1. Introduction

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1. INTRODUCTION

Forty years ago, at the height of the dominance of the Organization of Petroleum Exporting Countries (OPEC) and the approaching peak of the importance of oil, scholars from a number of western legal traditions gathered to consider the legal character of the primary vehicle governing the relationship between oil companies and host states – the petroleum licence.¹ The resulting papers, collected together in the monograph *The Legal Character of Petroleum Licences: A Comparative Study* (the 1981 study) and edited by Terence Daintith, considered the legal nature and the legal context of the licence ‘in the sense of several legal and constitutional rules of the relevant system within which it operates.’² Encompassing a variety of legal cultures and experiences, the 1981 study links the diverging jurisdictions through legal traditions – Australian, UK and Canada law through its common law heritage, and Denmark and Norway with its shared (until the 19th century) legal tradition based on *Dansk Lov* 1683, and the Norwegian equivalent of 1687.³ In each of the countries examined in the 1981 study, the licences examined had broadly the same content and effect.⁴ Collectively identified as an access licence, the licences examined grant the licence holder exclusive rights for exploration and/or production, and transfers to the licensee title in any petroleum extracted.⁵ In receiving

¹ Various terms in various jurisdictions are used to describe the document through which petroleum exploration rights are obtained. Like in the 1981 study, the term licence will be used inclusively here to collectively refer to these documents in a general sense. In the study of a particular jurisdiction the terms of art that used in that jurisdiction will be employed.

² Terence Daintith (ed), *The Legal Character of Petroleum Licences: A Comparative Study* (IBA, 1981), 3.

³ Ibid, 9.

⁴ Ibid, 9.

⁵ Ibid, 9.

these rights from the state to explore for and take petroleum, the licence holder also has a corresponding duty to pay the host state certain fees, together with a royalty on production or a special taxation. In addition, the licence holder agrees to accept a range of obligations and powers of state supervision and/or intervention in the way he carries out operations under the licence. Therefore, as noted by Daintith, the licence contains elements of both consensus and bargain, particularly in relation to the financial terms on which the licensee undertakes the risky venture of petroleum exploration,⁶ and the imposition by the state of a host of obligations 'designed to protect the public interest in the proper exploitation of the state's petroleum wealth.'⁷

Thus, the licence is essentially the vehicle upon which the state grants access to its petroleum resources and exerts control over the licensee exploiting that petroleum through varying levels of intervention. The question of the legal character of a petroleum licence is necessary in order to ascertain and understand the rights accrued by the licensee, and the way the host state can deal with the licence. Such dealings include the alteration of the conditions of the licence, the revocation, suspension or cancellation of a licence, or an alteration to the regulation of the operation of petroleum recovery. It is these first two elements upon which we primarily turn our attention to in this book. The unilateral alteration of the conditions for a licence has long been the subject of discussion and even disagreement between the licensee and the host state. Generally, such disagreement focuses on the fiscal terms relating to taxation or the payment of fees and royalties. However, in the modern age there are other reasons for the alteration of the terms of the licences.

Such alterations are exemplified by the UK jurisdiction where rapidly declining production in the North Sea has prompted the UK government to require licensees to work both individually and together in order to maximize the recovery of petroleum from the North Sea. Such 'working together' includes the requirement to allow third party access to facilities and infrastructure. Such an alteration, hitherto unheard of in the UK, challenges the very notion of the legal character of the petroleum licence in the UK. Similarly, public response to exploration drilling by Equinor in the frontier Great Australian Bight region raised the possibility of cancellation or revocation of exploration licences, or a failure to grant permission to undertake drilling activities, both prior to and after petroleum was discovered. It is within this modern context that the need to revisit the legal character of petroleum licences arose.

This book revisits the 1981 original study into the concept of the legal character of petroleum licences. It incorporates most of the original jurisdictions

⁶ Ibid, 9.

⁷ Ibid, 9.

studied, as well as encompassing some new jurisdictions, not all from the western legal tradition.⁸ Aside from the incorporation of a study of Australia, Canada, Norway and the UK which were considered in the original study, this book has extended the study to include the USA, the Netherlands, Uganda, Russia, Mexico and China. The USA and the Netherlands were incorporated to reflect their longevity as petroleum jurisdictions and to demonstrate how the legal character of petroleum licences both exist and have evolved in those jurisdictions. Uganda, as an emerging petroleum jurisdiction operating within a former colonial common law jurisdiction, has been incorporated as it provides an excellent study of emerging post-colonial African states, and the challenges in establishing a licensing system. This book also incorporates three non-western legal traditions: Russia, Mexico and China. For Russia and Mexico, petroleum has been a longstanding resource that has been exploited in each state. However, due to political and ideological factors, production has been, until recently, the purview of the state only. Similarly, China, although without a long petroleum exploration and production history, also exerts strong state control over petroleum production. Given the prominence of these states in global petroleum, it is necessary to include such states that are prominent within the petroleum system but differ considerably to the previously studied western legal traditions. In doing so, it is possible to gain a different perspective on the legal character of petroleum licences by examining states where the control exerted is strong and the government seeks to not merely be a bystander but also participate in petroleum activities.

An important reason for considering the legal character of a petroleum licence is that of security for the licensee. As owner of the petroleum (except for the US in some circumstances), the state has the capacity to control access to, and conditions of, access to petroleum. A licence that grants access to petroleum differs to one that grants operational authority. Therefore, this study, like the 1981 study, focuses on petroleum exploration and production licences. However, in emerging jurisdictions such as Uganda and China, there is also a consideration of operational licences given the need to discern between the access and operational licences, and how they interact in these states. The rights conferred by access licences differ greatly to operational licences. By their very nature operational licences infer a mere administrative right to undertake an activity, such as the placing of an installation of a pipeline. Operational licences are therefore required for permission to use the area. Such use is part of the access licence but requires separate operational

⁸ Originally this study was to include an analysis of Denmark, in line with the original study. However, this chapter is not included due to the untimely death of Professor Anita Ronne, who participated in the workshop that preceded this book.

licences granted in some jurisdictions. An operational licence is administrative in nature, akin to other administrative rights that grant a right to use that can be withdrawn if the licence holder does not comply with the conditions. This is because under an operational licence nothing is taken from the land, but rather makes use of the land. What sets apart petroleum access licences from operational licences is that a petroleum access licence confers upon the licence holder the right to look for and ultimately take petroleum that belongs to the state (or the state has sovereign right over), which can then be sold for profit by the licence holder. Given the proprietary nature of a petroleum access title, the legal character of this title is of upmost importance and deserving of further study. Therefore, it is the petroleum access title that is the focus of this book in a similar manner to the focus of the original 1981 study.

2. THE CONCEPT OF LEGAL CHARACTER

As a concept, 'legal character' has no set definition. If one were to look up the concept in a legal dictionary, it would not be possible to find legal character defined in a readily accessible manner. Yet, the concept of legal character first used by Daintith in *The Legal Character of Petroleum Licences* is not defined.⁹ In the original 1981 study on the legal character of petroleum licences, Daintith discusses the notion, particularly in the context of clashing legal values specific to different cultures. However, the term itself is not defined even though it is clearly an integral part of the study and gives its name to the title of the book. This book, in continuing the work of Daintith, also utilises the concept of 'legal character.' Indeed, a search in legal databases finds many articles written on the 'legal character' of all manner of legal areas, including international agreements,¹⁰ joint ventures¹¹ and agricultural enterprises.¹² Although utilising legal character in analysing a legal area, in all of these articles the term legal character is not defined. Yet in order to use 'legal character' as a handy taxonomy in analysing petroleum licences, it is necessary to define what 'legal character' is.

In this context, the term legal character refers to the attributes and qualities that a petroleum licence possesses. In broad terms, such a character may be

⁹ Terence Daintith (ed), *The Legal Character of Petroleum Licences: A Comparative Study* (IBA, 1981).

¹⁰ L E S Fawcett, 'The Legal Character of International Agreements' (1953) 30 *British Year Book of International Law* 381–400.

¹¹ Özel Hukuk, 'Legal Character of Joint Venture' (2017) 2017(2) *Yildirim Beyazıt Hukuk Dergisi* 97–126.

¹² Jean Schmidt and Akar Ocal, 'Legal Character of Agricultural Enterprises' (1980) 10(3) *Banka ve Ticaret Hukuku Dergisi* 769–72.

contractual in terms of the contractual relationship between the host state and the oil company or it may be administrative in nature, such as a grant of a petroleum licence as an administrative right. It may also be proprietary in nature, even though this may not be specified, since the grant of a right to recover petroleum necessarily imbue property rights, given that the oil company is granted permission to take petroleum from the land upon severance.¹³

The legal character also pertains to what category we place a legal phenomenon in, and this will influence the evaluation and which rules, principles and values influence the solution. In contract law the important value is to secure foreseeability by making the parties bound to the contract, while in constitutional and administrative law, the importance of the state maintaining its ability to secure public interests by new legislation is important. Licences are influenced by both considerations, thus presenting the legal classification conundrum. There is a clear difference between states as resource owners and private resource owners, as the latter do not have any responsibility for public interests and no possibility to change the legislation.

3. THE LEGAL CULTURE APPROACH

Legal culture is, like legal character, an unquestionable fact that is still hard to define. We can observe that law is experienced and practices differently at different times and in different places. However, it is difficult to analyse and precisely understand the reasons for the differences. Hence, too often legal character and legal culture just become labels put on a phenomenon when we know what matters, but do not know exactly how and why.

Still, we have chosen to ask the contributors to this book to use legal culture as a backdrop when exploring the petroleum licence regime of their country. In doing so, we wanted to obtain a more contextual and system-oriented approach, teasing out not only the facts of the petroleum licence regime, but its preconditions and inner coherence.

This is an ambitious goal. First, because a context and a system are endlessly far-reaching, and any delineation will be artificial. Second, because the context and system relations of each country is different, and hence where you draw the line differs. However, this is taking legal culture in its purity. However, legal culture varies, and hence studies with a legal cultural backdrop can and will be different. Importantly, a legal cultural approach can be used to bring out structures and patterns. We have found that despite all their differences, we can still group the petroleum licensing regimes investigated in this book

¹³ The term severance refers to when the petroleum reaches the surface at the top of the wellhead.

into three categories, based on their distinct characteristics attributed to the relationship between state and industry: minimal, regulatory and participatory intervention regimes. On an abstract level, what determines the categorization are political, legal and economic factors. On a more fundamental level, the regimes are characterized by the role of courts in developing the law and securing rights, the character of the licences and how they are obtained, and the role of the industry in the economy.

Can legal culture explain the petroleum licensing regimes in different countries? To a large extent, a petroleum licensing regime is also a question of politics and economy, and not law alone. This we will deal with later. It is the character of a legal culture, that such factors are intertwined and hard to detect. In the following, we will use the legal cultural approach to detect and display what we find are the characteristics and the internal relationships of the petroleum regimes investigated in this book.

However, first we must start with an essential acknowledgement: the essence in the notion of legal culture is that one size does not fit all, also in a legal context. When it comes to petroleum licensing regimes, this means that one regime will not be exactly like another, even if efforts are made to achieve parallelism. This has two implications.

The first implication is that universal law can never be more than an ideal that serves as inspiration for local law. The existence of universal law can be debated endlessly. However, in European legal history the rule has been the existence of law with universal aspirations. That is law that at one point in history is experienced as and claimed to have universal validity. Such law is typically natural law, Roman law, Canon law, human rights, UN-law and – in a much narrower context – EU-law. EU-law does apply to some extent to petroleum licensing through the Hydrocarbons Licensing Directive of 1994. It is hence of importance to the United Kingdom, the Netherlands and Norway, whose petroleum regimes are explored in this book. However, EU-law has a limited effect on the regimes in these countries, and despite some similarities they are in general quite different. In general, law with universal aspirations does not shape petroleum regimes. The similarities and differences of different petroleum regimes can hence not be explained by their relation to law with universal aspirations, and this topic will not be any further explored. Instead, similarities and differences stem from the extent you build a petroleum licence regime on 1) existing national law, 2) the petroleum law of other countries, and 3) to what extent you alter and adjust the law you borrow from others to fit with existing national law.

This brings us to the second implication, which is that a legal idea, principle or rule cannot be transplanted from one legal context to another without an alteration of content and function. This is of large relevance to petroleum regimes. Historically, a country has looked to the legal regimes of other coun-

tries when making their own. The reason is that law is an instrument to create stability in society. To alter existing law and produce new law, we can rely on experience or experiment. Legal experiment is not unknown in legal history. When the Norwegian Parliament in 2002 enacted new legislation stating that 40% of board members must be women,¹⁴ it was a globally unprecedented rule. The Norwegian legal experiment was later adopted in several countries based on the Norwegian experience.¹⁵ However, even this legal experiment was not entirely cut loose from experience, since women from the middle of the 19th century had gradually been granted more and more rights and responsibilities without the anticipated catastrophe occurring.

In general, experience is the main source for legal change. Legal experience is, very generally speaking, of two kinds: historical and comparative. Historical experience can be of relevance when changing the law. For instance, the French mining legislation from 1810, *Loi concernant les mines, les minières, et les carrières*, was adopted in the Netherlands during the French occupation during the Napoleonic wars becoming a pillar in Dutch petroleum legislation until it was replaced in 2003. In general, mining law has been of importance in the first phase when developing petroleum law. However, in general it is limiting to be guided by history when making something new. Rather you want to build on the more recent experience of others instead of your own history. It is in this transplanting process when looking to comparative experience that a notion of legal culture appears.

4. LEGAL CULTURE AND PETROLEUM LICENSING REGIMES

A major acknowledgement made by Alan Watson in his classic *Legal Transplants: An Approach to Comparative Law* from 1974, is that legal transplanting is historically a major source of legal development. It can be debated how well the term ‘legal transplant’ describe the actual process.¹⁶ We will instead turn our attention to history, since the notion of legal culture is as old as the idea of universal law and of legal transplanting. In the 7th century Isidor of Sevilla, a bishop on the Iberian Peninsula, noted that good laws were those adjusted to local conditions and customs: ‘A law should be honourable,

¹⁴ Morten Huse, *Boards, Governance and Value Creation: The Human Side of Corporate Governance* (Cambridge, 1997) 94–95.

¹⁵ See for instance *New York Times*, 6 March 2015, ‘Germany Sets Gender Quota in Boardrooms’; www.nytimes.com/2015/03/07/world/europe/german-law-requires-more-women-on-corporate-boards.html, accessed 14 April 2020.

¹⁶ See for instance Esin Öricü, ‘Law as Transposition’ (2002) 51(2) *The International and Comparative Law Quarterly* 205–23.

just, feasible, in agreement with nature, in agreement with the custom of the country, appropriate to the time and place.’¹⁷ The need for local adjustment of law, as expressed by Isidor of Sevilla, became a central tenet within the Church in the Middle Ages. Hence, throughout the Middle Ages Canon Law was to a large degree generously adjusted to the local culture, including the legal culture, in which it was applied. The same idea was later expressed in 1748 by Charles Montesquieu in the publication *De l’esprit des lois*, where, like Isidor of Sevilla, Montesquieu advised the lawmaker to make law in accordance with the local natural and cultural conditions:

They [the laws] should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives ... they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to the inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be consider.¹⁸

In the aftermath it can be claimed that legal culture for Montesquieu was a factor to take into consideration when legislating. These ideas were of great importance to the emergence of the idea of a close relationship between nation and law.¹⁹ Thus, the notion of legal culture was there, but not the term. This is because until recently, the notion of legal culture was based on observation of actual practice and not a theoretical exercise and label.

The American professor in law and legal historian Lawrence M. Friedman was a pioneer in taking the notion of legal culture and turning it into an analytical tool to understand law and – and not at least in – society. In his 1975 book *Legal Systems* he defined legal culture as ‘ideas, values, attitudes and beliefs of a specific group of people towards law.’²⁰ In a 1990 article he refined the definition to be ‘ideas, attitudes, values, and opinions about law, the legal system, and legal institutions in some given population.’²¹ This definition can be taken as representative of a whole tradition within legal cultural research

¹⁷ Bishop of Seville, *The Etymologies of Isidor of Sevilla* (Cambridge, 2006) 121 no. xxi.

¹⁸ Charles Montesquieu, *The Spirit of the Laws* (Batoche Books, 2001) 23.

¹⁹ See Roger Cotterrell, ‘Comparative Law and Legal Culture’, in *The Oxford Handbook of Comparative Law*, Mathias Reimann and Reinhard Zimmermann (eds) (Oxford, 2019) 714–15.

²⁰ Lawrence Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1977) 223.

²¹ Lawrence M Friedman, ‘Some Thoughts on Comparative Legal Culture’, in *Comparative and Private International Law – essays in Honor of John Henry Merryman on his Seventieth Birthday* (Duncker & Humblot, 1990) 53.

where the emphasis is on mentality rather than on institutions.²² There is also another tradition, and the English professor in law and comparatist John Bell claims that '[T]he law is something more than simply a system of rules or legal standards. Those rules operate in a context of institutions, professions and values that form together a "legal culture".'²³ Legal culture therefore is not merely a question of ideas and of law, but also the institutional practices that constitute law.²⁴ With this work we place ourselves more in the latter tradition, and define legal culture as ideas and expectations of law made operational through institutional(-like) factors.²⁵ We find that a legal culture is created in the interplay between ideas, expectations and practice.

The dominant practice shaping legal culture is conflict resolution. A society can do, and has historically done, without for instance legislation and professional lawyers. However, it cannot do without conflict resolution without collapsing in violence and chaos. When wanting to detect the character of law, starting by looking at conflict resolution will most of the time give the best result. Not because conflict resolution will always give you the answers you are seeking, but it will always direct you to the answers.

This acknowledgement is an important part of the backdrop for our classification of petroleum licence regimes in three categories: minimal, regulatory and participatory intervention regimes.²⁶ Viewing a petroleum licence as a contract becomes more natural in countries with the judiciary as a branch of government to be reckoned with in politics and society. This is because contract law is then mainly developed through court practice, which again assures that the courts, based on the actual arguments of the parties, will not restrain from reviewing the law in a petroleum licence dispute and act to secure rights. In countries where the judiciary (the courts) is a weak branch of government, the development of contract law will be done through legislation, and security for rights is hence secured by acts of the legislature rather than courts. Hence, petroleum licences tend to be more of an administrative right than a contract.

We find that the judiciary is a branch of government to be reckoned with in countries like Australia, USA and Canada. This is because the courts operate

²² See the discussion in Cotterrell 2019: 720–4.

²³ John Bell, *Judiciaries within Europe* (Cambridge University Press, 2006) 6, a definition he also uses in John Bell, *French legal cultures* (Butterworths, 2001).

²⁴ Jørn Øyrehaugen Sunde, 'Managing the Unmanageable – an Essay Concerning Legal Cultural Understanding', in *Comparing Legal Cultures*, Knut Einar Skodvin, Søren Koch, Jørn Øyrehaugen Sunde (eds), (Fagbokforlaget, 2017) 15 (13–25).

²⁵ Jørn Øyrehaugen Sunde, 'Champagne at the Funeral – An Introduction to Legal Culture', in *Rendezvous of European Legal Cultures*, Knut Einar Skodvin, Jørn Øyrehaugen Sunde (eds), (Fagbokforlaget, 2010) 20 (11–28).

²⁶ Brent F Nelsen, *The State Offshore: Petroleum, Politics and State Intervention on the British and Norwegian Continental Shelves* (Praeger, 1991) 8–9.

according to a *stare decisis* principle and are interpreters of the constitution. The petroleum licensing regimes in these countries also have much in common, and we have classified them as having a minimal intervention regime, where each jurisdiction is characterised by the State engaging in setting the laws and regulations for petroleum activities, and control over important aspects of petroleum development that have lasting effects, such as production levels and field priorities are largely left in the hands of the oil companies.²⁷ That means firstly that the petroleum licences, at least for the USA and Canada, are as much a contract as an administrative grant by government. This is again linked to petroleum being a part of a property rights regime instead of purely attributable to state sovereignty. In all these countries the federalist system of government means that the regulation of petroleum is a matter of constitutional interpretation, as well as often a negotiation between states/provinces and the federal government. Nowhere is this clearer than in Australia where the Offshore Constitutional Settlement sees the sharing of regulation of petroleum activities between the Commonwealth and states, with states regulating the first three nautical miles seaward from baseline, and the Commonwealth government the remainder. In these countries petroleum licences are granted according to a bidding system where the largest bid wins, and they have no national oil company that is both a petroleum industry and government actor at one and the same time. All together, these factors reflect that petroleum is an industry, and like any other industry is regulated legally and not politically.

Countries with a judiciary to be reckoned with to some extent, like the United Kingdom and the Netherlands,²⁸ we have classified as having a regulatory intervention regime. In this regime, the state assumes the role of overseer of activities, with the state not content to merely referee from the sidelines. Rather, they play an active role in every aspect of petroleum development, with the state involved as deeply as possible in the day-to-day operations without actually engaging in the activity itself.²⁹ Although the United Kingdom is the cradle of the *stare decisis* principle, due to the Parliament sovereignty principle the courts are no major interpreter of the constitution.³⁰ Dutch courts formally stand in the French tradition with a weak judiciary. However, they write

²⁷ Ibid, 8.

²⁸ Since the Uganda petroleum licence regime is still in an initial phase, we do not yet have the information we need to display the character of the Ugandan regime on the same level and the UK and Dutch regimes.

²⁹ Nelsen 1991: 8–9.

³⁰ See Neil Andrews, 'The Supreme Court of the United Kingdom: A Selective Tribunal with the Final Say in Most Matters', in *Supreme Courts in Transition in China and the West*, Cornelis Ehdrik (Remco) van Rhee and Yulin Fu (eds) (Springer, 2017) 39 (37–51).

lengthy decisions and take former decisions into account when passing new ones.³¹ In both jurisdictions, Parliament sovereignty has been on the losing end for a couple of decades, as seen for instance by the Dutch *Urgenda* case and the English *Heathrow Third Runway* case, both dating from 2020.³² In both the UK and the Netherlands, petroleum licences are partly contractual and partly grants. Licences are awarded according to an objective discretionary system. Here, there is no bid system, but rather a system where several considerations are also taken into account. The considerations to be taken into account have, since 1994, been stipulated in Articles 4 and 5 of the Hydrocarbon Directive.³³ There are no state-owned oil companies, but each has a major international oil company – British Petroleum in the United Kingdom and Shell in the Netherlands – that serves as a receiver of political signals to the industry. In these countries the petroleum industry is an industry, but more than just one industry among others. Here, the dominance of the petroleum activity and company is typical, as is the role of the state in actively managing both petroleum activities and the industry. Uganda appears to be an apparent outlier in this classification, given its weak judiciary. However, it must be remembered that the Ugandan legal system is based on the English legal system, dominated by residual British law. Hence, Uganda can be readily classified in a similar vein to UK common law.

Countries where the judiciary is a weak branch of government, that is where the courts do not operate according to a *stare decisis* principle and are no major interpreter of the constitution, often have a more participatory intervention regime. In these countries we find that petroleum licences are government grants based on state sovereignty, the highest bid is not the sole consideration if there is a bidding system, and state oil companies are both a petroleum industry and state interests influence petroleum governance. These countries in our study are Norway, Russia, Mexico and China. In Norway, Russia and Mexico, the petroleum industry is an industry of great national importance, while it in China is an industry of national priority.

³¹ See CR van Rhee and RR Verkerk, ‘The Supreme Cassation Court of the Netherlands: Efficient Engineer for the Unity and Development of the Law’, in *Supreme Courts in Transition in China and the West*, Cornelis Ehndrik (Remco) van Rhee and Yulin Fu (eds) (Springer, 2017) 95 (77–96).

³² The *Urgenda*-case in the Hoge Raad 13 January 2020; <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>, accessed 14 April 2020, and the *Heathrow third runway*-case in the Court of Appeal (Civil Division) 27 February 2020; www.judiciary.uk/judgments/r-friends-of-the-earth-v-secretary-of-state-for-transport-and-others/, accessed 14 April 2020.

³³ Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospecting, exploration and production of hydrocarbons.

Table 1.1 Overview of petroleum licensing regimes

Country	The role of courts		Character petroleum licences	Bidding system	National petroleum company	The character of the petroleum industry
	<i>Stare decisis</i>	Constitutional interpreter				
Australia	Yes	Yes	Grant	Work Program and Cash Bid	No	Industry
USA	Yes	Yes	Contract	Cash Bid	No	Industry
Canada	Yes	Yes	Contract	Cash Bid	No	Industry
United Kingdom	Yes	Some	Contract and grant	Objective Discretionary	One large petroleum company in the nation	Industry of importance
The Netherlands	Some	Some	Contract and grant	Objective Discretionary	One large petroleum company in the nation	Industry of importance
Uganda	Yes, although rely on UK cases	Some	Contract and grant	To be decided/ cash	Contemplated but not to date	Not yet determined
Norway	Yes	Yes	Grant	Objective Discretionary	Yes	Industry of large national importance
Russia	No	No	Grant	Dysfunctional	Yes	Industry of large national importance
Mexico	No	No	Grant	Dysfunctional	Yes	Industry of large national importance
China	No	No	Grant	Dysfunctional	Yes	Industry of large national importance

This leaves us with the overview of the three different categories of petroleum licensing regimes we have identified in Table 1.1.

However, it is not quite as simple as this. If we first look at the category participatory intervention, Norway has a judiciary to be reckoned with, operating according to a *stare decisis* principle, with a major role in interpreting the constitution, having performed constitutional review since 1821,³⁴ yet is still a participatory intervention petroleum regime. Norway has no bidding system, not even a dysfunctional one like in Mexico, but grant licences according to an objective discretionary system. Norway has a tradition – though modified over the last two decades – of one single national oil company, like Mexico, and not two or three like Russia and China, that for decades was a dominant actor in the Norwegian sector. In addition, in Norway the state determines the joint venture parties within a licence and also selects the licence operator, which is a system you do not find in China for instance.

Perhaps one reason for this outlier nature of Norway is the type of state participation. Whereas once Norway had a state oil company that was a vehicle for state entrepreneurship and control, similar to Mexico, Russia and China, the partial privatisation of Statoil through an IPO on the Oslo and New York stock exchanges means that although Statoil – now Equinor – participates as a state oil company, it no longer acts on behalf of the state's interest. Rather it is now a state-owned entity used as a vehicle for commercial activities. This is because the company must meet the demands of the stock exchange and the shareholders rather than merely the state. Today Norwegian state participation is wielded through the *State Direct Financial Interest* where the state, when determining the joint venturers in a licence, inserts itself into a licence through the management company Petoro, thereby undertaking entrepreneurship activities through direct investment. Thus, today the 'participatory intervention' exhibited by Norway is less of a technical participation like Russia, Mexico and China, and more an economic participation.

Perhaps another reason for the poor fit of Norway into the participatory intervention category is the political ideology of Norway compared to that of Russia, Mexico and China. Dealing first with China, it is clearly a country that is communist with a market economy. Similarly, Russia arose from the ashes of the breakup of the communist former Soviet Union. Although not a communist state, Mexico nonetheless has communist influences on its government when seeking to exert control over its resources in the 1930s, particularly through Leon Trotsky and other left-leaning thinkers of the day. What is clear is that Mexico, Russia and China clearly value and promote strong state control

³⁴ Jørn Øyrehagen Sunde, 'Dissenting Votes in the Norwegian Supreme Court 1965–2009: A Legal Cultural Analysis' (2012) 1 *Rechtskultur – Zeitschrift für Europäische Rechtsgeschichte* 60–3 (59–73).

over the commanding heights of the economy,³⁵ a concept coined by Lenin in 1922 to refer to the critical parts of the economy, including electricity generation, heavy manufacturing, mining and transportation.³⁶ Although Norway does not share this history or style of leadership, it has, since gaining independence from Sweden and Denmark, forged a social-democratic state where the interests of the people, including access to the commanding heights of the economy, have been the forefront of government policy. Thus, the tie binding Russia, Mexico, China and Norway in such participatory intervention is strong state control over the economy's commanding heights.

With Norway we see that the basic structural elements – a judiciary not to be reckoned with – is different, and therefore Norway sits awkwardly in the category of participatory intervention petroleum regimes. This demonstrates that any kind of classification is only an instrument to create an unnatural order in a field that is multifaceted. If we take perhaps the most homogeneous category, minimal intervention regime, we also find differences. Australia has a far more constrained contractual and property right-based petroleum regime than, for instance, the USA. To some extent, Australia is in this aspect as close to the United Kingdom or Norway as the USA. If we then turn to the category regulatory intervention petroleum regimes, we find that in the Netherlands there is a tradition of state participation in the production of petroleum, similar to what we find in Norway, and different from what we find in the United Kingdom.

To understand these differences, we must turn to the starting point of this excursion – legal culture as an experience and not as a theoretical exercise. We can use legal culture to systematise and understand. However, what we label legal culture are ideas and expectations that are operationalised by institutions. These ideas, expectations and practices are linked to the interaction between law and context. Different context means difference in petroleum licensing regimes. Even though we can make and apply the categories minimal, regulatory and participatory interventions to petroleum regimes, they are only a theoretical instrument to order a complex reality. In reality, the variations will always overcome such theoretical tools. Hence, each petroleum licensing regime is unique, because they are fitted to a specific context. One size does not fit all where petroleum licensing regimes are concerned.

³⁵ See Daniel Yergin and Joseph Stanislaw, *The Commanding Heights: The Battle Between Government and the Marketplace that is Remaking the Modern World* (Simon and Schuster, 1998).

³⁶ Arnold Klingg, 'The New Commanding Heights' (2011) *Cato Institute*, www.cato.org/publications/commentary/new-commanding-heights. Accessed on 4th March 2020.

This is true for all legal fields. However, it is truer for petroleum law than for most fields of law. This is because petroleum is of great importance to the national economy. It can be important because of the revenues through sale and taxes, as in Mexico, for national industrial production, as is the case in China, or as an industry, as in the US. The development of the petroleum licensing regime will hence not only be a product of historical and comparative experience. It will also be a product of politics. For instance, Russia is placed in the category participatory intervention regime with China, Mexico and Norway. Russia has a communist past, China has a communist present, Mexico has a petroleum regime inspired by socialist ideas, and Norway had social democratic governments for most of the post-war period. This still does not explain why Russia is a part of the category. In the 1990s, Russia turned its back on its communist past, and was heading in a US direction in many policy fields. To make a turn from the way things were heading, was a political choice. However, the importance of the petroleum industry and experience with weak courts and instead the role of the legislator in developing law and ensuring rights made the political choice easier.

Isidor of Sevilla claimed in the 7th century that '[A] law should be honourable, just, feasible, in agreement with nature, in agreement with the custom of the country, appropriate to the time and place.' When reading this statement, we can imagine that it was made by a Prime Minister or Minister of Petroleum in almost any government in the world today instead of a Spanish bishop more than 1500 years ago. When it comes to the petroleum licensing regime, this is ensured by fitting it to the rest of the system, and by making political decisions. It is hence a question of a large dose of experience and a dash of experiment.