FOOD SECURITY AS SOCIAL PROVISIONING: INSIGHTS FROM THE INTERNATIONAL APPROACH AND THE INDONESIAN EXPERIENCE

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Abstract

In 2006–08, there was an international food crisis. At its peak, 34 countries were severely affected. A total of 850 million people were short of food and a further 100 million were considered to be at risk. Yet, despite the widespread agreement that existed on the unacceptability of hunger, international institutions struggled to take responsibility, and to effectively deal with the problem.

I argue in this thesis that this failure to take responsibility is a case of international institutional failure that is rooted in the structure of international law, with its homage to both universal rights and state sovereignty, and in the type of economics that was wired into the international system at the time of the inception of contemporary international law.

To illustrate these structural features the thesis traces the evolution of the concepts of food security and the right to food within the UN system, alongside the emergence of international law in the UN era and the consolidation of the neoclassical economic orthodoxy within UN institutions. That economic orthodoxy was highly formal and reflected the neoclassical emphasis on individualism, markets and economic growth, as well as the emergent Keynesian representation of national income and expenditure.

The consequence of the way approaches to hunger were framed in the nascent international institutions has been that international institutions try endlessly to reconcile the putatively opposing poles of rights and sovereignty, and the seemingly opposing disciplines of law and economics. Within this frame, attempts to allocate responsibility bounce between growth and markets or human rights, or, national economic responsibility or international economic responsibility.

In this thesis I present a heterodox tradition of economics — a tradition that has been referred to as ‘old’ institutionalism, as distinct from new institutional economics — as an alternative way of thinking about, and addressing, problems of food and hunger. For the old institutionalists the subject matter of economics is social provisioning — a concern with the means of life. Institutionalism focuses on the institutional
arrangements for provisioning and incorporates an account of governance and power relations into its theoretical framework. It confronts the imperative of preventing starvation. Institutionalism also emphasises the interconnections between law and economics and accepts that economic relations are affected by a prevailing structure of legal rights. I build on the institutionalist approach to situate the legal dimension of institutionalist thought within a public law framework to draw out the authority and economic duty of government. This approach conceptualises economic policy as a duty to provide and aligns a community and its institutions through this duty. It takes us towards developing a jurisprudence of the institutions of provisioning.

In the thesis I use Indonesia as a case study to illustrate a version of social provisioning in practice and to draw out the link between social provisioning and taking up the responsibility for social provisioning. Since independence in 1949, successive Indonesian governments have focused on providing food for the poor, in spite of mostly demanding economic conditions and sometimes turbulent political conditions. The discussion highlights the way in which the penetration of international legal and economic norms into Indonesian national policymaking in recent times has both provoked and shaped a policy struggle between the merits of liberalisation against the implicit social provisioning and associated responsibilities to the people of a nation. This replicates a struggle occurring inside the organisations of the United Nations. The case study shows that this type of struggle accentuates the separateness, rather than the interconnections, of law and economics, and loses sight of the provisioning purpose of old institutional economics.
DECLARATION

This is to certify that:

(i) the thesis comprises only my original work towards the Ph.D;
(ii) due acknowledgement is made in the text to all other material used;
(iii) the thesis is fewer than 100,000 words in length, exclusive of bibliography.

Peter Dirou
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INTRODUCTION

Following several years of relative stability, international food prices began increasing steadily from early 2002 before rapidly escalating between late 2006 and early 2007. Over the following 18 months food prices would increase by 54 percent.¹ The food inflation was part of a wider boom in commodity prices, including oil prices, which added to the pressure on food prices. The price increases influenced the availability of, and access to, food in both developed and developing countries, but the more damaging impacts were experienced in developing countries. Thirty-four countries, predominantly in Africa and Asia, were experiencing severe distress at the peak of the crisis in July 2008, according to the Food and Agriculture Organization of the United Nations (FAO).² In ‘people terms’, 100 million people were at risk of becoming short of food, in addition to the 850 million people already suffering from that plight.³ Several countries experienced food riots and there was a general concern over the impact that the price increases would have on economic growth, and economic and social stability.

As the severity of the crisis deepened, so did the pressure on the international community to respond. Achieving the UN Millennium Development Goal (MDG) of halving the proportion of people who suffer from hunger by 2015 was at risk,⁴ as was the progress many countries had made in alleviating poverty in association with the international development agencies. The ‘development’ machinery was summoned and the international response was delivered principally through the UN ‘family’ of organisations.

³ Ban Ki-moon, Address by the Secretary-General of the United Nations to the High-Level Conference on World Food Security: The Challenges of Climate Change and Bioenergy, 3 June 2008.
Broadly speaking, this was a two-part response with a short- and long-term component. The short-term component was meant to address the immediate needs of those most affected by the crisis. It was a humanitarian response aimed at getting food into the mouths of the hungry through emergency food aid, emergency financial assistance, and the supply of essential seeds and fertilisers to quickly increase food production. The longer-term component was directed towards increasing the supply of food through, for example, improved agricultural productivity, increased investment in agriculture, and removing the restrictions on agricultural trade. The longer-term approach was grounded in the importance mainstream economics attaches to economic growth. That is, governments and the international development agencies should give primacy to policies that bring economic growth, as growth will deliver increased incomes, higher purchasing power, and higher standards of living.

By and large, international organisations rallied under the growth banner. But this masked what one close-hand observer saw as ‘profound internal contradictions within the international community’. For a start, there were widely differing conceptions of the role of agriculture. For some, the objective was to increase production and trade of agricultural commodities for allocation through the market, while others argued for the increased production to be tied to a particular local community. The more profound contradiction arose from the support for an alternative approach that insisted that food security policies should be directed by the right to adequate food grounded in international human rights law.

The principal proponents of the right to food within the UN family were the Economic and Social Council (ECOSOC), the Committee on Economic, Social, and Cultural Rights (CESCR), and the UN Special Rapporteur on the Right to Adequate Food. Their rights-based approach stressed the ongoing right to adequate food and the obligation placed on national governments, foreign governments and international organisations to ensure that this right was realised. They distinguished between natural disasters requiring a humanitarian response, and man-made disasters, such as the food crisis. Man-made disasters were preventable and implementing the right to food was

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important to preventing a repeat of the food crisis. The right to food was about guaranteeing adequate food and nutrition on an ongoing basis, which, if achieved, would make humanitarian interventions for food crises redundant in the future.

History shows how difficult achieving this objective has been, for the 2006–2008 crisis was not an extraordinary event. Certainly there has been a high incidence of famine in South Asia and Africa, in particular, through the 20th century, but famines have been a feature of recorded history for 6,000 years. Even in the absence of an officially-designated international food crisis, hunger is a pressing international problem. It is the leading cause of death worldwide, killing an estimated 10 million people each year — more than the total combined deaths from AIDS, malaria and tuberculosis. Every second, a child dies from hunger-related causes somewhere in the world. Even more alarming is Mark Nathan Cohen’s ecological analysis that maintains that technological improvements in agriculture are more of a holding action than a liberating force, as mankind brings more inhospitable environments into agricultural production. For Cohen ‘it is the prevailing notion of “progress” rather than the contemporary “crisis” which is the historical anomaly’.

History also shows that earlier crises prompted substantive policy analyses and calls for action. Peter Singer, for one, penned a now well-known response to the widespread death and suffering arising from the famine in East Bengal in the early 1970s. Singer’s basic argument was that this suffering was bad and that more affluent individuals in the West were morally obliged to contribute financially to alleviate the suffering. A World Food Conference was called in 1974 in response to the more widespread international food crisis from 1972–74. This prompted Susan George’s populist 1976 book on world hunger. George objected to the emphasis that

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9 Ibid 286 (emphasis altered).
10 Peter Singer, ‘Famine, Affluence, and Morality’ (1972) 1 Philosophy & Public Affairs 229.
11 Susan George, How the Other Half Dies: The Real Reasons for World Hunger (Penguin, 1986). In her view, the power of transnational corporations and the Western domination of food technologies, food production and distribution systems were serious impediments to reducing this poverty: at 133–5.
the 1974 World Food Conference placed on technological solutions rather than the equitable distribution of food. For George, the real problem was poverty and ‘[a]n end to hunger depends on how many of us refuse to tolerate the intolerable’.  

In the 1980s, extensive critical analysis of the prevalence of famine and poverty came from Amartya Sen, individually, and in collaboration with Jean Drèze. The entitlement to food is central to their analyses, where ‘entitlements’ relate to ‘the ability of different sections of the population to establish command over food, using the entitlement relations operating in that society depending on its legal, economic, political, and social characteristics’. Their entitlements framework focuses on the structural features of a community that affect the availability and distribution of food. The important question for Sen is ‘what determines distribution of food between different sections of the community?’ Sen labels famines ‘economic disasters, not ... just food crises’ but the entitlement approach also brings into focus the legal rights affecting ownership and market exchanges, and the law can be seen as ‘stand[ing] between food availability and food entitlement’. More generally, Sen and Drèze emphasise the importance of good public policy for averting and dealing with famines and food crises. In that sense, food crises are also crises of governance. Sen’s well-publicised comments on famines not occurring in a democracy underline this point.

Similarly, the 2006–08 food crisis has prompted substantive analysis and policy proposals, with the distinction being that human rights advocates are now more prominent in the policy debate — a debate that is increasingly focussed on how to achieve food security. This reflects the inroads that human rights has made into policy debates since the 1970s but it can also be seen as push-back against the tenets of mainstream economics. For many, economics does not hold the solutions to multiple

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12 Ibid xviii.
15 Sen, Poverty and Famines, above n 13, 162.
16 Ibid 7.
17 Ibid 162.
18 Ibid 166.
crises — food, debt, financial, and environmental — that have confronted the world in recent years. The work of Carmen Gonzalez\textsuperscript{21} and Christine Kaufmann\textsuperscript{22} illustrates the inroads ‘rights-talk’ has made into the food security debate. But the debate remains polarised with economists such as Paul Collier, perhaps best-know as the author of The Bottom Billion,\textsuperscript{23} prominent at the opposite pole to the human rights approaches. If there is a common element to this commentary, it is that the structure of the international political-legal-economic order is pulling against the realisation of food security. Fundamental to this structure, as Pahuja notes,\textsuperscript{24} is the separation of international political and economic institutions.

In this thesis I will argue that the ongoing polarity of the debate highlights the way in which institutions of the international community struggle to take responsibility for the problem of hunger, despite the widespread agreement that exists on the unacceptability of hunger and food insecurity. There is a struggle within the international, as mainstream economics is pitted against human rights. And there is


\textsuperscript{22} See Christine Kaufmann and Mirina Grosz, ‘Poverty, Hunger and International Trade: What’s Law Got to Do with It?’ (2008) 51 German Yearbook of International Law 75; Christine Kaufmann, ‘International Law in Recession? The Role of International Law When Crisis Hits: Food, Finance, and Climate Change’ in Ulrich Fastenrath et al (eds), From Bilateralism to Community Interests: Essays in Honour of Bruno Simma (Oxford University Press, 2011) 1189; Christine Kaufmann and Simone Heri, ‘Liberalizing International Trade in Agriculture and Food Security — Mission Impossible’ (2007) Vanderbilt Journal of International Law 1039. Kaufmann’s work focuses on international trade law and in her assessment the way the multilateral trade regime infringes human rights through not accepting that food security is an objective of the multilateral trade system. But she acknowledges that giving practical effect to this link between the right to food and international trade is problematic because ‘there seems to be no coherent framework for addressing the manifold underlying legal and economic problems, let alone policy considerations’: Kaufmann and Grosz, above n 22, 108. She is critical of the unequal partnership of states under international law and the consequent inability of the state-based international order to respect the universal dignity of mankind: Kaufmann, International Law in Recession, above n 22, 1203.

\textsuperscript{23} Paul Collier, The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done about It (Oxford University Press, 2007). Collier’s focus is on bringing food prices down and he advocates more commercial agriculture, more science, the removal of bans on genetically-modified products, as well as the removal of bio-fuel subsidies: Paul Collier, ‘How Illusion and Greed Fan the Food Crisis’ (2008) 87(6) Foreign Affairs 67, 68.

also a struggle between the national and the international on questions of state sovereignty and the universality of human rights. Attempting to understand these struggles prompted two closely connected questions which lie at the heart of this thesis. First, what factors explain the failure of the international community to take responsibility for problems of hunger? Second, is there a way of framing problems of hunger that captures the interconnected legal and economic dimensions of the problem?

I argue that this inability to take responsibility, despite a great deal of activity and intervention, is a case of international institutional failure. That failure is rooted in the way the structure of international law pays respect to both universal human rights and state sovereignty as fundamental purposes and principles in the UN Charter; the separation of international political and economic institutions; and the particular kind of economic thinking that, in my argument, was adopted by the early UN organisations. To uncover these structural features, this thesis traces the evolution of the concepts of ‘food security’ and the ‘right to food’ within the UN system. It does this alongside providing an account of the origins of contemporary international law and the consolidation of the neoclassical economic orthodoxy within the UN institutions. I show that this economic orthodoxy was highly formal, and reflected the neoclassical emphasis on individualism, markets and economic growth.

The consequence of the way approaches to hunger were framed in the nascent international institutions was that international institutions have tried endlessly to reconcile the opposing poles of rights and sovereignty, and the opposing disciplines of law and economics. Within this frame, proposed solutions to problems of hunger bounce between growth, or markets, and human rights. And attempts to allocate responsibility bounce between national responsibility and international economic responsibility. Effective solutions cannot be anchored to either of the poles or disciplines; the international order comprises states, and economics does not exist in the absence of some national or international legal ordering.

While neoclassical thinking continues to pervade economic orthodoxy at the international institutional level, there are heterodox traditions in economics that offer an alternative paradigm to those same institutions. In this thesis, I draw out the
applicability of one such tradition — ‘old’ institutionalism — to thinking about, and addressing, problems of food and hunger in the context of international institutional approaches. For old institutionalists, the subject matter of economics is social provisioning — a concern with what Veblen described as ‘the aggregate means of human life’, and Backhouse as the ‘ordinary business of life’. Institutionalism focuses on the institutional arrangements for provisioning and incorporates governance and power relations into its theoretical framework. It confronts the imperative of preventing starvation.

Institutionalism also emphasises the interconnections between law and economics with its acceptance that economic relations are governed by legal arrangements that determine the rights structure within an economy. The thesis builds on the institutionalist approach to locate and draw out the legal dimension of institutionalist thought using a public law framework that addresses the authority of government and international institutions, and the economic duty of those institutions. This approach conceptualises economic policy as a duty to provide and aligns a community (local, national, or international) and its institutions through this duty. We could call this a jurisprudence of the institutions of provisioning.

The body of the thesis builds the argument that problems of hunger are more tractable if framed as social provisioning, which is an inherently legal-economic frame. It then examines whether this thinking can be applied by international organisations. After the introductory first chapter, we begin in Chapter 2 with an examination of the institutional setting for the emergence of the concepts of food security and the right to food. I trace the lineage of these concepts and the associated evolution of the FAO and the Office of the UN Special Rapporteur on the Right to Food. As we shall see, these concepts have a specific meaning but they have also become proxies, and sometimes substitutes, for international efforts to address the more troubling problems of hunger and starvation.

The discussion is structured around three events. The first two are the major

international food conferences of 1974 and 1996. These have been important milestones in the development of the institutional framework. The third is the 2006–08 food crisis, and the international institutional response to it. Of interest throughout is the nature of the arguments advanced to justify the form of any international action. The exploration of these three events highlights the fragmented institutional response, the polarisation of the debate into ‘economic’ and ‘human rights’ camps, and the ultimate privileging of economic solutions at the 2008 World Food Summit. In the chapter as a whole, the intention is to illustrate how the evolution of food security and the right to food run parallel to the evolution of international law in the UN era; to draw attention to the limited usefulness of food security and the right to food as organising constructs for shaping policy decisions; and to demonstrate the privileging of economic and technical knowledge in the formulation of international responses to food crises. What we discover is that history seems to repeat, that history being a continuing institutional incoherence within the UN system and the failure of the international community to accept the correlative responsibility entailed in achieving its asserted objective of food for all. It is also a history that runs parallel to ‘the way crises [of conflict] mould, and are moulded by, international law’.27

In Chapter 3, I turn to a consideration of the Indonesian approach to food policy as a counterpoint to international institutional approaches to food problems. The intention of the chapter is not to present Indonesia as an ideal model of economic management. Indeed, the Soekarno years ended in economic crisis, Indonesia was badly scarred by the 1997 Asian Economic Crisis, and corruption remains a serious problem. Rather, the purpose is to illustrate that food problems can be addressed without recourse to the languages of human rights or mainstream economics. Indonesia has grappled with the imperative of feeding its population since ultimately gaining independence in 1949 and the economic hardship experienced under Dutch colonial administration and Japanese occupation during WWII shaped a widespread commitment through Indonesian society to addressing this imperative. Successive Indonesian governments have taken responsibility for ensuring that the population is fed by adopting a purposive, heterodox approach to economic policy that incorporates local values, especially with

respect to food. Institutionalists would say that Indonesia accepted responsibility for social provisioning — for ensuring the population had the means of life.

The Indonesian experience also illustrates how the polarity of the rights-mainstream economics debate compromises social provisioning. In recent years, the discourse of human rights has penetrated more deeply into local public policy debates, in tandem with the constitutionalisation of human rights in Indonesia. From the economic perspective, the government perennially faces severe fiscal constraints and is consequently forced into choosing between social imperatives. Under these circumstances, support for food price liberalisation has oscillated depending on the extent to which the government budget could accommodate the alternative of supporting food prices through subsidies or similar measures. Chapter 3 traces those oscillations and the underlying policy intention, and also comments on the pro-market food policies advocated by mainstream economists and international organisations, as well as the regional approach to food security being developed within ASEAN.

The discussion in Chapters 2 and 3 points to the possibility of reconceptualising international approaches to hunger, if the intention that underlies the concepts of food security and the right to food is actually to be realised. In particular, it argues that connecting the languages of law and economics in some way, without subordinating law to economic logic, is critical to any reframing. These languages are not at ease with each other in the debate, as it stands, and responsibility for addressing food problems is obscured. Chapters 4 and 5 are concerned with that reconceptualisation. Chapter 4 focuses on the economic dimension, while Chapter 5 focuses on the legal dimension of social provisioning and its kinship with contemporary regulatory approaches.

Specifically, Chapter 4 reviews the economic arguments that supported the establishment of the FAO and situates these arguments and the subsequent food security debate within neoclassical economic thinking, the dominant intellectual tradition within mainstream economics. It firstly clarifies what it means to be part of mainstream thinking, as this is important to understanding how neoclassical economics has retained its dominant position in economic thinking. The chapter locates the emergence of neoclassical economics in the late-19th century and examines the nature of the foundations of neoclassical thought, particularly the emphasis on
individual behaviour, competitive markets and economic growth, to gain a better understanding of the limitations of this thought. With the emergence of neoclassical thinking, economics became a discipline that was distinct from political economy. The international institutional failure I am concerned with in this thesis is, in part, a legacy of this separation. In my argument, economics cannot have a life independent of politics, particularly the politics of distribution. Frank Stilwell emphatically makes this point in his historical survey of political economy when he says ‘the economic is not separable from the political. This is the crux of political economy’.  

Chapter 4 goes on to present ‘old’ institutionalism as an alternative conception of economics, and one which, crucially, accepts the importance of politics to economic life. A critical shortcoming of neoclassical economics, for many, is that mainstream economics is disembedded from its society in the way that Polanyi described, and that too much emphasis is placed on markets. Indeed, even one of the managing directors of The World Bank conceded at the peak of the crisis that ‘food security is based on facts that markets would work, but … food markets are not responding’. Institutionalism originally emerged as a critique of neoclassical economics at the turn of the 20th century and its primary concern is with social provisioning. The chapter outlines the institutionalist critique and its influence on economic policy debates in the first part of the 20th century, particularly in the United States.

In my argument, institutionalism not only refuses the idea that economics may be disembedded from society, and re-embeds economics in its society, it explains this embeddedness within the wider institutional structures of a society. This explanation brings out clearly that there is an important distinction between identifying the choices that are open to a society through a technical apparatus, such as economics, and the decisions about what choices to make, which are inescapably in the domain of law and politics. It is my contention that thinking in terms of social provisioning helps us to understand why the international institutions have struggled with the question of hunger, as well as to reconceptualise new ways of approaching the question.

To that end, I argue that institutionalism is conceptually equipped to deal with problems of food and hunger in a way that human rights and neoclassical economics, in isolation, are not. Institutionalists emphasise the interconnections between law and economics and the objective of Chapter 5 is to elaborate what I am referring to in this thesis as the legal dimension, or jurisprudence, of social provisioning. The chapter explores this interconnection first through the work of Warren J Samuels and his formulation of the ‘legal-economic nexus’.\(^{30}\) His focus is on a dynamic social space where law and economics are continually (re)forming each other and where governance arrangements are important to this reformation. The key point for the food debate is that the legal ordering of the society structures economic questions in some way. This goes well beyond the neoclassical focus on the legal framework for markets. For institutionalists, markets are but one component, albeit important, of the way a society approaches questions of production and distribution.

Second, the chapter discusses the compatibility of contemporary regulatory scholarship and institutionalist thought. Bronwen Morgan\(^{31}\) and Cass Sunstein,\(^{32}\) for example, like Samuels,\(^{33}\) play down any distinction between rights and regulation. Furthermore, modern pluralist justifications for regulation go beyond market failure to include social solidarity.\(^{34}\) The concept of ‘solidarity’ is attractive because of its usefulness in forging conciliation between individual and community interests — or between state and international interests — and because it can be extended to resolving tensions between mainstream economics and human rights. Solidarity provides a direct link to the functionalist style of public law which, in turn, has a strong link to institutionalism. The nature of that link, especially the emphasis on the purpose of economic arrangement and social welfare, is explored through an overview of the emergence and features of the functionalist style of public law.

\(^{34}\) Tony Prosser, The Regulatory Enterprise: Government, Regulation, and Legitimacy (Oxford University Press, 2010).
Third, the chapter builds on this purpose-oriented thinking in drawing on Martin Loughlin’s pure theory of public law to elaborate a jurisprudence of provisioning. Purpose, duties, and social welfare are important elements of Loughlin’s pure theory. The essential feature, though, is his conceptualisation of public law as a political jurisprudence: a law of good politics. Marrying Loughlin’s pure theory to the social provisioning of institutionalism provides intellectual underpinnings for a reconceptualisation of economic policy as a duty to provide, rather than being focussed on economic growth. Through this duty, economic policymakers would address the basic means of life needed by the whole society.

Chapter 6 assesses whether this reconceptualisation of food problems as questions of social provisioning can be translated from a national setting to an international setting. In line with the approach taken in Chapters 4 and 5, the chapter firstly assesses whether institutionalist thinking can be applied to the international economy — whether it makes sense to talk in terms of international social provisioning — and then moves on to discuss the legal dimension of international social provisioning.

I first discuss the institutionalist approach to international trade to illustrate how institutionalists approach questions of international economy. International trade is clearly important to the workings of the international economy and the institutionalist perspective is that trade is part of international social provisioning and that international governance is crucial to the workings of the international economy. But the institutionalist emphasis is on supra-national rather than inter-national governance arrangements.

Second, I examine whether constructs such as community and responsibility are features of international law, as these concepts are important elements of social provisioning. In doing so, I provide an overview of the history of international law, using the 1648 Treaty of Westphalia as a reference point, and comment on the structure of international law, particularly the tension between universal rights and state sovereignty. Next, I examine the place of the idea of an ‘international community’ within international law. I focus here on treatment of bilateral and community interests in international law, the conception of an emergent international community in international environmental law, and the emerging concept of a
‘responsibility to protect’.

This discussion illustrates that moving the social provisioning frame from ‘the domestic’ to ‘the international’ is not straightforward — hence the struggle of international institutions to address food problems in the name of a notional international community. But it also illustrates the central role of the international executive in international governance and how this executive is conflicted by the tension between universal rights and state sovereignty, as well as between human rights and mainstream economic approaches to international socio-economic problems, such as preventing hunger. The final section of the chapter reinforces these points through a discussion of the differing approaches to food security adopted by the World Trade Organization (WTO) and the UN Special Rapporteur on the Right to Food.

Chapter 7 summarises the thesis. I attribute the failure of international institutions to take responsibility for problems of hunger to the structure of international law, particularly in the separation of international economic and political institutions at the end of WWII, and the type of economics adopted by the UN institutions at their inception. My central argument is that institutionalist thinking provides an alternative way of thinking about problems of hunger and starvation, and a better explanatory lens through which to analyse institutional failures to date, and through which to address institutional practice. In situating institutionalism within a public law framework, the objective is to draw attention to the question of what responsibilities international institutions have for preventing hunger and starvation. I have conceptualised that responsibility as a duty to provide consistent with the institutionalist emphasis on social provisioning. This approach stands in contrast to the technocratic solutions offered by neoclassical economics, and avoids of the polarity of the current human rights-mainstream economics debate through offering an institutionalist legal-economic frame for addressing food problems.
FOOD SECURITY AND THE RIGHT TO FOOD: THE INSTITUTIONAL CONTEXT

This chapter examines the international institutional context of the two main, contemporary approaches to hunger at the international institutional level: food security and the right to food. In addition to their specific meaning, the concepts have also become proxies for international efforts to address shortages of food and hunger. The chapter traces the birth and lineage of these concepts within the UN system, focusing on the FAO, CESCR, and the office of the UN Special Rapporteur on the Right to Food. The discussion is structured around the major international food conferences that were held in 1974, 1996, and 2008. The first and third of these conferences were a direct response to the food crises of the time, but all three were milestones in the emergence and ongoing refinement of the concept of food security. The 1996 conference was also pivotal to reinvigorating discussion on the right to food.

The first part of the chapter discusses the establishment of the FAO. This proceeded in parallel to the establishment of the UN itself, and, in many ways, it is a shared story. A key element of the FAO establishment was the preparatory work undertaken by the United Nations Commission on Food and Agriculture towards the creation of the FAO. The major report of that commission is consequently examined in detail. Part II discusses the subsequent evolution of the FAO and the associated emergence and development of the concept of food security. The evolution is segmented into three periods: 1945 to the 1974 World Food Conference; from the World Food Conference to the 1996 World Food Summit; and from the World Food Summit to the present. The 1996 Summit provides the link between the concepts of food security and the right to food and Part III discusses the location of the right to food within international human rights instruments, as well as the content of the right. Particular attention is paid to
the CESCR’s General Comment 12 on the right to adequate food.\textsuperscript{35} The creation of the office of Special Rapporteur on the Right to Food consequent to the 1996 World Food Summit is also discussed. Part IV reviews the responses of the international institutions to the 2006–08 international food crisis, including the 2008 High-Level Conference on World Food Security. The review highlights the polarisation of the debate on the appropriate international response into rights-based and economic growth-based approaches, as well as the ultimate dominance of the Bretton Woods institutions and their mainstream economic policy prescriptions.

The argument that I develop through this chapter is that the ongoing polarity of the debate reflects ‘institutional incoherence’\textsuperscript{36} on the approach to hunger within the UN ‘family’ of organisations and the failure of the institutions of the international community to accept the responsibility entailed in ensuring food for all. In my argument, this institutional failure is rooted in the structure of international law, the separation of international political and economic institutions, and the influence of neoclassical economic thinking on the early UN organisations. Consequently, the international system fails to take responsibility for problems of hunger, as international institutions have tried endlessly to reconcile the opposing poles of rights and sovereignty, and the opposing disciplines of law and economics.

\section{The Establishment of the FAO}

The FAO is the main vehicle for improving the availability of, and access to, food within the UN system, and it has been prominent when the international community has attempted to deal with international food crises. Since the FAO is a specialised agency of the UN, it can be expected that its history, and its approach to food security and the right to food, is intertwined with the history of the UN itself. And, as this section shows, that is indeed the case. But it needs to be kept in mind that the FAO is only one of three specialised food and agriculture organisations within the UN system, all of which are headquartered in Rome. The others are the World Food Programme (WFP), which is responsible for emergency food aid, and the International Fund for Agriculture


Development (IFAD), which is responsible for financing agricultural development.\textsuperscript{37} Furthermore, many other UN programmes have food security and food nutrition components.

\textbf{A Towards a Multi-Lateral Food Arrangement}

It is surprising that the establishment of the FAO actually preceded the establishment of the UN, although the FAO’s establishment was clearly against a backdrop of the establishment of the UN itself. Some understanding of the early history of the UN is important, therefore, to being able to interpret the establishment and evolution of the FAO and the influences underpinning its work.

Briefly, the key milestones in the establishment of the UN were: (a) President Roosevelt’s State of the Union Address in January 1941 — the ‘Four Freedoms Speech’\textsuperscript{38} — in which he articulated his world vision as one where there was freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear. These freedoms would ultimately be included in the preamble of the Universal Declarations of Human Rights (UDHR), an instrument that owed much to the efforts of his wife, Eleanor Roosevelt; (b) the Atlantic Charter — the joint declaration made by Roosevelt and the UK prime minister, Winston Churchill, at the Atlantic Conference in August 1941. The four freedoms were the ‘foundational principles’ of the Atlantic Charter,\textsuperscript{39} and the declaration, which was made prior to the US entering WWII in December 1941, outlined the goals for any post-war settlement;\textsuperscript{40} (c) the Declaration by the United Nations — those nations which had allied themselves in the war against Germany and Japan — was signed in January 1942 and this declaration was a commitment to the Atlantic Charter;\textsuperscript{41} (d) the Washington Conversations on

\textsuperscript{37} Ibid 207. Shaw notes that there are more than 30 other UN and international bodies which have food and nutrition security programmes or are an important part of international efforts to reduce food insecurity.

\textsuperscript{38} President D Roosevelt, ‘Message to Congress 1941’, 6 January 1941.

\textsuperscript{39} Franklin D Roosevelt Presidential Library and Museum, \textit{FDR and the Four Freedoms Speech} \url{http://www.fdrlibrary.marist.edu/fourfreedoms}.

\textsuperscript{40} The United Kingdom and four former dominions and nine European governments in exile had earlier issued the Declaration of St James Palace (the Inter-Allied Declaration) in June 1941 calling for greater international cooperation if there was to be an enduring peace. \textit{United Nations, History of the United Nations, 1941–1950} \url{http://www.un.org/en/aboutun/history/1941-1950.shtml}.

\textsuperscript{41} United Nations, above n 40. The Moscow and Tehran conferences between the United States of America, the United Kingdom, and the Soviet Union followed in October and December 1943. At these conferences the three big powers pushed for an international organisation for peace and security.
International Peace and Security (the Dumbarton Oaks Conference), which took place over the period August–October 1944 at Dumbarton Oaks in Washington, D.C., with the objective of establishing a new international organisation for peace and security to replace the League of Nations; and (e) the United Nations Conference on International Organization (the San Francisco Conference) in June 1945, at which the agreements reached at Dumbarton Oaks were reworked into the draft UN Charter. The UN was formally established with the coming into force of the Charter in October 1945 and the first meeting of the General Assembly was held in January 1946.

The push for the establishment of an international food and agriculture organisation emerges relatively early in the timeline of the establishment of the UN — not long after the Declaration of the United Nations and around two years prior to the Dumbarton Oaks Conference. In May 1943, only a few months after the Declaration of the United Nations, President Roosevelt convened a United Nations Conference on Food and Agriculture at Hot Springs, Virginia in the United States (the Hot Springs Conference). The premise for the conference was that food problems would be a feature of a post-war world, which would have to be confronted in the interests of a lasting peace. Roosevelt had earlier convened the US government’s First National Conference for Defense in 1941, and nutrition was a core concern of the conference.

The interest in a multilateral food arrangement was not new to the wartime environment, however: the League of Nations had discussed multilateral food arrangements during the 1930s. The renewal of interest had been prompted by the realisation that international cooperation had been important to increasing awareness of the emerging knowledge about nutrition. It was also prompted by concerns over the reduction of international trade in agricultural products, as countries adopted restrictive policies in an attempt to cope with the impacts of the Great Depression.

The general thinking that had gained support within the League by the mid-1930s was

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42 United Nations, above n 40. The Yalta Conference took place in February 1945 and it was at this conference that the three big powers resolved to establish an international organisation for peace and security.
43 United Nations, above n 40.
44 Ibid.
that malnutrition was a function of poverty and the associated food shortages through
the world.\textsuperscript{47} An increase in food production was needed, if these problems were to be
alleviated. This expansion would occur through increased agricultural production, as
this would increase the prosperity of the agricultural sector and, in turn, the prosperity
of the industrial sector.

The institutional focus at that stage was more concerned with the merits of inter-
governmental commodity arrangements and buffer stocks than with specialised food
and agriculture organisations. The concern was with the impacts of price and
production volatility and with disposing of the agricultural surpluses of developed
countries in such a way that it did not create disincentives to developing country
production.\textsuperscript{48} It was argued that an inter-government commodity agreement would
mitigate these concerns, and would benefit producers and consumers in developed
and developing countries.\textsuperscript{49}

\textbf{B The Hot Springs Conference}

The Hot Springs Conference set the tone for the approach that the soon-to-be-
established UN would take after the war to food and agriculture. The historical context
is important here. World War II was yet to end and it was a time of suffering marked
by shortages of essential goods and services. The aspirations were for a world at
peace, but there was recognition that a world at peace would also be a world in need.
The Conference was blunt in its assessment: ‘the first duty of the United Nations will
be to win complete victory in arms [and] as their armies liberate territories from
tyranny their goal will be to bring food for the starving.’\textsuperscript{50}

This concern for the starving was expressed, at the time, in terms of ‘freedom from
want of food’;\textsuperscript{51} the concepts of ‘food security’ and ‘the right to food’ were yet to
appear in the international discourse on hunger. Freedom from want of food ‘mean[t]
a secure, adequate, and suitable supply of food for every man’, and it was a prerequisite of the more general freedom from want that President Roosevelt had articulated: it was about food for all.

Standing in the way of achieving food for all, in the conference’s assessment, were the problems of insufficient food and poverty. But, as article 4 of the conference declaration stresses, these were essentially economic problems that could be addressed within the economic orthodoxy that had emerged:

The first cause of hunger and malnutrition is poverty. It is useless to produce more food unless men and nations provide the markets to absorb it. There must be an expansion of the whole world economy to provide the purchasing power sufficient to maintain an adequate diet for all. With full employment in all countries, enlarged industrial production, the absence of exploitation, an increasing flow of trade within and between countries, an orderly management of domestic and international investment and currencies, and sustained internal and international economic equilibrium, the food which is produced can be made available to all people.

Note the use of the term ‘economic equilibrium’. As we will shortly see, this term indelibly marks the economic philosophy of those involved in establishing the FAO.

In broad terms, the approach advocated by the Conference was to produce more and better food through improved agriculture, taking advantage of the advances in knowledge of nutrition and agricultural practice, and to allocate this food through international trade. Increased production could not occur independently of the consumers of food, however, and the summation of the conference secretary-general emphasises the conference view that greater acknowledgement of the ‘fundamental interdependence of the producer and consumer’ was needed. This interdependence was regarded as a foundation of increased employment and investment. This sentiment stands in contrast to other comments in the summation, where it was acknowledged that an international economic equilibrium could not occur without international economic adjustment, and that economic dislocation and price volatility

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52 United Nations Conference on Food and Agriculture, above n 50, Summation of the Work of the Conference by the Secretary-General.
53 Ibid Declaration article 4.
54 Ibid Summation of the Work of the Conference by the Secretary-General.
could well be part of this adjustment.\textsuperscript{55}

The widespread view of the Conference was that a multilateral organisation focused on food and agriculture would be important to achieving increased production, employment, and investment, and the Conference, accordingly, established an Interim Commission on Food and Agriculture in Washington, D.C. to develop the plans for a permanent food organisation. The role envisaged for this organisation was limited, however. It was to provide advice on agriculture and nutrition issues, as well as a statistical service in the service of expanded national economies, and hence an expanded world economy.\textsuperscript{56} The Conference was unequivocal in its view that food for all was primarily a national responsibility, but, as article 5 of the Declaration stresses, it was recognised that the goal could only be fully achieved if all nations worked together.\textsuperscript{57} As had been the case in the 1930s, the key issue seen to be requiring international cooperation was the need for some form of international commodity arrangement that included the place of buffer stocks and the regulation of production.\textsuperscript{58} The Conference agreed that the new international organisation should be limited to providing advice and collecting information. Interestingly, there was no justification given for this decision in the Final Act, but it is consistent with the conference’s comments on nations having the primary responsibility. The overriding impression that the Final Act of the conference leaves is that it was more concerned with international economic expansion, and that the food concerns consequent to the war provided an entry point to further this agenda.

\textbf{C The Interim Commission and the Creation of the FAO}

The Interim Commission would extend over the next two and a half years and the culmination of its work was the presentation of its General Report — ‘The Work of the FAO’\textsuperscript{59} — to the first session of the Conference of the FAO in Quebec, Canada in

\textsuperscript{55} Ibid.
\textsuperscript{56} D John Shaw, \textit{Global Food and Agricultural Institutions} (Routledge, 2009) 55.
\textsuperscript{57} United Nations Conference on Food and Agriculture, above n 50, Declaration article 5.
\textsuperscript{58} Ibid Summation of the Work of the Conference by the Secretary-General.
\textsuperscript{59} United Nations Interim Commission on Food and Agriculture, \textit{The Work of the FAO} (General Report to the First Session of the Conference of the Food and Agriculture Organization of the United Nations, 16 October–1 November 1945) FAO Library AN:63(061) UN 3W.
October 1945. The report took up where the Hot Springs Conference left off and elaborated the justification for the FAO, the problems it would address, and the approach that it would follow in its work, as well as outlining the organisational structure and priorities for the initial work plan of the organisation.

The tone of the report is similar to that which pervaded the Hot Springs Conference. As foreshadowed at Hot Springs, the basic justification for the FAO was that it would be a key component of a UN pursuit of ‘freedom from want’. This pursuit had become an imperative consequent to the suffering of the Great Depression and World War II, but it was also seen as being more feasible with developments in knowledge about nutrition.\(^60\) The Commission articulated freedom from want as a ‘conquest of hunger and the attainment of the ordinary needs of a decent, self-respecting life,’\(^61\) an aspiration ‘as old as mankind’.\(^62\) ‘Whenever primitive men tried to imagine paradise in concrete terms, they pictured it as a place where food was plentiful and want no longer existed.’\(^63\)

The Commission also reaffirmed that the mandate of the new food and agriculture organisation would be limited to providing advice and disseminating information. It would serve as a ‘clearing house of information’;\(^64\) provide an agricultural ‘extension-service’;\(^65\) and act as a ‘trouble-shooter’.\(^66\) It would also ‘encourage research to solve the problems of food and agriculture ... [and] help nations to translate the findings of scientists and economists progressively into practicable administrative programs’.\(^67\)

This privileging of economics is significant. From this point, international efforts to improve the availability of food and nutrition would be informed by good science and good economics. The report leaves the reader in no doubt: ‘it is safe to predict that every major problem with which FAO will deal will have both scientific and economic aspects. From the beginning a clear realization of this fact should permeate all of the

\(^{60}\) Ibid [5].
\(^{61}\) Ibid [4].
\(^{62}\) Ibid [1].
\(^{63}\) Ibid.
\(^{64}\) Ibid [103].
\(^{65}\) Ibid [77].
\(^{66}\) Ibid [33].
\(^{67}\) Ibid [119].
organization’s work.\textsuperscript{68}

But the Commission did offer a proviso:

it is taken for granted that the work of FAO in furthering increased agricultural production, better distribution, improved nutrition, and the welfare of rural populations depends for its success on such concomitant efforts as those looking toward international security, on expanding the world economy, full employment, adequate buying power, and international trade free of hampering restrictions.\textsuperscript{69}

While \textit{The Work of the FAO} was a reaffirmation of the direction agreed at Hot Springs, and put the flesh on the organisational bones, it can also be read as a justification for a post-war system of international agricultural trade. To this end, the Commission links nutrition and human welfare, food production and consumption, and national production and international trade, through the construction of a system of ‘food management’ — a system based on the creed of economics and one which should be treated as ‘a new concern on the part of national and international statesmanship’.\textsuperscript{70} I will return to this theme of statesmanship in later chapters, where the lack of international statesmanship on international food problems will be exposed.

The Commission acknowledged that the term ‘food management’

has not been precisely defined but it does draw attention to the fact that food can be managed for welfare of people and nations. It is also a unifying concept; for everyone concerned with food has a part to play and a contribution to make in food management, from the individual housewife who plans and prepares meals for her family to the international organizations with responsibilities in this field — including, in between, the farmer who produces food, the food industries, numerous scientific and professional groups, and various branches of government.\textsuperscript{71}

There were four main aspects to ‘food management’: expanding world production to supply more food to meet nutritional needs, particularly livestock and fruit and vegetables to substitute for staple energy foods; improving the handling, processing

\textsuperscript{68} Ibid [126].
\textsuperscript{69} Ibid [7].
\textsuperscript{70} Ibid [47].
\textsuperscript{71} Ibid [47].
and storing of agricultural products to preserve the nutritive value of the food produced; a better synthesis of national and international marketing and distribution to ensure the placement of the additional production; and consumer education.\textsuperscript{72}

Interestingly, the discussion of food management in the report is headed ‘What Food Management Means for Nations’, but the dominant concern is with the international dimensions of increased national production. National food self-sufficiency certainly was not the goal being advanced ‘for few nations are able or wish to produce enough of everything for themselves, though they may be forced to attempt it under conditions such as those which prevailed in the inter-war period’.\textsuperscript{73}

Expanding the world economy was the omnipresent concern of the Commission and this expansion, with respect to agriculture, needed to be based on three principles: international collaboration, a favourable agricultural-industrial balance, and the development of less-advanced economies.\textsuperscript{74} Leaving international collaboration aside for a moment, a favourable agricultural-industrial balance incorporates the idea that industrial employment will need to expand to offset employment reductions, as the agricultural sector becomes more efficient. The development of less-advanced economies is seen as an opportunity for increased production, which would, at the same time, improve the welfare of undernourished and poor in developing countries.

Again, freedom from want appears to take a back seat to the interests of the developed economies:

\begin{quote}
Most of the economically advanced countries are supremely interested in the supply-demand situation for particular products — especially those that were chronically in oversupply in the inter-war period — and for agricultural commodities in general. They will urge, and rightly, that FAO should start immediately to study the world picture with a view to detecting maladjustments, actual or incipient, and recommending corrections.\textsuperscript{75}
\end{quote}

And if this balance could not be achieved through expanding the demand for

\begin{footnotes}
\footnotetext[72]{{Ibid} [48]–[55].}
\footnotetext[73]{{Ibid} [52].}
\footnotetext[74]{{Ibid} [22]–[25].}
\footnotetext[75]{{Ibid} [194].}
\end{footnotes}
agricultural and industrial products, then ‘industry and agriculture will have to continue throttling production down to a restricted demand, which is like hobbling a finely bred horse and expecting it to win the race.’

International coordination would be critical to achieving the desired balance and the wartime experience had demonstrated what international cooperation could achieve. An important undercurrent here is the concern to avoid agricultural surpluses, particularly grain surpluses in the US, which ‘were the nightmare of most of the developed countries during the inter-war depression’. How to encourage production and avoid surpluses was, for the Commission, the question at the heart of the FAO’s work programme.

The Commission’s answer to that question was to increase effective demand, as ‘the surpluses were surplus only in relation to purchasing power — effective demand — and not in relation to the needs of human beings’. The welfare of producers could now be presented as identical to the welfare of consumers and as a ‘fundamental principle’ of the Commission’s approach. Promoting the framework that gave effect to this identity would reconcile international differences and progress freedom from want ‘and higher levels of living for all’. The FAO’s role, then, would be to help reorient international agricultural trade ‘toward more economically advantageous patterns’ that would help pre-empt surpluses, but ‘when temporary surpluses develop, FAO can take the lead in urging that they be used to alleviate the needs of hungry and poverty-stricken people in certain regions.’

The 44 member countries that comprised this first Conference of Member Nations duly accepted the Interim Commission’s work and the FAO was formally established on 16 October 1945 as a specialised agency of the United Nations, which was itself

76 Ibid [25].
77 Ibid [16].
78 Ibid [20].
79 Ibid [17].
80 Ibid [9].
81 Ibid.
82 Ibid [34].
83 Ibid [35].
formally established eight days later, on 24 October 1945.\textsuperscript{84}

The original preamble of the 1945 FAO constitution would read:

> FAO was established to promote the common welfare through: raising levels of nutrition and standards of living of the peoples under their respective jurisdictions; securing improvements in the efficiency of the production and distribution of all food and agricultural products; and bettering the condition of rural populations, and thus contributing toward an expanding world economy. Member countries would work individually and collectively to achieve these ends.\textsuperscript{85}

The wording of the preamble at this time leaves no doubt over the importance that the then-member nations attached to expanding the world economy. The striking omission to contemporary eyes, conditioned by the languages of rights and development, is the absence of any reference to alleviating hunger. It would not be until 1963 that an explicit concern with hunger would find its way into the preamble of the FAO constitution.

D The Wider International Context Surrounding the Establishment of the FAO

So far, I have looked at the FAO as part of wider preparations for peace by the allied nations and an attack on freedom from want. Some commentators have questioned whether the intentions of the promoters of the FAO and UN were in truth this virtuous.\textsuperscript{86} They suggest, rather, that the creation of the FAO and UN can be seen as serving the interests of their main promoters. The discussion that follows illustrates the point. It also helps clarify the ambiguity and the undercurrents in \textit{The Work of the FAO}, which are important to understanding the struggle of the international institutions in addressing food problems.

\textsuperscript{84} The FAO was initially headquartered in Washington, D.C. in the expectation that it would be permanently housed alongside ECOSOC at the United Nations in New York. But after ECOSOC was located in Geneva, the FAO headquarters was relocated to Rome in 1951.

\textsuperscript{85} FAO, Report of the Conference of FAO, First Session, City of Quebec, Canada, 16 October–1 November 1, 1945.

1 The League Reborn

Mark Mazower’s thesis in *No Enchanted Palace* is that the establishment of the UN should not be seen as a response to World War II, or the position of the US at that time, and that it did not represent any substantive break with the past. Certainly, the earlier comments on the League’s approach to commodity arrangements support this thesis. Effectively, the establishment of the UN froze in place the international configuration of power that existed at the end of World War II and transposed that configuration into an updated League of Nations. For Mazower, the UN was ‘the League reborn’ and ‘a further chapter in the history of world organization inaugurated by the League and linked to that question of empire and the visions of global order that emerged out of the British Empire in particular in its final decades’.

From the British perspective, the League provided an instrument for bolstering empire. The British Empire was in decline and needed to accommodate a rising nationalism in the settler colonies, and it needed to find a new way ‘to project its self-defined sense of moral purpose globally’. Some way had to be found ‘to reconcile the interests of the British Empire with the preservation of its civilizational mission’. And imperial internationalism provided that vehicle in the early twentieth century.

Turning to the US, Mazower notes that the body that had been formed to study the organisation of a post-war world — the Commission to Study the Organization of the Peace — had initially ‘been set up at the end of the 1930s by Wilson internationalists associated with the League of Nations Association’. Their model of world organisation was an association of states; it was ‘basically a warmed-up League’. The difference this time around was that the participation of the US ‘became an imperial priority’. The fact that this model was only one of a number of internationalist

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87 Mazower, above n 86.
88 Ibid 14.
89 Ibid 27.
90 Ibid 194.
91 Ibid 14.
92 Ibid 192.
94 Ibid 192.
95 Ibid.
96 Ibid 15.
97 Ibid 21.
models being advocated at the time underlines Mazower’s point. One of these alternatives was a world government, which had great appeal to the institutionalist economists, whose approach is discussed in some detail in later chapters.

Whatever the form of world organisation being advocated, there is a tension between the interests of states, especially the more powerful states, and giving a greater role to some form of world organisation in the interest of promoting a world community and improving the welfare of mankind. This tension was a characteristic of the League and Mazower comments that it was ‘hardwired into the UN from the start’. 98 Both the League and the UN ‘spoke for humanity but acted through national governments’. 99 The ‘universalizing rhetoric of freedom and rights ... [was] a veil masking the consolidation of a great power directorate that was not different from the Axis powers in its imperious attitude to how the world’s weak and poor should be governed’. 100

I will consider this tension and ambiguity in more depth in Chapter 6. The point to hold onto for the moment is that, in my argument, this continued tension and ambiguity is a function of the failure to adequately develop any robust concept of international duty and responsibility.

2 Food Regimes
Food interests were among the more important of the great power interests and the story of empire is also at the forefront of the work of Harriet Friedmann and Philip McMichael on food regimes. But where Mazower plays down the US influence on the establishment of the UN, US hegemony did shape the world food system.

Friedmann initially formulated the concept of a food regime as part of her research into the post-World War II international food order and the place of US food aid within this order. 101 Adopting a Marxist focus on the accumulation of capital, 102 her interest was in the role of agriculture in a capitalist world economy. 103 Subsequently, she

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98 Ibid 194.
99 Ibid.
100 Ibid 7.
101 Friedmann, above n 86, 248.
102 Ibid.
extended the analysis back to the 1870s, and, together with McMichael, continued to refine and systematise the approach. Food regime analysis ‘historicises the global food system’. The essential quality of a regime is stability (order) in international food relations, and this stability is a reflection of the geo-political power configuration of the time. But there are contradictions and tensions within the regime and these ultimately rupture into instability. Friedmann and McMichael have identified two food regimes: the first lasted from 1870–1930s and the second from the 1950s–70s. McMichael later extended this work and suggests that a third regime may have commenced in the mid-1980s and continues to this day.

The first food regime (1870s–1930s) spans the last stages of empire and the demise of the League of Nations. When an empire, Britain had positioned itself as the ‘workshop of the world’, whereby it imported food from the colonies and the settler nations and exported capital goods and other manufactures. In effect, the colonies and settler nations were provisioning British (and also European) wage workers with cheap food. But as empire drew to an end in the late 1800s and early 1900s, British hegemony was under threat from the competition between imperial powers ‘in a final scramble for empire’. One result of this competition was increased investment and production in colonies. The principal beneficiaries of this economic expansion were the metropolitan states, which were increasingly administered from the centre, a development made possible by improvements in communications and the emergence of administrative professionals.

The settler states, such as Canada and Australia, in contrast to the other colonies, had been allowed to develop representative governments and with that came the powers

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106 McMichael, above n 103, 140.
107 Ibid 139.
108 Friedmann and McMichael, above n 105, 95.
110 Ibid, above n 103, 141.
111 Ibid.
112 Friedmann and McMichael, above n 105, 96.
113 Ibid.
to levy taxes and regulate domestic and international commerce. These governments emulated the patterns of European agricultural and industrial production but, because they were able to produce at scale and at a lower cost, they were better able to meet ‘the large-scale provisioning of the growing European working classes’.\(^\text{114}\)

These developments were not without costs, however. There were ecological costs arising from the farming practices in the settler colonies, for example, and costs arising from the displacement of European agriculture, as it became less competitive relative to that of the settler states. Before long, the agricultural crisis in Europe also became an urban crisis. The response was a turn to economic nationalism through a more commercial approach to European agriculture and the spurning of international trade in agricultural products. The consequent collapse of their European markets prompted the settler states to adopt price support and other market control measures to protect their own producers — measures that would later be replicated in Europe and the newly decolonised states.\(^\text{115}\)

Stability returned to international food relations after World War II. Two features of the second food regime (1950s–70s) were the large increase in the number of states consequent to the decolonisation that had gained momentum from the establishment of the UN, and the shift from national to trans-national forms of agriculture and industry. One enhanced the place of the state in the international system, while the other undermined it. Central to both movements, though, was the hegemonic position of the US in the post-World War II international order.

Decolonisation extended the system of nation-states and the governments of the newly-decolonised states set about structuring their domestic economies for domestic political purposes, as had been done in Europe and the settler states. The ‘model’ structure offered to the newly-decolonised states was the model of US capitalism, by virtue of the dominant position the US now occupied in the international order. This model was one of an integrated national economy: a model of articulated agricultural-industrial development. Under this model, the agricultural sector served more to supply inputs for agricultural-based production and less to supply food and labour to

\(^{114}\) Ibid.

\(^{115}\) Ibid 101.
growing urban centres.\textsuperscript{116} The newly-colonised states internalised the articulated agriculture-industry model, thereby universalising the national model of economic development.\textsuperscript{117} But as Friedmann and McMichael point out, ‘the US model is misleading insofar as settler agriculture was a component of an integrated national economy only because it was at first an export sector.’\textsuperscript{118}

Trade, nevertheless, remained important to the new states but the larger number of nation-states led to greater economic competition between states. The result was a breakdown in old trading blocs. With colonial domination over world trade in retreat, US influence quickly filled the breach. The main factor driving this development was the US need to find markets for wheat surpluses that had built up under US wartime policies. But where settler states now faced reduced opportunities to export grain to Europe as a consequence of the post-World War II import substitution policies employed in Europe, the US had sufficient economic power to protect its own interests through subsidising exports of wheat surpluses to provide cheap wage-foods for industrial workers in the new states. This approach was reinforced by international agencies encouraging new governments to pursue cheap food policies to facilitate industrialisation and further disposal of US wheat stocks, as aid fitted neatly into this approach.\textsuperscript{119} An import dependence had been created.

While decolonisation was strengthening the position of states generally in international food relations, the transnational restructuring of agriculture was working in the opposite direction. This restructuring, which affected mainly meat and durable foods production, was to have a major impact on the international division of labour. Agricultural production became more specialised and agricultural products were increasingly produced for use as inputs for manufactured goods — as well as for final consumption. The boundaries between agriculture and industry had been blurred and the two were now much more integrated. Again, the US was at the centre of this change.\textsuperscript{120}

\textsuperscript{116} Ibid 111. Friedmann and McMichael also note that this model informed the Green Revolution.
\textsuperscript{117} McMichael, above n 103, 141.
\textsuperscript{118} Friedmann and McMichael, above n 105, 111.
\textsuperscript{119} Ibid 104.
\textsuperscript{120} Ibid 105–6.
During World War II, the US government encouraged the transformation of livestock production from handicraft and extensive systems, which involved large areas of land and minimal animal husbandry efforts, to scientific and intensive systems. This transformation continued after the war, as production systems were increasingly geared to mass production, particularly after 1950. The production scale of feedstock suppliers increased accordingly, as did the scale of the distribution. Mass producers and mass distributors were increasingly interlinked and these linkages extended beyond national boundaries.\textsuperscript{121} The progression was to specialised agricultures in different countries that were linked by global supply chains.\textsuperscript{122}

The industrialisation of agriculture led to the substitution of synthetic and artificial products for natural products, such as synthetic fibres for cotton, and natural and generic sweeteners and fats for sugar and oils. Mass production and mass consumption also led to greater product standardisation with quite significant impacts on farmers, who were now no longer supplying multiple customers (local and foreign), but rather were supplying oligopolistic corporate purchasers of raw materials for food manufactures.\textsuperscript{123}

Central to transformations in livestock production and synthetic substitutions were soy products, which were used in animal products and as substitutes for oils. But until 1973, soy was, outside Asia, almost exclusively a US crop, and the US was able to exploit its power to secure access for its soy products in Europe through the Marshall Plan and the General Agreement on Tariffs and Trade (GATT) negotiations.\textsuperscript{124} Furthermore, the US provided soy products as food aid to selected post-colonial states ‘on strategic perimeters of the Cold War’\textsuperscript{125} to secure their loyalty against communism.

Again, these transformations were not without cost. An international division of labour had been created. And the greater the specialisation, the greater the likelihood of rural communities no longer being able to provide for their own food needs. So, the internal tensions within the decolonisation and transnational movements eventually led to a

\textsuperscript{121} Ibid 106–7.
\textsuperscript{122} McMichael, above n 103, 141.
\textsuperscript{123} Friedmann and McMichael, above n 105, 105–10.
\textsuperscript{124} Ibid 109–10.
\textsuperscript{125} McMichael, above n 103, 141.
rupturing of the second food regime with the food crisis of the early 1970s. In the next section, we will see how this food crisis was a catalyst for the development of the concept of food security.\footnote{Friedmann, ‘The Political Economy of Food’, above n 86, 249.}

McMichael suggests that a third food regime may have commenced in the mid-1980s. New regions such as China and Brazil have been incorporated into animal protein chains and formerly differentiated supply chains have been consolidated through, for example, the ‘supermarket revolution’ and the global interrelationship between food and fuel. Whether stability has returned to the international food order remains an unsettled question, however.

Ultimately, as Friedmann and McMichael recognise, food regime analysis comes up against the institutional dimensions of the food problem. Their question is what is the appropriate unit of analysis? They see two possible answers: a truly global institution to regulate capital accumulation, or decentralised institutions, be they regional, local, or municipal, to reflect the politics of the communities served by those institutions.\footnote{Friedmann and McMichael, above n 105, 112–13.}

My question is what is the appropriate institution for addressing food problems? It is to this institutional dimension that I now turn, with the aim of showing how international institutions have struggled to take responsibility for problems of hunger and starvation.

II THE FAO AND FOOD SECURITY

This section covers the evolution of the FAO and the emergence of the concept of food security within this evolution. The discussion is segmented into two periods. The first extends from the establishment of the FAO to the 1974 World Food Conference. The conference was called in response to the food crisis of the early 1970s, which marked the end of the second food regime. And it was at this conference that the FAO proposed a definition of food security for the first time.

The second period covers events from the 1974 World Food Conference to the 2006–08 food crisis. This was a period of substantial change in the international approach to food problems, marked by expansion in the institutional machinery to address these
problems (including the creation of the WFP and IFAD), and of continued refinement of
the concept of food security. In broad terms, the concept evolved from one focused on
world food reserves to one focused on the national achievement of food security. 128
The major international event during this second period was the 1996 World Food
Summit.

A  From 1945 to the 1974 World Food Conference

In February 1946, within months of the FAO’s establishment, the UN General Assembly
called on governments and international organisations to address a deteriorating
international food situation. In response, the FAO called a Special Meeting on Urgent
Food Problems in May 1946. The focus of the meeting was on how to provide
emergency food supplies, and this led to a proposal for the creation of a World Food
Board. In line with the thinking that had emerged at Hot Springs, the Board was seen
as a way of channelling increased production to where it was needed in order to raise
nutritional levels. The concern was more with underpinning effective demand than
with accumulating surpluses. Accordingly, under the proposal, the Board would
maintain food reserves to offset crop failures throughout the world, purchase
agricultural surpluses for supply to countries in need of food supplies, and work to
stabilise prices on world markets. 129

The proposal to establish the Board was submitted to the second session of the FAO
Conference in 1946 and the Conference gave in-principle agreement to the proposal.
This agreement was not unanimous, however, and there was opposition from those
looking to establish the International Trade Organization alongside the Bretton Woods
institutions and from those who had been opposed to the use of buffer stocks since
the issue was discussed at the Hot Springs Conference. 130 Consequently, the
Conference referred the matter to the Preparatory Commission on World Food
Proposals.

The Preparatory Commission opposed the proposal for a World Food Board throwing

130 The Draft Havana Charter of 1948 provided for the establishment of the International Trade
Organization, as well as guiding principles for commodity agreements. But this organisation did not
come to fruition and stabilisation did not become part of GATT or the WTO negotiations. Ibid 67.
its support instead behind inter-government commodity agreements and a ‘famine reserve’. The conception the Commission favoured was for a reserve that would be held nationally by public corporations, but internationally administered under agreed rules. This proposal also failed to materialise, as did the proposal to the 1949 FAO Conference to establish an International Commodity Clearing House. The latter proposal called for the FAO to provide a clearing house as a way of better matching the food surpluses that had developed in the late 1940s to the inability of developing countries to finance food imports.\textsuperscript{131}

The international management of food reserves again became a focus for the FAO in the first half of 1950s, particularly in the context of providing emergency food assistance; the idea of a world food reserve that would provide emergency relief and reduce price volatility was revived in 1954–5. At the request of the UN General Assembly, the FAO submitted its report on ‘Functions of a World Food Reserve’ to the UN ECOSOC in 1956 and to the UN General Assembly at its 11\textsuperscript{th} session in 1957. Again, the initial indications of support did not translate into committed cross-country support, and the general interest in a world food reserve ended up being diverted into a push for national food reserves in the second half of the 1950s. National reserves were considered to be more viable and developed countries were reluctant to relinquish control over their own national initiatives, or to have these initiatives weakened.\textsuperscript{132} The problem with such a national arrangement, as Shaw notes, is that developing countries are most in need of the reserves but are the least able to provide them.\textsuperscript{133}

The FAO changed its approach to food problems with the launching of the ‘Freedom from Hunger Campaign’ in 1960. The Campaign was the initiative of the then-FAO director-general, Binay Ranjan Sen. Sen had been the Director-General of Food in the Indian administration during World War II and not long after his appointment to the FAO in 1957 he began the groundwork for the Campaign. His intention was to heighten international awareness of the problem of hunger throughout the world. His expectation was that this increased awareness would translate into pressure on

\textsuperscript{131} Ibid 32–6.
\textsuperscript{132} Ibid 36.
\textsuperscript{133} Ibid 60.
governments to intensify national and international efforts to combat hunger, as well as intensifying the FAO’s own efforts.\textsuperscript{134}

Originally, it was planned that the Campaign would culminate in a World Food Congress in 1963 to mark the 20\textsuperscript{th} anniversary of the Hot Springs Conference. But when the Campaign was ultimately launched on 1 July 1960, it was as a five-year programme and this was later extended for another five years, to 1970. The World Food Congress took place in 1963 in Washington, D.C., nevertheless, with President John F Kennedy delivering the opening address, just as Franklin D Roosevelt had done 20 years earlier. Despite the timing, the Congress remained the highpoint of the Campaign.\textsuperscript{135}

The Congress was held against the backdrop of the first UN Development Decade, which had been launched by the General Assembly in December 1961. The elimination of hunger was now set within a development framework and ‘development’ now nuanced the pursuit of growth. That is, development was presented as being consistent with making the most effective use of human and natural resources. It was, therefore, a route to higher economic and social growth rates and, in turn, a more equitable distribution of the world’s food resources.

The Campaign spoke of the goal of freeing the world of the scourge of hunger as being a joint responsibility of developing nations, developed nations, the UN and its specialised agencies, other international organisations, and non-government organisations. Yet, there was still no mention of freeing the world from hunger in the preamble of the FAO constitution. This addition would not occur until the 20\textsuperscript{th} FAO Conference in 1965, midway through the Campaign, when the words ‘and ensure humanity’s freedom from hunger’ were added to the preamble.\textsuperscript{136}

The Campaign also provided the impetus for the establishment of the World Food Programme. Following a US-led initiative, the UN General Assembly adopted a resolution in October 1960 on the Provision of Food Surpluses to Food-Deficit People.
through the United Nations System.\textsuperscript{137} Under the resolution, the FAO was invited after consulting Governments of member States, the Secretary-General and appropriate specialized agencies, to establish without delay procedures — in particular for consultation and the dissemination of information — by which, with the assistance of the United Nations system, the largest practicable quantities of surplus food may be made available on mutually agreeable terms as a transitional measure against hunger, such procedures to be compatible with desirable agricultural development as a contribution to economic development in the less developed countries and without prejudice to bilateral arrangements for this purpose and compatible with the principles of the Food and Agriculture Organization.\textsuperscript{138}

The ambiguities that had plagued the FAO since its establishment are again all too evident. Nevertheless, this did not prove to be an impediment to the WFP, and the transitional status ended with the establishment of the WFP as a permanent UN programme in 1965.\textsuperscript{139}

The 1970s began with the Second World Food Congress at The Hague in The Netherlands in 1970, the First World Food Congress in 1963 having recommended periodic congresses to review FAO world food surveys.\textsuperscript{140} The world food situation was to change dramatically not long after the second congress, however.

Poor harvests in 1972 that stemmed from unfavourable weather, coupled with the efforts of the US and Canada to take land out of production in an attempt to reduce their own surpluses, meant that world food production decreased for the first time since World War II. The Soviet Union now became a major grain importer and reserve stocks in the exporting countries were not sufficient to offset the lower production. Prices consequently rose. Production increased in 1973 but not by enough to prevent a further rundown in stock levels. By this time, the world was in the grips of a wider economic crisis that resulted from the first oil crisis of the 1970s. The world economy was now characterised by stagnant production, rising unemployment, and rising


\textsuperscript{138} Ibid art 4.

\textsuperscript{139} Since 1996, the governing body has been the 36-member WFP Executive Board. 18 members of the Board are elected by ECOSOC and 18 by the FAO Council.

\textsuperscript{140} Shaw, World Food Security, above n 36, 83.
inflation. With respect to agriculture, the higher energy prices fed into higher prices for fertiliser and power, as well as irrigation and other energy-related agricultural inputs. It was a dual crisis — a shortage of food and a shortage of critical inputs, particularly fertilisers. The 1974 harvest was still below that required to replenish stocks and economic imbalances worsened. While overall world food production had, on average, kept pace with population growth, many developing countries had moved from being net exporters of food prior to World War II to net importers, as their populations expanded quickly. Balance of payments financing problems ensued and grain aid was no longer available to the previous extent to alleviate these problems. Furthermore, an increasing proportion of world food production was being used for livestock production rather than directly for human consumption.\textsuperscript{141}

In response to the crisis, the UN General Assembly convened the World Food Conference in 1974. This proved to be a landmark event, as the food crisis had clearly called into question the adequacy of both the resources that had been directed to the fight against hunger and the institutional arrangements. It was also at this conference that the first international definition of food security was formalised, in the sense of an attempt to provide a standard definition for use by international organisations.\textsuperscript{142}

The Conference agreed on a definition of food security as

the availability at all times of adequate world food supplies of basic food-stuffs, particularly so as to avoid acute food shortages in the event of widespread crop failure, natural or other disasters, to sustain a steady expansion of food consumption in countries with low levels of \textit{per capita} intake and to offset fluctuations in production and prices.\textsuperscript{143}

Equally as important as the definition was the context for that definition. Food security was seen as one of the pillars of a world food policy that was needed to address the


world food problem. The three pillars of the policy were to increase production of food in the developing countries, improve the consumption and distribution of food, and establish a better system of food security. Food security, at this stage, was a risk management add-on to the strategy that had been fashioned at Hot Springs. It was about the stability of food supply, to be achieved through the management of buffer stocks, as paragraph 12 of the conference declaration — the Universal Declaration on the Eradication of Hunger and Malnutrition — makes clear:

As it is the common responsibility of the entire international community to ensure the availability at all times of adequate world supplies of basic food-stuffs by way of appropriate reserves, including emergency reserves, all countries should co-operate in the establishment of an effective system of world food security ...

Overall, the Conference Declaration is again plagued by ambiguity. The sentiment of the opening paragraph is a reaffirmation of the promise expressed at Hot Springs and it sets the tone for the document:

Every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties. Society today already possesses sufficient resources, organizational ability and technology and hence the competence to achieve this objective. Accordingly, the eradication of hunger is a common objective of all the countries of the international community, especially of the developed countries and others in a position to help.

This short opening paragraph manages to squeeze in references to individuals, rights, society, countries, developed countries, and the international community. In the paragraphs that immediately follow, the discussion turns to the responsibilities of governments, states, industrialised countries, and developed countries. In line with ‘the common responsibility of the entire international community to ensure the availability at all times of adequate world supplies of basic food-stuffs’, individual state responsibility was to ‘remove the obstacles to food production and to provide proper

144 Ibid [47].
147 Ibid.
148 Ibid [1].
incentives to agricultural producers\textsuperscript{149} through national plans, sovereign judgement and internal legislation.\textsuperscript{150}

The Conference also called for a number of institutional enhancements to improve the effectiveness of the international response to international food problems, and the implementation of this institutional machinery is discussed in the next section.

B \textit{From the 1974 World Food Conference to the 2006–8 Food Crisis}

A major concern of the 1974 World Food Conference was the need for additional investment to increase agricultural production.\textsuperscript{151} On the initiative of the Organization for Petroleum Exporting Countries (OPEC), which were accumulating significant foreign currency reserves as a result of the rise in oil prices in the early 1970s, the Conference resolved to establish a specialised agricultural financial institution.\textsuperscript{152} The Conference resolution mandated IFAD to finance ‘agricultural development projects for food production in the developing countries’.\textsuperscript{153} When the agreement to establish IFAD as a specialised UN agency was signed in June 1976, the mandate was revised to give greater focus to boosting agricultural production in the poorest food-deficit countries in order to raise productivity, incomes, and nutrition of the rural poor.\textsuperscript{154} Currently, the goal of IFAD is expressed as one of ‘empower[ing] poor rural women and men to achieve higher incomes and improved food security’.\textsuperscript{155}

Another major institutional development arising from the Conference was the call for the UN General Assembly to establish a World Food Council. This council was intended to act as a coordinating body for policies on food production, nutrition, food security, food trade, food aid, and other food-related matters across the UN system, in order to make UN action more effective.\textsuperscript{156} Shaw’s assessment is that the World Food Council was intended to be ‘a political overview body, serving as the eyes, ears, and conscience

\textsuperscript{149} Ibid [4].
\textsuperscript{150} Ibid.
\textsuperscript{151} Shaw, \textit{Global Food and Agricultural Institutions}, above n 56, 63.
\textsuperscript{153} Ibid [1].
\textsuperscript{154} Shaw, \textit{World Food Security}, above n 36, 82–3.
of the UN system regarding world food security issues'.\textsuperscript{157} The General Assembly duly approved its establishment in December 1974 as an organ of the United Nations. It would be located in Rome and would report to the General Assembly through ECOSOC. The 36-member council would comprise ministers of agriculture from member countries.

The 1980s, habitually described as ‘the lost decade of development’,\textsuperscript{158} was a relatively quiet decade in terms of international food-related initiatives. Nevertheless, it was a time of reflection on the understanding of hunger and the concept of food security. In the background was the economic hardship being experienced by many countries. Two important influences were the African famine of 1984–5, and the impacts of IMF and World Bank structural adjustment programmes that were imposed on developing countries\textsuperscript{159} — programmes which found their justification in the uncritical application of western, liberal, mainstream economics.

It was a period where Amartya Sen’s work on entitlements and the work of Drèze and Sen on the public policy dimensions of hunger found receptive audiences.\textsuperscript{160} In line with this thinking, the FAO reviewed its approach to food security to put more emphasis on economic access to food alongside physical access, and this led to a revised definition of food security in 1983. Food security was now concerned with ‘ensuring that all people at all times have both physical and economic access to the basic food that they need’.\textsuperscript{161}

A few years later, in 1986, an influential World Bank report on food security and poverty and hunger drew attention to the distinction between transitory and chronic food insecurity,\textsuperscript{162} where the latter was a reflection of deep-seated structural poverty.\textsuperscript{163} With this distinction in mind, the World Bank proposed a definition of food security as ‘access of all people at all times to enough food for an active and healthy

\textsuperscript{157} Shaw, \textit{World Food Security}, above n 36, 206.
\textsuperscript{158} Ibid 385.
\textsuperscript{159} Ibid.
\textsuperscript{160} Ibid.
\textsuperscript{162} World Bank, ‘Poverty and Hunger: Issues and Options for Food Security in Developing Countries’ (World Bank, Policy Paper Number 9275, February 1986).
\textsuperscript{163} FAO, \textit{Trade Reforms and Food Security}, above n 145, [2.2].
life’ and this definition gained a general acceptance. If the 1980s was the lost decade of development, then the 1990s was the decade of its rediscovery. It was a decade of international conferences that were united through their developmental focus. Conference themes ranged through environment, human rights, population, women, and children. The major food-related events were the International Conference on Nutrition in 1992, the World Bank-hosted World Conference on Overcoming Global Hunger in 1993, and the World Food Summit in 1996.

The major institutional development of the 1990s was the disbanding of the World Food Council in 1993. This outcome was the final chapter in a textbook case on institutional failure. According to Shaw, the Council had been hobbled from its start in 1974 in that it was only ever a compromise between those that wanted a more powerful international agency and those that were against new UN food entities. In these circumstances, it was never able to claim sufficient authority and resources to be an effective coordinator across the UN. Its ‘role became a confused mixture of general advocacy and action plans’. The major failing, though, for Shaw, was that the Council did not distinguish between a world food problem and a world food insecurity problem. The former was concerned with the adequacy of production and the stability of food supplies and the latter incorporated the additional concern with access to the food that was available. Ministers may have understood agriculture, but they were not equipped to deal with the complexity of influences on food security.

Not long after the demise of the World Food Council, the FAO established its Special

164 World Bank, ‘Poverty and Hunger’, above n 162, 1.
165 FAO, Trade Reforms and Food Security, above n 145, [2.2].
172 Ibid 219.
Programme for Food Security in September 1994. The FAO saw this programme as a more focused vehicle for transmitting knowledge and technical assistance on food security, particularly for low-income, food-deficit countries.

The next major milestone was the World Food Summit that was held from 13–17 June 1996 in Rome. This event came about largely through the efforts of the then-director-general Jacques Diouf. He was appointed as director-general in November 1993 and was the first African to head the FAO. In his first policy statement to the FAO Council in May 1994, he proposed holding a world food summit. His rationale was that such a summit was needed to better align the FAO with the direction that the FAO Conference had set for it. The goals of the 1974 World Food Conference had not been met and the continued existence of widespread under-nutrition nagged at the conscience of the international community. In addition, the agricultural capability to meet the challenge had been called into question.

The 1996 Summit was an unusual event in two respects. First, it was not held in response to a world food crisis or even a serious deterioration in the longer-term food situation in the world. The international humanitarian focus at the time was on regional conflicts in central Africa and the former Yugoslavia, and the UN was also pre-occupied with issues related to the reform of its structure and financing and the appointment of a new secretary-general. Second, the main conference documents — the *Rome Declaration on World Food Security* and the *World Food Summit Plan of Action* — were adopted unanimously at the beginning of the summit, having been thrashed out with various stakeholders over the previous 18 months with the FAO’s Committee of World Food Security playing the coordination role.

The *Rome Declaration* unequivocally regarded responsibility for food security as primarily a national matter. The Summit was ‘[c]onvinced that the multifaceted character of food security necessitates concerted national action, and effective

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175 Shaw and Clay, above n 173, 72–3.
176 See Joachim Müller (ed), *Reforming the United Nations: New Initiatives and Past Efforts* (Kluwer in Association with the United Nations, 1997) for a detailed review of 50 key reforms that were under discussion.
international efforts to supplement and reinforce national action’. These sentiments are reflected in the first paragraph of the Plan of Action and the revised definition of food security therein:

The Rome Declaration on World Food Security and the World Food Summit Plan of Action lay the foundations for diverse paths to a common objective — food security, at the individual, household, national, regional and global levels. Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. In this regard, concerted action at all levels is required. Each nation must adopt a strategy consistent with its resources and capacities to achieve its individual goals and, at the same time, cooperate regionally and internationally in order to organize collective solutions to global issues of food security. In a world of increasingly interlinked institutions, societies and economies, coordinated efforts and shared responsibilities are essential.

Similar comments are expressed in paragraph 12:

The implementation of the recommendations contained in this Plan of Action is the sovereign right and responsibility of each State through national laws and the formulation of strategies, policies, programmes, and development priorities, in conformity with all human rights and fundamental freedoms, including the right to development, and the significance of and the full respect for various religious and ethical values, cultural backgrounds and philosophical convictions of individuals and their communities should contribute to the full enjoyment by all of their human rights in order to achieve the objective of food security for all.

There are two other aspects of the Declaration that are particularly noteworthy. The first is the importance attached to free trade. Commitment Four of the Plan of Action reads: ‘[w]e will strive to ensure that food, agricultural trade and overall trade policies are conducive to fostering food security for all through a fair and market-oriented world trade system.’ The insertion of this text is not surprising given that the WTO was established in the previous year. But there is no attempt to reconcile this

179 FAO, World Food Summit Plan of Action (1996) [1].
180 Ibid [12].
181 Ibid Commitment Four (emphasis added).
commitment with the national responsibility that had been emphasised elsewhere. The second noteworthy aspect is the call to place more importance on the right to food. The right to food will be discussed more fully in the next section but the point for now is that international organisations have struggled to reconcile free trade and the right to food, and this struggle typifies the struggle between universal human rights and market-based prescriptions of neoclassical economics.

Despite the problematic timing and doubts over the need for the event, the Summit was, in the assessment of Shaw and Clay, successful in drawing attention to the continued problems of food insecurity and at integrating food security into the agendas of the other international conferences of the period; this type of event was needed to keep problems of poverty and hunger at the forefront of any agenda for international action. Shaw and Clay’s assessments of the Summit’s efforts to address the institutional incoherence within the UN system, and to reconcile international trade and food security, were considerably more negative, however. The overarching problems, in their view, were that, first, the complex, multifaceted nature of food security made it difficult to find a consensus on policy prescriptions; and, second, this difficulty was exacerbated by the proliferation, and lack of integration, of institutions involved with food security. Food security had become everybody’s business and thus risked becoming nobody’s business. To put this another way, there was no overarching responsibility in this institutional framework.

The first half of the 2000s was marked by two major international events: the United Nations Millennium Summit in 2000 and the World Summit in 2005. Food security remained on the international agenda, although never fully in the spotlight. This was not a reflection on the efforts of the FAO, however, and two FAO publications during this period warrant particular comment. The first was the refinement of the FAO’s definition of food security in the 2001 edition of the FAO’s annual flagship publication *The State of Food Insecurity in the World*. Food security was now ‘a situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an

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182 Shaw and Clay, above n 173, 73.
183 Ibid 59.
active and healthy life’. Also, The World Food Summit: Five Years Later, was held in June 2002 as part of the
review mechanism that was agreed at the 1996 World Food Summit. This event was largely a reaffirmation of the 1996 summit, but one important outcome was the Summit’s invitation to the FAO Council ‘to establish an intergovernmental working
group to develop a set of voluntary guidelines to support Member States’ efforts to
achieve the progressive realization of the right to adequate food in the context of
national food security’. The intergovernmental working group was established in
November 2002 and the Voluntary Guidelines were published by the FAO in 2005, having been adopted by the 127th session of the FAO Council in November 2004. The national focus is plain to see, but the most innovative aspect of the Voluntary
Guidelines is the merging of food security and the right to food in an FAO document.

III THE RIGHT TO FOOD
This section examines the source of the right to food in international law and the
evolution of the content of the right. As noted in the previous section, the World Food
Summit in Rome in 1996 was important to reenergising discussion of food security. Similarly, it was an important milestone in the reinvigoration of the right to food, although it was not an outcome of the Summit that received much attention.

The explanation possibly lies in the fact that the references to the right to food lie deep
in the Rome Declaration — among the follow-up actions, as part of the overall plan of
action.

Under Commitment Seven of the Declaration, the FAO committed to ‘implement,
monitor, and follow-up [the] Plan of Action at all levels in cooperation with the
international community’. And, as part of this commitment (Objective 7.4 (e)), the
FAO was to

<http://www.fao.org/docrep/003/y1500e/y1500e06.htm#P0_0>.
185 FAO, Declaration of the World Food Summit: Five Years Later (2002) [10].
186 FAO, Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the
187 FAO, World Food Summit Plan of Action, above n 179, [61(e)].
[I]nvite the UN High Commissioner for Human Rights, in consultation with relevant treaty bodies, and in collaboration with relevant specialized agencies and programmes of the UN system and appropriate intergovernmental mechanisms, to better define the rights related to food in Article 11 of the Covenant and to propose ways to implement and realize these rights as a means of achieving the commitments and objectives of the World Food Summit, taking into account the possibility of formulating voluntary guidelines for food security for all.188

The Commission on Human Rights agreed to the request189 and the eventual outcome was the establishment of the office of the Special Rapporteur on the Right to Food (the Special Rapporteur) by the Human Rights Commission in April 2000.190 The Special Rapporteur is an independent expert appointed by the Commission and the broad role of the office is to examine and report back on country situations or specific issues related to the right to food.

The office of Special Rapporteur was endorsed by the Human Rights Council in September 2007 (the Human Rights Council having superseded the Commission on Human Rights in 2006) for a further three years, and the scope of the mandate was widened at that time.191 That mandate is premised on the universal rights of mankind, as evidenced by paragraph 2 of the Mandate:

(a) To promote the full realization of the right to food and the adoption of measures at the national, regional and international levels for the realization of the right of everyone to adequate food and the fundamental right of everyone to be free from hunger ...

(d) To submit proposals that could help the realization of Millennium Development Goal No. 1 to halve by the year 2015 the proportion of people who suffer from hunger ...

(f) To work in close cooperation with all States, intergovernmental and non-

188 Ibid.
governmental organizations, the Committee on Economic, Social and Cultural Rights, as well as with other relevant actors representing the broadest possible range of interests and experiences, within their respective mandates, to take fully into account the need to promote the effective realization of the right to food for all ... 192

A Locating the Right to Food

Given the emphasis that is placed on the right to food, a common perception is that the right has some standalone status as an international human rights instrument. In fact, the right to food is subsumed within a broader right to an adequate standard of living. The foundations of the right to an adequate standard of living and, hence, the right to food, lie in the Charter of the United Nations and the Universal Declaration of Human Rights. The Charter reaffirmed fundamental human rights and human dignity directly in its preamble and indirectly through the emphasis on economic and social progress and development193 and member countries’ commitment to those goals.194 The Universal Declaration was adopted by the General Assembly in December 1948, a little over three years after the Charter was adopted. Article 25(1) states that

[e]veryone has the right to a standard of living adequate for health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.195

The right to an adequate standard of living is contained within Article 11 of the International Covenant on Economic, Social, and Cultural Rights196 (ICESCR). Article 11(1) specifies the right:

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, clothing and housing, and to the continuous improvement of living conditions. The States parties will take appropriate steps to ensure the realization of this right, recognizing to this

192 Ibid para 2.
193 Charter of the United Nations art 55.
194 Ibid art 56.
195 Universal Declaration of Human Rights.
effect the essential importance of international cooperation based on free consent.\footnote{Ibid art 11(1).}

And Article 11(2) puts the onus for realising the right on individual states and outlines the broad approaches to give effect to the right within a state and across states:

The States parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed:

(a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.\footnote{Ibid art 11(2).}

Note the specific reference to ‘freedom from hunger’ alongside the by-now familiar themes of production, distribution, and technical knowledge.

The ICESCR came into life alongside the \textit{International Covenant on Civil and Political Rights}\footnote{\textit{International Covenant on Civil and Political Rights}, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).} (ICCPR), but this distinction was not originally intended. It was a legacy of the drafting process. After the Commission on Human Rights was established in 1946, it was directed by the General Assembly to draft a Bill of Rights. In 1947, the drafting committee initially decided to prepare two documents: a declaration (of general principles), and a convention (detailing specific rights and their limitations). This would later become three documents with the addition of an implementation document, at which time the ‘convention’ was renamed a ‘covenant’. Collectively, the three documents were referred to as the ‘International Bill of Human Rights’.\footnote{Office of the High Commissioner for Human Rights, Fact Sheet No.2 (Rev.1), ‘The International Bill of Human Rights’.} The declaration took shape at an early stage, but time constraints and the more complex discussions on the details of a convention delayed progress on the other two

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\footnote{Ibid art 11(1).}
\footnote{Ibid art 11(2).}
\footnote{\textit{International Covenant on Civil and Political Rights}, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).}
\footnote{Office of the High Commissioner for Human Rights, Fact Sheet No.2 (Rev.1), ‘The International Bill of Human Rights’.}
documents. The declaration was therefore submitted alone through ECOSOC to the General Assembly, which adopted the *Universal Declaration of Human Rights* in December 1948.  

On the same day, the General Assembly requested the completion of the covenant and implementation documents. Up to this point, the drafting committee had only been working on one covenant and the development work continued in this vein until the sixth session of General Assembly in 1951–2, when the General Assembly directed that two covenants were needed — one to cover civil and political rights and the other to cover economic, social, and cultural rights. The General Assembly further directed that there should be as many common articles as possible across the two covenants and that an article on the right to self-determination for all peoples should be included.  

Drafting of both covenants had been completed by the ninth session of the General Assembly in 1954 and a detailed article-by-article review of both covenants began in 1955. It would be eleven years, however, before the General Assembly adopted both covenants through resolution 2200 A (XXI) of 16 December 1966. And it would be a further ten years before ICESCR entered into force on 3 January 1976 with the depositing of the 35th instrument of ratification.  

Up to this point, as Matthew Craven notes, the ICESCR was ‘only [...] a textual reference point subject to the speculative claims of both its proponents and detractors’. The reason was that there was no entity mandated to oversee the implementation of, and compliance with, the Covenant. It would take yet another ten years before the Committee on Economic, Social, and Cultural Rights was established in 1986 and given that mandate — 30 years after the drafting of the Covenant commenced.  

The burning question is why did it take so long for the Covenant to be ratified and for the UN itself to respond seriously to its existence? The split into two covenants was  

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201 Ibid.  
202 Ibid.  
203 Ibid.  
205 Ibid.
certainly a factor, but the more important factor was the lack of traction for human rights, generally, within the international community until the late 1970s.

Craven explains the history behind the split into two covenants. There was a perception that developed during the drafting ‘that the two categories of rights were different in nature, origin, and significance’ making a single covenant impractical and politically unacceptable.\footnote{Ibid 7.} The more important factor, though, in his assessment, was the ideological conflict between East and West:

Soviet States, on the one hand, championed the cause of economic, social, and cultural rights, which they associated with the aims of the socialist society. Western States, on the other hand, asserted the priority of civil and political rights as being the foundation of liberty and democracy in the ‘free world’.\footnote{Ibid 8–9.}

This is not to say that the West did not favour the pursuit of improved social and economic conditions — and the discussion of the establishment of the FAO clearly demonstrates otherwise. Rather, the conflict was more about whether capitalism or communism would best deliver these improved social and economic conditions.\footnote{Samuel Moyn, above n 20, 222.}

So, despite the appearances of human rights being central to the Charter and the Universal Declaration, they were, to use Samuel Moyn’s words, ‘peripheral to both wartime rhetoric and post-war reconstruction, not central to their outcome’, and neither gave rise to any substantive human rights movement.\footnote{Ibid 7.} Nor did human rights get the traction envisaged in the UN Charter when misgivings over superpower rivalry arose in the 1960s. It was not until the 1970s that human rights emerged, ‘seemingly from nowhere’.\footnote{Ibid 3.}

Moyn’s explanation for the delayed emergence is that ‘other utopian visions prospered’\footnote{Ibid.} — visions that ‘called for community at home, redeeming the United States from hollow consumerism, “socialism with a human face” in the Soviet empire, or further liberation from a so-called neo-colonialism in the third world’. Reinforcing

\begin{footnotes}
\footnotetext[206]{Ibid 7.}
\footnotetext[207]{Ibid 8–9.}
\footnotetext[208]{Samuel Moyn, above n 20, 222.}
\footnotetext[209]{Ibid 7.}
\footnotetext[210]{Ibid 3.}
\footnotetext[211]{Ibid.}
\end{footnotes}
the dominance of these utopias was the absence of human rights non-government organisations (NGOs): these were yet to emerge.\textsuperscript{212}

The turnaround came in the 1970s. A number of factors were at play:

- the search for a European identity outside Cold War terms; the reception of Soviet and later East European dissidents by politicians, journalists, and intellectuals; ... the American liberal shift in foreign policy in new, moralized terms, after the Vietnamese disaster ... the end of formal colonialism and the crisis of the postcolonial state.\textsuperscript{213}

The most significant factor for Moyn, though, was the ideological and political collapse of these utopias. Human rights now filled the void that existed with this collapse and became an international language because it talked across these former divides.\textsuperscript{214}

This reawakening of rights was selective, however, and social and economic rights were not part of the initial groundswell:

- In contrast, the conditions of totalitarian and authoritarian rule that were the context for the breakthrough of human rights in the 1970s meant that social rights simply did not figure on the agenda, as the world moved on from the high tide of social democratic commitments. Social rights were absent from Eastern dissidence, and Latin American leftists seeking alliance abroad muted their critiques of capitalism to do so, while their Western audiences in an era of economic shock stripped down their appeals to focus on political and civil basics.\textsuperscript{215}

But, as Moyn explains, human rights advocates ‘were forced to confront the need for [a] political agenda and programmatic vision’,\textsuperscript{216} rights could not survive as a moralist anti-politics. Western Europe led the way in this regard in the 1980s, as demonstrated by the decisions of the European Court of Human Rights.\textsuperscript{217}

Increasingly, all political concerns had to be formulated and addressed within a rights discourse. In this environment, a surge in social and economic rights consciousness

\textsuperscript{212}Ibid.  
\textsuperscript{213}Ibid 7.  
\textsuperscript{214}Ibid.  
\textsuperscript{215}Ibid 222.  
\textsuperscript{216}Ibid 213.  
\textsuperscript{217}Ibid 218.
was inevitable.\textsuperscript{218}

\subsection*{B The Normative Development of the ICESCR and the Right to Food}

Craven credits the CESCR with reinvigorating the Covenant through its supervision and work on the normative development of the Covenant.\textsuperscript{219} As he notes, article 11 of the ICESCR is wide-ranging and general. This consequently raises a number of interpretative questions, partly because the realisation of the right cuts across a variety of technical areas, such as nutrition, economics, and agriculture,\textsuperscript{220} and partly because it seems to make a distinction between the adequacy of food for survival and the adequacy of food consistent with human dignity through the split between article 11(1) and 11(2).\textsuperscript{221} This latter distinction lurks awkwardly just below the surface in much of the UN work on food security and the right to food. It is an important distinction, in my view, and it resurfaces later in the thesis. Donald Buckingham also comments on these interpretative problems. His contention is that the right to food is best understood as a ‘bundle of rights related to food’ — the right of everyone to be free from hunger, the right of everyone to safe and nutritious food, and the right to adequate food — that should be implemented at various levels.\textsuperscript{222}

During the initial drafting work in 1951 and 1952, two articles had been proposed: one covering the right to adequate food, clothing, and housing; and the other covering the right to an adequate standard of living and the continuous improvement of living conditions. This split proved contentious and the compromise reached in 1955 was the wording that is now article 11(1). Article 11(2) was not proposed until 1963, on the suggestion of the then-director-general of the FAO,\textsuperscript{223} part-way through the FAO’s Freedom from Hunger Campaign that had commenced in 1960. It should also be remembered that the World Food Congress was held in 1963 to mark the 20\textsuperscript{th} anniversary of the Hot Springs Conference.

While the renewed focus on the specificity of the right to adequate food within the

\begin{footnotesize}
\begin{footnotes}{\footnotesize
\textsuperscript{218} Ibid 222–3.
\textsuperscript{219} Craven, above n 204, 1.
\textsuperscript{220} Ibid 289.
\textsuperscript{221} Ibid 288, 306.
\textsuperscript{222} Donald E. Buckingham ‘Food Rights and Food Fights: A Preliminary Legal Analysis of the Results of the World Food Summit’ (1998) 19 Canadian Journal of Development Studies 209.
\textsuperscript{223} Ibid 288–9.
\end{footnotes}
\end{footnotesize}
right to an adequate standard of living was a consequence of the 1996 World Food Summit and the establishment of the Special Rapporteur on the Right to Food, it also owes a debt to the earlier work of Eide and Alston, among others. Interestingly, Eide’s initial work on the topic was in the context of anti-discrimination.

The most comprehensive UN interpretation of the right to adequate food is found in CESC General Comment 12. Similar to the situation with the establishment of a Special Rapporteur on the Right to Food, General Comment 12 was prompted by the request during the 1996 World Food Summit to improve the definition of the rights relating to food, as provided for in Article 11 of the ICESCR, and by a special request to review the World Food Summit Plan of Action against the actions required to implement article 11 of the ICESCR.

In line with this request, the CESC elaborated on the normative content of the right, the national implementation of the right, and the national and international obligations associated with the right. But it did not do so before first affirming that the right to food was ‘indivisibly linked to the inherent dignity of a human person’ and was fundamental to the realisation of other rights in the UDHR.

In the Committee’s assessment, the right to adequate food is realised when every man, woman and child, alone or in a community with others, [has] physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However,

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224 The current Special Rapporteur on the Right to Food, Olivier De Schutter, credits Eide as being at the forefront of developing the content of the right to food. Olivier De Schutter, ‘The Role of the Right to Food in Combating Global Hunger’ (Castan Centre for Human Rights/King and Woods Mallesons Annual Lecture, Melbourne, 19 June 2012) <http://www.law.monash.edu.au/castancentre/events/2012/right-to-food.html>; Asbjørn Eide et al (eds), Food as a Human Right (United Nations University, 1984); P Alston and K Tomasevski (eds), The Right to Food (Martinus Nijhoff, 1994).


227 Ibid [4].
States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural disasters.\footnote{228} According to General Comment 12, adequacy is context-specific and determined by a number of factors: ‘social, economic, cultural, climatic, ecological and other conditions’.\footnote{229} The core content of the right, again according to General Comment 12, implies availability and accessibility, where availability captures ‘a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture’. This understanding of availability covered both self-sufficiency as well as reliance on market-based production and distribution systems to match supply and demand.\footnote{230} The context here is the elaboration of the right to adequate food but it is remarkably similar to the sentiments expressed at Hot Springs on the role of the FAO. Accessibility encompassed economic and physical accessibility.\footnote{231} Long-term availability and accessibility were implicit in the notion of sustainability. This was ‘intrinsically linked’\footnote{232} to food security, which the Committee appears to equate with the notion of adequate food.\footnote{233}

General Comment 12 unequivocally views implementation efforts as national strategies, but it does recognise that the strategies will vary state-by-state and that individual states needed discretion.\footnote{234} It is silent on international implementation efforts, other than that states not take action that will impact realising the right in another state.\footnote{235}

Within national strategies, General Comment 12 seems to privilege a national food resource base: ‘As part of their obligation to protect people’s resource base for food, States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.’\footnote{236} But this privileging of a national resource base seems to sit uncomfortably with comments on

\footnotesize{\begin{enumerate}
  \item Ibid [6].
  \item Ibid [7].
  \item Ibid [12].
  \item Ibid [13].
  \item Ibid [7].
  \item Ibid.
  \item Ibid [21]–[28].
  \item Ibid [36].
  \item Ibid [27].
\end{enumerate}}
the importance of trade and markets to the availability of food elsewhere in General Comment 12.

A framework law on the right to food was regarded as a ‘major instrument’ of national implementation strategies under General Comment 12.²³⁷ Such a law should address: the purpose of the law; targets or goals for the law; timeframes for achieving the targets; the means, in broad terms, for achieving the goals; institutional responsibility; national monitoring mechanisms; and possible recourse measures.²³⁸

General Comment 12 also elaborates on the obligations of states to achieve the right, building on the CESC’s earlier General Comment 3.²³⁹ These obligations extend to entities regulated by the state as well as to the direct action of states. The CESC considers that there are three types of obligations: to respect, to protect and to fulfil:

The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure the livelihood, including food security.

Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by means at their disposal, States have the obligation to fulfil (provide) that right directly.²⁴⁰

In General Comment 3, the CESC addressed the progressive realisation of the rights contained in ICESC — ‘the principal obligation of result’.²⁴¹ It acknowledged that the rights will not be fully realised in a short timeframe, but was at pains to point out that ‘this should not be misinterpreted as depriving the obligation of all meaningful

²³⁷ Ibid [29].
²³⁸ Ibid.
²⁴¹ Committee on Economic, Social and Cultural Rights, The Nature of States Parties Obligations, above n 239, [41].
content’.\textsuperscript{242} The obligation is ‘to move as expeditiously and effectively as possible towards that goal’.\textsuperscript{243} More telling, though, is the CESC’s view that a state is obliged ‘to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances’.\textsuperscript{244} In other words, a lack of domestic resources does not absolve the state of its obligation. The implication, presumably, is that the state has to actively pursue the needed resources elsewhere.

Article 11 recognises the importance of ‘international co-operation based on free consent’, the nature of which, Craven notes, was ‘[t]he most controversial element in the drafting of article 11’..\textsuperscript{245} Craven’s view was that mere recognition of the importance of international cooperation did not constitute a binding legal obligation, and that it served perhaps to draw attention to article 2(1).\textsuperscript{246}

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.\textsuperscript{247}

General Comment 12 only has two paragraphs on the nature of international obligations. The first paragraph certainly refers to article 2(1), among other references, but, by starting the sentence with the words ‘[i]n the spirit of’, it does not clarify the nature of the obligation. The full sentence reads:

In the spirit of article 56 of the Charter of the United Nations, the specific provisions contained in articles 11.1, 2.1, and 23 of the Covenant and the Rome Declaration of the World Food Summit, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide

\textsuperscript{242} Ibid.
\textsuperscript{243} Ibid.
\textsuperscript{244} Ibid [11].
\textsuperscript{245} Craven, above n 204, 296.
\textsuperscript{246} Ibid 327.
\textsuperscript{247} International Covenant on Economic, Social and Cultural Rights, above n 196.
the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end. 248

The second paragraph on international obligations states that measures such as food embargoes ‘should never be used as an instrument of political and economic pressure’, as these measures affect food production and access to food in other countries. 249

General Comment 12 also addresses food aid, which it states ‘should be based on the needs of the intended beneficiaries’ and which should ‘facilitate the return to food self-reliance of the beneficiaries’. 250

C The Special Rapporteur on the Right to Food

The Special Rapporteur addressed the meaning of the right to food in his initial reports to the General Assembly and Commission on Human Rights in 2001, not long after the office was established in April 2001. In these reports, the Special Rapporteur notes that the right to food is linked to the right to life contained in the ICCPR 251 and that it was typically presented as part of a generic right to an adequate standard of living or as the right to be free from hunger. 252 The Special Rapporteur also made the link between the right to adequate food and food security, which was that understanding food security was important to understanding the minimum standards necessary to give effect to the right. 253 Food security was a corollary of the right to food. 254 Here, the Special Rapporteur is using ‘corollary’ in the sense that food security is a natural consequence of the right to food. It would be more accurate to say that the right to food has been defined in the terms of food security and that there is no useful distinction between the two concepts, a point that the discussion on the normative

249 Ibid [37].
250 Ibid [39].
254 Ziegler, Report by the Special Rapporteur on the Right to Food, above n 252, [15].
content of the right also reinforces.

The Special Rapporteur presented his own definition of the right to food in the report to the General Assembly in 2001. This was modified slightly in the report to the Commission on Human Rights several months later, and continues to be used by the present Special Rapporteur. Under this definition the right to food is

the right to have regular, permanent, and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.\(^\text{255}\)

While this definition was close to the CESCR specification of the right, it incorporates elements of food security, as contained in the definition used in the *World Food Summit Plan of Action*, and it attempts to capture the human suffering that was a consequence of not realising the right.\(^\text{256}\) That suffering was shortly to become the focus of international attention with the onset of another international food crisis in the mid-2000s.

IV THE 2006–08 FOOD CRISIS

As discussed in Chapter 1, food prices began increasing in early-2002 before escalating in late-2006 and early-2007. By mid-2007, the FAO had become more vocal in warning of an impending food crisis. The FAO Council responded at its 34\(^\text{th}\) session in November 2007 with a call for a series of preliminary meetings and consultations in advance of a high-level conference on world food security and the challenges posed by climate change and bioenergy. And the FAO itself launched its ‘Initiative on Soaring Food Prices’, targeted at assisting small farmers to produce more and thereby generate higher incomes.

Food prices rose significantly in the ensuing months, against a backdrop of rising fuel prices, natural disasters in several countries, and generally unfavourable climatic

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\(^{255}\) Ibid [24].

\(^{256}\) Ziegler, Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food, above n 251, [23].
conditions that were widely attributed to climate change. The impacts were now so extensive across countries and across regions that the crisis was seen as global. Pressure was building for an international response and this part provides an overview of that response, with a particular focus on the Bretton Woods institutions and the Special Rapporteur on the Right to Food.

A  **Mobilising the International Community**

Once the international community felt compelled to respond, the international machinery moved quickly between April–July 2008. In early April 2008, the President of the World Bank Group, Robert B Zoellick, began calling for a ‘New Deal for Global Food Policy’ and the Bank prepared a package of responses, the most prominent of which was the introduction of the USD 1.2 billion Global Food Crisis Response Facility on 29 May 2008.

Meanwhile, the United Nations System Chief Executives Board for Coordination established the High-Level Task Force (HLTF) on the Global Food Crisis, under the leadership of the Secretary-General in April 2008. The HLTF was mandated to develop a plan for a coordinated UN response and duly produced the Comprehensive Framework for Action (CFA), which continues to be developed. Parts of the framework were first circulated at the 2008 Rome High-Level Conference and the conference declaration encouraged the HLTF, and the UN system generally, to

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258 United Nations System Chief Executives Board for Coordination, Summary of Conclusions, [16], UN Doc CEB/2008/1 (2008). The Chief Executives Board is the vehicle through which the heads of the autonomous UN specialised agencies coordinate with each other and other entities within the UN system. It is chaired by the Secretary-General and reviews issues confronting the UN system and approves system-wide policy statements.
259 The High Level Task Force comprised heads of the UN specialised agencies, including the Bretton Woods institutions, as well as relevant UN funds and programmes and departments and offices of the Secretariat. The Director-General of the FAO was the vice-chair and the Task Force’s work was supported by the UN Secretariat and coordinated by the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator. See United Nations, The Secretary-General’s High Level Task Force on the Global Food Security Crisis <http://www.un.org/en/issues/food/taskforce/background.shtml>.
260 United Nations System Chief Executives Board for Coordination, above n 258, [16].
261 The Comprehensive Framework for Action represents the Task Force’s joint position on the actions needed to address the threats and opportunities arising from the global food crisis; develops policy responses aimed at avoiding future crises; and enhances country, regional and global food security and nutritional security. United Nations, The Secretary-General’s High Level Task Force on the Global Food Security Crisis, above n 259.
further its work on improving food security.\textsuperscript{262}

By the time the High-Level Conference was held, it was being referred to as an ‘emergency food summit’, the ‘summit’ status being a reflection of the attendance of the UN Secretary-General, the heads of The World Bank and the IMF, and a number of state and government heads. The elevated status did not translate into any breakthrough international approaches to food security, however. Certainly, there was a greater concern with climate change, the relationship of bioenergy and food security, and also sustainable development, more generally, but these concerns were wrapped into the international rhetoric that had evolved since Hot Springs.\textsuperscript{263} The conference declaration is, in the main, a reaffirmation of previous agreements and commitments — the 1996 World Food Summit declaration and plan of action, the FAO’s \textit{Voluntary Guidelines}, the MDGs — and adopts a catch-all approach to responsibility. Conference participants ‘pledge[d] to embrace food security as a matter of permanent national policy’,\textsuperscript{264} but then there were also the usual exhortations to international and regional institutions to assume more responsibility. The belief in trade liberalisation was unshaken, although it was qualified in line with the agricultural trade for aid approach being pushed within the Doha round of international trade negotiations.\textsuperscript{265}

The final two paragraphs of the declaration illustrate just how little progress, other than the concern with sustainable development, had been made since Hot Springs:

\begin{quote}
We firmly resolve to use all means to alleviate the suffering caused by the current crisis, to stimulate food production and to increase investment in agriculture, to address obstacles to food access and to use the planet’s resources sustainably, for present and future generations.

We commit to eliminating hunger and to securing food for all today and tomorrow.\textsuperscript{266}
\end{quote}

Perhaps the most telling language of the declaration was the distinction between the first and second lines of action that were needed to respond to the crisis. The first line

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\begin{itemize}
  \item \textsuperscript{262} FAO, \textit{Declaration of the High-Level Conference on World Food Security: The Challenges of Climate Change and Bioenergy} (2008).
  \item \textsuperscript{263} Ibid.
  \item \textsuperscript{264} Ibid [3].
  \item \textsuperscript{265} Ibid [6(d)].
  \item \textsuperscript{266} Ibid.
\end{itemize}
of action is to respond urgently to requests for assistance from affected countries’, while ‘[t]he second line of action is immediate support for agricultural production and trade’. This separation recognises the imperative of keeping people alive, in the first instance, and improving standards of living through agricultural production and trade, in the second. It is a distinction that the drafters of the ICESCR also grappled with.

Shortly after the High-Level Conference, the 34th G8 Summit — the Hokkaido Toyako Summit — took place from 7–9 July 2008, and the food crisis figured largely in the proceedings. That food security was not originally on the agenda for the Summit was indicative of the urgency that was now attached to the issue and the pressure for action that had built up within the international community. Also telling is the lack of concern shown for food security at the annual G8 development ministers meeting only a few months earlier in April, a time when the UN and World Bank responses were being formulated. The most favourable interpretation of the ministers’ attitude to the issue at their meeting is that food security is implicit in the references to reducing poverty and achieving human security and the importance of increased agricultural productivity to Africa’s development.

The G8 leaders re-affirmed the importance of short-term assistance to the most vulnerable and the importance of a coordinated response from the international community, including freer international food markets. The leaders put more emphasis on the ‘people-removed’ macro-economic impacts, such as inflation and worsening balance of payments. In so doing, the leaders emphasised the structural nature of the crisis and the need to implement medium- and longer-term policies to increase world food production and investment in agriculture.

The response of the G8 leaders seemed to have reduced the problem of food insecurity to the application of a good economics, or, perhaps, just a faith in economics. In this, it was not dissimilar to the discussions at Hot Springs 60 years earlier. Economics seemed to have an inherent authority and this was reinforced by

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267 Ibid [5].
268 Ibid [6].
269 Ministry of Foreign Affairs of Japan, G8 Hokkaido Toyako Summit: Chair’s Summary of the G8 Development Ministers’ Meeting <http://www.g8summit.go.jp/eng/other/g8_develop_gs.html>.
the responses of the Bretton Woods institutions, albeit a response that made some attempt at social qualification. The strongest opposing voice within the international framework was that of the Special Rapporteur on the Right to Food.

B The Bretton Woods Institutions and the Special Rapporteur on the Right to Food

While the Special Rapporteur and the Bretton Woods institutions held opposing views on how to respond to the crisis, these did not arise from their respective analyses of the causes of the crisis. Focusing on the IMF for the moment, its analyses cast the increase in global food prices as part of the broadest boom in international commodity prices since the 1970s. Oil prices started to increase in 2003 and food prices started to increase somewhat later in 2006. The broad, underlying cause was the favourable macroeconomic situation in the global economy and this had catalysed the demand for commodities. The point of difference between the boom of the 2000s and earlier boom episodes was that the former persisted even when growth slowed in developed countries. This was due to continued strong economic growth in emerging and developing economies.271

There were, however, other more specific factors that contributed to the rise in food prices. The increase in fuel prices was obviously one, but unfavourable weather conditions and poor harvests, the increase in biofuels production, and new trade restrictions as the crisis developed, were others. These factors were mutually reinforcing, as the rise in the price of oil increased the demand for biofuels. The increased biofuels production pushed up demand for other food crops and the costs of biofuels crops used as agricultural feedstock, and the rise in fuel prices increased agricultural production costs more generally. As a result, the demand for major food crops outstripped production.272

Donald Mitchell estimates that 25–30 percent of the general food price increase could be attributed to the combination of higher energy prices, related higher fertiliser and transportation costs, and the weaker US dollar, while the remainder ‘was due to biofuels and the related consequences of low grain stocks, large land use shifts,

272 Ibid 7–8.
speculative activity and export bans. The most disturbing aspect of this conclusion is that the increase in biofuels production in the US and Europe were due to policy decisions supported by incentives to producers in the form of tax credits, subsidies and favourable tariffs, as well as directives to substitute biofuels for part of the fossil-based fuels.

The Special Rapporteur’s assessment of the causes of the crisis was strikingly similar to that advanced by the economists. He considered that there were six interrelated causes: a structural transformation in the demand for food, resulting from strong economic growth in China and India, in particular, and the consequent higher demand for protein, which led to a switch from grains to meat, fruit and vegetables; insufficient investment in agriculture that was linked to structural adjustment reforms; climate change; the increase in the price of oil and the resultant impact on the price of agricultural inputs; the increase in demand for agrofuels, which had also been boosted by the increase in the price of oil; and speculative investment in primary commodities, particularly in grains.

1 Response of the Bretton Woods Institutions

In April 2008 Dominique Strauss-Kahn, then-IMF Managing Director, described the food crisis as both a humanitarian and economic problem. The opening paragraph of Strauss-Kahn’s op-ed in the Financial Times read: ‘High food prices are today a serious humanitarian concern. They are also a source of macroeconomic instability affecting budgets, trade balances and, of course, incomes almost everywhere in the world.’

There was a ‘moral responsibility’ to get food into the hands of the poor, or at least get money to these people so that they could buy food. By the time of the High Level Conference on World Food Security several weeks later, Strauss-Kahn was urging donor support for increased food aid to combat ‘a moral and economic imperative.’

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273 Mitchell, above n 1, 17.
274 Ibid.
275 Olivier De Schutter, Background Note by the Special Rapporteur on the Right to Food on Analysis of the World Food Crisis, 6–10, UN Doc (2008).
276 Dominique Strauss-Kahn, A Global Approach is Required to Tackle High Food Prices (Financial Times, London, 20 April 2008).
277 Ibid.
278 International Monetary Fund, ‘IMF Managing Director Strauss-Kahn Calls Donor Support of Food Aid for the Poor a Moral and Economic Imperative’ (Press Release No. 08/131, 3 June 2008).
While few would dispute the sentiment, it was not accompanied by any statement of a foundation for the humanitarian concern. More generally, the same observation can be made about all of the IMF material related to the global food crisis. There are occasional references to food security and MDGs, but a complete absence of any mention of the right to adequate food.

The IMF supported the cooperative multilateral approach to addressing the global food crisis and participated in the Rome High-Level Conference on World Food Security, the G8 summit, and the UN Task Force on the Global Food Crisis. It saw its role as providing analyses of the source of the increases in food prices and on the severity, impact and duration of the increases, as well as providing financial support and technical assistance on the policy measures that could be taken.  

Its basic policy position was that emergency assistance needed to be provided in the first instance, but financial assistance was only suitable if the price increases were temporary. Otherwise, macroeconomic adjustment was needed and this adjustment needed to promote economic efficiency and a sound fiscal position, while avoiding negative international spillovers. For the adjustment to occur, the market prices consumers and producers faced needed to reflect the increase in global food prices, but monetary policy needed to contain the consequent impact on other goods and services. The IMF recognised that there would be social considerations where domestic food prices had been kept artificially low, and that the impacts of the price rises would need to be moderated in the interests of protecting the poor and most vulnerable groups in the society. The advice was that policymakers needed to create the fiscal space to provide this protection.

In these situations, the IMF’s preferred policy responses were targeted transfer programmes, ideally part of a wider, integrated social safety net, and reductions in the tariffs on imported food, with the former likely to be more effective than the latter, due to the more precise targeting. Measures such as reductions in consumption taxes,

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279 International Monetary Fund, ‘Food and Fuel Prices’, above n 271, 34.
280 Ibid 35.
281 Mark Plant, ‘Food Security and the Increase in Global Food Prices’ (Speech by Deputy Director, Policy and Development Department, IMF to Panama Chamber of Commerce, Industry and Agriculture, Panama City, 19 June 2008).
282 Ibid.
price subsidies, compensatory adjustments in public sector wages, and export restrictions were not favoured on the grounds that they were unlikely to be effective, and likely to be distorting. The policy challenge for countries, in the IMF’s view, was to replace the ineffective policies with better-targeted and more cost-effective policies.\footnote{283} The longer-term policy prescriptions were focussed on increasing long-term food supply through investment in infrastructure, greater access to finance for agricultural investment, and reduced barriers to international trade in agricultural goods. The IMF also advocated improved risk management and insurance approaches for both farmers and countries.\footnote{284}

The call by the president of the World Bank for a ‘New Deal for Global Food Policy’ was endorsed shortly after by the Development Committee of the World Bank and IMF at the 2008 Spring Meeting of the Joint Ministerial Committee of the Boards of Governors of the Bank and the Fund.\footnote{285} Zoellick maintained that the New Deal should focus not only on hunger and malnutrition, access to food and its supply, but also the interconnections with energy, yields, climate change, investment, the marginalization of women and others, and economic resiliency and growth. Food policy needs to gain the attention of the highest political levels, because no one country or group can meet these interconnected challenges. … and requires a stronger delivery system, to overcome fragmentation in food security, health, agriculture, water, sanitation, rural infrastructure, and gender policies.\footnote{286}

Zoellick stressed that the crisis was man-made. The priority was to assist the most vulnerable through emergency WFP assistance and then to implement policies that would provide long-term solutions to the problem.\footnote{287} He suggested a 10-point plan for tackling the short- and long-term issues, and urged greater international cooperation on the policies that were needed and the resources required to make these policies

\footnote{283}{International Monetary Fund, ‘Food and Fuel Prices’, above n 271, 35–37.}
\footnote{284}{Strauss-Kahn, above n 276.}
\footnote{285}{Joint Ministerial Committee of the Boards of Governors of the Bank and the Fund on the Transfer of Real Resources to Developing Countries, Development Committee Communiqué, 13 April 2008.}
\footnote{286}{Robert B Zoellick, ‘A Challenge of Economic Statecraft’ (Speech to the Center for Global Development, Washington, D.C., 2 April 2008).}
\footnote{287}{World Bank, ‘Action, Resources and Results Needed Now for Food Crisis, Zoellick says’ (Press Release No. 2008/349/EXC, 4 June 2008).}
effective. Zoellick reiterated the plan to the High-Level Conference, stressing the three immediate and critical needs of meeting the immediate requirements of the vulnerable; ensuring small farmers had access to the necessary seeds, fertiliser and other basic inputs; and the removal of export bans and restrictions, particularly as they affected the operations of WFP. But, almost in the same breath, he linked the short- and long-term by comment ing that the crisis provided an opportunity to develop world agriculture, which would also be to the benefit of farmers in developing countries.

The Bank’s Global Food Crisis Response Facility was designed as a rapid response facility to address the immediate needs of member countries through financing food-related investment and budget support for safety net programmes, conditional cash transfers, school feeding programmes, supplying seeds and fertiliser, and payments to offset tariff reductions on food items. In addition, the Bank established a single-donor trust fund and multi-donor trust fund, which, respectively, provided additional assistance to those countries most affected by the crisis, and complemented the emergency assistance provided by WFP, FAO and IFAD. The Bank also boosted its financing of longer-term support for agriculture from USD 4 billion to USD 6 billion; increased its policy, technical and research advice to crisis-affected countries; and submitted proposals for new risk management tools to the Bank’s Board of Executive Directors.

2 \textit{Special Rapporteur on the Right to Food}

The second Special Rapporteur, Oliver De Schutter, took office on 1 May 2008, at the height of the crisis. He was unequivocal in his assessment that governments had a human rights obligation to respond to the food crisis without delay. Individuals that no longer had access to adequate food ‘should be given the same degree of attention as if they were arbitrarily detained by an authoritarian government, or if they were beaten

\begin{itemize}
\item \textsuperscript{289} Robert B Zoellick, Speech to Rome World Food Security Summit, 3 June 2008.
\item \textsuperscript{290} Ibid.
\item \textsuperscript{292} Ibid.
\item \textsuperscript{293} Ibid.
\end{itemize}
by the police'. This obligation extended to any member of the UN, in the Special Rapporteur’s opinion, irrespective of whether that member had ratified the ICESCR, since Article 55 of the Charter required the respect and observance of human rights. With respect to the right to adequate food, it followed that governments should suspend, or at least urgently review, any policies that negatively impacted the realisation of the right, and that the right should be protected through an appropriate regulatory regime covering the production and distribution of food. The appropriate policy mix was one that respected the right, which meant that the policy mix needed to adjust to the changing economic circumstances and the consequent change in individual entitlements.

While acknowledging that governments were compelled to provide emergency responses through trade policies aimed at lowering domestic prices and targeted safety nets, the Special Rapporteur cautioned that these responses were not a substitute for the holistic approach within the FAO’s Voluntary Guidelines, or the need to incorporate the right to food in international trade negotiations, or the need to increase investment in agriculture. Of much greater concern to the Special Rapporteur was the failure of the policy responses to be framed within the parameters of the human right to adequate food:

The Special Rapporteur cannot fail to note that neither in the policy responses to the current food crisis, nor in the exploration of long-term solutions to enhance food supply, is the human right to adequate food even mentioned – let alone, used as a guide for the implementation of the international cooperation and regional strategies.

He called on the HRC to convene a special session on the impact of the crisis on the right to food. The Council agreed with this assessment of the gravity of the situation and the special session was duly held — the first time a special session of the HRC had

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294 De Schutter, Background Note by the Special Rapporteur on the Right to Food on Analysis of the World Food Crisis, above n 275, 1.
295 Ibid 2.
296 Ibid 3.
298 Ibid 5.
300 Ibid 14.
been devoted to a thematic issue.\textsuperscript{302} In his statement to the Council, the Special Rapporteur was more pointed in his criticisms of the lack of a human rights foundation to the international responses to the crisis. Not only did the responses lack a human rights foundation, they were a violation of human rights, whenever there was a failure to ‘mov[e] along the chain of causation, from the situation of the malnourished of the hungry to specific acts or abstentions by duty-holders’.\textsuperscript{303} It was this link to human causality that distinguished a human rights violation from a natural disaster,\textsuperscript{304} in his view.

Shortly after, in his address to the Rome High-Level Conference on World Food Security, the Special Rapporteur elaborated on the strategies that he considered were necessary in order to give full realisation to the right, as opposed to the short-term humanitarian and economic policy responses that had been employed in the attempts to arrest the crisis. The emphasis was on the obligation of individual states to develop the strategies.\textsuperscript{305}

There were three broad components to the strategies that the Special Rapporteur advocated. First, individual states needed to develop an institutional framework for the right to adequate food that was based around a national strategy, consistent with the Voluntary Guidelines, and a framework law that provided for redress through national courts, or otherwise, and that required other agencies of government to respond to any crisis. Second, ‘a new deal for agriculture’ was needed. This should comprise significant increases in agricultural investment in science, technology and infrastructure, as well as greater access to credit, and should emphasise sustainability and the role of small-holders. And third, private sector participation needed to be enhanced and impediments to this participation, such as intellectual property rights on seed and commodity speculation, needed to be addressed.\textsuperscript{306}

In reviewing the outcomes of the Rome High-Level Conference, the Special Rapporteur

\textsuperscript{302} Olivier De Schutter, ‘Address by the UN Special Rapporteur on the Right to Food’ (Address to the High-Level Conference on World Food Security: The Challenges of Climate Change and Bioenergy, Rome, 3–5 June 2008) 1.


\textsuperscript{304} Ibid.

\textsuperscript{305} De Schutter, ‘Address by the UN Special Rapporteur on the Right to Food’, above n 302, 1.

\textsuperscript{306} Ibid 2–5.
continued to lament the fact that humanitarian responses to the food crisis were still not based on the right to food and that these responses did not ‘address the questions of power and accountability, which distinguish the global food crisis from a natural disaster’. 307 He was aggrieved that there was no mention of the right to food in the final declaration of the conference and that there were only a few references in the draft of the Comprehensive Framework for Action to the right, or to the operational implications of seriously taking a rights-based approach to tackling the food crisis. 308

With respect to the policy approaches, the Special Rapporteur was critical of the way the supply-side responses of the Conference focused on increasing agricultural production and enhancing opportunities for international trade at the expense of a greater focus on the impact of agrofuels production, speculation in the markets for agricultural commodities, or the imbalances of power in the production and distribution of food. 309 As for the supply-side responses themselves, his concern was that these objectives may be incompatible when producers are not supported by adequate infrastructure and access to improved technologies and credit, 310 for example. He also pointed to the lack of consensus on the meaning of ‘agricultural development’ where two paradigms were competing. The first emphasised improved agricultural systems and technologies to boost production and encourage exports. The second emphasised self-sufficiency in food production and encouraged improving the purchasing power of small-scale producers. 311 This last observation opens a door to a wider critique of the technical apparatus of mainstream economics, one aspect of which is concerned with who benefits from growth. It also suggests that greater clarity is needed within mainstream economics as to the purpose of economics.

C Postscript to the Crisis

To date, the lasting impact of the crisis has been the shift in the international discourse on food to focus more squarely on problems of hunger and the problems of feeding

307 United Nations, ‘Accountability as important as feeding the hungry, says UN right to food expert on follow-up to Summit on World Food Security’ (Press Release, 6 June 2008).
308 Olivier De Schutter, Statement of the UN Special Rapporteur on the Right to Food to the 8th session of the Human Rights Council, Geneva, 6 June 2008, 2.
310 Ibid 2.
311 Ibid 3.
the world, and the implications for international governance — not unlike the concerns at Hot Springs. This shift (or return to the concerns of old) became evident at the World Food Summit in November 2009 and at three preceding events in October 2009: ‘How to Feed the World in 2050: High-Level Expert Forum’; the World Food Day; and the 35th session of the Committee on World Food Security.  

The opening paragraph of the FAO’s Director-General’s opening statement to the Summit typified the shift:

One billion hungry people, that is one out of every group of six persons in the world, 105 million more than in 2008, five children dying every 30 seconds. ... It is sad to note that only when ‘food riots’, with deaths and injuries, broke out in 22 countries in all the continents during 2007 and 2008, threatening national government stability and global peace and security, that the issue of hunger became a serious concern.

The Director-General went on to say that ‘[t]he root cause of hunger and malnutrition is underinvestment in agriculture in developing countries’ and that ‘[f]ood production must expand by 70 percent in the world and double in developing countries, to meet the food needs of a world population expected to reach 9.1 billion in 2050’. This will have to happen in the face of several emerging challenges, particularly climate change and rapid urbanisation.

These sentiments were reflected in the summit declaration, which advocated a twin approach of direct action to address the needs of the suffering from hunger, as well as a medium- and longer-term approach directed at the root causes of hunger and poverty. This twin approach was one of the ‘Five Principles for Sustainable Food Security’ promoted within the summit declaration. The other four principles were all too familiar: investment in country-owned plans; strategic coordination at national,

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312 This last meeting resulted in a reform of the Committee on World Food Security so as to include a wider group of stakeholders and to increase the Committee’s ability to promote policies that reduce food insecurity. The Committee had originally been established in 1974 after the demise of the World Food Council as an intergovernmental body to serve as a forum in the United Nations system for review and follow-up of policies concerning world food security, including the production and physical and economic access to food. Committee on World Food Security, Reform of the Committee on World Food Security, 35th session, agenda item III, Doc CFS:2009/2 Rev.2.
314 Ibid.
315 Ibid.
regional, and global levels; a more responsive and effective multilateral system; and more substantial and sustained investment in agriculture.\footnote{FAO, Declaration of the World Summit on Food Security, Doc WSFS 2009/2 (2009) 2–7.}

What is particularly noticeable about the declaration, when viewed as a whole, is the infrequent reference to ‘food security’ and the ‘right to food’. Furthermore, when these terms are used, it is not as objectives in their own right, but more as components of medium- and longer-term action. Silent, in the background, is a judgement on the efficacy of the concepts for confronting the imperative of survival.

Since the 2006–8 crisis, De Schutter has continued to push for problems of hunger and food security to be framed as human rights issues. But his approach has, latterly, put more emphasis on duties and obligations. One such example is his contribution to the 37th session of the Committee on World Food Security in October 2011, in which he talks of the importance of ‘tak[ing] seriously our duties towards the most vulnerable’.\footnote{Olivier De Schutter, ‘Achieving the Right to Food: From Global Governance to National Implementation’ (Contribution to the 37th Session of the Committee on World Food Security, 17 October 2011) 2.} While he would still locate these duties and obligations as part of the right to food, that is, as correlative duties to that right, it is significant that his starting point and point of purchase has moved towards duties and obligations.

De Schutter’s turn to obligations is also evident in his comments on the importance of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.\footnote{De Schutter, ‘The Role of the Right to Food in Combating Global Hunger’, above n 224.} These principles were formulated on 28 September 2011 by an expert group in international law and human rights, including De Schutter, on the initiative of Maastricht University and the International Commission of Jurists.\footnote{International Commission of Jurists, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. <http://www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20FINAL.pdf>}. As the preamble states, the principles ‘aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights’.\footnote{Ibid [preamble].} The underlying concern, however, is with the need to rethink extraterritorial obligations, given the reality that globalisation
has deepened state economic interdependencies and, at the same time, poverty remains pervasive throughout the world; that is, state policies influence the realisation of economic social and cultural rights in other states. De Schutter’s view is that the organic development of these principles is the way of the future. This is an implicit admission, in my view, that attempts to use existing international human rights law have not met with any great success, as he appears to have foregone the further normative development of the right to food.\footnote{De Schutter, ‘The Role of the Right to Food in Combating Global Hunger’, above n 318.}

As will become clear in later chapters, I view De Schutter’s turn to duties as a positive development, but the formulation and discharge of duties occurs within a political context. De Schutter’s work does not adequately address this context, in my view. His quote on taking duties seriously was made in the context of the importance of Sen’s insight that law stood between food availability and food entitlement,\footnote{Olivier De Schutter, ‘Achieving the Right to Food: From Global Governance to National Implementation’ (Contribution to the 37th Session of the Committee on World Food Security, 17 October 2011), quoting Sen, \textit{Poverty and Famines}, above n 13, 166.} but Sen’s concern in this context is with famine and not the progressive realisation of any right to food. Furthermore, Sen is concerned with entitlements and makes several observations on the entitlement approach to famines.\footnote{Sen, \textit{Poverty and Famines}, above n 13, 162–5. The other observations were regarding the usefulness of the entitlements approach as a general framework for analysing famines; the occurrence of famines in both boom and slump conditions; and the distinction between the availability of food and direct entitlement to food.} Only one of these observations concerns law and the full quotation reads:

> the focus of entitlements has the effect of emphasizing legal rights. Other relevant factors, for example market forces can be seen as operating through a system of legal relations (ownership rights, contractual obligations, legal exchanges, etc.). The law stands between food availability and food entitlement. Starvation deaths can reflect legality with a vengeance.\footnote{Sen, \textit{Poverty and Famines}, above n 13, 165–6 (emphasis in original).}

Sen’s observation on law is an observation on the interconnection of law and economics through good public policy; it is certainly not an observation on the right to food and Sen makes no mention of the concept in \textit{Poverty and Famines}. Drèze and Sen position the entitlements approach with a public policy framework, where that
framework can be thought of as the interconnection of law and economics within a good political system.325 Or to put it another way, Sen’s concern is, in essence, with good politics.

V SUMMARY AND CONCLUDING REMARKS

This chapter has traced the evolution of the concepts of food security and the right to food within the evolution of the institutional machinery of the UN. It also examined the response of prominent international institutions to the 2006–8 international food crisis.

The key finding is that the collective institutions of the international community have failed to take responsibility for problems of hunger throughout the UN era. That era has been characterised by an institutional fragmentation reflecting the ongoing struggle between human rights and mainstream economic approaches across UN institutions, and also between the universality of human rights and state sovereignty that is a feature of both the Charter and the ICESCR. The rationalisation of international cooperation and national responsibility has proved troublesome ever since. The consequence of this fragmentation is that the approaches being advocated by the international community have not advanced far at all from the approaches advocated at the Hot Springs Conference. If any ‘universality’ has been achieved, it is in the inroads of market economics.

Even the contemporary concepts of food security and the right to food are reincarnations of the language of Hot Springs and the emphasis remains on production, distribution, consumption, and the technicalities of nutrition and mainstream economics. The usefulness of both concepts as organising constructs was called into question. First, the right to food is ultimately defined in terms of food security, and the search for the normative content of both leads to the door of economics. Second, the search for normative content demonstrates the multifaceted, and contingent, nature of both approaches. And third, it has proved difficult not to confront the reality that hunger and the progressive realisation of food security or the right to food are distinct policy issues. While mainstream economics has been able to

325 Drèze and Sen, above n 14.
seize both the policy high ground and control the playing field of policy implementation, it is questionable whether mainstream economics, on its own, provides the conceptual framework for distinguishing between gradual improvements in nutrition or standards of living and the imperative of survival.

If privileging mainstream economics is one of the core reasons for the institutional failure, then economics has to be ‘deprivileged’ in some way. The reference to economic statesmanship at Hot Springs and Zoellick’s reference to economic statecraft hint that economics sits — or should sit — within a wider framework. The argument I will develop over the remainder of the thesis is that the international community has failed to take responsibility for the problem of hunger and that the nature of this problem needs to be reconceptualised in both economics and law. The reconceptualisation involves positioning economics within a public law framework that captures a duty to provide in order to re-embed economics in its society. There is no sense of this duty in mainstream economics and it is telling that the Special Rapporteur has relied on notions of duty in his recent work.

The immediate task is to look at the way in which one government — the Indonesian government — has approached food security over a comparable period to that reviewed in this chapter. The case study will interrogate what it means to take national responsibility for feeding a people and demonstrate the tensions that arise when taking responsibility conflicts with a reliance on mainstream economics.
INDONESIA AND FOOD SECURITY

The previous chapter traced the way the institutional machinery of the UN, particularly the FAO, had framed problems of hunger and responded to international food crises. I argued that this institutional response was fragmented and had privileged mainstream economics, especially during international food crises. The result was that the institutions of the UN had failed to take collective responsibility for these problems. I also argued that this experience had called into question the concepts of food security and the right to food as organising constructs in alleviating and preventing food problems: one was defined in terms of the other and the normative content of both ultimately involved economic choices, which undermined the aspiration of universal human rights. Furthermore, the conceptual framework behind these concepts did not distinguish between gradual improvements in nutrition and the imperative of survival.

This chapter inverts the analysis of the international experience to look at the approach of an individual country — Indonesia. The choice of Indonesia was prompted by the observation that one of the few constants through the 60 plus years of independence is a government focus on providing food for the poor, in spite of mostly demanding economic conditions and sometimes turbulent political conditions. My intention is to understand the underpinnings of this focus, as opposed to presenting Indonesia as a model case of economic management. Indeed, there are well documented disasters: the Soekarno years ended in economic chaos, the scars of the Asian Financial Crisis run deep, and one of Soeharto’s legacies is endemic corruption.

Indonesia is the fourth most populous country in the world (246.9 million in 2012)\textsuperscript{326}, it is a high-growth economy (real growth rates of 5–6 percent over the last decade)\textsuperscript{327} but it remains a lower-middle-income country (GNP per capita of USD 3,420 in 2012)\textsuperscript{328}

\textsuperscript{326} World Bank, Data <http://data.worldbank.org/country/indonesia#cp_wdi>.
\textsuperscript{327} Ibid.
\textsuperscript{328} Ibid.
with widespread poverty (12 percent of the population were below the national poverty line in 2012).\footnote{Ibid.} Furthermore, a large proportion of the population rely on agriculture for their incomes (70 percent in rural areas)\footnote{McCulloch, ‘Rice Prices and Poverty in Indonesia’ (2008) 44 Bulletin of Indonesian Economic Studies 45, 50.} and food expenditures account for 72 percent of total expenditure by the lowest income quintile.\footnote{Ibid.} In these circumstances, the government cannot focus on economic growth and future increases in production and ignore the current plight of the poor. But, in attempting to deal with these issues the government faces severe fiscal constraints and is forced into ranking social needs, as occurred through the 2006–08 international food crisis. Even though Indonesia was not among the 34 countries most affected by the crisis, a large portion of the population was affected by the increase in food prices and the government was forced to respond.

The first part of the chapter discusses the legacy of Indonesia’s colonial inheritance on the post-independence emphasis on providing adequate food for the population, along with the approaches successive governments have adopted since independence in 1949. The socio-economic transformation from a pre-colonial to a colonial order was significant but this transformation did not provide the institutional foundations for an independent Indonesia. This institutional void had to be addressed, if an independent Indonesia was to feed its population. The discussion shows how the political economy of food has changed considerably since the fall of Soeharto in 1998. Constitutional changes have shored up democracy,\footnote{Tim Lindsey, ‘Indonesian Constitutional Reform: Muddling Towards Democracy’ (2002) 6 Singapore Journal of International & Comparative Law 244.} government has decentralised, international financial organisations have emphasised market liberalism, and regional integration within ASEAN has deepened.\footnote{These events are covered extensively in the book series of the annual Indonesia Conference of the Indonesia Project at the Australian National University. Australian National University, Indonesia Project <https://crawford.anu.edu.au/acde/ip/>.}

The increased emphasis on market liberalism was also reflected in calls for a more liberal food policy and Part II examines how mainstream economists view Indonesian rice policy, which is regarded as a proxy for food policy within Indonesia. The views of
several international economists with substantial, first-hand experience of the Indonesian situation are surveyed to illustrate the mainstream view on questions such as rice self-sufficiency and the stabilisation of rice prices.

Part III discusses the legal infrastructure underpinning the provision of adequate food in Indonesia. Historically, the legal infrastructure has been limited, which was a reflection of the importance attached to economic arrangements to underwrite the provision of adequate food. The situation changed from the mid-1990s, however, with the enactment of a Food Law, which does explicitly refer to food security, and the constitutional protection of human rights by virtue of the constitutional amendments that took place over 1999–2002. The open question is how the Constitutional Court will decide the constitutionality of any existing legislation that influences the attainment of food security and the realisation of the right to food. The Court has decided several cases that give clues as to what is at stake within the Indonesian constitutional order and these cases are discussed in this part.

The central argument of the chapter is that Indonesian governments have taken responsibility for ensuring that the population is fed by adopting a purposive, legal-economic approach. This heterodox approach to economic policy stands in contrast to the mainstream economics adopted by international institutions. This purposive approach has been compromised, however, with the inroads of international human rights norms and liberal economic policies.

I FEEDING THE POPULACE

The food security debate in Indonesia has its roots in the long-standing debate on food self-sufficiency, particularly self-sufficiency in rice production. As McCulloch and Timmer note:

Rice is Indonesia’s single most important commodity: almost all of her 220 million people consume it, and for most it is the staple food. Rice is also an important part of the rural economy: although only 38 [percent] of rural households actually grow rice, many more are connected to the rice economy through services, labour and trade. Getting rice policy right is therefore essential for food security and for income and
employment in rural areas.\textsuperscript{334}

The roots of the food self-sufficiency debate, in turn, are rooted in Indonesia’s colonial history. In broad terms, the colonial period lasted from the first European engagement in the early-16\textsuperscript{th} century to Indonesian independence in 1949 — a period of roughly 450 years. The Dutch became the dominant colonial power, initially through the charter the Netherlands government granted the Dutch East Indies Company in 1603 and then, after the bankruptcy and nationalisation of the Dutch East Indies Company in 1800, through the Netherlands government as the colonial administrator. Dutch influence continued to expand through the region during that administration until the early 20\textsuperscript{th} century.\textsuperscript{335}

Anthony Reid estimates that the population of what we know now as Indonesia was around 9 million in 1600. This population was unevenly spread through the archipelago, with the majority living in Java (3.4 million) and Sumatra (2.4 million). What is particularly interesting about these pre-colonial times, in the context of the contemporary food security debate in Indonesia, is that it is a myth to think that self-sufficient village economies were the dominant form of social organisation. Relatively large cities founded on international trade were a feature of these times, while most of those people who did not live in cities were engaged in intensive wet-rice cultivation. Rice was the staple foodstuff for all, but it was also a major export item alongside other foodstuffs. Indeed, Java was the largest food exporter in Southeast Asia in those times.\textsuperscript{336}

This was to change with colonisation, however, as Reid explains:

\begin{quote}
The inability of the Indonesian trading cities to defend their position militarily led to the loss of the ‘commanding heights’ of the economy to Western hands. The political (and cultural) centres of Indonesia became isolated from the dynamic element of international trade, and Indonesian society as a whole became more rural, more
\end{quote}


\textsuperscript{335} See M C Ricklefs, \textit{A History of Modern Indonesia since c. 1200} (Palgrave, 3\textsuperscript{rd} ed, 2001) and Howard Dick et al, \textit{The Emergence of a National Economy: An Economic History of Indonesia, 1800–2000} (Allen & Unwin and University of Hawai’i Press, 2002).

politically diffuse, more inward-looking, and more mystical.

The combination of foreign military supremacy, internal political insecurity, and the lack of capital accumulation that characterised the colonial period broke down the vibrant trading culture of the islands of the East Indies, and did not foster a local capitalism. It also changed the socio-economic structure. Indigenous chiefs were reduced to dependents, and Dutch commercial institutions were encouraged as Indonesian ones were discouraged. So, by independence, very little of the pre-colonial trading culture had survived and there was negligible domestically-controlled economic infrastructure.

In the colonial period, food self-sufficiency was valued for its contribution to the revenues of the colonial administration via the control the administration had over local production. Indonesian living standards suffered accordingly. Friend comments that

[Under Dutch rule, in the late Victorian period, rice plus nonpreferred staples allowed Javanese an estimated daily supply of about 1650 calories — low by any standards and threatening chronic malnutrition in some parts of the population. When the Japanese arrived in 1942, Indonesians were poorer in rice consumption than when Sir Thomas Raffles and the English left, after their brief occupation, in 1815.]

It would not be until the declaration of independence in August 1945, following the withdrawal of the Japanese from Indonesia towards the end of World War II, that the concept of food self-sufficiency was invoked in the interests of the Indonesian people and as a relationship between the demand for, and supply of, food.

This was consistent with the overall thrust of the 1945 Constitution that accompanied the declaration of independence. That constitution rests on five foundational principles (Pancasila) that are listed in the preamble: belief in One Supreme God, just

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337 Ibid 161–164.
humanitarianism, unity of Indonesia, democracy guided by constitution, and social justice. It represents Soekarno’s reconciliation formula for uniting the competing interests shorn of their colonial and wartime masters under an independent Indonesian government. Social concerns were underpinned by a view that democracy embodied social equality and mutual help, freedom and progress.\(^{342}\)

The 1945 Constitution reflected the eventual dominance of ‘Integralist’ thinking that was championed by Professor Raden Soepomo over liberal-democratic and Islamic thinking in the constitutional debates.\(^ {343}\) Integralism envisioned ‘[t]he nation and the people [as] one “organic whole” led by a charismatic ruler who embodied his people’s “essence”, drawn from their ancient traditions and historical experience’.\(^ {344}\) The state was integrated in the sense that ‘it could never be at odds with individuals comprising it’.\(^ {345}\) It was an ‘organic state’ based on the family principle where the head of the family asked duties of the members of the family.\(^ {346}\) The (European) legal-philosophical concept that captures these sentiments is that of the *Volksgeist*.\(^ {347}\) This thinking would survive the short-lived constitutions of 1949 and 1950 and the creation of a Constituent Assembly in 1955. And, with the return to the 1945 Constitution in 1958 after several years of political instability, it would last until the fall of Soeharto in 1998.

A An Overview of Rice Policy since Independence

Since independence, Indonesia’s political-economic history can be broadly separated into the Old Order and New Order regimes of Indonesia’s first two presidents — Soekarno and Soeharto — and the period after the fall of Soeharto. The Asian crisis was the catalyst for Soeharto stepping down from the presidency and the subsequent democratic transformation, and it was also the catalyst for renewed international intervention in the Indonesian economy and an associated emphasis on market-

\(^{342}\) Ibid 48.
\(^{344}\) Ibid 8.
\(^{345}\) Ibid 9.
\(^{346}\) Ibid 8–10.
oriented economic policies.

1 The Old Order — the Soekarno Years

The declaration of independence in 1945 was short-lived, as the Dutch sought to resume control of Indonesia with military force, following the defeat of Japan in World War II. International recognition of Indonesia’s independence would have to wait until December 1949 when Dutch sovereignty was transferred under UN oversight to the federal United States of Indonesia. This federation was dissolved just months later, in early 1950, at which point, the unitary Republic of Indonesia became the sovereign entity. New constitutions came into existence with the sovereignty changes of 1949 and 1950.\(^{348}\)

The four years after the 1945 declaration of independence were marked by a resumption of colonial oppression that included two military invasions, as social unrest and guerrilla insurgency against the colonial power increased. Consequently, the first truly independent Indonesian government faced enormous political, social and economic challenges in attempting to unify the geographically and ethnically disparate Indonesian peoples. Soekarno became Indonesia’s first president, having overseen the construction of the 1945 Constitution. But the new leaders had no experience of government and there was a lack of relevant models to guide them.\(^{349}\) Government was essentially an exercise in nation-building and Soekarno is remembered as an Indonesian nationalist whose life was an active protest against Indonesia’s colonial past and western imperialism. Indeed, Indonesia hosted the Bandung Conference of Asian and African Nations in 1955 for the leaders of formerly colonised countries and this conference, and Soekarno’s direct involvement, had a significant and direct impact on the establishment of the Non-Aligned Movement in 1961.\(^{350}\)

During this time the formulation of economic policy was ‘dominated by the consideration of ends, of broad social and political norms’\(^{351}\) and ‘the professional

\(^{348}\) See Butt and Lindsey, The Constitution of Indonesia, above n 343, 2–4 for a discussion of these events.


economists ... were also obliged to talk in terms of goals and norms, or at least to use these as a point of departure for discussions of appropriate means. Dealing with poverty was the imperative and the poverty of the time was a shared poverty. It called for a public response, in keeping with the Indonesian tradition of mutual help (gotong royong). Increasing rice production was central to dealing with the poverty and other challenges that confronted the newly-independent Indonesia through improving the living standards of an overwhelmingly poor population, providing payment in kind to army personnel and government workers, and enabling scarce foreign exchange to be directed to imports needed for other economic activities. Furthermore, as incomes increased with the increased economic activity, so did the demand for rice. But, even in these early post-independence years, the task of increasing production was compromised by the pressure from the urban population to keep rice prices low and by the lack of a transport infrastructure to redistribute rice production from surplus to deficit regions within Indonesia.

In response, the Soekarno government centralised the pursuit of rice self-sufficiency through formal development plans and other central government programmes. The first development plan of 1952 — the Kasimo Welfare Plan — targeted rice self-sufficiency by 1956, but this objective was thwarted due to the increase in demand for rice from a rising population outpacing the increase in rice production. Further increasing food production was a priority of the next development plan that was intended to cover 1956–60, but securing parliamentary approval for the plan proved to be a protracted affair. The approval did not eventuate until 1960, by which time the plan covered the period 1960–68. Meanwhile, in 1959, the government had introduced the Padi Centra Program aimed at securing rice self-sufficiency in Java through pairing inputs supplied by local cooperatives with technical extension services provided by central government. The programme was beset by logistical problems and
farmer resistance to below-market prices and was terminated in 1962.\textsuperscript{358}

The difficulties in achieving rice self-sufficiency during this period were but one symptom of deeper economic problems that characterised the Soekarno years. Economic development took a backseat to ongoing political struggles, including the confrontation with Malaysia in the 1960s,\textsuperscript{359} territorial claims in West Irian, which did not come under Indonesian control until 1963, and, within Indonesia, battles with Islamic and military-backed separatists as well as power plays within government.\textsuperscript{360} Quasi-socialist economic policies were enlisted in support of an understandable post-independence, nationalistic political agenda, but these drained government financial resources. Furthermore, economic advancement was severely constrained by a chronic shortage of foreign exchange that was exacerbated by ‘[a] regime of pervasive exchange controls, multiple exchange rates and wide differences between the official and black market exchange rates’\textsuperscript{361} that impeded external trade.\textsuperscript{362}

The Indonesian economy was now disintegrating under the dual, oppressive forces of hyper-inflation and economic stagnation. Per capita incomes had been falling since 1958, such that by 1965 they had retreated to below 1940 levels.\textsuperscript{363} Rice yields were stagnant from 1960 and employment in manufacturing also declined markedly. Friend summarised the Soekarno era as one of ‘guided chaos’,\textsuperscript{364} a play on Soekarno’s invocation of ‘guided democracy’ where he saw himself, as president, best placed to guide Indonesia, but where his efforts culminated in a social and economic disaster.\textsuperscript{365} The 1965 food riots and the overthrow of Soekarno, following a foiled Leftist coup and a military counter-coup, were, in retrospect, an inevitable outcome of this economic implosion.

\textsuperscript{358} Ibid.
\textsuperscript{359} One outcome of this confrontation was Indonesia’s withdrawal from UN membership. The withdrawal lasted from January 1965 to September 1966 and was prompted by Malaysia’s appointment to a non-permanent seat on the UN Security Council. See Friend, above n 341, 78–81 for a discussion of these events. This is the only occasion that a country has withdrawn from UN membership. Mazower, above n 86, 200.
\textsuperscript{361} George Fane and Peter Warr, ‘Agricultural Protection in Indonesia’ (2008) \textit{44 Bulletin of Indonesian Economic Studies} 133, 144.
\textsuperscript{362} Ibid.
\textsuperscript{363} Friend, above n 341, 97.
\textsuperscript{364} Ibid 47.
\textsuperscript{365} Ibid 97–8.
2 The New Order — the Soeharto Years

On coming to power with the overthrow of Soekarno in 1965, Soeharto’s emerging New Order regime was confronted with an economic and social mess and the threat posed by the Indonesian communist movement. The regime moved quickly to stabilise the economy and the economic mantra became ‘developmentalism’, which encompassed the trilogy of ‘growth, stability and equality’.

Like many Indonesians of the time, Soeharto had first-hand experience of poverty during his semi-rural upbringing. He had not travelled outside Indonesia until after he became president. As Friend notes:

His practical values were simple and focused: the Indonesian nation; the armed forces guiding it; and its people who deserve a better life. Suharto had a peasant’s commonsense understanding that you must eat to live, that education helps you earn more money, and those with more money eat better and live longer.

The 1965 food riots left a lasting impression on Soeharto and he well understood the importance of poverty reduction to social political stability, a sentiment well-entrenched in Indonesian politics. Technocrats were enlisted to policymaking roles at an early stage and many had been exposed to western economic thinking. Policymaking was pragmatic, but structured, in marked contrast to the Soekarno years. More liberal economic policies were employed, in line with the western influences, but trade policy remained more interventionist. The Soeharto government continued the pursuit of rice self-sufficiency, which had assumed greater importance as rice prices rapidly escalated in 1967 and 1968 as a result of limited domestic rice supplies and inadequate foreign exchange to finance imports to meet the shortfall. The Bimas (Bimbingan Massal – Mass Guidance) programme, which had been introduced in the final years of Soekarno’s government, was expanded and rice self-sufficiency was entrenched in successive New Order five-year development plans, the first of

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366 Ibid 136–139.
367 Ibid 150.
368 Ibid 136–142.
369 Ibid 137.
370 Fane and Warr, above n 361, 134.
371 Ibid 144.
372 Mears, above n 340, 127.
which commenced in 1969. The central institutional feature of rice policy was BULOG (Badan Urusan Logistik – the Logistical Affairs Authority). It was established in 1967, not long after Soeharto formally assumed the presidency, with the objective of stabilising rice prices. To this end, it was granted a monopoly on rice imports, along with the imports of the other main tradable food items — sugar, maize and soybeans. From 1978 it was under direct presidential control.

Fane and Warr note that this tension between economic liberalism and interventionism remained throughout the New Order and the position of the liberalism-interventionism pendulum was a reflection of the overall health of the economy. In good economic times — high government oil revenues, ample foreign exchange at an under-valued exchange rate, and low government debt servicing — technocratic market liberals advocating increased exposure to international markets had relatively greater influence on Soeharto. When foreign exchange was scarce and the government budget under pressure, the interventionists held sway and import substitution was the order of the day. Broadly speaking there were two groups of interventionists — the industrialists and those promoting food self-sufficiency, particularly rice self-sufficiency.

With respect to rice policy, the interventionists were in the ascendancy up until the end of the oil boom in the early 1980s. To that point, the government had encouraged rice production through subsidised inputs, improving agricultural infrastructure and agricultural extension services. This expenditure was partially financed by the extraordinary oil revenues from the oil boom at that time, as were the investments in protected, import-substituting state-owned enterprises. With the end of the oil boom, government oil revenues declined and this led to reduced financial support for rice production and, in turn, a decline in rice production. To make up the shortfall, the government, through BULOG, borrowed rice from Vietnam and these borrowings were repaid when surplus domestic production allowed. Before long, it became clear,

373 Fane and Warr, above n 361, 134.
375 Ibid 144–7.
376 Ibid 146.
377 Ibid 144.
378 McCulloch and Timmer, above n 334, 33.
however, that this was not going to provide an ongoing solution and the government directed BULOG to supplement domestic production with imports.379

If a review of the Soeharto years is limited to food policy, the overall assessment is highly favourable. Although rice self-sufficiency was only achieved in the mid- to late-1980s,380 production had increased with the result that rice prices were reasonably stable and rural poverty declined. Soeharto’s food policies were acclaimed internationally: in 1984 the FAO awarded Soeharto its medal of honour and in 1985 it invited him to address the annual conference that also marked the 40th anniversary of the FAO. Within Indonesia the achievement had been recognised in March 1983 when the Majelis Permusyawaratan Rakyat (MPR – People’s Consultative Assembly) conferred on Soeharto, by decree, the title of ‘The Father of Development’. The results spoke for themselves, as Friend notes:

By early in Suharto’s fifth term (1988–90) ... Indonesian calorie supplies had increased 45 percent and proteins by 50 percent over levels in the years 1961 to 1963. ... Indonesians moved on from the survival question ‘How do I get enough to eat?’ to the more alluring question ‘How much can I earn?’381

Soeharto’s achievements with food policy survived the denigration reserved for the greater part of the New Order legacy, as evidenced by the lead front page article in the Jakarta Post on the day following Soeharto’s death in 2008. The opening sentence read ‘The father of development is dead’.382

Abuses of human rights and institutionalised corruption are particularly unfavourable aspects of Soeharto’s legacy. The corruption undoubtedly affected wider economic performance, but it was institutionalised in a way that made it diffuse and predictable — it was ‘a better class of corruption’,383 to use Ross McLeod’s label. While systemic corruption served to maintain Soeharto’s authority, it was, nevertheless, ‘[compatible] with rapid economic progress ... and brought considerable material benefits to the

379 Fane and Warr, above n 361, 140–1.
380 Ibid 135.
381 Friend, above n 341, 150.
majority of the population’. Institutionalised as it was, it was not sustainable, however, and could not withstand the pressures of the Asian financial crisis in 1997.

The financial crisis was the catalyst for the economic and political upheaval that ultimately forced Soeharto to step down from the presidency in May 1998. The centrality of Soeharto to Indonesian political economy was undermined by the turn to international organisations for financial assistance, calls for reform from Indonesian technocrats, and the eroding of the close linkages between business and government as corporate distress followed the exchange rate depreciation, interest rate increases and banking distress. As for food, rice prices spiked in 1997–98 before reducing to half the peak level in 2000. History was repeating and, as Friend notes, the events ‘put Indonesia on notice that it was facing an old problem in a new form: how to achieve long-term economic growth to lift people out of poverty and how much short-term suffering to ask the poor to endure.’

3 Post-Soeharto

Rice policy was an isolated constant amidst the economic and political upheaval of the final months of the New Order and the post-Soeharto transition. This continued through the four immediate post-crisis years of 1998–2001, when Indonesia was the largest importer of rice in the world, accounting for 18 percent of world imports. This equated to nine percent of Indonesia’s total rice consumption. BULOG also remained a feature of the post-Soeharto landscape, albeit less influential.

The goal for rice policy did change markedly in 2004, however, when the government reintroduced a ban on imports. In so doing, it substituted self-sufficiency for stable prices as the goal of rice policy. The price increases that resulted were difficult to manage politically, and government was forced into a policy u-turn. BULOG was given more autonomy to manage imports and overall rice supply in an attempt to stabilise prices, while the government increased its efforts to boost production and productivity.

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384 Ibid 99.
385 Ibid.
388 Friend, above n 341, 142.
389 Fane and Warr, above n 361, 136.
and distribution under the RASKIN (*Beras Miskin* — Rice for Poor Families) programme.\(^{390}\) The thrust of rice policy at this time was not dissimilar to what had prevailed early in the New Order, but concerns over the adequacy of rice supply returned once the economic impacts of the 2007 Global Financial Crisis took hold. The government tightened rice export regulations in April 2008 and, later that month, raised the price at which BULOG purchased rice, with the aim of reducing smuggling and raising farm incomes.

While policy struggles over the direction of rice policy were broadly similar pre- and post-Soeharto, Fane and Warr suggest that post-Soeharto policy needs to be seen in the context of democratic transition.\(^{391}\) At first, the policy mix was a backlash against what Indonesians and the Indonesian government saw as a loss of economic sovereignty, consequent to the IMF programme that was implemented in the final stages of Soeharto’s rule. As democracy took hold,\(^{392}\) the political power of farmers and agricultural processors increased and this, in part, found expression in greater protection of domestic producers. Fane and Warr capture the mood: ‘rice self-sufficiency and protection of farmers are both politically attractive in Indonesia, and in the public imagination both are strongly associated with the national interest and with concern for the poor’.\(^{393}\)

### B Regionalism

One area in which food policy in the post-Soeharto era differs from earlier periods is in the extent to which this has been wound into regional economic arrangements through ASEAN.\(^{394}\) While ASEAN commenced in 1967 and an Agreement on an ASEAN Food Security Reserve was signed by the five original members in 1979,\(^{395}\) more

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\(^{390}\) McCulloch and Timmer, above n 334, 33–34. Under the RASKIN programme, BULOG distributes a specified quantity of rice (currently 20 kg) of rice per month to poor families at subsidised prices.

\(^{391}\) Fane and Warr, above n 361, 136.

\(^{392}\) The constitutional amendments spanned the period 1998–2002, but it was not until October 2004, when Susilo Bambang Yudhoyono became president, that an Indonesian president was directly elected by the people. BJ Habibie (May 1998–Oct 1999) was appointed president upon Soeharto standing down, while Abdurrahman Wahid (October 1999–July 2001) and Megawati Soekarnoputri (July 2001–October 2004) were elected by the MPR.

\(^{393}\) Fane and Warr, above n 361, 147.

\(^{394}\) ASEAN currently comprises ten member states: Brunei Darulssalam, Cambodia, Laos, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. See ASEAN, *ASEAN Member States* [<http://www.asean.org/asean/asean-member-states>].

\(^{395}\) Indonesia, Malaysia, the Philippines, Singapore, and Thailand. See ASEAN, *ASEAN Cooperation in
attention has been given to a regional approach since the 2006–08 food crisis.

The ASEAN Economic Ministers discussed food security during their May 2008 retreat and emphasised the importance of rice production and supply and rice prices to ASEAN economic and social wellbeing. Not surprisingly, there was a corresponding emphasis on increasing production and productivity and providing an orderly regional trading environment.\(^{396}\) The focus on food security flowed over into the 14\(^{th}\) ASEAN Summit in early 2009, when the heads of state/government pledged to increase regional cooperation in both the production and distribution of food, increase agricultural productivity, and eliminate distortions in food trade. The Summit also supported the efforts that were underway to establish a permanent ASEAN Plus Three\(^ {397}\) food crisis intervention capability in the form of the ASEAN Plus Three Emergency Rice Reserve (APTERR).\(^ {398}\) This built on the 1979 Agreement on the ASEAN Food Security Reserve.

In addition to the Chairman’s statement, the Heads of State/Government issued a statement on food security at the Summit. This was adopted as the ASEAN Integrated Food Security (AIFS) Framework and the Strategic Plan of Action on Food Security in the ASEAN Region (SPA-FS) covering 2009–13. ‘The goal of SPA-FS is to ensure long-term food security and to improve the livelihoods of farmers in the ASEAN region.’\(^ {399}\) The objectives are to increase food production, reduce post-harvest losses, promote markets and trade for agricultural commodities and inputs, ensure food stability, promote availability and accessibility to agriculture inputs, and operationalise regional food emergency relief arrangements.\(^ {400}\) The AIFS Framework has four components: food security emergency/shortage relief, sustainable food trade development, an integrated food security information system, and agri-innovation.


\(^ {396}\) The ASEAN Economic Ministers’ Retreat, Joint Ministerial Statement on Food Security, Bali, 3 May 2008.

\(^ {397}\) The ‘ASEAN Plus Three’ dialogue was established in 1997. The ‘Plus Three’ countries are China, Korea, and Japan.

\(^ {398}\) ASEAN Summit, Chairman’s Statement of the 14\(^{th}\) ASEAN Summit ‘ASEAN Charter for the ASEAN Peoples’, Cha-am, 28 February–1 March 2009 <http://www.asean.org>.

\(^ {399}\) I<http://www.aseansec.org>.

\(^ {400}\) Ibid.
Food security was one of the issues discussed in the 3rd ASEAN-UN Summit held alongside the 14th ASEAN Summit. Those discussions were based around the Convergence Matrix of Programmes and Activities on the Implementation of Food Security that had originally been drawn up at the ASEAN-UN Meeting on Food Security on 11–12 November 2008, as well as the AIFS framework. The food security definition used is that formulated at the 1996 World Food Summit: food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life. The emphasis was on the production of rice, maize, soybean, sugar and cassava.

Subsequent to the 14th ASEAN Summit, the ASEAN-FAO Regional Conference on Food Security was held on 27–28 July 2009 in Bangkok, Thailand. The conference noted the importance of linking FAO’s Regional Priority Framework for Asia and the Pacific to ASEAN’s AIFS Framework and encouraged FAO to do further work on the reasons for the lack of progress in reducing hunger, and on addressing agricultural trade issues and foreign investment in agricultural land.  

II THE ECONOMIC ASSESSMENT

Since the advent of the New Order, economic policymakers in Indonesia have attempted to marry a western economic orthodoxy built on markets and individualism with Indonesian value systems, including the struggle for Islamic expression in a pluralist democracy. Friend’s observation is that Indonesia has operated with a split-level value system in which western values were assimilated with various Indonesian cultural traditions, such that what seem like inconsistent ways of thinking and viewing the world coexist. This stands in contrast to the economics that was privileged in the establishment of the FAO, and in the international response to the 2006–08 food crisis. Of interest, then, is how mainstream economists would view the Indonesian approach to rice policy, generally, and to the contentious questions of price liberalisation and exposure to international markets, in particular. To give a flavour of these views I draw on the work of several long-term, close-hand observers of Indonesian rice policy and

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402 Friend, above n 341, 12.
Agricultural development.

A Production, Prices, and Poverty

When thinking about Indonesian rice policy, McCulloch and Timmer make the point that Indonesia has generally been a net importer of rice, and this should be borne in mind in any discussion of rice self-sufficiency, food security, or the potential to be a net exporter. Following on from this point, price information becomes especially important as an indicator of shortages in the rice supply, particularly when production and consumption measures are not always reliable. But, as we have seen, price stabilisation has been an important platform of rice policy for lengthy periods in Indonesia’s history. It is deeply ingrained into the Indonesian psyche and remains an attractive aspiration.

Indonesia’s attempts to stabilise rice prices are not unusual and many countries attempt to keep food prices stable because of the obvious impact on standards of living. Nor is Indonesia unusual in the methods it has employed to stabilise prices. The two broad mechanisms typically used are stabilising prices through sales and purchases, irrespective of who the purchasers or sellers might be, or supplying limited quantities of rice at low prices through ‘ration shops’. Within these broad mechanisms, there is a continuum of modalities ranging from ‘complete reliance on market mechanisms for procurement (tenders) and distribution (open market sales at auction) ... and forced procurement and rationed sales at official prices’. At the market end of the continuum, countries typically use, singularly or in unison, buffer stocks and trade-based instruments. Buffer stock agencies, such as BULOG, underpin food security through holding stocks as a reserve to offset food shortages, as might occur during an emergency, or to stabilise prices by buying when prices are low and selling when prices are high. Market-based mechanisms link domestic and international markets through a trigger price that, when breached, triggers imports.

Difficulties arise when countries have multiple objectives, such as both targeted prices

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403 McCulloch and Timmer, above n 334, 37–38.
404 Ibid.
406 Ibid 93.
and targeted supplies of rice, but lack the instruments to meet each objective or cannot reconcile conflicting policy objectives. This type of problem is familiar to economists and to public policy analysis, more generally. If price stabilisation is the policy objective, then what is the most efficient way of stabilising prices? Dorosh’s assessment is that it is preferable to rely on trade liberalisation and competitive markets over buffer stocks, because markets can respond more quickly to whatever information is available, and because it is costly to maintain and distribute buffer stocks.

Year-to-year rice production in Indonesia has varied significantly since 1955, but the average growth over that time has been positive. In their study covering the 30 years from 1955–85 Simatupang and Timmer segment this growth into four broad periods: 1955–77, when average growth was 3.1 percent per annum; 1977–82, when average annual growth was 7.0 percent in response to across-the-board improvements in seed varieties, infrastructure and extension services; 1982–98, when the previous growth trend was broken by a sustained drought and steadily declined thereafter; and 1998–2005, when average growth stabilised at 1.2 percent per annum. The general picture is one where the growth in production is lower than the growth in demand arising from population growth and higher incomes as a consequence of economic growth, with the result that Indonesia remained a consistent net importer of rice.

Nevertheless, the evidence suggests that Indonesia was quite successful in stabilising rice prices, attaining rice security, and reducing poverty, at least up until the Asian financial crisis that began in 1998, and particularly from the mid-1970s, after the 1974 food crisis had abated. Economic growth was undoubtedly a contributing factor, but McCulloch also attributes part of the success to the equitable nature of this growth and the rice price stabilisation policy was central to this equitable growth.

Since the Asian financial crisis, price stability has generally only been attained at prices above those prevailing in world markets. The IMF financial programme imposed after the Asian crisis brought an end to the policy, when a free rice trade policy replaced the

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407 Ibid.
408 Ibid 110.
409 Simatupang and Timmer, above n 360, 66–68.
410 McCulloch, above n 330, 45–6.
BULOG monopoly, although inefficiencies and corruption within BULOG itself also had a major bearing on the removal of the monopoly. Rice prices were relatively stable under the free trade policy, but after import restrictions were reintroduced in January 2004, prices escalated by around 80 percent over the next three years, calling into question the merits of the policy.

McCulloch’s analysis indicates that the higher rice prices are associated with a higher incidence of poverty. There are two main reasons. First, rice consumption accounts for 25 percent of total monthly expenditures for the poorest 20 percent of the population, and 80 percent of the income for this group is derived from non-food crop farming, most of which is non-rice farming. Second, while it is true that agriculture is the largest employer in Indonesia, and around 70 percent of rural households engage in agriculture in some form, the sector only accounts for 40 percent of national employment. This is reminiscent of Reid’s observations on pre-colonial Indonesia. The evidence further suggests that higher prices do not boost employment in rice farming or the wider agricultural sector. Farmers as a group are also hurt by high rice prices. Only about a half of rural households engaged in agriculture grow rice and two-thirds of farmers are net consumers of rice.

Peter Timmer, who has extensively studied Indonesia’s rice economy for several decades, is in no doubt that BULOG has been successful in stabilising rice prices in Indonesia through its procurement and market operations. The result was that rice prices, particularly during the New Order, were, on the whole, more stable than would have been the case had Indonesia operated a free domestic market in rice with open access to world markets. He is also in no doubt that this policy was socially beneficial and that these benefits persisted, even as the rice economy’s contribution to total economic activity decreased over time. The reason was that periodic instability in world markets or sudden changes in rice production had negative effects on the

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411 Ibid 46.  
412 Ibid 45–46.  
413 Ibid 49.  
414 Ibid 50.  
415 McCulloch and Timmer, above n 334, 36.  
416 McCulloch, above n 330, 53.

\section*{B \textit{Does Rice Policy Need to be Re-oriented?}}

Any discussion of price stabilisation has to take into consideration the volatility of world prices and the policies of other countries, especially if they are deemed to distort the world market. Historically, Indonesia has been reluctant to surrender to the world rice market because of concerns over price volatility. The achievement of the New Order in stabilising rice prices from 1969–1996\footnote{David Dawe, ‘Can Indonesia Trust the World Rice Market?’ (2008) 44 Bulletin of Indonesian Economic Studies 115, 115–117.} would seem to validate the policies adopted. Nevertheless, the difficulties that the Indonesian government has encountered since the Asian crisis in stabilising rice prices through import controls, coupled with the costs that have been imposed on the Indonesian public from stabilising domestic prices at levels above world prices, have, not surprisingly, led a number of commentators to question the concerns over price volatility, and to call for a reorientation of policy.

The proponents of change point to world prices being much more stable from the mid-1990s, as world production has increased. So too has the volume of rice traded increased, as the major rice exporting countries have become more dependent on the world market. Furthermore, the foreign exchange constraint is now much less pressing in Indonesia than formerly was the case. Dawe captures a fundamental concern that would be shared by many economists: ‘If the world market can now provide the same level of stability as was provided by the New Order government, then it is difficult to justify any interventions to stabilise domestic prices’.\footnote{Ibid 126–127.}

Simatupang and Timmer suggest that government policy would be better directed towards increasing production, although they caution against pursuing self-sufficiency at any cost. But increasing production will be difficult, in their view, without marked improvements in productivity and efficiency, as there is little room to increase production with existing technology and infrastructure.\footnote{Simatupang and Timmer, above n 360, 77.} Dorosh advocates for price
stabilisation and food security packages that are part of a wider, integrated social protection package aimed at poor and vulnerable households, so as to employ the most effective form of assistance.\footnote{421} In this respect, cash transfer systems targeted at particular households are now regarded as being less expensive and perhaps more effective than untargeted public distribution systems.

McCulloch and Timmer advocate what is, by their own admission, a controversial reorientation of rice policy.\footnote{422} Essentially, they argue that poverty reduction is a preferable policy goal to rice self-sufficiency and it is overall food policy, as opposed to rice policy, that should be emphasised in the achievement of this policy goal. The focus on domestic production and use of imports to make up the shortfall in domestic production has resulted in rice prices being above the international price. And, as McCulloch points out elsewhere,\footnote{423} this policy has hurt not only the urban population, but also non-rice farmers and rural workers. His assessment is that as much as 80 percent of the population were adversely affected. Furthermore, if food policy did not favour rice over other foods, then prices would play their economic role in directing agricultural resources to their most valuable use. If rice prices were lower, the production of non-rice foodstuffs would increase, and forsaking rice self-sufficiency would be consistent with the pursuit of overall food security in these circumstances.

While pro-market advocates would find the economic case for greater reliance on world markets convincing, it does beg the question as to whether Indonesia can be confident that there will still be sufficient supply for the majority of the Indonesian population when prices rise. The rapidly escalating prices associated with the 2006–08 international food crisis is a case in point, and, as noted earlier, the history of food crises is a case of history repeating. Price rises will certainly ration the available supply, but it is rationed to those that can afford to pay in the absence of government assistance to those that cannot.

With respect to the policies of other countries, Dawe notes that the major exporting countries have never been successful in establishing a cartel. This is because the six

\footnotesize{\begin{itemize}
  \item \footnote{421} Dorosh, above n 405, 112.
  \item \footnote{422} McCulloch and Timmer, above n 334, 33.
  \item \footnote{423} McCulloch, above n 330, 61.
\end{itemize}}
largest exporters account for only around 25 percent of total exporters and no single country is in an overly-influential position. Thailand, the largest exporter, only accounts for around eight percent of total world exports. Reinforcing this lack of market power is the fact that there are now more substitutes for rice as a food source. In short, the individual interests of the main exporting countries are best served by foregoing attempts to gain market power. Dawe is also dismissive of concerns over the effect that trade distorting policies adopted by other countries, such as import restrictions or export subsidies, could have on Indonesia, as the world rice market is segmented by variety, and the variety most important to Indonesia is not affected by these policies.\footnote{Dawe, above n 418, 122–125.}

Dawe is in no doubt that Indonesia is destined to be a net importer of rice, because it is geographically disadvantaged compared to mainland producers such as Thailand and Vietnam. The mainland producers typically have large river deltas, or at least larger river systems providing ample water to abundant flat lands. Island producers, such as Indonesia, typically have more varied topography that allows for greater agricultural variety.\footnote{Ibid 118.} In itself, this challenges the pursuit of food security through self-sufficiency, and even more so when put alongside arguments that restricting imports to achieve self-sufficiency increases poverty rather than alleviating it through increasing domestic prices.\footnote{Peter Warr, ‘Food Policy and Poverty in Indonesia: A General Equilibrium Analysis’ (2005) 49 Australian Journal of Agricultural and Resource Economics 429.} If self-sufficiency is not possible, then a reliance on international markets would appear to be the only prudent policy objective.

A further consideration when assessing the suitability of rice policy is that the distribution channels of the rice economy have fundamentally changed. ‘A “supermarket revolution” is altering the nature of Indonesia’s food supply chain from farmers to retail consumers.’\footnote{C Peter Timmer, ‘Food Security in Indonesia: Current Challenges and Long-Run Outlook’ (Working Paper Number 48, Center for Global Development, 2004) 17.} Timmer’s view is that, provided there is sufficient competition, this structural change will improve agricultural productivity and consumer welfare. The main issue to be addressed is the impact on small-scale rice farmers who are likely to be squeezed out by the increased competition at the supplier
end of the rice chain.\textsuperscript{428} For Timmer, this becomes a problem of how to deal with rural poverty and there are lessons to be learned from the way the New Order approached this issue. To use a modern phrase, the New Order approach was one of growth for the poor. The paradox for Timmer was that the autocratic New Order was consistently able to demonstrate a political commitment to reducing poverty and improving economic policies — other than in the early 1980s, when the oil boom ended and agricultural prices collapsed, and, later, with the onset of the Asian financial crisis — that increasingly democratic governments in the post-Soeharto era have not been able to replicate.\textsuperscript{429} His conclusion is that the increased use of fiscal transfers to assist the poor reflects a stronger democratic constituency for dealing with poverty at the expense of the former political-technocratic pro-poor growth coalition.\textsuperscript{430}

These views permeate Timmer’s approach to food security. He notes that Asian countries did not get distracted by debates on definitions of food security.\textsuperscript{431} Instead, they recognised the suffering of the hungry and the food insecure for what it was. Broadly speaking, Asian governments adopted a two-pronged approach of pro-poor growth, where economic growth boosted incomes of the poor, and stable food prices.\textsuperscript{432} While price stabilisation is contentious, and certainly not part of the mainstream economic orthodoxy, Asian policymakers justified it on the grounds that rice was the food staple, it was grown mostly by small land-holders, and because, historically, world rice markets were thin and volatile. Governments considered that they had a political mandate for price stabilisation.\textsuperscript{433} The underlying process for Timmer was one where the food system linked politics and economics.\textsuperscript{434}

Timmer’s conception of food security stands in marked contrast to the UN definitions discussed in the previous chapter. For Timmer food security is a vague concept but is one which crystallises public sentiment against ‘chronic hunger, local food shortages, and sudden spikes in food prices’.\textsuperscript{435} The concept captures ‘what the public wants with
respect to these problems. However defined, food security is clearly a public good.\footnote{Ibid 2 (emphasis altered).} It is a public good in the sense that food security is only achieved when it applies to each individual. Linking food security to some concept of ‘the public’ is important, in my view, and it suggests that there is a link between economics and public law. I develop this thinking later in the thesis.

While invoking ‘the public’, Timmer, nevertheless, states that food security is an economic issue, albeit ‘embedded in a broader set of political, economic and technological forces’\footnote{Ibid 2.} that reflect the development that has taken place in Indonesia.\footnote{Ibid 3.} Consequently, in his view:

> food security needs little specific policy attention, beyond a concern for coping with the chronically poor populations that market forces tend to leave behind. Thus, a decade from now, Indonesia’s food security will depend primarily on the rate and distribution of economic growth and targeted programs to alleviate poverty. Of course, some of these programs may well be food-oriented, because the most basic need of the poor is for food.\footnote{Ibid 2 (emphasis in original).}

This is revealing. Clearly there is a high sensitivity to the plight of the poor. But the reliance on mainstream economics directs attention to the future and the contribution longer-term economic growth makes to increasing incomes of both producers and consumers. The parallel with the emphasis that the international organisations placed on economic growth is clear, although Timmer’s is a nuanced emphasis. ‘Rather than asking how to cope with hunger and famine, the question might be how to escape from their threat altogether.’\footnote{Ibid 2.}

The problem with asking that question is that it takes attention away from those that suffer from hunger and famine. I would suggest that there are two questions that have to be asked. One relates to how to prevent hunger and famine and the other relates to what to do about those that in the meantime are experiencing the hunger and famine. Both have to be asked and both have to be addressed at the same time. My concern is

\footnotesize{\textsuperscript{436} Ibid 2 (emphasis altered). \textsuperscript{437} Ibid 2. \textsuperscript{438} Ibid 3. \textsuperscript{439} Ibid 2 (emphasis in original). \textsuperscript{440} Ibid 2.}
with the ability of mainstream economics and international organisations to address these questions of distribution and equity. I will take up that discussion again in Chapter 4.

III THE LEGAL FRAMEWORK FOR FOOD SECURITY

One of the distinguishing features of the Indonesian experience, compared to the international experience, is that Indonesia confronted the problem of hunger at independence and for several decades was not greatly influenced by the evolution of the international food organisations, or the associated food discourses. Indeed, through the 1980s, it was more of a case of the FAO lauding Soeharto and holding up the example of Indonesia to the rest of the world, as noted earlier. That would change from the mid-1990s, when the international discourses of food security and human rights gained traction within Indonesia, and Indonesian civil society reacted against the human rights abuses of the New Order.

A Legal Instruments

Indonesia enacted a Food Law441 in November 1996, not long after the 1996 World Food Summit. This law ‘is the legal foundation for food matters in Indonesia. It sets down basic policy on foods, food safety (keamanan) and food security (ketahanan)’.442 The FAO’s assessment was that the law ‘recognizes the right to adequate food for all, covers food security and food safety, and allocates institutional responsibility. With the food law and the ensuing regulations, the building blocks of the legal framework for food security have been put in place.’443

The law established the Agency for Implementing Food Security (Badan Usaha Ketahanan Pangan — BUKP) within the Ministry of Agriculture. The agency commenced operations in 2000 and in the following year was merged with BIMAS, which, to that point, was focussed on increasing national rice production. The new agency, Badan BIMAS Ketahanan Pangan (BBKP), was ‘responsible for food supplying, food distribution, food security, community food security enhancement, and the early

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441 Law Number 7/1997 The Act on Food Affairs.
442 Yonekura, above n 374, 143.
BBKP also functioned as the secretariat for the national Council of Food Security (Dewan Ketahanan Pangan) that had been established. The Council was personally chaired by the President and was supported by local councils for food security that had been set up under BBKP.

Yonekura observes that these new organisational arrangements clashed with the efforts of another central government agency, the Ministry of Home Affairs, which was focusing its attention on strengthening the traditional village system for storing food — the Lumbung Desa. Similarly, BBKP did not have direct influence over BULOG and this has compromised the effectiveness of Indonesia’s food security policy, in Yonekura’s assessment. But these coordination problems can also be seen as an illustration of the importance of a political machinery for issues such as food security. The fact that the President chairs the Council of Food Security reinforces this point: national food problems are ultimately problems of national choice and establishing the priorities for that choice.

As noted, the Food Law was enacted shortly after the 1996 World Food Summit, an event which re-energised discussion on the right to food. The enactment was also against the backdrop of increased demand by the Indonesian public for greater respect of human rights and for redressing human rights abuses of the past. These demands went hand-in-hand with the political liberalisation that was unleashed with the fall of Soeharto. His immediate successor, President Habibie, lost no time in widening the legal framework for human rights and Law No 39/1999 on Human Rights Law and Komnas HAM (Komisi Nasional Hak Asasi Manusia – the National Human Rights Commission) was a key component of this framework.

Komnas HAM had been established by Presidential Decree Number 50 in 1993. At first glance, this seems incongruous, given that human rights abuses were a feature of the New Order, along with military involvement in politics and the centralised control over national administration and resources. The decree was issued shortly before a meeting of Indonesia’s major aid donors and just one week before the World

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444 Yonekura, above n 374, 143.
446 Lindsey, ‘Indonesian Constitutional Reform’ above n 332, 254.
Conference on Human Rights in Vienna.\(^\text{447}\) To some extent, the decree was a response to domestic social and economic pressures, but it was widely seen ‘as a public relations gimmick to divert attention from the intense international pressure mounted on the Indonesian government in the wake of the 1991 Santa Cruz massacre in East Timor’.\(^\text{448}\)

Another key component of the Indonesian human rights framework is the amended 1945 Constitution. As a result of the four amendments that were made over 1999–2002, the constitution became a substantive, rules-based social contract between the Indonesian state and its citizens, with state institutions also subordinate to the constitution: constitutional supremacy had replaced presidential supremacy.\(^\text{449}\) The establishment of a constitutional court was provided for in the third amendment of 2001 and the powers of the court were provided in the third and fourth amendments in 2002. The Constitutional Court commenced in August 2003.

Chapter XA of the second amendment of 2000 provided for a comprehensive set of citizen’s rights based on the *Universal Declaration of Human Rights*. While it has not been unusual for developing countries to explicitly include economic, social, and cultural rights alongside civil and political rights,\(^\text{450}\) Tim Lindsey regarded this inclusion as ‘perhaps the most radical change’\(^\text{451}\) to the paternalistic and authoritarian philosophy that characterised the 1945 Constitution, and he was impressed that the range of rights ‘extend[ed] well beyond those guaranteed in most developed states’.\(^\text{452}\)

To date, the Constitutional Court has not been petitioned on the state’s failure to provide for food security, although it seems only a matter of time before this happens. First, the existence of the Food Law opens up the possibility of a challenge to the constitutionality of this law. Second, there are precedents in the way constitutional courts in several developing countries have addressed state obligations for realisation


\(^{448}\) Ibid.

\(^{449}\) Jimly Asshiddiqie, ‘Creating a Constitutional Court for a New Democracy’ (Seabrook Chambers Lecture, Melbourne, 11 March 2009) 3.


\(^{451}\) Lindsey, above n 332, 254.

\(^{452}\) Ibid.
of economic, social, and cultural rights.\textsuperscript{453} And third, within Indonesia, the Constitutional Court ‘has become the site of political contestation over the shape of the economy in Indonesia’s new democracy’.\textsuperscript{454} That contest has arisen in connection with the Court’s interpretation of Article 33 of the amended 1945 Constitution.

Article 33 currently provides:

(1) The economy shall be structured as a common endeavour based upon the family principle.

(2) Branches of production that are important to the state, and that affect the public’s necessities of life, are to be controlled by the state.

(3) The earth and water and the natural resources contained within them are to be controlled by the state and used for the greatest possible prosperity of the people.

(4) The national economy is to be run on the basis of economic democracy, and the principles of togetherness, efficient justice, sustainability, environmentalism, and independence, with a balance between advancement and national economic unity.

(5) Further provisions to implement this provision will be legislated.\textsuperscript{455}

Paragraphs (4) and (5) were added as part of the Fourth Amendment in 2002.

Butt and Lindsey note that Article 33 was originally ‘[c]onceived in the lead-up to the declaration of Indonesia’s independence in 1945 [and] inspired by socialist and nationalist ideals of the kind common to many of the anti-colonial Asian independence movements of the period’.\textsuperscript{456} It ‘reflects long-standing anxiety about control of the economy that can be traced back to the nationalist analyses of the Dutch colonial economic system and suspicion of economic “liberalism” tied to ideas about colonial domination’.\textsuperscript{457} As Butt and Lindsey note, this is clear from the formal Elucidation of Article 33 in the 1945 Constitution, where the primary underlying concerns were that...
private business might exploit the people through control over production or natural resources.\footnote{Ibid.} The original elucidation makes clear that the main priority of economic policy is the prosperity of the community, rather than that of individuals. It equated the prosperity of community with state ownership. ‘The land and water and natural resources ... fundamentals of community prosperity’ and ‘only business not important for the lives of many people may be left in private hands’.\footnote{Ibid 251.} The Indonesian expression that captures this thinking is ekonomi rakyat — the ‘People’s Economy’.

Article 33 of the Constitution has had an enduring influence on Indonesian politics and government. It survived the constitutional upheavals of the Soekarno years and the selective liberalisation and suppression of socialist opposition of the Soeharto years.\footnote{Ibid 251–2.} The retention of Article 33 was fiercely debated at the time of constitutional amendments in 2002, and, in the end, the article was not only retained but expanded. In short, the debate is over the merits of market liberalism versus protectionist antiliberalism.\footnote{Ibid 250.} The establishment of the Constitutional Court has further entrenched the debate, as the Court has the power to review the constitutionality of economic legislation. Some of its decisions have ‘thwart[ed] government efforts to provide greater scope for the private sector to participate in the branches of production and exploitation of natural resources referred to in article 33’.\footnote{Simon Butt and Tim Lindsey, ‘Economic Reform When the Constitution Matters: Indonesia’s Constitutional Court and Article 33’ (2008) 44 Bulletin of Indonesian Economic Studies 239, 243.} In turn, the executive has subverted the Court in some instances through issuing subordinate regulations that the Court has no power to review, rather than amending laws the Court has decided are unconstitutional.\footnote{Ibid 255–7.}

The cases at the centre of the debate include the *Electricity Law* cases of 2003 and 2009,\footnote{Constitutional Court Decision 001-021-022/PUU-I/2003 and 149/PUU-VII/2009.} the *Oil and Natural Gas (Migas)* case,\footnote{Constitutional Court Decision 002/PUU-I/2003.} and the *Water Law* case.\footnote{Constitutional Court Decision 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005.} To date the Court has had no difficulty in determining what is an important sector in these
Article 33 cases,\textsuperscript{467} but it has wrestled with distinguishing ends from means and the meaning of the word ‘control’ in the phrase ‘controlled by the state’ that appears in paragraphs (2) and (3). Any judicial interpretation of the article is bound to be contentious, particularly as paragraph (2) omits any reference to purpose while paragraph (3) has a clear statement on purpose — the ‘greatest prosperity of the people’.\textsuperscript{468}

The Court’s most comprehensive statement on the matter is contained in the \textit{Electricity Law} judgement and this position was endorsed in the other two cases.\textsuperscript{469} The Court reasoned that ‘control’ was wider in scope than ‘regulation’ and that ‘ownership’ did not equate to ‘control’. Both were necessary, but neither was sufficient. In order to guarantee the welfare of the people and ensure social justice, as required by the Constitution, the government would also have to be in a position to exert its influence on the management of the entities concerned through share ownership or through a state-owned enterprise. It would also have to provide the framework for administrative control, through a licensing regime for example. Above all, the state was obliged to ‘supervise and monitor the sector to ensure that the branches of production and natural resources were, in fact, exercised for the greatest prosperity of the people’.\textsuperscript{470}

In line with this reasoning, the Court decided that the Electricity Law was unconstitutional, because competition and unbundling were at the heart of the law, and the Law did not address state control of this important industry. With respect to the Oil and Natural Gas Law, the Court decided that the state had not relinquished control, due to the establishment of a Mining Authority to control upstream and commercial activities and licensing regime covering management, transportation, storage and commercial activities. As for the Water Law, the Court held that private sector participation was not inconsistent with government control of national water resources, as the private sector had effectively been granted a ‘right to exploit water’

\textsuperscript{467} Butt and Lindsey, \textit{The Constitution of Indonesia}, above n 343, 260.
\textsuperscript{468} Butt and Lindsey, ‘Economic Reform When the Constitution Matters’ above n 462, 251–253.
\textsuperscript{469} Butt and Lindsey, \textit{The Constitution of Indonesia}, above n 343, 254–5.
\textsuperscript{470} Ibid 255.
and the government controlled the allocation of this right.\textsuperscript{471}

Phillipa Venning also reviewed the \textit{Electricity Law} and \textit{Water Law} cases in connection with her examination of the form of judicial review being practised by the Constitutional Court.\textsuperscript{472} Venning’s primary concern is with the determination of economic, social, and cultural rights, and, more specifically, with the way in which the type of judicial review affected this determination, based on what Mark Tushnet has labelled ‘strong-form’, ‘weak-form’, and ‘superweak-form’ judicial review.\textsuperscript{473} She notes that in the \textit{Electricity Law} case the Court stated that Article 33 was the basis of the Indonesian economy and that the implications were that the state had power to control production that was deemed important, but also that the state had ‘a \textit{positive duty} to protect its control over important production in order to provide social justice and ensure the availability, fair distribution and affordability of important products’.\textsuperscript{474} It followed, for the Court, that only where ‘an industry is deemed not important for the welfare of the country can the private sector be given policy and decision-making control’.\textsuperscript{475} Venning also notes that the Court was persuaded by Joseph Stiglitz’s argument in \textit{Globalisation and its Discontents}.\textsuperscript{476} Stiglitz was critical of the view that the market could be relied on to ensure efficient outcomes because this failed to take into account the possibility of government interventions altering the market distributions so as to make everyone better off.\textsuperscript{477}

\textbf{B The Indonesian Constitution as an Economic Constitution}

Butt and Lindsey flag the possibility that other areas of public policy in Indonesia will be subject to judicial review in the future\textsuperscript{478} and food security offers itself as a strong contender. Indeed, Venning notes that in its judgment in the \textit{Electricity Law} case the ‘right to electricity ... was deemed by the court to be so important as to be second only

\begin{itemize}
\item \textsuperscript{471} Ibid 255–7.
\item \textsuperscript{472} Venning, above n 450.
\item \textsuperscript{474} Venning, above n 450, 115–6 (emphasis in original).
\item \textsuperscript{475} Ibid 116.
\item \textsuperscript{476} Joseph E Stiglitz, \textit{Globalization and Its Discontents} (W W Norton, 2002).
\item \textsuperscript{477} Venning, above n 450, 117.
\item \textsuperscript{478} Butt and Lindsey, ‘Economic Reform When the Constitution Matters’, above n 462, 254.
\end{itemize}
to the right to food’.\textsuperscript{479} The prospect of food security being the subject of judicial review has a strong parallel in the economic growth versus human rights approaches that characterised the debate over the international response to the 2006–08 food crisis. The major difference is that in a domestic setting it is a legislative authority that will prevail, while in the current international setting the authority of an economic ideology prevails. The prospect of the Court extending its ‘control’ reasoning in the Article 33 cases to agricultural production runs counter to conventional economic thinking, which is discussed in greater detail in the following chapter, and potentially widens the divide between economics and law. Butt and Lindsey have a similar concern:

\begin{quote}
[T]he Court has required that the Indonesian government maintain a strong presence within the economy and, in particular, high levels of control over, and protection of, important industries. The Court’s conservative interpretation of Article 33 has thus impeded legal reforms aimed at improving the efficiency of the Indonesian economy and, critically, attracting much-needed high levels of foreign investment in key industries. Whether the Court’s interpretation and application of Article 33 does, in fact, maximise the welfare of the Indonesian people, therefore, remains an open — and much debated — question.\textsuperscript{480}
\end{quote}

Not surprisingly, the Court’s decision in the Electricity Law case was divisive — praised by NGOs and condemned by the government, investors and the donor community. As Venning notes, the criticisms revolve around the Court not considering what, for many, were other relevant considerations, such as the implications for access, consistency with the government’s targets for electrification, and the consequences for the government budget from any impacts the decision had on government subsidies.\textsuperscript{481}

While the Court’s decisions were divisive, it is, nevertheless, clear that it is trying to find some kind of balance between economic and social considerations that reflects Indonesian cultural traditions and is consistent with the provisions of the Indonesian Constitution. In this process, Article 33 can be thought of as an economic constitution, linking the social and the economic. It is built on a community’s values and culture and

\begin{footnotes}
\item[479] Venning, above n 450, 116.
\item[480] Butt and Lindsey, \textit{The Constitution of Indonesia}, above n 343, 266–7.
\item[481] Venning, above n 450, 117–18.
\end{footnotes}
gives expression to these values. In so doing, it seeks to align the economic system with the values and the balance the society has found between the social and the economic.

Hugh Collins provides a fuller description of an economic constitution. It contains rules that claim supremacy and that have been entrenched or are regarded as virtually immutable. Yet this kind of constitution is not directly concerned with the political process or civil liberties. Its subject matter concerns the social and economic order for a society. It seeks to fix in a fairly permanent form the structures for a particular kind of social and economic system. ... An economic and social constitution endeavours to promote a consensus of values regarding fairness and social justice for a community. It provides a cement of social and economic structures around which a community may build more permanent institutional structures, including its political institutions. It supplies a steady framework of laws and institutions that permit individuals to go about their business without fear of unforeseen political or administrative obstructions and seizures. The economic constitution inscribes in the basic laws of the country a commitment to a particular kind of social and economic order, which might require a capitalist, a communist, or some kind of mixed order of markets and public controls.482

Collins is writing here in the context of a European community and the importance of law and economic constitutions to forming this community, but his comments have wider applicability in that an economic constitution allows law to express a social-economic balance that the society has found and ‘provide[s] the necessary stability for the society to flourish’.483

But Collins’s focus is on a market society and the balance between individual freedom and constraints on markets — regulatory constraints — in line with the dominance of markets in contemporary society.484 Missing, though, is any justification of markets, or the purpose markets serve within a wider purpose of economics. In my view, this failure to isolate economic purpose is at the root of the consternation over the Article

483 Ibid 75.
484 Ibid 73–5.
33 cases in Indonesia. The struggle in Indonesia has been to give expression to the People’s Economy. That struggle has largely been in the context of markets and ownership. When the 1945 Constitution was drafted, it was deemed more important to protect Indonesian participation in the economy and the Indonesian ownership of national resources. While this can be seen as a statement of purpose, it loses sight of the imperative at the time the 1945 Constitution was drafted, which was that Indonesia was facing an armed struggle to rid itself of colonial rulers and needed to be able to provide for its people. Article 33 has, accordingly, become a site of ‘contestation over the shape of the economy’\textsuperscript{485} rather than a contest over the purpose of the economy. It does not seem unreasonable to suggest that the drafters of the 1945 Constitution were concerned with Indonesia being able to feed its people — to provide for its people — and that arguments over the instrumentality of markets and protection have distracted from this fundamental economic purpose. In this sense, economic policy debate has moved away from the focus on ends that characterised the initial post-independence debate. While that distraction remains, it is also reasonable to expect the Constitutional Court, the legislature and the executive will continue to be conflicted over the intention of Article 33.

\section*{IV \hfill SUMMARY AND CONCLUDING REMARKS}

What does the Indonesian experience tell us? First, it illustrates that hunger can be addressed without recourse to the language of human rights, something which has been forgotten amidst the revitalisation of rights since the 1970s and the emergence of the concept of the right to food in 1996. At this point, the ‘feeding the people’ problem in Indonesia bifurcated into the legal and economic approaches to food security.

Second, the Indonesian experience reinforces that problems of hunger and starvation have legal and economic dimensions, and there is some sort of connection between the legal and the economic. Framing food security in terms of human rights or market liberalism is not adequate for dealing with the problem, nor are attempts to cast the problem in broader legal or economic terms alone.

\textsuperscript{485} Butt and Lindsey, \textit{The Constitution of Indonesia}, above n 343, 266.
Third, economic policy has often been idealised in Indonesian political discourse as a servant of the people rather than a servant of economic technique. The Indonesian experience points to a wider, purposive conception of economics rather than a narrower, technical conception of economics. That purpose can be thought of as a society providing for itself and the Article 33 cases reinforce that whenever the institutions of society are not aligned with that purpose, the realisation of the purpose is thwarted. Thinking of the economy in this way challenges mainstream economic thinking that has influenced the way international institutions have approached food problems. What is at issue is the ability of an economic system to provide for the people and reliance on markets and techniques of economics are secondary issues. Furthermore, decisions of providing for a population involve choices between policies and the ordering of these choices introduces a political dimension to economic decisions.

The remainder of the thesis takes up the challenge of finding a language and a frame for problems of hunger that captures the economic, legal, and political dimensions of providing for a people. The first task is to unpack the nature of mainstream economics to reveal its unsuitability to conceptualising the problem of provisioning. From there, we can ask whether there are conceptions of economics outside the mainstream better suited to conceptualising such problems of provisioning, and to making economics a servant rather than master. This exploration and excavation begins in the next chapter.
ECONOMICS AND ITS SOCIETY

Taken together, the two preceding chapters contrast the approach of the institutions of the international community to food problems with that taken by Indonesian governments. The institutions of the international community have struggled to take responsibility for problems of hunger and have privileged mainstream economics, while successive Indonesian governments have taken up this responsibility, with respect to the Indonesian people, and have treated economics as a servant to this purpose. The discussion also showed how the Indonesian approach has been compromised in recent years, with the encroachment of international human rights norms and the market-oriented economic models of international institutions. What was a strong sense of economic purpose has now become obfuscated by an increased focus on economic technique, not unlike the way international institutions have privileged economics and economic growth in their response to international food problems. In effect, economics is a rival authority and form of authoritative knowledge to human rights in the international sphere.

This chapter probes the nature of the type of economic thinking that was adopted by the early UN institutions and presents an alternative, heterodox conception of economics — institutionalism — that I argue is better suited to framing problems of hunger and food insecurity. The first part of the chapter locates ‘mainstream economics’ by positioning the ‘mainstream’ against both ‘orthodox’ and ‘heterodox’ variants of economics. It illustrates the distinction between these variants through a brief overview of historical changes in economic thinking. Of particular interest is the place of neoclassical economics and institutionalism within this history, and the disciplinary separation of economics from political economy in the late 19th century. Part II examines two key analytical strands of mainstream economics — competitive markets and economic growth — and interrogates how mainstream economics deals with questions of both individual and social welfare. Institutionalism is presented as an
alternative to mainstream economics in Part III. The discussion contrasts ‘old’ institutionalism with new institutional economics, before providing an overview of the key features of ‘old’ institutionalist thought and the points of departure from neoclassical economics. The two key points that emerge from this discussion are the institutionalist emphasis on social provisioning and the associated conceptualisation of economics as the study of the institutions of provisioning.

The central argument of the chapter is that the institutionalist focus on social provisioning makes problems of hunger and food insecurity more tractable. Institutionalism embeds economics in its society, but mainstream economics lacks the machinery to explain this embeddedness. Furthermore, institutionalism explains this embeddedness within the wider institutional structures of a society, where the institutions of law and politics are particularly important. In so doing, institutionalism incorporates governance and power relations into its theoretical framework. This brings out clearly that there is an important distinction between identifying the choices open to a society through the technical apparatus of mainstream economics and the decisions on what choices to make, which are traditionally in the domain of law and politics. I will elaborate the legal dimension of institutionalism in Chapter 5 and extend the institutionalist approach to locate institutionalism within a public law framework.

I LOCATING MAINSTREAM ECONOMICS

The first task in locating mainstream economics is to clarify what is meant by the term ‘mainstream’, and what distinguishes this term from ‘orthodox’ and ‘heterodox’ — two other terms that are often used to describe economic ideas or ways of thinking. The second task is to trace the broad changes in accepted economic thinking to illustrate that the mainstream evolves. The economics of Hot Springs and subsequent food security-related international interventions can then be located within the thinking that prevailed at a particular time.

A What is the Mainstream?

Colander, Holt, and Rosser distinguish between the terms ‘mainstream’ and ‘orthodox’, at least in their usage within economics, in the following way:

Mainstream consists of the ideas that are held by those individuals who are dominant in
the leading academic institutions, organizations, and journals at any given time, especially in the leading graduate research institutions. ... ‘orthodox’ is primarily an intellectual category. It is a backward looking term that is best thought of as a static representation of a dynamic, constantly changing profession, and thus is never appropriately descriptive of the field of economics in its present state. Orthodoxy generally refers to what historians of economic thought have classified as the most recently dominant ‘school of thought’, which today is ‘neoclassical economics’.\textsuperscript{486}

The term ‘heterodox’ stands in opposition to both the orthodox and the mainstream, but there is ‘no single unifying element’,\textsuperscript{487} as Colander, Holt, and Rosser explain:

Heterodox ... is usually defined in reference to orthodox, meaning to be ‘against orthodox’, and defines itself in terms of what it is not, rather than what it is. An economist who sees him or herself as heterodox does not subscribe to the current orthodox school of thought, as defined by the historian’s classifications. ... A self-identified heterodox economist has also defined his or her self outside the mainstream.\textsuperscript{488}

Colander, Holt, and Rosser make two further points on the categorisation of the ‘orthodox’. First, since the categorisation of the ‘orthodox’ is backward looking, it names that which previously had no name. Second, the naming ‘usually comes from a dissenter, who opposed orthodox ideas, not from a supporter of the orthodox ideas’.\textsuperscript{489} As they point out, it was Marx who gave ‘classical economics’ its name in 1847, although that school of thought had emerged in the late 1700s.\textsuperscript{490}

Colander, Holt and Rosser contend that a binary classification of orthodox-heterodox is not sufficient for economics. The reason is that the discipline of economics is dynamic and not a static set of ideas; there is a diversity of views contesting for widespread acceptance. The mainstream, then, is a reflection of both orthodox and heterodox views, where some heterodox ideas are absorbed into the orthodox in some way. What holds this ‘diverse evolving set of ideas’ together is the ‘modeling approach to

\textsuperscript{486} Ibid 492.
\textsuperscript{487} Ibid 491.
\textsuperscript{488} Ibid.
\textsuperscript{490} Ibid.
economic problems’.

The changes in thinking are brought about through what Colander, Holt and Rosser describe as ‘work at the edge of economics’.

‘The edge of economics is that part of mainstream economics that is critical of orthodoxy, and that part of heterodox economics that is taken seriously by the elite of the profession.’ Work at the edge has both an intellectual and social dimension. The intellectual dimension brings originality and has been boosted by technological advances, as in computing and modelling technologies. The social dimension impacts the way in which ideas become widely accepted and incorporated into policy and practical applications.

The engagement with the history of economic thought over the remainder of this chapter bears out these comments. But this history also illustrates that neoclassical orthodoxy has been a dominant feature of the mainstream since its emergence in the late 1800s.

B Locating Neoclassical Economics

Adam Smith (1723–90) is widely acknowledged as the founder of economics, but other 18\textsuperscript{th} century thinkers, including François Quesnay and the French physiocrats, Richard Cantillon and David Hume, were also influential on its emergence.

This was not economics as we know it today, however. Rather, this early economics was part of a wider moral philosophy that was a composite of what later were to become separate disciplines of natural theology, ethics, jurisprudence and political economy.

The distinguishing feature of the work of the classical economists, who would later include David Ricardo (1772–1823) and Thomas Malthus (1766–1834), among others, was their focus on production and factors influencing the supply of consumption goods.

As Daniel Hausman explains, ‘[w]hat set these thinkers apart from their predecessors was their growing recognition of the existence of mechanisms whereby

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\textsuperscript{491} Ibid 486–7.
\textsuperscript{492} Ibid 486.
\textsuperscript{493} Ibid 492.
\textsuperscript{494} Ibid 487–8.
\textsuperscript{496} Ibid 42.
\textsuperscript{497} Ibid 24–5.
individual actions would have systematic consequences without any need for government control of the processes.\textsuperscript{498} The study of these systems and mechanisms, immortalised with Smith’s publication of \textit{The Wealth of Nations},\textsuperscript{499} in which he portrayed the economy as a self-regulating mechanism,\textsuperscript{500} would evolve into the discipline of economics.

The classical economists were liberal thinkers in the sense that they advocated the removal of restrictions on international trade and argued that the pursuit of individual motives was in the interests of society as a whole. At the same time, they saw the source of wealth in human labour — hence the foundational importance of the labour theory of value in classical economics — rather than in agriculture and trade.\textsuperscript{501}

Two themes dominated Smith’s analytical work. The first concerned economic growth and the relationship to income distribution, and the second concerned the competitive marketplace. The interest in these issues built up through the late-17\textsuperscript{th} and early-18\textsuperscript{th} centuries, had become mainstream in the 19\textsuperscript{th} century, and ‘[live] on today as the classic capitalist ideology.’\textsuperscript{502}

The work of Ricardo and Malthus is associated with the first theme and Ricardo’s work, in particular, influenced both Marx (1818–1883) and a group of thinkers who revolutionised classical economics. The socialist and marginalist traditions in economics were thus born, with the latter being retrospectively named the neoclassical tradition. Socialist thinking was a response to the social problems that were associated with the Industrial Revolution, particularly in the last quarter of the 18\textsuperscript{th} century and the first quarter of the 19\textsuperscript{th} century. The downside of industrialisation was the disparity in wealth between the industrialists and their financiers, and the factory workers, with the result that the poverty of the countryside had been exported to the cities.\textsuperscript{503} Socialist thinking emphasised the society as a whole, rather than a collective of individuals driven by the motive of higher profits, and rallied against

\textsuperscript{498} Ibid 22–3.
\textsuperscript{499} Adam Smith, \textit{An Inquiry into the Nature and Causes of the Wealth of Nations} (Originally published 1776).
\textsuperscript{500} Hausman, above n 495, 22–3.
\textsuperscript{501} Daniel R Fusfeld, \textit{The Age of the Economist} (Addison Wesley, 9\textsuperscript{th} ed, 2002) 19–21.
\textsuperscript{502} Ibid 19, 215.
\textsuperscript{503} Ibid 57–8.
income inequality.\textsuperscript{504}

Marx became the central figure of socialist thinking. He “begins with the idea that economic relationships are the fundamental driving force in any society,”\textsuperscript{505} that economic interests motivate people, that the predominant classes of interest are those of the capitalist and those of the worker, and that these two classes of interest stand in opposition. Marx’s intellectual achievement was to mount a rigorous critique of classical economics, based on what he saw as the inadequacies of the labour theory of value. His principal concern with the theory was that it did not reflect the true worth of the workers’ contribution to the final value of a product. Within his wider critique, he posited that capitalism was inherently unstable, because capital accumulation was a source of economic crisis and because these crises would be recurring and more severe. He regarded social revolution as the inevitable response to the social catastrophes.\textsuperscript{506}

Marx’s attack on capitalism was a theoretical attack on the orthodox assumptions of capitalism. Accordingly, a theoretical response was needed if the Marxist critique was to be seriously challenged.\textsuperscript{507} That response came in the form of the marginalist revolution. For the marginalists, the value of a product or service was not derived from its labour value but rather from its marginal utility — “the usefulness of the last unit purchased”.\textsuperscript{508} Neoclassical economists would apply this marginal analysis to their work on the second of Smith’s major themes — competitive markets — and the interaction of supply and demand in determining equilibrium prices in these markets.

Ricardo was also a major influence on the thinking of the marginalists, as was the utilitarianism of Jeremy Bentham (1748–1832) and John Stuart Mill (1806–1873). Mill’s 1836 essay ‘On the Definition of Political Economy and the Method of Investigation Proper to It’\textsuperscript{509} is regarded as one of the earliest discussions of what would be now

\textsuperscript{504} Ibid 57.
\textsuperscript{505} Ibid 62.
\textsuperscript{506} Ibid 62–6.
\textsuperscript{507} Ibid 74.
\textsuperscript{508} Ibid 86.
referred to as the methodology of economics.\textsuperscript{510}

The initial neoclassical response became a substantive school of thought in the late 1800s. Alfred Marshall (1842–1924) is generally considered the leading figure of the early neoclassical period. Other key figures included William Jevons (1835–82) in England, Carl Menger (1840–1921) in Austria, and Léon Walras (1834–1910) in France.\textsuperscript{511} Neoclassical economists added a demand focus, based on consumer preferences, to the supply focus of the classical economists, and, with the marriage of the demand side to the supply side, a theory of the market mechanism was born.\textsuperscript{512} The interest in individual choice and exchange was now central to economic thinking.

There were two broad strands to the neoclassical theoretical agenda. The first, in which Walras was a figurehead, was concerned with a general equilibrium across all markets: the market system was an interconnected set of prices determined in competitive individual markets subject to the decisions of individual producers and consumers. The second strand, in which Marshall was prominent, was concerned with developing the analysis of supply and demand in individual markets and applying this framework to particular economic problems.\textsuperscript{513} The publication of Marshall’s \textit{Principles of Economics} in 1890 approximates the point of separation of political economy into economics and politics. After that separation, the economic system was seen as independent of the political system.\textsuperscript{514} From that time, economic theories were specified ‘as if any set of political institutions could be compatible with any set of economic institutions.’\textsuperscript{515}

The term ‘neoclassical’ was not part of the language of the marginalist economists of the late-19\textsuperscript{th} century and the first use of the term is attributed to Thorstein Veblen (1857–1929) in his article on ‘The Preconceptions of Economic Science’,\textsuperscript{516} published in

\textsuperscript{510} Hausman, above n 495, 31.
\textsuperscript{512} Hausman, above n 495, 25–6.
\textsuperscript{513} Fusfeld, above n 501, 215.
\textsuperscript{515} Ibid.
The Quarterly Journal of Economics in 1900. Veblen was a founding figure of American Institutionalism (discussed more fully later in this chapter) and he was heavily influenced by the German Historical School, whose protagonists were at loggerheads with Menger’s Austrian School on questions of economic methodology. Veblen used the term ‘neoclassical’ to draw attention to the similarity between the thinking of the Austrian school and that of the notable marginalists of the day, including Marshall, Edwin Cannan, and J B Clark. His assessment was that the ‘the so-called Austrian school is scarcely distinguishable from the neo-classical, unless it be in the different distribution of emphasis’ and that there was a continuity in thought between these marginalist economists and the classical economists.

The continuity between the classical and neoclassical economists that Veblen noted was in the embrace of utilitarianism and the psychology of hedonism. Elsewhere, Veblen says ‘[t]he hedonistic conception of man is that of a lightning conductor of pleasures and gains, who oscillates like a homogeneous globule of desire of happiness under the impulse of stimuli that shift about the area, but leave him intact’. The thinker who best represented this continuity, in Veblen’s view, was Marshall, who ‘excellently exemplifies the best work that is being done under the guidance of the classical antecedents’.

In drawing attention to this continuity, Veblen was also drawing attention to the divergence between the ‘modernized classical views ... and the historical and Marxist schools’. In the inter-war years, this divergence developed into what Yonay has described as a ‘struggle over the soul of economics’. a struggle where the main contestants were the institutionalists on one hand, and the neoclassical economists on the other. It was a struggle in which the neoclassical economists were gradually to gain

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519 Veblen, above n 516, 261.
520 Aspromourgos, above n 517, 266.
523 Ibid.
524 Yonay, above n 511.
ascendancy. Lionel Robbins would play a key role in this struggle. Robbins ‘squar[ed] off the marginalist revolution’,525 to borrow from Dimitris Milonakis and Ben Fine, and in 1932 he (now famously) set the tone for what would become the mainstream view: ‘Economics is the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses.’526

The focus on scarcity was not especially significant: other economists, including another institutionalist pioneer, J R Commons,527 had earlier drawn attention to the problems of scarcity. The significance was, first, in the widening of the application of economic tools to any problem of scarcity, market-related or not. All aspects of human behaviour were brought into this new conceptual tent. Second, Robbins had instigated a major break with the economics of the preceding years. He was the instigator in the sense that, in Hodgson’s assessment, he ‘contrived an Austro-neoclassical tradition’ through which he defined institutionalism and historicism out of economics.528

It was not until the 1930s and 1940s, and primarily through the work of John Hicks (1904–89) and George Stigler (1911–91), that the thinking of the marginalists was increasingly referred to as a neoclassical approach. But this naming was without conviction, however, as neither was convinced that the continuity between the classical and neoclassical economists was as apparent as Veblen had made out.529

Joseph Schumpeter (1883–1950) was more pointed in his comment that ‘there is no more sense in calling the Jevons-Menger-Walras theory neo-classic than there would be in calling the Einstein theory neo-Newtonian’.530 After World War II, the term ‘neoclassical’ was regularly used due, Aspromourgos suggests, to the exposure it received in the debates on capital and growth in the 1950s and its prominence in the widely used introductory textbook Economics531 by the American economist Paul

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525 Milonakis and Fine, above n 518, 224–8.
529 Aspromourgos, above n 517, 266, 268–9. At page 269, Aspromourgos finds fault with Veblen’s attribution of hedonism to all marginalists.
531 Economics was first published in 1948. It was co-authored with William Nordhaus from the 13th edition, with the most recent edition published in 2010. Samuelson also authored some country-specific editions with other collaborators.
Samuelson (1915–2009). Important to both influences were the impact of the Great Depression and the aftermath of World War II.

The events of the Great Depression in the early 1930s called into question the merits of prevailing economic theory, and policymakers responded eventually by increasing government expenditure and easing monetary conditions to stimulate economic activity and employment. But, as Fusfeld notes, this response was more a commonsense political response to humanitarian concerns than a policy response based on economic theory. The theoretical justification would come not long after, however, with the publication in 1936 of John Maynard Keynes’s *The General Theory of Employment, Interest and Money*. Keynes advocated both active monetary and fiscal policies directed towards the goals of economic stability and economic growth.

The Keynesian approach threw a lifeline to neoclassical economics. If the government could take responsibility for addressing unemployment, then market mechanisms could be relied on as the principal tool of resource allocation. Individual motivations were fundamental to the workings of the economic system and profit-maximising producers would meet consumer preferences through the marketplace. This lifeline was formalised through what became known as the neoclassical synthesis. This approach took hold after World War II and is associated, principally, with Samuelson’s work. As the term suggests, the synthesis blended Keynesian economics with a theory of competitive markets, ‘supplemented by a theory of optimal and stable economic growth based on Keynesian concepts’.

Keynesian economics was a theoretical exposition, but it was also an economics of promise: the promise that ‘individual freedom and social order were consistent with each other within the framework of prosperity for all.’ And government would have a key role in delivering on the promise through the overall management of the economic system. The promise was far from reality, however, and the neoclassical synthesis crumbled in the face of social and political changes in the 1960s, and the

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532 Fusfeld, above n 501, 134.
534 Fusfeld, above n 501 128, 200.
535 Ibid 197.
536 Ibid 128.
stagflation — economic stagnation alongside high inflation — that plagued economic management in the 1970s.\textsuperscript{537} This was the time of the first oil shock and an international food crisis, but the dissenters to the synthesis had been marshalling their forces for some years before.

The dissenters fell into two main groups — neo-Austrians such as Friedrich von Hayek, who were influenced by, but developed a separate identity to, the Austrian school, and those such as Milton Friedman, who were associated with the increasingly influential Chicago School.\textsuperscript{538} Both shared a conviction in the centrality of individual freedom to the economic system. The orthodoxy that emerged extended general equilibrium theory and also supplanted an interventionist, Keynesian macroeconomics with a laissez-faire, neoclassical macroeconomics.

The core concept of the neoclassical macroeconomics that emerged in the 1970s was the ‘natural rate of unemployment’: there was a level of economic activity that was consistent with this natural rate of unemployment and also with stable inflation.\textsuperscript{539} It followed that the pursuit of Keynesian policies to reduce unemployment below the natural rate would lead to accelerating inflation and would have no lasting impact on output. And the outcome would be similar if monetary policy was used in an attempt to reduce unemployment below the natural rate. The neoclassical macro-policy prescription accordingly emphasised the importance of a balanced budget and monetary policy that led to interest rates that were consistent with the natural rate of unemployment.

A central issue was the longer-term effectiveness of government interventions, but this was part of a broader concern with how to achieve economic growth. Friedman, for example, argued that government spending was not large enough to be a counterweight to the private sector, that economic growth was based on economic stability, and that a fixed annual percentage increase in the money supply would provide monetary stability and underpin growth. This thinking proved more powerful than the advocacy of a more activist government and was accordingly absorbed into

\textsuperscript{537} Ibid 138, 197, 221.
\textsuperscript{538} Ibid 154–8.
\textsuperscript{539} Ibid 179–81.
C The Specialisation of Economics: From Political Economy to Economics

The preceding discussion of the evolution of economic thought can also be read as a story of the specialisation of economics, particularly since the emergence of neoclassical economics. A key contributing factor to this specialisation has been the increased reliance on quantitative techniques as part of a scientific approach to economics. Attempts to label economics as a science had existed since the early days of political economy, although these attempts had always met some resistance. Mill, for example, characterised economics as a ‘science of tendencies’ based on incomplete theories, which meant that any conclusions had to be interpreted cautiously. The gathering momentum for a scientific approach to economics overwhelmed any resistance in the inter-war years, as evidenced by the esteem in which scientific endeavour was held in the establishment of the FAO. This momentum quickened considerably in the second half of the 20th century, with the continued development of mathematical, statistical, and computing techniques. Econometrics was now an essential part of the economist’s toolbox.

It is not important for our purposes here to delve into the evolution of quantitative techniques in economics in any detail. What is important is the criticism that the scientific pursuit has distracted economics from its core social explanatory role. Heilbroner, for example, is in no doubt that this has been an undesirable development and that economics can never be a science because of the unpredictability of human behaviour and the politicisation of social life with the attendant classes of privilege and disprivilege. Heilbroner’s response was to call for the rebirth of the worldly philosophy:

Economics, by itself, cannot provide a torch that lights our way into the future, but economic vision could become the source of an awareness of ways by which a capitalist structure can broaden its motivations, increase its flexibility, and develop its social

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540 Ibid 156.
responsibility. ... we need to develop a new awareness of the need for, and the possibilities of, socially as well as economically successful capitalisms. 543

Another way of phrasing Heilbroner’s concern is to say that with the increasing quantitative intrusion the positive dimension of economics has assumed normative status. The invocation of science and the recourse to mathematical rigour has distracted economists from the social (normative) underpinnings of economics and its place in society. These underpinnings are values and they can change. Furthermore, they are not unanimously held by all the individuals of the society, such that the society must find the political means for deciding the ultimate choices that are needed.

The specialisation of economics has, however, been at the cost of its separation from political economy. Milonakis and Fine make this point forcefully in the opening paragraph of their recent book From Political Economy to Economics 544:

If we were to describe the essence of this book in two words, they would certainly be political economy. If we were to use four words, they would be economics as a social science. In short, this book is about the shifting boundaries between the economic and the non-economic, all set within a methodological context.

It deals with the process by which political economy became economics, through the desocialisation and dehistoricisation of the dismal science, and how this heralded the separation of economics from other social sciences at the beginning of the twentieth century. 545

They trace this separation from the time of classical political economy to the consolidation of general equilibrium theory within mainstream economics. Heterodox economics, particularly institutional economics, has resisted this desocialisation and dehistoricisation, as we will see later in this chapter.

One major problem with the separation of economics from political economy and other social sciences is that it abstracts from the formulation and implementation of economic policy. That is, it treats economics and economic policy as synonymous.

544 Milonakis and Fine, above n 518.
545 Ibid 1 (emphasis in original).
Keynesian economics stands out as an obvious exception to this comment, given the role that it acknowledges for government intervention, certainly as far as this applies to interventionist policy aimed at economic stability. The explanation, in Frank Stilwell’s view, is that

[t]he neoclassical synthesis was as much political economy as it was economic analysis. It supported the comprehensive macroeconomic planning of the Keynesian system and promoted such liberal ideas as antipoverty programs and aid to less-developed countries.\textsuperscript{546}

Stilwell goes further to say that there have been four major schools of political economy starting with classical economy. In addition to Keynesian economics, the others are Marxist economics and institutionalist economics. The general point he makes is that a political economic approach ‘confront[s] current political problems and policy issues’\textsuperscript{547} — food security, for example. It is an approach which draws on other disciplines and the interrelationships with these disciplines. I concentrate on the interrelationship with law in this thesis.

Stilwell’s point is that care is needed not to put the cart before the horse. That is, the problem being confronted, not theory or a particular way of thinking, should drive the policy response.\textsuperscript{548} To use market liberalisation as an example, policymakers need first to demonstrate how liberalisation is the appropriate response to the problem being confronted. Indonesia’s struggle with the liberalisation of rice prices comes to mind. Stilwell’s criticism is that neoclassical thinking has been too determinative of policy responses.\textsuperscript{549} Or, to put it another way, when economics is overly determinative of the policy response, economics is not embedded in its society.

Stilwell’s view is that the four schools of political economy should be seen as contributors to modern political economy\textsuperscript{550} and not dismissed simply as some prior orthodoxy. Classical economics is important for understanding how surplus is generated and distributed. Marxist economics is important for understanding the

\textsuperscript{546} Stilwell, above n 28, 153–4.
\textsuperscript{547} Ibid 4 (emphasis in original).
\textsuperscript{548} Ibid 3–4.
\textsuperscript{549} Ibid 3.
\textsuperscript{550} Ibid 6.
dynamics of capital formation and the impacts of capital accumulation on social classes. Keynesian economics is important for showing that a capitalist economy could not guarantee full employment, that there was a role for government intervention, and that the macro-economy was not simply the aggregation of individual markets. We will explore the nature of institutionalist economics — Stilwell’s fourth school — shortly. For the moment, the point to make is that institutionalists stress the importance of institutional form to economic outcomes, where the market is but one form used by society to provide for itself.\textsuperscript{551}

Neoclassical economics, in contrast to these four schools, is limited in the contribution it can make to political economy.\textsuperscript{552} The neoclassical synthesis was an attempt to overcome the inherent limitations within neoclassical economics, but, as Stilwell notes:

splicing together a microeconomics emphasising market freedoms and a macroeconomics emphasising the necessity of government intervention was bound to lack coherence, both analytically and politically. In that sense, the assault by monetarist and other neo-liberals on Keynesian economic ‘interventionism’ during the last quarter of a century has produced a more consistent capitalist free-market ideology. But it takes us back to pre-Keynesian economics and spurns the valuable, practical insights that Keynes made.\textsuperscript{553}

Nevertheless, as Fusfeld comments:

[t]he neoclassical synthesis was well suited to the climate of opinion that prevailed during the Cold War. It showed how the Western democracies, led by the United States, would prosper; economic growth would solve the internal problems of poverty; aid could be provided to the developing nations; and a growing economy could provide ample resources for a large defense establishment. The new system of political economy validated the position taken by the United States and its allies in the international struggle for world power after World War II, just as it validated the internal structure of power and the existing economic organization within those countries. The neoclassical synthesis defined a policy mix that would allow capitalism not only to survive, but to

\textsuperscript{551} Ibid 6–8.
\textsuperscript{552} Ibid 8.
\textsuperscript{553} Ibid 7–8.
While Stilwell was not directly addressing the events at Hot Springs, his comments bring the political context of that conference very much into the foreground. The economics being advocated — at that time more a hybrid of Keynesianism and neoclassical economics than a formal synthesis — validated international power structures and the pursuit of a capitalist system.

The general point of this discussion is that the distinction between economics, in its contemporary forms, and political economy is important to all economic policy applications, be that in a state, regional, or international context. Economic policy is concerned with political economy, not just economics. The latter is concerned with identifying choice, while the former is concerned with the actual choice. The nature of the economics being advanced needs to be understood, as does the nature of the problem being confronted.

The limitations of economics were well understood by prominent neoclassicists, but this point is not widely acknowledged within mainstream neoclassical economics. Samuelson and Nordhaus, for example, point out to their readers in their classic text that ‘[e]conomic science does not determine the final conclusion. It arms us for the great debate.’ Robbins was also clear on the distinction between economics and political economy. Writing in 1981, some 50 years after his work fundamentally shifted the direction of economics, he was at pains to point out that while he had always considered economics to be distinct from political economy, he also considered that economics did not have an existence abstracted from political economy. He distinguished between the technical apparatus of analytical economics and the application of ‘this apparatus to the examination of schemes for the realization of aims whose formulation lies outside Economics: and it does not abstain from the appeal to the probabilities of political practice when such an appeal has seemed relevant.’

The food security debate has been muddied by the failure to make these distinctions. From Hot Springs through the Cold War years, the emphasis placed on economics in

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554 Fusfeld, above n 501, 202.
that debate has masked an international political economy, where some interests were more important than others. In subsequent years, the economics has been more overtly driving international responses. The Indonesian situation stands in contrast. The problem to be confronted was always paramount, and the struggle was over what type of policy was most appropriate to address the problem.

We can take this general point one step further to acknowledge that while the academic discipline of economics may have diverged from the academic discipline of political science, ‘economic models always imply an underlying set of political institutions’, and it is the political system that lays the foundations of the economic system. The economics merges with the politics to the point that a separation is not possible. I will explore this more fully in subsequent sections through a discussion of the way in which society, markets, and government are interwoven into the political system and after we have reviewed the main features of neoclassical economics.

II GROWTH, MARKETS, AND WELFARE

As noted above, Adam Smith’s work laid the foundations for two lines of economic analysis: the neoclassical work on economic growth and competitive markets. Both lines remain at the heart of mainstream economics, albeit not without criticism. In this part, I look at some of the shortcomings of the neoclassical emphasis (or over-emphasis) on growth and markets, particularly as it has been applied to the positioning of food security by international organisations. The intention is to illustrate that this over-emphasis on growth and markets hides the social construction of the economy and the difficulty neoclassical economics has in moving between individual welfare and aggregate, or social, welfare. The discussion, as a whole, serves to reinforce the uneven distributive outcomes of neoclassical economics — there will be winners and losers — and to lay the groundwork for the institutionalist critique in the following part. That critique points to how the international approach to hunger can be reframed.

558 Ibid 408.
559 The commentary surrounding the Global Financial Crisis and its aftermath is a recent manifestation of this criticism.
A Markets and Society

We saw earlier that Lionel Robbins positioned economics as a discipline concerned with solving any problem of scarcity, irrespective of the value to the society. The key role in allocating the available resources in resolving any problem of scarcity, within neoclassical economics, is given to markets. James Buchanan, noted for his work applying economic concepts to questions of public choice,\textsuperscript{560} regards markets as the centrepiece of economics and takes the view that their significance to The Wealth of Nations had been overlooked. Harking back to Smith’s observation of man’s ‘propensity to barter, truck and exchange one thing for another’,\textsuperscript{561} Buchanan states:

> economists should concentrate their attention on a particular form of human activity, and upon the various institutional arrangements that arise as a result of this form of activity. Man’s behaviour in the market relationship, reflecting the propensity to truck and to barter, and manifold variations in structure that this relationship can take — these are the proper subjects for the economist’s study.\textsuperscript{562}

In short, economics for Buchanan was about how a society institutionalised market exchange.

Polanyi stands in contrast to Buchanan. Also harking back to Smith, Polanyi observed that ‘bartering and trucking’ would require an institution of the market and it followed that the way this institution functioned was of great social significance. As important as markets were, he was opposed to the concept of a self-regulating market economy in which economic decisions were directed solely by the price mechanism.\textsuperscript{563} This was far from desirable for Polanyi, because it meant the running of society as an adjunct to the market. Instead of economy being embedded in social relations, social relations are embedded in the economic system. The vital

\textsuperscript{560} Public choice theory is concerned with the application of neoclassical tools to the behaviour of political actors — politicians, bureaucrats, and voters. See, eg, James M Buchanan and Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (University of Michigan Press, 1962); James M Buchanan et al, The Economics of Politics (Institute of Economic Affairs, Great Britain, 1978).


importance of the economic factor to the existence of society precludes any other result. For once the economic system is organized in separate institutions, based on specific motives and conferring a special status, society must be shaped in such a manner as to allow that system to function according to its own laws.564

Markets of some description had existed long before Smith’s dissection of capitalism, but awareness of the embeddedness of markets in their society, and the associated safeguards to protect the economically disadvantaged, receded into the background due to the importance that neoclassical economics attached to prices. Polanyi was repositioning markets within a political economy, where human purposes would not be subordinated to the market. And this required that the state play a role in the economic system, a subject I will return to in a later discussion on regulation.

It is important to reflect a moment on this lost history to better understand what is at stake when ‘the myth that only “the market” can efficiently allocate a society’s economic resources and equitably distribute its income’565 is accepted without question. Marc Tool and Paul Dale Bush warn us that

neoclassical economics writes the script for a morality play in which the market is the ‘good guy’ and the government is the ‘bad guy’. As such, it undermines the belief that free societies can enhance economic welfare through the use of democratic processes in the formulation of economic policies.566

Heilbroner gets to the core of this problem with his observation that ‘capitalism is the first society to place its overall guidance under two authorities, one public, one private, each with its own powers and its own boundaries to power.’567 Production and distribution decisions were based on the pursuit of individual gain, but this pursuit also served the interests of the wider community through the opportunity provided to others to contribute to wealth creation. Decisions on production and distribution and, hence, market activities, were largely covered by private authority, while the

564 Ibid 60.
566 Ibid.
567 Heilbroner, above n 542, 312.

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government as the public authority established law and wielded force.\textsuperscript{568} This was a system ‘for sustaining and maintaining an entire society’\textsuperscript{569} in which markets dominated the exchanges of social life. Under capitalism, markets were not new, but the centrality of markets was.

Heilbroner, Robbins and Buchanan would all agree on the importance of markets, but contemporary mainstream economists are characterised by the extent of their faith in markets and their view that it is generally preferable to entrust resource allocation within the economy to market forces. However, they would generally acknowledge that markets do not always work perfectly, that sometimes they don’t work at all, and that sometimes they simply don’t exist.\textsuperscript{570}

Markets are well-suited to resolving coordination problems associated with logistics — getting goods and services to where they are needed, whether for production, consumption or investment, when they are required. They do not work well whenever the public does not tolerate temporary imbalances, because the coordination breaks down or is impaired in some way, as was seen with the food crisis. They are not well-suited to situations that call for coordination through networks or standards, such as access agreements across the networks of mobile phone providers. Even if the market gave the appearance of working well in the latter case, it would be very unlikely that the resource allocation will be that desired by the community. Furthermore, there are situations where markets do not exist, such as with public goods like defence and even the framework within which the market economy operates; where competitive markets are not possible, as can be the case for utilities; and where exchanges take place outside markets, as is the case for many not-for-profit social services.\textsuperscript{571} Brief as these comments are, they do suggest that markets are inherently complex, consistent with the proposition that markets are embedded in their society, rather than abstract, universal entities.

As we saw with the establishment of the FAO and international institutions’ response

\textsuperscript{568} Ibid 24–27, 312–313.
\textsuperscript{569} Ibid 27 (emphasis altered).
\textsuperscript{571} Ibid 19.
to the food crisis, international organisations put great store by markets. Indeed, the development of markets is a key component of the ‘development’ agenda; the instrumentality of markets supports the instrumentality of economic growth. Sen has no qualms about acknowledging the importance of the market mechanism to economic growth and to economic progress, but he points out the contribution of markets is contingent on the freedom to participate in economic interchange.572 ‘[T]he ... immediate case for the freedom of market transaction lies in the basic importance of that freedom itself’.573 Furthermore, this freedom to participate in the market is complemented by the freedoms associated with the activities of non-market institutions, ‘such as economic entitlements, democratic freedoms, social opportunities, transparency guarantees and protective security’.574 The essential point, for Sen, is that both market and non-market means were essential to enriching people’s lives, now and in the future. Focusing solely on market solutions for food security is inconsistent with this thinking.

The international organisations have found that the development of markets in developing countries is not a straightforward undertaking. The lessons learned reinforce the embeddedness of markets and, at the same time, the idea that markets are plural institutions. The failure to appreciate this plurality has meant that, for some countries, market liberalisation has been disruptive and the promised benefits slow to emerge. Even Hernando de Soto, an acclaimed promoter of the benefits of property rights and markets for the developing world, has been forced to acknowledge that the development of markets was more difficult and more sophisticated than he had originally thought.575 De Soto concluded that too much emphasis has been placed on transplanted Western models and too little emphasis on local custom and tradition. Good rules in the Western model need to be adjusted to make them both culturally recognisable and applicable in the importing country, and the institutions in the developing country have to connect with the social order.576

572 Sen, Development as Freedom, above n 19, 6–7.
573 Ibid 112.
574 Ibid 127.
576 Ibid.
De Soto’s observations are reinforced by those of William Easterly, a long-time analyst of both growth and development, who, while a forceful advocate for markets, is in no doubt that the market is a complex institution that cannot be constructed from the top down, as many development agencies had tried to do. Rather, the essential ingredients for making markets are ‘a confusing welter of bottom-up social institutions and norms’ that ‘evolve[d] slowly on their own from the actions of many agents’. Informal social ties are an important part of this welter, as individual choices in the market are often made in this informal setting. Easterly considers that it is quite plausible that informal norms and relationships evolved into the formal rules and institutions of developed economies, but the informal arrangements remain as important supports to formal institutions and rules.

In a more recent overview of the mechanics of markets and the market system, John Kay also refers to economic institutions, including the market, being embedded in a wider social, political and cultural context. He distinguishes between the classical, liberal approach and an embedded market system. The liberal model achieves its wider objectives through individuals pursuing their self-interest, constrained only by the taxation and regulatory framework. It is a model that is based on prescribing the permissible, as opposed to excluding the unacceptable. In contrast, in the embedded market, individuals and corporations embrace a wider set of social responsibilities that could be described, as Kay notes, as a general duty of care. For Kay, the embedded market will ultimately prevail, because it is more closely tuned into the wider society. ‘In complex, democratic societies, rules are implementable only if they define behaviour which most people would adopt in any event.’

B Economic Growth and Economic Policy

Economic growth is valued in mainstream economics because it provides a route to

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577 William Easterly, The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good (Penguin, 2006) 77.
578 Ibid.
579 Ibid 86.
580 Ibid 101.
581 Ibid 344.
582 Ibid (my emphasis).
583 Ibid.
higher living standards, where the chain of causality runs from greater aggregate output, to greater employment, to higher aggregate incomes; and the more income that is earned, the greater spending power industries and households have. Furthermore, in theory, living standards can increase even if the population is increasing, whenever per capita output increases at a faster rate than population growth. Not surprisingly, given these claims, the pursuit of economic growth has been a cornerstone of economic policy in the developed world and in the export of the associated policy agenda to the developing world. The establishment of the FAO underlines this point in bold, as does the response of the Bretton Woods institutions to the 2006–8 food crisis. Niggling away underneath the surface, however, is the fact that the appreciable acceleration in world growth rates that occurred with the onset of the Industrial Revolution, and again in the second half of the 20th century, masked uneven progress across countries. This sits uneasily with those concerned about the incidence and impact of income inequality within and across countries.

These concerns were at the core of the ‘growth versus poverty reduction’ debate within economics. Collier, for example, argues that a focus on economic growth will not relieve the intractable problems faced by the poorest billion people in the world, who live in countries trapped by conflict, mismanaged dependency on natural resources, weak governance, particularly in small countries, and which are landlocked with bad neighbours and face high costs transporting their goods to large markets.585 It was a hollow debate, however, for Dani Rodrik, because the policies needed to promote growth are very similar to those needed to reduce poverty. Economic growth is associated with a decrease in the number of people living in poverty, and poverty reduction feeds back into further growth through enhancing the productive capacity of those who are poor.586 Reducing poverty is, after all, an increase in living standards, albeit for the poorest members of the society.

Rather than growth versus poverty, the debate within economics is now more focused on what are to Rodrik the more meaningful issues of what kinds of policies deliver both economic growth and poverty reduction and whether these policies are more

585 Collier, above n 23, 5.
likely to be adopted, if the focus is to be on poverty reduction. Policies on food self-sufficiency are a case in point. As Rodrik notes, it is important to put some flesh on the public policy bones to concentrate attention on the policy trade-offs that are required and the human impacts of the alternative policy prescriptions, rather than hiding behind inanimate outcomes such as macroeconomic stability, microeconomic efficiency and institutional quality.

The most comprehensive recent assessment of economic growth and developing countries was conducted by the Commission on Growth and Development — the Growth Commission. The Commission was chaired by the Nobel Laureate Michael Spence and its membership comprised a mix of highly influential economic policymakers and academic economists from both the developed and developing worlds. The Commission’s brief was to take stock of the existing knowledge on economic growth and draw from this knowledge the implications for policymaking in developing countries. Its explanation of the rationale for the focus on growth underscores the instrumentality of economic growth to higher standards of living, as opposed to economic growth as the ultimate objective of economic policy:

> It is a necessary condition for the achievement of a wide range of objectives that people and societies care about. One of them is obviously poverty reduction, but there are even deeper ones. Health, productive employment, the opportunity to be creative, all kinds of things that really matter to people seem to depend heavily on the availability of resources and income, so they don’t spend most of their time desperately trying to keep their families alive.

Note the reference to people and societies. Unspoken though, is any reference to the compatibility of individuals and society as target groups, or the applicability of neoclassical economics to issues that concern the whole society. Increasing attention

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588 Ibid.
will be given to these considerations over the remainder of this thesis.

Coincidentally, the work of the Spence Commission overlapped the 2006–2008 global food crisis and the Commission could not avoid addressing the problem, given its poverty reduction focus. It identified the rising prices of food and fuel as one of several new global trends (climate change was another) where individual countries’ economic growth performance was adversely affected by the aggregation of policies adopted by other countries. While one could argue over how new the problem was, the Commission did, at least, acknowledge that the problem demanded attention. But its solution echoed those that had been consistently advanced at various international meetings to discuss world food problems: the importance of economic growth to a long-term solution; social safety nets and buffer stocks to provide short-term protection; and the need to avoid trade restrictions. The Commission did not consider that a country’s pursuit of self-sufficiency in food was desirable, unless it was based on a country’s comparative advantage in food production.\textsuperscript{591}

There is no effective development strategy that doesn’t first deal with the issue of hunger. But there is a distinction between food security and food self-sufficiency. Successful economies have striven for growth that gives the broadest segment of the population sufficient purchasing power to buy adequate nutrition. Without this, we cannot hope to see healthy mothers, effective students or productive workers.\textsuperscript{592}

Admirable as this sentiment is, it does not address how to deal effectively with those that are hungry in the ‘here and now’. This is not a failure peculiar to the Spence Commission, however, and the Commission ultimately falls back into a similar mode of thinking to that which prevailed at the time of the establishment of the FAO. Economics as a discipline is ill-equipped to deal with those that don’t benefit from economic growth. Similarly, it cannot mediate effectively between those that do participate in the benefits of growth and those that do not in an individual country, such as those suffering from hunger and food insecurity.

As Dani Rodrik notes, the Spence Report is, nevertheless, a milestone document in that it is a shift away from the traditional presumptive approach, where standard problems

\begin{footnotes}
\item[592] Ibid 97.
\end{footnotes}
Like poor governance or insufficient regulation are presumed, to a diagnostic approach, where the cause of the problem is identified and appropriate policies developed. But the rejection of a one-size-fits-all approach puts the policymaking ball back into the national policymaking court. Rodrik approves, as he regards policymaking as a domestic enterprise: if there is a ‘new Washington consensus’ it is that the ‘rulebook must be written at home’. Rodrik is talking about responsibility for policymaking and this will be a recurring theme in this and subsequent chapters.

Adding to concerns about the emphasis attached to economic growth are concerns about the way in which growth is measured. This subject was addressed by the Commission on the Measurement of Economic Performance and Social Progress (the Sarkozy Commission). This was an initiative of then-French president Nicholas Sarkozy, who was dissatisfied with the shortcomings of statistical information compiled to portray the state of the economy and society. The principal members of the Commission were Joseph Stiglitz, Amartya Sen and Jean-Paul Fitoussi.

The fundamental statistical shortcoming, in the Commission’s view, was the conceptual narrowness of Gross Domestic Product (GDP). And since economic growth is measured as the change in GDP, the measurement of growth was also at issue for the Commission. The Commission’s assessment was that over-reliance on GDP led to ‘wrong policy decisions’. The Commission’s report focused on what it considered the three major areas of statistical inadequacy: deficiencies associated with the measurement of GDP; the need for a quality of life or wellbeing measure that was more broadly based than the production-based GDP; and the need to distinguish between current wellbeing and the sustainability of this level of wellbeing, where ‘sustainability’ reflected economic, social, and environmental concerns.

Theoretically, the measurement of economic growth should capture all exchanges in the economy, irrespective of whether these are monetary exchanges. In practice, non-

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594 Ibid.
596 Ibid 7.
597 Ibid 21.
monetised transactions are under-covered and the exclusion of some of these not-for-market services, such as unpaid work in the household typically undertaken by women, has attracted criticism.\(^{598}\) The Commission notes this shortcoming and makes another four suggestions for addressing measurement-related deficiencies of GDP: put more emphasis on indicators that give a more complete picture of standard of living; improve the measurement of key services such as health and education; emphasise impacts on households as the household unit is determinative of living standards; give greater emphasis to the distribution of income, wealth and consumption; and include more non-market activities in any summary measures.\(^{599}\)

Even if measurement in practice matched the underlying theoretical construct, the way in which GDP is used would still attract criticism and many non-economists would need to be convinced on why economic growth should be held in such high esteem. The general concern is not with what GDP tells us, but with what it does not tell us. What does a growth measure convey about the impact of the growth on individuals and particular groups in the society? To put the question another way, who are the beneficiaries of growth? Greater output does not necessarily lead to greater employment and the benefits of growth may be uneven. Concerns over the impact of growth quickly coalesce around normative concepts of what makes a good society, such as ‘fairness’, ‘distributive justice’, or ‘social welfare’ and at that point run up against important issues of morality, politics and law. Furthermore, as is discussed later in this chapter, economics is severely constrained in what it can add to this discussion because the economic concept of welfare is based on consumption preferences.

The Commission notes that where economists have been concerned with wellbeing this concern has been limited to the use of, or command over, resources and this shortcoming has been compounded by the focus on the market value of these resources. This approach is too narrow because it fails to take into account the ability, or extent to which these resources can be transformed into wellbeing, and variability


\(^{599}\) Commission on the Measurement of Economic Performance and Social Progress, above n 595, 22.
in what people pursue in the name of wellbeing.\textsuperscript{600} It also notes that wellbeing is multi-dimensional\textsuperscript{601} and that it has both subjective elements (for example, how one sees one’s life, and positive and negative emotions) and objective (for example, capabilities) ones and that the statistical techniques are now better able to capture both of these elements. But they emphasise that these measures need to capture inequalities, that is, variability, as well as averages, as both are determinative of social progress.\textsuperscript{602} They also go on to make the important point that choosing between measurement approaches is ultimately a normative exercise as ‘[i]t depends on what aspects of life are deemed to be most relevant in the evaluation of [Quality of Life]’.\textsuperscript{603}

The difficulty in distinguishing current wellbeing from sustainable wellbeing was the third area of statistical inadequacy identified by the Sarkozy Commission. Measuring sustainability entails a complexity not found in measures of economic performance or wellbeing. Not only does it require a ‘dashboard’ of current indicators,\textsuperscript{604} sustainability has a future orientation and therefore requires projections of future states. Two further observations are especially important. First, the Commission again notes these measurement issues are more than technical matters: they are inherently normative. In this case, the key consideration is the view/s on what is important for existing and future generations. Second, sustainability has to be ultimately approached as a global issue.\textsuperscript{605} This has major implications for global or international governance and we will return to this discussion in later chapters.

The key point to be extracted from this discussion is that normative considerations underlie technical issues, such as the measurement of economic performance or wellbeing, and how we organise ourselves institutionally to express those norms is of vital importance. One of the problems with the food security debate is that no unequivocal norm has emerged in the debate and the economics of economic growth

\textsuperscript{600} Ibid 143.
\textsuperscript{601} The Commission list the dimensions as material living standards (income, consumption, and wealth); health; education; personal activities (for example, work, political voice and governance); social connections and relationships; environment (present and future conditions); and insecurity (economic and physical). Commission on the Measurement of Economic Performance and Social Progress, above n 595, 14–15.
\textsuperscript{602} Ibid 217.
\textsuperscript{603} Ibid 155.
\textsuperscript{604} Ibid 17.
\textsuperscript{605} Ibid 263–4.
has become ‘good’ economics. The economist’s concern with a lack of food in the present is the potential for this shortage to lead to social instability and unrest, which could threaten growth in the future. The starving have more pressing concerns.

C  From Individual to Social

The preceding discussion highlights the awkwardness in moving from the individual to the social — the aggregate of individuals. This, in turn, is a reflection of the theoretical reliance on ‘utility’ in neoclassical thought. We saw in the first section of this chapter that the individual was the focus of analysis for the early neoclassicists and individuals acted in accordance with their preferences. Those preferences were a function of the utility that would be derived from an individual’s choice. In short, utility captured the value in any choice. At issue is whether utility does adequately capture what is valued.

Robbins is quite clear on the merits of relying on utility:

The question therefore arises what should be the ultimate values guiding us in this field. The answer must necessarily be debatable: there is no agreement yet on the ultimate desiderata of the good society: consider for example the variety of opinions regarding the desirability of growth. Speaking personally, I see no objection to regarding utility in a very wide and non-quantitative sense as one of the principal criteria ...  

In contrast, Ronald Coase, who will feature prominently in the following chapter, is far less convinced on the usefulness of utility:

I am strengthened in this view by a consideration of the part played by utility theory in economic analysis. ... To say that people maximise utility tells us nothing about the purposes for which they engage in economic activity and leaves us without any insight into why people do what they do. ... Utility theory seems more likely to handicap than aid economists in the work in contiguous disciplines.  

Coase is highlighting that there is also value in the approaches of disciplines contiguous to economics — one of which is law — and I will extend this thinking from contiguous disciplines to the interconnectedness of law and economics in the next chapter. For the moment, I will look at the difficulties that a reliance on utility poses for moving from questions that concern the welfare of individuals to questions that concern the

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welfare of a society of individuals, and the shortcomings of a reliance on utility for the
prescription of economic policy.

The ‘welfare’ of welfare economics is an individualistic concept that equates to the
satisfaction of individual preferences. It is not necessary to know what ‘welfare’ is.
There is no normative content in ‘welfare’, in other words. ‘Welfare’ is that which is
chosen by rational, self-interested individuals. Aggregate welfare — social welfare —
then, is the sum of each individual’s welfare, but this is neutral as to the distribution of
any change in aggregate welfare. The concept of efficiency is concerned with these
distributive impacts and there are two core efficiency principles in economics — the
Pareto principle and the Kaldor-Hicks principle.

Pareto broke with the utilitarian approach of the likes of Jeremy Bentham and John
Stuart Mill that equated welfare improvements with advancing the good of the
greatest number, based on the assumption that individual utilities could be
compared. Pareto rejected the possibility of interpersonal comparisons and
concluded that social welfare improved only if at least one person is better off while
no-one else is worse off. There is an absolute positive benefit in this case: a Pareto
improvement or Pareto efficiency. Economists also refer to Pareto efficiency as
allocative efficiency. The resources in the economy have been used in such a way that
no-one can be made better off through an alternative allocation. A Pareto optimum
exists when one person’s welfare cannot be increased without making someone else
worse off. As appealing as the concept is, there is no single Pareto optimum and some
value judgement is required to choose between a set of optimal outcomes.
Furthermore, Pareto-efficient outcomes are independent of the distribution of goods
in the society and sometimes are not in the interests of the society, as would happen if
the rich were to get richer while the poor remained miserable.

Early welfare economics was concerned solely with economic efficiency, that is, with
allocative efficiency. Over time, an interest in distributive equity emerged, as reflected

eds, Macmillan, 1972) [trans of Manuel d’Economie Politique (1927 ed)].
609 Hausman, above n 495, 24.
in the Kaldor-Hicks principle.\textsuperscript{610} The Kaldor-Hicks principle is less restrictive than Pareto efficiency and the Kaldor-Hicks principle is concerned with net benefits: there are both winners and losers. An outcome will be efficient under the Kaldor-Hicks criterion whenever the winners could compensate the losers, with the winners still being better off than they were prior to the event in question. Achieving Kaldor-Hicks efficiency will not usually equate to maximising social welfare, but it is operationally pliant and lends itself to decision-making procedures. Kaldor recognised that economics was limited in the contribution it could make to these decisions, nevertheless, as economics did not have anything to offer on how much inequality was desirable. ‘All that economics can, and should, do in this field, is to show, given the pattern of income-distribution desired, which is the most convenient way of bringing this about.’\textsuperscript{611} Here he is making a distinction between the decision and what is informing it.

Modern welfare economics is based on a social welfare function, which had an earlier analytical presence in economics in international trade models and income distribution models, all of which reinforce the earlier comments on the quantitative intrusion into economics. The social welfare function is a mathematical formulation that corresponds to the aggregation of individuals’ utility functions. Its strength is that it is mathematically tractable and permits calculations of how to maximise welfare subject to some specified constraints. It also allows interpersonal comparisons as well as comparisons of different aggregate states, unlike Pareto efficiency.\textsuperscript{612} Despite these mathematical niceties, at the end of the day, as Holcombe notes:

> there is in reality no scientific method by which one person’s utility can be compared with another’s to determine whether a gain to one person outweighs the loss to another. Therefore, the social welfare function leaves itself open to many of the same criticisms as utilitarianism. It is simply a method for disguising one’s value judgements behind a mask of pseudo-scientific jargon.\textsuperscript{613}

While welfare economics can be thought of as the normative side of economics, and

\begin{itemize}
  \item \textsuperscript{611} Kaldor, above n 610, 552.
  \item \textsuperscript{613} Ibid 170.
\end{itemize}
the classical economists did have an interest in social issues such as inequality and poverty, the norms in question are not economic norms. They are norms that are valued in some way by the wider community. Economic tools are employed to advance these norms. More formally, then, welfare economics is the ‘study of the theoretical underpinnings of economic policy’. But the problem with this type of language is that it does not distinguish between theoretical and technical economics, and the policy use of economics. The office of the economist does not extend to both, to paraphrase Kaldor.

This distinction is often blurred in the application of cost-benefit analysis (CBA), which is one of the most widely used techniques for making this assessment. CBA is a procedure — or technique, to use Coase’s description — for aggregating individual preferences to determine the impact a particular economic activity has on social welfare. The procedure involves calculating the amount that those who will benefit from the activity would be willing to pay for these benefits, less the amount that those who are disadvantaged by the activity would be willing to be compensated for bearing the cost of being disadvantaged.

Widely used it may be, but the suitability of CBA to informing policy decisions has often been questioned. Some of the often-voiced objections are that some things in life cannot be reduced to a monetary value, including the value of life itself; CBA does not take account of moral concerns; the reliance on willingness-to-pay overweights the preferences of those on higher incomes; the value of future goods is overly-discounted; aggregating across consumers is flawed, as individual demand for goods and services is context specific; and costs are easier to quantify than benefits. Robert Frank’s view is that the objections do not invalidate CBA, rather, they highlight biases in the calculus of CBA. It follows that policy prescriptions based on this calculus are systematically biased. As Frank points out, the task for economists is not to replace CBA, but rather to eliminate the biases in the calculus.

614 Ibid 438.
617 Ibid 929.
Frank considers that opposition to CBA ‘was rooted in the distinction between consequentialist and deontological moral theories’. The deontologist would take absolute positions on moral issues. The consequentialist would take a qualified position on the same issues, where the qualification was based on an assessment of the net benefits. But, as he points out, there are also systematic biases in the consequentialist approach, as individuals create their calculations of net benefits from their own perspective and the outcome is not necessarily in the public interest. If this view is correct, then the task, again, is to remove the biases in the calculus. In the final analysis, the relative merit of the consequentialist or deontological approach is largely an empirical question for Frank.

Making sense of the controversies surrounding CBA rests, in the first instance, on the recognition that CBA has its origins in a scientific economics, while the deontological approach has its origins in philosophy and political philosophy. Given this, it is questionable whether moral concerns can be counterpoised against economic analysis and the economist’s conception of welfare. Some would go further and say it is ‘pernicious’ to do so. Some other notion of welfare is needed if this gap is to be bridged, and a turn to the philosophical component of moral philosophy is required. The same point could be made about attempts to counterpoise human rights against economic analysis, as is happening in the food security debate.

The way forward, in the view of Matthew Adler and Eric Posner, is to provide conventional CBA with some moral backbone and employ CBA as a welfarist decision procedure — a procedure that advances the overall wellbeing of the public. This is not a compromise position, however, as Adler and Posner regard conventional CBA as applied moral philosophy, albeit lacking in philosophical content. The undercurrents of classical economic thinking are present in this view. Other considerations, such as

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618 Ibid.
619 Ibid 929–930.
620 Ibid 930.
623 Adler and Posner, above n 621, 7.
624 Ibid 4 (my emphasis).
distributive justice are also morally relevant and should be part of the CBA framework. Furthermore, the preference-based construction of CBA needs to be qualified to take account of non-ideal preferences and to get a good fit between expressed preferences and the reality of an individual’s situation. Extending this thinking to the food security debate means the debate needs to be grounded in the self-interested preferences of those most affected by the lack of food and not in the disinterested preferences of those who are remote to the lack of food.

This discussion has illustrated shortcomings in both the economist's conception of welfare and in the tools and procedures at the economist's disposal. But, some decision-making procedure is ultimately needed and while a combination of normative abstraction and hard-headed empiricism can improve the procedures, no single procedure can capture all the dimensions of morality or of wellbeing. This is not to say that economists are resigned to the shortcomings of CBA. Richard Layard, for example, who is prominent for his earlier academic work on CBA, and regards CBA as one of the strengths of economics, advocates improving CBA through incorporating other social sciences to build on another strength of economics — people are ‘self-determining agents’ — to better capture human wellbeing and overcome the fundamental flaws in the economic approach. These flaws, for him, arise from keeping individual preferences constant over time and not taking account of the intensity of these preferences, as well as from the difficulties in comparing individual preferences.

The fundamental problem for Layard is that economics focuses on aggregate purchasing power, while ignoring whether these purchases increase people’s happiness. For Layard, like income and material wealth, happiness is also a function of work satisfaction, family life, community involvement, health, freedom and individual values. Layard’s view is part of a wider revival of interest in economics and happiness that, for Luigi Pasinetti, is indicative of a broader dissatisfaction with mainstream economics, particularly the reductionist nature of current economic

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626 Ibid 8.
629 Ibid 145.
theory. The dissatisfaction has also contributed to a renewed appreciation of the classical approach to political economy,\textsuperscript{631} an approach that Pasinetti sees ‘as much more suitable for dealing with the richness and freedom of human action’.\textsuperscript{632}

The resurgence of interest in happiness and economics owes much to the work of Easterlin\textsuperscript{633} and Scitovsky\textsuperscript{634} in the 1970s, but the historical legacy of happiness and economics dates back to the classical economists. Bruni and Porta trace a line of thinking that links Adam Smith’s \textit{The Theory of Moral Sentiments}, Malthus’s \textit{Essay on Population}, Marshall’s social economics, Veblen’s ‘conspicuous consumption’, Galbraith’s criticism of the ‘affluent society’, and Duesenberry’s use of interpersonal comparisons in his social theories of consumption.\textsuperscript{635} The classical emphasis on wealth was not misplaced, as it is an important determinant of happiness, and this emphasis directs attention to the mechanisms and aggregate human activity involved in creating wealth. The classical framework is dynamic and can accommodate continuous human adaptation. And, as this approach is focused on ends rather than means, it lends itself to discussion and analysis of the public or common good — in this case, public happiness — much more so than approaches that focus on utility.\textsuperscript{636}

Easterlin’s early work introduced the ‘paradox of happiness’: higher income earners were happier than lower income earners, but absolute happiness did not increase over time with increases in income and wealth. The wider significance of Easterlin’s work is that it challenges the neoclassical orthodoxy that the satisfaction of individual preferences brings utility and wellbeing increases as the consumption set associated with this utility expands. Easterlin is critical of the orthodoxy for ignoring the role of aspirations in determining wellbeing and for ignoring the impact of an individual’s previous experience and social comparisons, and for ignoring the differences between the monetary and non-monetary domains of an individual’s life.

\textsuperscript{632} Ibid 336, 341.
\textsuperscript{634} Tibor Scitovsky, \textit{The Joyless Economy: An Inquiry into Human Satisfaction and Consumer Dissatisfaction} (Oxford University Press, 1976).
\textsuperscript{635} Luigino Bruni and Pier Luigi Porta, ‘Introduction’ in Bruni and Porta, above n 631, 1, 2.
\textsuperscript{636} Ibid 336–342.
Easterlin’s analysis indicates that wellbeing does not change as income or material welfare change, which he attributes to humans adapting to their changed circumstances. As their income increases, their aspirations increase. His analysis indicates, however, that wellbeing does change in line with changes in health, marital status and other family life goals, which Frank extends to other domains of inconspicuous consumption, to use his terminology, such as good working conditions, restorative activities such as exercise and longer vacation time, and the absence of pollution and traffic congestion. The public policy significance of Easterlin’s work is that it provides a justification for policies that, first, target increasing wellbeing, such as reducing unemployment and improving health, and, second, shape preferences so that individuals devote more time to inconspicuous consumption or the non-monetary aspects of life that increase wellbeing.

Regulation is one way of shaping preferences, as is the tax system. Much of the undesirable types of inconspicuous consumption could be classed as market failures and regulation is a commonly accepted way of dealing with these situations. But the economic decision rule has to be implemented within its wider political economy and will be constrained by, for example, the constitutional setting or a consensus on what constitutes moral rights. The conclusion that can be drawn from Easterlin’s work is that if, indeed, happiness should be the goal of economic policy, then these policies need to more explicitly address human suffering, such as food insecurity, as well as material progress. Unspoken, but clearly important to these outcomes, is the reliance on a society’s institutions for achieving these outcomes and the relationship of economics to the political process where choices and trade-offs are required.

In his critique of the existing state of economics, Gilbert Rist also singles out the importance of institutions to economic life:

‘the economy’ (production systems, rules of exchange and distribution, the division of labour, etc.) may take very different forms, depending not only on the ecological milieu (forest, savannah, coastal region, high plateau) but above all on history, culture,
traditions, and the distribution of power: in short, on institutions. There is not one economy resting on a few universal principles, but economic forms (or types of exchange) that vary with the society, environment and ‘institutional arrangements’.

What Rist does not say is that there was a time when the importance of institutions was integral to economic policy debate. Hyman Minsky reminds us of this time in an essay written towards the end of the 20th century:

As the economy was running toward the 1929–33 debacle, Rexford Guy Tugwell took the initiative and brought together a batch of essays by institutionally oriented economists in a volume published as The Trend of Economics. The essays in that volume broke the ground and helped set the agenda of reform for the era of reform and reconstruction that began in 1933. If capitalism is to be successful in the twenty-first century, economists must now apply the orientation of Tugwell’s Trend to a new era...

In this quotation Hyman Minsky recalls an earlier crisis and reminds us that an institutional orientation was needed to break the shackles of the Great Depression and the thinking of the institutionally-oriented economists will be explained in the following part. My argument is that an institutionalist orientation is again needed to successfully confront food crises and problems of hunger.

III UNDERSTANDING INSTITUTIONALISM

Institutional economics secured its foothold in economic thought through its critique of the neoclassical approach and, indeed, the American Economic Association was itself born, in part, out of protest against the then-existing laissez-faire orthodoxy.

Institutional economics remained the dominant discourse of American economics up until the 1940s, although it had reached its highpoint with Franklin D Roosevelt’s New Deal for the United States in the 1930s. The New Deal was notable for the turn to government intervention for protecting the welfare of citizens. And while institutional

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640 Ibid 166.
economics lost its academic standing after the 1940s, it continued to find political expression in the democratic welfare state.

A  *Distinguishing the ‘Old’ from the ‘New’*

Mainstream economics paid little attention to the importance of institutions to economic life from 1940–1975 but the work of the ‘new institutionalists’ led to a re-examination of the importance of institutions within economics. Prominent figures included Oliver Williamson — it was Williamson who coined the term ‘new institutional economics’ (NIE) — and Douglass North. But it was Ronald Coase who provided the intellectual source.

To simplify their work, Coase and Williamson had a focus on transaction costs and the workings of the firm, while North’s work has been important to the awakening that the quality of institutions is an important determinant of economic growth. North describes institutions as ‘the rules of the game in a society or, more formally, [as] the humanly devised constraints that shape human interaction’. Institutional change resulted from the interaction between these institutions and organisations — the players in the game — who are groups of individuals sharing a common purpose and who emerge in response to the rules of the game.

North was not convinced about the general applicability of neoclassical theory:

> The theory is based on the fundamental assumption of scarcity and hence competition; its harmonious implications come from its assumptions about a frictionless exchange process in which property rights are perfectly and costlessly specified and information is likewise costless to acquire. Although the scarcity and hence competition assumption has been robust and has provided the key uperinnings of neoclassical theory, the

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644 Ibid 322.
The lack of general applicability of neoclassical theory was particularly evident for North in markets outside developed economies, in the inability to explain widespread inefficiencies in exchange, and in that group dominance was also often associated with efficiency. North’s theory of institutional change combined a theory of human behaviour with a theory of transaction costs. Then, by adding a theory of production, it was possible to analyse the relationship between economic growth and the role of institutions. North’s insight was that an understanding of human coordination and cooperation was missing from theories of economic development and that the underlying role of institutions was to facilitate human cooperation.

NIE has been influential. The importance of institutions in shaping economic incentives is now widely accepted and these incentives directly impact growth via the decisions that economic actors make on investment and production. Furthermore, institutions, especially the state, play a critical role in redistributing the economy’s resources, underscoring the complementarity of the institutions of markets and state. Effective state intervention is another issue, however, and calls into question the quality of institutions and the governance of those institutions — the manner in which organisations apply the rules — and their interaction. This was very much a theme of the World Bank’s World Development Report for 2002 — *Building Institutions For Market*. Acemoglu and Robinson also took up this theme in their work for the Growth Commission. They formulate this interaction as a relationship between two state variables — the distribution of economic resources and political institutions that affect how political power will be distributed. The exercise of these de jure and de facto powers (the latter due to the resources available to particular groups) affects how economic and political institutions will be chosen. The interaction affects economic performance and subsequently the distribution of resources and this feeds

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649 Ibid 11.
650 Ibid 21.
651 Ibid 27.
652 Ibid 9.
back into political choice, and so on.\textsuperscript{654}

‘New’ suggests that there was an ‘old’, or ‘original’, and that, indeed, was the case.\textsuperscript{655} Yet while the new institutionalist economics does not align itself closely with neoclassical theory, it should not be seen as the ‘old’ being dressed up in new clothes. There are fundamental differences between the ‘new’ and the ‘old’. The ‘new’ is aligned much more closely to the neoclassical conception of the individual than is the ‘old’,\textsuperscript{656} particularly with respect to the rational, utility-maximising individual and the relative emphasis on scarcity and individual exchanges through the market. The most distinctive features of the ‘old’ are the emphasis on meeting needs and the ‘instituted individual’, neither of which is found in neoclassical economics or new institutional economics.\textsuperscript{657}

The remainder of this chapter provides an overview of the institutionalist tradition and its contemporary expression within a broader, heterodox economics critique, to better understand the character of this tradition.

\textbf{B The Institutionalist Tradition}

Institutional economics emerged as a distinctive school of thought in the 1880s in the US,\textsuperscript{658} but the term ‘institutional economics’ appeared somewhat later in a paper delivered by Walton H Hamilton (1881–1958) at the 1918 annual meetings of the American Economic Association. That paper was titled ‘The Institutional Approach to Economic Theory’.\textsuperscript{659} In that paper, Hamilton provides what he considered to be five fundamental concerns of economic theory, which were not satisfactorily addressed by the neoclassical orthodoxy. They were:

\begin{itemize}
\item \textsuperscript{654} Daron Acemoglu and James Robinson, ‘Role of Institutions in Growth and Development’ (Working Paper No. 10, Commission on Growth and Development, 2008) 6.
\item \textsuperscript{655} See Malcolm Rutherford, \textit{Institutions in Economics: The Old and the New Institutionalism} (Cambridge University Press, 1996) for a detailed comparison of ‘old’ and ‘new’ institutionalist approaches.
\item \textsuperscript{656} Stilwell, above n 28, 223–224.
\item \textsuperscript{657} Paul D Bush and Marc R Tool, ‘Foundational Concepts for Institutionalist Policy Making’ in Tool and Bush, above n 565, 1, 10–11.
\item \textsuperscript{659} Walton H Hamilton, ‘The Institutional Approach to Economic Theory’ (1919) 9 \textit{American Economic Review} 309.
\end{itemize}
1. Economic theory should unify economic science. 2. Economic theory should be relevant to the modern problem of control. 3. The proper subject-matter of economic theory is institutions. 4. Economic theory is concerned with matters of process. 5. Economic theory must be based upon an acceptable theory of human behaviour.

Many of the early institutionalists had received their economics training in Germany in the tradition of German historicism, which stressed the national economy and the role of specialised institutions therein. In contrast, the Austrian school, in which Carl Menger was prominent, focused on the individual as the unit of economic analysis. The most influential figures on American institutionalism were Torstein Veblen (1857-1929) and John R Commons (1862-1945). In contrast to the more philosophical debates on welfare occurring in England, where Tawney, Hobson and the Fabian Socialists, among others, were central characters, the American neoclassical critique was rooted in the analysis of business cycles, labour relations, and monopoly and big business to illustrate the problems and shortcomings of an industrial society. Furthermore, also unlike the English, the American institutionalists advanced solutions ‘within the traditional framework of American society’, rather than looking for a new way forged from socialist philosophies. What was common to both the English and the Americans, nevertheless, was a concern that market forces could be socially destructive — the market was not self-adjusting in other words — and that government needed to play a greater role in preventing this destruction, or, at least, in protecting its citizens against this destruction.

Allan Gruchy explains that at the heart of Veblen’s economics was an interest in the process of economic life, which, when ‘viewed from the standpoint of the collective interest ... is rated primarily as a process for the provision of the aggregate means of

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660 Bush and Tool, above n 565, 4.
661 Among the better known figures influenced by the Austrian School are Ludwig von Mises (1881–1973) and Friedrich Hayek (1889–1992).
662 Commons acknowledged the Scottish economist, Henry Dunning Macleod (1821–1902), as an ‘originator’ of institutionalist ideas. See John R Commons, Institutional Economics: Its Place in Political Economy (Macmillan, 1934) 5.
663 Fusfeld, above n 501, 101.
664 Ibid.
human life’. It follows, for Veblen, that

[t]he details of economic life are construed, for purposes of general theory, in terms of
their subservience to the aims imputed to the collective life process. Those features of
detail which will bear construction as links in the process whereby the collective welfare
is furthered, are magnified and brought into the foreground, while such features as will
not bear this construction are treated as minor disturbances.

Veblen was concerned that neoclassical economics did not offer any insights into the
institutional transformations that were occurring in the late-19th and early-20th
centuries. (It was noted earlier that Veblen had coined the term ‘neoclassical’ in
1900). His institutional insights were that the industrial society had changed social
and economic relationships and that these changes were historical and culturally
sensitive. That is, the particular transformations that Veblen was observing may have
been new, but they were part of a history of transformations. The economy had
historical roots and was evolutionary, and social, economic and political institutions
needed to change in response to the transformations, despite any resistance from
vested interests.

The importance institutionalists attached to institutional change and the forces and
processes at play in this change called into question the ‘givens’ of the neoclassicists,
such as consumer tastes, technology and the ownership of resources. Just as Veblen
rejected the neoclassical focus on efficiency and equilibrium, he also rejected the focus
on the individual and the associated assumption of the hedonist individual, arguing
that individual behaviour was far more complex. Not only was individual behaviour
rooted in the individual’s wider society, it could also be influenced by the institutions
of that society. For the institutionalists, consumer tastes were learned over time and
had a social context. Veblen also coined the terms ‘conspicuous consumption,
‘conspicuous leisure’ and ‘social emulation’, in response to his concern with the

667 Ibid 193.
668 Stilwell, above n 28, 211.
669 Aspromourgos, above n 517, 266.
670 Fusfeld, above n 501, 103.
672 Fusfeld, above n 501, 103–104.
673 Stilwell, above n 28, 212–213.
social waste that goes hand-in-hand with conspicuous consumption and leisure in a capitalist society. To the extent that Veblen was concerned with the individual, it is with a socially constituted — institutionally constituted — individual.

Commons assigned a deeper institutional role for government that was, essentially, political economy. The role of government, for Commons, was to mediate the social and economic conflicts that had come to characterise the industrial society and which could not be resolved through market forces. This was in contrast to the neoclassical approach that maintained that the market would generate a social harmony. Commons believed that it was in society’s interest to resolve these conflicts, which, in broad terms, could be reduced to the protection of individual welfare in a market system, as there would be a net benefit to society as a result. The government’s role was not to remove the possibility of conflict, but rather to assist in mediating the conflicts and competing interests that were an inevitable outcome of the myriad of economic relationships. Commons clearly saw that new conflicts would be a continuing feature of the industrial economy, as the complexity of economic and social relationships deepened, and that the dynamism of the economic system would only bring widespread progress, provided the conflicts were resolved.674 Commons did not regard institutionalism as making a novel theoretical contribution to economics, since there had always been a need for collective action and this had been recognised in some way since the early economists.675 But by giving collective control of individual transactions ‘its due place in economic theory’,676 institutionalism contributed to the whole of a rounded-out theory of Political Economy’.677

While no longer as influential as in the first part of the 20th century, ‘old institutionalism’ has, nevertheless, spawned a diverse, heterodox legacy that encompasses social economics, evolutionary economics, institutional political economy and, more recently, behavioural economics, to name but four of an extensive list of legatees that collectively fall under the umbrella of pluralism in economics.678

674 Fusfeld, above n 501, 105–106.
675 Commons, above n 662, 5.
676 Ibid.
677 Ibid 6.
678 See ICAPE Associates <http://www.icape.org/associates.htm> for a list of the associations and groupings of associations that comprise the International Confederation for Pluralism in Economics, and
The leading proponents remain largely American but there have also been influential European figures, such as Gunnar Myrdal and Geoffrey Hodgson. And Keynes and Polanyi shared ‘an intellectual kinship with this American institutionalist tradition’. More importantly, issues such as food security, the global financial crisis, global warming, and income inequality, as well as the associated dissatisfaction with market approaches, have given their ‘old institutional’ approach a contemporary relevance.

Gruchy devoted many years of study to the fundamentals of institutional economics and to capturing its essence. The latter was an enduring task, but towards the end of his career he defined institutional economics as ‘the science of social provisioning’, reminiscent of Veblen’s construction. Succinctly capturing the approach of the ‘old institutionalism’ is not easy, since institutionalism is not identified with a particular set of policy prescriptions. But the approach is unquestionably empirical and directed towards observing the way individuals actually behave in the economy. Capturing the flavour is far more straightforward, however. Warren J Samuels says of institutionalism that it stands for economic democracy and pluralism, while, for Daniel Fusfeld, the future of institutional economics ‘lies within a humanistic political economy based on understanding institutional change and its widespread impact on the social order ... and on social policies designed to control and direct the path of institutional change’.

Within institutionalism, Geoffrey Hodgson has also subjected its workings to close scrutiny. For Hodgson, issues of ‘power, learning and welfare’ lie at the heart of the theoretical agenda for institutionalism and he has identified five propositions that give institutionalism its character: first, institutionalism is not defined by a particular set of economics journals.

679 See Tool and Bush, above n 565, xv for a comprehensive list of Americans who have been influential in the development of institutionalist thought.

680 Ibid.


682 Gruchy, above n 665, 21.

683 Samuels, above n 642, 313.


685 Hodgson, above n 643, 328.
policy prescriptions; second, it draws on other disciplines so as to better understand human behaviour and the dynamics of institutions; third, it regards institutions as the key component of the economy; fourth, the economy is ‘embedded in a broader set of social, cultural, political and power relationships’ and continues to evolve; and fifth, these relationships affect an individual’s behaviour.686

For Hodgson, it is this final proposition on the ‘institutionalised individual’687 that captures the essence of institutionalism, as the other propositions are either embraced, or unable to be clearly distinguished from, other schools of economic thought.688 ‘Institutionalism is distinguished from both mainstream economics and the “new institutional economics” precisely for the reason that it does not assume a given individual, with given purposes or preference functions.’689 It explicitly recognises that institutions shape an individual’s ‘habits, conceptions, and preferences’.690 In the language of institutionalism, there is a reconstitutive downwards causation from institutions. Institutionalists do not deny that there is also an upwards causation whereby individuals are instrumental in shaping institutions. But it is the downwards causation that is distinctive in recognising that individuals evolve in their thinking and that their preferences can be altered.

Furthermore, as Hodgson points out, through accepting that institutions can shape individual behaviour, institutional economics incorporates concepts of power into its analytical framework.691 As with other schools of economic thought, institutionalists conduct their inquiry within a capital-labour-state framework, but they see each component of the framework as an heterogeneous institutional cluster — firms and labour are organised in a variety of ways and the state has many forms. They are interested in the power relations between these various forms of capital, labour and state.692 The expressions of power can also take on a variety of forms, from subtle to coercive. A key point is that within institutionalism government is seen as integral to the economy, and government interventions are not external to the normal workings

686 Ibid 318.
687 Ibid.
689 Ibid 325.
690 Ibid.
691 Ibid 326.
of the market. Legislation and regulation are, therefore, central to the framework.

Institutionalists reject the devotion to markets that is central to mainstream neoclassical economics. At issue are both the claimed superiority of the market as a vehicle for making social choices and the characteristics of markets. The institutionalist position is that markets can be a very effective form of exchange and can be socially useful in resolving situations of scarcity. But they are not the only form of exchange. While institutionalists accept that there is an important role for markets, it is not a pure, free market they have in mind. For institutionalists, markets are neither necessarily competitive nor necessarily efficient. They would agree with Polanyi that markets are not self-adjusting. There is no single, best market outcome, as market allocations are dependent on how competing interests are resolved. It follows that the market is not a settled state and institutionalists focus, accordingly, on the changing, evolutionary nature of markets rather than market equilibria at different points in time.

It is the context of markets that is important to the institutionalists. To draw on Polanyi again, institutionalists view markets as socially-constructed institutions that are embedded in their society. Daniel Bromley reminds us that ‘[t]he fundamental issue for any society concerns the constructed order out of which markets arise’. Government plays a critical role in the constructed order through mediating various interests and ordering the social relations. That is, the society decides on what it wants to achieve and, then, whether the market will be instrumental — part of the social ordering — to that achievement. The critical point is that markets are not the prime force in the allocation of resources. Markets are only allowed to do what they have been constructed to do. Markets are not the goals or objectives, they are instruments.

In line with their empirical bent, institutionalists think in terms of a model of the market, as opposed to a theory of the market. For institutionalists, the market is not conceptual, or abstract, or a-institutional; it is institutional, and is the product of other

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693 Ibid 209.
institutions and the power resident within. \textsuperscript{696} The marketplace is an arena of power, rather than the price mechanism, per se, and to understand markets is to understand the competing interests of those served by the marketplace. What markets are allowed to do, and constructed to do, is a function of the institutions of the society they serve. An institutionalist, socially-constructed model, then, is an objective, non-ideological assessment of whose welfare is served by the market through a determination of whose interests are served by the market.

The power that lurks in the background is integral to the socially-constructed market model that institutionalists advocate. As Warren J Samuels elaborates, two elements of power/social control are at play in this model. First, there is the social control afforded by the economic instrumentality of law — the legal underpinnings of the marketplace — and, second, there is the control of opportunity sets through the legal rights and obligations that constrain economic actors, as well as the impact of the decisions of other economic actors. \textsuperscript{697} Mainstream economists attach considerable importance to the legal foundations of markets, and while there is no doubt that this is the case, it is a second order issue. Accepting that the legal foundation is itself socially constructed reinforces that the first order issue is the decision on what the society wants to achieve.

One of these decisions concerns income distribution. Mainstream economics emphasises the intrinsic worth, or value, of the factors of production, individually or severally, \textsuperscript{698} and the role of the market in ‘divining’ \textsuperscript{699} this value. In contrast, institutionalists stress that factors of production draw their value only through being connected with each other. \textsuperscript{700} Mainstream economics is on less contentious ground when it comes to analysing the positive aspects of the resultant income distribution, or the conditions under which an income distribution is Pareto-optimal, \textsuperscript{701} but this ground is far from solid when it comes to dealing with the normative aspects of income distribution. I have been critical throughout of the economic growth approach

\textsuperscript{697} Ibid 359–60.  
\textsuperscript{699} Ibid 919.  
\textsuperscript{700} Ibid.  
\textsuperscript{701} Ibid 915.
to reducing food insecurity, because it over-emphasised increasing future food supply at the expense of confronting the much more difficult present tense distributional shortcomings of the market system.

Does institutionalism offer an alternative way of thinking about distribution, particularly the normative dimensions? Here, again, institutionalism does not provide a distinctive theory. There is, nevertheless, ‘a constellation of mutually consistent ideas’\textsuperscript{702} throughout the institutionalist literature. The core ideas, in Christopher Brown’s assessment are:

1. production is a social activity;
2. folk views or belief systems assist in the maintenance of power relationships;
3. market outcomes are often predetermined by the rules governing transacting parties;
4. the institution of property is not static; and
5. the pursuit of pecuniary interest can upset the delicate balance among vertically arranged activities vital to modern production and distribution methods.\textsuperscript{703}

These ideas reinforce the general tenets of institutionalism. Distribution is an instituted process and distributive mechanisms are inseparable from ‘habits, customs, working rules, laws and belief systems’\textsuperscript{704} for the institutionalists. As Brown points out, the fundamental question concerns the purpose of the institutions. ‘What ends should [the] institutions be instrumental in achieving?’\textsuperscript{705} Regulatory thinking, particularly the public interest theory of regulation, also grapples with similar questions. This is discussed further in Chapter 5. To preview that discussion, the primary justification for public interest regulation, historically, is that markets cannot be relied on to generate socially preferred outcomes, in which case, market outcomes needed to be modified to ensure that the public interest is met. The key point is that there is a strong sense of purpose also lurking in the background.

The strength of institutionalism is that it sharpens the focus on that purpose and casts the market as an instrument that is employed in the public interest. The market is itself an institution that serves a regulatory purpose. The institutional approach is a market-plus approach in the sense that regulatory thinking focuses on regulation as a means of

\textsuperscript{702} Ibid.
\textsuperscript{703} Ibid 916.
\textsuperscript{704} Ibid 920.
\textsuperscript{705} Ibid 925.
correcting for market failure or enhancing the market, an approach that thrusts the
market forward as a solution to fundamental questions. Not accepting that the market
has limitations as a distributive mechanism constrains economic progress by limiting
the knowledge and productive capacity of a society to change the lives of its
members. Institutionalists accept these limitations.

C Economics and the Institutions of Provisioning

Although this was never his intention, Ronald Coase provides a link between the old
and new institutionalists. It is difficult to attach any label to Coase, but he was
certainly more outside the economic mainstream than in. He was critical of the
neoclassical framework, regarding ‘the science of human choice’ as too broad a
description of what economists actually did and what their skill sets qualified them to
do. He neatly captures the problem with ‘the science of choice’ with his observation
that under this approach ‘economics becomes the study of all purposeful human
behaviour and its scope is, therefore, coterminous with all of the social sciences’. He
was also critical of Milton Friedman’s positive economics:

What we are given is not a positive theory at all. It is I believe, best interpreted as a
normative theory. What we are given is not a theory of how economists, in fact, choose
between competing theories, but unless I am completely mistaken, how they ought to
choose.

But Coase was no great admirer of early 20th century institutionalism either, being
critical of its lack of theoretical underpinnings. He did, however, hold similar views
on the nature of economics and the purpose of institutions. Coase thinks of economics
as the study of ‘the working of social institutions which bind the economic system
together: firms, markets for goods and services, labour markets, capital markets, the

706 Ibid 926.
and Implications’ in Steven G Medema (ed), Coasean Economics: Law and Economics and the New
710 Ibid.
711 Ronald H Coase, ‘How Should Economists Choose?’ (Third G Warren Nutter Lecture in Political
Economy, American Enterprise Institute for Public Policy Research, Washington, D.C., 18 November
1981) reprinted in Ronald Coase, Essays on Economics and Economists (University of Chicago Press,
1994).
banking system, international trade, and so on’.  

Geoffrey Hodgson agrees with the thrust of Coase’s approach, but he considers that Coase’s primary focus is on the institutions of a ‘civilised society’ and that this is too limiting. For Hodgson, economics, broadly defined, should be the study of the social structures and institutions concerned with the requisites of human life, irrespective of the extent of ‘civilisation’ or development.

These institutions covered those engaged in production, distribution, acquisition and protection, including those focused on improving the capability to obtain the basics of human life. The family and the education system are such examples. In short, economics, for Hodgson, is the study of all provisioning institutions. He finds support for his position from J. Fagg Foster, another latter-day ‘old’ institutionalist, who saw economics as ‘an effort at rational enquiry into those institutions through which man provides himself with the means of life and experience’. He might also have found support for his proposition in the earlier thinking of William Beveridge, who saw economics as ‘the study of the general methods by which men co-operate to meet their material needs, considered both theoretically and in their various practical forms of commerce and industry, transport, banking and currency, and so forth’. Beveridge is seen as an architect of the British welfare state. He had worked in the British Ministry of Food in WWI and was briefly its permanent secretary before being appointed a director of the London School of Economics and Political Science in 1919, a position he held until 1937. It comes as no surprise to learn that he and Robbins were not each other’s intellectual admirers.

The economics of the food security debate for Hodgson and Foster would not take a growth orientation. Rather, the orientation would be towards how the provisioning institutions contributed to food security and addressed food insecurity. Looking back to the Indonesian example, the imperative for the newly-independent Indonesia was

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714 Geoffrey M Hodgson, How Economics Forgot History, above n 528, 299, 347.
715 Ibid 299, 346.
717 William Beveridge, ‘Economics as a Liberal Education’ (1921) 1 Economica 2, 2.
to meet the challenge of meeting the survival needs of Indonesians and to develop the provisioning institutions for this task. Humans naturally give priority to acquiring the basics of life and it follows, for Hodgson, that the institutions of provisioning take priority in a society.\textsuperscript{719} Provisioning has universal applicability for Hodgson in a way that other aspects of economics do not, including the fundamentals of markets, such as supply and demand, and even scarcity. His reasoning is that there is a difference between absolute scarcity, relative scarcity, and the absence of scarcity.\textsuperscript{720} Rist is similarly concerned with the way that the emphasis on scarcity has formalised economics and urges that ‘[t]his is indeed the approach from which extrication is necessary’.\textsuperscript{721} The alternative for Rist is to prioritise the substantive economy that Polanyi espoused as this ‘prioritizes the relation of human beings among themselves and with their environment, and that these are shaped by institutions’.\textsuperscript{722}

For the institutionalists, then, the institutions of provisioning take priority because providing for people is the priority. Marc Tool and Paul Dale Bush similarly explicitly link institutional change and social provisioning, but they put the point more strongly through linking institutional survival with the fit with social provisioning:

\begin{quote}
perhaps the diagnostic characteristic of institutional economics is its focus on the process of institutional change ... [and] whether existing institutional structures are capable of nurturing the community’s capacity to provide and enhance the means of life.\textsuperscript{723}
\end{quote}

The distinction between ‘providing’ and ‘enhancing’ is important. The former is an imperative and the latter an aspiration, as in the right to food or the capabilities approach in the development discourse. More important, to my mind, is that this statement also links the evolution of institutions to the legitimacy of institutions. Only the fittest will survive and the development of a provisioning culture is an important factor underlying that survival.

A provisioning culture confronts problems of survival — the first claim on the

\textsuperscript{719} Hodgson, above n 528, 284.
\textsuperscript{720} Ibid 277–278.
\textsuperscript{721} Rist, above n 639, 164.
\textsuperscript{722} Ibid.
\textsuperscript{723} Tool and Bush, above n 565, xiv (emphasis in original).
institutions of provisioning — something which both Samuels and Hodgson draw attention to; and something that mainstream economics has difficulty confronting. In his final work compiled shortly before his death in 2011 Samuels reinforces this point:

The survival requirement is not a minor, esoteric consideration relevant only to some theoretically, philosophically, or mathematically oriented scholars. The requirement that economic actors survive when opportunities for trade are exhausted is central to the concept of Pareto optimality: Death is not a marginal adjustment. The survival requirement is fundamental to both economic theory and economic policy formed under the aegis of neoclassical economics.

Neither individual nor group survival is a given in actual economic life. To my knowledge, no ‘invisible hand’ has been said to guarantee ‘survival’ and no author has named survival as a function performed (such as ‘equilibrium’, for example, has been) by some identity attributed to the invisible hand.\textsuperscript{724}

To understand the evolution of the institutions of provisioning, is to understand the interconnectedness of economics with other social sciences, including law, and how this interconnectedness resolves provisioning imperatives. For example, Hodgson sees law as vitally important to these institutions in more civilised societies through constraining and legitimising thoughts, habits, customary rules and behaviour generally; and because in these societies ‘institutions emerge in the context of explicit legal rules’.\textsuperscript{725} The economists’ interest in other social sciences should not automatically raise the fear of the economic colonisation of these social sciences either. Coase points out that the economist has a natural interest in the interdependencies between economics and other social sciences and this should be a permanent part of the economic inquiry. The purpose, though, is not to absorb other social sciences into economics. It is to better understand the economic system through better understanding the linkages with other social sciences.\textsuperscript{726} My primary concern here is with the linkage with law and that is the subject of the next chapter.

\textsuperscript{724} Warren J Samuels with the assistance of Marianne F Johnson and William H Perry, Erasing the Invisible Hand: Essays on an Elusive and Misused Concept in Economics (Cambridge University Press, 2011) 278.

\textsuperscript{725} Hodgson, above n 528, 300–301.

\textsuperscript{726} Coase, ‘Economics and Contiguous Disciplines’, above n 607, 209–211.
IV SUMMARY AND CONCLUDING REMARKS

In this chapter I began the reconceptualisation of problems of hunger through exposing the shortcomings of mainstream, neoclassical economics and presenting a heterodox, institutional alternative that emphasised social provisioning. My argument is that thinking in terms of social provisioning makes the food security debate more tractable.

The economic thinking that was influential at the time of the FAO, and which remains influential on the policy prescriptions of international institutions, privileged the neoclassical theoretical agenda of growth and markets and the neoclassical emphasis on individuals as the subject of analysis. The shortcomings of this analytical agenda were illustrated through reference to the work of the Growth Commission and the Sarkozy Commission. This work demonstrated that the emphasis on growth and markets does not capture the richness and, indeed, complexity of economic life. It did not adequately address activity outside markets, issues of sustainability, or factors that influenced the overall wellbeing of individuals. The shortcomings of the neoclassical emphasis on individual behaviour revolved around the usefulness of utility and individual preferences as theoretical constructs and the consequent awkwardness in aggregating individual behaviours when dealing with issues of national, or social, welfare. Furthermore, the neoclassical approach was inflexible as to policy objectives, such as happiness, which may have greater impact on people’s lives, especially in times of crisis or suffering, such as with food insecurity. Arguably, the most significant feature of neoclassical thought is its separation from political economy — a legacy of the marginalist revolution was the separation of political economy from economics, which was sealed when Robbins directed economic enquiry to problems of scarcity in the 1930s.

In contrast, the strength of institutionalism is that it does not divorce economic issues from issues of political economy. Consequently, it respects the distinction between the identification of choice, through technical apparatus such as economics, and the decisions on what choice to make. Furthermore, the focus of institutionalism is demonstrably empirical: the interest is in understanding how the economy actually works, rather than being locked into narrow neoclassical ways of looking at individual
behaviour and incentives. For institutionalists, the economy is embedded in its society and, therefore, the institutions of the society are critical to the workings of the economy and economic outcomes. Institutionalist economics ‘enlighten[s] us as to the workings ... of that complex social entity we call the economy’.\textsuperscript{727}

Institutionalism offers a better frame for problems of hunger because it emphasises that a society has first to provide for itself and it relegates the market to being simply an instrument of this provisioning. By reinforcing that the economy is embedded in its society, institutionalism also has the potential to force the protagonists in the contemporary food security debate and the institutions of the international community, more generally, to confront the meaning of international community and how this community is structured, and to understand the interlinkages between economics, law and politics. The following chapter addresses these interlinkages.

\textsuperscript{727} Heilbroner, above n 542, 310.
THE LEGAL DIMENSION OF SOCIAL PROVISIONING

To this point, I have argued that the institutions of the international community have not taken responsibility for problems of hunger. This was due to an institutional incoherence across the UN that reflected the respect paid to both universal human rights and state sovereignty, and the clash between human rights and mainstream economics. Furthermore, mainstream, neoclassical economics was not conceptually suited to addressing problems of hunger and starvation. To overcome these conceptual shortcomings — to deprivilege mainstream economics — I presented institutionalism as an alternative, broader conception of economics. I then began the reconceptualisation of food problems as problems of social provisioning, in line with the thinking of the ‘old’ institutionalists.

Through offering a wider conception of economics, institutionalism responds to the shortcomings of mainstream neoclassical economics, particularly the overemphasis on growth and markets in neoclassical economics. This emphasis distracts from the essential task a society has of providing for its own, and institutionalism reminds us that markets are but one instrument, albeit an important one, of this social provisioning. Institutionalists stress that economics is embedded in the society it serves, and focus on the institutions that are needed to provide for a society. This focus on provisioning enables institutionalists to distinguish the imperative of survival from the progressive enhancement of living standards and to shape public policy accordingly.

The second plank in the deprivileging of mainstream economics is to elaborate the legal dimension of institutionalism. Institutionalism accepts that the institutions of law and politics are critical to the workings of the economic system, and, in effect, can be described as the original ‘law and economics’. This chapter is structured in three parts. Part I discusses the legal dimensions of institutionalist thinking. In effect, this can be
described as the original ‘law and economics’. Mirroring the discussion on institutionalism in the previous chapter, neoclassical economics stands between the ‘old’ and ‘new’ law and economics. The institutionalist thinking on law and economics is illustrated through Warren J Samuels’s formulation of the ‘legal-economic nexus’, which he identifies as a social space where law and economics are continually (re)forming each other.

Contemporary regulatory thinking is examined in Part II. Regulatory thinking provides an entrée into inquiring about the legal dimensions of economic policy, because it is typically justified as a response to some kind of market failure; it qualifies the neoclassical emphasis on markets. For my purposes, regulatory thinking first reinforces the interconnections between law and economics and provides a route to depolarising the polarity of the contemporary food security debate. Rights and regulation can both be viewed as generalised claims on the social order and both are connected to economics in some way. There are costs associated with both and both ultimately involve political choices. Hence, the language of human rights cannot provide a standalone frame for problems of hunger, just as neoclassical economics could not. Second, it reinforces the value of the institutionalist approach. Aspects of contemporary regulatory thinking are closely aligned with institutionalist thought, as regulatory pluralism takes hold in academic work and regulatory practice. The institutionalist dimension to this pluralism is informed by the concept of ‘solidarity’ and the origins of this thinking are discussed.

Solidarity is a key link between the legal and economic dimensions of institutionalism, as is shown in Part III. In this part, I build on the institutionalist approach to situate institutionalism within a public law framework. This is done, initially, through a discussion of the thinking of Léon Duguit, who was influential on both legal and economic scholars in the late-19th and early-20th centuries, particularly in shaping the functionalist style of public law that emerged in parallel to institutionalism. This style emphasised purpose and public service. The final section of Part III discusses Martin Loughlin’s conception of public law. Elements of both purpose and social welfare can be seen in Loughlin’s ‘pure theory of public law’. But is also concerned more broadly

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728 Martin Loughlin, Foundations of Public Law (Oxford University Press, 2010).
with questions of political jurisprudence and what it means to take political responsibility for duties. It is concerned with good choices — something that was noticeably absent from the neoclassical framework. Marrying Loughlin’s pure theory with institutionalist thinking connects economics with its public through public law. This marriage enables problems of hunger to be reconceptualised as a duty to provide.

I LEGAL DIMENSION OF INSTITUTIONALISM

In thinking about the legal dimension of institutionalism, a useful starting point is to ask whether this dimension is already captured by the field of law and economics within the broader discipline of law.

A Law and Economics

A commonly-held perception is that the origin of law and economics is associated with the Chicago Law School of the 1950s and that this thinking became increasingly influential throughout the US in the 1960s and ’70s, before later taking hold in other parts of the world. Major landmarks in this ascendency were the introduction of the Journal of Law and Economics in 1958; the publication of Ronald Coase’s The Problem of Social Cost in 1960;729 Gary Becker’s The Economics of Discrimination in 1957730 and ‘Crime and Punishment: An Economic Approach’ in 1968,731 and Richard Posner’s Economic Analysis of Law in 1973.732 The Chicago thinking came under increased critical scrutiny from the mid-1970s, in line with the rise of new institutional economics and neo-Austrian economics. This scrutiny heralded a second wave of law and economics that was sceptical of the assumptions underlying Chicago economics and one that was more empirical and open to law and economics thinking from outside the US.733

Institutionalists challenge this commonly-held understanding of the early history on

two counts. First, an extensive interest in law and economics dates back to the late-18th century — ‘the first great law & economics movement’, as Hoverkamp has labelled it. This level of interest was ‘unprecedented’ in Hovenkamp’s view. And second, law and economics has an earlier history at Chicago to that outlined above and the character of the programme has changed considerably over the years. Furthermore, institutionalists acknowledge the contribution made by the American Realism movement within law to the emergence of law and economics.

1 First Great Law and Economics Movement

The defining feature of the first great law and economics movement, in Hovenkamp’s assessment, was an interest in the relationship of law to the distribution of wealth in American society at the time. Pioneers of this movement included Charles Francis Adams (1807–86), Henry Carter Adams (1851–1921), and Richard Ely (1854–1953). Charles Francis Adams is regarded as a prophet of regulatory theory. His lasting legacy was to show that the operation of railways in the US was a case of market failure and, hence, needed to be regulated. In so doing, he also demonstrated that marginalist thinking could not be applied universally. Henry Carter Adams was also concerned with regulatory issues and, more generally, with questions of economics and jurisprudence. Richard Ely’s work illustrated that private property was important to increased prosperity, but that it also needed to be regulated in the wider social interest. It was Ely who developed the justification for the state exercising the power of eminent domain.

All three were influenced by the German Historical School and shared a distaste for the marginalist economic thinking that become increasingly popular elsewhere in Europe. As noted earlier, the battle between the marginalists and the institutionalists over the importance of history and empirical analysis led to the foundation of the American

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736 Hovenkamp, above n 734, 994–5.
737 Ibid 1022.
738 Eminent domain power is used to address a situation of market failure where privately owned property is not the socially-optimal use of that property, for example where land is needed for major infrastructure projects.
Economic Association (AEA) as an alternative to the mainstream, marginalist thinking of the time. Ely was an instrumental figure in the establishment of the AEA and was its first secretary.\(^739\) John R Commons, who was introduced in the previous chapter as a key figure in the rise of institutionalism, continued to develop these institutionalist legal-economic approaches and the publication of his *Legal Foundations of Capitalism*\(^740\) in 1942 ensured that the legal-economic approach would have a lasting impact.

2 American Realism

William Twining dates the realism movement in the United States to the period 1870–1931.\(^741\) Realism was not about the content of law. It was about how law worked and distinguishing between what law did to, or for, people, and what it ought to do to, or for, people.\(^742\) Focusing on how and the extent to which ideals were actually realised was just as important as the formulation of the ideal.\(^743\) Of particular interest was the social setting in which law operated and the workings of legal institutions such as courts.

The jurisprudential themes and issues addressed within realism were wide-ranging, including the content and method of legal education and research, the interrelationship between law and other social sciences, and the adaptation of law and legal institutions to social change, particularly the lag in this adaptation.\(^744\) The rapid social and economic change associated with the industrialisation that was taking place in the US in the late 19\(^{th}\) century was a constant reminder at the time of the gap between needs and the capacity to meet those needs.\(^745\) Institutionalists would say that the capacity to provide was at issue.

In a wider context — one that is wider than the jurisprudential context — realism is also associated with the ‘revolt against formalism’. And while Duxbury disputes the

\(^739\) Hovenkamp, above n 734, 1021–2.
\(^744\) Twining, above n 741, 376–377.
\(^745\) Ibid 4.
extent of this revolt, less dispute surrounded the breaking down of boundaries between disciplines that was a feature of realism, as was the distaste for mathematical abstraction and analogy, and the ahistorical approach of the utilitarians.

The similarities between realism and institutionalism are clearly evident. Indeed, Edythe Miller ‘suggest[s] that realism is the only ontological position consistent with institutional economics’. Miller’s position is evidenced by the work of Karl Llewellyn (1893–1962), the best-known figure in American Realism. Llewellyn acknowledged the influence of Veblen and Commons on his own thinking, and he was also heavily influenced by Walter Hamilton. Llewellyn thought about law ‘as an engine (a heterogeneous multitude of engines) having purposes, not values in itself’. In other words, law was a means to a social end and not the end in itself. And since law was purposive, the observation of law in practice became more important than the wording of the law in effectively addressing the concerns that prompted the particular legislation.

Kennedy and Fisher point out that there were a number of strands to Llewellyn’s thinking that were also common to the views of other anti-formalist scholars, such as Oliver Wendell Holmes Jr (1841–1935) and Roscoe Pound (1870–1964), but this does not detract from the distinctiveness of Llewellyn’s thought. Llewellyn’s approach to the distinction between rights and remedies is a case in point:

Previously legal scholars typically had assumed that legal remedies were derivative of legal rights. In other words, to determine whether a party is entitled to a particular remedy, one should first ascertain the scope of the right of which he or she had been
deprived. Llewellyn argued the analysis ought to run in the opposite direction ... Legal rights, in other words, are nothing more than descriptions of the availability of legal remedies.\textsuperscript{755}

Llewellyn regarded institutions as ‘the central and most important concept of social science’.\textsuperscript{756} Institutions were organised around the activity of particular jobs and major institutions, of which law was one, were ‘vital to the continued existence of the society or group’.\textsuperscript{757}

And when one looks to see, it is plain enough what the great and basic job is, on which the institution of law-and-government is focused. It is the job, for any group, for any community, for any political entity, for any society, of becoming and remaining and operating as enough of a unity, with enough team-work, to be and remain recognizable as a group or as a political entity or as a society. The fundamental Law-and-Government job is, then, the job that is fundamental to the existence of any society and of any social discipline at all: it is the job of producing and maintaining the groupness of the group.\textsuperscript{758}

By the late-1940s, Llewellyn had come to see the institution of law and the institution of government as essentially undertaking the same function. Accordingly, he adapted his terminology of ‘law-and-government’ to ‘law-government’.\textsuperscript{759}

As Twining notes, Llewellyn understood that these jobs were focused on survival, in the first instance, and on efficiency, in the second. The first was ‘ideal’ and the second was ‘aspirational’.\textsuperscript{760} Llewellyn also saw his ‘law-jobs’ theory holding for any group — from small groups such as the family or a partnership, to the complexity of business groups and government, to the even more complex international community.\textsuperscript{761}

Llewellyn brings into sharp focus the importance of understanding what the international institution is, if issues such as food security are to be in the domain of international institutions:

\begin{footnotesize}
\begin{enumerate}
\item Ibid 136–137.
\item Llewellyn, Jurisprudence, above n 743, 356 n 3.
\item Ibid 355.
\item Ibid 357.
\item Ibid 357.
\item Ibid 357.
\item Ibid 357.
\item Ibid 357.
\item Ibid 357.
\item Ibid 357.
\end{enumerate}
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Indeed, it is when one marks out sharply what group-unit one is dealing with as being the Entirety concerned, that such a concept as ‘social control’ loses its amorphousness and becomes manageable. Pick up any discussion of that topic and observe the sharpness which emerges if one carries in mind persistently such queries as ‘Control of whom, by whom, for what and the context of what Entirety? Is this an intra-group case or an inter-group case? If the latter, how well organized a larger Entirety is there in the picture?\textsuperscript{762}

Another prominent realist, and someone who worked closely with Llewellyn, was Robert Lee Hale. Hale undertook a law degree and then a Ph.D. in economics before commencing his academic career at Columbia University, initially with a joint appointment in the economics department and the law school and subsequently solely in the law school. At Columbia he would work alongside Llewellyn and Jerome Frank, who was also influential within American Realism. Hale identified with institutionalism, particularly the work of Veblen, Commons, and Ayres. He was also influenced by Walton Hamilton, who commenced his academic career at Yale, which would become another hothouse of realism alongside Columbia. Hamilton and Hale were the first two economists recruited to law schools in the US. Hale’s academic work challenged laissez-faire attitudes and the separation of politics and economics that characterised neoclassical thought.\textsuperscript{763} He focussed on the interface between law and economics, with the regulation of railways and public utilities being an ongoing concern.

The major legal influence on Hale’s thinking was Wesley H Hohfeld, particularly Hohfeld’s fundamental legal conceptions, or lowest common denominators of law, and his perspective on rights. Medema, Mercuro, and Samuels explain that

Hale’s paradigm was comprised of the concepts of voluntary freedom, volitional freedom, coercion, power and government. Legal and economic processes were viewed as inseparable and the economy described as a structure of coercive power arrangements and relationships which necessitated an understanding of the formation and structure of the underlying distribution of economic power.\textsuperscript{764}

\textsuperscript{762} Llewellyn, ‘The Normative, the Legal, and the Law-Jobs’ above n 742, 1374 (emphasis in original).
\textsuperscript{763} Kennedy and Fisher, above n 750, 87–8.
\textsuperscript{764} Steven G Medema, Nicholas Mercuro and Warren J Samuels, ‘Institutional Law and Economics’ in Bouckaert and De Geest, above n 733, 418, 426.
Hale made clear that coercion was ever-present in the economy through the design and enforcement of entitlements. What on the surface appear to be voluntary arrangements, including market prices, are a reflection firstly of the structure of entitlements — the distribution of coercion — and secondly the relative power of the bargaining agents, which were themselves a function of the entitlements. Changing, or redistributing, entitlements brought about changed social outcomes and it was important, therefore, to be clear on the social objective from changing the entitlements. Hale extended this thinking to statute law as well, pointing out that wherever a statute had economic implications it was unavoidable that there would be a negative impact on someone’s property or liberty.

Hales’s ideas live on in institutionalist thinking on law and economics and he was also influential on the critical legal studies movement. The essence of his approach was that legal and economic processes were inseparable.

3 Law and Economics at Chicago

The work of the institutionalists and realists in the early decades of the 20th century led to a growing interest in the relationship of law and economics — beyond institutions associated with the pioneering figures we have discussed. And the University of Chicago would become an important part of this changing academic landscape, keeping in mind, however, that several Chicago academics had been influential in the early years of institutionalism — Veblen’s first academic appointment was at Chicago and Ayres completed his Ph.D. in philosophy at Chicago.

The changing attitude toward law and economics at Chicago was reflected in a widening of the Law School’s curriculum in the 1930s to include economics, accounting and other non-traditional courses of legal study. The inclusion of economics and social sciences in the curriculum was very much in the realist tradition. In 1939, Henry Simons, an economist/political scientist with an active interest in

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765 Kennedy and Fisher, above n 750, 90.
768 But the Chicago Economics faculty did not have any significant influence on the way economics was taught in the law school at this stage. See Ronald H Coase, ‘Law and Economics at Chicago’ (1993) 36 Journal of Law and Economics 239, 240.
institutionalism, was appointed to the staff. The curriculum and research agenda of the Chicago Law School subsequently evolved with the appointment of another economist, Aaron Director, in 1946 (the same year in which Milton Friedman was appointed to the Department of Economics at Chicago), Ronald Coase in 1964, and Richard Posner in 1969. Along the way there was a shift from the institutionalist-realist based approach to law and economics — what could be called the pre-Chicago approach — to the ‘early’ Chicago approach, epitomised by Coase, to the ‘new’ Chicago approach of the economic analysis of the law that has been dominant since the mid-1970s and which is closely identified with Posner.

Director’s interests were in the economic analysis of law and the way this analysis could be used in anti-trust law. He shaped the Chicago law and economics curriculum around these interests. Coase had previously been at the London School of Economics and was interested in how to improve the analysis of the workings of the economic system. On his own admission, his target audience for ‘The Problem of Social Cost’ was economists, not legal scholars, and his interest was with the practice of economics in order to expose the shortcomings of welfare economics. Coase’s objective was to show that law was very important to the workings of an economy, whenever positive transaction costs existed.

Posner’s work has been very influential on the teaching and application of law and economics, but it is not closely connected to Coase’s work. Indeed, Coase would publicly distance himself from Posner’s approach to law and economics, an approach that Deakin describes as the extension of ‘Friedman’s positive methodology of economics to the interface between economics and law’. The essential aspect of Posner’s project, in Deakin’s view, is

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769 In Coase’s assessment, Simons did not make a significant contribution to the law and economics curriculum but was instrumental in the appointment of Aaron Director and influenced the thinking of Director and also Friedman. Simons’s academic strength was in macro theory and monetary policy. Ibid 240–3.
770 For an extensive discussion of this historical shift see Medema, The Hesitant Hand, above n 733, 160–96.
772 Ibid 251.
773 Simon Deakin, ‘Law Versus Economics? Reflections on the Normative Foundations of Economic Activity’ in Richardson and Hadfield (eds), above n 733, 30, 47.
that its methodological foundations are kept secure from corrupting influences, such as 
those of the ‘old’ institutionalist or heterodox economists ... Posner’s approach is openly 
reductionist, in the sense of seeking to reduce the institutional detail and complexity of 
legal process (and of social interaction) to a small number of fundamental axioms from 
which predictions and generalisations can be deduced ...”

Paradoxically, Coase’s ‘The Problem of Social Cost’ was an important factor in the rise 
of the ‘new’ because it drew attention to court decisions where harmful social effects 
were at issue. Ironies abound. The paper was closer to the institutionalist-realistic 
focus on policy issues surrounding the interrelationship between law and economics 
than to the ‘new’ law and economics thinkers, such as Posner. Posner is harshly 
dissmissive of the contribution of realism to modern law and economics but, as 
Medema notes, this is to miss the point that the ‘new’ law and economics in its 
economic analysis of the law is consequentialist, just as were realism, the institutional 
law and economics, and the early Chicago law and economics. What unites each of 
these approaches is their focus on the actual impacts of law and economics in society.

Deakin contends that Posner’s work has not yielded an adequate theory of the law-
economy relation. ‘Instead, law is subsumed into an all encompassing “economic logic” 
based on the axioms of rational choice, the law of the single price, and the allocative 
properties of voluntary exchange.” Deakin’s response to these methodological 
deficiencies is to call for greater interdisciplinary scholarship in contemporary law and 
economics that is ‘capable of fusing insights of the two disciplines and of contributing 
methodological insights to them both.’ He cautions that unless an interdisciplinary 
perspective can be found, law and economics ‘is likely to collapse back into one or 
both of the disciplines in due course: economists will continue to apply ever more 
formal and complex techniques to the analysis of legal problems, and lawyers will 
return to a primarily doctrinal focus.’ Institutionalism answers Deakin’s call.

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774 Ibid 31–2.
778 Mackaay, above n 733, 65.
779 Deakin, above n 773, 31, 47 (emphasis in original).
B The ‘Legal-Economic Nexus’

An interest in interdependencies and interrelationships has always been a hallmark of institutionalist inquiry. The interrelationship with law is no exception and the commonalities between economics and law attracted comment from the earliest institutionalists. Commons, for example, noted that ‘[of] the five elementary concepts or principles of economic theory, at least four are functional also to the science of law, namely, Scarcity, Futurity, Custom and Sovereignty. A fifth concept of economics, Efficiency, connects that science with the physical sciences’.\(^{780}\) Drawing on the work of the institutionalist Warren J Samuels, this section extends the description of the commonalities between law and economics, or the relationship between law and economics, to something much stronger — to the interconnectedness of law and economics. In many ways it is a discussion about the embedding of economics in its legal self, in much the same way that institutionalists embed the social construct of markets into the wider social system.

Samuels’s starting point is that the emphasis institutionalists place on interdependencies and interrelationships, and the language used to describe these interdependencies and interrelationships, have, somewhat ironically, tended to exacerbate the distinction between the ‘legal’ and the ‘economic’:

> The conventional juxtapositions of ‘law and economics,’ ‘economics and jurisprudence,’ ‘government and economics,’ and ‘government and business,’ and the ubiquitous phrase, ‘the economic role of government,’ all point to the historically mutual relevance of the two spheres while linguistically continuing to postulate, and thereby reinforce, the sense of deep structural distinction between them. This distinction has also been reinforced by all modern ideologies that are economic and political in orientation.\(^{781}\)

The separate languages of law and economics reinforce a self-contained existence for each discipline, as does the word ‘and’ in the juxtaposition of law and economics. This is a problem for Samuels, as self-containment is not conducive to openness. It tends to enslave the respective professionals to their own values and the ideologies of their disciplines and obscure from their view what is actually occurring and the processes at

\(^{780}\) Commons, ‘Law and Economics’, above n 527, 371.
\(^{781}\) Samuels, ‘Legal-Economic Nexus’, above n 30, 1557.
work — a familiar institutionalist response. Samuels refutes the notion of separateness, although he does concede that he has also been guilty of forcing this distinction in his earlier work. But rather than speak of an interrelationship, Samuels prefers to speak of an interconnectedness that he refers to as the ‘legal-economic nexus’. His use of a hyphen in the ‘legal-economic nexus’ underscores that the legal and the economic are connected to each other in some way.

Once economics is embedded into its interconnections, the co-determination of law and economics becomes more apparent. The interconnection is a multifaceted social space in which both law and economics have a common origin and are just aspects of one fundamental process. In short, some behaviours are ‘simultaneously legal and economic’. They (re)make each other. In Samuels’ words:

The economy is an object of legal control, and the law is an instrument of economic advantage; the legal-economic nexus is the sphere in which the questions of whose control and whose instrument are worked out, and the polity and the economy are created in the process. All that is terribly obscured by the pretense, or the belief, that polity and economy are independent and self-subsistent.

To appreciate the nexus is to appreciate the social dynamic — the way society participates in the decisions — that (re)create the economy and the polity under the influence of competing and conflicting ‘definitions of reality, values, interests, and expectations’. Samuels refers to this process as governance and he identifies several key dynamics within this social space(s). These dynamics, which are elaborated in the following paragraphs, sit comfortably alongside the core institutionalist themes of power, the role of government in the economy, and the

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782 Ibid 1572.
786 Ibid 1577.
787 Ibid 1574–5.
788 Ibid 1578.
789 Ibid 1577.
790 Ibid 1565–1572.
social construction of markets. What Samuels brings out more forcefully, though, is that law and economics are co-contextual and are reformed in response to each other; that these reformations are inherently normative; and that values and belief systems shape economic and state power.

Samuels sees five key dynamics inherent in the ‘legal-economic nexus’: the allocation of resources; the mutual creation of law and economy; power, ideology and distribution; economic and state power; and control of the state. First, like his fellow institutionalists, Samuels acknowledges the importance of markets to the allocation of resources and the social structuring of these markets through the legal rights and associated rules that underpin the markets. To understand the legal-economic nexus is to understand the interconnections between institutions, such as markets and government, and the processes that shape those institutions. As Samuels explains:

The legal-economic nexus is the social location wherein, on the basis of ideology or material interest, private individuals and businesses attempt to influence the social agenda, and politicians and courts, through the exercise of government choice, translate pressures and influences into government policy and thereby determine the scope and performance of the market.\(^\text{791}\)

Second, the mutual (re)creation of economy and law is arguably the most distinctive, and insightful, aspect of the legal-economic nexus. Samuels accepts that the economy is a function of law — law is determinative of economy through the assignment of rights or government spending, for example — and that, at the same time, law is a function of the economy, due to the economic origin of many legal problems and the ongoing social change within the economy. In other words, law and economy are not independent and changes in one determine changes in the other.\(^\text{792}\) Seeing law and economics as co-produced or co-determined helps avoid what can often be unhelpful distinctions between private and public, or market and government.\(^\text{793}\) As Samuels explains, public action is often driven by private interests and some kind of

\(^{791}\) Ibid 1566.
\(^{792}\) Ibid 1567–8.
government action underpins the existence of a private sector.  

Third, questions of distribution within the economy can also be thought of as questions concerning whose interests are to count. These interests are resolved within the legal-economic nexus in a form of collective bargaining that determines ‘who will use government and economy for what purposes and under what conditions’. Samuels reminds us that the process is one of giving normative direction to government and, as such, reflects beliefs systems and ideologies. This is how people understand their world, but the beliefs, ideologies and selected interests are themselves weighted by the power held by various groups. The beliefs structure power and the power structures beliefs. The end result is the collective clarification and selection of a set of values.

Fourth, within a broader set of locations of power, economic power and political power act on each other in such a way that each is continually (re)formed by the other. Economic power influences government decisions and government decisions influence economic power. The determination and assignment of rights and legal rules are part of these (re)formations, as are distributive outcomes, such as the distribution of income and wealth. As part of a legal-economic nexus, these outcomes automatically become inputs and (re)shape the economy and the polity.

Fifth, given the earlier comments on how economic power influences state power, the contest within society for control of the state is clearly important to determining whose interests will be protected and how these interests will be protected, including through the use of law. The central issue is the uses to which the state will be put and the government budget is, in turn, central to this use. It is not surprising, then, that Samuels regards the government budget as at the core of the legal-economic nexus, although he does concede that it does not constitute the whole of the core. The budget is an expression of government as an alternative economic provider and, as such ‘reflects both the legal control of the economy and the economic ... control of

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795 Ibid 1570.
796 Ibid 1568–1570.
797 Ibid 1570–1.
798 Ibid 1571.
government’. Indeed, the budget itself could be thought of as a legal-economic nexus in its own right, where the budget formulation is a contest of ideologies and competing demands that are constrained by finite financial resources. It is a social space where suffering is balanced against progress. Samuels is clearly of the view ‘that it is desirable to have the processes constituting the legal-economic nexus out in the open rather than obfuscated by selective specifications of the economy and polity’ and the budget is well-suited to this task.

The five key dynamics of the ‘legal-economic’ nexus that Samuels has identified are especially apparent in the rights system that structures the economy. The human rights discourse is one way of structuring these claims, as the food security debate demonstrates. But it is not the only way. Samuels considers that rights and regulation are functionally equivalent in that both protect a set of interests. And, as we shall see in the following section, Bronwen Morgan also plays down the distinction between rights and regulation, preferring to see both as generalised claims on the social order. With respect to rights, the primary concern of institutionalists is with the ongoing process of rights (re)definition. It is an evolutionary process. The critical feature of the process is that it is inherently normative in both the formulation of the rights and distribution of these rights — in other words, whose interests are to count? The allocation of resources is determined by some rights system, but the rights and rules have no meaning in the absence of the economic context they relate to. The rights system is formulated and implemented by government and, while it can be thought of as an illustration of the use of government, it can equally be thought of as a contest over the use of government the resolution of which is reflected in the composition of the rights system. To some degree, institutionalists are saying that the legal system (rights and regulation and the associated role of government) is logically prior to economic analysis and also determinative of the economics. ‘The legal system must select the result to be pursued: the definition of the efficient solution

799 Ibid 1571.
800 Ibid 1573 (emphasis in original).
801 Samuels, ‘Normative Premises in Regulatory Theory’, above n 33, 104.
803 Ibid 106.
805 Samuels, ‘Normative Premises in Regulatory Theory’, above n 33, 105.
is both the object and subject of the legal system. The risk with this type of description is that it potentially drives a wedge between law and economics, where the wedge is inserted from the legal side rather than the economics side, as most mainstream economists tend to do. This problem largely disappears if attention is directed to the ongoing process of rights (re)definition.

Central to institutionalist thinking is that the public chooses the type of society it wants. To give effect to this choice it structures a rights system, or, more accurately, a combination of rights systems. Three broad types of rights systems exist: exclusive and transferable rights — the price system for example; non-exclusive rights — property rights; and the non-transferable rights of command systems. Each produces different social outcomes. The relative weight given to the different systems shapes the character of a particular society through the differing incentives and associated behaviours that result. It follows that changing the nature of the society and the associated behaviours entails a change to the rights systems adopted.

But the choice of rights system is not a decision for the economists. That choice, and the assignment of specific rights therein, is a matter of public choice. Using the market system as an example, the government determines where the market system will be employed and what specific rights will be part of this system. The system is bounded and the price mechanism is only efficient within these bounds. ‘There is no unique optimal result, only rights-structure-specific results.’ It does not make sense, then, to talk of an efficient allocation of rights, as the rights themselves are derived from the values — implicit or explicit — in the rights system. The Indonesian approach to feeding its population and struggle with economic purpose and instrumentality in the Article 33 cases reinforces this point. The struggle was to express deeply held values concerned with the prevention and alleviation of hunger into a form of economic organisation.

The institutionalist emphasis on rights formation is much richer than the emphasis

806 Ibid 106 (emphasis in original).
807 Dales, above n 793, 486–7.
808 Ibid 502–3.
810 Ibid 490–1.
mainstream economics places on the legal foundations of markets, but it does beg the question of how to situate the legal dimension of the legal-economic nexus within legal thinking. My starting point for answering this question is to look more closely at human rights and regulation to give context to Samuels's comments on the similarity of rights and regulation and a rights-structure-specific economy.

II HUMAN RIGHTS, REGULATION, AND SOCIAL SOLIDARITY

As we have seen, institutionalists are critical of the foundations of neoclassical mainstream economics, particularly the inherent individualism and the disconnection from the community it supposedly serves. Human rights and regulation suggest themselves as worthy of examination at this point. Both can be seen as responses to these shortcomings and are now pervasive features of socio-economic life. And human rights provide one of the existing competing frames for food security. But rather than focus on the differences between rights and regulation, this part focuses more on their similarities as generalised social claims that need a political resolution. The objective is to bring the legal dimensions of social provisioning into the foreground and illustrate how contemporary regulatory thinking has moved closer to institutionalist thinking through explicitly recognising economics as a servant of social purpose and promoting the conciliation of individual and community values.

A Two Important Qualifications to Human Rights

Rights talk typically makes two distinctions: first, between moral rights — moral entitlements — and descriptive rights — ‘the kinds of interests that a politically organized society actually protects’; and second, between positive rights — where the state is active in underpinning the realisation of the right for the rights-holder — and negative rights — where the state is constrained from interfering with the rights holder. But, as Holmes and Sunstein point out, these distinctions are not that meaningful as soon as one takes into account that all rights involve costs.

Focusing on the cost of rights fundamentally challenges the conception of rights by directing attention to the community and away from the individual, as Holmes and

813 Ibid 39–43.
814 Ibid 30–1, 48.
Sunstein note:

we ought not to define rights as individual powers deriving from membership in, or affiliation with, a political community, and as selective investments of scarce collective resources, made to achieve common aims and to resolve what are generally perceived to be urgent common problems.\textsuperscript{815}

Holmes and Sunstein maintain that rights are, in effect, a bargain between the taxpayer and government. It is a bargain that operates on two levels. The first is the political support and funding of government activities by citizens in exchange for property rights. The second relates to the provision of welfare rights in return for the support offered to the state in peace and war, and as compensation for the poor receiving less value than the rich for rights that have supposedly been guaranteed to all.\textsuperscript{816} In short, rights are ‘creatures of state action’\textsuperscript{817} and rights-based individualism is dependent on state action and social cooperation.\textsuperscript{818} Rights are defined by state organs on behalf of the community, as well as being implemented by state organs. Such a conception focuses attention directly on the financing of the rights through the government budget.

Because rights cost, they are relative and not absolute.\textsuperscript{819} Trade-offs are involved. Governments are forced to make choices on how to allocate available funds and, consequently, may not be able to protect particular rights or protect all rights equally. The onus is on the government to justify that the allocation of funds is in the community’s interest. Given that there is a wide constituency that regards rights as important — they are special interests — the threshold for funding other interests in preference to rights has to be suitably high, in the view of Holmes and Sunstein. ‘Rights talk’ serves the purpose of raising the threshold,\textsuperscript{820} so that government assistance is directed towards urgent common problems. The stronger the economy, the stronger the government’s fiscal position, and the easier it is for government to provide the assistance.

\textsuperscript{815} Ibid 123.
\textsuperscript{816} Ibid 208.
\textsuperscript{817} Ibid 83.
\textsuperscript{818} Ibid.
\textsuperscript{819} Ibid 97.
\textsuperscript{820} Ibid 104–5.
Constitutionally protecting rights does not avoid the dependence on government funding. It may lead to the protection of rights being accorded a higher priority in government spending decisions, but there can be no guarantee that funding will always be available. It does suggest, on the surface at least, that some ranking of rights is required, such as giving priority to basic needs. But, as Holmes and Sunstein note, any ranking does not advance thinking on how to achieve the guaranteed protection of rights very far, because a focus on social justice would assert the similar priorities for action to those falling within a human rights approach. The critical question concerns the best route to achieving the desired ends. But all possible routes rely on budgetary, and hence, political, support. And that support will not be constant. Rather, it will be context dependent. ‘Judgments about issues of value, fact and harm change with time and place’,821 even before allowing for variations stemming from an inherently variable budgetary process.822

The focus on the collective also calls into question the pairing of human rights and their correlative duties. Holmes and Sunstein insist that ‘rights should not be opposed to duties’823 because they are perceived by the public to be public goods. The community finances programmes to realise these rights, because they are seen to be a response to difficult social problems causing disadvantage and vulnerability for some. The wider community, as the direct individual beneficiary, nevertheless shares in the benefits of the public provision. As such, rights are ‘gestures of inclusion’:824 they ‘reconcil[e] diverse social groups to each other, making them all feel a part of the nation and thereby encouraging public and private cooperation’.825

Holmes and Sunstein are concerned to see that government social assistance is directed towards urgent common problems in much the same way that other commentators have emphasised basic rights. Implicit in any concept of basic rights is some minimum standard, the duties involved in meeting it, and institutional arrangements for giving effect to it.

821 Ibid 123.
822 Ibid.
823 Ibid 218.
824 Ibid 219.
825 Ibid.
Henry Shue, an American philosopher with interests in human rights and food policy, takes a contrasting approach in deriving the duties from the specification of the right. He states that basic rights are concerned with a moral minimum — ‘the lower limits on tolerable human conduct, individual and institutional’. Shue stresses that it is not the statement of the right, or the fact that it is satisfied at a particular point in time, that is crucial. Rather, it is the social guarantee of this right that is crucial.

Shue classifies basic rights into the basic right to physical security and the basic right to minimal economic security or subsistence. Food security would be captured by the latter, as would unpolluted air and water, adequate clothing and shelter, and minimal preventive health care. ‘[T]he basic idea is to have available for consumption what is needed for a decent chance at a reasonably healthy and active life of more or less normal length, barring tragic interventions.’ Shue recognises that, once the discussion moves to duties, what really matters is the institutionalisation of those duties; they have to be given practical effect. But, if that is the case, it begs the response that there is merit in focusing on duties in the first place, especially as the validity of an account of duties does not depend on an account of human rights. The way in which village communities provide a social guarantee

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827 Ibid 18.
828 Ibid 27.
829 Ibid 19.
830 Ibid 23.
832 Ibid 60.
illustrates the point. Village communities have designed rules of village life that are consistent with meeting the subsistence needs of members, and these members work cooperatively to ensure these needs are met; they take responsibility for the needs of each other. Undoubtedly, this behaviour is also in the interests of individual members for, as Shue pointedly notes, ‘[n]o one is assured of living permanently on one side of the rights/duties coin’.

Moreover, if focusing on duties is a better place to start, then it will also be clear at an early stage that the institutionalisation of those duties cannot be avoided. Those institutions that can clearly articulate their duties and give practical effect to these duties will be able to both provide for and protect a community and its individual members. The task for more developed societies — more developed than village communities, however defined — and the international community is to design the institutions that will give effect to those duties. The key point is that institutionalists start with the obligation to take responsibility for the performance of these duties and fold the duties into an institutional framework to ensure they are addressed and performed.

Sandra Fredman embraces Shue’s approach in advocating for the urgency of transforming human rights through focusing on the positive duties of the state. In the context of the right to food, and of other socio-economic rights, the state’s role is to facilitate individual livelihoods; that is, to promote opportunities (an economic system) whereby individuals can provide for themselves in the first instance. If they are not able to do so, then the state is obliged to directly provide food. I would argue that the interpretation of the duty should be widened to the obligation to provide the food, or the means of acquiring the food. It is access to food that is important. Of course, this brings into question, again, basic needs or the absence of want. Any standard above what is required to keep a person alive, literally, becomes a political discussion,
and this further reinforces the importance of not making too much of the distinction between civil and political rights and socio-economic rights. Sen reinforces this point: ‘Political rights, including freedom of expression and discussion, are not only pivotal in inducing political responses to economic needs, they are also central to the conceptualisation of economic needs themselves.’

Fredman acknowledges that rights cost, and that the community has to pay in some way, typically through the state. But, as she points out, the state is not autonomous in this respect; it is ‘only the medium through which the community operates’. She is, nevertheless, uneasy with any focus on the cost of rights, because it usually leads to a cost-benefit analysis with the implication that some benefit at the cost of others. Much more preferable, in her view, is a focus on ‘individuals as embedded in society’, as this captures the relationship individuals have to each other in a community. Any cost is incurred in the interests of the community; it is considerably more than a negative benefit.

While Fredman dismisses the importance of ‘who pays’ to the existence of positive duties and to transforming rights, she does not fully confront the ability to pay. The implementation of the duty has to be financed in some way. Even if it is accepted that human rights have the first claim on the available resources, these resources have to exist in the first place; where they do, they are not infinite. Will all rights have a claim on the available resources and how will the available funding be allocated across the various rights? At some point, the reality that rights cost has to be addressed, as do questions such as which right to pay for, and how much of each right to pay for.

It is important to flag at this point that this discussion is in terms of state responsibilities and the extension of this thinking to an international or global context.

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837 Ibid. Fredman identifies three existing politico-legal approaches that underscore this interrelationship of the individuals in a society: reciprocity and the mutuality of benefits that arises from interactions between rights-holders; the civic virtue of republicanism; and the reconstructed harm principle.
838 This is true also for the courts. Where rights are justiciable, the courts will ultimately have to confront the cost of rights as well. Just as there are limits to the expenditures that can be allocated to the administration of the courts, there are limits to any court-imposed directives on the government, directives that can only be financed from the government budget.
becomes a critical consideration in how to think about the international community’s response to food insecurity. This question is picked up again in Chapter 6. For the moment, the reader should keep in mind, as Fredman does, that a state still has duties in the face of globalisation, even though it is the international institutional structures that have burgeoned.839

B  Regulation and Social Provisioning

The objective of this section is to provide insights into the nature of a community’s preference for food security. The previous section rejected the proposition that human rights can stand alone as either a discursive or practical framework for food security, because the individualistic nature of human rights has to be reconciled with what the community can provide. Another way of making the point is to say that human rights cannot be isolated from their economic connections. Institutionalists make the same point about economics: economics exists through its social connections and cannot be isolated from a set of underlying values. Regulation addresses this point, and goes some way to tackling the dominant position of economics on its own terms, wherever it presents a justification for a regulatory intervention.

1  Regulation and Market Failure

The term ‘regulation’ conveys some sense of government presence or intervention in the working of an economy but where competitive markets are the dominant form of economic organisation; it makes little sense to talk of regulation in the context of command or laissez-faire economies. Indeed, Selznick has described the ‘central meaning’ of regulation to be a ‘sustained and focused control exercised by a public agency over activities that are valued by a community’.840 It is fundamentally a politico-economic concept. Politics is essential to reconciling the ‘valued activities’ of Selznick’s definition and is a reflection of the system of economic organisation and the supporting legal system.841

839 Fredman, Human Rights Transformed, above n 453, 4.
841 See Bronwen Morgan and Karen Yeung, An Introduction to Law and Regulation (Cambridge University Press, 2007) for a discussion of the role of law within this framework. They identify a facilitative role whereby law shapes social behaviour and ‘links the state to the market, to the community and to individuals’ and an expressive role whereby law expresses and institutionalises the values inherent in
Anthony Ogus provides important context to contemporary discussions on regulation with his reminder that regulation has a long history dating back to the Tudor and Stuart periods in Britain. This regulation was typically justified through reference to the ‘common profit of the Realm’, although he comments that this was often in the private interest of guilds and trade groups seeking protection from competition. After waning in the 18th century, regulation found widespread support in the 19th century consequent to the economic and social dislocations of industrialisation and urbanisation. As noted earlier, this interest in regulatory issues was a feature of the emergence of institutionalism and legal realism, where the regulation of public utilities was a focus, alongside an interest in health and labour conditions. The scope of regulation continued to broaden in the 20th century and it expanded significantly in the United States with the New Deal and the Rights Revolution of the 1960s and ’70s. There was, however, some backlash in late 1970s and ’80s with the push for deregulation and privatisation of public businesses as part of the ascendency of more market-oriented and fiscally prudent economic policies.

Taxonomies of regulation have typically distinguished between public interest and private interest theories and rely heavily on economic concepts. The regulatory intent under a public interest theory is to pursue regulatory goals that will enhance the welfare of the community in some way. But this intent does not always transfer to the intended beneficiaries. This is the starting point for private interest theories of regulation, theories that regard the regulatory process as a competition between the various participants in the regulatory endeavour to capture the benefits of the regulation for their individual interests. The commonality between public and private interest theories is that both focus on the actors in the regulatory process.

The public interest goals can be economic or social, but addressing some kind of market failure is common to both. Broadly speaking, economic regulation is mainly concerned with market failures associated with monopolistic practices and modifying

\[ \text{the social, democratic context: at 5.} \]
\[ \text{842 Anthony Ogus, } \textit{Regulation: Legal Form and Economic Theory} \text{ (Clarendon Press, 1994) 6–7.} \]
\[ \text{843 Ibid 8.} \]
\[ \text{844 Ogus, above n 842, 8–10. See also Sunstein, } \textit{After the Rights Revolution}, \text{ above n 32.} \]
\[ \text{845 Ogus, above n 842, 10–12.} \]
\[ \text{846 Ibid 3–4.} \]
the market to get outcomes closer to what would prevail if perfect competition existed. Social regulation is mainly concerned with market failures associated with information problems that impact consumer preferences and with any negative impacts on people not directly associated with the transaction. The individual regulatory interventions are targeted at achieving particular economic and social goals, such as distributional justice or achieving what individuals want for the community as a whole.

It is important to acknowledge that the regulatory thinking discussed to this point is a product of the structure of common law. Common law, however, does not have the equivalent of the German *Wirtschaftsverwaltungsrecht* and the French *droit public economique*, terms that refer directly to the presence of collective goals and the legal instruments for giving effect to those goals. Consequently, the common law world ‘[has] to fall back on admittedly imprecise expressions, such as ‘regulation’ and ‘regulatory law’ to fill the gap.’ As discussed in the following chapter, the common law meaning of public law is captured by more than one concept in other legal systems.

Similarly, mainstream regulatory approaches have been a product of mainstream neoclassical economic thinking. Much is made of the distinction between the market provision and collective provision of goods and services and the corresponding private law and regulation distinction. The distinction is based on the acceptance of the market as the first-best system of economic management, with private law supporting the market system. The neoclassical influence is clear. Regulation was a second-best approach with the objective of correcting for deficiencies in the market system: situations of market failure.

In contrast, modern regulatory scholarship has taken on an overtly institutionalist tone and acknowledges the influences of a variety of disciplines. In contrast to older

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847 Ibid 4–5. These impacts that are experienced beyond those directly engaged are referred to as externalities or spillovers, which can be positive or negative in their impact. In this case the externality is negative.
848 Ogus, above n 842, 29–54.
849 Ibid 1–2.
850 Ibid 15.
851 Morgan and Yeung, above n 841, 8.
approaches, institutionalist regulatory theories focus on institutional dynamics, typically within sectors, and the way the economic, legal and political systems interact within the particular sector.\textsuperscript{852}

Contemporary regulatory thinking also plays down the emphasis placed on market failure in regulatory justifications. Tony Prosser reinforces that the market failure logic is ‘rooted in ... [the] methodological individualism of welfare economics’,\textsuperscript{853} which, as he points out, sidelines substantive concerns such as ‘what kind of society do we want to be’ and ‘what is good for us all’.\textsuperscript{854} Prosser’s criticism is that the market failure logic is at once too narrow and too broad: too narrow in that it suggests reliance on the market will be the first-best approach; and too broad in the sense that other approaches lack sound foundations and reflect arbitrary political decisions.\textsuperscript{855} ‘[T]he idea that there is an independent, cultural or social, justification for regulation as an alternative to market has no place here.’\textsuperscript{856}

Peter Brown turns the market failure logic in on itself with his proposition that there has been a ‘failure of market failure’.\textsuperscript{857} He lists four major limitations to the market failure approach:\textsuperscript{858} First, the approach shackles public policy to utilitarianism. Second, it is unable to answer the fundamental questions that lie beneath the market: what should be for sale; how that production should be priced; who should the production be for; and what is the value of a person? Third, the approach is flawed in the way in which equity is factored into the analyses to offset the shortcomings of the-ability-to-pay without any guidance on how to order and resolve conflicts between these two principles. And fourth, the market-failure approach undermines attempts to derive state legitimacy from the government’s response to public goods and externalities. What these limitations expose, in Brown’s assessment, is that mainstream economics lacks an account of equity and a vocabulary to give a more definitive content of public goods and externalities. The terms are too formal and give no direction as to relative

\textsuperscript{852} Ibid 8–9.
\textsuperscript{854} Ibid 377.
\textsuperscript{855} Ibid 369.
\textsuperscript{856} Ibid 366–7 (emphasis in original).
\textsuperscript{858} Ibid 4–13.
importance of different externalities and public goods.\textsuperscript{859}

Brown repositions the discussion away from regulation to social provisioning by emphasising market boundaries rather than market failure. The key point is that the market is not suited to the allocation of resources in all situations. Criteria other than price become important in particular situations. The state’s role, then, is to determine these market boundaries through democratic processes: that is, to adjudicate between non-market values and regulate to give effect to these values, rather than just leaving the market as the sole allocator of resources.\textsuperscript{860} It is these extra-market factors that give meaning to the formal terms of ‘public goods’ and externalities’ and provide these terms with operational content.\textsuperscript{861}

Brown comments:

> It is the absence of these boundaries that makes the market approach to policy that we have been considering so ineffective and even dangerous. Having no account of why something should be for sale, what property rights are justified and what not, how ‘merit’ should be understood and rewarded, in practice their ideas justify reducing everything to the measuring rod of money. In so doing they not only do violence to our fundamental values, but attempt to foist a vocabulary upon us that makes defending those values difficult — and if the language of ‘tastes’ is accepted in its entirety — impossible. On this account, no genuine argument about what we should do is possible.\textsuperscript{862}

Furthermore, if the supremacy of the democratic order is accepted, then there is less need to rely on the market as the single principle of choice, for to do so would be deny that the political deliberations within a democracy are required.\textsuperscript{863} Giving structure to these deliberations — the political discourse — are the languages of morality, as well as the language of human rights.\textsuperscript{864} In other words, rights and regulation are interdependent rather than being in opposition.

\textsuperscript{859} Ibid 15.
\textsuperscript{860} Ibid 18.
\textsuperscript{861} Ibid 19.
\textsuperscript{862} Ibid 20.
\textsuperscript{863} Ibid 21.
\textsuperscript{864} Ibid.
2 The Interdependence of Rights and Regulation

Samuels commented on the similarity of rights and regulation, as have Morgan and Sunstein. As Morgan observes:

‘Rights scholarship’ is concerned with mobilization, social change, questions of identity and culture, frequently taking the position of those who are disadvantaged or oppressed through judicial avenues, using claims of individualized entitlement as a point of departure. Regulation scholars are more typically concerned with questions of economic efficiency, the evaluation of results, rational design of institutions and bureaucratic or discretionary modes of pursuing generalized public interests.\(^{865}\)

While Morgan concedes that this characterisation tends to exaggerate the differences, it does reflect the situation that regulation is, more often than not, presented in opposition to rights and as being restrictive of rights.\(^{866}\) Relying on a contextual approach to law and legal institutions, Morgan challenges this opposition and presents rights and regulation ‘as social practices articulating generalized claims upon the social order’,\(^{867}\) as opposed to ‘enforceable legal interests’.\(^{868}\) In her view, rather than being in opposition, rights and regulation are interdependent, and this interdependence is powerful, but varying.\(^{869}\) ‘[R]ights and regulation form overlapping and complementary aspects of processes of disputing and rule-elaboration’,\(^{870}\) which are associated with the articulation of a grievance and any consequent claim, respectively.\(^{871}\)

Morgan discusses the implementation of the ‘right to water’\(^{872}\) — along with food, water is ‘a basic good critical to life’\(^{873}\) — to illustrate the interdependence.

\(^{865}\) Morgan, ‘The Intersection of Rights and Regulation’ above n 31, 1.
\(^{866}\) Ibid.
\(^{867}\) Ibid 7 (emphasis in original).
\(^{868}\) Ibid.
\(^{869}\) Ibid 2.
\(^{870}\) Ibid.
\(^{871}\) Ibid 7.
\(^{872}\) While the right to water has never been directly articulated as a right in the core UN rights documents, it has increasingly been seen as a right within the legal framework of the ICESCR, the argument being that this right is inherent in other rights and without its recognition the ICESCR would be ineffectual.\(^{872}\) Underscoring this view is the position taken by ECOSOC in General Comment No. 15 where it recognises the right to water, various UN soft law provisions, including resolutions of the UN General Assembly, such as those relating to the MDGs, and the legal recognition of the right to water in the constitutions and other legal instruments of some countries. See M A Salman and Siobhan McInerney-Lankford, The Human Right to Water: Legal and Policy Dimensions (2004) 86.
Implementing the right to water has increasingly been polarised into a debate about whether ‘water [is] a human right or a commodity?’\(^{874}\) Private providers of water services became increasingly important in the 1990s and, while the water industry differs from the food industry, in that there are a only a small number of water providers in comparison to food providers (and an even smaller number of private providers), in both cases the private provision exists ‘at the troublesome intersection of competitive markets and resource-blind universal need.’\(^{875}\)

A hybrid response has emerged because, as Morgan has noted:

Water services are ... at most a managed market good. Whether access to water is provided by the state or market, and whether it is framed as a right, a customer expectation, or a user need, the resource allocation dilemmas that result are necessarily implemented by regulatory norms that protect collective and individual interests by establishing minimum standards of provision. To the extent that rights are involved, they have an inevitable regulatory face ... It therefore makes more sense to think of a right to water not in direct opposition to market provision but as constituting a minimum acceptable baseline of market activity, a baseline constructed by regulatory intervention.\(^{876}\)

Morgan suggests that there may be a better chance of consensus on how to approach the problem if the ideological divide is bridged through hybrid sector-neutral approaches that blend markets, human rights and regulation. These blends, in Morgan’s view, hold out the promise of more durable, workable solutions through bridging ‘ideological divides’.\(^{877}\) Indeed, where these hybrid responses have emerged, the balance has swung away from protecting property rights to guaranteeing access. Prosser’s observation of the impact of the privatisation of essential services in the United Kingdom is that there has been an evolution in the purpose of independent regulators mandated to protect consumers through restricting the opportunities for arbitrary government intervention to legal constraints on the enterprises being

\(^{874}\) Ibid 467.
\(^{875}\) Ibid.
\(^{876}\) Ibid 469.
\(^{877}\) Ibid 486.
regulated, such as minimum access requirements and affordability considerations. Sunstein also comments on the similarity of rights and regulation. He views rights as regulatory interests and observes that with the rights revolution in the United States in the 1960s and '70s ‘rights rhetoric was used to justify protection of collective interests’. The rights revolution gave rise to an explosion of legal rights, such as rights to clean air and water and a social safety net that included adequate food, and freedom from discrimination. The revolution substantially expanded the coverage of regulation compared to the 1930s, when the focus was on economic stabilisation and promoting business confidence to reduce unemployment through tackling the lack of demand and excess capacity that characterised the period. Reducing social risks and social insubordination are now well-entrenched themes thanks to the rights revolution and, in the name of rights, government action is now pursued in the interests of reducing harms faced by a majority of individuals.

Sunstein’s important observation is that these government programmes were about managing social risks that could not be entirely eliminated, as opposed to vindicating an individual right that would not be ‘balanced against other social interests’. Furthermore, as discussed earlier, these so-called rights were formulated and articulated independently of the cost of providing programmes to realise the rights and without acknowledging the implications of these costs for balancing or trading off the various rights.

In After the Rights Revolution, Sunstein defends the rise of the regulatory state in the United States, arguing that it is superior to a system based solely on private ordering, because there are ‘multiple defects in private markets’. For Sunstein, the case for government interference in the market rests on three main points. First, it is the state that constitutes rights, wealth, and power and this enables it to impact

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879 Sunstein, After the Rights Revolution, above n 32, 29.
880 Ibid.
881 Ibid.
882 Ibid 90.
883 Ibid 90–1.
884 Ibid 4. See pp 48–73 for an extensive discussion of these defects.
885 Ibid 45–6.
distributive outcomes. Second, state intervention can actually enhance the likelihood of an individual realising the individual’s preferences, particularly with respect to collective action and coordination problems, such as the need for coordinated transport networks. And third, private preferences can change in response to new information and opportunities or when an individual gives a higher ranking to collective interests over individual interest. In short, private preferences are context-dependent, as opposed to the fixed preferences of the neoclassical model. Sunstein points to social movements, such as those concerned with the environment or labour standards, as examples where individuals have preferred collective action over individual action. But, if collective action is not possible or effective, then individuals will resort to their individual preferences.886

Another way of making this point is to say that political values outrank private values. That is, the individual looks to the political process to achieve the collective interest. The key idea is that politics can promote the common good, or the public interest, alongside promoting the interests of the individual or particular groups. Sunstein’s view is that the regulatory state in the United States is able to respond to questions of individual autonomy and welfare where this conception of regulation is based on liberal republican idea of politics as a deliberative process,887 and because of the foundation laid by the New Deal. From a legal standpoint, the New Deal also challenged the historical reliance on common law solutions to socio-economic problems by advocating for direct government intervention to achieve better results.888 ‘On the view that emerged, governmental decisions inevitably constituted the private sphere; they were prior to it rather than vice versa.’889

Sunstein concludes that regulation in the United States now reflects and shapes a range of values that are legitimised through the political process.890 Regulation is much more than a reflection of particular interests and ‘[a]pproaches that begin from laissez-faire economics and rely exclusively on neoclassical economics are bound to

887 Ibid 12.
888 Ibid 21.
889 Ibid.
890 Ibid 59.
misinterpret the modern regulatory state.\footnote{Ibid 229.}

The work of Morgan and Sunstein also exposes the shortcomings in the standard approach to ‘public interest’ regulation approach, as these approaches do not explicitly acknowledge the values and political choices within.

3 The Public Interest and Social Provisioning

Public interest theories would appear, on first glance at least, to offer a close fit with the problem of food insecurity but regulatory theorists struggle with these questions. Ogus, for example, notes that it is not possible to establish a definitive list of public interest goals ‘since what constitutes the “public interest” will vary according to time, place, and the specific values held by a particular society’.\footnote{Ogus, above n 842, 29.}

Ogus discusses two controversial (to use his description) justifications for regulatory intervention. Both cases are highly relevant to the food security debate. The first concerns exceptional market conditions, such as ‘[a]cute and sudden shortages in the supply of commodities for which demand is inelastic’. Ogus uses the example of wartime controls on food and clothing, particularly through rationing. In these times, the market solution of increased prices is considered unacceptable because of the resulting inequality in the distribution of food or for fear of the damage it will do the social fabric.\footnote{Ibid 42–3.}

The second example concerns cases where the ‘market aggravates, rather than reduces, regional disparities’,\footnote{Ibid 44.} as advanced by Gunnar Myrdal.\footnote{Gunnar Myrdal, Economic Theory and Under-Developed Regions (Duckworth, 1957).} As workers move from less prosperous to more prosperous regions the demand for workers spirals up with the continuing increase in economic activity. But this is offset by a spiralling-down in the demand in the less prosperous areas. It becomes harder for the economically disadvantaged region to support itself in the absence of some form of regional assistance.\footnote{Ibid.}

Both cases highlight that the justification for regulation can be non-economic as well
as economic. They also highlight that community values are important, as well as individual values. As Ogus explains,

Social ordering may reflect not only what people want for themselves but also what they want for the community as a whole. ... the emphasis is on providing the opportunities for members of the community to develop and pursue different conceptions of the ‘good’, and on fostering this through a mutuality of concern and respect, as well as by increased participation in the decision-making processes of collective affairs. ... 897

The plurality of values and goals calls into question whether thinking in terms of market failure is the best way to conceptualise the basic justification for regulatory intervention. No society insists that all social provisioning should be via the market and economics is not the source of the language that explains what is occurring in these non-market activities. For example, most societies will find a way to assist those in need, those who cannot participate in the market, or those whose needs cannot be fully met through the market, although, as Brown notes, what constitutes need and who is obliged to respond to this need will vary across space and time.898

To use the term ‘public interest’ is to enter the domain of public policy, as Wolfgang Friedmann noted. It is a domain of competing interests that are resolved through the state. But some of national goals need to be elevated beyond this conflict to national goals to “reserve functions” of the state,899 which are ‘an embodiment of values and interests that bind together the many conflicting and contending groups’.900 As Friedmann explains, these goals mostly ‘cluster around basic national loyalties, and this reserve function therefore usually becomes conscious and articulate in times of great emergency such as wars and economic or natural disasters.’901 He notes, however, that there are other transformative national goals that might not be in the category of imperatives, but which become the subject of political debate. These goals will change over time and will need redefining and reassessing.902 To be truly in the

897 Ibid 54.
898 Brown, above n 857, 17–18.
901 Ibid.
902 Ibid 85–6.
public interest, however, they will be goals that transcend particular individual and group interests and their implementation will rely on some form of public power as the repository of that interest.  

It does not follow that this lack of definitional precision means that ‘public interest’ is vague or meaningless. Cassinelli makes the point that the term has a clear, general meaning as an expression of preferred and shared values: something in the public interest is valued more highly than the alternatives. To criticise any particular use of the term is to miss what the general meaning offers. Furthermore, such criticisms, ‘den[y] that we should evaluate our political life’.  

Cassinelli adds that the general meaning of the term conveys the sense of a standard. The public interest is the standard against which political choices are judged. It is a standard of goodness, as opposed to an objective standard, such as efficiency. There is a threshold that delineates what is, or what isn’t, in the public interest. To be more accurate, the standard conveys a sense of outcome, as well as a sense of process. With respect to the outcome, the standard is one that is worth attaining. It is a standard that is worthy of approval but beyond any individual’s approval. With respect to process, ‘[t]he public interest is the highest ethical standard applicable to political affairs … [W]hen the public’s interest is being met, then the most desirable type of political association has been realized’. And the political values implicit in the standard are ‘deducible from a general conception of human excellence’.  

Another way of thinking about Cassinelli’s standards of outcome and process is to think in terms of the final political good. A concept of ‘public interest’ guides us to this good. The words ‘public interest’ are ‘expendable’ and could disappear from general use without detracting from the political choices that have to be made between good and bad, provided society is clear on the importance of the political good. Choices

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903 Ibid 85.
904 C W Cassinelli, ‘The Public Interest in Political Ethics’ in Friedrich (ed), above n 899, 44, 47.
905 Ibid 45.
906 Ibid 46.
907 Ibid 51.
908 Ibid 47.
909 Ibid.
between good and bad are ethical choices that bring political duties into focus. Correspondingly, ‘public interest’ helps give meaning to political duties — for both officials and citizens — through the standards it conveys. ‘No one ... has an intrinsic duty to govern according to the constitution or to pay taxes according to the law’.  

This focus on the duties inherent in the public interest is important in restoring balance to the rights debate, in Cassinelli’s view, and he disproves of the worrisome tendency of the citizen ... to believe himself possessed of many rights, while denying or ignoring any concomitant duties ... When the public interest is kept firmly in mind, the political duties of the citizen can be properly stressed, and his political rights can be put in their proper perspective as necessary conditions for his ultimate duty of living the kind of life befitting a human being.

Duties are not passive either. There is always a time to act and the public interest demands action be taken when the threshold of the public interest is not being met.

It follows that public officials have a responsibility to act in the public interest, but this does not imply that executive action in the service of the public interest carries its own authority. Good political systems allocate authority and functions, and are accountable in some way.

Barry offers a more nuanced view of the ultimate political good. It is one that places relatively more emphasis on the political process rather than the outcome of the political deliberations. His starting point is that the ‘public’ of ‘public interest’ applies to all individuals without distinction. Each of these individual members of the public have a view on the merits of a particular a policy or action — a regulation, say, but they are not unanimous in their views towards the policy or action. Some are for, and some against, and their respective views are aligned with the role they play in the economy. The public interest, as the sum of the different interests, is a net interest,
then, after the different views have been balanced in some way.\textsuperscript{918}

These policies and actions can also be thought of as outcomes of some superior policy
that is in the public interest. Barry gives the examples of national roads, flood
protection, disaster compensation and social security benefits from which only a
proportion of the population benefits. Most people, however, will have a common
interest in a policy that is superior to the implementation of the roads, flood
protection, insurance, compensation and benefit schemes.\textsuperscript{919} There is a net common
interest in these policies, even though not all benefit from the implementation of the
policy. ‘Under favourable conditions it may be that everyone can reasonably expect to
gain if a higher-order policy is adopted which specifies some criteria and says that any
action or policy which satisfies these criteria is to be put into effect’.\textsuperscript{920} The criteria for
adopting a subordinate policy or action could be, for example, an electoral majority or
some rule that aims to maximise the community’s utility.\textsuperscript{921} It is the principle
underlying the higher-order policy that is in the public interest, not the policies and
actions that are subordinate to it.\textsuperscript{922}

This thinking is consistent with Feintuck’s view that ‘the public interest’ is employed as
a servant of fundamental democratic values that is most closely aligned to the spirit of
civic republicanism and its emphasis on community goals.\textsuperscript{923} It is

an expectation, deriving from democracy, that legal and regulatory instruments and
practices will serve the end of equality of citizenship which is common to both. To a
significant extent, the legitimacy of the state, and hence the legal and regulatory system,
depends on this expectation being met.\textsuperscript{924}

Sunstein’s interpretative principles for deliberative government\textsuperscript{925} can be seen in a
similar light, although, as Prosser notes, it is easier to ground these principles in the
constitutional law base of the United States than is the case in the United Kingdom, for

\begin{itemize}
\item \textsuperscript{918} Ibid 198.
\item \textsuperscript{919} Ibid 199–201.
\item \textsuperscript{920} Ibid 202 (emphasis in original).
\item \textsuperscript{921} Ibid 202–3.
\item \textsuperscript{922} Ibid 203.
\item \textsuperscript{923} Mike Feintuck, ‘The Public Interest’ in Regulation (Oxford University Press, 2004) 247.
\item \textsuperscript{924} Ibid 248.
\item \textsuperscript{925} Sunstein, After the Rights Revolution, above n 32, 160–92.
\end{itemize}
example.  

C Regulatory Pluralism and Social Solidarity

Prosser suggests that a turn to well-developed social theory is needed to articulate and formulate regulatory values other than economic efficiency, and to justify the broader socio-economic goals of regulation. This would present a counterpoint to the ‘methodological individualism of welfare economics’ that underlies the market-failure approach. He regards Feintuck’s attempt to ascribe a core value of democratic citizenship to public interest and Sunstein’s formulation of interpretative principles for deliberative government as exemplars of the type of thinking that now needs to take place within social regulation more generally. This thinking underlies the regulatory pluralism that has emerged in recent years.

1 Regulatory Pluralism

Prosser recognises the socio-economic linkages inherent in much of the contemporary regulatory work and notes that the ‘independent, cultural or social, justification for regulation as an alternative to market’ are becoming more prominent in academic work and regulatory practice. He points to the examples of the citizenship-based approaches to financial services and public utilities regulation in response to the dissatisfaction with the traditional market-failure and public goods approaches. The ‘economic regulator of public utilities is no longer the paradigmatic regulatory body, and there is no new single paradigm’. The fundamental problem with the traditional approaches to regulation is, in Prosser’s view, that they can fail to distinguish means from ends, where these ends reflect the society’s values.

Prosser’s response is to incorporate these wider and less restrictive, actual regulatory approaches into a modern vision and model(s) of regulation. This approach elevates regulation for consideration as a first-best response ‘to administer an area of social

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927 Ibid 375.
928 Ibid.
930 Ibid 366–7 (emphasis in original).
931 Ibid 371.
932 Prosser, The Regulatory Enterprise, above n 34, 3.
provision for which markets are considered in principle inappropriate',\textsuperscript{934} and puts more weight on the importance of social responsibilities as a regulatory justification.\textsuperscript{935} As we have seen, these social responsibilities go hand-in-hand with social provisioning.

Rather than highlighting the distinction between private and public interests, Prosser highlights the distinction between two broad regulatory visions — regulation as an infringement of private autonomy, and regulation as a collective enterprise.\textsuperscript{936} Each vision has its own distinguishing characteristics, but, in broad terms, the former emphasizes private autonomy, self-correcting markets, and the underpinnings provided by private law instruments to an orderly economic system. The latter, in contrast, emphasizes collective interests, government responsibility for issues of distribution and equity, and accountability through public law instruments, where accountability is more about good governance than accounting for private wrongs.\textsuperscript{937}

Prosser explains that these two visions now account for four models of regulation, each with its own distinctive regulatory rationale:\textsuperscript{938} The first is regulation for economic efficiency and consumer choice, with the rationale of maximising efficiency and consumer choice. The typical application is to the regulation of utilities.\textsuperscript{939} The second is regulation to protect rights, with the rationale of protecting basic human rights through equity-based criteria or providing minimum levels of protection against unacceptable risks, irrespective of the magnitude of possible benefits. Prescriptive standards are a characteristic of this model.\textsuperscript{940} The third is regulation for social solidarity, with the rationale of promoting social solidarity to avoid the fragmenting effects of markets and of promoting universal access to public services of consistent quality. Essentially, ‘this approach starts from the duties of the community to secure inclusiveness, resting both on a moral sense of equal citizenship and a more prudential goal of minimizing social fragmentation’.\textsuperscript{941} It could find its expression in, for example, setting average prices for public services to increase access to the services, and

\textsuperscript{934} Ibid.
\textsuperscript{935} Ibid 2–3.
\textsuperscript{936} Prosser, The Regulatory Enterprise, above n 34, 2–3.
\textsuperscript{937} Ibid 4–6.
\textsuperscript{938} Ibid 1–19.
\textsuperscript{939} Ibid 12–13.
\textsuperscript{940} Ibid 13–14.
\textsuperscript{941} Ibid 15–16.
initiatives to promote sustainability.\textsuperscript{942} The final model is regulation as deliberation, with the rationale of providing a forum for participation and collaboration so as to achieve a compromise or build a consensus.\textsuperscript{943}

Prosser’s clear message is that justifications for regulation can be found outside market failure.\textsuperscript{944} And these alternative justifications will depend on what the society values in a particular set of circumstances. That is, regulatory approaches are value specific and context specific. It follows that questions of institutional design should be based around regulatory values rather than an economic logic such as efficiency. It also follows that there is no single set of regulatory values or single regulatory goal that can be universally applied.\textsuperscript{945}

The challenge is to present ‘non-economic’ goals in a coherent way that enables them to compete with the market-failure as a justification for regulation and not be seen as ‘the result of arbitrary political decision’.\textsuperscript{946} Prosser suggests that ‘social solidarity’ offers such an approach by virtue of its recognition of common values and the acceptance that these values can have a higher social priority than narrow economic goals such as efficiency.

2 \textit{Solidarity as a (R)evolutionary Idea}

The major influences on Prosser’s thinking on ‘social solidarity’ are the French philosopher, Emile Durkheim (1858–1917), and Durkheim’s disciple, the French legal theorist, Léon Duguit (1859–1928).\textsuperscript{947} Both had strongly-held views on the importance of social services to an interdependent society.\textsuperscript{948} Durkheim rejected utilitarianism and there were strong moral underpinnings to his thinking.\textsuperscript{949} For the moment, it is

\textsuperscript{942} Ibid 15–17.
\textsuperscript{943} Ibid 17–18.
\textsuperscript{944} Prosser, ‘Regulation and Social Solidarity’, above n 838, 383.
\textsuperscript{945} Ibid 385–6.
\textsuperscript{946} Ibid 377.
\textsuperscript{947} Ibid 379.
\textsuperscript{948} Ibid 381.
\textsuperscript{949} Ibid 379–80. Prosser isolates two aspects of social solidarity that were particularly important in Durkheim’s work. The first — a descriptive use — was Durkheim’s ‘use of law as an external index symbolizing the nature of social solidarity’. He contrasts the penal law and ‘mechanical solidarity’ of pre-modern societies with the restitutive law and ‘organic solidarity’ of modern societies ‘based on the division of labour’. The second — a moral use — was Durkheim’s positioning of solidarity as a moral alternative to private law contracts and exchange, thereby ‘limiting [the] fragmenting effects of contractual relations’.
sufficient to draw attention to Duguit’s views that society, through the state, owed obligations of public service to the members of the society, and that the state’s sovereignty rested on it underwriting those services. Duguit’s work provides ‘[a] more direct link with public law’ and these linkages will be examined more fully in the next part. The task for now is to better understand the evolution of the idea of solidarity and where to locate Durkheim and Duguit in this evolution.

In his study of the emergence of the idea of solidarity, Hayward observes that the evolution of the idea was a ‘metamorphosis and diffusion of a specific juristic concept into a network of social institutions’. He traces the legal origin to the *Dictionnaire de l’Académie Française* of 1694 and notes that by 1765 the words ‘solidaire’, ‘solairement’ and ‘solidarité’ were used ‘in the sense of an individually collective debt’. That is, each member of the collective was responsible for the individual’s debt. This usage can, in turn, be traced to ‘obligations of mutual assistance and collective responsibility with the Roman extended family or “Gens”’, where each family member was responsible for the debts of any individual family member. This ‘recognition of interdependence of interests’ was also present in the Roman religious brotherhoods and workers’ corporations. Hayward then traces the first official use of ‘solidarity’ as ‘the juridical conception of a relationship of solidarity between members of a society’ to the 1804 *Code civil des français* (the Napoléonic code), specifically to its fourth section — *Des Obligations Solidaires*.

‘Solidarity’ first took hold as a social idea in early 19th century France. Initially, it was a vague idea — a mystique — that was more a yearning for the lost stability and unity in French social life and the concomitant ‘revulsion against the anarchic individualism’ that had taken its place. The rise of solidarity accompanied the rise of economic justice and the protection of social rights in French social thinking, in contrast to the 18th

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950 Ibid 381–2.
951 Ibid 381.
953 Ibid.
954 Ibid.
955 Ibid 270.
956 Ibid 270–1.
957 Ibid 270.
958 Ibid.
century when ‘the idea of unfettered personal liberty, coupled with the institutions of civil and political justice for the defence of individual rights’ had dominated intellectual and political thought. The rise of solidarity was also a product of the approach taken by French social philosophers in the 19th century. The distinctiveness of the approach of the 19th century French social philosophers was in the way they ‘sought to base the principles of social reorganization upon a conciliation of social moralism and social scientism — associated with, but cutting across, the simultaneously attempted synthesis between individualism and collectivism’.  

Over the second half of the 19th century ‘solidarity’ was transformed from ‘mystique’ to ‘politique’, as solidarist ideas gained a wider appeal beyond a socialist base. Radical-Socialism became the movement of change, as radicals from the middle classes and the peasantry joined forces with reformist socialists in response to the inhumanities of the time. It was a time of political transition, a transition that was laying the foundations for wider social reform and it is to this transition that Durkheim and Duguit belong. The social transformation of the social idea of ‘solidarity’ was also reflected in a ‘metamorphosis of the law’, which had shed the individualist, ‘anti-solidarist bias of the Napoléonic Codes’ for the presumption that ‘solidarity’ was ‘the supreme fact of social life’. Accordingly, the collective had responsibilities to its members.

By the 1890s the political force of ‘solidarity’ was well established and it was cemented in place with the election of Léon Bourgeois, ‘the apostle of solidarity’, as prime minister in 1895 and the publication of his ‘epoch-making brochure’ Solidarité in 1896. There was now widespread political support among the middle class for the public provision of social services for those in need, alongside an ‘uncompromising hostility towards the existing economic order’. The objective was the establishment

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959 Ibid 264.
960 Ibid 266.
961 Ibid 277.
962 Ibid 272.
963 Ibid.
964 Ibid.
965 Ibid 278.
966 Ibid 280.
967 Ibid 279.
of ‘a classless common good as the foundation of social relations subject to interdependence’.968 But this political support had rallied around a rational and realistic solidarity, as opposed to its utopian and idealistic rival. To use Hayward’s words, solidarity had now become an ‘idea force’969 whose ‘astounding popularity derived mainly from the wider and more profound recognition of the need to deal by collective action with the complex problems raised by the rapid and interrelated economic, political and social changes of the nineteenth century’.970 ‘Solidarity’ became dogma and had ‘doctrinal content’ to go with ‘its intellectual, emotional and volitional “goodwill”’.971 This doctrine was enshrined through legislative enactment, teaching and preaching, and ultimately the implementation of a wide-ranging program of social reform.972

As an idea force, ‘solidarity’ managed to aggregate other ideas, while at the same time selectively distilling what was useful from those other ideas.973 ‘The source of its emotional and intellectual force was that it simultaneously connoted a fact and a value ... the need for mutual aid and cooperation and the desire for harmonious unity’.974 It forged conciliation between the antagonistic ideologies of scientism and moralism, and individualism and collectivism,975 through capturing the essence of interdependence.

The forcefulness of the idea was in its usefulness in confronting the practical, real world problem of how to adjust social, economic and political life to a society that was now organised around the division of labour: a society that was now interdependent. It provided a ‘conceptual construction’ that pointed to the changes in social ideals and social organisation that was needed at the time. In doing so, it was able to blend social morality with institutional purpose and underpinned the role of state organisations and various associations in providing social services.976

The durability of the idea, and hence its continuing relevance, is that it has an inherent
flexibility and strength to withstand ‘the stress of changing needs and circumstances’.\textsuperscript{977} That is, it can accommodate changes in factual interdependencies and associated values, but not at the expense of the deflecting attention from what a community should provide its members, hence, the re-emergence of the idea in the contemporary regulatory context.

If the regulatory focus turns away from market failure to social solidarity, then law serves to constitute markets in a non-socially-fragmenting way and regulation to achieve social solidarity may be the first-best option, as opposed to correcting for market failure, as it is valued more highly than the market fundamentals of competitiveness, efficiency, and choice.

The idea of solidarity recognises the interdependencies of economic and social life and accommodates individual and community aspirations within the value of social purpose. It is my contention that the non-internationalisation of this value of social purpose has impeded the international community’s approach to food insecurity. This also has implications for thinking about public law. It is to that question that I now turn.

III THE PUBLIC LAW FOUNDATIONS OF INSTITUTIONALIST THOUGHT

As noted in the discussion on the emergence of institutionalism, the early years of the 20\textsuperscript{th} century were marked by upheaval in existing social and economic ordering arising from the pressures of industrialisation and urbanisation in Europe and the United States. Economic power became more concentrated but, at same time, urban poverty was increasing and trade unions becoming more militant. The relationship between state and society, the state and individuals, and law and government was being reconfigured. In the same way that a new type of economic thinking emerged, and so too did a distinctive approach to public law.\textsuperscript{978}

A The Functionalist Style in Public Law

Loughlin has labelled this distinctive approach ‘the functionalist style in public law’.\textsuperscript{979}

\textsuperscript{977} Ibid 285.
\textsuperscript{979} Ibid 362.
Functionalism is best thought of as a ‘style’ rather than a ‘school of thought’, because it was linked to the broad political movement that fell under the umbrellas of ‘new liberalism, social democracy, progressivism or democratic socialism’ as well as drawing on a range of philosophical beliefs that were not always compatible — idealism, positivism, empiricism and pragmatism — in much the same way that institutional economics has accommodated a range of social attitudes.

While institutionalism took on a distinctly US flavour, the functionalist style in public law was distinctly European. The new liberal philosophy that was emerging stood in contrast to the classical liberalism of laissez-faire economics. Classical liberalism was centred on the individual and held a correspondingly restrictive view of the state. Individual responsibility, liberalised trade and freedom of contract were catch-cries. In contrast, the new liberalism stressed the social nature of human beings and the importance of collective action for realising individual freedom. For the functionalists, free markets were inconsistent with individual freedom where they existed alongside social conflict — food riots, for example. Some form of social cooperation was needed for markets to deliver on their promise of freedom.

Loughlin identified ten basic elements of belief that shaped the functionalist style in public law:

First, that the institutions and practices of public law can and should be used for the purpose of promoting human improvement. Second ... law is a function of society and must evolve as society evolves. Third, that humans are intrinsically social creatures and that society is best conceived as some type of organism. Fourth ... the basic function of public law must be to maintain a healthy body politic: to promote social solidarity. Fifth ... sovereignty does not invest subjective rights in the institutions of government: government is the subject of duties. Sixth, because public law is concerned with the realisation of these duties, lawyers should not get too bound up in the promotion of form (concepts) over substance (ends). Seventh, the public law must be interpreted purposively (i.e. with regard to its function). Eighth, that because freedom is not realized through the absence of formal constraints but is intimately connected with the

980 Ibid 362–3
981 Ibid 367.
982 Ibid 361.
983 Ibid 367.
realisation of one’s potential and goals, the pursuit of liberty requires an active role on the part of the agencies of state; freedom entails the exercise of one’s functions. Ninth, that rights are to be treated as claims that are recognised and enforced only insofar as their recognition promotes the common good — and parts are thus interpreted as a function of the whole. And tenth, that in order to draw these elements into a coherent whole, a much broader, sociological conception of public law — one that extends beyond positive law to embrace a particular way of living — must be embraced.984

Looking at these basic elements as a whole, the core concern of the functionalist style is with human welfare and the essence of the style is that government has a duty to improve this welfare. These duties had a justification in their own right, that is, they were not the correlative duty to some form of human right. The elevation of duties over rights was also a feature of the thinking of R H Tawney, as developed in The Acquisitive Society,985 and Loughlin credits Tawney with providing the legal philosophy for the functionalist style.986 The functionalist style embodied an unambiguous objective of improving human welfare through the performance of duties, which could be bolstered by legislative reform and stronger democracy.987 The jurisprudence was built on the principles that, first, a society accepted as the basis of its social organisation; and, second, the overriding principle directing economic activity and economic institutions is that of social purpose. Tawney saw three major attributes of purpose. First, it determined limits through its focus on the ends for which some activity is undertaken and directed resources to what is worth doing; second, it unified in the common interest; and, third, those involved in undertaking the activity are allocated roles.988

Tawney was critical of the economic and political liberalism that had emerged after Adam Smith. The economic mechanisms of the ‘invisible hand’ and markets were presented as instruments of public good, but, for Tawney, the pursuit of self-interest had become the starting point and primary objective and it was independent of service, and, indeed, had subverted social purpose. Individuals strived to obtain what

987 Ibid.
988 Tawney, above n 985, 179.
was advantageous to the individual and the society became an acquisitive society because the ‘whole tendency and interest and preoccupation is to promote the acquisition of wealth’.\footnote{Ibid 32.} Happiness would not have been a goal of economics for Tawney because happiness was individualistic ‘and to make happiness the object of society is to resolve society itself into the ambitions of numberless individuals, each directed towards the attainment of some personal purpose’.\footnote{Ibid 31–2.}

Tawney advocated for a functional society, as opposed to an acquisitive society. A function was ‘an activity which embodies and expresses the ideal of social purpose’.\footnote{Ibid 15.} The functional society would be organised primarily for the performance of duties rather than the maintenance of rights. Hence, the public law of the functionalist style was presented as a system of duties rather than a system of rights.\footnote{Loughlin, ‘The Functionalist Style in Public Law’, above n 978, 371.} Unlike rights, duties were a basis of cooperation. A society that accepted the principle of function obliged its members to question the purpose of any activity or institution and what end was being served.\footnote{Tawney, above n 985, 85.} The role of individuals within this society was that of trustee of the discharge of these functions — individuals were instruments of social service.

The functional society implied three things, then, for Tawney. First, proprietary rights were only maintained alongside the performance of some service. Otherwise, there was no justification for the right. Second, producers stood in direct relation to the community they served through the production of goods and services needed by that community. And third, professional organisations (groups of producers) needed to have an active involvement in their industry to make sure the services were provided to the community.\footnote{Ibid 176.} In this functional society, wealth would be ‘contingent upon the discharge of social obligations, which sought to proportion remuneration to service and denied it to those by whom no service was performed, which inquired first, not what men possess, but can make or create or achieve’.\footnote{Ibid 31.}

Individual rights could only be seen, according to Tawney, as relative to some function

\footnote{Ibid 31.}
that was needed by the community. He regarded the insistence on individual rights as divisive, but a completely understandable reaction to ‘arbitrary, tyrannical, and corrupt regimes that had not promoted the performance of functions’. Tyranny and corruption aside, economic functions would only become a focus in moments of ‘abnormal emergency’. A reflection on the food crisis and the Indonesian approach to food security is not inconsistent with these views. Function only became important to the international community when the problem became severe. With respect to Indonesia, the food security debate has not historically revolved around rights-talk. There was no need, as successive governments had accepted the function of providing adequate food and, through their actions, were seen to accept the responsibility, even if they were not always successful. This has not been the case for other economic and social rights in Indonesia. In these cases, rights-talk became the language of protest against the corruption, violence and neglect of other aspects of principled government by the Soekarno and Soeharto regimes. Furthermore, as the discussion of the utilities cases in relation to Article 33 of the Indonesian Constitution bore out, the absence of wording on function and any judicial search for function has contributed to a perverse economic and social outcome.

Before leaving Tawney, it is worth re-iterating that he regarded society not as an economic mechanism, but as a community of interests. While he saw this community in the religious terms of devotion to a common end — he attached considerable importance to religious duty in his own life — this was still a valuable insight on economic life, nevertheless. After all, public law had itself grown out of a religious order and, as Loughlin notes, it still ‘lives on as culture’, if no longer ‘the basic structuring force of collective organization.’

Loughlin maintains that functionalism had a distinctive approach to this structuring, in a number of respects:

A distrust of abstract conceptual approaches in favour of a practical orientation on what government actually does; an acknowledgement that the constitution evolves in accordance with the changing needs of society, the rejection of such shibboleths as the

996 Ibid.
997 Loughlin, Foundations of Public Law, above n 728, 8.
‘rule of law’ or the ‘separation of powers’ as being invariably invoked to disguise (often reactionary) value propositions; recognition of the importance of discretion in the exercise of administrative government; advocacy of the need to decentralise the exercise of governmental power; including the power of the judicature; support for modes of legal reasoning that promote a purposive interpretation; and hostility to active judicial review of governmental action on the grounds that, political choice that non-elected, conservative judges are unlikely to exercise wisely.  

The public law context for the business of government was now fundamental.

B  Duguit and the Business of Government

Loughlin links the purposive nature of the functionalist style to Duguit’s view that constitutional law should change in response to social change. As noted earlier, Duguit was influenced by the sociology of law and the associated emphasis on observable facts. His quest was for an empirical, rather than metaphysical, basis for public law that matched the reality and observable facts of the time. His sociological jurisprudence revolved around man as a social creature and the social interdependence of groups of individuals. Loughlin regards Duguit’s efforts as the most systematic application of this approach to the examination of government arrangements.

Duguit’s examination was in the context of the wider debate in France at the time over ‘the relation between the social fabric and political authority’. Duguit’s social-centred view led him to dismiss the then-prevailing subjective foundations of public law — the state and those subject to its commands — and the associated body of rules regulating this relation. He did not ascribe any legal personality to the state, as the state was comprised of individuals and it was individuals who were taking decisions in the name of the state. But, at the same time, he rejected the validity of individual rights, as this ran counter to the social nature of man. If the state did not have a legal personality, then the notion of a sovereign will, and a superior will at that, was meaningless.

Duguit’s public law was objective. It was

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999 Ibid 402–3.
1000 Ibid 403.
the body of rules inherently necessary to the organisation and management of certain
services. Statute is no longer the command of the sovereign state; it is the organic rule
of a service or body of men. An administrative act is no longer the act of an official who
gives commands or of a public servant who fulfils a command; it is always an act made in
view of the rule of service.\footnote{1001}

Sovereignty, for Duguit, was rooted in social function. It was not about the imposition
of sovereign will through commands: it was about public service.\footnote{1002} He saw public
services as ‘those activities that the government is bound to perform’\footnote{1003} in the
interests of avoiding social disorder. Government was, therefore, simply about
organising and managing the nation’s business\footnote{1004} through ‘a regime of duties’\footnote{1005} to
assure these services.\footnote{1006} It followed that the legitimacy of the state was a function of
its ability to provide key public services.

Enlarging the administrative role of the state was a positive development for Duguit.
Of necessity, government would provide these services in the absence of private
providers. Duguit saw the increased provision of public services as an inevitable
consequence of economic development, as local economies could not meet their own
needs and interdependencies grew within the national economy.\footnote{1008} With these
changes, the nature of the group changes, and law evolves with the changed economic
needs of the group.\footnote{1009} This is a familiar institutionalist refrain and one that is captured
by Frida and Harold Laski in their introduction to Duguit’s \textit{Law in the Modern State}.
There, they note that principles and social norms emerge as a moral code to bring
some order to these interdependencies and interrelationships and some of the
principles and norms acquire the status of ‘general legal sanction’ because of their
importance to achieving the social purpose.\footnote{1010}

\footnote{1001} Léon Duguit, \textit{Law in the Modern State} (Frida Laski and Harold Laski trans, B W Huebsch, 1919) 243
[trans of: \textit{Les Transformations du Droit Public} (first published 1913)].
\footnote{1002} Ibid 32.
\footnote{1003} Ibid 44.
\footnote{1004} Ibid 48.
\footnote{1005} Ibid 51.
\footnote{1006} Loughlin, \textit{Foundations of Public Law}, above n 728, 404.
\footnote{1007} Ibid 48.
\footnote{1008} Duguit, above n 1001, 45–46.
\footnote{1009} Ibid 47.
\footnote{1010} Laski and Laski, ‘Introduction to Léon Duguit’ in Duguit, above n 1001, xvi–xvii.
Functionalism emphasised the importance of social groups with a consequent blurring of any distinction between the domains of law and politics, and between ‘public’ and ‘private’. This focus on social groups has a modern legacy in Edward Rubin’s conception of government as a complex network that exists to meet social needs.\textsuperscript{1011} Presenting the machinery of government as a network more closely aligns the structure of government with the operations of government than with the traditional presentation of the three branches of government – the legislature, the judiciary, and the executive. While clearly there are constitutional implications to such a model, as there were with Duguit’s conception, the value lies in directing attention to the social purpose of the contemporary administrative state and the instrumentality of law in this case, where the legislature and the judiciary are effectively working in unison (and also with the president in a presidential system) as the chief executive of this state.\textsuperscript{1012} Within Rubin’s task-oriented model of government and law, the social objectives are achieved via the signalling effects of statutes, regulations and enforcement policies.\textsuperscript{1013} As such, it also owes part of its legacy to the legal realism of the late 19\textsuperscript{th} and early 20\textsuperscript{th} centuries.

\textbf{C  Loughlin’s Conception of Public Law}

Loughlin’s assessments of functionalism and Duguit’s conception of public law are but part of his much more exhaustive study of the evolution and character of public law as an autonomous discipline. Public law for Loughlin is much broader than the modern day approach, which focuses on public law as that body of law governing relations between the state and individuals. Loughlin focuses on ‘questions of “right” relating to the conferral of authority and legitimacy on modern governmental ordering’.\textsuperscript{1014} In other words, the fundamental concern of public law is with the ‘authority of the office of government’.\textsuperscript{1015}

Loughlin traces the origins of public law to the medieval concept of ‘fundamental law’ — the law that ‘regulated the conduct of the king and his officers, the Parliament and

\begin{footnotes}
\item[1012] Ibid 66.
\item[1014] Ibid 2.
\item[1015] Ibid.
\end{footnotes}
It was the law that made the sovereign, in contrast to the civil or positive law that was made by the sovereign and which governed the conduct of the sovereign’s subjects. Along the way, fundamental law, which in itself was an ‘expression of natural law’, but one which intermingled political ideas with religious ideas, becomes more secular, rational and positive in response to ‘[e]conomic, social, political, and technological’ changes. Called into question are ‘the character of collective human association’, the nature of state, and the nature of government authority.

Public law emerges in its own right when political thought is separated from religious thought. Public law becomes the ‘code of this emerging autonomous political sphere’. It is a political jurisprudence that has a basic concern with ‘political right’ that, as Loughlin points out, can be found in Hegel’s *Philosophy of Right*. Loughlin credits Gauchet with having identified the timing of this separation as having occurred around the beginning of the 18th century, when human activity was divided into ‘the economic, the scientific, the technical, the intellectual, and the political’. Law becomes divorced from its religious foundations and is seen as a human, and not God-given, construct. It also becomes seen as an instrument of self-government, with public law concerned with the authority of government.

One problem with the division of human activity into disciplinary specialisations, according to Loughlin, is the loss of understanding of, and language for, expressing government claims to authority. Echoing the institutional economists, Loughlin is critical of the supposedly scientific approaches, and the associated formality and quest for certainty that have become more pervasive in these disciplines. His use of the

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1016 Ibid 1.
1017 Ibid.
1018 Ibid 2.
1019 Ibid 6.
1020 Ibid 2.
1021 Ibid.
1022 Ibid 8–9.
1023 Ibid 8–9.
1027 Ibid 9–10.
term ‘political right’ also stems from problems of language. Loughlin equates ‘public law’ with ‘political right’ as the latter term is ambiguous in the English language, and the ambiguity stems from English lacking the vocabulary to distinguish ‘between law as an instrument of government (lex, la loi, das Gesetz) and law as an expression of the constitutive principles of right-ordering (ius, le droit, das Reht)’. 1028

Loughlin’s pure theory of public law is concerned with these principles of right-ordering. The theory has three basic features. The first concerns scope. Public law is a ‘discourse of political right’ that ‘works to maintain the autonomous world of the public sphere’. What makes the public sphere distinctive is that it is here that the ‘reconciliation of claims of individual autonomy with the existence of a regime of public authority’ 1029 occurs.

The second feature concerns the nature of political right. The awkwardness that exists in neoclassical economics when moving from the individual to the aggregation of individuals in welfare economics was noted in Chapter 4. Loughlin talks of a similar awkwardness, or disjunction, in public law that stems from the difficulty in reconciling individualism with the need to be part of a group. As the disjunction can neither be reconciled nor eliminated, public law becomes an exercise in acknowledging competing claims and negotiating between these claims. And the negotiation does not conform to any science of ‘political right’; rather, it is an exercise in prudential judgement. In this sense, public law can be thought of as political jurisprudence. Under this formulation, public law as a discourse of political right is ‘the elaboration of a prudential language through which the negotiation is effected.’ 1030

The third feature of Loughlin’s pure theory centres on the connection between law and political power. This power resides in the people through the ‘imposition of controls and checks’ on the offices of authority. That is, it is the institutional arrangements for governing that create the power. Public law generates power while at the same time constraining this power. 1031 It follows, from this understanding of the autonomy of the public sphere and public law as political right, that freedom does not stand in

1028 Ibid 9.
1029 Ibid 10–11.
1030 Ibid 11.
1031 Ibid 11–12.
opposition to the state. It is realised within the state and ‘[t]he discourse of political right is simultaneously enabling and constraining’¹⁰³² in the pursuit of an institutional structure that is consistent with and promotes the liberty of the individuals within.¹⁰³³ This second point has a parallel in the way Samuels spoke of law and economy (re)forming each other. Political right maintains power that is generated through the institutional structure of the public sphere, and the decisions of government are made in accordance with the relative standing within the institutional structure. There is an inherent dynamism in these relations as they respond to ‘political necessities’ and legal concepts and doctrines evolve accordingly.¹⁰³⁴

Loughlin goes on to point out that there is also an inherent tension between two concepts of power within political right itself. It is a tension between that power which shapes the structure of the state (potestas) and that which shapes the infrastructure of the state (potentia). It is a tension between institutional authority and control and allocation of resources, and between the constitutional idealism and budget materialism.¹⁰³⁵

These themes of power and antecedent authority were important to the institutional economists and Samuels, in particular, has highlighted the government budget as the expression of the legal-economic nexus. These tensions underscore Loughlin’s description of public law as a negotiation of competing claims. The government budget can be seen as a negotiation along several dimensions — between the state and its citizens, between the present and the future, between protection and progress. As Loughlin notes, ‘maintaining [the] prudential discourse of political right is an essential precondition of our ability successfully to make those negotiations.’¹⁰³⁶

Loughlin cautions that is important not to lose sight of the prudential nature of the discipline, as, otherwise, there is a risk of placing too much emphasis on the place of the social in the foundations of public law. His reasoning is that political jurisprudence is about negotiation and compromise and presenting ‘the social’ as ‘the right and true’

¹⁰³² Ibid 12.
¹⁰³³ Ibid.
¹⁰³⁴ Ibid.
path, akin to the religious truth of public law’s early heritage, will make negotiation and compromise more difficult to achieve.\textsuperscript{1037} Central to both, though, is some concept of provisioning. The marriage of institutional economics with Loughlin’s pure theory of public law would relate the generation of power within the public sphere to a legitimacy forged from the success of the institutions of provisioning in providing for the population.

IV \hspace{1em} \textbf{SUMMARY AND CONCLUDING COMMENTS}

The chapter elaborated the legal dimension of social provisioning and through this elaboration extended the conceptualisation of social provisioning from the economics of institutionalism to the law and economics of institutionalism. My argument has been that this type of legal-economic frame is more suited to problems of hunger than either of the frames in which they have tended to be framed, namely human rights or mainstream economics.

The approach I have advanced finds its antecedents in the first law and economics movement of the late-19\textsuperscript{th} and early-20\textsuperscript{th} centuries, the legal-economic tradition within institutionalism associated with John R Commons and, more recently, with Warren J Samuels. Samuels’s ‘legal-economic nexus’ was a powerful construct for demonstrating the interconnections between law and economics. It was a social space in which law provided the rights structure for economics and in which law and economics continually (re)formed each other. This institutionalist legal-economic approach has found support in contemporary regulatory thinking: first, in the thinking that emphasised the similarity of rights and regulation as generalised claims on the social order; and, second, in a regulatory pluralism that emphasised social solidarity and the conciliation of public and private interests. This conciliation requires decisions on economic choices in the name of the public; it involves good political choices.

Loughlin addressed the nature of good political choices in his pure theory of public law. That theory built on the functionalist style in public law to bring out the importance of purpose and duty in government action. Thinking in these terms rounds out the reconceptualisation of problems of hunger that was the task of this and the preceding

\textsuperscript{1037} Ibid 465.
chapter. If institutionalism is about social provisioning and the institutions of provisioning, then the legal dimensions of institutionalism are captured by the concept of a duty to provide and the institutional prescription of that duty.

Thinking in these public law terms also means that the correlative focus of the duty is not a correlative right, as would be emphasised in human rights discourses, but a common interest in a higher-order policy. The individual’s interest was in knowing that the higher-order policy was in place, not with whether the individual would benefit from the policy.

The public law framework articulated in this chapter deprivileges economics by undercutting its positioning as a rival authority to law. It distinguishes between the identification of choices available to a society, using the technical apparatus of mainstream economics, and the choices that are made by the society. Thinking in this way also clarifies that there is a distinction between the imperative of survival and decisions on how to progressively realise the right to food. As Samuels noted, mainstream economics is not equipped to respond to this distinction. In contrast, an institutionalist construction of a duty to provide could both identify and respond to the imperative.

The next task is to examine whether this public law framework for institutionalism can be translated from the national to the international. That is the subject of the following chapter.
In the Name of the International

In earlier chapters, I have argued that the institutions of the international community have not taken responsibility for problems of hunger due to an institutional incoherence across the UN. This was a reflection of the respect paid to both universal human rights and state sovereignty, the clash between human rights and mainstream economics, and the ultimate privileging of mainstream economics in international solutions to food crises. I further argued that if the problem of hunger is to be more tractable, at least, then the problem needs to be reconceptualised as a problem of social provisioning within a legal-economic frame. I have constructed this frame through situating the institutionalist conception of economics, particularly its conception of the purpose of economics as one of social provisioning, within a public law framework that also emphasises purpose and duty and which pays attention to questions of authority. Within this frame, economic policy can be thought of as a duty to provide.

The question to be addressed in this chapter is whether this thinking can be extended from the domestic to the international, as the discussion has, to date, primarily been concerned with national economies and legal systems. At issue are what it means to provision for an international community and who takes responsibility for this provisioning.

The chapter is structured in four parts. Part I provides an overview of the applicability of institutionalist thinking to issues of international economy, particularly international trade. In line with the importance institutionalists placed on the role of government in the context of domestic economy, the discussion highlights the importance institutionalists attach to international governance in the workings of the international economy. Governance is closely linked to law and the character of international law is addressed in Part II through an overview of its contemporary history and structure.
Increased interdependencies through trade and investment and the imperative of responding to global food, financial and climate crises call into question the notion of the ‘international community’ and international responsibility, which are examined in Part III. The issues raised in the chapter are brought together in Part IV through a discussion of the way the UN Special Rapporteur on the Right to Food has attempted to engage the WTO on its approach to food security. This discussion highlights the competing jurisdictions, or spheres of authority, of mainstream economics and international law.

As will become clear, addressing these issues calls into question the limitations of the prevailing legal-economic frameworks employed by international law and economics scholars in explaining this global political-economic order. In particular, it highlights the role of the international executive and the authority of mainstream economics in these frameworks. The chapter argues that international food problems would be more tractable, if the institutions of the international community, through their executive, accepted that they had a duty to provide.

I AN INSTITUTIONALIST TAKE ON INTERNATIONAL TRADE: A QUESTION OF GOVERNANCE

Historically, institutionalism focused more on questions of national economics than international economics although some institutionalists, for example, Wendell Gordon and students of Gordon, including John Adams, have well-developed positions on international issues. The national preoccupation is not altogether
surprising, given that institutionalism was initially a US movement and the US was a relatively closed economy in the late-19th and early-20th century, when institutionalism was in the ascendency in mainstream economic thought.\textsuperscript{1043}

\textbf{A International Trade, Adjustment, and Social Provisioning}

Despite this US legacy, the institutionalist approach can be translated in a straightforward way from the national to the international, as McClintock explains:

In the institutionalist conception of society and economy, the center of attention shifts away from economic and political exchange to the working rules of society that give expression to collective action. The policy issues become issues not so much of determining the institutions necessary for market efficiency but of establishing the working rules for the administration of international trade, finance, and the environment that will foster the mix of values society deems vital to its social provisioning.\textsuperscript{1044}

The quotation highlights a number of key institutionalist constructs — ‘working rules’ (institutions), ‘values’, and ‘social provisioning’, all of which relate to ‘society’. But how do we understand international society? The nature of this society is explored more fully later in this chapter through a discussion of international law and international community. Suffice to say that international society is not a cohesive social space where law and economics continually (re)form each other.

Focusing on the economic for the moment, trade is the obvious linkage between the national and the international. Trade opens up a larger market to domestic producers (exports) and also provides the domestic economy with goods and services that are unavailable domestically or are not price-competitive with foreign-produced goods (imports). But behind this rather innocuous statement lies an unstable dynamic, as exporters and importers adjust to changes in domestic and foreign economies. The economic jargon is ‘economic adjustment’ and this adjustment manifests itself in many ways, including price changes, relocation of factories, and changed employment

\textsuperscript{1043} Adams, ‘Foreign Economic Policy’, above n 1040, 289. Adams also suggests that the relative lack of attention to monetary phenomena within institutionalism may also have been a factor.

\textsuperscript{1044} McClintock ‘International Trade and the Governance of Global Markets’ in Whalen, above n 641, 225, 231.
opportunities, all of which fundamentally impact societies. The challenge, as McClintock notes, 'is to savor the taste of trade without allowing trade to become an all-consuming force that threatens the development of social and economic life within a community.'

To use Wendell Gordon’s language, the challenge is about modifying free trade assumptions and making trade ‘constructive’ in order to achieve maximum world well-being.

Narrowing the focus yet further to the domestic economy, institutionalist thinking emphasised the role of the state in cushioning the economic and social adjustment. James Ronald Stanfield’s conceptualisation of the ‘dichotomised state’ is an example of this thinking. The ‘coercive state’ could use its powers ‘to further or suppress the conflicts between individuals, classes, and societies in such a way as to redistribute income and wealth to further the ends of vested interests’, or, the ‘integrative state’ could focus on social provisioning and ‘act as a counterbalance to private interests that jeopardize social reproduction’. This integrative function is not dissimilar to the ‘double movement’ of capitalism that Polanyi described, whereby ‘as the market system encroached upon greater areas of social life, it was met by a socially protective response aimed at limiting the social disruption caused by market shocks’. The source of the social disruption was capitalism’s ‘treatment of labor, natural resources, and productive organization as fictitious commodities’ for sale in markets.

Reintroducing international trade does not change the institutionalist approach or the critique of neoclassical economics. The economic task remains that of social provisioning — ‘the maintenance of society as a going concern’ — but openness to international trade is an additional source of economic and social disruption. Institutionalists advocate easing the society through the economic adjustment, as the institutions of provisioning adjust to international trade and to changes in the international economy. Refusing to make the adjustment, or insulating the economy through trade barriers and investment controls, is unlikely to be a prudent economic

\[\text{\textsuperscript{1045}}\text{Ibid 225.} \]
\[\text{\textsuperscript{1046}}\text{Gordon, above n 1041, 87.} \]
\[\text{\textsuperscript{1047}}\text{Ibid.} \]
\[\text{\textsuperscript{1048}}\text{McClintock, above n 1044, 231.} \]
\[\text{\textsuperscript{1049}}\text{Ibid231.} \]
\[\text{\textsuperscript{1050}}\text{Ibid 225–6.} \]
course, however. At best, it will delay the adjustment that is needed. At worst, it will set the community on the path of long-term economic decline. But there are inevitably casualties of this international economic adjustment.

Two questions related to social provisioning spring immediately to mind. The first concerns finding the balance between providing in the present and providing in the future. Polanyi ‘characterise[d] this as a struggle over “habitation versus improvement”’.\textsuperscript{1051} As McClintock notes, ‘[t]he need to protect the social fabric very often conflicts with the need to bring about economic improvement. While neoclassical economics assumes the two objectives coincide, there is no guarantee that this will happen, except by chance’.\textsuperscript{1052} As history shows, the pursuit of food security has often been the source of conflict between these objectives and a government has to actively manage the conflict to preserve the social fabric.\textsuperscript{1053} Food riots would be regarded as a manifestation of the destruction of a social fabric under this analysis. The more general institutionalist observation is that markets — domestic and international — are not necessarily a vehicle for rapid and smooth economic adjustment. Social dislocation can go hand-in-hand with market adjustment and social intervention will be needed to ease a society through the adjustment rather than to support any resistance to the adjustment.\textsuperscript{1054}

The second question concerns the translation of the integrative function of the state from the domestic to the international. To put the question another way, should the burden of social protection that arises from international economic adjustment fall on a state or some construct of the international community, such as an international organisation? This is a question about governance.

\section*{B International Governance}

Answering the governance question requires a conception of international society. Does this conception involve an inter-national society of states, or a global society premised on the equality of human beings that is coordinated through supra-national

\textsuperscript{1051} McClintock, above n 1044, 232, citing Polanyi, above n 563, 35–44.
\textsuperscript{1052} McClintock, above n 1044, 232.
\textsuperscript{1053} Ibid.
\textsuperscript{1054} Ibid 232–3.
organisations? Furthermore, how does the integrative function of the state translate to the international?

A minimalist institutional response would be along the lines that states can only go so far in moderating any dislocation arising from an exposure to, or reliance on, global markets. And the poorer the country, the more difficulty governments have in finding the fiscal capability to ease the country through the adjustment while not compromising the ability to provide for the future. Some degree of supranational governance would be ‘required to bolster national economic policies’ in these circumstances, international organisations are important to these arrangements. But institutionalist global governance would be wider in scope than global administrative law. And it should not be equated with the ‘development’ project either, as the essential point is that global redistribution is involved, not the imposition of a particular economic model on a nation-state. The core purpose of the governance arrangements for the institutionalists is international social provisioning.

To this end, institutionalists are in favour of global trade agreements but the content of these agreements would be driven not by free trade but by use of constructive free trade to achieve a more clearly defined purpose. This could be the achievement of basic social minima in health and food, for example. Institutionalists endorse global institutions that emphasise knowledge transfer and they support freer movement of peoples, which implies fewer barriers by nation-states to migration.

The more difficult it is to achieve social provisioning through recourse to the economy of the state alone, or the state-economy supplemented by international trade, the more the institutionalist orientation aligns itself with ideals such as the world citizen, the rights of mankind and the legacy of mankind, each of which values human equality as opposed to sovereign equality. Indeed, one prominent institutionalist, Rexford Guy Tugwell, was a member of the Committee to Frame a World Constitution that met from November 1945 to July 1947 to draft the ‘Preliminary Draft of a World

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1055 Ibid 228–9.
1057 See Pahuja, above n 24 for a deeper analysis of the development project.
Constitution for a World Republic’ — better known as the ‘Chicago Draft’.\textsuperscript{1059} The Committee undertook its work against the backdrop of the onset of the atomic age and the establishment of the UN, the Bretton Woods institutions, and the GATT.

Not surprisingly, the release of the Chicago Draft provoked a strong reaction — both positive and negative — and this reaction was sharpened by fact that the University of Chicago had been home to much of the research on the preparation of an atomic bomb.\textsuperscript{1060} But by 1951 interest in supranational governance had waned considerably, in line with the lessened concern about an imminent nuclear war, and the University of Chicago had ceased publishing Common Cause, the monthly magazine that covered the Committee’s work. While the Committee was realistic enough to know that the prevailing international political order was inconsistent with the creation of a world republic, its work was a considered response to the post-World War II concerns that also included the Western perception of the Russian threat and the place of the UN. It was a serious critique of both the inconsistency of that order, with universal justice for mankind and the threat to international stability inherent in the pursuit of national self-interest.

In a number of respects, the Committee’s work was a firm pointer to the global issues confronting the world today and the need for international systems of governance to adapt to meet those challenges. Underlying the Committee’s work was a social humanism that had appeal across many nation-states. The Committee drew attention to the four elements of life — earth, water, air and energy — as being ‘the common property of the human race’ and advocated the displacement of nation-states by regional federations. Political and trade regionalism gathered pace in the second half of the 20\textsuperscript{th} century and I contend that regionalism needs to be seen as major plank in any international efforts to confront food insecurity. Furthermore, the Committee also

\textsuperscript{1059} John W Boyer, ‘Drafting Salvation’ (December 1995) The University of Chicago Magazine <http://magazine.uchicago.edu/9512/9512Salvation.html>. The genesis of the Chicago Draft was a comment by Robert Maynard Hutchins, then-Chancellor of the University of Chicago, in a radio discussion on ‘Atomic Force: Its Meaning for Mankind’ shortly after the bombing of Hiroshima. Hutchins ‘predicted that proliferation of the bomb would inevitably lead to “world suicide” unless war itself was abolished “through the monopoly of atomic force by a world organization”’. Subsequent to the broadcast, he was urged by several of the Chicago faculty to form a group to draft a constitution for a federal world government. The 11-member group of distinguished academics was mainly drawn from the Chicago faculty.

\textsuperscript{1060} Ibid.
had a significant impact on the thinking of Chicago academics who were influential in the law of the sea movement that advocated for the treatment of the oceans and their resources as ‘the common heritage of mankind’, as reflected in the adoption of the Law of the Sea Convention in 1982.\(^{1061}\)

Noted University of Chicago historian John W Boyer sums up the lasting significance of the Committee’s work with his observation that

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\text{[t]hey felt that their dual obligations as private citizens and as public intellectuals mandated that they speak out on significant civic issues. They believed that the search for peace and justice was not something to be left solely to anonymous government agencies or to be dumped on the laps of self-interested professional politicians. True, the world-government movement was marked by the constraints of its time — particularly the deep, almost phobic fear of the spread of nuclear weapons. But the committee also had a more general exemplary significance. ... They believed ... that in a free society people need to ‘cohere for common purposes’.}^{1062}\]

As for Tugwell himself, he was trained as an agricultural economist and became a key adviser to Franklin Roosevelt on the 1933 New Deal, later becoming Under-Secretary of the US Department of Agriculture and Professor of Political Science at the University of Chicago. The parallels with William Beveridge’s contributions to the London School of Economics and the British Ministry of Food, as discussed in the previous chapter, are striking. Tugwell’s lasting institutionalist legacy is perhaps that of being the driving force behind, and editor of, *The Trend of Economics*\(^{1063}\) that Minsky referred to in the earlier quotation introducing institutionalism. There, Minsky called for an institutionalist orientation for 21\(^{st}\) century economics.

McClintock adds flesh to the bones of this orientation:

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The role of twenty-first century economics is to explore the place of the economy in the cultural context. It must assist in working out institutional arrangements that will allow societies to continue to engage in international trade and production without substantial damage to the social fabric. This will involve extending social oversight of the
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\(^{1061}\) Ibid.
\(^{1062}\) Ibid.
economy to the supranational level within a democratic, participatory process. To do so otherwise is to risk continuing market dislocation of society, increasing isolationism, or a shift to antagonistic trade blocs. The task of building an international economics fit for the twenty-first century awaits us.\textsuperscript{1064}

Clearly supranational social oversight is an ambitious aspiration and stands opposed to the international governance arrangements that exist under current international law. Institutionalists would not disagree. But the basic point that institutionalists would want to emphasise is that any social outcome — food security being one of these — is not a product of some natural economic order, but rather is a product of a set of institutional arrangements that should reflect social purpose.\textsuperscript{1065}

The governance arrangements provided through the UN system are discussed more fully in the following two parts of this chapter. For now, I ask the reader to be alert to the institutionalist critique of these arrangements, a critique that highlights the failure of these arrangements to provide the integrative function for a global order in the way that a state does, and that this failure is a reflection, in the first instance, of its international, not supra-national, foundation. It follows, for Peter Uvin, that hunger is internationally organised.\textsuperscript{1066}

Acknowledging the failure of the integrative function of global governance arrangements is also an acknowledgement that an over-reliance on the market has generated outcomes that are not fully consistent with the values of individual nation-states. This acknowledgement is important, if international institutional arrangements are to ameliorate problems such as food insecurity. There are costs as well as social benefits associated with any institutional configuration. Some redistribution is required to compensate for the costs and the redistribution requires some assessment of the ability to make the compensation. Furthermore, the costs may not lend themselves to monetary quantification. What becomes important, then, in identifying social costs and benefits, as McClintock stresses, is the scientific determination of ‘social minima’ or ‘basic needs’, which might include

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\textsuperscript{1064} McClintock, above n 1044, 242.
\textsuperscript{1065} Ibid 231.
\textsuperscript{1066} Peter Uvin, The International Organization of Hunger (Kegan Paul International, 1994).
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environmental, health, education, nutrition, housing, transportation, and employment standards. These social minima would reflect certain value minima, or value floors, of society. ... Where social minima are not met, society might be expected to intervene either to reduce social costs or to increase social benefits.\(^{1067}\)

Giving institutional form to these ‘value floors’ is part of the institutionalist dynamic of law and economics (re)forming each other. Morgan, Sunstein, and Prosser were also concerned with this dynamic in their respective approaches to regulation, albeit through recourse to a different vocabulary. In a domestic setting, the state plays an important role in the formation and representation of these values.\(^{1068}\) At issue is what values the international legal and economic systems stand for, how representative they are of these values, and the extent to which these values can be captured through market transactions and market valuations. To quote McClintock, there has to be an attempt ‘to move beyond the market mentality’s overemphasis on the motive of self-interested gain and the value of market efficiency to a broader interpretation of the ends of human endeavour.’\(^{1069}\)

The fundamental question concerns the nature of the social values and social relations that are embedded in international law. In some areas, such as international transport and communication — areas that McClintock would call the technological imperatives, the existence of an international legal-economic nexus, where law and economics (re)forming each other with a view to facilitating global exchange, can be seen. What is less clear, however, is whether international law furthers the integrative imperative of modern life — the ‘need to embed the international economy more firmly within social relations’.\(^{1070}\)

The institutionalist insistence on purpose and social value and for this concept of value to be embedded in any governance arrangements provides, in my view, the intellectual beacon to navigate through the contention surrounding the international community’s approach to food security. This has important implications for the way in which not only food security, but other international social issues, more generally, are

\(^{1067}\) McClintock, above n 1044, 233.
\(^{1068}\) Ibid 234.
\(^{1069}\) Ibid 234.
\(^{1070}\) Ibid 236.
addressed by international organisations operating under the aegis of international law.

II INTERNATIONAL LAW

A brief overview of the history of international law and the impact on the structure of international law and the associated structure of legal argument follows. The discussion serves two purposes. First, it helps contextualise the international law that was in the background to the discussion in Chapter 2 of food security and the right to food, as well as a history of economic thinking and public law in Chapters 4 and 5. Second, it draws attention to the historically limited focus of international law and the recurring tension between state and international interests. This tension is playing out in attempts to allocate responsibility for addressing hunger. The discussion highlights the absence of an international equivalent of the rights system that Samuels emphasised in the domestic legal-economic nexus. In short, international law does not provide the legal construct to support global provisioning.

A History of International Law

A typical textbook treatment of international law dates the start of international law to the Peace of Westphalia that concluded the Thirty Years War in 1648.\textsuperscript{1071} The acceptance of universal principles, especially universal principles of justice, was a feature of the pre-Westphalian world, as was the distinction between \textit{jus natural} (natural law) and \textit{jus gentium} (law of peoples), with \textit{jus gentium} being the human sub-category of natural law.\textsuperscript{1072} There was no attempt to delineate a body of law specific to international relations,\textsuperscript{1073} however. But the rise of the city-states in the late 16\textsuperscript{th} century weakened the universalism of the age and provided the first glimpse of a world where independent states would function within a body of law governing interstate relations.\textsuperscript{1074} The Peace of Westphalia marked the birth of an international law applying uniquely to states.\textsuperscript{1075} State practice was recognised ‘as a true source of law’

\begin{thebibliography}{9}
\bibitem{1071} See, eg, Antonio Cassese, \textit{International Law} (Oxford University Press, 2nd ed, 2005).
\bibitem{1073} Ibid 6.
\bibitem{1074} Ibid 7.
\bibitem{1075} Ibid 4. Although, as Neff notes in this passage, there had been an international law in the form of an ‘ensemble of methods or devices which [gave] an element of predictability in international relations …
\end{thebibliography}
in addition to natural law. It was not an easy co-existence, however, as is true of the world of today.\textsuperscript{1076}

In the story of progression familiar to international lawyers, the leading intellectual figures behind the development of this new spirit were: Hugo Grotius (1583–1645), who transformed \textit{jus gentium} into a law of nations; Emmerich de Vattel (1714–67), who continued this tradition; and Thomas Hobbes (1588–1679), who dismissed natural law and its attendant disorder in favour of state law as the only way to ensure the protection of the people from aggression and war. For Hobbes, the people had a right to survival (self-preservation) and the state was duty-bound to provide this protection.

Subsequent to the Peace of Westphalia, major shifts in the orientation of international law were again tied to peace settlements or, at least, the thawing of international tensions. The shifts were associated with the defeat of imperial France in 1815, the end of the two world wars in 1918 and 1945, and the end of the Cold War. In broad terms, this shift in the orientation of international law has been understood, in the mainstream, as a shift from an international law applying uniquely to states to an international law that reflected ‘the integration of the world at large into something like a single community under a rule of law’.\textsuperscript{1077}

The Peace Settlement that followed the defeat of France in 1815 introduced a new legal order — the ‘public law and system of Europe’. While overtly hegemonic in its pre-occupation with Europe, and not at all concerned with any equality of states, it can be seen as a forerunner of the UN in the way it represented an ideal ‘of collective, orchestrated State action for the preservation of international peace’.\textsuperscript{1078} It also contained traces of a later functionalism in public law with its emphasis on states having to earn their legitimacy. While positivism was dominant during this period, the emergence of the Historical School provided some intellectual opposition, particularly in its emphasis on the cultural distinctiveness of peoples or nations and the inherent unity of peoples. It was the people that had the moral right to organise themselves as

\textsuperscript{1076} Ibid 9.
\textsuperscript{1077} Ibid 4.
\textsuperscript{1078} Ibid 13.
Natural law ideas receded during this period but did not totally disappear. Underlying the associated emerging economic order ‘was a belief, directly imported from natural-law thought, in a natural harmony of interests amongst human beings across the globe’. Free trade was the particular hallmark, and removing economic barriers the general hallmark. The unrestricted movement of goods, capital and people became the economic orthodoxy and set the world on the path of its first globalization.

From the Peace of Westphalia until WWI, the international community was dominated by European states united through both Christian and capitalist heritages. While other states were engaged as part of the world community, they were effectively marginalised by tyrannies of distance and communication and notions of European superiority that were reinforced by Western jurists. One manifestation of this attitude was the colonisation of, in the main, African and Asian communities.

Economic globalisation and integration crumbled in the face of WWI and then the Great Depression of 1929–33 but there were several major developments in international law in the aftermath of WWI. The League of Nations was created in 1919 as part of an international order that, in Cassese’s assessment, ‘greatly resembled[d] that devised in 1648 in the form of the Settlement of Westphalia’. The period ‘marked the passing of the “European Age” whereby ‘Europe’s pivotal role in the previous centuries as the world’s store room of values, institutions, political concepts, and standards of behaviour came to an end’. The participation of non-European states in the conflict, the rise of the USA, and the emergence of the Soviet Union eroded Europe’s centrality to international law and raised awareness of international relations, and, thereby, broadened the scope of the world community.

The League of Nations had a narrow mandate to maintain peace through a more open
international public order that imposed procedural restrictions on any resort to war. While it was never intended to be a form of world government, the failure of the US to join the League severely compromised its international standing. Despite additional international efforts to further reduce acceptance of acts of aggression in the form of the Pact of Paris in 1928 and the Stimson Accord in the 1932, the League failed in the narrow mandate. The Italian invasion of Ethiopia in 1935–36 left no doubt as to this failure and the search for a stable international order resumed.

While the League may have failed to protect against aggression, there were still significant international legal achievements in the form of the establishment of the Permanent Court of International Justice\textsuperscript{1088} and the beginnings of the codification of international law. Through this period the positivist approach to international law remained dominant, as evidenced by the decision in the \textit{Lotus} case which affirmed that international law governed relations between independent states and arose from the free will of those states.\textsuperscript{1089}

WWII greatly changed the international order. The establishment of the UN institutionalised peace as the principal goal of the international community and the UN Charter\textsuperscript{1090} was positioned as an instrument of collective security and international cooperation.\textsuperscript{1091} Acts of aggression by states against other states became an international crime and the UN Security Council was given authority under the Charter to use force against states that transgressed. The legal order was unmistakably international, but with disproportionate power in the hands of the five states that became the permanent members of the UN Security Council.

Another major consequence of the new, post-WWII international order was the demise of colonialism. The UN Charter provided for the trusteeship system and by 1960 developing countries, many of them newly-independent, comprised the majority of UN member states. The practical consequences of that majority included increased powers for the UN, an increased emphasis on self-determination, racial equality and human rights generally, and the attempts to reshape the international economic order.

\textsuperscript{1088} Statute of the Permanent Court of International Justice.
\textsuperscript{1089} \textit{SS ‘Lotus’ (France v Turkey) (Judgment)} [1927] PCIJ (ser A) No 10.
\textsuperscript{1090} Charter of the United Nations.
\textsuperscript{1091} Cassese, above n 1071, 39.
through the New International Economic Order. Furthermore, the subject-matter reach was accompanied by recourse to formal legal instruments, including the UN Convention on Racial Discrimination,\textsuperscript{1092} the UN Covenants on Human Rights,\textsuperscript{1093} and the substitution of treaty law for customary law.

The institutionalisation of the international legal order deepened after WWII with the continued codification of international law, the replacement of the Permanent Court of International Justice with the International Court of Justice in 1946,\textsuperscript{1094} and the establishment of the International Criminal Court\textsuperscript{1095} in 1998.\textsuperscript{1096} The increase in the number of international organisations concerned with economic cooperation has also been a feature of the post-WWII international landscape, with much of this institutional energy channelled into the ‘development’ project.\textsuperscript{1097} The establishment of the WTO in 1995 has continued that trend.\textsuperscript{1098} Furthermore, the increased presence of international organisations was accompanied by the increased influence of their executive.\textsuperscript{1099}

The collapse of the Soviet Union in 1989 brought an end to the Cold War and the ideological divisions of the globe that had pervaded the Cold War years. While not a peace settlement, the thawing of the tensions between the US and the USSR was, nevertheless, a catalyst for greater international cooperation. Economic concerns, particularly the functioning of the international trade regime, now usurped ideological concerns. With the breakup of the USSR, the US now stands alone as a super power, but this has been counterbalanced, to some extent, by the rise of China as an international economic force; regionalisation, such as the expansion of the EU and ASEAN configurations and regional trade agreements; and the still-increasing presence

\begin{footnotesize}
\begin{enumerate}
\item International Covenant on Economic, Social and Cultural Rights, above n 196 and International Covenant on Civil and Political Rights, above n 199.
\item Statute of the International Court of Justice.
\item See David Kennedy, ‘The Move to Institutions’ (1987) 8 Cardozo Law Review 841 for a discussion of the roles these institutions play as parliament, executive, and adjudicator.
\item See Pahuja, above n 24.
\item Ibid 42.
\end{enumerate}
\end{footnotesize}
of international organisations.\textsuperscript{1100}

This brief overview of the history of international law gives the flavour of the ‘crisis orientation’ and ‘narrow agenda’ of international law that Charlesworth has drawn attention to.\textsuperscript{1101} The result, in her assessment, is ‘an impoverished set of substantive principles in international law’,\textsuperscript{1102} which ‘[shackle] international law to a static and unproductive rhetoric’.\textsuperscript{1103} The consequence of this ‘crisis model’ is that old issues are constantly being rediscovered ‘without building on past scholarship’.\textsuperscript{1104}

Similar judgements could be made on the way international institutions have approached food problems. The international food problem is, effectively, a sub-discipline of crisis, key events being the establishment of FAO at end of WWII, and the international food crises in 1972–4 and 2006–08. My observation in Chapter 2 was that international efforts were a history repeating and that the contemporary rhetoric of the food debate has changed little from that of the Hot Springs conference. My argument that the institutions of the international community have not taken responsibility for food problems sits within Charlesworth’s wider argument that international law does not attend to ‘issues of structural justice that underpin everyday life’.\textsuperscript{1105}

Where to, then, for international law? Whether international law continues its evolution to become ‘the enactments and judicial decisions of a world government’,\textsuperscript{1106} as promoted in the \textit{Chicago Draft} for example, remains to be seen. The quest for international solutions to multiple crises have directed the spotlight, and with greater intensity, on international law and international organisations. But, if this turn to the international is to be more than hopeful, then the structural constraints of the existing international order and the associated structure of international legal argument have to be confronted in the interests of reconceptualising what we understand as the ‘international community’.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{1100} Ibid 44–5.
  \item \textsuperscript{1101} Charlesworth, above n 27, 386.
  \item \textsuperscript{1102} Ibid 390.
  \item \textsuperscript{1103} Ibid 377.
  \item \textsuperscript{1104} Ibid 384.
  \item \textsuperscript{1105} Ibid 391.
  \item \textsuperscript{1106} Neff, above n 1072, 4.
\end{itemize}
\end{footnotesize}
B The Structure of International Law

The consequence of states being the subjects of international law is that international law is structurally different to domestic law. But this structure is not overly developed. Indeed, both Friedmann and Cassese have described the international legal system as structurally primitive. For Friedmann, this assessment reflected the historical reliance on custom.\(^{1107}\) For Cassese, it reflected the group ‘play[ing] a much greater role than individuals’.\(^ {1108}\) In these circumstances, ‘responsibility for violations of the rules governing the behaviour of States does not fall upon the transgressor (the individual state agent) but on the group to which he or she belongs (the State community)’\(^ {1109}\).

As a body of law it is, to use Allott’s words ‘the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory-owners in relation to each other’.\(^{1110}\)

International law has, in the main, been bilateralist. And the essence of bilateralism is that international legal obligations apply, in the main, to the relations between states under a treaty or customary law. International law ‘exhausts itself in correlative rights and obligations of its subjects’.\(^ {1111}\) Each state is responsible for protecting its ‘rights’ under this law and the system rests on consent and the prohibition of intervention by third parties in a state’s domestic and international affairs. Without a universal standard of conduct in this bilateralist structure of international law — a state only has obligations to another state/s in terms of treaty provisions or customary law — there is no international morality: it is a value-impoverished law according to Simma.\(^ {1112}\) This bilateral framework was supplemented with

- a reciprocity-based framework for diplomatic and consular relations, for legal transactions in the form of treaties, and for the protection of foreigners [and] a set of procedures for the settlement of disputes as well as a humanitarian minimum standard

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1108 Cassese, above n 1071, 6.
1109 Ibid.
1112 Ibid 233.
Legal relations within the state are typically characterised as vertical, whereby the centralised institutions perform their legal roles on behalf of the citizens. In contrast, legal relations between states are typically characterised as horizontal. In this world of horizontal state relations, the organisational rules for international relations are ‘embryonic’ and ‘[s]tates do not act in the interest and on behalf of the international community; they do not fulfil an obligation, but primarily pursue their own national interests’. The consequence is, as Cassese points out, that international law is grounded on effectiveness rather than a set of shared principles, much less a set of legally binding principles. ‘A situation is effective if it is solidly implanted in real life’ and ‘only those claims and situations which are effective can produce legal consequences’. Furthermore, force was the principal means for legitimising this effectiveness and the force itself was a function of ‘the favourable distribution of factual power’.

The UN Charter can be seen as an attempt to modify this tradition and substitute, to some extent, legal principles and rules. But, in so doing, the Charter has anointed both sovereign equality and self-determination, alongside communitarian justice, as core principles of the international order without any attempt to resolve the ambiguity.

To fall back on Loughlin’s conception of public law, there is no public law to structure good international politics of choice. Consequently, international law is found wanting when it comes to political choices that involve finding a balance between social provisioning and protection against aggression, as the food security debate illustrates. To some extent, this is a history repeating: a history of recurrent tension between the universal and the plural, the natural and the positive. What was a break with history, though, is the institutionalisation of this tension through the UN Charter.

In the absence of anything explicit in the UN Charter to reconcile the competing foundational principles, international law has developed, from within, a structure and

1113 Ibid 229.
1114 Cassese, above n 1071, 6.
1115 Simma, above n 1111, 233.
1116 Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Cambridge University Press, reissue with new epilogue, 2005) n 4, 476.
style of argument to accommodate the conflict. This structure of argument is arguably even more distinctive than the structure of international law itself. Koskenniemi has written incisively on this structure in *From Apology to Utopia*.\(^{1117}\) He discusses the tension in terms of arguments over order and obligation in international affairs:

One argument traces them down to justice, common interests, progress, nature of the world community or other similar ideas to which it is common that they are anterior, or superior, to State behaviour, will or interest. They are taken as a given normative code which precedes the State and effectively dictates how a State is allowed to behave, what it may will and what its legitimate interests can be. Another argument bases order and obligation on State behaviour, will or interest. It takes as given the existence of States and attempt to construct a normative order on the basis of the “factual” State behaviour, will or interest.\(^{1118}\)

But, as Koskenniemi notes, these arguments ‘are both exhaustive and mutually exclusive ... unable to be both at the same time.’\(^{1119}\) International law works to make them compatible with each other through its own discursive structure, a discourse that positions itself between politics and morality. Through this argumentative structure, international law argues within itself for both normativity and concreteness but, in fusing the two, international law ‘threatens the law’s concreteness and its normativity and makes ultimately doubtful whether any meaningful distinction between international law, politics and morality can be made’.\(^{1120}\)

Koskenniemi labels the proponents of the political and moral positions as apologists and utopians, respectively: the apologists are apologists for politics, in effect. They are strongly subjective and find an infinite flexibility in international law. The utopians, on the other hand, are strongly objective and advocates for the moral content of international law. Each position has its conceptual style. ‘Sovereignty’ and ‘consent’ co-habit the vocabulary of the apologists in the way that ‘natural law’, ‘community’ and ‘purpose’ co-habit the vocabulary of the utopians.\(^{1121}\)

\(^{1117}\) Ibid.
\(^{1118}\) Ibid 59.
\(^{1119}\) Ibid.
\(^{1120}\) Ibid 23.
\(^{1121}\) Ibid 69.
As incisive as Koskenniemi’s observations are, it is, in my view, his conclusion that ‘neither sets of concepts suggests anything by way of solving any normative problems’¹¹²² that gets to the heart of why the contemporary international debate on food security is so contentious. He points towards an institutional shortcoming: legal values have not been institutionalised cohesively through the UN system. International public law has not provided a site of struggle for these values, as would occur in domestic law. Contributing to, and at the same time exacerbating the problem, is the call to the imperfect notion of ‘international community’.

Koskenniemi’s exit from the discursive dichotomy in the argumentative structure of international law is to shift the focus of attention from ‘what is international law for?’ to ‘what is international law used for?’ He provides four responses, each of which highlights the instrumentality of international law.¹¹²³ First it is an instrument of power. ‘[I]nternational law exists to advance the values, interests and preferences that those in dominant positions seek to realize in the world’. Second, it acts as a critique of this power through ‘giv[ing] voice to those who have been excluded from powerful positions and are regularly treated as the objects of other peoples’ policies as they rally against ‘violence, injustice, and social deprivation’. Third, international law provides the vehicle for reconciling the powerful and the anti-powerful. In this sense it plays the political role, but the objective of international law is international law itself. And fourth, ‘international law exists as a promise of justice’. This resort to the instrumentality of law can be seen at work in the policy positions advanced for dealing with the impacts of international trade on food security, as discussed later in this chapter.

Koskenniemi also notes that the dichotomous discursive structure of international legal argument permeates the representation of the international community, where ‘autonomy’ and ‘community’ are competing constructs for understanding the character of international society. The problem for international law is that it ‘lacks a principle for choosing either one and therefore contains both within itself’.¹¹²⁴ This situation is similar to that seen in liberal politics, where autonomy and community are

¹¹²² Ibid.
¹¹²⁴ Koskenniemi, From Apology to Utopia, above n 1116, 475.
reconciled by thinking of one in terms of the other.\textsuperscript{1125}

III THE INTERNATIONAL COMMUNITY

The meaning of ‘international community’ is important to this inquiry because so much of the food security debate is framed in the name of the international community. But what is the international community and what does it stand for? As Kritsiotis notes, any such scrutiny is rarely undertaken: ‘it is almost as if there exists a subliminal and pervasive appreciation of the meaning of this term — of what forms and frames this community — that eliminates the need for further detail or consideration’.\textsuperscript{1126} ‘International community’ is a ‘given’\textsuperscript{1127} in most cases and that is certainly the sense that surrounds the food security debate. Villalpando puts this down to ‘the reassuring sense of togetherness that it inspires, but also the legitimacy it vests upon whoever claims to be acting on its behalf’.\textsuperscript{1128}

My interest is in how this discussion of togetherness and legitimacy plays out in international law and whether this is consistent with the existence of an international legal-economic nexus. Of particular interest is how ‘community interests’ are reconciled with the traditional bilateralist, sovereignty-based framework of international law. This question is examined using Bruno Simma’s work on community interests and Anne Orford’s work on the responsibility to protect. My argument is that ‘international community’ does not have a universal meaning and that the variable use of the term, coupled with the state bias in international law, is obscuring responsibility for food security and impeding solutions to the food crisis. In effect, international law is searching for its public and the international community of protection is dislocated (perhaps it has never been co-located) from the international community of provision.

A The Meaning of ‘International Community’

The founding fathers of classical international law had a conception of international community — \textit{societas gentium} — which was derived from natural law and which

\textsuperscript{1125} Ibid.
\textsuperscript{1127} Ibid.
affirmed the equality of all humans.\textsuperscript{1129} But, as Abi-Saab notes, ‘this universal community, embracing all humanity, was only a theoretical construct ... a mental image, perceived as the philosophical proposition or a distant horizon, rather than as an existent reality’.\textsuperscript{1130} The reality was the community that had existed prior to the Peace of Westphalia and which shaped the law of co-existence.\textsuperscript{1131}

Since that time, the way in which the inherent character of the international community has been represented in international law falls within three traditions of thought — Hobbesian, Kantian and Grotian — as identified by the political scientist Hedley Bull.\textsuperscript{1132} The Hobbesian, or ‘realist’, world is one of state rivalry: ‘power politics, temporary alliances, and national interest.’\textsuperscript{1133} At the opposite end of the scale, the Kantian, or ‘universalist’ world is a ‘community of mankind’ that values justice.\textsuperscript{1134} The reality of the state is acknowledged in this view, but the role of the state is not central, whereas ‘the role of international “civil society”, multinational cooperation and non-governmental organizations’\textsuperscript{1135} is. The Grotian world stands between the Hobbesian and Kantian worlds. The Grotian world is an ‘international’ world composed of states and where ‘cooperation between states is possible, and even to be encouraged in order to realize common values and interests’.\textsuperscript{1136}

Bull identifies two Grotian variants: a ‘Vattelian’ view contained in classical, Westphalian international law, that values order and ‘emphasizes the individual interest of states’,\textsuperscript{1137} but which accepts that cooperation may be needed to secure these interests. The second variant is a ‘true Grotian’ view that values solidarity between peoples and which emphasises ‘common interests, the development of common values, and the creation of common institutions’.\textsuperscript{1138} This conception is one of

\textsuperscript{1131} Ibid 249–50.
\textsuperscript{1133} Simma and Paulus, above n 1132, 269.
\textsuperscript{1134} Ibid 269–70.
\textsuperscript{1135} Ibid 270.
\textsuperscript{1136} Ibid.
\textsuperscript{1137} Ibid.
\textsuperscript{1138} Ibid 271.
an ‘organized state community’, which Tomuschat describes as ‘an overarching system which embodies a common interest of all states and, indirectly, of mankind’.

Where then to locate contemporary international community? Simma and Paulus suggest adopting a Grotian base mixed with elements of both Vattelianism and Kantianism, and with an increasing pull towards institutionalisation. Their reasoning is that the regime where states are only bound by their express consent seems to be gradually giving way to a more communitarian, more highly institutionalised international law, in which states channel the pursuit of most of their individual interests through multilateral institutions.

Simma and Paulus do not describe this international community as an ‘international legal community’, however. They regard this type of terminology as an affirmation of the international community as a community of states, with the normative structure of this community being provided by international law. They are critical of both aspects of this usage, because of its circularity — the community of states exists exclusively under international law and the legal international community exists exclusively of states — and also for overestimating the capability of legal norms to bind the community. That community bond, that unity or solidarity, is a reflection of a consensus on social values and the process for finding that consensus. In Simma’s view, ‘the assumption that a society/community could be held together by means of legal norms alone overestimates the capacity of law and, conversely, underestimates the necessity of a social consensus as a precondition for the formation of, and in particular, the respect for, legal rules’.

‘Community’ is also a relative concept for Abi-Saab as it refers to the strength of the bond — the extent of the unity — within the group. What matters is ‘the degree of community existing within the group in relation to a given subject, at a given

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1139 Ibid.
1141 Simma and Paulus, above n 1132, 276–7.
1143 Simma, above n 1111, 245.
moment'. Allott would be sympathetic to this view, but would start from the proposition that this has always been the object of international society. International society, for Allott, ‘is the society of the whole human race and the society of all societies’ and this follows from the construction of society as a ‘collective of self-creating human beings’. His project is the development of a general theory of law and international society that, potentially, all members of that society can act on. It is the pursuit of *eunomia* — ‘the good order of a self-ordering society’.

International law has not delivered this good order:

The misconceiving of international society as a system of closed sovereignties, externalized state-systems, undemocratized and unsocialized ... became a world sovereignty-state system, a world fit for government. It is an unsociety ruled by a collective of self-conceived sovereigns whose authority is derived neither from the totality of international society nor from the people but from the intermediating state-systems.

Allott’s construction of international law excludes the possibility of a society of nation-states, but it does leave room for a society beyond the collective of nation-states. It conceptualises international law as providing ‘the continuing structure-system of human socializing’ for this society beyond nation-states. Another key plank in Allott’s thinking that sets him apart from other legal commentators on community and society is his emphasis on society as a ‘process’: a ‘process of continuous self-creating’. It is the ‘struggle’ of socialising. Institutionalists would relate strongly to this line of thinking, resembling as it does, the institutionalist emphasis on culture, habituation and evolution: the interest in process.

Allott does not distinguish society from community, but for others the sociological distinction between the two concepts is important. Villalpando, for one, sees society as a group

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1144 Abi-Saab, above n 1130, 249.
1145 Allott, above n 1110, 3.
1146 Ibid xix.
1147 Ibid 404.
1148 Ibid 249–50.
1149 Ibid 3.
1150 Ibid 39.
1151 Ibid 53.
in which the individual sees social relations in a ‘profit-oriented’ manner, as instrumental to the realization of his or her personal goals. Social relations are, in other words, based on ‘organic solidarity’ and compromises or coordination of interests which are rationally motivated by the pursuit of individual objectives.\footnote{Villalpando, above n 1128, 391.}

In contrast, he regards community as ‘a social group in which the individual actor considers him or herself as a means to serve the goals of the group and may be called upon to sacrifice his or her own personal benefit for those goals.’\footnote{Ibid 392.} The basic distinction is that between insiders and outsiders. Villalpando observes that the social group of international law has changed over time and this reflects changes in the nature of international engagement. There was limited engagement following the Treaty of Westphalia but this changed as international relations intensified through trade and the movement of people. Cooperation and compromise were necessary but the motivation for the cooperation and compromise is the achievement of the individual (state) objectives. But with a further intensification of international relations states are now confronted with global collective interests that can only be protected through the collective efforts of the entire group.\footnote{Ibid 391–2.}

\subsection*{B From Bilateralism to Community Interests}

Friedmann managed to navigate the difficulty in conceptualising international law by making the distinction between the 'law of coexistence' and 'law of cooperation'.\footnote{Friedmann, above n 1107, xiii. See also Abi-Saab, above n 1130, 248–9.} The law of coexistence governed the diplomacy of inter-state relations, while the law of cooperation was reflected in the increased presence of international organisations and ‘the pursuit of common human interests’.\footnote{Friedmann, above n 1107, xiii.} International law therefore comprised universal and non-universal spheres, ‘depending on the degree of community of interests and purposes’.\footnote{Ibid.}

Abi-Saab refined the distinction between co-existence and cooperation by referring to them as poles of international law, or contrasting types of legal regulation.\footnote{Abi-Saab, above n 1130, 248–9.} His
purpose was to locate the body of international law, and hence the strength of the bond between members of the international community, at any point in time, within the poles. But the discussion to date has illustrated that the strength of the bond varies depending on the issue of concern. This does not deny, however, that the trend in international law has been towards greater cooperation.

Simma has described this trend as the gradual emergence of community interests in international law and as a significant departure from the traditional bilateralist pattern of international law.\textsuperscript{1159} Community interests for Simma ‘correspond to the needs, hopes and fears of all human beings, and attempt to cope with problems the solutions of which may be decisive for the survival of entire humankind.’\textsuperscript{1160} These interests include human rights, the environment, the global commons, the spread of nuclear weapons, and economic interdependence. Friedmann also writes of the ‘common interest of mankind in survival’, which he saw as having two major aspects: ‘the interest in preservation from national destruction, and ... the interest in the preservation of common resources’.\textsuperscript{1161} He dates this concern with common interests to the outbreak of WW1, when it became clear that mankind now had the technological and scientific capability to threaten its own existence.

Simma attributes the increased awareness of community interests to a response to the lack of universality and the poverty of values that characterise traditional international law. What has emerged is a more ‘socially conscious international legal order’.\textsuperscript{1162} He concedes that while international legal doctrine has increasingly recognised community interests and institutions, this has largely been a recognition of a ‘community model of interstatal society existing in political reality’, with the UN having the concrete institutional form in this community.\textsuperscript{1163} His contention is that this interstate, international legal order is no longer sufficient to deal with community interests, where the basis of these interests is not the state but humanity. Allott shares this

\textsuperscript{1159} Simma, above n 1111, 217.
\textsuperscript{1160} Ibid 244.
\textsuperscript{1161} Friedmann, above n 1107, 12.
\textsuperscript{1163} Ibid 246.
sentiment with his view that the state-based international system has ‘succeeded in keeping the international legal arena free of the social progress gradually achieved within States’.

Allot did concede, however, that the state-societies had begun to see themselves as ‘agents and instruments of the survival and prospering of the human race’. In a similar vein, Tomuschat pointed to the common interests of states and, therefore, indirectly of mankind that were embodied in the ‘international community’.

‘International community’ to these writers was thus a purposive term, which, in Simma’s words

constantly reminds the representatives of States that it is less the Governments themselves that will be affected in their existence through successes or failures in the realization of community interests, but rather concrete human beings about whose, basic needs, health, life or death, governmental decisions are being made.

Institutionalists would share this sentiment, as they would Simma’s statement that

in the last instance, of course, what will be decisive is not the use of the term ‘international community’ as such, as a mere combination of words, but rather concrete institutions, principles and rules through which commitment to the interests common to humankind can be activated.

In effect, Simma’s plea is a call to international law to clarify its ‘public’. Indeed, Simma’s conception of public law is not dissimilar to that of Duguit. Simma argues for ‘a reconceptualization of [international law], proceeding from the axiom of social responsibility and accountability of its subjects’ in the same way that ‘domestic systems have granted public authority the power to control property-holding and other socially relevant behaviour in the common interest’. A true international public law for Simma should ‘[reflect] the common concerns and values of the

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1164 Ibid 247.
1165 Allott, above n 1110, 329.
1166 Tomuschat, above n 1140, 236.
1167 Simma, above n 1111, 248.
1168 Ibid.
1169 Ibid 234.
1170 Ibid.
international community’. For Simma, the object of solidarity is now the ‘responsibility to the general global welfare’ as opposed to solidarity of inter-state relations.

As Simma notes, environmental concerns have been a modern manifestation of the rise of community interests in international law and the contemporary focus on climate change continues the shift towards Abi-Saab’s pole of cooperation. But, at the same time, the climate change debate underscores the difficulty in achieving this cooperation. International environmental law has not merely had to undergo a significant conceptual expansion, it has had to do so against the grain of the foundational structures of international law. It has become a focal point for the shift from bilateralism to community interests in international law on account of the inadequacy of the bilateralist framework for dealing with global environmental interests.

The traditional bilateralist framework did not recognise global environmental interests; states were only obliged not to cause environmental harm to neighbouring states. Three concepts have emerged in international environmental law to deal with this limitation: first, ‘common areas’ ‘beyond the jurisdiction of state, like the high seas, Antarctica, or outer space’; second, the ‘common heritage’ of mankind in ‘resources that lie beyond the jurisdiction of states, such as the non-living resources of the seabed’; and third, the ‘common concern’ of humankind with ‘global environmental problems, like climate change or the conservation of biological diversity’.

Ellen Hey discusses these global environment issues from a public law standpoint. She points out, the ‘co-existence’ dimension of international law, particularly for global environmental law, has evolved to the co-existence of the inter-state normative

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1171 Ibid 237.
1175 Ibid.
1176 Ibid.
1177 Ibid 552–3.
pattern and the common-interest normative pattern.\textsuperscript{1178} And, with this evolution, the \textquote{consent} dimension of international law is now more about states consenting to a process of normative development at the international level in response to the increased interdependencies resulting from globalisation.\textsuperscript{1179} In the process there has been a re-orientation of public international law to international public law, in keeping with a \textquote{law that seeks to address common interests of the international community, instead of law aimed at addressing the interests that states share}.\textsuperscript{1180} Furthermore, it calls for a reconstitution of public space, that space \textquote{in which society interactively (re)constitutes itself through, amongst other things, law}.\textsuperscript{1181} In a normative sense, it is that space \textquote{in which public power should be exercised in the common interest to standards of accountability, associated with the rule of law}.\textsuperscript{1182}

Hey also points out that universal principles, such as common concern, sustainable development, and inter- and intra-generational equity, are shaping the evolution of global environmental law and require states to adopt a functional approach to their relations with other states, as well as with groups and individuals. States have responsibilities, in other words. They are obliged to protect these interests globally, in contrast to limiting themselves to not harming a neighbouring state under the bilateralist approach. With respect to global environmental law, states have allocated powers to international organisations to carry out these functions, analogous to the way in which individual states have been given the public power to provide environmental protection, and, indeed, wider public services. Where the analogy breaks down, however, is that these international public powers are not matched by international accountabilities in the way that public power within states is.\textsuperscript{1183} Thus, Hey argues, a further reconstitution of international public space is required to achieve this accountability and this can be achieved through the types of checks and balances

\textsuperscript{1180} Hey, \textquote{International Public Law}, above n 1178.
\textsuperscript{1181} Ellen Hey, \textquote{Global Environmental Law: Common Interests and the (Re)Constitution of Public Space} (2009) 1 Iustum Aequum Salutare 41, 41.
\textsuperscript{1182} Ibid 41–2.
\textsuperscript{1183} Ibid 48–9.
mechanisms that are part of state public law.¹¹⁸⁴

Hey’s conception of public law is a closer fit with the global administrative law championed by Nico Krisch and Benedict Kingsbury, among others, than it is with Loughlin’s conception of public law. Kingsbury’s project is to build ‘a theoretical account of international law that is both normatively attractive and practically operable’.¹¹⁸⁵ It can also be viewed as a search for the ‘public’ of international law via global administrative law. Prompted by Simma’s ‘notion of a move toward “a true public international law” or “a contemporary international legal order which is strongly influenced by ideas of public law”’,¹¹⁸⁶ Kingsbury has proposed an alternative to the standard jus inter gentes account of international law, that is, the account of international law as ‘the law established between governments of states to regulate relations between states as juridical entities’. He proposes ‘that international law should be theorized as the law between public entities outside a single state, these public entities being subject to public law and to requirements of publicness’.¹¹⁸⁷ He uses the term ‘publicness’ to ‘[refer] to the claim of law to stand in the name of the whole society and to speak to that whole society even when any particular rule may in fact be addressed to narrower groups’.¹¹⁸⁸ Kingsbury’s conception is pluralistic, in contrast to the universality that is implicit in conceptions of the international community as a society of societies or community of communities. It is a conception whereby international law permits a relationship between the ‘publics’ and also integrates the ‘publics’. That is, the ‘normative content of international law is immanent in the public quality of law in general and in the inter-public quality of

¹¹⁸⁷ Kingsbury, ‘International Law as Inter-Public Law’, above n 1185, 1.
¹¹⁸⁸ Ibid 6–10.
Kingsbury and Donaldson accept that their idea of inter-public law does not sit neatly alongside Simma’s idea of an ‘international community’ based on shared interests and, in their own words, ‘heretically suggest that the idea of “international community” may become something of a by-way on the path to developing a theoretical basis for the dense and intrusive rules and institutions and governance processes serving multiple interests and constituencies that more and more characterise international law’.  

The preceding discussion brings to the forefront the struggle to articulate the composition of the international community, as well as the struggle to articulate a generally accepted model of international law that serves the interests of this community. The core concern is whether it makes sense to have community interests dependent on the bilateralist international law model. If the answer is negative, then the inference is that there are circumstances where the interests of the international community could justify sacrificing the existence of a sovereign state. Would rescuing a populace from starvation, for example, justify overriding state sovereignty? These struggles are very much evident in the development of the responsibility to protect concept, as is the struggle to articulate the role of the international executive. Suffice to say, the critical question that arises is what permits law to stand in the name of the whole society or community.

C The Right to Protect: Jurisdiction without Territory

Where the interests of humanity are at stake, rather than the interests of states, Simma exhorted the international community to move beyond the ‘rise and recognition’ of international community to tangible deeds that give expression to that community, something that did not occur at the time of the atrocities in Bosnia and Rwanda. The subsequent reaction to the lack of international action was a factor in the development of the ‘responsibility to protect’ concept. My interest is in understanding the justifications for invoking the responsibility to protect, and whether

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1189 Kingsbury and Donaldson, above n 1186, 80.
1190 Ibid.
1192 Ibid 247.
these justifications have wider applicability — to protecting the world’s hungry, for example.

The catalyst for the development of the right to protect was the widespread unease over the merits of humanitarian intervention, given the international community’s apparent inability to prevent or reduce the extreme violence and suffering that had marked the intrastate conflicts in Rwanda, Kosovo, Bosnia and Somalia in the 1990s, and a lack of consensus on when it was appropriate to intervene. The international community had seemingly ignored the atrocities in Rwanda, while, in Kosovo, an international coalition had intervened without Security Council approval.1193

One response to the unease was the challenge from the Secretary-General of the UN to the international community to find a consensus on the principles that would allow for protection against gross violations of human rights in the face of policy contention over whether the international community was intervening too much or too little, whether or not the interventions were effective, and whether or not the interventions were legal and in accord with some agreed process.1194 The core concern was to clarify the circumstances under which it was appropriate to intervene in the affairs of a sovereign state to protect against gross violations of the human rights of the citizens of those states.

The Canadian Government took up this challenge and established the International Commission on Intervention and State Sovereignty (ICISS) in September 2000 and ICISS presented its report, The Responsibility to Protect in December 2001. The report articulated a set of core principles underlying the responsibility to protect. The basic principles were that the sovereign state bore primary responsibility for the protection of its people and that the international community assumed this responsibility when the sovereign state failed, or was unwilling to assume its primary responsibility to protect. These core principles were founded on the view that responsibility was inherent in sovereignty, the responsibility of the Security Council under Article 24 of the UN Charter, other international and national legal instruments, and the developing

1194 Ibid vii, 1.
practice of states, regional organisations and the Security Council.\textsuperscript{1195}

Gareth Evans, co-chair of ICISS, considers that the ICISS made four contributions to the international policy debate.\textsuperscript{1196} The first was to reposition thinking on the approach to humanitarian intervention from rights to responsibilities, that is, away from the right to intervene to the responsibility to protect those at risk. The second contribution was in a similar repositioning of the essence of sovereignty away from control to responsibility.\textsuperscript{1197} The third contribution was in clarifying that the responsibility to protect entailed much more than intervention, particularly military intervention. The fourth was making explicit a set of criteria that the Security Council could apply in determining the legitimacy of any coercive military intervention. Evans considers that the responsibility to protect has now achieved the status of ‘a broadly accepted international norm’,\textsuperscript{1198} by virtue of its endorsement by the UN Secretary-General, the UN General Assembly, the African Union, and an increasing constituency among academic commentators and lawyers.

While not disagreeing that the way in which the international community has embraced the responsibility to protect concept is significant, Orford adopts a more critical view of these developments, questioning even the originality of the recourse to protection in international law.\textsuperscript{1199} Orford’s primary concerns, though, are with the authority and legitimacy of international action, particularly of UN action and the associated expansion of international executive rule. She traces the origins of this executive to the creation of the United Nations Emergency Force in response to the Suez crisis of 1956. The intervention had its roots in the ‘idea that the UN has a responsibility to maintain order and protect life in the decolonised world’.\textsuperscript{1200} The UN also offered military assistance to the Government of the Republic of the Congo in

\textsuperscript{1195} Ibid xi.
\textsuperscript{1197} Evans acknowledges the influence that the thinking of Francis Deng, who was later to become UN Special Advisor on the Prevention of Genocide, on this approach. See Francis Deng et al, Sovereignty as Responsibility: Conflict Management in Africa (The Brookings Institution, 1996).
\textsuperscript{1198} Evans, above n 1196, 715.
\textsuperscript{1199} Anne Orford, International Authority and the Responsibility to Protect (Cambridge University Press, 2011) 37. Orford points out that the Hobbesian idea of the sovereign being responsible for the protection of subjects was a foundational underpinning of the classical tradition of international law and that this idea was later revived by Carl Schmitt.
\textsuperscript{1200} Ibid 3.
1960 and the cessation of Cold war hostilities provided additional impetus to executive action. Orford’s assessment is that the executive approach was actively promoted by Secretary-General Hammarskjöld and became operationalised through, for example, Security Council mandates, rules of engagement, and instruction manuals with the objective of equipping the UN to act ‘independently of the ideologies and interests of specific governments.’

Executive action raises two questions: how the claim to executive action relates to the claim to domestic authority, and what determines the legitimacy of any action. Orford notes that the lawfulness of domestic authority under the Charter is a matter of effective control over territory and the right to that territory, by virtue of the Charter enshrining ‘principles of self-determination, sovereign equality, and the prohibition against acquisition of territory through the use of force’. Intervention by another state (or the UN) in the affairs of another state would, therefore, appear to be illegal. The Charter does, however, open up the possibility of legal intervention in the affairs of another state through the incorporation of ‘a “hard” regime governing public law questions relating to territory and the use of force, [and] also a “soft” regime concerned with economic and social issues’. The first regime enables the use of force, albeit with limited authority, in the common interest. Over time the UN has adopted a less restrictive stance towards the use of this force. The second regime enables economic and social development interventions. Less clear, though, is whose interests are being served by this second regime and their legality and effectiveness has come under increasing challenge.

The critical question in this world of dual jurisdiction is who gets to decide. But, as Orford notes, there is no system for prioritising the various jurisdictions, as was the case in the latter part of the Holy Roman Empire, when emperors aspired to rule over one big centralised state in the face of the reality of the overlapping jurisdictions of the territories claimed as part of the Empire. ‘What was at stake then, as now, was how complementary jurisdictions were to be negotiated, or how one law would encounter

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1201 Ibid 5.
1203 Ibid 995.
1204 Ibid 996–8.
The second question surrounding executive action relates to the source of the authority to make law: it is a question of jurisdiction. As Dorset and McVeigh note, jurisdiction makes possible a life before law, the rule and occupation of a place, and events become juridical.\textsuperscript{1206} Since the modern state became the dominant form of political organisation through the world, this authority has been closely tied to territory.\textsuperscript{1207} But this relationship has been contested though time and has never been finally resolved.\textsuperscript{1208} It was contested with the rise of the modern state alongside the Holy Roman Empire and the associated competition between state and imperial jurisdictions, and the contest continued beyond the triumph of the modern state, albeit in two different forms.

The first concerned the recognition of a government or state. Up to the late-18\textsuperscript{th} century the de facto existence of control over territory was enough to establish sovereignty. This changed in the early 19\textsuperscript{th} century. External recognition was also seen as important to legitimising a state.\textsuperscript{1209}

The second form concerned the challenge to the authority of the state in terms of whether individuals could have rights that derived from a source other than the state. The legacy of both streams continues in modern international law and the UN Charter\textsuperscript{1210} and can be seen in ‘the emergence and institutionalization of the “responsibility to protect” concept’.\textsuperscript{1211}

Clearly, the authority behind the responsibility to protect does not rest on effective territory. Nor is it based on some notion of rights. Its legitimacy ‘depends on the capacity to provide effective protection to populations at risk’.\textsuperscript{1212} More generally, the authority of the international community resides in the effectiveness of its

\textsuperscript{1205} Ibid 1012.
\textsuperscript{1206} Shaunnagh Dorsett and Shaun McVeigh, ‘Questions of Jurisdiction’ in Shaun McVeigh (ed), \textit{Jurisprudence of Jurisdiction} (Routledge-Cavendish, 2007). For a wider discussion of the concern that jurisdiction has for questions of authority and the way in which law is authorised, see Dorsett and McVeigh, \textit{Jurisdiction}, above n 1038.
\textsuperscript{1207} Orford, ‘Jurisdiction without Territory’ above n 1202, 981–2.
\textsuperscript{1208} Ibid.
\textsuperscript{1209} Ibid 992.
\textsuperscript{1210} Ibid.
\textsuperscript{1211} Ibid 982.
\textsuperscript{1212} Ibid 1002–3.
interventions, as Friedmann also stressed. This effectiveness depends on the success of the executive interventions across the range of activities within the soft regime of the UN Charter, which amount to attempts to ‘[spread] the beliefs underlying Western legality throughout the world’. To this blunt assessment I would add the spreading of beliefs in mainstream neoclassical economics. The authority for these interventions ultimately derives from some concept of justice ‘unmediated by the will of States or Governments’. Authority residing in the effectiveness of the intervention also strengthened the position of the UN executive. What was relevant was the welfare of the populations in the decolonised world and responding to this concern justified international executive action. This action did not compromise ownership of territory, but it did ‘instead seek ... to exercise control over territory for specific purposes and for limited ends’. As Orford explains:

Once that separation of ownership and control is properly understood, the governance of the decolonised world can be seen simply to involve the distribution of “functions”. International authority needs no further justification than the functionalist claim to be managing the world and acting as executive agent of the international community.

Food security has become one of these functions.

The challenge of such an approach is to find the legal form to fit the practice. Orford notes that this challenge is not unlike that of the early functionalists to lawyers to ‘try to make legal form meaningful in light of experience and practice’. But the early functionalists were not concerned with the then-political form, but rather with the adequacy of that form. Orford notes that Harold Laski, who, as we saw earlier, was heavily influenced by Duguit’s thinking, ‘turned from asking what the state is to what the state does in an attempt to develop a theory of state responsibility that was

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1213 Ibid 1010.
1214 Ibid.
1215 Orford, International Authority and the Responsibility to Protect, above n 1199, 39.
1217 Ibid 199.
1218 Ibid 197.
adequate to the expansion of state functions \(^{1219}\) in the service of the public.

The development of the responsibility to protect concept may share functionalism’s concern with welfare, but it has overridden political form. That is, it has overridden questions of status, such as state and sovereignty. \(^{1220}\) The international community has given to itself an authority to govern that is superior to state authority. In so doing, it has marked out ‘new zones of protection as belonging to international law’. \(^{1221}\) While this authority only applies to the context of the responsibility to protect, it does open up the possibility of international intervention for some as yet unspecified end or variety of ends. \(^{1222}\) Glaringly absent, though, as Orford reminds us, is the mention of any attempt to legitimise the authority for the international intervention by reference to ‘the people, the nation, the Volk’. \(^{1223}\)

Orford concludes that ‘the significance of the responsibility to protect concept lies not in its capacity to transform promise into practice, but rather in its capacity to transform practice into promise, or deeds into words’, \(^{1224}\) and the words articulate ‘an ambitious conceptual framework aimed at systematising and giving formal expression to the protective authority exercised by international actors in the decolonised world since 1960.’ \(^{1225}\)

Neither states nor the UN have any new legal obligations resulting from the formalisation of the responsibility to protect concept, contrary to the tone of the ICISS report. But there are, nevertheless, legal implications, which centre on the jurisdiction: public powers have been established and articulated. \(^{1226}\) What the responsibility to protect concept has done, in Orford’s view, is make visible what ‘is involved in translating concepts such as responsibility and protection into political communities and positive laws’, \(^{1227}\) and this is something that she regards as much more valuable.

\(^{1219}\) Ibid 197 (emphasis in original).
\(^{1220}\) Ibid 196.
\(^{1221}\) Orford, ‘Jurisdiction without Territory’ above n 1202, 1003.
\(^{1222}\) Orford, *International Authority and the Responsibility to Protect*, above n 1199, 38.
\(^{1223}\) Orford, ‘Jurisdiction without Territory’, above n 1202, 1011.
\(^{1224}\) Orford, *International Authority and the Responsibility to Protect*, above n 1199, 2.
\(^{1225}\) Ibid 3.
\(^{1226}\) Ibid 25.
\(^{1227}\) Ibid 210.
than validating past practice.\textsuperscript{1228}

As noted throughout this thesis, the contemporary international approach to food security is marked by the difficulty in translating responsibility into political communities. The following part reinforces that point and brings together the issues that have been raised in this chapter through a discussion of the way the UN Special Rapporteur on the Right to Food has attempted to engage the WTO on its approach to food security.

\textbf{IV \quad REVISITING FOOD SECURITY: A CLASH OF AUTHORITIES}

In order to assess whether the jurisdictional clash described in the previous section is also influencing the way the international community approaches food security, this section examines the interface of food security with the WTO regime through a discussion of the way in which the UN Special Rapporteur on the Right to Food has engaged the WTO over the right to food.

In 2009 De Schutter directly engaged the WTO on the relationship between WTO legal agreements, the Agreement on Agriculture in particular, and food security. The initial engagement involved a mission to the WTO in February 2009. His findings as to the main impacts of the multilateral trade regime on the right to food were:

\begin{itemize}
  \item[(a)] increased dependency on international trade which may lead to loss of export revenues when the prices of export commodities go down, threats to local producers when low-priced imports arrive on the domestic markets, against which these producers are unable to compete, and balance of payments problems for the net food-importing countries when the prices of food commodities go up;
  \item[(b)] potential abuses of market power in increasingly concentrated global food supply chains and further dualization of the domestic farming sector; and
  \item[(c)] potential impacts on the environment and on human health and nutrition, impacts that are usually ignored in international trade discussions, despite their close relationship to the right to adequate food.\textsuperscript{1229}
\end{itemize}

These impacts resulted, in De Schutter’s assessment, from a failure of global

\textsuperscript{1228} Ibid 2.
governance to coordinate human rights obligations and trade commitments, a failure that could not be compensated by better coordination at the state level.\textsuperscript{1230} Accordingly, most of his recommendations, which will be addressed shortly, were directed at the actions individual states needed to take to meet their obligations with respect to the right to food.

In the following month, De Schutter presented a statement to the 10\textsuperscript{th} Session of the United Nations Human Rights Council.\textsuperscript{1231} That statement was based largely on the report of his mission to the WTO and, not surprisingly, emphasised the linkages between trade and development, and trade and human rights. But the tone of the statement was more critical of the impact of the Agreement on Agriculture than the earlier report, especially with respect to the impacts of trade liberalisation on developing countries:

> the current regime of multilateral trade in agriculture is deeply flawed. Heavily distorted by various types of subsidies and with a number of remaining barriers impeding access to the markets of industrialized countries, the current system is not benefiting developing countries as it should.\textsuperscript{1232}

De Schutter was strongly of the view that any agreements need to give priority to ensuring developing countries have the flexibility to broaden their productive base; trade liberalisation was a second order priority and one that needs to be selectively applied. On the other hand, De Schutter regarded trade liberalisation as an essential in developed countries. In taking this view, De Schutter was rejecting comparative advantage — the key intellectual underpinning of free trade — as a given. ‘Comparative advantage is constructed, rather than revealed’ and reflected other factors, such as the policies and history of other countries, in addition to a country’s own endowments.\textsuperscript{1233} Institutionalists would be sympathetic to this view, as evidenced by Daniel Bromley’s comment that ‘[t]here is no natural law of comparative advantage among sovereign nations. There is, instead, constructed economic advantage that can

\textsuperscript{1230} Ibid.
\textsuperscript{1231} Olivier De Schutter, Statement of Mr Olivier de Schutter, Special Rapporteur on the Right to Food, 10\textsuperscript{th} Session of the United Nations Human Rights Council, 9 March 2009.
\textsuperscript{1232} Ibid 4.
\textsuperscript{1233} Ibid 4–5.
be — and often is — manipulated to the benefit of particular nation-states. 1234

The next stage in the Special Rapporteur’s engagement with the WTO involved a public debate with Pascal Lamy in Geneva on 11 May 2009 and a subsequent meeting with WTO country representatives. 1235 The question under debate was whether agricultural trade liberalisation hampered or supported the right to food. Not surprisingly, De Schutter argued that trade liberalisation was a hindrance to governments achieving food security, and Lamy, while agreeing that the right to food was important, argued the opposite. They did, however, agree that food self-sufficiency was not a desirable objective. 1236

De Schutter’s case focused on the dangers of trade liberalisation, dangers which made countries more vulnerable to international markets and, hence, were destabilising. This was especially so where a country’s policy options were constrained by the content of WTO agreements and, therefore, lacked the policy space to respond in the interests of their populations. He described the four ‘dangers’ of trade as the focus on country specialisation in the production of a narrow range of goods and services at the expense of a more diversified production base; the vulnerability that arose from this dependency on a narrow range of exports, whether that be through weak sales volumes or prices; the increased inequality that liberalisation brings as the benefits accrue to a small number of larger farmers at the expense of a large number of small farmers; and the disproportionate share of the food price that is captured by those higher up the agri-food chain, at the expense of small growers, in particular. De Schutter was particularly concerned about this last point: ‘This is where the food crisis is. It is small farmers driven towards the cities, unable to live off their fields, relegated to subsistence farming because prices are not sufficiently profitable’. 1237

Lamy, in contrast, stressed that trade liberalisation generally brought benefits. It was a risk that was worth taking and many developing countries wanted to take this risk. His

1234 Bromley, above n 694, 20.
1235 The debate was jointly organised by the Mayor of Geneva, as part of the Open Doors to the Palays Eynard series of public presentations, and 3D, a Geneva-based NGO concerned with trade, human rights, and an equitable economy.
1237 Ibid.
main concern was that the distortions from import barriers and subsidies were preventing the full realisation of these benefits. Hence the WTO push for the US, Europe and Japan to reduce around 80 percent of their prevailing subsidies, alongside retaining flexibility for the least developed countries to increase import duties, if this was in the interest of the least developed country. But, as Lamy pointed out, imposing a tariff on imported food would not necessarily be in the interests of all people in the importing country, particularly for the urban poor who would face higher food prices as a result. In other words, food security for Lamy was about consumers and producers of food. Countries that produced little, or not well, needed to be supplied through trade. But this was not to say that some countries could not improve agricultural productivity in the way that developed countries had. Lamy also cautioned against oversimplifying the food security debate by focusing on trade liberalisation and the WTO. Trade policies were but one dimension of a multi-dimensional policy framework that also needed to include property ownership systems, storage facilities, transport and distribution infrastructure, credit availability, and water supply, for example.

At this debate De Schutter asked if he could present the conclusions of his earlier mission to the WTO to member states in the Agricultural Committee or the General Council. He was unsuccessful in this request but he was subsequently invited to meet WTO agriculture delegates at a WTO Secretariat Information Session on 2 July 2009. If the WTO summary of this presentation is an accurate guide, then De Schutter failed to convince the majority of delegates, who, not surprisingly emphasised the benefits of international trade.

De Schutter continued to develop his thinking on the impact of international trade on the right to food through 2009 and to construct a more comprehensive argument based around the realisation of the right to food as a foundational principle for the

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1238 The General Council comprises representatives of all Members and meets as appropriate between the Ministerial Conference held every two years to carry out functions of the Ministerial Conference. The Agriculture Committee is a committee of the Council for Trade in Goods, which is one of four councils of the General Council.
1239 World Trade Organization, UN Rapporteur and WTO Delegates Debate the Right to Food <http://www.wto.org/english/news_e/news09_e/aga_02jul09_e.htm>. The WTO criticised De Schutter’s analysis for being unbalanced; selective in its choice of evidence; ignoring the benefits poorer populations can gain from exporting; neglecting the harm caused by distortions with an over-emphasis on the domination of big companies; and overlooking the amount of flexibility for developing countries that is actually being negotiated in the WTO.
establishment and development of the multilateral trading system.\textsuperscript{1240} Such an approach, his argument runs:

shifts the perspective from aggregate values — from the benefits of trade for the country as a whole — to the impacts of trade on the most vulnerable and food insecure ... leads to emphasize the dimensions of participation and accountability in the negotiation and implementation of trade agreements ...[and] takes into consideration, not only the need to ensure a sufficient intake of calories for each individual, but also the availability and accessibility of adequate food i.e. containing the required micronutrients of the physical and mental development of the individual, and culturally acceptable.\textsuperscript{1241}

At the heart of De Schutter’s argument is his conviction that it is access to food, rather than availability of food, that has to be improved for poor and marginalised people. ‘Trading more food will not help them if they are excluded from production and have no means to buy the food which arrives on the markets; and producing more food will not assist them in purchasing food if their incomes remain too low’.\textsuperscript{1242} Furthermore, ‘[t]he majority of hungry people in the world are located in developing countries, live in rural areas, and depend on agriculture directly or indirectly for their livelihoods’.\textsuperscript{1243} As he points out, people can be hungry in food exporting countries, as well as net-food-importing countries, and trade in food can only take place when there is some consideration for the trade.

His summation is:

Our challenge today is not simply to produce more food, and to ensure that food flows as freely as possible from food-surplus to food-deficits regions. It is to produce it in a way which preserves the environment ... and it is essential to raise the incomes of those who are, today, most food insecure – smallscale farmers and agricultural laborers in developing countries – and so that it allows States to adequately protect the urban

\textsuperscript{1240} The most comprehensive treatment is contained in Olivier De Schutter, ‘International Trade in Agriculture and the Right to Food’ (Dialogue on Globalization Occasional Paper No 46, 2009). \textsuperscript{1241} Ibid 7–8. \textsuperscript{1242} Ibid 11. \textsuperscript{1243} Ibid.
De Schutter questions whether the trade liberalisation approach of the WTO is suited to this challenge and this shapes his four policy recommendations to individual WTO members. In brief, these are to make any WTO undertakings fully compatible with the right to food; improve the transparency of and democratic participation in the negotiations so as to avoid becoming over-reliant on international markets, boost domestic production with an emphasis on small-scale farmers; fully implement the Marrakesh Decision, and regulate private actors consistent with realizing the right to food. His recommendations for the international community were to find ways to reduce the volatility of international food prices and to regulate transnational corporations that are influential in the global food chain.

The most telling aspect of these recommendations is, to my mind, not in the policy prescriptions, as such, but in their underlining of the lack of community in the ‘international community’. In De Schutter’s assessment, viewing international trade from the perspective of the right to food is ‘new and different’, as it focuses on both the winners and losers from trade and protects the losers, who are typically vulnerable small farmers, from the impacts of trade liberalisation. The reality is that it is states that are ultimately responsible for provision and protection in the current international order. The international community in this case is the place of negotiation rather than redistribution. There is no international safety net, the absence of which heightens the fears of the risks associated with international trade, whether that be an over-reliance on international trade to generate employment and incomes or with the impact of price volatility on incomes and standards of living. But it is not only the actions of states vis-a-vis other states that impedes the building of community. De Schutter has commented on the ‘schizophrenic’ approach within the UN system to human rights and economic development, as was mentioned in Chapter 2, but there is also schizophrenia within states that are members of both the WTO and

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1244 Ibid.
1245 The decision was concerned with the provision of food aid to compensate for any negative effects of liberalising trade in agricultural products. See World Trade Organization, Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food-Importing Developing Countries <http://www.wto.org/english/docs_e/legal/35-dag.pdf>.
1246 World Trade Organization, above n 1239.
the Human Rights Council on how to approach trade and human rights considerations.\textsuperscript{1247}

V SUMMARY AND CONCLUDING REMARKS

This chapter has probed the workings of international law to assess whether the structure of international law could support an international legal-economic approach to the problem of hunger, derived from a marriage of ‘old’ institutional economics and ‘pure’ public law. A fundamental difficulty in developing such an approach is the lack of a principle within international law for unifying the attempts to respect both state sovereignty and human rights. Consequently, it is more fruitful to ask, as Koskenniemi does, not what international law is but what is it used for. Furthermore, the absence of a mechanism for resolving this duality strengthens the position of the international executive and the reliance on mainstream economic thinking within that executive.

The emergence of the responsibility to protect concept in the 2000s illustrates these two points. But the development of the responsibility to protect concept stands in marked contrast to the approach institutions of the international community have taken towards food security since that time. The responsibility to protect concept justified action: it put practice into words; it established a protective authority; it is based on the hard law of the UN Charter; it does not impose obligations; it goes beyond state sovereignty; and it constitutes an international community, albeit as a site of force. In contrast, the international approach to food security is more about justifying inaction: it is looking to put a language of human rights into practice; it is looking for an authority for provisioning; it is based on the soft law of the UN Charter; it is looking for new obligations and responsibilities; it hides behind the shield of state sovereignty; and it is in search of its community.

So, while food security has been promoted as a site worthy of international law and the intervention of international institutions, the reality is that this site has not been consecrated through effective action to reduce food insecurity. I have argued that international food problems would be more tractable, if the institutions of the international community, particularly the executive of those institutions, framed

\begin{footnotesize}
\textsuperscript{1247} Ibid.
\end{footnotesize}
problems of hunger and starvation as problems of social provisioning and accepted the responsibility that resides in their duty to provide. Thinking in terms of international social provisioning would help forge a conciliation of national and international food interests.
CONCLUSIONS

The motivation for this thesis was to try to understand the ongoing failure of international institutions to take responsibility for problems of hunger, and to ask whether there might be a way of framing approaches to hunger that moved away from the various polarities which have dominated the debate over the appropriate policy response. The questions were prompted by having observed the manner in which international institutions responded to the 2006–08 food crisis and the observation that the debate around approaches to hunger surrounding this crisis was polarised into a human rights approach versus an economic approach. Deep divisions existed at the heart of the UN ‘family’ of organisations, as the respective protagonists seemed unable (and perhaps even unwilling) to reconcile their positions and overcome these disciplinary divisions. Where the international community, through its institutions, did manage to speak with one voice, it usually reflected the policy prescriptions of the more powerful Bretton Woods institutions: mainstream economics held the high-ground of international policy making.

The thesis I have advanced in these pages is that the failure of international institutions to take responsibility for global hunger, even as they intervene to do the same, is a reflection of the particular institutional form of the UN system and the history of its approach to the question of hunger. Specifically, this failure is rooted in the structure of international law, the separation of international economic and political institutions at the end of WWII, and the privileging of neoclassical economics within the contemporary international system. I argued that institutionalist thinking, through its focus on social provisioning, provides the starting point for reconceptualising the problem of hunger as a legal-economic problem. I then built on the institutionalist approach to situate institutionalism within a public law framework to draw attention to the responsibilities of international institutions for preventing
hunger and starvation. Under this reconceptualisation, economic policy can be thought of as a duty to provide.

I SUMMARY

The legal-economic frame I have advanced emerged after a closer examination of mainstream economics, human rights, regulatory theory, an early form of institutional economics, and international law. This examination was a search for some commonality of concept, approach and language between the disciplines of law and economics, to reinforce shared concerns. It was given direction by what appeared to be widespread agreement on the unacceptability of the human consequences of hunger but this agreement seemed, nevertheless, to be unable to be translated into an agreed policy or institutional approach.

This thesis began with a ‘genealogy’ of the concepts of food security and the right to food and placed this genealogy within a broader international context that included the establishment of the FAO, the international political economy of food, and the emergence of human rights. The genealogy revealed that the approach of the international institutions to international food crises has not advanced very far at all from the approaches advocated at the Hot Springs Conference in 1943 that led to the establishment of the FAO. Certainly, the language of intervention has evolved, and food security and the right to food are part of this evolution. But, on closer scrutiny, these languages are invariably tied in some way to the technocratic and scientific languages of Hot Springs and its emphasis on production, distribution, consumption, and the science of nutrition. Moreover, neoclassical economics was mainstreamed into the international institutions at their inception and maintains its privileged position.

In a critical register, the genealogy called into question the usefulness of both food security and the right to food in shaping policy responses. The development of the normative content of both is a work in progress. Furthermore, this normative content is multifaceted and contingent, and leads ultimately to the doors of economics and political choice. More importantly, the imperative of preventing starvation and, hence, survival, is a different and distinct policy issue, to the question of the progressive realisation of food security.
On an optimistic note, both concepts have been important in focusing attention on the plight of the hungry and the food-deprived, and the Special Rapporteur on the Right to Food has been active in trying to bring about meaningful change. But any optimism is short-lived in the face of continued institutional differences arising from the respect accorded both human rights and state sovereignty, and also the rival authorities of international law and mainstream economics within a fragmented UN system.

Chapter 3 reoriented the discussion to an individual country experience to bring out more forcefully the policy choices that confront national governments. Indonesia is not a model case of economic management but it has grappled with the policy choices surrounding the question of providing food for the population. Historically, that question was well-entrenched in the public consciousness — a consciousness that had not been shaped by the languages of human rights or mainstream economics.

Three features of the Indonesian experience stood out. The first was the priority that the early governments of a newly-independent Indonesia placed on feeding the population over other policy objectives. Ensuring that people were fed was the policy priority and the focus in those early years was on agricultural development. In short, survival took precedence over broader economic development objectives, including economic growth. The government realised, however, that it could not rely on agricultural development alone to feed a rapidly growing population and that it would have to adopt a broader-based economic development strategy if people were to have sufficient access to, and purchasing power, for food.

The second feature was that, at any time, economic policy was concerned with both providing for, and protecting, the population. Successive Indonesian governments have grappled with the distributional consequences of price liberalisation and exposure to international markets and have not been afraid to modify market outcomes with a public purpose in mind. In that sense, the approach can be thought of as regulatory, but it was also about accepting the responsibility of government to provide for the population it governed.

The third was that this purpose of provisioning has been compromised in recent years as Indonesian policymakers have accommodated the policy prescriptions of
international organisations and absorbed the international discourse on food security and the right to food. Notions of purpose are being lost in battles over economic instrumentality, as was evident in the constitutional court cases that were discussed in Chapter 3.

Given that international institutions intervening in Indonesia, and elsewhere, had privileged economics and economic growth in the way they approached food problems, it was important to understand the nature of the economic thinking that permeated those institutions. In particular, it was necessary to return to the Hot Springs conference and the subsequent approaches of the international community. The position of neoclassical thinking as the dominant intellectual tradition within mainstream economics — a tradition which had been adopted by the early UN institutions — was the focus of Chapter 4. This chapter reviewed the evolution of neoclassical economic thought, emphasising its separation from political economy, and the key assumptions on which neoclassical economics is based. The neoclassical approach is highly individualistic and emphasises the role of markets in allocating resources within and across economies.

Criticisms of neoclassical economics offered in Chapter 4 were, therefore, largely concerned with the unrealistic assumptions attached to individual behaviour and competitive markets. The way neoclassical economics aggregates individual behaviour into social behaviour was also called into question. The fixation on economic growth in the interests of raising overall living standards was likewise criticised for excluding other important policy objectives, such as environmental sustainability, an equitable distribution of resources, and overall wellbeing. The general criticism was that mainstream economics lacks a moral or ethical foundation — that mainstream economics is asocial.

Yet, there are heterodox traditions in economics, such as institutionalism, that situate economics within a social and cultural context. Institutionalism goes further to emphasise the role of institutions as a policy vehicle that shapes human behaviour. If the individual and markets are seen as being embedded in the society, then the economy can then be treated as synonymous with society and economics treated as serving that society. Mainstream economics lacks the machinery to explain this
embeddedness and, accordingly, struggles with issues such as hunger and food security.

The Indonesian case study highlighted the way successive Indonesian governments have struggled to reconcile a reliance on market mechanisms with providing sufficient food for the Indonesian people. Subsumed within these discussions were oppositions of interest — between individual and society; urban and rural; national and international; and between economics and politics, including between the goals of economic policy and the distributive impacts of these policies. Institutionalism accepts the inevitability of these oppositions but it is able to navigate through them on account of its focus on social provisioning. It reconnects economics with its roots.

Another criticism of mainstream economics was that the emphasis on quantitative technique and markets distracted from what the techniques and markets were directed towards. Institutionalism is largely above this criticism, as it is grounded on the purpose of the economic inquiry and its methodological strength is the reliance on empirical observation to try and understand how the economy actually works: economic tools or economic techniques are servants to this inquiry. Latter-day institutionalists such as Hodgson and Samuels remind us that the core concern of institutionalism is social provisioning. Both Samuels and Hodgson drew attention to the problem of survival — the first claim on the institutions of provisioning — and the difficulty that mainstream economics has in confronting this imperative. Hodgson extended this thinking with his formulation of economics as the study of the institutions of provisioning. For me, this is a key conceptual foundation for reframing international institutional approaches to hunger.

If the privileging of mainstream economics is one of the core reasons for the institutional failure in the UN’s approach to food security, then economics has to be ‘deprivileged’ in some way. The institutionalist emphasis on social provisioning was the first plank in that deprivilegong. The second plank was the elaboration of the legal dimension of social provisioning in Chapter 5.

Samuels’s conception of the ‘legal-economic nexus’ was drawn out to illustrate the institutionalist emphasis on the interconnectedness of law and economics. Samuels
brings to the forefront the importance of a societal rights structure to economic policy decisions and the dynamic through which law and economics are continually (re)forming each other. Economics has a mandate from its community, in other words, and government and politics were central to the formulation and implementation of this mandate.

To explore the legal dimension of this interconnectedness, which is underdeveloped in institutionalism, this thesis looked initially towards regulatory thinking since regulation confronts the adequacy of market outcomes. That discussion reinforced the similarity of rights and regulation. First, rights cost. There are therefore implications for the government’s budget and it therefore has to have some way to decide between the competing claims on scarce government financial resources. Rights are relative in the face of this scarcity. Second, the relativity means, as Sunstein and Morgan have argued, that rights are similar to regulation in that both represent a general claim on the social order. This leads us to ask the question as to how choices between claims are made.

If rights and regulation involve choices, then that is politics — they are political choices — and this opens up fundamental public law issues of authority and legitimacy of government and the role of the administrative machinery of government. Accordingly, what needs to be emphasised is not the benefit to an individual rights-holder but rather the reconciliation of social groups. The important point for my argument is that since a conception of duties was important to both rights and regulation in addressing social problems, the framing of food security could be recast in the language of duties rather than rights — albeit with the qualification that it was more useful to focus on the government’s role as both provider and protector rather than on negative duties and positive duties. The value of rights-talk from a regulatory perspective was in its ability to draw attention to, and provide a threshold for, the high-value interests that were held by the public. These interests had the first claim on the available resources. As such, they can be interpreted as a final political good and that draws attention to political duties and the interdependency of values, institutions, and policy.

Contemporary approaches to regulation were of interest because they have moved beyond a focus on market failure to reflect the influence of human rights on the policy
debate and because they make the connection between the ‘social’ and the ‘economic’, as opposed to distinguishing social regulation from economic regulation. Prosser’s taxonomy was of particular interest because of the role he ascribed to regulation in promoting social solidarity. Social solidarity provided a route to the conciliation of individual and community interests. In my view, a similar conciliation within, and between, states is needed to make substantive progress in the food security debate.

Prosser also de-emphasised market-failure justifications for the provision of public goods, on the grounds that the market-failure approach automatically treated any interference in the market, or any non-market approach, as a second-best approach. Something that society values is being expressed in these non-market contexts and it does not follow that non-market approaches are always second best. This thinking is consistent with the institutionalist position that social provisioning takes place through and outside the market.

The second avenue for exploring the interconnectedness of law and economics was the search for legal traditions akin to institutionalism. One of the criticisms of mainstream economics was that the emphasis on technique and markets distracted from what the techniques and markets were directed towards. Institutionalism is largely above this criticism, as it is grounded on, and in, the purpose of economic inquiry. The use of economic technique is secondary to this purpose. There are similar traditions to institutionalism in law in the form of the functionalist style of public law and, to some extent, legal realism, which came into prominence in parallel to the rise of institutionalism in the late 1800s and early 1900s.

In marrying institutionalism and functionalism, I have brought into the foreground the importance of government and law to the conciliation, or balancing, of individual and collective interests, and to underpinning social provisioning. I argued that government played an essential role as designer and implementer of the rights or entitlement system and as a provisioning institution, where necessary, to underwrite the essentials of life and the provision of essential public services. In addition, I argued that the balancing of interests was achieved through a political negotiation with the government playing a pivotal role in this negotiation. Drawing on Loughlin, I brought
this negotiation into a public law framework. The practice of this negotiation was, for Loughlin, at the heart of public law, which he presented as an exercise in acknowledging competing claims and negotiating between these claims. It was an exercise in prudential judgement; it was political jurisprudence. In the background, however, were issues of antecedent authority and political power, issues that go to the heart of the international order.

The thesis then turned to the question of whether social provisioning could be translated from the ‘national’ to the ‘international’. The discussion in Chapter 6 showed that this was not straightforward. The institutionalist emphasis on social provisioning was tractable but the institutionalist approach to social provisioning cannot be dissociated from the underlying governance structures. To this end, international governance arrangements were found wanting. The discussion of the structure of international law clarified why this was so: the UN Charter pays homage to both state sovereignty and universal human rights but there is no mechanism within international law for resolving these competing claims. Exacerbating this absence is the separation of international economic and political institutions. This separation, coupled with the absence of a mechanism for resolving competing claims, strengthens the position of the international executive, which had already become more active in the UN era.

Consequently, it is more fruitful to ask, as Koskenniemi does, not what international law is, but what it is used for. The responsibility to protect concept provided an illustration of such a use. As we saw, that use was to justify action — to put deeds into words, as Orford puts it. The international community’s approach to food security stands in marked contrast. This is more a case of the failure to put words into deeds. And while the international community has identified food security as a site worthy of international law, the reality is that this site has not been consecrated through effective action to reduce food insecurity. That ineffectiveness reflects a contest between rival jurisdictions within international law, as well as a contest between the universal jurisdiction of market-oriented economics and international law. This was well-illustrated by the debate between the Director-General of the WTO and the UN Special Rapporteur on the Right to Food described in Chapter 6.
II CONCLUDING REMARKS: PUTTING WORDS INTO DEEDS

Minsky called for a reorientation of 21st century economics towards that which characterised institutionalism in the early 20th century. The argument developed in this thesis supports that call but it also extends it. The search for an economics fit for the 21st century must also accompany the search for international legal form fit for the 21st century. It is a search for ‘an international law of everyday life’\textsuperscript{1248} to complement the institutionalist focus on ‘the ordinary business of life’.\textsuperscript{1249}

Institutionalists locate economics within a structure of entitlements chosen by a community that is willing to take responsibility for providing for, and protecting, that community. But, as the discussion on international law made clear, there is no consistent rights or entitlements structure within the international community. It is not surprising, then, that international institutional debates about the appropriate response to the presence of hunger bounce between arguments on autonomy and arguments on community, and struggle to reconcile the universal market-based model of provisioning with the idea of individual states having to bear responsibility for those that lose out under that model.

This is not to say that the public policy goal of addressing hunger and starvation — of ensuring that the members of the international community are provided for — is not worthwhile. Rather, it is saying that if this goal is to be realised, then the international community has to reconceptualise the pursuit of food security. This reconceptualisation requires an acceptance that while ‘food security’ and the ‘right to food’ might be powerful discursive concepts, they are not adequate constructs for framing policy, and are even less suited to making the policy choices that are required. Similarly, mainstream economics is, on its own, not an adequate organising construct. Mainstream economics certainly has a crucial role to play in identifying choices, and what is involved in these choices, but it has no authority to make those choices.

Deprivileging mainstream economics requires economists and international economic organisations to accept the limitations of the knowledge and techniques of mainstream economics and the consequent limitations of their institutional practice. It

\textsuperscript{1248} Charlesworth, above n 27, 391.
\textsuperscript{1249} Backhouse, above n 26.
also requires an acceptance of the distinction between economics and economic policy. In the absence of supra-national governance, and while the international executive maintains such a central role in international political economy, this thesis challenges that executive to consider what it means to act responsibly on international food problems. I have argued that institutionalist thinking provides the starting point for this institutional practice through its emphasis on social provisioning, that is, on the purpose of economics.

Thinking with public law enables a richer conception of social provisioning. It focuses attention on who is speaking in the name of economics, where the authority to do so resides, and who is ‘the public’ of international law. It focuses attention on the office of the economist and what it means to provision in a responsible way. I have conceptualised this responsibility as a duty to provide. Thinking in this way would better align international organisations with the community they purport to serve. The international organisations would then be far better placed to put words into deeds in the pursuit of food security.

The important governance insight of institutionalism is, therefore, not that some form of supranational governance is needed. Instead, the point is that social provisioning — the proper object of economics — demands a form of governance that accepts the duty to provide for all members of a community, whatever its scale.
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