad* has a duty to do so. As Professor Baderin points out, 'Muslim jurists are agreed on the fact that a qualified jurist or judge must exercise his own juristic opinion in accordance with the *Shariah*'.⁷⁶

The pertinence of this debate is to be appreciated on both a theoretical level and a practical one. Ideologically, the question of the closure of the gate of *ijtihad* is interesting in that it is revealing of how one wishes to portray Islamic law. Not only must one analyse an author's substantive arguments, but one must always bear in mind the wider context in which a particular article was written. Thus,

⁷⁶ Baderin (n 73) 190.

one may follow the evolution of Western scholarship's attitude toward Islamic law through the question of the closure of *ijtihad*'s gate.

Fortunately for those to whom Islamic law is applied, when confronted with novel situations, jurists do not think twice to carry out *ijtihad* on account that its gate may have closed toward the end of the third century AH. They respect their duty to carry out *ijtihad* and although the process might take months and even years to be implemented, they strive to interpret the *Sharia* so as to meet people's needs. Thus, in states where Islamic law is applied, the question of the closure of the gate of *ijtihad* is seldom raised. The importance of carrying out *ijtihad* however may not be overemphasised, as without it there would no *khula* without the husband's consent, polygamy would not be illegal in Tunisia, and Muslims would not be able to pay *zakat* on a monthly basis. These are just a few practical legal issues amongst many that were resolved through the process of *ijtihad*.

BIBLIOGRAPHY**BOOKS**

- Anderson JND, *Law Reform in the Muslim World* (Athlone Press 1976)
- Coulson N, *A History of Islamic Law* (first published 1964, Edinburgh University Press 1994)
- — *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago Press 1969)
- Gibb HAR, *Modern Trends in Islam* (University of Chicago Press 1947)
- — *Mohammedanism: An Historical Survey* (OUP 1969)
- Humphreys RS, *Islamic History: A Framework for Inquiry* (Princeton University Press, 1991)
- Kamali MH, 'Law and Society: The Interplay of Revelation and Reason in the Shariah' in Esposito JL (ed), *The Oxford History of Islam* (OUP 1999)
- Makdisi G, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh University Press 1981)
- Mallat C, *Introduction to Middle Eastern Law* (OUP 2007)
- Moors A, 'Debating Islamic Family Law: Legal Texts and Social Practices' in Meriwether ML and Tucker JE (eds) *A Social History of Women and Gender in the Modern Middle East* (Westview Press 1999)
- Qadri AA, *Islamic Jurisprudence in the Modern World* (Taj Co 1986)
- Schacht J, 'Classicisme, traditionalisme et ankylose dans la loi religieuse de l'Islam' in Robert Brunschvig and Gustave von Grunebaum (eds), *Classicisme et déclin culturel dans l'histoire de l'Islam* (Maisonneuve et Larose 1977)
- — *An Introduction to Islamic Law* (Clarendon Press 1965)
- Tucker JE, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (University of California Press 1998)

JOURNAL ARTICLES

- Baderin M, 'Understanding Islamic Law in Theory and Practice' (2009) 9(3) *Legal Information Management* 186
- Gerber H, 'Rigidity versus Openness in Late Classical Islamic Law: The Case of the Seventeenth-Century Palestinian Mufti Khayr al-Din al-Ramli' (1998) 5(2) *Islamic Law and Society* 165
- Hallaq WB, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) *International Journal of Middle Eastern Studies* 3
- Hourani GF, 'The basis of Authority of Consensus in Sunnite Islam' (1964) *Studia Islamica* 21
- Weiss B, 'Interpretation in Islamic Law: The Theory of Ijtihad' (1978) *American Journal of Comparative Law* 199

CASES

- Khurshid Bibi v Muhammad Amin* PLD (1967) SC 97

STATUTES AND CODES

- 1956 Tunisian Code of Personal Status

The Criminalisation of Piracy – Between Heinousness and Imperialism

Amira Nassim*

The high seas have been a scene for piracy since maritime commerce existed between states. From the Persian Gulf, Caribbean, North America, China and the 'Barbary States' of North Africa to modern-day piracy in the Horn of Africa, piracy has provided a substantive threat to trade as well as an ideological one by challenging the law and order of empires and sovereign nation-states. The pirate was labelled as a threat not to one state or all states but to mankind and was consequently made the first subject of international criminal law through universal jurisdiction.

By examining different legal and normative definitions of the pirate, this Article will analyse why pirates were treated as the first international criminals and what contributions this criminalisation has made to aspects of international criminal law. Through the work of theorists like Giorgio Agamben, Ernesto Laclau, and Carl Schmitt, this Article will examine the jurisdictional position of the figure of the pirate in order to provide a theoretical framework for its criminalisation under international law.

It will be argued that although piracy was criminalised under universal jurisdiction because of its alleged heinousness, the role pirates played in undermining capitalist expansion should be considered. Pirates, in other words, were anti-territorial figures who posed challenges to imperialist paradigms and nation-state boundaries. This Article will conclude that pirates are political actors whose criminalisation cannot be reduced to the charge of heinousness.

* Amira Nassim is currently studying for an MA in International Law at SOAS, University of London. She completed her undergraduate degree at The Open University in International Studies, focusing on Political Science.

I. INTRODUCTION

There is a close relationship between flowers and convicts. The fragility and delicacy of the former are of the same nature as the brutal insensitivity of the latter.

Jean Genet¹

II. THE FIGURE OF THE PIRATE: DECONSTRUCTING THE ENEMY OF MANKIND

The figure of the pirate often invokes images of greedy treasure hunting outlaws with an unrefined appearance and a criminal lifestyle. In popular culture and imagination, however, the maritime pirate of the Golden Age² is regularly³ seen as a rebellious and clever figure who operated outside the restricting structures of modern nation-states. From a legal perspective, piracy has multiple, though interrelated, definitions. For the purposes of this Article, two definitions of piracy will be examined. These definitions underline the legal continuity of the idea of jurisdiction as an overarching paradigm in which pirates have been positioned.

The present international law definition of piracy is set out in Articles 100 to 107 and 110 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).⁴ These Articles, with almost exact wording, repeat Articles 14 to 22 of the 1958 Geneva Convention on the High Seas.⁵ According to UNCLOS Article 101, piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

¹ Jean Genet, *The Thief's Journal* (Faber & Faber 1949) 7.

² Golden age of piracy 17th and 18th century piracy, particularly 1688-1725.

³ See for discussion Alexander Exquemelin, *The Buccaneers of America* (Penguin Books 1969); Tim Powers, *On Stranger Tides* (Corvus 2011) and CR Pennell, 'Who Needs Pirate Heroes?' (1998) 8(2) *The Northern Mariner/Le Marin du Nord* 61.

⁴ Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

⁵ Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11.

- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The UNCLOS definition limits acts of piracy to the high seas, thus excluding those acts which take place in territorial waters expanding 12 nautical miles off the coast of a nation-state. High seas, it is important to note, encompass economic zones that span from 'the edge of the territorial sea to 200 nautical miles'.⁶ This effectively means that UNCLOS not only provides a legal definition of piracy, but also organises the world's waters into the various jurisdictions of coastal nation-states. This definition also excludes politically motivated acts from piracy by referring to 'private ends'. According to UNCLOS, 'political acts' are equated to state sponsored acts, therefore assuming that non-state actors, like pirates, could not act for political ends.⁷

The jurisdiction's centrality to the legal definition of piracy is articulated, though in a different way, in a 1696 definition proposed by Justice Sir Charles Hedges. This definition was then adopted as a working legal definition of piracy:

Now piracy is only a term for sea-robbery, piracy being committed within the jurisdiction of the Admiralty. If a man shall be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy.⁸

Absent from Justice Hedges' definition is the exact extent of the jurisdiction as well as the difference between state-licensed privateers⁹ and non-state pirates. Nevertheless, the definition interestingly argues that piracy is robbery, taking place at sea, and as such the legality of piracy is regarded from the perspective of the *act* itself. Contrasting views¹⁰ emphasise the *effects* and nature of piracy,

⁶ Donald R Rothwell, 'Maritime Piracy and International Law' (*Crimes of War*) <<http://www.crimesofwar.org/commentary/maritime-piracy-and-international-law>> accessed 28 March 2015.

⁷ *ibid.*

⁸ Burdick H Brittin, 'The Law of Piracy: Does it Meet the Present and Potential Challenges?' in Eric Ellen (ed), *Piracy at Sea* (ICC Publishing SA 1989) 159.

⁹ Privateering refers to the practise of persons or ships authorised by government to attack foreign vessels.

¹⁰ See Gentile cited in Douglas R Burgess Jr, 'Hostis Humani Generi: Piracy, Terrorism and a New International Law' (2006) 13(2) *University of Miami International and Comparative Law Review* 293, 317.

such as heinousness, rather than the act itself. In this scenario, the pirate is seen as a threat to the nation-state.

Agamben's 'Homo Sacer'¹¹ is useful in further analysing both definitions. Building on Michel Foucault,¹² Agamben posits that biopolitics, that is, the inclusion of the biological life of the human being (*zoe*) into the nation-state's political calculations and mechanisms (*polis*), is the 'foundational event of modernity'.¹³ He argues that this inclusion is bound to dispossess certain populations of their political significance as legitimate members of a nation-state. The concept Agamben proposes to describe this condition is homo sacer. Homo sacer involves the reduction of the life of a citizen into *zoe*, by means of stripping off the *polis*. This figure, no longer a citizen entitled to legal protection, becomes depoliticised and is reduced to her/his biological being. Homo sacer, according to Agamben, can be unceremoniously killed, but not sacrificed.¹⁴ Within the scope of this Article, it will be demonstrated that while pirates fit the paradigm of homo sacer, they are political actors who actively challenge it by contesting the sovereignty and jurisdiction of the nation-state(s) in question.

Although Agamben's homo sacer has the refugee as its primary figure, arguably, pirates can be seen as a particular strand of homo sacer. Pirates were hunted and killed by the British Admiralty's Royal Navy¹⁵ and the killing of individuals involved in acts of piracy was standard practice. Interestingly, while these killings were taking place, the British Parliament in 1700 started to set up special courts that could convene abroad to try pirates. In these courts, defendants were not given any legal representation and the courts were composed of 'commissioners' who were not legal professionals but colonial officers. These courts are responsible for the execution of at least ten percent of active pirates at the time.¹⁶

The peculiarity of piracy to homo sacer lies in Carl Schmitt's 'state of exception' where 'the sovereign stands outside the judicial order and, nevertheless,

¹¹ 'Homo sacer' is used interchangeably with 'bare life' by Agamben and throughout this essay.

¹² Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (Palgrave Macmillan 2008).

¹³ Giorgio Agamben, *Homo Sacer Sovereign Power and Bare Life* (Stanford University Press 1998) 10.

¹⁴ *ibid* 85.

¹⁵ See Jameson cited in Burgess (n 10).

¹⁶ Max Boot, 'Pirates, Then and Now: How Piracy Was Defined in the Past and Can Be Again' (2009) 88(4) *Foreign Affairs* 94, 99.

belongs to it'.¹⁷ It is noteworthy here that the two definitions highlighted above have the state of exception as their underlying principle; piracy is defined according to its distance from (or proximity to) the physical boundaries that delineate the nation-state and its legal foundation, namely, the jurisdiction. 'Sovereignty only rules over', Deleuze and Guattari write, 'what it is capable of interiorizing'.¹⁸ Interestingly, the 1696 definition of piracy places pirates inside its jurisdiction by paradoxically excluding them from it; pirates are seen as outside invaders who, by virtue of their invasion of the jurisdiction of the Admiralty become included in it. The UN definition, on the other hand, directly places acts of piracy outside the territorial jurisdiction of nation-states. In both definitions, the state of exception positions pirates outside the jurisdiction of the nation-state while simultaneously including them in their political mechanisms which legitimise their unceremonious killing, or capture and trial. Agamben describes this condition of existence as a 'zone of indistinction between outside [the jurisdiction] and inside, exclusion and inclusion'. This zone, he argues, constitutes 'the original political relation', namely, 'the ban'.¹⁹ However, Agamben's conceptualisation of the 'ban' does not take into consideration the positionality of homo sacer as political actors par excellence.

Pirates surf and attack on international waters, outside nation-state boundaries, in both the physical and legal senses. That they are outside, however, does not mean that they have lost their relationship to nation-state jurisdictions; rather, it means that they are tied to these jurisdictions through a relationship of antagonism, or exclusion. This antagonism can be seen in light of Laclau's 'mutual ban' where two opposing laws seek to subvert each other thereby creating a political relation.²⁰ The mutual ban does not materialise when one force exists outside the nation-state jurisdiction. Rather, it bursts forward when this force is in opposition, through an antagonistic relationship, to the jurisdiction. Pirates, therefore, are anti-judicial actors that cannot be reduced into extra-legal or extra-judicial figures. Agamben's theory, however, places homo sacer in the realm of the extra-judicial rather than examining the ways in which homo sacer can be an active producer of the mutual ban. I argue that pirates, precisely because they are excluded from the normative structures of the nation-state, are political actors who, by virtue of their anti-judicial

¹⁷ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, MIT Press 1985) 13.

¹⁸ Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Brian Massumi tr, University of Minnesota Press 1987) 445.

¹⁹ Agamben (n 13) 181.

²⁰ Ernesto Laclau, 'Bare Life or Social Indeterminacy?' in Matthew Calarco and Steven DeCaroli (eds), *Giorgio Agamben: Sovereignty and Life* (Stanford University Press 2007) 15.

existence, undermine the legal foundations of nation-states. The threat pirates pose to the modern order underwrites the nation-states' impulse to criminalise and eradicate them.

III. PIRATES AGAINST UNIVERSAL JURISDICTION: CHALLENGING SOVEREIGNTY

At the core of the criminalisation of piracy, as has been demonstrated, lie questions of jurisdiction and sovereignty, both of which are inextricably linked. It is therefore the case that criminal jurisdiction is regarded in international law as an entitlement of sovereign states.²¹ In terms of maritime sovereignty, the freedom of the high seas undermines the notion of sovereignty over entire sea spaces. However, this freedom was limited to policing the seas, rather than to capturing and/or executing pirates; notably, the absence of sovereign control over the high seas initiated the practice of states patrolling these spaces against pirates without violating any other state's territorial sovereignty.²² This practice lasted throughout the age of Elizabethan privateering as a *laissez-faire* attitude. During the Renaissance, however, a shift occurred in the perception of pirates who came to be seen as active hostile enemies. It was particularly in 1718 that pirates could be, with reference to law, 'captured and executed by any one that takes them', with the scant provision that the captors must attempt to bring them to 'some government to be tried'.²³ This made piracy a crime of universal jurisdiction (similar to what it had been in the Roman Republic). The argument for the criminalisation of piracy was based on its alleged extraordinary heinousness, barbarity, and their being a collective threat to mankind. Piracy was further criminalised in the 1721 Piracy Act, under which mere affiliation or trading with a pirate was made to constitute a crime.²⁴

Universal jurisdiction typically holds that a nation can prosecute offences to which it does not have any connection on the basis of the extraordinary heinousness of the alleged conduct.²⁵ For hundreds of years, the crime of piracy

²¹ See Bassiouni cited in Eugene Kontorovich, 'The Pirate Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45(1) *Harvard International Law Journal* 183, 188.

²² Kenneth C Randall, 'Universal Jurisdiction under International Law' (1988) 66 *Texas Law Review* 785, 789.

²³ Lee A Casey, David B Rivkin Jr and Darin R Bartram, 'An Assessment of the Recommendations of the American Bar Association Regarding the Use of Military Commissions in the War on Terror' (2002) *The Federalist Society for Law and Public Policy Studies* 1, 18.

²⁴ Piracy Act 1721 8 Geo 1 c 24 (UK).

²⁵ Princeton Project on Universal Jurisdiction, 'The Princeton Principles on Universal Jurisdiction' (*Princeton University Press*, 2001)

<https://lapa.princeton.edu/hosteddocs/unive_jur.pdf> accessed 1 April 2015.

was the only offence to which universal jurisdiction applied.²⁶ In recent decades, however, the scope of the universal jurisdiction has been expanded to include several human rights offences, including torture, genocide, and crimes against humanity.

In 1856, most imperial powers signed the Declaration of Paris that abolished all forms of piracy, privateering, and government sponsorship.²⁷ This Declaration marked the labelling of pirates as *hostis humani generi*, the enemy of mankind, subject to capture and trial when found.²⁸ It is no surprise that the Declaration was signed; firstly, the practice of states using privateers as a political tool against each other had become more difficult to control, and secondly, non-state pirates became a growing menace for imperial expansion. The Declaration is also interesting because until 1856 international law only recognised two legal entities: persons and states.²⁹ One consequence of making piracy a universal crime and labelling pirates as enemies of not one state, or even all states, but of mankind, was the creation of a third legal category. This third category for a figure that is not a state or an individual meant that pirates were neither entitled to the benefits of the sovereignty of states nor to the protections of citizenship. Pirates were effectively placed within the jurisdiction by means of excluding them from the legal categories of citizenship. By pitting pirates against mankind, universal jurisdiction excluded pirates from the normative legal categories, mankind here being the nation-state citizen who, due to citizenship, has the right to have rights. Pirates, then, became the figures who can be killed without being sacrificed, a bare life, I argue, whose political qualities cannot be minimised.

Universal jurisdiction is a subject of many thought-provoking debates. However, due to the limited scope of this Article, not all aspects of the universal jurisdiction can be thoroughly considered. For the purposes of this Article, the interest in analysing sovereignty and jurisdiction in relation to piracy lies in the lingering legacy of the latter to international criminal law. It has been noted that piracy has often been summoned as a 'precedent for what would otherwise appear to be unprecedented'.³⁰ For example, the unusual cases of extra-territorial jurisdiction find their missing genealogy in early piracy trials.

²⁶ Kontorovich (n 21) 184.

²⁷ Burgess (n 10) 314.

²⁸ *ibid.*

²⁹ *ibid* 315.

³⁰ Kevin Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013) 6.

Eugene Kontorovich uses the term ‘piracy analogy’ to refer to the assertion that ‘new universal jurisdiction’³¹ is based on the ‘old universal jurisdiction’ that saw piracy’s heinousness as so extraordinary that it required a universal jurisdiction to exterminate it.³² He argues that universal jurisdiction over piracy ‘had nothing to do with the heinousness or moral gravity of the offence’³³ and, in fact, piracy was not regarded as exclusively atrocious in a manner that could explain its exceptional jurisdictional status. Heinousness is not an essential trait of piracy. That sovereign powers sponsored privateers to achieve certain ends on their behalf undermines claims to heinousness, as an essential characteristic, of acts of piracy; state-sponsored piracy was not regarded as heinous when the same legal definitions which criminalise non-state pirates could be applied to it.³⁴ Therefore ‘heinousness’ was selectively deployed to criminalise piracy that did not serve the interests of the sovereigns. Despite providing a critique of universal jurisdiction and its precept on the heinousness of piracy, Kontorovich in his paper does not explicitly provide alternative grounds for the criminalisation of piracy. The desire for imperial expansion, as will be demonstrated, is one conceivable motivating rationale.

IV. IMPERIAL EXPANSION AND DEMONISING THE RADICAL ‘OTHER’

To fully understand the rationale behind the criminalisation of piracy for sovereigns, it is important to analyse how piracy worked against imperial aspirations. Pirates back in the Golden Age were a source of serious economic threat to the imperial powers and continue to be perceived as such today. From an economic perspective, piracy was a lucrative business during the Golden Age and presently according to World Bank estimations, Somali piracy alone results in an assessed loss of \$18 billion for the global economy annually.³⁵

Furthermore, there is a parallel between the emergence of modern international law and the emergence of the capitalist market. The ways in which international law introduced universal jurisdiction to criminalise piracy tells a story of exploitation and marginalisation of those who were seen as a threat to colonial

³¹ Kontorovich (n 21). Kontorovich distinguished between the ‘new universal jurisdiction’ that includes human rights offences from the ‘old’ or ‘traditional’ universal jurisdiction that applied to piracy only.

³² *ibid* 185.

³³ *ibid* 236.

³⁴ *ibid*.

³⁵ Quy-Toan Do and others, ‘The Pirates of Somalia: Ending the Threat, Rebuilding a Nation’ (*The World Bank*, 2013) <<http://documents.worldbank.org/curated/en/2013/01/17672066/pirates-somalia-ending-threat-rebuilding-nation>> accessed 6 April 2015.

expansion and the formation of a stable world market. The aforementioned 1856 Declaration, in addition to making piracy an international crime under universal jurisdiction, is interesting because it established that piracy was no longer a tool for states to deploy. The Declaration effectively illustrates the paradox in the perceived criminality and barbarity of piracy on one hand, and the need for piracy by privateers as an adjunct to states' armed operations on the other. It is important to note here that prior to the signing of the Declaration, piracy (in the form of privateering) was used as a political tool by states against enemy states. Indeed, pirates and privateers operated in an analogous manner, the only difference being that the latter were state sponsored and therefore perceived to be legal, while the former were, in the normative sense of jurisdiction, outside the law. Privateers were deployed to distract an enemy's navy, frustrate its relations with its empire, hinder its trade, and even drive it toward open warfare.³⁶ In other words, piracy was seen as a legitimate tool, a useful asset for the imperial powers that only became criminal when it ceased to serve imperial aspirations.

The criminalisation of piracy cannot be fully understood without considering the imperial formation of the world market. Access and transportation by sea have constituted a building block of capitalist trade, making maritime trade a key aspect of imperial and political projects. Privateers, for instance, played an instrumental role in the violent process of state-building. Political economist Karl Marx illustrated the importance of piracy to early modern commercial empires and for making primitive accumulation possible on a mass scale.³⁷

Moreover, privateering and imperialist plunder were based on an unbending separation between Europe and the colonised world. In this state of affairs, the colonial world was reduced to a permanent state of exception, simultaneously included and subtracted from international law.³⁸ Law then became a tool used by the sovereigns in order to seize control through juridification. Foucault established a link between liberal governmentality³⁹ and a new spatial thinking that originated from maritime law.⁴⁰ He argued that 'the history of piracy could also figure as one of the aspects of this elaboration of a worldwide space in

³⁶ Alfred P Rubin, *The Law of Piracy* (2nd edn, Transnational Publishers 1998).

³⁷ Amedeo Policante, 'The New Pirate Wars: The World Market as Imperial Formation' (2013) 3(1) *Global Discourse* 52.

³⁸ Eliga H Gould, 'Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772' (2003) 60(3) *The William and Mary Quarterly* 471.

³⁹ That is, governmentality that is concerned with the control of circulation rather than the defence of clear boundaries.

⁴⁰ Foucault (n 12) 176.

terms of a number of legal principles'.⁴¹ He wrote that 'in relation to the suppression of piracy we can say that there was a juridification of the world, which should be thought of in terms of the organization of a market'.⁴² The creation of a space where international commerce can flow freely required violent means and, in this context, the criminalisation of piracy translates into an exercise of law-making violence.

Colonial expansion was ferocious and met resistance from numerous native people, including pirates. Native peoples fought against imperial land grabs and against the order of European states, as did pirates, who were seen as an obstacle to the reduction of high seas into a suave space for commercial circulation. This reduction was a prerequisite for 'an efficient process of expanded capitalist accumulation that would feed off the systemic exploitation of wage labour in Europe and of slave trade in the colonies'.⁴³ Colonial exploitation, whether occurring on land or sea, motivated sovereigns to demonise, then criminalise piracy in order to secure international trade routes and transport and to juridify long-distance trade. Throughout history dehumanising the 'other' has been a pretext for colonialism and imperial expansion. Marcus Rediker provides an intriguing account of how pirates 'stripped of all human characteristics' were reduced to 'a wild fragment of nature that could be tamed only by death'.⁴⁴ Pirates were repeatedly demonised, described as savage beasts, bloodthirsty sea wolves and demons of the ocean. This rhetoric promoted the manhunt of pirates, as mere objects of jurisdiction that were a target of annihilation campaigns as enemies of mankind.

It is noteworthy that this demonisation of the 'enemy of mankind' was not only restricted to individuals perceived as pirates but also influenced the labelling of certain states as 'pirate states' and/or excluding communities from the recognised sovereign members of the international community. For instance, the Europeans did not see the Barbary cities of Northern Africa⁴⁵ as sovereign states. This is evident in the European states' refusal to consider attacks on trade by the 'Barbary corsairs' as acts of war carried out by an official of an

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ Amedeo Policante, 'The Return of the Pirate: Post-Colonial Trajectories in the History of International Law' (2014) 5 *Política Común*

<<http://quod.lib.umich.edu/p/pc/12322227.0005.005?view=text;rgn=main>> accessed 10 April 2015.

⁴⁴ Marcus Rediker, *Villains of All Nations: Atlantic Pirates in the Golden Age* (Beacon Press 2011) 146.

⁴⁵ Particularly the ports of Algiers, Tunis and Tripoli.

equal sovereign state.⁴⁶ Instead, they were condemned as crimes (of piracy) against international law that required all 'civilised nations' to jointly exercise universal jurisdiction to eliminate the 'savage pirates'.

The criminalisation of piracy was in the interest of imperial powers as is the case with sovereign states today. This is partly because pirates as persons existing outside the normative scope of society posed a threat to imperial order and questioned the entire idea of a nation-state. Pirates learned to live 'outside the law and beyond sovereignty'.⁴⁷ Intriguingly, while they contested the power of the state, they did not desire sovereign power for themselves. Rather, they provided an idea of an alternative sovereignty, that of anti-territoriality. Pirates provided not only a substantive threat (trade and mercantile) but also a formal one (posting an alternative to statism).⁴⁸ It can therefore be argued that pirates, on all fronts, provided an ideological opposition by living a counter-life.

Finally, I want to draw attention to what is perhaps palpable, yet often left out, namely, why some decide to brave the sea. Since the beginning of this millennium, the Horn of Africa, and particularly the Coast of Somalia, has seen an increase in the number of acts of piracy. Although acts of robbery, violence, and hostage-taking cannot be minimised, it is important to understand the socio-political and economic contexts within which these acts take place. For instance, since the early 1990s, there have been several failed central governments in Somalia, and the average GDP per-capita of the country was 128.1 USD⁴⁹ in 2012, thus making it one of the poorest countries in the world. Moreover, other states have taken advantage of Somalia's legal waters. They have deployed sophisticated fishing fleets that have wiped out entire fish populations in the Indian Ocean destroying traditional fishery.⁵⁰ Indeed, individuals who turn to piracy are often unemployed fishermen or sailors. Furthermore, the waters of Somalia have been used as dumps for toxic waste.⁵¹ This has led to considerable loss of livelihood and income for the local people. Attempting to protect their territorial waters, some individuals organised

⁴⁶ Policante (n 43).

⁴⁷ Gerry Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Polity Press 2007) 172.

⁴⁸ See Rediker cited in Simpson (n 47).

⁴⁹ United Nations Statistics Division, 'Country Profile: Somalia' (*UNdata*, 2012) <<http://data.un.org/CountryProfile.aspx?crName=somalia>> accessed 10 April 2015.

⁵⁰ Ted Dagne, 'Somalia: Current Conditions and Prospects for a Lasting Peace' (*Congressional Research Service*, 2011) <<https://www.fas.org/sgp/crs/row/RL33911.pdf>> 15–16 accessed 11 April 2015.

⁵¹ 'Somalia Toxic Waste Dumping' (*Environmental Justice Atlas*, 2014) <www.ejatl.org/conflict/somalia-toxic-waste-dumping-somalia> accessed 11 April 2015.

themselves into bands to face the international ships and demand compensation for the loss of income resulting from over-fishing and illegal dumping.⁵²

V. CONCLUSION

This Article has argued that the criminalisation of piracy under international law cannot be reduced into a depoliticised and de-historicised phenomenon, but must instead be seen in its complex historical context of imperial expansion and the formation of the world market. I have demonstrated the ways in which the pirate figure has posed a threat to sovereignty and raised questions of law and politics, space, violence and legality.

Agamben's theorisation of homo sacer has provided an analytic lens through which the historical treatment of the pirate vis-à-vis international criminal law can be understood. In his work, Agamben places homo sacer in the realm of extra-judicial and depoliticised subjectivity. However, by drawing on Laclau's work, I have argued that pirates are anti-judicial, that is, they are active producers of the mutual ban. Pirates are excluded from the normative structures of the nation-state and have been criminalised because they undermine legal mechanisms, such as (universal) jurisdiction.

The emergence of the universal jurisdiction to criminalise piracy over the high seas cannot be separated from questions of sovereignty and corresponding imperial prerogatives. Pirates were a threat to trade, to the creation of a stable world market and to imperial expansion more generally. As such, sovereigns were prompted to devise methods to eradicate the 'heinous' pirates, by making them the first international criminals through juridification. Throughout this Article, it has been illustrated that imperial calculations, rather than the 'heinousness' of piracy, provided the basis for the criminalisation of piracy.

The criminalisation of piracy based on its alleged 'heinousness' remains resonant today. The idea of a universal jurisdiction, by means of which the most shocking of offences can be prosecuted by any nation, is subjective and, as argued by Kontorovich, faulty. The alleged 'heinousness' of piracy on the basis of which the universal jurisdiction was organised, remains widely accepted and enforced, and as such has admonitory implications for international tribunals using universal jurisdiction, including the International Criminal Court.

⁵² Do (n 35) 87.

A conversation between a king and a pirate illustrates the particular position of pirates vis-à-vis sovereigns that criminalised them:

King: 'What is your idea, in infesting the sea?'

Pirate: 'The same as yours, in infesting the earth! But because I do it with a tiny craft, I'm called a pirate; because you have a mighty navy, you're called an emperor'.⁵³

⁵³ John Mark Mattox, *St. Augustine and the Theory of Just War* (A&C Black 2009) 25.

BIBLIOGRAPHY**BOOKS**

- Agamben G, *Homo Sacer Sovereign Power and Bare Life* (Stanford University Press 1998)
- Brittin BH, 'The Law of Piracy: Does it Meet the Present and Potential Challenges?' in Eric Ellen (ed), *Piracy at Sea* (ICC Publishing SA 1989)
- Deleuze G and Guattari F, *A Thousand Plateaus: Capitalism and Schizophrenia* (Brian Massumi tr, University of Minnesota Press 1987)
- Exquemelin A, *The Buccaneers of America* (Penguin Books 1969)
- Foucault M, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (Palgrave Macmillan 2008)
- Genet J, *The Thief's Journal* (Faber & Faber 1949)
- Heller K and Simpson G (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013)
- Laclau E, 'Bare Life or Social Indeterminacy?' in Calarco M and DeCaroli S (eds), *Giorgio Agamben: Sovereignty and Life* (Stanford University Press 2007)
- Mattox JM, *St. Augustine and the Theory of Just War* (A&C Black 2009)
- Powers T, *On Stranger Tides* (Corvus 2011)
- Rediker M, *Villains of All Nations: Atlantic Pirates in the Golden Age* (Beacon Press 2011)
- Rubin AP, *The Law of Piracy* (2nd edn, Transnational Publishers 1998)
- Schmitt C, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, MIT Press 1985)
- Senior CM, *A Nation of Pirates: English Piracy in its Heyday* (Crane, Russak & Co 1976)
- Simpson G, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Polity Press 2007)

JOURNAL ARTICLES

- Boot M, 'Pirates, Then and Now: How Piracy Was Defined in the Past and Can Be Again' (2009) 88(4) *Foreign Affairs* 94
- Burgess Jr DR, 'Hostis Humani Generi: Piracy, Terrorism and a New International Law' (2006) 13(2) *University of Miami International and Comparative Law Review* 293
- Gould EH, 'Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772' (2003) 60(3) *The William and Mary Quarterly* 471
- Kontorovich E, 'The Pirate Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45(1) *Harvard International Law Journal* 183
- Pennell CR, 'Who Needs Pirate Heroes?' (1998) 8(2) *The Northern Mariner/Le Marin du Nord* 61
- Policante A, 'The New Pirate Wars: The World Market as Imperial Formation' (2013) 3(1) *Global Discourse* 52
- — 'The Return of the Pirate: Post-Colonial Trajectories in the History of International Law' (2014) 5 *Política Común*
<<http://quod.lib.umich.edu/p/pc/12322227.0005.005?view=text;rgn=main>> accessed 10 April 2015
- Randall KC, 'Universal Jurisdiction under International Law' (1988) 66 *Texas Law Review* 785

STATUTES

Piracy Act 1721, 8 Geo 1 c 24 (Australia)

Piracy Act 1721, 8 Geo 1 c 24 (UK)

INTERNATIONAL LAW SOURCES AND TREATIES

Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11

Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3

WEBSITES AND OTHER SOURCES

Dagne T, 'Somalia: Current Conditions and Prospects for a Lasting Peace' (*Congressional Research Service*, 2011)

<<https://www.fas.org/sgp/crs/row/RL33911.pdf>> accessed 11 April 2015

Do Q and others, 'The Pirates of Somalia: Ending the Threat, Rebuilding a Nation' (*The World Bank*, 2013)

<<http://documents.worldbank.org/curated/en/2013/01/17672066/pirates-somalia-ending-threat-rebuilding-nation>> accessed 6 April 2015

Princeton Project on Universal Jurisdiction, 'The Princeton Principles on Universal Jurisdiction' (*Princeton University Press*, 2001)

<https://lapa.princeton.edu/hosteddocs/unive_jur.pdf> accessed 1 April 2015

Rothwell DR, 'Maritime Piracy and International Law' (*Crimes of War*)

<<http://www.crimesofwar.org/commentary/maritime-piracy-and-international-law>> accessed 28 March 2015

'Somalia Toxic Waste Dumping' (*Environmental Justice Atlas*, 2014)

<www.ejatlas.org/conflict/somalia-toxic-waste-dumping-somalia> accessed 11 April 2015

United Nations Statistics Division, 'Country Profile: Somalia' (*UNdata*, 2012)

<<http://data.un.org/CountryProfile.aspx?crName=somalia>> accessed 10 April 2015

International Oil Companies and Petroleum Legal Policy in Iran: Evolution in the Shadow of Resource Nationalism, 1951-1980

Charlotte Joy Trudgill*

This Article applies legal thought to a critical theory on resource nationalism. The discussion is guided by the question: How did resource nationalism (1951-1980) shape the legal landscape of oil production in Iran? Adopting a historical approach, I explore how resource nationalism shaped the legal policy for oil production, following a series of political and economic changes from 1951 to 1980. The main argument is that the political and economic changes that ensued from resource nationalism affected the legal power of international oil companies and the Iranian state, by shaping the legal framework that governed oil production and ownership. During resource nationalism, legislation is introduced to restrict foreign participation, and when nationalisation recedes, different contractual regimes are used to re-facilitate foreign interest. The discussion is organised under two headings, 'The International Consortium' and 'Resource Nationalism'. An understanding of how the International Consortium achieved its dominance is firstly established. This is followed by an exploration into how resource nationalism influenced the legal structure of the oil industry. Key legal changes fell under three phases of the Iranian framework for petroleum: (1) the traditional concessions phase, (2) the hybrid phase and (3) the general legislative framework. Throughout these phases I examine how the rearrangement of power was achieved through contracts and legislation. Finally, I apply the critical theory of resource nationalism as a cyclical phenomenon, to explain the fluctuating nature of state intervention and legal changes in this context.

* Charlotte Joy Trudgill is a second year undergraduate in Law and Development Studies at SOAS, University of London. She wishes to thank Ria Parmar and acknowledge Giulia Jacovella for her guidance.

I. INTRODUCTION

Resource nationalism created a structural change in power and ownership of the oil industry. This Article explores how it has shaped the legal landscape of oil production, analysing the phenomenon through the evolution of contractual regimes and legislation. As suggested in the title, the core discussion will focus on Iranian oil production. This is because Iran is an example of a country that has experienced almost all forms of prototypical contractual regimes in the history of oil trade,¹ from traditional concessions to buy-back agreements. Additionally, the advent of resource nationalism in 1951 was the first government intervention of its kind in the Middle East, and despite its initial failure, it sowed the seed for similar political developments throughout the region. Resource nationalism itself is a phenomenon worth examining, not only because it created an irreversible shift in patterns of investment and the operation of the oil industry, but also because it affects the ability of a country or region to mobilise its resources for development (in this sense, growth, employment and poverty alleviation).²

An important consideration is the definition of resource nationalism. There is no single meaning, let alone legal typology of resource nationalism. Thus, it is useful to consider a number of interpretations of the term. The International Energy Forum describes it as 'nations wanting to make the most of their endowment',³ by which producer countries create conditions 'to maximize revenue from present oil and gas production while altering the terms of investment for future output'.⁴ Another is the 'increasing use of control of natural resources to advance policy goals – both economic and foreign policy'.⁵ Paul Stevens⁶ simply defines it as 'limiting the operations of private

¹ Nima Nasrollahi Shahri, 'The Petroleum Legal Framework of Iran: History, Trends and the Way Forward' (2010) 8(1) *China and Eurasia Forum Quarterly* 111, 112.

² Paul Stevens, 'National Oil Companies and International Oil Companies in the Middle East: Under the Shadow of Government and the Resource Nationalism Cycle' (2008) 1(1) *Journal of World Energy Law & Business* 5.

³ The International Energy Forum, 'Global Dialogue to Meet the Global Energy Challenge' (*IEF*, 2007) <<https://www.ief.org/events/global-dialogue-to-meet-the-global-energy-challenge>> accessed 5 August 2015.

⁴ Stevens, 'National Oil Companies and International Oil Companies in the Middle East' (n 2) 5.

⁵ Joseph Stanislaw, 'Power Play: Resource Nationalism, the Global Scramble for Energy, and the Need for Mutual Interdependence' (Deloitte 2008).

⁶ Paul Stevens was educated as an economist and specialist in Middle East Studies at the University of Cambridge and SOAS, University of London. Stevens is a distinguished expert in the field of oil and energy research. A number of his works expound on the political economy of the Middle East that pertain to nationalisation in the region. See Paul Stevens, 'Saudi Aramco: The Jewel in the Crown' in David G Victor, David R Hults and Mark C Thurber (eds), *Oil and Governance: State-Owned Enterprises and the World Energy Supply* (CUP 2012).

international oil companies (IOCs) and asserting a greater national control over natural resource development'.⁷ For the purpose of this Article, Stevens' definition will be construed in line with resource protectionism. This expands the meaning, by revealing a core motive behind resource nationalism in Iran, which is protection against 'Western dominance in the energy sector through their IOCs'.⁸ Thus resource nationalism is understood as limiting operations of international oil companies (IOCs) and asserting sovereign control over natural resource development, shielding the national oil industry from foreign influence. Lastly, Stevens' theory of resource nationalism as a *cyclical phenomenon* will be interpreted in the core discussion, to offer a critical narrative on the changing legal landscape of Iran's oil industry.

II. EVOLVING LEGAL LANDSCAPE

2.1 The International Consortium

The hypothesis of this Section is that the oligopolistic structure of the international oil industry from 1945 to the 1960s was a catalyst for resource nationalism, structural change in ownership, and the rise of power over production. As a result, the industry saw an evolution in agreements and legal conditions that reflected the political and economic climate of the time. This will be analysed in terms of how the legal landscape of oil production evolved during the period of nationalisation in Iran. Adaptation of rules were implemented by governments during resource nationalism, and by IOCs in response to it; but in order to understand how the landscape of ownership and production changed, it is necessary to look at the state from which it evolved. Prior to the shift, the world's oil supply was in the hands of seven major corporations, otherwise informally known as the Seven Sisters. These seven companies were the major powers of the Oil World: Shell, British Petroleum (the Anglo-Persian Oil Company), Esso (Exxon), Gulf, Texaco, Mobil and Chevron (Socal). During the time when they ruled as *de facto* supranational governments, their fleets of oil tankers were comparable to navies; controlling whole cities in the desert, and their citizens, Western consumers.⁹ Their map was defined by oil fields; and in the Middle East, regions were divided along the gulf coast marked with the consortia of oil companies: Saudi Arabia was ARAMCO's turf, Kuwait was Gulf's and BP's, and all seven operated as the

⁷ Stevens, 'National Oil Companies and International Oil Companies in the Middle East' (n 2) 5.

⁸ AFM Maniruzzaman, 'The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (2009) 5 Texas Journal of Oil, Gas, and Energy Law 80, 81.

⁹ Anthony Sampson, *Seven Sisters: The Great Oil Companies & the World they Shaped* (Bantam Books 1974).

Consortium for Iran. By the 1960s, these companies controlled 85% of the world's oil reserves. In essence, it was the reincarnation of Rockefeller's Standard Oil monopoly in the United States, as a global cartel.¹⁰

The International Petroleum Cartel commanded the Oil World, operating as an oligopolistic closed system. How it achieved its dominance can be categorised as two key systems: (1) through a system of petroleum concessions, and (2) a system of inter-company arrangements.¹¹ Petroleum concessions were the key legal tool that granted exploration and production rights to IOCs, who held major concessions in the Middle East, where they had almost full autonomy over oil resources. An example is the D'Arcy Concession, issued to William D'Arcy, a founder of the Anglo-Persian Oil Company – later known as the Anglo-Iranian Oil Company (now BP). It was the first ever concession for oil in the Middle East that covered almost all regions of Iran, granting rights for a 60-year term.¹² For governments and rulers of emerging Arab oil states, the IOCs were a beacon for technology, expertise and market knowledge; in this sense the IOCs were able to decide where to allocate economic growth.¹³ This was a subcontract of their national sovereignty:¹⁴ meaning that the host country could not interfere in production activities (eg, *inter alia*, exploration plans, development of oil fields) because traditional concessions gave exclusive rights to the holder (the oil company) in all upstream phases and made IOCs the sole arbiter of these activities.¹⁵ Meanwhile, a purely fiscal relationship between the state and foreign company was maintained, as the state's role was limited to collecting taxes and royalties.¹⁶ This was advantageous for IOCs because it provided them with unregulated decision-making powers in relation to the region, without imposing any liability on them to fulfil requirements of economic development, transfers, or social responsibility in the host state.¹⁷ In other words, IOCs were operating the production and nature of investment based on the needs of the West – in particular, the West's economic growth. IOCs could thus maximise profits without engaging in the national economy of the host state.

¹⁰ 'The Secret of the Seven Sisters' (*Aljazeera*, 26 April 2013)

<<http://www.aljazeera.com/programmes/specialseries/2013/04/201344105231487582.html>>
accessed 20 February 2015.

¹¹ FJ Al-Chalabi, *OPEC and the International Oil Industry* (Springer 1981) 8.

¹² Shahri (n 1) 113; The Concession covered 'almost all territories of Iran, except for the five Northern provinces which were the traditional preserve of Russia'.

¹³ *ibid.*

¹⁴ Sampson (n 9) 24.

¹⁵ Al-Chalabi (n 11) 9.

¹⁶ *ibid.*

¹⁷ *ibid.* 7.

The benefits are obvious for the IOCs, but for the host country it was less clear. The exclusivity and lack of liability in the traditional concession system is comparable to occupation and plunder of the colonial era. A critical observation of the system is the existentially exploitative relationship between the concessionaire and the state. In the Middle East, the Concession system was a remnant of the old colonial rule that initially secured the foothold for European oil companies, through the 1916 Sykes-Picot Treaty,¹⁸ and the 1920 San Remo Agreement.¹⁹ The former was an agreement to partition the Ottoman Empire's provinces in the Middle East between France and Britain, and the latter a realisation of the imperial role in the region. This carve-up continued as the US increased its presence, and alleged that the 'door' to the Middle East be open to all victors of the First World War.²⁰ This presence was driven by energy security objectives as the War demonstrated the importance of and dependence on energy. As Lord Curzon depicted, [Nation States] ... floated to victory on a wave of oil'.²¹ In this sense, the Seven Sisters were positioned to pursue the energy goals of Western governments, acting as a buffer between them and the governments in the Middle East. Sampson described this as 'oleaginous diplomacy'.²² Evidently, the concession system facilitated interests of the West and its dominance in the region, and can arguably be observed as a form of absentee colonialism.

For the purposes of this Article, absentee colonialism describes the nature of activities that are analogous to the colonial era but operated in the absence of direct intervention by Western governments. As mentioned, the buffer position of oil companies played a part in influencing the foreign policy and energy security objectives of the West, save that direct force was replaced by private commercial forces. Zygmunt Bauman, an influential sociologist, regarded such activities of contemporary capitalism as being shaped after the 'pattern of the old-style 'absentee landlords''.²³ This influence is demonstrated by the sheer fact that the British government acquired half of the shares of BP's predecessor by 1914. This was part of Churchill's plan to secure energy resources for Britain

¹⁸ The Sykes-Picot Agreement between Britain and France (19 May 1916).

¹⁹ The Treaty of Sèvres between Britain, France, Italy and Japan. The Treaty of peace between the Allied and Associated Powers and Turkey (10 August 1920).

²⁰ Al-Chalabi (n 11) 8.

²¹ Sampson (n 9) 77.

²² Sampson (n 9). Sampson gives a detailed account of the idiosyncrasies of the oil industry vis-à-vis 'oleaginous diplomacy' or oil diplomacy and the role of American foreign policy. Although this is a key contentious area of the industry, and political and economic discourse, it is not the focus of this discussion.

²³ Zygmunt Bauman, *Liquid Modernity* (Polity Press 2000) 13.

along the Gulf Coast.²⁴ In the age of corporate capitalism: the Seven Sisters were the contemporary ‘forerunners of the modern multinational corporation’;²⁵ and unlike colonial conquests, corporate capitalism did not require war to plunder precious resources, but rather achieved the same through negotiated contracts. The full autonomy to exploit oil resources and maximise profits, enabled by traditional concessions, can also be argued as a feature of absentee colonialism. This is a parallel that can be drawn with the unscrupulous expansion of the colonial empire. The force of capitalist firms was described by Smith and Marx as driven without bounds and mercy to discover and open up new markets. However, oil exploration and production are very capital- and technology-intensive,²⁶ which Iran and similarly oil-rich, yet less economically developed countries (LEDCs) were not initially equipped to undertake. Thus, it should be remembered that IOCs introduced knowledge and production inputs to develop the oil industry – a notion very much similar to the ‘development’ or ‘modernisation’ mandate of colonialism.

Another aspect that reinforced the oligopolistic structure of the oil market was the system of intercompany arrangements. There were three notable features of this system: the Redline Agreement, the Gulf-Plus pricing method, and vertical integration. Following a major oil field discovery in Iraq, the 1928 Redline Agreement divided the development of oil reserves, allocating monopolies. The terms provided each producer with a 23.75% cent share of all oil produced by the Turkish Petroleum Company – this covered all regions between the Suez Canal and Iran.²⁷ The signing of this agreement was very significant in solidifying the Consortium’s dominance, notably due to its ‘self-denying clause’. This clause prohibited any members from undertaking independent oil production. It ‘stipulat[ed] that they “would not be interested, directly or indirectly, in the production or manufacture of crude oil in the Ottoman Empire ... otherwise than through the Turkish Petroleum Co”’.²⁸ Another arrangement was the ‘Gulf-Plus System’. This was similar to a currency peg. The cartel fixed its oil prices to the American oil price in the Gulf of Mexico. This was a system unanimously accepted amongst the major oil companies and protected American oil. It also ensured greater profits for other members. For example, ‘if BP supplied cheap oil from Iran to Italy, the oil would be charged as if it had come from the Gulf of Mexico to Italy’,²⁹ and the profits of this phantom pricing

²⁴ CA Heller, ‘The Birth and Growth of the Public Sector and State Enterprises in the Petroleum Industry’ (Speech at UN Symposium, Vienna, March 1978) 10.

²⁵ Sampson (n 9) 76.

²⁶ Al-Chalabi (n 11) 4.

²⁷ JM Blair, *The Control of Oil* (Pantheon Books 1976) 33.

²⁸ *ibid* 31.

²⁹ Sampson (n 9) 91.

would be split between the companies. Finally, the integrated nature of the commodity chain was advantageous because it allowed the major oil companies to jointly own or enter collectively in all phases of production.³⁰ Through this, an 'Integrated Oil Company' was created, controlling the upstream phases (exploration, production, transport) and downstream phases (distribution, marketing) of oil production.³¹ Spreading the risks and profits throughout the commodity chain, the Consortium created a degree of market stability:³² if the marketer is also the producer, possession of a large distribution base in the marketing phase would ensure a degree of regular demand, and as a result enable more consistent production in the upstream phases. Various intercompany arrangements diversified the various processes part and parcel of the oil commodity chain for IOCs, creating stability in a typically volatile market.

For capitalists and 'cartelists', the International Consortium is considered an inevitable historical development in the oil industry.³³ It is arguably a 'natural monopoly' that cannot be sustained in a free market according to the rules of supply and demand, and subject to the inevitable control of a single entity – be it the Standard Oil monopoly, the Seven Sisters oligopoly or the OPEC cartel. Oil consultant and economist Paul Frankel postulated that the variations in the market have little effect on demand: as dependence on oil is so high, people are willing to pay higher prices for it.³⁴ There is also limited effect on supply because producers will continue to produce, regardless of the uneconomic costs, in order to keep the refineries operating. Therefore, the price of oil is inelastic as the industry fails to self-adjust.³⁵

Conversely, economist Edith Penrose argued that the oil industry *is* self-adjusting and operates like other free market enterprises in the sense that, 'the greater the output of an oil field, the higher the cost of additional output'.³⁶ The reason for this is that oil is non-replenishing, more difficult, as well as more costly to extract over time, as demonstrated by tar sands extraction and the controversial Arctic oil drilling in Alaska. Yet this does not eliminate the notion

³⁰ David Hawdon, *The Changing Structure of the World Oil Industry* (Routledge Kegan & Paul 1984) 28.

³¹ Sampson (n 9) 76.

³² Paul Frankel, 'The Rationale of National Oil Companies' in United Nations Centre for Natural Resources, Energy and Transport, *State Petroleum Enterprises in Developing Countries* (Pergamon Press 1980) 3.

³³ Sampson (n 9) 47.

³⁴ See Paul Frankel, *Essentials of Petroleum* (Chapman & Hall 1946); Paul Frankel, *Oil: the Facts of Life* (Weidenfeld & Nicolson 1962) and Paul Frankel, *Mattei: Oil and Power Politics* (Faber 1966).

³⁵ Sampson (n 9) 46.

³⁶ Sampson (n 9) 28.

that oil is considered an inevitable monopoly because an oil company requires vast economies of scale in order to be sustainable as production gets more capital- and technology-intensive over time. Additionally, the weak price inelasticity argument is convincing, as market volatility has existed since the beginning of the trade, being that there is always too much or too little oil.³⁷ In this sense, the Seven Sisters viewed the oligopoly as representative of the fact that only big companies with markets and resources were in a sensible position to produce oil.³⁸ Intercompany arrangements were seen as essential in an oil glut where 'there would only be cut-throat competition and sudden floods of cheap oil', thus providing a rationale to restrict supply.³⁹ For the Standard Oil monopoly and Seven Sisters oligopoly, their control brought 'order' to the market.⁴⁰ Notwithstanding this, the independent producers and state enterprise were subject to an unfair system that was controlled and manipulated by the Seven Sisters for their own profit maximisation.

2.2 Resource Nationalism

The closed-system conditions and oligopolistic power over oil resources in the Middle East provided a rationale for nationalisation, a movement that was reactionary to the loss of sovereignty and constraints the Iranian government experienced in relation to its oil industry. In terms of influencing the oil sector, the government was limited to the sphere of regulation: tax, import and export licences, and fiscal regimes were the only policy levers at its disposal.⁴¹ Combined with the exploitative terms of the concessions and financial inequalities, this normative system kept the state powerless to pursue national interests and direct action within the industry. Reluctance of the Anglo-Iranian Oil Company (AIOC) to renegotiate better concession terms, and the subsequent pervasion of American IOCs through the Iranian Consortium, reinforced sentiments to nationalise the oil industry and shift power and control to the state.

Resource nationalism was the erosion of the IOCs' dominance. Characterised as a struggle between foreign influences and national interests,⁴² it was a 'reversal' in oil investment relationships and the replacement of IOCs with governments and state enterprise – in the ownership and management of oil resources.⁴³

³⁷ MW Watkins, *Stabilization or Conservation* (Harper & Brothers 1937).

³⁸ Sampson (n 9) 149.

³⁹ *ibid.*

⁴⁰ Sampson (n 9) 76.

⁴¹ Frankel (n 32) 5.

⁴² Stevens, 'National Oil Companies and International Oil Companies in the Middle East' (n 2).

⁴³ Al-Chalabi (n 11) 16.

Nationalisation of oil in Iran was the first major state intervention in the Middle East petroleum industry. The concept of absolute state control had a ripple effect and led to similar political developments in the region.⁴⁴ Resource nationalism is understood as limiting the operations of IOCs and asserting sovereign control over natural resource development, shielding the national industry from foreign influence. The following discussion begins with a cursory account of Iran's history of petroleum law and its key developments, which are categorised into three phases: the traditional concession phase, the hybrid phase and the general legislative phase. This lays the foundation for examining the influence of resource nationalism in the respective phases and their significant features, including concessions, the role of the state enterprise, the Consortium Agreement, the petroleum laws, and the Iranian Constitution.

Prior to the promulgation of Iran's first petroleum law in 1957,⁴⁵ the industry was characterised as being 'lawless',⁴⁶ because Western IOCs were able to gain massive profits from oil resources, to the detriment of Iran's national revenues.⁴⁷ Nonetheless, contractual regimes existed to regulate the relationship between IOCs and the state. This constituted the rudimentary stages of Iran's petroleum legal landscape, known as the traditional concession phase. Without a consistent legislative framework, this phase consisted of individually negotiated contracts or agreements. Two key agreements were the D'Arcy Concession and the 1933 Concession, both of which concerned the British-owned AIOC.

As aforementioned, the D'Arcy Concession was a major contract for the Anglo-Persian Oil Company (APOC; renamed AIOC in 1935). It granted exclusive rights to Iranian oil resources for 60 years (1901-1961). It was the first and largest concession granted in the Middle East. Agreed at a time when oil resources were not considered particularly valuable in Iran, the concession provided a nominal income for Iranian Shahs (or kings) who were unaware of the deal's inequalities. It has been argued that the D'Arcy Concession 'was awarded by the corrupt and inexperienced'.⁴⁸ Reza Shah challenged the terms of the concession due to his dissatisfaction with the state's entitlement to a

⁴⁴ Saudi Arabia acquired 100% of shares of Aramco by 1980. Iraq nationalised the Turkish Petroleum Company in 1972, and Kuwait nationalised the Kuwait Oil Company (founded by APOC and Gulf Oil) by 1975. See JW Plunkett, *Plunkett's Energy Industry Almanac* (Plunkett 2009).

⁴⁵ Petroleum Act 1957.

⁴⁶ Shahri (n 1) 112.

⁴⁷ *ibid.*

⁴⁸ Fereidun Fesharaki, *Development of the Iranian Oil Industry: International and Domestic Aspects* (Praeger Publishers 1976) 22.

meagre 16% of net profit from the APOC, and the 'precipitous' decline in royalty payments in 1931.⁴⁹ In 1932, the Iranian government abrogated the D'Arcy contract due to financial inequalities and the increasing influence of the British government through the APOC (owing to the latter's 52.5% acquisition of the APOC). As a result, the Iranian government and the APOC (hereafter AIOC) renegotiated terms and signed the 1933 Concession Agreement otherwise known as the Supplement Agreement.⁵⁰

Although the 1933 Agreement provided more government revenue, it failed to ensure the Iranian government any sovereign control. Lacking considerable changes, it was a mere extension of the D'Arcy concession.⁵¹ For example, it maintained a 60-year term, the AIOC held full ownership rights of production and resources, and the government relinquished their right to abrogate the concession.⁵² Nationalistic sentiments heightened during this phase as working conditions at the AIOC oil fields and refineries deteriorated for Iranian workers, disparate to British workers. This disparity fuelled anti-Western views as the inequality of living conditions was compared to 'images of the British as nineteenth-century imperialists' with 'tennis courts, and swimming pools'.⁵³ Thus the concession phase was characterised as exploitative, and although the rights to production and risks were vested in the concessionaire, the AIOC, the government had no control over its activities and posed little liability.⁵⁴

⁴⁹ Shahri (n 1) 114. See Thomas B Phillips, *Queer Sinister Things: The Hidden History of Iran* (Lulu 2013) 57: '[APOC informed the Iranian government] that due to the precipitous decline in revenues as a result of the worldwide economic depression, the company's royalty payments to Persia for Fiscal Year 1931 would not exceed £306,872. This is less than one-sixth the royalty revenues of the previous fiscal period and represents a major threat to further economic development [in Iran]'.

⁵⁰ Homayoun Mafi, 'Iran's Concession Agreements and the Role of the National Iranian Oil Company: Economic Development and Sovereign Immunity' (2008) *Natural Resources Journal* 407.

⁵¹ The core purpose of negotiations was to push for better fiscal terms. See Vanessa Martin (ed), *Anglo-Iranian Relations since 1800* (Routledge 2005) 132: 'Two meetings were held [on] 24 April and 26 April 1933, and the Shah agreed to a new sixty-year concession in return for [the conditions of the 1933 Agreement] 1. a minimum guaranteed payment of £750,000 annually plus a royalty of 4 shillings (gold) per ton of oil produced 2. 4 per cent tax to Iran ... 4. payment of 1 million pounds (by APOC) as settlement of all past claims....'

⁵² Shahri (n 1) 114.

⁵³ Paasha Mahdavi, 'Oil, Monarchy, Revolution and Theocracy: A Study on the National Iranian Oil Company (NIOC)' in David G Victor, David R Hulst and Mark C Thurber (eds) *Oil and Governance: State-Owned Enterprises and the World Energy Supply* (CUP 2012) 240.

⁵⁴ An example of a liability in a concession agreement is a relinquishment clause, which forces a foreign company to return developed land to the host government after a certain period. This was not incorporated into Iran's early concession agreements.

As the sole legal framework for oil production, concessions governed the relationship between the IOC and the state. The nature of this relationship and its legal character has been controversial in international law,⁵⁵ especially in the context of resource nationalism. This has given rise to the question of whether a concession falls under public or private law. There are two prominent views: first, that concessions are private in nature, and must fall under the municipal law of the state party. This is because a concessionaire's rights are analogous to those rights given under private law – for instance, the concessionaire may not require specific performance, but rather seek to recover investment.⁵⁶ In *Anglo-Iranian Co v Idemitsu Kosan Co*,⁵⁷ the Tokyo High Court held that the Anglo-Iranian concession was a contract of private law between the Iranian government and the IOC. It distinguished the concession rights not as a right to a 'concession area' but, '...only a right to *extract* petroleum in Southern Iran, refine and sell oil', and that such rights were based in Iran and thus fell under municipal law.⁵⁸ Another argument for such concessionary rights being characteristically private was highlighted by the International Court of Justice (ICJ) in the 1952 *Anglo-Iranian Oil Co Case*.⁵⁹ This was a dispute brought by the UK against the Iran government's nationalisation of the AIOC's assets under the 1933 Agreement. The ICJ held that it did not have jurisdiction over the case, because the concession agreement was not a treaty or convention between the two countries, and the UK was not a party to it.⁶⁰ This highlights the fact under public international law; concessions cannot amount to treaties, and corporations (AIOC) do not have legal personality.

However, concessions may also be regarded as a matter of public law, because the state is a party to the contract. Arguably, an oil concession is an 'economic development agreement' concerning a resource that is vital to a country's interest. Thus the state's abrogation of concessionary rights in the public interest⁶¹ can be justified if the 'moral and economic welfare of its citizens' is concerned.⁶² However, it seems that oil concessions are neither exclusively public nor private in character, as held in *Sapphire International Petroleum Ltd v*

⁵⁵ Mafi (n 50) 412.

⁵⁶ DP O'Connell, 'A Critique of the Iranian Oil Litigation' (1955) 4(2) *International and Comparative Law Quarterly* 267, 270.

⁵⁷ *Anglo-Iranian Co Ltd v Idemitsu Kosan Co* (YO) 2, 942 of 1953. See O'Connell (n 56) 280–83.

⁵⁸ O'Connell (n 56) 281 (emphasis added).

⁵⁹ *Anglo-Iranian Oil Co Case (UK v Iran)* [1952] ICJ Rep 93.

⁶⁰ *ibid.*

⁶¹ Mafi (n 50) 412.

⁶² O'Connell (n 56) 270.

National Iranian Oil Company,⁶³ that a concession 'gives the contract a particular character, which is partly public and private law'.⁶⁴ These two views represent the complexity of applicable substantive law vis-à-vis concessions, particularly whether to turn to public or private law in disputes. Arguably, this uncertainty reveals the inflexible nature of the concession phase to provide a system of compromise between the interests of private foreign companies and the state. It lacked a level of stability to protect foreign interests, such as in *UK v Iran*,⁶⁵ and lacked legislation or guidelines, which created inconsistency in the terms agreed by the Iranian government. Thus concessions could not provide stability in contracts, nor be evolutive between the principles of *pacta sunt servanda* (sanctity of contracts) and the *clausula rebus sic stantibus* (unenforceability of an agreement due to fundamentally changed circumstances) in private and public law.⁶⁶ It seems that resource nationalism gave rise to this problem in the framework for oil production rights in Iran, which altered the relationship between IOCs and the state in the hybrid phase.

Prior to the hybrid phase was the nationalisation of Iran's oil industry, resource nationalism created a pivotal change in the legal landscape of oil production. After the Second World War, nationalistic sentiments heightened with growing influence on Iranian politics. In 1949, the Iranian government attempted to renegotiate the 1933 concession terms, demanding a 50-50 profit sharing agreement with the AIOC. The British were reluctant to compromise, and, failing to acknowledge these demands, also failed to prevent encouraging nationalist aspirations in other regions of British interest.⁶⁷ The AIOC was even criticised as 'an anachronism',⁶⁸ as the the 50-50 deal had already existed between Saudi Arabia and Aramco (Arabian American Oil Company).⁶⁹

⁶³ *Sapphire International Petroleum Ltd v National Iranian Oil Company* (1963) 35 ILR 136. A dispute arising from a joint agreement between the two parties. The dispute was brought to the Swiss Federal Court by Sapphire International (a private Canadian company). It concerned the legal principles governing choice of law. See also Rouhollah K Ramazani, 'Choice-of-Law Problems and International Oil Contracts: A Case Study' (1962) 11(2) *International and Comparative Law Quarterly* 503.

⁶⁴ *Academie de Droit International de la Haye, Recueil des Cours: Volume 113 (1964/Iii) (Collected Courses of the Hague Academy of International Law - Recueil des Cours)* (Springer 1968) 203.

⁶⁵ *Anglo-Iranian Oil Co Case* (n 59).

⁶⁶ Mafi (n 50) 430. '*Clausula rebus sic stantibus*' is a clause in international agreements and treaties, and in private international law that provides for the unenforceability or inapplicability of a treaty due to significant change in circumstances.

⁶⁷ Edward Henniker-Major, 'Nationalisation: The Anglo-Iranian Oil Company, 1951: Britain vs. Iran' (2013) 2(2) *Moral Cents* 16.

⁶⁸ WMR Louis, *The British Empire in the Middle East 1945-1951: Arab Nationalism, the United States, and Postwar Imperialism* (OUP 1984) 648.

⁶⁹ Svante Karlsson, *Oil and the World Order: American Foreign Policy* (Berg Publishers 1986) 123.

Mohammad Mossadeq, leader of the National Front of Iran, proposed the nationalisation of the AIOC's concessions and assets, which was supported by the Iranian Parliament's Oil Commission.⁷⁰

In 1951 both Iranian Parliaments⁷¹ promulgated the Oil Nationalization Act of 1951,⁷² which nationalised the entire oil industry, 'exploration, development and exploitation were to be carried and controlled by the Iranian government'.⁷³ The Act authorised the National Iranian Oil Company (NIOC) to manage and operate the AIOC's assets and facilities as Iran's state enterprise. For the Iranians, resource protectionism was a reaction against the British mercenaries and pervasive control over their oil wealth. The British found this as an 'affront to the rights of private property' and *pacta sunt servanda* (sanctity of contracts) and took nationalisation to the ICJ in *UK v Iran*.⁷⁴ However, the project of nationalisation came to a premature end in 1953, when the Mossadeq regime was overthrown by a US-British backed military coup. Through this Western companies had resumed activity in the Iranian oil sector and in 1954 the Majlis (Parliament) validated the establishment of the Consortium, to encourage participation of non-British IOCs. Resource nationalism was a phenomenon that shook Iran's oil industry: it went from a state of absolute government control and *closure* to foreign interests, to establishment of a new consortium and *re-opening* foreign access. In these phases, the legal landscape of petroleum production first saw 'lawless' concession agreements, and then a stringent Nationalization Act 1951, resulting in the coup-d'état government validating the 1954 Consortium Agreement. This therefore supports the notion that resource nationalism has shaped petroleum law in Iran, in that legal changes have reflected the political and economic climate of the period.

The political economy of resource nationalism in Iran was complex and multifaceted. Nonetheless, three key driving forces can be identified: inequalities in concession terms, the ideology of state intervention, and rising oil demand.⁷⁵ Inequalities in the concession system were a key motivation for the state, especially financial inequalities (see Figure 1), combined with exogenous factors such as rampant poverty, recession, high inflation and huge

⁷⁰ *ibid.*

⁷¹ Prior to the 1979 Iranian revolution, two parliaments co-existed: the National Parliament and the Senate. Concessions and agreement had to be validated by both parliaments to come into effect.

⁷² Nationalization Act 1951 (Iranian Parliament).

⁷³ Shahri (n 1) 116.

⁷⁴ *Anglo-Iranian Oil Co Case* (n 59).

⁷⁵ Stevens, 'National Oil Companies and International Oil Companies in the Middle East' (n 2) 10.

capital flowing out of Iran.⁷⁶ The second was an ideological force: in the postwar period, there existed the popular view that the state should have an increasing role in the economy.⁷⁷ It was generally accepted that 'market failure', imperfect competition (owing to there being a natural monopoly of the oil market) and asymmetrical information were problems that plagued the oil market.⁷⁸ Solutions to this market failure were considered to be found in state intervention, from fiscal regulation, taxes on profits and 'ultimately government ownership'.⁷⁹ From the international sphere, this view was influenced by United Nations resolutions on the notion of 'permanent sovereignty' over natural resources. Resolution 2158 of 1966, was very explicit about this concept:⁸⁰ it advised host countries to be in a position to 'undertake themselves the exploitation and marketing of their natural resources so that they may exercise their freedom of choice ... related to the utilization of natural resources under ... favourable conditions'.⁸¹ Popular anti-Western sentiments also grew against the managerial freedom granted by concessions that allowed the AIOC to operate as a 'state within a state'.⁸² In this sense, the company was the largest industrial employer, the key source of government revenue,⁸³ and a symbol of globalisation and westernisation. The last factor was increasing oil demand, due to the rapid growth of the US, Western Europe and Japan or the 'OECD Economic Miracle' – unprecedented growth was met with very high oil demand. For instance, from 1958 to 1972, global oil demand grew from 16.5 million barrels per day to 46.3 million, along with an average annual growth rate of 8.1% from 1965 to 1970.⁸⁴ The latter forces contribute to changing the state's position in bargaining power over time, theorised as the 'obsolescing bargain',⁸⁵ meaning that the dominance of the IOC diminishes once oil is discovered.⁸⁶ This is a switch of relative bargaining power to the state that uses its position to increase its fiscal take by changing the terms of agreement. These

⁷⁶ Karlsson (n 69) 121.

⁷⁷ Stevens, 'National Oil Companies and International Oil Companies in the Middle East' (n 2) 6.

⁷⁸ *ibid.*

⁷⁹ *ibid.* 7.

⁸⁰ UNGA Res 2158 (XXI) (25 November 1966) UN Doc A/RES/2158.

⁸¹ *ibid.*

⁸² Stevens, 'National Oil Companies and International Oil Companies in the Middle East' (n 2) 10.

⁸³ Phillips (n 49) 57, 157.

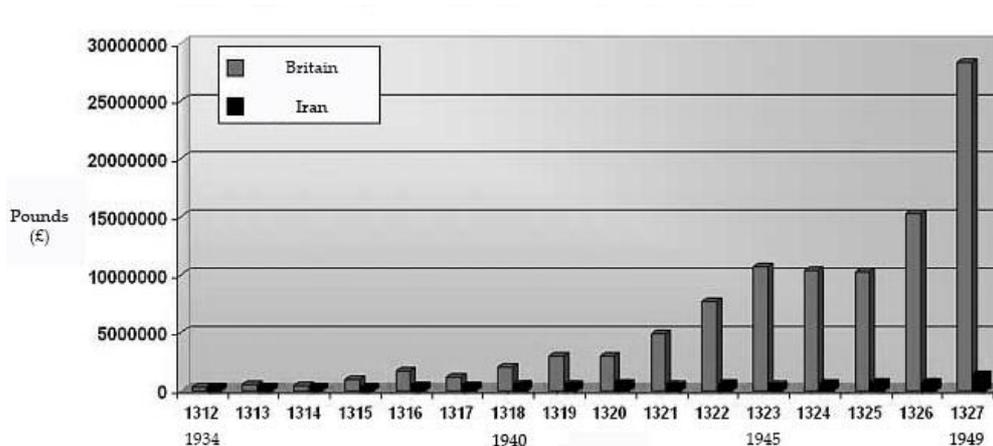
⁸⁴ Stevens, 'National Oil Companies and International Oil Companies in the Middle East' (n 2) 11.

⁸⁵ Raymond Vernon, 'The Obsolescing Bargain: A Key Factor in Political Risk' in Mark B Winchester (ed), *The International Essays for Business Decision Makers vol 5* (Center for International Business 1980) 281–286.

⁸⁶ AD Nwokolo, 'Oil and Gas Law: Is there a Legal and Functional Value for the Stabilisation Clause in International Petroleum Agreements?' (2009) 8 CAR (CEPMLP Annual Review) <<http://www.dundee.ac.uk/cepmlp/gateway/?news=28033>> accessed 4 April 2015.

changes are motivated by the rise in oil prices, increasing demand, and political pressure from anti-foreign sentiment and independence.⁸⁷

Figure 1: Comparison of Shared Petroleum Taxation Revenues of the British and Iranian Governments⁸⁸



Following the short-lived period of resource nationalism (1951-1953), the industry's structure proceeded into the hybrid phase. This phase describes two separate regimes that coexisted under the umbrella of Iran's petroleum legal framework: the 1954 Oil Consortium Agreement,⁸⁹ and the Iranian Parliament's petroleum legislation (1957 Law).⁹⁰ The 1954 Consortium Agreement established the oil Consortium,⁹¹ which included the Seven Sisters, as well as CFP⁹² and Iricon.⁹³ The Consortium was a new coalition in Iran: BP held 40% of its shares, Shell 14%, and the US companies took 39%. Although the NIOC retained full ownership of oilfields and refineries, the Consortium operated concessions and purchased all the oil back from the NIOC (distributed relative to the companies' shares in the Consortium).⁹⁴

The Consortium Agreement was a guise for a modern concession agreement that reinstalled the power of IOCs. Containing 51 Articles, the Agreement was complex because the parties sought to reconcile the terms with the 1951 Iranian

⁸⁷ *ibid.*

⁸⁸ Shahri (n 1) 115. Graph from Shahri has been reconstructed.

⁸⁹ The Iran-Consortium Agreement 1954.

⁹⁰ Petroleum Act 1957 (n 45).

⁹¹ *ibid.*

⁹² Compagnie Française des Pétroles (renamed Total in 1991) was a major French-owned oil company.

⁹³ Iricon was divided into 12 shares distributed amongst a group of independent oil companies.

⁹⁴ Karlsson (n 69) 134.

Nationalization Act.⁹⁵ However, the Agreement merely seemed to mask old, concession-like terms. This was apparent in the change in language used. For instance, instead of the word 'royalty' (seen in traditional concession agreements), the term 'state payment' was used to avoid the historical connotations.⁹⁶ The Agreement denied Iran a share in the Consortium⁹⁷ and notably, stipulated that the Consortium were exempt from taxes and tariffs.⁹⁸ With respect to a concession-like formulation, the Agreement was a guise that made the Iranian government appear as the owner, but in fact had no rights as its ownership ended at the oil wellhead.⁹⁹ However, there was a modification in the Agreement term to 25 years,¹⁰⁰ and there was a relinquishment clause to hand over land after 10 years.¹⁰¹ Still, there was a covert relationship between the companies in the Consortium, who signed the 'participants' agreement'. This created a regime that restricted production in Iran to avoid an oil glut, and agreed on terms to purchase oil.¹⁰² It held production levels at the lowest levels of demand of the companies; for example, Exxon and Texaco demanded the least oil because of their existing production in Saudi Arabia.¹⁰³ Unknown to the public and the Iranian government, this agreement meant that the future of Iran's income was dependent on a 'private rationing system' controlled by the major oil companies.¹⁰⁴ Previously, resource nationalism attempted to shield foreign influence from the industry. Instead, it resulted in the re-establishment of foreign control that returned to the tendencies of the concession system.

The second regime acting parallel to the 1954 Consortium Agreement was the Iranian Parliament's legislation. The 1957 Petroleum Law¹⁰⁵ was unprecedented in Iran. It encouraged foreign interest by prescribing joint ventures with government participation. It allowed alternative contractual frameworks that facilitated joint ventures, such as Joint Operations Agreements (JOAs) and Production Sharing Agreements (PSAs). PSAs facilitated foreign investment, and oil companies earned returns through a share of oil.¹⁰⁶ A condition under Article 6 required that the NIOC must have at least a 30% share in foreign

⁹⁵ Nationalization Act 1951 (n 72).

⁹⁶ Shahri (n 1) 116.

⁹⁷ *ibid.*

⁹⁸ Consortium Agreement (n 89), art 28.

⁹⁹ Shahri (n 1) 116.

¹⁰⁰ Consortium Agreement (n 89) art 7, para 4.

¹⁰¹ *ibid* art 7, para 3.

¹⁰² Sampson (n 9) 146.

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ Petroleum Act 1957 (n 45); Shahri (n 1) 117.

¹⁰⁶ Mahdavi (n 53) 242.

ventures.¹⁰⁷ Different to the 1954 Consortium Agreement, foreign oil companies taking part in contracts under the 1957 Petroleum Law were liable for all applicable taxes.¹⁰⁸ On that note, this legislation failed to address or regulate the territories granted to the Consortium. The Consortium was exempt from the law and operated separately under the 1954 Consortium Agreement.¹⁰⁹ The 1957 Petroleum Law provided the legal backdrop for other IOCs to attract foreign investment and modern technology.¹¹⁰ As prescribed by the legislative framework, foreign oil companies could engage in Iran's oil sector in the form of partnerships with the state, and the Seven Sisters gained access with the Consortium Agreement. Coexistence of these regimes reflected the political climate of converging interests – that is to say, the major oil companies' rearrangement to secure energy resources for the West was met with Iran's motive to retain a form of sovereignty in the industry. Thus reopening access for foreign participation through these regimes was aimed at encouraging foreign investment while ensuring a degree of Iran's control and ownership through the NIOC.

The promulgation of the 1974 Petroleum Act¹¹¹ and Risk Service Contracts ended the hybrid framework, and commenced resource nationalism for the second time in Iran's oil industry. The 1974 Act reinforced resource nationalism, providing that oil companies could no longer engage in Iranian oil production through partnerships and could only participate as contractors. It prohibited foreign investment in production and downstream operations, and replaced PSAs with a new contractual regime – the service contract system.¹¹² As stated in Article 3,¹¹³ service contracts were the only arrangements permitted to facilitate foreign interest; companies were no longer entitled to oil as opposed to under concessions and PSAs, and could only receive remuneration for its services.¹¹⁴ In contrast, the first phase of nationalisation still allowed foreign companies to participate in the sector and still contracted through the NIOC, but provided 'equity-like' incentives for companies to explore oil.¹¹⁵ Iran demonstrated its limited interest in attracting foreign direct investment through adoption of service contracts, which completely vested the risk in its foreign contractors. Despite the incorporation of stabilisation clauses and arbitration

¹⁰⁷ Petroleum Act 1957 (n 45), art 6.

¹⁰⁸ Shahri (n 1) 117.

¹⁰⁹ Nationalization Act 1951 (n 72) art 1.

¹¹⁰ *ibid.*

¹¹¹ Petroleum Act 1974.

¹¹² Mahdavi (n 53) 242.

¹¹³ Petroleum Act 1974 (n 111), art 3(1).

¹¹⁴ Shahri (n 1) 118.

¹¹⁵ Mahdavi (n 53) 242.

procedures to protect foreign companies' interests, the Iranian government already had a history of derogating from them. This was the case in *Sapphire International*:¹¹⁶ the plaintiff agreed on a joint venture with the NIOC and was contracted to explore oil, being promised a reimbursement for the cost of its operations from the NIOC. However, the NIOC refused and cashed out the \$350,000 guarantee (as *Sapphire* had failed to perform its obligations). The NIOC also refused to appoint an arbitrator. Returning to the argument of ownership, the 1974 Act was a legal change that maximised the state's 'permanent sovereignty' over its resources. In effect, the state's goal of resource nationalism took legal effect and once again changed the legal framework for petroleum production in Iran.

The Islamic Revolution in 1978-1979 was a drastic change for Iran. It had a direct impact on Iran's petroleum law – namely, the annulment of all foreign investment and contracts before the revolution.¹¹⁷ This ultimately gave effect to the 1979 Iranian Constitution¹¹⁸ that restricted foreign parties from owning shares of Iranian assets, by which the ownership of the oil industry and right to exploit was completely vested in the NIOC,¹¹⁹ thus finalising nationalisation. The 1979 Constitution created a legislative framework that contained express provisions on natural resources and foreign interest, providing guidelines that confined the government as to the terms and contractual forms, which they could partake,¹²⁰ compared to the previous phases which allowed for greater flexibility, such as individually negotiated contracts (concessions and PSAs). The 1979 Constitution is the main example of how resource nationalism shaped the legal landscape of the oil industry. This was apparent in the prominent themes of the Constitution, which included nationalisation and permanent sovereignty over resources, driven by outrage against what was perceived as 'imperialism'. This is evidenced in Article 3(5) of the Constitution,¹²¹ which clearly calls for the 'complete elimination of imperialism and prevention of foreign influence'. Article 82 further imposes a prohibition on engaging foreign experts,¹²² and Article 153 prohibits any 'agreement[s] resulting in foreign control over the natural resources ... of the country'.¹²³

¹¹⁶ *Sapphire International Petroleum Ltd* (n 63).

¹¹⁷ Petroleum Act 1987.

¹¹⁸ Constitution of the Islamic Republic of Iran 1979 (adopted 24 October 1979, effective 3 December 1979).

¹¹⁹ Mafi (n 50) 242.

¹²⁰ Shahri (n 1) 118.

¹²¹ Constitution of the Islamic Republic of Iran (n 118), art 3(5).

¹²² *ibid*, art 82.

¹²³ *ibid*, art 153.

Protecting the Iranian oil industry was the clear goal of the drafters of the 1979 Constitution, as it prohibited participation of foreign companies and opportunities for foreign ownership in all production phases.¹²⁴ Article 43(8) explicitly provides for the 'prevention of foreign economic domination over the country's economy'.¹²⁵ This was arguably a whiplash reaction against the 1954 Consortium's dominating operation (a 'state within a state'), because it was detached from the national economy. It evidently controlled production and investment in Iran's sector based on the global market and their individual interests. On that note, Article 81 determined that 'granting of concessions to foreigners [companies and institutions] ... is absolutely forbidden'.¹²⁶ Foreigners no longer had rights under Iranian law to form companies to extract resources, which eliminated the possibility of JOAs. Thus the new Constitution asserts that the government is the only entity that can deal with natural resources.¹²⁷ Overall, concessions, PSAs, JOAs and any contractual arrangement involving foreign participation (investment and ownership) are effectively illegal.

The nationalisation of the AIOC's assets and the entire oil industry violated a cornerstone of the new world order, namely the free market enterprise.¹²⁸ In this sense resource nationalism can be thought of as an antithesis to liquid modernity. In his theory of liquid modernity,¹²⁹ Bauman uses the 'liquidity' and 'fluidity' characteristics of fluids as metaphors to capture the world's postmodern state. Bauman conceptualises that for capitalist forces 'to be free to flow, the World must be free of ... barriers, fortified borders and checkpoints'.¹³⁰ In the context of this Article, the latter is perceived in the sense that the AIOC effectively gained power over Iranian oil because there were no barriers of regulation or framework governing its activities. It thus had the opportunity to operate and exploit freely. Bauman describes this as the process of 'melting of solids',¹³¹ which in this sense is the liquefaction of the pillar of the state. However, such uncontrollable fluidity provoked protectionism, and resource nationalism effectively 'solidified' this pillar, which was antithetic to the flow of capitalism and the liberal market mandate of the new world order. Nevertheless, the 'continuous growing fluidity' of capitalist forces overcomes the nationalisation obstacle, enabling and reinforcing their 'invincibility'.¹³² This

¹²⁴ Mahdavi (n 53) 247.

¹²⁵ Constitution of the Islamic Republic of Iran (n 118), art 43(8).

¹²⁶ *ibid*, art 81.

¹²⁷ Shahri (n 1) 118.

¹²⁸ Karlsson (n 69) 137.

¹²⁹ Bauman (n 23).

¹³⁰ *ibid* 14.

¹³¹ *ibid* 6.

¹³² *ibid* 14.

weakens resource nationalism and re-establishes the power of capitalism or IOCs, and the framework for production enters into a recurring cycle whereby resource nationalism is the state's fluctuating intervention.

Through analysing the evolution of Iran's legal policy and levels of the IOCs' involvement in its oil sector, Stevens' theory of resource nationalism as a *cyclical phenomenon* most plausibly fits in with Iranian legal policy towards the Iranian oil industry. Stevens postulates that the level of foreign participation and ownership, as well as the level of state intervention vis-à-vis resource nationalism, is relative to the influence of endogenous and exogenous drivers and is cyclical according to these forces.¹³³ Endogenous factors are typified as the 'obsolescing bargain', which intensifies as oil prices rise, and exogenous factors include ideological forces of state intervention and independence, which is ever-present in a postcolonial world. According to Stevens, resource nationalism:

... [I]nevitably leads to less investment and a shortage of crude oil ... high prices encouraging further 'resource nationalism' as the obsolescing bargain kicks in and the need for capital and technology ... diminishes. [H]owever, markets work albeit imperfectly. The high price provokes a market response ... causing prices to fall. As they fall, the imperative of the obsolescing bargain diminishes and the need for access to capital and technology grows. 'Resource nationalism' recedes and the upstream opens.¹³⁴

In Iran's legal framework what emerges is perhaps an image of peaks and troughs in legal policy. Such peaks would be the points at which there is a high level of state involvement (ownership and management), closing the industry to foreign interest. On the other hand, troughs refer to the industry's reopening to foreign investment and equity. Iran's legal landscape began with minimal state involvement in the concession phase, when the industry was completely open to foreign control (AIOC's concessions); then faced a drastic closure to foreign ownership in the event of resource nationalism in 1951 through the 1951 Nationalization Act – positioning the state in permanent sovereignty over oil assets and production. It provoked the Western-backed coup, and the IOCs' control was reinstated in the region with the signing and coming into force of the 1954 Consortium Agreement. This laid the conditions for the next round of dissatisfaction, which manifested in full nationalisation under the 1979 Iranian

¹³³ Stevens 'National Oil Companies and International Oil Companies in the Middle East' (n 2) 27.

¹³⁴ *ibid.*

Constitution. Through strict contracts the Iranian government reflected their disinterest in foreign direct investment. However, the market remained imperfect and resource nationalism diluted in the 1980s, due to the spread of the Washington Consensus and market liberalisation, the 1986 oil crisis, and increasing difficulties in oil extraction. In the wake of decreasing oil prices the Iranian government reopened the oil market to foreign participation to expand production and increase government revenue, since the IOCs had the capital and expertise to undertake more risk and engage with complex geology (e.g. deep sea projects). This shifted the bargaining power to the IOCs once again, and inevitably led to weaker contractual terms. This would eventually sow the seeds for resource nationalism yet again.

III. CONCLUSION

What emerges from this discussion is the conclusion that resource nationalism created a major structural transformation in power and ownership in the oil industry. This was achieved through legal changes that were driven by the political and economic climate of resource nationalism, namely the 1951 Nationalization Act and the 1979 Iranian Constitution. Through this, the legal landscape saw an evolution of agreements and legal conditions pertaining to foreign oil companies, regarding their participation in upstream phases of petroleum production. Lastly, in view of resource nationalism as a *cyclical phenomenon*, I conclude that the fluctuating nature of state intervention has created parallel conditions in the legal landscape, by which strict and flexible mechanisms vary with the cycle of resource nationalism. The implementation of these legal tools exemplifies the state's attempt to control and nationalise the forces of Western capitalism, which evidently adapted to flow in the shadow of resource nationalism.

BIBLIOGRAPHY**BOOKS**

- Academie de Droit International de la Haye, *Recueil des Cours: Volume 113 (1964/Iii)* (Collected Courses of the Hague Academy of International Law - Recueil des Cours) (Springer 1968)
- Al-Chalabi FJ, *OPEC and the International Oil Industry* (Springer 1981)
- Bauman Z, *Liquid Modernity* (Polity Press 2000)
- Blair JM, *The Control of Oil* (Pantheon Books 1976)
- Fesharaki F, *Development of the Iranian Oil Industry: International and Domestic Aspects* (Praeger Publishers 1976)
- Frankel P, *Essentials of Petroleum* (Chapman & Hall 1946)
- — *Mattei: Oil and Power Politics* (Faber 1966)
- — *Oil: the Facts of Life* (Weidenfeld & Nicolson 1962)
- — 'The Rationale of National Oil Companies' in United Nations Centre for Natural Resources, Energy and Transport, *State Petroleum Enterprises in Developing Countries* (Pergamon Press 1980)
- Hawdon D, *The Changing Structure of the World Oil Industry* (Routledge Kegan & Paul 1984)
- Louis WMR, *The British Empire in the Middle East 1945-1951: Arab Nationalism, the United States, and Postwar Imperialism* (OUP 1984)
- Karlsson S, *Oil and the World Order: American Foreign Policy* (Berg Publishers 1986)
- Mahdavi P, 'Oil, Monarchy, Revolution and Theocracy: A Study on the National Iranian Oil Company (NIOC)' in Victor DG, Hults DR and Thurber MC (eds) *Oil and Governance: State-Owned Enterprises and the World Energy Supply* (CUP 2012)
- Martin V (ed), *Anglo-Iranian Relations since 1800* (Routledge 2005)
- Phillips TB, *Queer Sinister Things: The Hidden History of Iran*, (Lulu 2013)
- Plunkett JW, *Plunkett's Energy Industry Almanac* (Plunket 2009)
- Sampson A, *Seven Sisters: The Great Oil Companies & the World they Shaped* (Bantam Books 1974)
- Stevens P, 'Saudi Aramco: The Jewel in the Crown' in Victor DG, Hults DR and Thurber MC (eds), *Oil and Governance: State-Owned Enterprises and the World Energy Supply* (CUP 2012)
- Vernon R, 'The Obsolescing Bargain: A Key Factor in Political Risk' in Winchester MB (ed), *The International Essays for Business Decision Makers vol 5* (Center for International Business 1980)
- Watkins MW, *Stabilization or Conservation* (Harper & Brothers 1937)

JOURNAL ARTICLES

- Henniker-Major E, 'Nationalisation: The Anglo-Iranian Oil Company, 1951: Britain vs. Iran' (2013) 2(2) *Moral Cents* 16
- O'Connell DP, 'A Critique of the Iranian Oil Litigation' (1955) 4(2) *International and Comparative Law Quarterly* 267
- Mafi H, 'Iran's Concession Agreements and the Role of the National Iranian Oil Company: Economic Development and Sovereign Immunity' (2008) *Natural Resources Journal* 407

- Maniruzzaman AFM, 'The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (2009) 5 Texas Journal of Oil, Gas, and Energy Law 80
- Nwokolo AD, 'Oil and Gas Law: Is there a Legal and Functional Value for the Stabilisation Clause in International Petroleum Agreements?' (2009) 8 CAR (CEPMLP Annual Review)
<<http://www.dundee.ac.uk/cepmlp/gateway/?news=28033>> accessed 4 April 2015
- Ramazani RK, 'Choice-of-Law Problems and International Oil Contracts: A Case Study' (1962) 11(2) International and Comparative Law Quarterly 503
- Shahri NN, 'The Petroleum Legal Framework of Iran: History, Trends and the Way Forward' (2010) 8(1) China and Eurasia Forum Quarterly 111
- Stevens P, 'National Oil Companies and International Oil Companies in the Middle East: Under the Shadow of Government and the Resource Nationalism Cycle' (2008) 1(1) Journal of World Energy Law & Business 5

CASES

- Anglo-Iranian Oil Co Case (UK v Iran)* [1952] ICJ Rep 93
- Anglo-Iranian Co Ltd v Idemitsu Kosan Co* (YO) 2, 942 of 1953
- Sapphire International Petroleum Ltd v National Iranian Oil Company* (1963) 35 ILR 136

CONSTITUTIONS

- Constitution of the Islamic Republic of Iran 1979

STATUTES

- Nationalization Act 1951
- Petroleum Act 1957
- Petroleum Act 1974
- Petroleum Act 1987

INTERNATIONAL LAW SOURCES AND TREATIES

- The Treaty of Sèvres (10 August 1920)
- The Sykes-Picot Agreement (19 May 1916)
- UNGA Res 2158 (XXI) (25 November 1966) UN Doc A/RES/2158

WEBSITES AND OTHER SOURCES

- Heller CA, 'The Birth and Growth of the Public Sector and State Enterprises in the Petroleum Industry' (Speech at UN Symposium, Vienna, March 1978)
- Stanislaw J, 'Power Play: Resource Nationalism, the Global Scramble for Energy, and the Need for Mutual Interdependence' (Deloitte 2008)
- The International Energy Forum, 'Global Dialogue to Meet the Global Energy Challenge' (IEF, 2007) <<https://www.ief.org/events/global-dialogue-to-meet-the-global-energy-challenge>> accessed 5 August 2015
- 'The Secret of the Seven Sisters' (*Aljazeera*, 26 April 2013)
<<http://www.aljazeera.com/programmes/specialseries/2013/04/201344105231487582.html>> accessed 20 February 2015

soaslawjournal.org

Knowledge Is Power

