

SOAS LAW JOURNAL

VOLUME 1 - ISSUE 1 - AUGUST 2014



SOAS
University of London

SOAS
LAW JOURNAL

VOLUME 1 – ISSUE 1

AUGUST 2014

ISSN: 2055-2068

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

Published in the United Kingdom
By the © SOAS LAW JOURNAL

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

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

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

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

Volume 1 – Issue 1 (August 2014)
ISSN: 2055-2068 (Online)
ISSN: 2057-3006 (Print)

© SOAS LAW JOURNAL

The SOAS Law Journal expresses its sincere gratitude to
Clifford Chance LLP for their generous support.

Editorial Board

Executive Board

Editor-in-Chief

Laura Wong

Executive Editors

Harsimran Kalra
Eric Daniel Leofflad
Chris Price

Managing Editors

Bakhtawar Awan
Joshua Chan
Samar Masood
Mohammad Rafat Mehmood
Bakhtawar Bilal Soofi

Editorial Staff

Content Editors

Titis Lintang Andari	Yu Tong Lee	Otto Simonsson
Khalid Hayat	Ramsha Noshab	

Senior Editors

Najat Jebari	Przemyslaw Kokot	Sabeehah Motala
Farisha Khan	Mirella Sinobuhle Manhombo	Noorzadeh Salman Raja

Associate Editors

Assma Kurdy	Kelvin Ma	Amanda Ranaweera
Elizabeth Jane Lawrence	Mahnoor Farogh Naseem	Jun Sean Wong

Honorary Board

Professor Anne Griffiths

Professor Mohammad Hashim Kamali

Professor Duncan Kennedy

Dr Richard Small

Professor David Takacs

Professor Robert A. Williams

Contents

Introduction

Laura Wong, Editor-in-Chief viii

A Search for Authenticity

Zeeshan Hussain 1

Creating A Legal Market In Kidneys: Recognition of Ownership of the Body and Its Parts and A Proposal For A Legal Kidney Market

Setareh Taei 30

(UN)chartered Territories: The Paragon of Global Governance (Inside Out)

Lizzy Willmington 75

Neglected Bodies in International Law: Sexual Violence Against Boys

Helena Van Roosbroeck 91

Perverted Peace

Mia Tamarin 109

The History of International Law in the Caribbean and the Domestic Effects of International Law in the Commonwealth Caribbean

Andrew Welch 124

Law, Land and Identity: Property and Belonging in Colonial Kenya

Amelia Hopkins 139

Decolonising Australia's Native Title System

Kayla Gebeck 173

Judicial Independence and the Media in China: An Exercise in Modelling Interfering Relationships as a Means of Assessment

Thomas Van Mourik 192

Introduction

Laura Wong, Editor-in-Chief

It is no exaggeration to say that the School of Oriental and African Studies (SOAS), University of London, has an abundance of riches when it comes to legal scholarship. With courses ranging from Legal Systems of Asia and Africa, to Chinese Law, to Islamic Finance and Law, SOAS has deservedly earned its reputation as one of the world's leading institutions on the study of Asia, Africa and the Middle East. The inaugural issue of the SOAS Law Journal is the birth of what we hope to be a longstanding publication worthy of this reputation. It is our sincerest hope that the SOAS Law Journal will become the centrepiece of critical legal thinking regarding these regions, not just in the United Kingdom, but also globally.

The Journal is an independent publication that is edited, reviewed and published entirely by SOAS students. It seeks to showcase our diverse continuum of interests, not only geographically, but also in a vast array of legal issues. Although our university and the Journal pride ourselves on expertise in Asia, Africa and the Middle East, the SOAS Law Journal exceeds these borders and touches on topics regarding law in the United Kingdom and law generally. The Journal seeks to highlight our university's distinct range of interests in its inaugural issue with area-specific articles spanning five continents and cutting-edge topics such as the legal market for human organs and the construction of boyhood in UN Security Council Resolutions. We hope that the SOAS Law Journal will inspire and facilitate intellectual exploration, discourse and debate between academics and practitioners from all corners of the world.

We would like to express the utmost gratitude to Mr Paul Kohler and Professor Makeen F Makeen for providing their guidance to a group of bright-eyed law students, the Managing Editors, who courageously undertook the challenge of launching this Journal. We would also like to thank the SOAS Law Journal Honorary Board, the SOAS Law Society, the SOAS Law School and the SOAS Law Faculty for their unwavering support and their inspiration for our wealth of critical thinking. Finally, we would like to thank Clifford Chance LLP for generously supporting our mission.

Yours sincerely,



Laura Wong
Founding Editor-in-Chief
SOAS LAW JOURNAL

A Search for Authenticity

Zeeshan Hussain*

I. INTRODUCTION

The tremendous growth of the Islamic finance industry, valued globally at \$1.357 trillion in 2011,¹ conceals a deep-rooted paradox. Marketed as an ethical alternative to the conventional interest-based financial system, the economics of Islamic financial transactions have increasingly borne a likeness to their conventional counterparts, causing Islamic finance to seem like a mere outward revival and a 'crass exploitation of religious sentiment'.² This perceived duplicity has triggered widespread scepticism concerning the authenticity of Islamic finance – it is this notion of *Sharia* authenticity that forms the central focus of this Article.

1.1 What Is *Sharia* Authenticity?

The Article offers a fresh perspective on the notion of *Sharia* authenticity in Islamic finance and proposes a model that not only acts as an identifiable yardstick, which realistically measures '*Sharia* authenticity'; but also provides insight into the inherent complexity of such an endeavour. The principal research question this Article seeks to answer is: What is *Sharia* authenticity in Islamic finance? The existing difficulty of defining such a subjective term is made further complex with the highly interpretative nature of Islamic jurisprudence and concepts such as *ikhtilaf* (juristic disagreement), which have consequently resulted in diverse bodies of law that all hold claim to legitimacy. In Islamic finance, the term itself denotes the level of a particular transaction's legitimacy in light of the 'principles' of Islamic law. However, mere mechanical adherence to these principles is inadequate and hardly translates the more

* Zeeshan Hussain is an LL.B graduate from SOAS, University of London. After travelling South East Asia and the Middle East for a year he will begin his LPC at the University of Law. He would like to acknowledge Dr Jonathan Ercanbrack and Dr Anicée Van Engeland for their endless support and guidance.

¹ 'Islamic Finance Country Index: Methodology and Results' (*Global Islamic Finance Report*, 2012) <http://www.gifr.net/home_ifci.htm> accessed 1 April 2014.

² Mohammad Fadel, 'Riba, Efficiency, and Prudential Regulation: Preliminary Thoughts' (2008) 25(4) *Wisconsin International Law Journal* 655, 656.

important underlying substance. A strict formalist³ approach is fixated on reviving the form of classical principles and overlooks the ubiquitous and ever-permeating effects of context, which may change the form these principles take or the way they are expressed, whilst retaining their underlying substance. It is therefore submitted that *Sharia* authenticity inextricably correlates with context, and this forms the theoretical foundations of this Article. Our proposed model of *Sharia* authenticity uses this underlying premise of a context-based approach and gleans principles from the commercial transactions of the classical period of Islamic law,⁴ a period revered and idealised in Islamic orthodoxy, and its return aspired towards by both modernists and traditionalists alike – either in substance or in spirit.

The principles that will be used in this Article have been garnered from the way commercial transactions have been described in the *fiqh* and the Cairo Geniza, which are a collection of manuscripts that were discovered inside an old synagogue in Cairo. They are dated from mainly the 11th to 13th centuries, covering the Fātimid and Ayyūbid periods.⁵ These historic findings contain some of the earliest records of actual commercial transactions of Muslim and Jewish merchants in the form of invoices, contracts, court records and other business correspondences. By confirming that aspects of the early *fiqh* manuals were practised in reality, these ancient documents thus contain a unique and authentic reflection of commerce during the classical period of Islam.

In employing ‘principles’, our approach takes inspiration from Al-Ghazali’s *Maqasid Al-Sharia* (the objectives of the *Sharia*),⁶ which are principles that have been gleaned from the *Qur’an* and *Sunna*. However, whereas the *maqasid* are generally applicable to all aspects of *mu’amalaat* (human affairs or transactions), the present Article’s principles are specifically applicable to ‘commercial’ transactions. The process of ascertaining these principles was most arduous,

³ Haider Ala Hamoudi, ‘Jurisprudential Schizophrenia: On Form and Function in Islamic Finance’ (2007) 7(2) Chicago Journal of International Law 605.

⁴ Hodgson highlights the difficulty of categorising or defining civilisations, suggesting that each scholarly approach will differ. The categorisation may be useful as a frame of reference, but it should not be taken as fixed, nor universally agreed upon. See Marshall GS Hodgson, *The Venture of Islam: Conscience and History in World Civilization*, vol 1 (University of Chicago Press 1961). This Article adopts a broad categorisation of the classical period, following Foster and Ercanbrack who define the classical period of Islamic law from the 7th century (623 AD) to the 19th century, prior to the onset of modernity. See Jonathan Ercanbrack, ‘The Law of Islamic Finance in the United Kingdom: Legal Pluralism and Financial Competition’ (PhD thesis, SOAS 2011) 22.

⁵ SD Goitein, *A Mediterranean Society: the Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza: Economic Foundations*, vol 1 (University of California Press 1967) xvii.

⁶ See Mohammad Hashim Kamali, ‘Maqasid al-Shariah: The Objectives of Islamic Law’ (1999) 38(4)Islamic Studies 193, 4.

requiring hours of deliberation and research. A thorough exposition of these principles is provided in Section 4. The term 'principles' will be used broadly to describe the general characteristics of the classical transactions, as well as their underlying reasoning. It is reiterated that our list of principles is by no means exhaustive and more principles may be extracted. The following six principles will be used in this Article:

1. Consideration of customary practice
2. Prohibition of *gharar* (excessive uncertainty or risk)
3. Fairness
4. Commercial expediency
5. Attainment of profit
6. Prohibition of *riba* (defined as compound interest)

Ultimately, this approach seeks to harmonise traditional and modernist perspectives and creates a methodology through which we can view modern Islamic financial markets, in keeping with the underlying principles of the classical period – indispensable in the Islamic tradition due to its religious and historical significance.

1.2 Overview

This Article will be split into five Sections excluding this present introductory Section, each of which needs to be accepted in order to progress to the subsequent Sections.

Section 2 forms the theoretical foundations of this Article and provides a detailed rationalisation for the underlying premise that *Sharia* authenticity is intimately connected to context. This Section features a philosophical discussion of the 'ontology of principles', exploring whether principles can merely be revived in a completely different environment and remain in line with traditionalist Islamic conceptions of authenticity.⁷ It is ultimately concluded that this is unrealistic, as principles are so deeply influenced by the context in which they exist that overlooking the context would run the risk of distorting the principle's underlying spirit.

Section 3 provides a brief introduction to the core components of Islamic law. It de-constructs the typical traditionalist ideologies of the primary sources being

⁷ By 'traditionalist', the Author refers to the more conservative movements within the Islamic faith, such as *Salafism* or *Wahabism*. Both seem to employ a literalist approach to view Islamic law.

the sole regulators of *Sharia* authenticity through highlighting the important role of jurists in deriving new laws, such as those in Islamic finance, and ultimately upholds that Islamic law is a divinely inspired jurists' law.⁸ It provides an overview of the academic criticisms of the *fiqh* (legal theory), which will ultimately form one of our sources of *Sharia* authenticity. This Section also reinforces this Article's thesis of a context-based approach to *Sharia* authenticity through concepts within Islamic law, such as *ikhtilaf* (juristic disagreement) and *ijma* (consensus of scholars), which are both heavily influenced by contextual environment.

Section 4 outlines our methodological framework and proposes a model of measuring *Sharia* authenticity. As stated above, our model utilises the principles we have gleaned from the classical commercial transactions via the Geniza documents and, building upon our underlying premise established in Section 2, interprets them in light of the present context. This Section provides a detailed justification for using the classical period of Islam and the Geniza documents as our sources of *Sharia* authenticity from which our core principles shall then be gleaned. It outlines and justifies our six principles, which are by no means exhaustive, and puts forward a framework in which they can be reinterpreted dynamically, so as to retain their underlying ethical substance.

Section 5 applies our proposed model of measuring *Sharia* authenticity in the context of modern Islamic finance by studying controversial derivative contracts. The mechanics of a derivative, specifically a futures contract, is analysed and measured against our model of *Sharia* authenticity as established in Section 4. The derivative is just one aspect of modern Islamic finance, and our findings regarding its authenticity are in no way generalisable to the whole of Islamic finance today. Rather the purpose of this analysis is to illustrate that the principles of classical Islamic commercial transactions can, in substance, be found in the modern world to a much greater degree when the 'contextual dimension' is taken into account. This Section also finds that there is rarely absolute adherence to all principles but neither is there complete violation; in light of this, this Section ultimately argues that *Sharia* authenticity should best be viewed on a scale, with differing degrees of authenticity.

The Conclusion ties together each of the preceding Sections and reiterates this Article's primary thesis that *Sharia* authenticity is intimately connected to context and should hence be viewed contextually. The scale of *Sharia* authenticity is also emphasised upon as a tool that accurately reflects the

⁸ Noel J Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (1st edn, University of Chicago Press 1969) 3.

Islamic characteristics of modern transactions. It is ultimately submitted that only such an approach can give effect to the true spirit of Islamic law and successfully harmonise the sacred classical Islamic principles with today's economic reality.

II. THE ONTOLOGY OF PRINCIPLES

It is submitted that *Sharia* authenticity in the modern world centres on the degree of consonance there is today with the principles of the classical age. Thus, a central theme of this Article is that of 'revival' and the question of whether classical principles can be revived in a modern context. Through analysing the ontology of principles, this Section sets out to prove the deep-rooted relationship between context and principles and argues that a revival of any kind must be carried out in light of context – ultimately, the theoretical foundations underpinning this Article.

Principles are the fundamental values that influence one's behaviour and thinking and express one's notion of morality, which is the key determiner of what is viewed as right or wrong. Principles are often perceived to be reflecting universal values, a view supported by philosophers such as Kant who in relation to morality, argued for the existence of objective moral laws that are accessible to all rational people.⁹ This view is echoed in the sphere of religion where principles are believed to have divine origins, and it is their connection with God that reinforces the view that conceptions of right and wrong, or the principles they are contained in, are universally agreed upon.

However, it is argued that in reality principles are not objective and never exist in isolation as idealised concepts. They are in fact subjective and deeply interwoven with context. Their existence appears dependent on context and varies accordingly. Mackie's 'Argument from Relativity'¹⁰ demonstrates this premise when addressing moral principles. Based on empirical findings of differing moral values existing between societies, he concludes that universal objective morality does not exist. The alternative explanation that some societies are less moral than others is unconvincing and then begs the question, 'Whose moral principles are correct?' Mackie traces morality to the way cultures and societies live their lives and demonstrates this with the practice of monogamy: '[I]t is that people approve of monogamy because they participate in a monogamous way of life rather than they participate in a monogamous

⁹ Kant argued that there existed objective moral laws, which could be accessed rationally through the 'categorical imperative'. See Immanuel Kant, *Groundwork of the Metaphysics of Morals* (CUP 1785).

¹⁰ JL Mackie, *Ethics: Inventing Right and Wrong* (Penguin Books 1977) 36.

way of life because they approve of monogamy'.¹¹ He insists that a better explanation for the divergence in moral views regarding monogamy is that the practice developed in some cultures, but not in others, and the moral views later emerged as a result.¹² Therefore, the principles can be seen as being the product of culture, which is an aspect of context. Not only do they exist within it, but they also gain their meaning from it. Ultimately, separated from their context, principles plain and simply cannot exist.

Another important aspect to the study of principles is the way they are perceived, since different perceptions may in substance lead to completely different principles. One's perception of principles will be greatly influenced by the infinite number of contextual variables that exist, such as society's thinking patterns. These are the most basic identifiable elements that influence all walks of life. They significantly affect our understanding of our own existence and, therefore, impact on the way we perceive principles. For instance, the Age of Enlightenment considerably changed the thinking patterns of the West, as well as the rest of the world, triggering widespread critique across all disciplines and revolutionising the way man perceived his own existence.¹³ The medieval world-view, characterised by an unquestioned adherence to religion and tradition as a source of true knowledge and direction to life, gradually diminished.¹⁴ There was an apparent shift in emphasis from divine revelation to reason; the latter no longer subservient to the divine will and in fact becoming an authority in and of itself. Man replaced God as being the central focus of the universe, and this view was reflected in the philosophical thinkers of the time, such as Descartes who 'looked for certainty in knowledge within the individual [Man], not from an outside authority [God]'.¹⁵ This 'awakening of intellectual power' was in constant tension with the other sources of authority, such as religion and tradition, as it was viewed as undermining them.¹⁶ Thinking, and life in general, became increasingly secularised, whilst religion and tradition gradually became relegated to the sphere of private life, serving simply a customary and ritualistic function.¹⁷ The Post-Enlightenment world was no longer limited by these institutions, which resulted in a degree of flexibility in the exercise of reason and thinking that was previously absent. Society's thinking is now less constrained,

¹¹ *ibid.*

¹² *ibid.*

¹³ Rick Wade, 'The Enlightenment and Belief in God' (*Probe Ministries*, 2002) <http://www.probe.org/site/c.fdKEIMNsEoG/b.4220807/k.47FF/The_Enlightenment_and_Belief_in_God.htm> accessed 1 December 2013.

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ 'Enlightenment' (*Stanford Encyclopaedia of Philosophy*, 20 August 2010) <<http://plato.stanford.edu/entries/enlightenment/>> accessed 1 December 2013.

¹⁷ *ibid.*

and this logically affects one's perception of principles, which are likely to be vastly different than before – largely attributable to the different context. Similarly, in Islamic law, Coulson observes that the emergence of tools such as *istihsan* (seeking the most equitable solution) marked a significant shift in what was perceived to be the purpose of God's law.¹⁸ The purpose was no longer seen as being the passive obedience to the divine will, but was now focused on man and the public interest, a principle made famous by Al-Ghazali: '*Maslahah* (public interest) was God's purpose in revealing the divine law' (to be discussed later).¹⁹ This change in approach liberalised thinking. Laws, and by extension principles, now had an extra layer of meaning that was again previously absent. Ultimately, the perception of principles and how they are received will inevitably differ in contexts with different thinking.

Principles are formulated in a particular context, and regardless of whether their underlying morality is believed to be of divine origin, they exist, operate, are adhered to and are translated within the earthly realm. It is therefore likely that the biases and influences of the formulator, who is socially conditioned by his wider context, also seep into the formulating process.²⁰ Thus, the principles have an obvious suitability to the period from which they are extracted. It follows that applying these principles strictly in a significantly different environment, such as a modern context, will pose considerable difficulties because of the extent to which society has changed and developed. For instance, much of the complexities that exist in today's financial markets, ranging from banks, regulatory bodies and financial institutions, were just non-existent. Paradoxically, it seems the only way to revive the form of these principles in any practical manner would be to re-create the context in which they emerged – an impractical fallacy. Otherwise, the fixations with reviving the form of old principles and legal interpretations need to be dispensed with, and instead, a conscious effort to revive its functional spirit needs to be put in place. Just as the formulation of principles and interpretations were suited to and inevitably reflected the contextual environments of its time, it seems that in order for principles to be valid in a different context, they must be reinterpreted in light of that different context.

This Article is a response to the question of whether classical principles can be revived in a modern context, as these are often associated with a traditionalist agenda. Principles cannot do so in and of themselves. They are too deeply influenced and shaped by the surrounding context to be detached from it and

¹⁸ Coulson (n 8) 7.

¹⁹ Felicitas Opwis, 'Maslahah in Contemporary Legal Theory' (2005) 12(2) *Islamic Law and Society* 182, 188.

²⁰ *ibid* 182.

transplanted to another context. This will distort the principles, as they will inevitably be viewed differently from the context in which they were extracted.²¹ It is thus evident that principles cannot exist independent of context. It is submitted that on the basis of this premise, principles of classical Islamic transactions will need to be reinterpreted in a way that takes account of context in order to meaningfully measure *Sharia* authenticity.

The next Section provides a brief outline of the nature of authenticity in Islamic law, discussing the sources suitable for carrying out a measure of *Sharia* authenticity. We also reaffirm the central premise established in Section 2 above, that *Sharia* authenticity is connected to context through using examples of legal tools within Islamic jurisprudence.

III. AUTHENTICITY IN ISLAMIC LAW

This Section provides a brief overview of the nature of Islamic law as it pertains to the central theme of *Sharia* authenticity. It maintains that Islamic law is a jurists' law, since large portions of man's *mu'amalaat* (transactions) and *ibadaat* (liturgical worship) are governed by, and are the product of, juristic reasoning. It is thus argued, contrary to conservative Muslim presumptions, that the divine sources are not sufficient, in and of themselves, in constituting a source of authenticity. Alternatively, the use of the *fiqh* is advocated, albeit with caution. Despite it being sufficient, the *fiqh* seems to lack the authenticity of the divine sources, causing us to arrive at the authenticity/sufficiency *conundrum*, to be explained ahead. In order to resolve this conundrum, and having established the necessity of reason, this Section then explores the roots of authenticity, establishing how these non-immutable and reason-based laws gained an authentic status. Finally, this Section examines the academic criticisms of the validity of such legal material as a source of *Sharia* authenticity.

3.1 The Authenticity and Sufficiency Conundrum

Authenticity in the Islamic legal system is undoubtedly rooted in divine revelation (*wahy*), consisting of the *Qur'an* and aspects of the *sunna*. However, although these divine sources are widely considered to be the highest sources of authenticity in the Islamic tradition, it is clear they cannot be used by

²¹ For instance, some communities in Somalia and Egypt observe the practice of female genital mutilation in order to preserve the chastity of young females. However, that same practice and the principle underpinning it will be viewed as an extreme form of child abuse in Western countries. See Ashenafi Moges, 'What is behind the Tradition of FGM?' (*African Women Organization*, 2003)

<<http://www.african-women.org/documents/behind-FGM-tradition.pdf>> accessed 1 December 2013.

themselves to judge emerging phenomenon as they are out-dated and lack the comprehensiveness to do so, instead simply containing general guidelines. This is also noted by Coulson, who states that 'the *Qur'an* and the *sunna* taken together in no sense constitute a comprehensive code of law'.²² However, *usul-ul-fiqh* (legal theory) allows these general guidelines to be used to uncover specific rulings for unprecedented cases, which are both detailed and updated. Shafi spoke of a category of knowledge that has 'no scriptural text (*nass kitab*) nor with respect to most of it is there a text of Tradition (*nass sunna*)', claiming that this type of knowledge was susceptible to interpretation (*ta'wil*) and was to be understood by deduction/analogy (*qiyas*).²³ In order to discover this type of knowledge, which, due to the rapid advancement of civilisation and the increasingly anachronistic nature of the primary sources (*Qur'an* and *sunna*), it was thus essential for the jurists to consult reason, especially with regards to commercial transactions. The interplay of reason and revelation²⁴ ensured that the product of reason retained the essence of the divine revelation and therefore, its authenticity as, of course, the interpretive efforts of the jurists (*ijtihad*) could not be contrary to the explicit rulings of the primary sources. The methods of interpretation were varied and could be either through the strict rules of *usul-ul-fiqh* (sources of understanding), the liberal use of *ra'y*, (personal opinion) or any of the variety of accepted tools in between these two extremes on the spectrum of interpretation. Ultimately, the major role played by reason to extract rulings is why the likes of Coulson,²⁵ Weber and Schacht²⁶ refer to Islamic law, and more specifically *fiqh*, as a jurists' law and not God's law.

3.2 The Roots of Authenticity

The products of juristic interpretations of the primary sources are legally valid but remain contingent and can only reach probable validity.²⁷ This is because it is acknowledged by all scholars that 'no normative interpretation of the revelation can claim a privileged access to truth'²⁸ – encapsulated in the jurists' 'epistemological scepticism'.²⁹ This theological limitation on the jurist's ability to discover *ilm al yakeen* (knowledge of certainty) suggests that the highest source of authenticity in the Islamic tradition is effectively inaccessible, which

²² Coulson (n 8) 4.

²³ Norman Calder, 'Ikhtilâf and Ijmâ' in Shâfi'î 's Risâla' (1983) 58 *Studia Islamica* 55, 56.

²⁴ Mohammad Hashim Kamali, 'Law and Society: The Interplay of Revelation and Reason in the Shariah' in John Esposito (ed), *The Oxford History of Islam* (OUP 1999) 107-15.

²⁵ Coulson (n 8) 3.

²⁶ Barber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslims Fiqh* (Brill 1999) 53.

²⁷ *ibid* 37.

²⁸ *ibid*.

²⁹ *ibid*.

appears detrimental to this Article since this would be equivalent to there being no authenticity. However, this theological limitation did not hinder the application, interpretation and extraction of the primary sources. On the contrary, it facilitated Islamic law's development and growth. It had the dual effect of establishing God's supreme authority and, through *iktilaaf* (difference of opinion), also establishing a degree of flexibility and tolerance,³⁰ contrary to conservative ideas of Islam's strictness. Furthermore, the interpretative efforts of the jurists were not void of authenticity. Their authenticity derived from the recognition they received from the community as 'constituting the most authentic representation of the divine intent',³¹ reminiscent of *ijma* (consensus of the scholars) as a source of binding law. Therefore, it is submitted that authenticity in practice is rooted in the community's approval and what they deem acceptable as constituting the essence of the divine will. This supports the Article's proposal of authenticity's intimate link with context, further suggesting that different standards of authenticity can exist across different communities and different periods of time – although within boundaries (explored later in this Article).

3.3 The *Fiqh*: A Source of Authenticity?

Caution must be taken when considering the *fiqh* as a source of authenticity. Western scholars have remained critical of the literature's ideal nature and its development in 'distance from social practice so that the jurists are not under the pressure to adapt their norms to the changing conditions of social life'.³² The likes of Goldziher and Hurgronje supported this incongruence between *fiqh* and reality, the latter stating that '... all classes of the Muslim community have exhibited in practice an indifference to the sacred law in all its fullness'.³³ Though these criticisms threaten the study's proposals for adopting the non-divine materials, the *fiqh*, as sources of *Sharia* authenticity, this Article sides with Bergstrasser's three category distinction: '(1) Ritual, family and inheritance law, which notwithstanding occasional deviations based on custom, adhered closest to the *fiqh*; (2) Constitutional, criminal, and fiscal law, which deviated the most from and, in some cases completely from, the *fiqh*; and (3) Commercial law, which falls somewhere between the two extremes'.³⁴ Not all aspects of the *fiqh* diverged from reality and therefore, a balanced approach must be taken.

³⁰ Calder (n 23) 71.

³¹ Sherman A Jackson, 'Domestic Terrorism in the Islamic Legal Tradition' (2001) 91 *The Muslim World* 293, 294.

³² Johansen (n 26) 53.

³³ Abraham Udovitch, 'The "Law Merchant" of the Medieval Islamic World' in GE von Grunbaum (ed), *Logic in Classical Islamic Culture* (Otto Harrassowitz 1970) 113.

³⁴ *ibid* 114.

Udovitch formulates a convincing rebuttal to Hurgronje and Goldziher and their views on the *fiqh*'s limitations in reflecting the social environment of the classical period. Drawing from Professor Brunschvig's studies on the divergent positions of the schools on specific questions of law, he states that these 'norms exhibit a close connection to their social matrix, with each school's opinions reflecting the differing level and needs of its respective sociological milieu'.³⁵ This *iktılaaf* between the schools is an example of the *fiqh*'s receptiveness to practical life and is a testament to its usefulness in providing, at the very least, a useful indicator of the practices of the classical period. Udovitch points to there being consonance in the *fiqh* and practical life with regards to partnership and commenda contracts, which were said to be 'instruments of remarkable flexibility and efficiency'.³⁶ Their flexibility could not have existed in a vacuum and were surely inspired by the party's demands for pragmatism in commercial transactions, illustrating an undeniable link between law and practice. Udovitch reaffirms this: '[F]ar from being unmindful or isolated from the exigencies of practical life, these texts reveal an intimate and sympathetic familiarity with the conditions of the marketplace'.³⁷ Therefore, in light of this, the use of the *fiqh* as a source of *Sharia* authenticity is advocated. This Article also later turns to the Cairo Geniza as a source of authenticity, providing a reliable and unbiased embodiment of the *fiqh* and a representation of the accepted commercial practices of the time, to address the doubts surrounding the relationship between the *fiqh* and practical life.

In conclusion, the reality of Islamic law being rooted in the intellectual endeavours of the early jurists debunk the modern conservative calls for the primary sources to be reinstated as sole regulators of commercial transactions. The *fiqh* performed this function from the very inception of Islam. It was used alongside the divine *Sharia* to find solutions for unprecedented cases, not to be pitted against it. Although the harmony between *fiqh* and practical life has been brought into question, and by extension the *fiqh*'s usage as a source of authenticity, the solution seems to lie with the use of the Cairo Geniza as an embodiment of the accepted transactions of the *fiqh* in the classical period (to be looked at in detail). By highlighting the contextual dimension inherent in Islamic legal concepts, such as *ijma* and *iktılaaf*, this Section also demonstrated the underlying thesis that *Sharia* authenticity is connected to context.

The next Section further underscores the importance of the Cairo Geniza as a source of *Sharia* authenticity and presents the Article's proposed model of viewing *Sharia* authenticity in Islamic finance.

³⁵ *ibid* 114-15.

³⁶ *ibid* 115.

³⁷ *ibid* 114.

IV. MODEL OF *SHARIA* AUTHENTICITY

This Section outlines the proposed model for viewing *Sharia* authenticity in modern Islamic financial transactions. The first Section will discuss the classical period's significance within Islamic tradition and how this is critical to our proposed notion of *Sharia* authenticity. The Geniza sources from which the principles of our model shall be gleaned will be used. The next Section will outline the core principles on the basis of the classical commercial culture as described in the Geniza. Finally, the manner by which these principles can be reinterpreted in the modern context to measure Islamic financial transactions will be discussed.

4.1 The Classical Period

Authenticity in Islam is often associated with the classical era, considered amongst Muslims to be of great religious and historical significance, as it is believed that practices were closely in accordance to God's Law. It could be argued that its 'authenticity' derives from its proximity with the Prophetic period, which is in itself authentic by virtue of it being under the supervision of the Prophet Muhammad (PBUH) – arguably, the very personification of Islam. This idea is strengthened by an authentic *hadith* (recorded tradition) of the Prophet stating 'the best people are those living in my generation, then those coming after them (*tabi'een*) and then those coming after (the second generation)'.³⁸ Therefore, on the basis of this tradition, the classical period gains its religious authenticity by virtue of this chain that leads back to the Prophet. Examples of the *tabi'een* include the founder of the Hanafi school of law, Abū Hanīfa. In addition, followers of the Salafi sect of Islam, known to be one of the most conservative groups within the Islamic faith, strive to emulate the practices of the 'pious predecessors' (*al salaf al salih*),³⁹ which include the Prophet Muhammad, his companions and the first three generations of his followers. Thus, this tradition of viewing the classical period as authentic exists across the whole of the Islamic faith. This classical period arguably represents the quintessential Islamic identity and is hence idealised in Islamic orthodoxy, its return aspired towards by both modernists and traditionalists in their endeavour to follow God's law.

³⁸ Sahih Bukhari, 'The Hadith Book "Witnesses"' (*Search Truth*)

<http://www.searchtruth.com/book_display.php?book=48&translator=1&start=10&number=814>
accessed 1 December 2013, verse 819.

³⁹ Theodore Karasik, Steven Strom and Frederic Wehrey, 'Islamic Finance in a Global Context Opportunities and Challenges' (2007) 7 *Chicago Journal of International Law* 379, 391.

4.2 The Cairo Geniza

The Cairo Geniza are historic documents from mainly the 11th and 13th centuries and provide an unbiased picture of the commercial on-goings of the medieval period; but the works of scholars such as Udovitch further credit these documents for providing insight into the earlier classical period of Islam – a period in which it is thought the practices were in accordance with God’s law, and were hence authentic. Udovitch says there is ‘a striking similarity between the outlines of commercial institutions as we find them in early Hanafi texts [from the classical period] and the actual documented business practice of the 11th and 13th century merchants whose business records have been preserved in the Geniza’.⁴⁰ These similarities confirm that these early Hanafi writings were not merely theoretical, but reflected the actual commercial practices of the classical period. The fact that these practices were uncovered centuries later in the Geniza, albeit specifically in relation to partnership (*sharika*) and *commenda* (eg *mudarabah*) contracts, suggests that the ‘*fiqh* deserves a closer analysis for their reflection of legal practice’.⁴¹ Therefore, it is through the use of both the *fiqh* manuals and the manuscripts of the Geniza that we endeavour to glean our principles of *Sharia* authentic transactions.

However, one criticism that emerges is that much of the scholarly findings from the Geniza are in relation to partnership arrangements (*sharikah*) within the Hanafi school of law, which appears too specific to generalise beyond those specific circumstances. However, Goitein’s research indicates that these types of arrangements served a primary role in the classical commercial context, and were widely used throughout the whole of the Geniza.⁴² They were contracts of great breadth, and ‘encompassed practically every economic activity in the Geniza period due to the fact that they substituted for large fields of economic activity ...’⁴³ Given the widespread use of partnership contracts during the classical periods, the observations made on the basis of the Geniza, as well as the principles that will be gleaned there-from, are in fact representative of the classical period, and can thus validly be used in our model.

⁴⁰ Abraham Udovitch, ‘Theory and Practice of Islamic Law: Some Evidence from the Geniza’ (1970) 32 *Studia Islamica* 289, 290.

⁴¹ Chibli Mallat, ‘From Islamic to Middle Eastern Law’ (2003) 50 *American Journal of Comparative Law* 669, 735.

⁴² SD Goitein, *A Mediterranean Society: Economic Foundations*, vol 1 (University of California Press 1967).

⁴³ Ercanbrack (n 4) 109.

4.3 Guiding Principles of *Sharia* Authenticity

4.3.1 Consideration of Customary Practice

Consideration of customary market practice (*urf*), the so-called ‘merchant’s law’,⁴⁴ is seen frequently throughout the early *fiqh* texts and in the Cairo Geniza, and is hence a fundamental principle of commerce in the classical period. This principle shaped commercial law, and Udovitch highlights this: ‘[J]urists were guided by a sympathetic and informed responsiveness to the needs of trade and conscious attention to prevalent mercantile customs’.⁴⁵ Thus, jurists understood that rules that were receptive to their environment would enrich the law and would be conducive to commercial transactions. The lawmakers facilitated commerce through accommodating many of the customary practices, at times, even where they appeared to contradict the strict letter of the law (*fiqh*). In this case, jurists would depart from the law in favour of the particular customary practice, supposing it did not conflict with the other principles of Islam. This illustrates that a flexible approach was taken to reconcile the strict nature of the law with market practice, as well as an appreciation that jurists’ rulings were not of themselves immutable – unlike Islamic law today which seems to have canonised jurists and their interpretations, a trend adopted in modern Islamic finance, with its strictly formalist rule-focused approach and unwillingness to depart from their interpretations.⁴⁶

Udovitch presents a case of a Hanafi partnership between a stall-owner and a craftsman, which can be used to illustrate the jurists’ respect for the prevailing customary practice. He describes a scenario where a stall-owner offers the use of his stall, a usufruct, to a craftsman on the condition that the latter does all the work, while sharing his profit equally with the stall-owner.⁴⁷ Udovitch highlights that under traditional rules of the *fiqh*, such an arrangement should be invalid considering that the stall-owner is bargaining with the usufruct of the stall, an intangible property, which is not suitable in partnership arrangements. He further argues that this arrangement would also fail to qualify as either a valid lease or hire contract, an *ijarah*, since neither the rent nor the sum agreed upon was specified. However, the early Hanafi jurist Shaibani seemed to recognise the hindrance that such rigid enforcement of traditional legal considerations caused to commerce in the case of a ‘foreign’ craftsman, and instead dispensed with the ruling in these circumstances through exercising *istihsan* (juristic preference) in favour of this customary practice. In allowing this partnership,

⁴⁴ Udovitch, ‘The “Law Merchant” of the Medieval Islamic World’ (n 33).

⁴⁵ *ibid* 108.

⁴⁶ See Hamoudi (n 3).

⁴⁷ *ibid* 117.

all parties attained their desired business objectives: 'The craftsman receives compensation for his labour; the people derive the benefits of his services; and the stall-owner receives compensation for the use of this stall'.⁴⁸ This accommodating approach was employed frequently throughout classical commerce and illustrates that jurists employed a functional approach even in the early classical period.⁴⁹

Another embodiment of the principle of 'respect for customary practice' was the existence of *shurut*, legal formularies (model documents) or precedents.⁵⁰ This was the outcome of law accommodating an indispensable customary practice at the expense of existing Islamic legal theory, which, contrary to the *Qur'anic* rulings which demand that transactions be written down, 'denied the validity of documentary evidence and restricted proof to oral testimony of witnesses'.⁵¹ Despite clear *Qur'anic* instructions stating the contrary, this legal rule still prevailed and it was the strength of the customary practice that ultimately caused its suspension – testament to the central role that customary usage had, in being able to do what the explicit declaration of the *Qur'an* could not.

4.3.2 Avoidance of *Gharar*

Rooted in the *Qur'an* and *sunna*, the prohibition of *gharar* is a ubiquitous feature of Islamic finance that is capable of invalidating a contract or transaction, which makes it a core principle of *Sharia* authenticity. Typically defined as excessive uncertainty or risk,⁵² it has developed a broad meaning that could also mean the uncertainty of one or both parties regarding the substance or attributes of the object of sale, or doubts as to the existence of the subject matter at the time of exchange.⁵³ Hamoudi outlines the development of *gharar* having originated from specific *Qur'anic* prohibitions of games of chance and hadith forbidding speculative activities such as the sale of fish, and, through *qiyas* (analogy) having extended to 'a prohibition of astonishing breadth'.⁵⁴ In the Geniza records, disputes relating to *gharar* can hardly be identified, which may imply that the principle was well adhered to. However, what is clear from the Geniza

⁴⁸ Al Sarakhsi in Udovitch (n 33) 117.

⁴⁹ *ibid* 118.

⁵⁰ Nicholas HD Foster, 'Islamic Perspectives on the Law of Business Organisations 1' [2010] European Business Organisation Law Review 25.

⁵¹ Abraham Udovitch, *Partnership and Profit in Medieval Islam* (Princeton University Press 1970) 7.

⁵² Karasik (n 39) 382.

⁵³ Nabil A Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (CUP 1986) 115.

⁵⁴ Hamoudi (n 3) 611.

is that transactions did not lack transparency, which also comes within the remit of *gharar*. The prohibition of *gharar* is thus one of our core principles of authenticity.

4.3.3 Fairness

Islamic law has a qualitative approach to commerce based on the core principles of equality and fairness,⁵⁵ which are evidenced in the commercial transactions of the classical period, as presented in the Geniza texts. These arrangements were intrinsically fair as they ensured profits, and losses were shared in equal parts where parties contributed equally and, where different shares existed, profits, losses and expenditures were divided in proportion to the investment. Even seemingly unequal, monetary partnerships were fair in actuality. Goitein points to a partnership where two individuals contributed a sum equally towards a drug store and where it was agreed that profits and losses were to be shared equally. It seemed that a third party who was also a partner in the business, but did not contribute regularly, was nevertheless allowed a share because of his social position (*jah*), as his connection with the business increased its profitability. Udovitch strengthens the authenticity of this practice through drawing a parallel with al-Sarakhsi's *Kitab al Mabsut*, a famous Hanafi jurist's work, where this contract is foreseen.⁵⁶

Similarly, another partnership described an arrangement where parties invested 600 dirhams and twenty dirhams respectively in a store of drug juices. The latter sat in the store and was responsible for selling, whilst the former purchased goods for supply. The shopkeeper received nine dirhams weekly but the partner only received four; the difference was regarded as compensation for the shopkeeper's work,⁵⁷ which, when viewed holistically, seemed the more important role. By taking into account these so-called 'imponderables',⁵⁸ such as the benefit from another party's social position and any of the other number of things that could practically be identified as having an effect on the partnership, the classical context demonstrates an unparalleled concern and emphasis upon maintaining fairness. This holistic approach ensures that the outcomes of commercial dealings reflect reality and everyone is merited or charged fairly, reflecting both monetary and non-monetary involvement.

⁵⁵ Karasik (n 39) 381.

⁵⁶ SD Goitein, 'Commercial and Family Partnership in the Countries of Medieval Islam' (1964) 3 *Islamic Studies* 315, 321.

⁵⁷ *ibid* 323.

⁵⁸ *ibid* 322.

4.3.4 Commercial Expediency

Commercial expediency appears to be a principle of great importance to classical Islamic commerce. Although it is clear that Islamic law, particularly the Hanafi School of law, allowed considerable flexibility and leeway for commercial transactions,⁵⁹ there remained significant legal limitations. Udovitch mentions that these restrictions 'placed certain aspects of practice on an inevitable collision course with legal theory'.⁶⁰ However, the law prescribed a remedy through the use of *hiyal* (legal devices or stratagems), which took what was otherwise considered a violation and made it conform to the letter of the law, while circumventing it in reality.⁶¹ It should be noted that these tools were not built to undermine the prevailing rule of law, which would seem absurd since the same law gives it its legitimacy. They were tools whose purpose was to ease hardship that was created by another human being deriving the law. These instruments were used by jurists to give effect to what they believed was God's desire to ease hardship for his people, caused by restrictive laws like the prohibitions of interest and using commodities as investment. According to Udovitch, the latter 'would have presented a severe handicap, especially for merchants engaged in long-distance trade' and 'those with all their capital tied up in merchandise which could not be advantageously sold at that place'.⁶² Thus, the law yielded to those practices that were conducive to practicality.

4.3.5 Attainment of Profit

From the very inception of Islam, attainment of profit or *tahsil ar-ribh*, has always been a central principle in Islamic commerce. Not only was Islam's birthplace, Mecca, a centre for trade, but the Prophet himself was a tradesman, and so were many of the respected jurists, such as Abū Hanīfa,⁶³ who was a silk merchant in the Baghdad market.⁶⁴ Therefore, attainment of profit is unquestionably important. The texts themselves recognise this to be an essential principle, transcending one's *madhab* (school of law) or religious or ethnic affiliation.⁶⁵ Udovitch regards this to be of considerable importance, stating that 'actions which promote the attainment of profit are permitted, and those that are extraneous or inimical to this goal are excluded'.⁶⁶ He further indicates that this

⁵⁹ Foster (n 50) 15.

⁶⁰ *ibid* 10-11.

⁶¹ *ibid* 11.

⁶² *ibid* 120.

⁶³ He was the founding father of the Hanafi school of law in Sunni Islam.

⁶⁴ Foster (n 50) 26.

⁶⁵ Udovitch, 'Theory and Practice of Islamic Law: Some Evidence from the Geniza' (n 40) 291.

⁶⁶ Udovitch, *Partnership and Profit in Medieval Islam* (n 51) 253.

principle took precedence over legal analogy and other religious-ethical considerations, which could even be suspended where conflict between them arose.⁶⁷

The principle is evident within partnership arrangements, such as *mudarabah*, where a *mudarib* (agent) is given almost limitless freedom in dealing with the *rab al-mal*'s (investor's) capital, as Udovitch confirms: '[T]he agent's freedom of action extends almost unto the commercial horizons in which he functioned'.⁶⁸ This was to ensure the investor was uninterrupted in his quest to attain maximum profit. Udovitch also mentioned that '[the jurists] epitomised the chief purpose of partnership and commenda simply as 'the attainment of profit',⁶⁹ further illustrating the significance of this principle in classical Islamic commerce. The principle can also be seen as an extension of 'protecting one's wealth' under Al-Ghazali's *Maqasid al-Sharia* (objectives of *Sharia*).

4.3.6 Avoidance of *Riba*

Avoiding *riba* is perhaps the most identifiable principle of Islamic finance, as it is derived explicitly from *Qur'anic* verses.⁷⁰ Typically defined as increase or gain, but also associated with interest or usury (excessive compound interest),⁷¹ *riba*'s legal meaning is incredibly intricate as it encompasses a range of different types, and is hence the subject of differing scholarly opinions. Of the three main types of *riba* identified,⁷² this Article focuses on *riba al jahiliyya*, known as the pre-Islamic *riba*, and is considered by scholars as the type that is referred to in the *Qur'an*. It arises where the lender asks the borrower at maturity date if he will settle the debt or increase it, which means that interest would be charged on the debt initially accrued,⁷³ akin to compound interest. The Geniza records confirm this principle, but specifically in relation to interest on loans: '[L]ending money for interest was not only shunned religiously but was also of limited significance economically'.⁷⁴ It seems this was partly due to the social stigma attached to a borrower, expressed in the maxim, '[T]he borrower is a slave to the lender'.⁷⁵ Furthermore, evidence of parties 'concealing interest'⁷⁶ within

⁶⁷ Udovitch, 'The "Law Merchant" of the Medieval Islamic World' (n 33) 122.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ '... but God hath permitted trade and has forbidden *riba*'. Abdullah Yusuf Ali (tr), *The Holy Qur'an* (Wordsworth Edition Limited 2000), Surah 2.275.

⁷¹ Saleh (n 53) 13.

⁷² There is also *riba al-fadl* and *riba al-nasi'a*. See *ibid.*

⁷³ *ibid.*

⁷⁴ Goitein, *A Mediterranean Society: Economic Foundations* (n 42) 170.

⁷⁵ Foster (n 50) 317.

business correspondences⁷⁷ reinforces the prevalence of this principle during this period since parties needed to practice *riba* in secrecy.

4.4 Framework of Interpretation

On the basis of this Article's central premise that *Sharia* authenticity is intimately linked with context and, in order for these underlying principles of classical commerce to be applied in modern Islamic markets, the principles need to be viewed in light of our modern context. However, this has to be done in a way that does not compromise their ethical substance. This approach is thus one of substantive rationality,⁷⁸ since these principles encapsulate the substance and underlying spirit of the classical transactions, as opposed to just their form. However, absent of context, simply employing those classical interpretations or principles today in a cut and paste fashion resembles the inadequate formalist approach that presently exists in some aspects of Islamic finance, which Hamoudi describes as an 'interpretive methodology relying almost entirely on logic and excluding more contextual and experimentally based techniques ...'⁷⁹ This approach adheres to the form of these classical principles, but not their underlying spirit. In fact, disregarding the contextual dimension and focusing solely on form may, quite ironically, undermine or even distort their underlying spirit.

As well as considering context, the new interpretations of these principles need to be conducted in a way that best expresses that underlying Islamic morality or spirit of the classical period – a bond that ultimately makes these principles Islamic. The principles may remain unchanged, but their interpretations cannot. They otherwise provide interpreters with great flexibility given the breadth of the principles' interpreting capacity – limited only by interpretations that are contrary to the principles' underlying essence. For instance, the principles of 'justice and fairness' may in fact mean different things to different people in different contexts, but one's understanding of this principle is not infinite, and is limited to the possible interpretations of 'justice and fairness', such as excluding that which is unjust and unfair. After acclimatising these principles to the modern context through such reinterpretations, it is submitted that transactions that are in consonance with these classical principles will indicate a higher level of *Sharia* authenticity, and those that are contrary will indicate a lower level.

⁷⁶ Udovitch, 'The "Law Merchant" of the Medieval Islamic World' (n 33) 257.

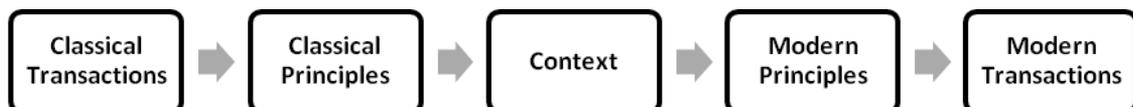
⁷⁷ For instance, where a valuable pawn was deposited by Muslims to Jewish Bankers in the 11th century. See *ibid* 254.

⁷⁸ Opwis (n 19) 192.

⁷⁹ Hamoudi (n 3) 607.

To summarise, our proposed model of *Sharia* authenticity described above employs the principles that we have gleaned from the accepted transactions of the authentic classical period, as presented in the historical findings of the Geniza, and views them through the lens of our modern day context. The next Section will apply this methodological framework to the case study of derivatives in modern Islamic finance.

Figure 1: The Proposed Model for Viewing *Sharia* Authenticity



V. MODERN ISLAMIC FINANCE

In this final Section an endeavour has been made to apply the model of viewing *Sharia* authenticity in the context of modern Islamic finance. This Section shall focus on analysing derivatives, highly controversial in both Islamic and conventional financial systems and widely recognised as being instrumental in bringing about the global financial crisis in 2008. The purpose of this analysis will be two-fold: firstly, to uncover whether classical Islamic principles, in substance and in light of a changed context, are evident in derivatives, and secondly, on the basis of the derivatives case-study, illustrate that *Sharia* authenticity should be viewed on a scale in order to most accurately reflect a transaction's standing in light of authentic Islamic principles.

5.1 *Sharia* Authenticity of Derivatives

A derivative is a generic term describing a transaction whose value derives from an underlying asset or instrument. Futures contracts are one of several derivative structures and will be the sole focus of this Section. They can be viewed as having evolved from forward contracts, whereby farmers for instance, could transact to sell their crops months in advance at a more advantageous price than at the time of delivery. The price agreed upon in advance was known as the strike price. Forwards were a means through which farmers could try to insure themselves against season price fluctuation,⁸⁰ which was by no means foolproof, as they could equally incur a loss on potential profits if the market price turned out to be more favourable to them upon delivery than when the contract was transacted. A futures exchange then

⁸⁰ Mohammed H Kamali, *Islamic Commercial Law: An Analysis of Futures and Options* (The Islamic Texts Society 2000) 3.

emerged where trading took place, which had strict standards pertaining to quality and size.⁸¹ Trades taking place on the exchange were called futures. Clearing-houses were also established which administered the transactions and guaranteed the performance of contracts. Besides buyers and sellers, there emerged speculators who were not interested in the delivery of the underlying asset, but were willing to assume the risk for the potential profits that derived from the price movements. In fact, the underlying assets were hardly delivered in the futures market, in which case the difference between the strike price and the market price was paid out; but if they ever were delivered, they were bought and sold several times before the date of delivery, referred to as short selling, as a seller does not own or possess the items he sells.

5.1.1 *Gharar*

The central issue with derivative structures, such as a futures contract, is *gharar*, typically understood as excessive risk, uncertainty or speculation. Avoidance of this is also one of our core principles of *Sharia* authenticity as established in Section 4. However, since a degree of *gharar* exists in almost all transactions, it must be stressed that the crucial issue is 'one of degree'⁸² and whether the *gharar* in question is exorbitant – a factor which is itself relative to context. The modern commercial environment is a vastly different reality compared to that of the classical period, and with modern technological advances, classical Islamic concerns of *gharar* relating to the object of the sale, its delivery or pricing are all issues that have been significantly reduced. Kamali admits that the increase in technology has introduced further complexities and different types of uncertainties, but maintains that 'a medieval farmer of food grains naturally experienced greater anxiety about the prospectus of a good harvest than his 20th century counterpart',⁸³ implying that uncertainty in commerce has undoubtedly been reduced in the modern context. For instance, the existence of clearing houses today ensures that contracts are fulfilled, which reduces the counter-party credit risk, the risk that counter-parties will default on their obligations. From a mundane perspective, these risks could be seen as the underlying reasoning (*ila*) behind rulings and principles prohibiting the trade of things one does not yet possess or that do not yet exist – both aspects of futures contracts that are criticised and both supposedly within the remit of *gharar*. However, Al-Jundi contests the latter, stating that the subject matter of futures contracts cannot be said to be non-existent because 'the market operates on a permanent basis' and the underlying commodities being traded are

⁸¹ *ibid* 4.

⁸² *ibid* 86.

⁸³ *ibid* 146.

expected to be available on the open market.⁸⁴ Furthermore, writers such as Yusuf Musa, Ali Abd al-Qadir and Yusuf al Qardawi have highlighted that the marketplace of Madina and the classical period could not guarantee regular supplies at any given time,⁸⁵ an issue which is resolved by clearing houses in the modern context, which fulfil the function of those prohibitions and arguably render them inapplicable. Ultimately, it seems that the utility of the prohibition of *gharar*, understood in its classical sense, has significantly diminished in light of the changed context.

5.1.2 Commercial Expediency and Attainment of Profit

Islamic legal criticisms of derivative contracts typically focus on its risky nature, which is another dimension of *gharar*, but its primary function is actually to hedge against risk, which is ironically the exact opposite. Elements of commercial expediency are evident in a seller's ability to simultaneously hedge against risk, ensuring they receive a reasonable amount for the transaction, and, where the strike price turns out to be better than the market price, also allows them to attain profit. They facilitate the needs of all parties by taking the risk out of the hands of those who do not want it, and allocating it to those that do – hence, personifying the principle of 'commercial expediency'. This principle becomes increasingly obvious in situations where farmers possess an excess amount of crops in comparison to market demand. The absence of derivative contracts leaves the farmer selling his crops at a reduced price or storing them until demand increases, which is both costly and risky. The forward contract would alleviate the farmer's situation, allowing him to sell those crops in advance, at a time where prices were more advantageous.⁸⁶ Therefore, derivative contracts seem to evince the dual classical principles of 'attainment of profit' as well as 'commercial expediency'.

5.1.3 Customary Usage of Market Practice

In today's commercial world, speculation has become something of a market custom, and can thus be classified under our classical commercial principle of respecting market or 'customary practice', often accommodated by jurists in the law-making process. Al-Khatib emphasises that speculation is essential for providing liquidity in today's markets and is necessary to keep the futures

⁸⁴ *ibid* 116.

⁸⁵ Sherin Kunhibava, 'Derivatives in Islamic Finance', Research Paper 7/2010 (*International Shari'ah Research Academy for Islamic Finance*, 2010)

<<http://www.kantakji.com/media/8574/n273.pdf>> accessed 25 March 2014.

⁸⁶ Kamali, *Islamic Commercial Law: An Analysis of Futures and Options* (n 80) 3-4.

market functioning.⁸⁷ Speculators buy and sell futures contracts and assume the risk of price fluctuation, whilst also injecting large amounts of money into the market and therefore increasing liquidity levels. They also allow hedgers an economical means of locating counter-parties who are actually willing to assume the risk. The fundamental role speculation plays in the functioning of the futures market and its overall utility makes it the equivalent of a modern day 'merchant's law'⁸⁸ and hence, within the scope of *Sharia* authenticity. However, even Al-Khatib cautions that 'speculation can become an instrument of abuse that can easily compromise the integrity of the market',⁸⁹ referring to excessive speculation, which effectively turns futures contracts into forms of gambling and hence renders them unlawful. The issue, once again, is one of degree. The modern financial world has tried to limit speculation and other potentially damaging economic activities through employing strict and well-regulated frameworks. For instance, Malaysia's Kuala Lumpur Options and Financial Futures Exchange (KLOFFE), governed by The Futures Industry Act 1993, provides a well-regulated framework for derivatives with sufficient measures in place, including heavy fines and even prison sentences,⁹⁰ to minimise exploitation and manipulation. The existence of such measures seems to render laws prohibiting speculation, another form of *gharar*, inapplicable as their functions are carried out by these regulatory measures. Their existence means that the restrictive approach of an almost blanket prohibition held by the likes of Justice Taqi Usmani⁹¹ is needless, especially in light of the several advantages speculation provides. Kamali mentions that 'a cautious and well-regulated approach to commercial speculation in futures and options, such as the one taken in Malaysia, is advisable if it can serve the public interest or *maslahah* ...'⁹² Therefore, even speculative aspects of derivatives, when well-regulated, indicate a level of *Sharia* authenticity under the classical Islamic principle of respecting market practice.

5.2 Shades of *Sharia* Authenticity

The existence of these classical Islamic principles merely indicates that there are levels of *Sharia* authenticity even within the most controversial of financial structures. The irony is that there exist contracts such as the *murabaha*, a relatively more basic building block structure of Islamic finance, which, when

⁸⁷ *ibid* 168.

⁸⁸ Udovitch, 'The "Law Merchant" of the Medieval Islamic World' (n 33).

⁸⁹ Kamali, *Islamic Commercial Law: An Analysis of Futures and Options* (n 80) 168.

⁹⁰ Malaysian Futures Industry Act 1993, pt VII, ss 79-89.

⁹¹ Obiyathulla I Bacha, 'Derivative Instruments and Islamic Finance: Some Thoughts for a Reconsideration' [1999] *International Journal of Islamic Financial Services* 1, 17.

⁹² Kamali, *Islamic Commercial Law: An Analysis of Futures and Options* (n 80) 219.

similarly viewed from a functionalist perspective,⁹³ reveals strikingly obvious violations of classical Islamic principles such as *riba*, or circumventions of them. A *murabaha* is simply a cost plus sale, where an object is sold at the price it was acquired, with the addition of an agreed upon mark-up or profit margin. In contemporary Islamic markets, *murabaha* is used by Islamic financial institutions to finance the purchase of cars and even finance mortgages, but in a manner that mimics conventional financial arrangements. The profit margin is predetermined and often parallels the prevailing market interest rates,⁹⁴ such as LIBOR (London Interbank Offered Rate), which are hidden,⁹⁵ much like the practice of concealing interest in classical transactions as evidenced in the Geniza.⁹⁶ In fact, Useem notes that *murabaha* 'is simply a thinly veiled version of [interest]'.⁹⁷ The economic substance of these modern *murabaha* transactions is ultimately the same as their conventional counterparts, despite their significantly different form. This is attributed to Islamic finance's greater focus on reviving the form of the classical jurisprudence, rather than its underlying spirit, which, ironically, provides it with the opportunity to manipulate and create such parallel structures and effectively circumvent the jurisprudential underlying spirit.

Both derivative and *murabaha* structures individually display the same complex ambiguity; neither of them entirely adheres to or contradicts the authentic classical principles of Islamic transactions. They contain aspects of both. The same pattern is demonstrated above with modern Islamic finance as a whole. Tyan, in being critical of the Geniza's scope, inadvertently confirms this to be the case in even the classical period, where, in practices such as *hawala* (transfer of debt), there existed a wide divergence between legal theory and practice.⁹⁸ This has important implications for the question of *Sharia* authenticity as it illustrates that in reality transactions cannot be limited to strict binary categorisations of authentic and non-authentic, or, in the terminology of modern Islamic finance, *Sharia* compliant or non-compliant. Alternatively, it seems there are different shades of *Sharia* authenticity in Islamic financial transactions. This approach of viewing *Sharia* authenticity seems to bear a greater semblance to the classical Islamic ethical scale, which included varying levels of ethical standards in measuring acts within the area of *mu'amalaat*. These included acts that were: obligatory (*wājib*), recommended (*sunna, mustahabb*), indifferent

⁹³ Hamoudi (n 3) 607.

⁹⁴ Mahmoud A El-Gamal, "'Interest" and the Paradox of Contemporary Islamic Law and Finance' (2003) 27 Fordham International Law Journal 1, 17.

⁹⁵ Hamoudi (n 3) 618.

⁹⁶ Udovitch, 'The "Law Merchant" of the Medieval Islamic World' (n 33) 257.

⁹⁷ El-Gamal (n 94) 17.

⁹⁸ Foster, 'Islamic Perspectives on the Law of Business Organisations 1' (n 50) 25.

(*mubāh*), reprehensible (*makrūh*) and forbidden (*harām*).⁹⁹ Islamic finance clearly cannot adopt the same categories, but a scale with a greater range would be better reflective of a transaction's level of *Sharia* authenticity. Furthermore, it becomes clear that the present strict binary categorisation yields distorted and limited results, such as the prohibition of derivatives by the likes of Justice Taqi Usmani.¹⁰⁰ Instead, reviving this ethical scale of classification in the area of commercial transactions and alternatively, viewing transactions' legitimacy on a spectrum denoting differing degrees of *Sharia* authenticity seems to be more in line with classical Islamic law and hence, more *Sharia* authentic.

VI. CONCLUSION

So far the efforts of Islamic finance to harmonise the sacred classical Islamic principles with today's ever-increasingly complex socio-economic environment has resulted in a legal system that seems burdened by its very classical Islamic roots, limited by large bodies of jurisprudence that emerged during this acclaimed golden era of Islam. What this Article has tried to underscore is that we must steer clear of such burdensome efforts, which too narrowly focus on conservative-inspired mechanical adherence to the 'form' of the law or its principles. This is but one aspect of *Sharia* authenticity. Such a formalist approach in Islamic finance today has proven inadequate and fails the classical Islamic principles, which it claims to adhere to, through adopting highly technical legal gymnastics and hence, circumventing the classical principles in reality. It also fails to be economically efficient, as illustrated by the prohibitions of derivatives by the likes of Justice Taqi Usmani based on its perceived formalist violations of *gharar*.

This Article has shown that there is a need for a more effective methodology, such as our proposed context-based model of Section 4, which takes those same classical principles and re-energises them in light of the modern context and thus, creates a framework which satisfies the competing interests of devout Muslims: to revive the classical principles and also to remain economically efficient in a 21st century context. Ultimately, we should yield to the reality that a changed context logically precludes formalism from effectively taking place and, in some instances, renders attempts of such formalism an unnecessary hindrance as the changed context adequately facilitates the functions of those prohibitions, as illustrated in Section 5 with the existence of clearing houses rendering the prohibition of *gharar* inapplicable within derivatives. We should delve deeper into the underlying functions and reinterpret these principles,

⁹⁹ Johansen (n 26) 69.

¹⁰⁰ Bacha (n 91) 17.

whilst staying true to their ethical substance, viewing them through the lens of the modern context in all its complexity, as it is here that these principles are operating. Only after viewing *Sharia* authenticity 'contextually' can we truly measure to what extent modern transactions evince those same classical principles that devout Muslims across the world so long to revive. Emphasis is given to the word 'measure' as our analysis of derivatives illustrated above in Section 5; modern Islamic transactions never 'completely' reflect Islamic principles, but neither do they entirely contradict them. They all seem to have differing degrees of adherence, which indicates that the most appropriate way to view them is on a scale depicting differing shades of *Sharia* authenticity. This approach not only acknowledges the inherent complexity of these transactions, but also provides a means through which the beneficial elements of Islamically-suspect transactions may be retained through simply providing lower ratings on a scale reflecting their *Sharia* authenticity – which is a far better approach than any blanket prohibition. So let us embrace this inherent flexibility and livingness of '*Sharia* authenticity' – forever shaped by context and forever a guiding tool for Islamic finance's unpredictable future.

BIBLIOGRAPHY**BOOKS**

- Coulson N.J, *Conflicts and Tensions in Islamic Jurisprudence* (1st edn, University of Chicago Press 1969)
- El-Diwany T, *Islamic Banking and Finance: What It Is and What It Could Be* (1st edn, Ethical Charitable Trust 2010)
- Esposito J.L, *Islam: The Straight Path* (OUP 1998)
- Goitein S.D, *A Mediterranean Society: Economic Foundations*, vol 1 (University of California Press 1967)
- Hallaq W.B, *An Introduction to Islamic Law* (CUP 2009)
- — *Can the Shari'ah be Restored? Islamic Law and the Challenges of Modernity* (1st edn, Altamira Press 2004)
- — *Islamic Legal Theories* (CUP 1997)
- — *The Shari'a: Theory, Practice, Transformation* (CUP 2009)
- Hodgson M.G.S, *The Venture of Islam*, vol 1 (University of Chicago Press 1961)
- Johansen B, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslims Fiqh*, vol 7 (Brill 1999)
- Kamali M.H, *Islamic Commercial Law: An Analysis of Futures and Options* (Islamic Texts Society 2000)
- — 'Law and Society: The Interplay of Revelation and Reason in the Shariah' in John Esposito (ed), *The Oxford History of Islam* (OUP 1999)
- Kant I, *Groundwork of the Metaphysics of Morals* (CUP 1785)
- Mackie J.L, *Ethics: Inventing Right and Wrong* (Penguin Books 1977)
- Menksi W, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd edn, CUP 2006)
- Saleh N, *Unlawful Gains and Legitimate Profit in Islamic Law* (CUP 1986)
- Schacht J, *An Introduction to Islamic Law* (Oxford Clarendon Press 1950)
- Udovitch A, *Partnership and Profit in Medieval Islam* (Princeton University Press 1970)
- — 'The "Law Merchant" of the Medieval Islamic World' in GE von Grunebaum (ed), *Logic in Classical Islamic Culture* (Otto Harrassowitz 1970)
- Hayes S.L and Vogel F.E, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998)
- Weiss B, *The Spirit of Islamic Law* (Atlanta University of Georgia Press 1998)

JOURNAL ARTICLES

- Bacha O.I, 'Derivative Instruments and Islamic Finance: Some Thoughts for a Reconsideration' [1999] *International Journal of Islamic Financial Services* 1
- Baderin A, 'Understanding Islamic Law in Theory and Practice' (2009) 9 *Legal Information Management* 186
- Calder N, 'Ikhtilâf and Ijmâ' in Shâfi'î 's Risâla' (1983) 58 *Studia Islamica* 55
- Chachi A, 'Origin and Development of Commercial and Islamic Banking Operations' (2005) 18 *Islamic Economics* 3
- Cohen E, 'Authenticity and Commoditization in Tourism' (1988) 15 *Annals of Tourism Research* 371

- El-Gamal M.A, ‘“Interest” and the Paradox of Contemporary Islamic Law and Finance’ (2003) 27 *Fordham International Law Journal* 1
- Ercanbrack J, ‘The Law of Islamic Finance in the United Kingdom: Legal Pluralism and Financial Competition’ (PhD thesis, SOAS 2011)
- Fadel M, ‘Riba, Efficiency, and Prudential Regulation: Preliminary Thoughts’ (2008) 25(4) *Wisconsin International Law Journal* 655
- Foster N.H.D, ‘Islamic Commercial Law: An Overview (I)’ (2006) 4 *InDret* 1
- — ‘Islamic Commercial Law: An Overview (II)’ (2007) 1 *InDret* 1
- — ‘Islamic Perspectives on the Law of Business Organisations 1’ (2010) 11(1) *European Business Organization Law Review* 3
- Goitein S.D, ‘Commercial and Family Partnership in the Countries of Medieval Islam’ (1964) 3 *Islamic Studies* 315
- — ‘The Cairo Geniza as a Source of the History of Muslim Civilisation’ (1955) 3 *Studia Islamica* 75
- Hamoudi H.A, ‘Jurisprudential Schizophrenia: On Form and Function in Islamic Finance’ (2007) 7(2) *Chicago Journal of International Law* 605
- — ‘The Muezzin’s Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law’ (2008) 56 *American Journal of Comparative Law* 423
- Jackson S.A, ‘Domestic Terrorism in the Islamic Legal Tradition’ (2001) 91 *The Muslim World* 293
- Kamali M.H, ‘Islamic Commercial Law: An Analysis of Futures’ (1996) 13 *American Journal of Islamic Social Sciences* 197
- — ‘Islamic Commercial Law: An Analysis of Options’ (1997) 14 *American Journal of Islamic Social Sciences* 17
- — ‘Maqasid al-Shariah: The Objectives of Islamic Law’ (1999) 38 *Islamic Studies* 193
- Frederic W, Karasik T and Steven S, ‘Islamic Finance in a Global Context Opportunities and Challenges’ (2007) 7(2) *Chicago Journal of International Law* 379
- Mallat C, ‘From Islamic to Middle Eastern Law’ (2003) 50 *American Journal of Comparative Law* 669
- Opwis F, ‘Maslaha in Contemporary Islamic Legal Theory’ (2005) 12(2) *Islamic Law and Society* 182
- Saleh N, ‘Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking’ (1986) 3 *Cambridge University Press* 115
- Udovitch A, ‘Theory and Practice of Islamic Law: Some Evidence from the Geniza’ (1970) 32 *Studia Islamica* 289
- Weiss B, ‘Interpretation in Islamic Law: The Theory of Ijtihad’ (1978) 26 *American Journal of Comparative Law* 199

STATUTES

- Part VII Malaysian Futures Industry Act 1993
The Futures Industry Act 1993

WEBSITES AND OTHER SOURCES

- Amin M, 'How can Islamic finance enter into western markets?' (5 December 2012)
<http://www.mohammedamin.com/Islamic_finance/Entry-into-western-markets.html> accessed 1 December 2013
- 'Enlightenment' (*Stanford Encyclopedia of Philosophy*, 20 August 2010)
<<http://plato.stanford.edu/entries/enlightenment/>> accessed 1 December 2013
- 'Geniza: Lessons for Islamic Finance' (*Marifa Academy*, 5 February 2014)
<<http://marifaacademy.com/blog/?p=20>> accessed 1 December 2013
- 'Islamic Finance Country Index: Methodology and Results' (*Global Islamic Finance Report*, 2012) <http://www.gifr.net/home_ifci.htm> accessed 1 April 2014
- Khan A, 'Islamic Finance – False Dawn' (*Islamic Revival*, 2 November 2009)
<<http://islamicsystem.blogspot.co.uk/2009/11/islamic-finance-false-down.html>>
accessed 1 December 2013
- Kunhibava S, 'Derivatives in Islamic Finance', Research Paper 7/2010
(*International Shari'ah Research Academy for Islamic Finance*, 2010)
<<http://www.kantakji.com/media/8574/n273.pdf>> accessed 25 March 2014
- Molnar T, 'Tradition and Social Change' (*First Principles ISI Web Journal*, 7 October 2010)
<<http://www.firstprinciplesjournal.com/articles.aspx?article=64>> accessed 1
December 2013
- Moore E and Wigglesworth R, 'Cameron aims to boost Islamic finance' (*The Financial Times*, 28 October 2013)
<<http://www.ft.com/cms/s/0/46947cc6-3ff9-11e3-a890-00144feabdc0.html#axzz2xfveqN2a>> accessed 1 December 2013
- Wade R, 'The Enlightenment and Belief in God' (*Probe Ministries*, 2002)
<http://www.probe.org/site/c.fdKEIMNsEoG/b.4220807/k.47FF/The_Enlightenment_and_Belief_in_God.htm> accessed 1 December 2013

Creating A Legal Market In Kidneys: Recognition of Ownership of the Body and Its Parts and A Proposal For A Legal Kidney Market

Setareh Taei*

I. INTRODUCTION

Central to libertarian ethos lies the well-embedded mantra, 'The body is mine, and mine alone'. Under the auspices of libertarianism, the core principles accentuating the right to self-ownership clash with the long-standing provisions in law against the recognition of a proprietary interest in one's body. The critical disparity between supply and demand in organ transplantation and its ramified loss of life has been documented worldwide.¹ In a world where three people die each day in anticipation for a kidney in Britain, and eighteen people in the US,² the need for kidneys is urgent. The traditional 'no property' approach in English law to the human body, including biomaterials leading to the denial of a commercial kidney market (ss 32 and 33 Human Tissue Act 2004), has fuelled this shortage. Inevitably, 'a global black market in human organs and a booming transplant tourism industry has materialised'.³

Controversy highlights the live debate regarding the valuable consideration for the exchange of a kidney. Advocacy for such a commercial market in kidneys has resulted in fundamental concerns with apprehension of opening up a Pandora's Box of ethical dilemmas. The underlying issue concerns the ownership of the body and its parts — vital for discussion because ownership is a prerequisite for economic transactions.⁴ Therefore, to deal successfully with

* Setareh Taei is an LL.B graduate from SOAS, University of London. I would like to thank Professor Paul Kohler for his much appreciated guidance throughout. For my mother, who has been there for me through every step of the way and for always being my rock.

¹ Alireza Bagheri, 'Compensated Kidney Donation: An Ethical Review of the Iranian Model' (2006) 16(3) Kennedy Institute of Ethics Journal 269.

² 'Organ Donation: Statements And Stances' (*Organ Donation*, March 2010)

<http://www.organdonation.nhs.uk/newsroom/statements_and_stances/> accessed 20 January 2014.

³ Steve P Calandrillo, 'Cash For Kidneys? Utilising Incentives To End America's Organ Shortage' (2004) 13 George Mason Law Review 69, 87.

⁴ Barbro Björkman and Sven Ove Hansson, 'Bodily Rights and Property Rights' (2006) 32 Journal of Medical Ethics 209.

commerce and remuneration, we must clarify the extent to which the body and its parts can be recognised as property.⁵ This Article provides a theoretical and legal analysis through the lens of libertarianism, arguing for self-ownership. Those hostile to self-ownership and a kidney market argue that it commodifies the body, challenging one's moral integrity. A market raises fears of predicaments such as exploitation of the poor, who, in times of destitution, will be attracted to making a quick buck via the system, making them slaves to the rich by providing them an abundant supply of kidneys. This Article however demonstrates that the body is already commodified, highlighting the contradictory nature of the law, and that injustice and inequality underlie any system and will be inevitably impossible to combat completely. A limited property right further thwarts fears of individuals selling their lives; this Article asserts that only biological material that does not harm anyone should be allowed to be sold, just like blood, sperm and hair which are regenerative and whose sale have been permitted in the past.

The analytical framework on ownership of the body lends itself to philosophical and legal theorists who subscribe to the 'body as property' view. The various kidney transplantation systems highlighted in this paper – UK, Spain and Iran – further demonstrate conflicting perceptions of the body. With Iran being the only country in which kidney sales are permitted, it provides a concrete legal framework from which the West can learn.

Section 2 explores philosophical perspectives on the individual's relationship with the body, and what constitutes property, and whether the body is congruent with these well-founded elements. The capricious nature of the law will be illustrated via case law. The law's progressive recognition of self-ownership will serve as the foundation of arguing for a compensated, regulated kidney market.

Section 3 analyses the fears held by those against commodifying the kidney. It draws from contemporary examples – prostitution, commercial surrogacy and the kidney exchange programme – highlighting the contradicting reasoning justifying the denial of such a market. Utilitarianism and Kantian ethics are further used to support such a market.

Section 4 looks at the body in three global spectrums. It compares the Iranian model with the current opt-in/out systems in Spain and the UK. Iran exemplifies the approach we should be taking.

⁵ *ibid.*

II. SELF-OWNERSHIP

*Over himself, over his own body and mind, the individual is sovereign.*⁶

At the epitome of libertarianism lies self ownership: the belief that every individual owns himself and has the right to do what he wishes with his body provided, no harm is caused. However, the law prohibits the way the body is used, for example, by prohibiting kidney sales. This is highly debated, for the ability to donate one's own kidney arguably postulates prior ownership of it. It is this paradox that haunts contemporary bioethics and law. This Section explores these contentious issues through philosophical and legal theory and attempts to illustrate that we own our bodies; thus, interference by the state is a violation on our rights, and selling our kidney should be permitted.

2.1 Theories on Property Rights and the Body

The 'body as property' is often rejected on the grounds that its acceptance might lead to morally objectionable practices.⁷ Historically, however, people as property was comfortably accepted. For example, in Roman and Anglo-Saxon law, and later by statute and common law fiction and equity, a debtor could be personally attached to force payment of the debt.⁸ Similarly, a wife was equated to chattel of her husband (*Hopkins v Blanco*).⁹ In the 17th century, people could be slaves, chattel owned by their masters (*Gregson v Gilbert*).¹⁰ Two hundred years of legal slavery exhibits the inherent collision of the market with human freedom. For most anti-slavery advocates, self-ownership constituted the 'taproot of freedom'¹¹ and the 'defining sin of slavery was its denial of a property in the self'.¹² Liberal notions were evident even in that era, where Sir William Blackstone commented, '[T]he spirit of liberty is so deeply ingrained in our constitution' that the instant a slave 'lands in England, [he] becomes a freeman; that is, the law will protect him in the enjoyment of his person, his liberty and his property'.¹³ For libertarians, acceptance of self-ownership is a

⁶ John Stuart Mill, *On Liberty* (J.W. Parker and Son 1859).

⁷ Muireann Quigley, 'Property Rights in the Human Body: Applying Honoré' (2007) 33(11) *Journal of Medical Ethics* 631.

⁸ Mark Pawlowski, 'Property in Body Parts and Products of the Human Body' (2009) 30(1) *Liverpool Law Review* 35.

⁹ *Hopkins v. Blanco*, 457 Pa. 90, 320 A.2d 139 (1974).

¹⁰ *Gregson v Gilbert* [1783] 99 ER 629.

¹¹ Peter Halewood, 'On Commodification and Self-Ownership' (2008) 20 *Yale Journal of Law and Humanities* 131, 133.

¹² *ibid.*

¹³ 'Right of Revolution' (*The Founders' Constitution*, 1765)

<<http://www.press-pubs.uchicago.edu/founders/documents/v1ch3s3.html>> accessed 14 December 2013.

necessity; otherwise, the argument that slavery is evil would have no validity. One cannot base the evilness of slavery on the mere fact that 'slaveholders often treat their slaves badly, since a kind-hearted slaveholder would still be a slaveholder, and thus morally blameworthy, for that'.¹⁴ Rather, the reason slavery is immoral is because it constitutes stealing – 'the stealing of a person from himself'.¹⁵ Murray Rothbard takes this view and argues that 'a man can alienate his labour service, but he cannot sell the capitalised future value of that service'.¹⁶ This is because an individual cannot sell himself into slavery and have this sale enforced as this would result in him surrendering his future will over his person. Thus, a man 'cannot transfer himself, even if he wished, into another man's permanent capital good'.¹⁷ This somewhat removes the contradictory nature of Locke's labour theory in which he argues that every man owns his labour, yet still agrees there can be slavery (but not the selling into). Rothbard argued that voluntary slavery is contradictory itself, for when an individual submits himself to the subservience of his master voluntarily, he is not yet a slave since his submission is voluntary; but if he later changes his mind 'and the master enforce[s] his slavery by violence, the slavery would not then be voluntary'.¹⁸

Libertarian philosophy traces its conceptual ancestry to 17th century philosopher John Locke, who, in justifying private ownership of 'unowned "things"' (ie things in nature), argued that 'every Man has a Property in his own Person' and thus, 'no Body has any Right to but Himself'.¹⁹ Therefore, we have property in our actions, which in turn gives us a property right in what we 'mix' our labour with. Alan Ryan argues that this property is a natural relationship in that it suffices to establish a claim of natural right in the absence of government and a system of positive law, and in the absence of any agreement by other persons to acknowledge our rights over what we thus establish a property right in.²⁰ Much uncertainty lies in Locke's theory and the different interpretations of his 'metaphor' can be discussed in three parts.

Firstly, much debate surrounds the meaning of 'every man hath property in his own person'.²¹ Some have interpreted it literally, meaning we have property in

¹⁴ Edward Feser, 'Robert Nozick (1938-2002)' (*Internet-Encyclopedia of Philosophy*) <<http://www.iep.utm.edu/nozick>> accessed 18 December 2013.

¹⁵ *ibid.*

¹⁶ Murray Rothbard, *The Ethics of Liberty* (New York University Press 1998).

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ John Locke, *Two Treatise on Government* (London 1821).

²⁰ Alan Ryan, 'Self Ownership, Autonomy, and Property Rights' (1994) 11(2) *Social Philosophy and Policy* 241.

²¹ Locke (n 19).

our bodies, hence, we own ourselves. However, Anne Philips, amongst other critics, argues that Locke was not implying property in the body and did not intend an absolute right to do whatever one wished with one's body and its parts.²² Likewise, Ryan argues ownership of ourselves does not amount to full liberal ownership. Instead, he posits that having property of ourselves is akin to what an English-man would recognise as a repairing lease; that is, a leasehold interest that grants rights of occupancy and enjoyment as extensive as those that the freehold owner would have and allows one to sell the unexpired portion of one's lease, but imposes simultaneously the requirement to maintain the property and hand it back in as good condition as it was received. This argument must be perceived carefully for at death, we do not hand our bodies back, nor are they given to someone else to use, so the requirement of it being in as good condition as it was first received is unfounded. When we die our bodies and organs will never be as they were at the beginning. Rather, it is that more elusive entity, 'our person that we have an indefinite care for, and our bodies are to be used properly in its service'.²³ Locke in some form also viewed the body as a leasehold, stating that 'men being all the workmanship of one omnipotent and infinitely wise Maker – all the servants of one sovereign Master, sent into the world by his Order, and about his business – they are his, not one another's pleasure'.²⁴ Thus, for Locke, we have a limited property right in our body, for we cannot commit suicide, undermining the absolute nature of property rights. However, this fails if a person does not believe in an 'omnipotent and infinitely wise maker'. The justification is perhaps a little outdated considering society's secularisation.

Nevertheless, possession greatly occupies the law and therefore, even if we accept that we only have a leasehold interest in our body, as long as we are in possession of it, it is still possible to own it. In fact, with leaseholds, we still have the power to sublet it, and you cannot give or let something you do not own (*nemo dat*), even if it is temporary. Perhaps this discussion requires an analysis of the body and soul distinction. If it is your soul that occupies the body (hence, possession), then, accepting we own ourselves, when the soul leaves the body upon death, the body then becomes no property. In George Bernard Shaw's play *Man and Superman*, he tried to portray exactly this. For him, we own our souls and this is what occupies the body. According to him, our bodies drag us down in that 'hunger, and cold, and thirst, age, decay and disease, death above all, makes [people] slaves of reality'.²⁵ He further asserts

²² Anne Philips, 'It's My Body And I'll Do What I Like With It: Bodies as Objects and Property' (2011) 39(6) *Political Theory* 724.

²³ GW Smith (ed), *Liberalism: Rights, Property and Markets* (Routledge 2002) 225.

²⁴ Locke (n 19).

²⁵ George Bernard Shaw, *Man and Superman* (United Holdings Group 1931).

that 'thrice a day a meal must be eaten and digested', which is congruent with the discussion below on labouring oneself – in other words, we are constantly labouring our body, for without it, we simply die. He further argues that when our souls enter heaven, we 'escape the tyranny of the flesh'²⁶ because we are bodiless. This could justify the current position in law because, upon death, your body is deemed '*nullius in bonis*';²⁷ hence, a representation of your soul leaving your body, but signifying that it was yours before, *unlike* the position in law.

Secondly, even if Locke did not imply literal interpretation, we must analyse what he postulated as the 'mixing labour' theory. He argues, 'The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state of nature [and] ... hath mixed his labour with ... thereby makes it his property'.²⁸ There are two potential ways to apply this theory to the body. Firstly, it applies to things in their state of nature. In *Association for Molecular Pathology v Myriad Genetics, Inc.*²⁹ the United States Supreme Court held that genes cannot be patented because they are naturally occurring. Therefore, our bodies could potentially be naturally occurring since they are made up of these genes. If Locke is correct, by necessity we must own ourselves, for otherwise anyone who did any work on us would come to have a property interest in us. For example, would a tattoo artist who tattoos your arm become the owner of your arm as a result of mixing his labour with it? According to Locke, but disputed by Nozick, this could subsequently lead to the ownership of your whole body.³⁰ According to Locke, others cannot own you for you own your labour. Therefore, self-ownership is essential to avoid enslavement.

Alternatively, if we are naturally occurring, one can argue that an individual labours his own body through the maintenance of it. For example, eating well, exercising and even stimulating the mind via education adds value to the body. Without such maintenance and self-preservation one would starve and wither away. Therefore, one could say that mixing one's labour with a naturally occurring phenomenon, the body, amounts to appropriation, inducing ownership of it and allowing one to bear the fruits of one's labour. As Locke stated, 'His labour hath taken it out of the hands of nature, where it was common, and belonged equally to all her children, and hath thereby

²⁶ *ibid.*

²⁷ *Hayne's Case* [1614] 77 ER 1389.

²⁸ Locke (n 19).

²⁹ *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 132 S.Ct. 1794 (2012).

³⁰ Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (CUP 2002).

appropriated it to himself'.³¹ Therefore, even if at one point our bodies were regarded as being in common, through our labour we become the owners of our bodies. Harris, agreeing with Locke, argued that 'starting with the premise of self-ownership, ownership of the fruits of my labour follow automatically. My body is the tree; my actions are the branches; and the product of my labouring activities is the fruit'.³²

Rothbard regards self-ownership as being the only viable solution. He recognises only two refutable alternatives: (a) communal ownership – 'no person is a full self-owner of their body and each person has an equal part of the ownership of everyone's body'³³ or (b) class rule ownership – 'one person or group of persons are entitled to own not only themselves but all the remainder of society'.³⁴ He rejects (a) for it is 'physically impossible for everyone to keep continual tabs on everyone else, and thereby to exercise his equal share of partial ownership over every other man'.³⁵ Even if it were not impossible, it is 'absurd to hold that no man is entitled to own himself, and yet to hold that each of these men is entitled to own a part of all other men'.³⁶ He adds that a society systematised on this principle perishes because it interferes with people's freedom to act and ability to survive; and thus, it is not desirable because people refuse to live in a society where they are not 'free to take any action whatsoever without prior approval by everyone else in society'.³⁷

Rothbard further rejects (b) because it is not a universal ethical rule that pertains to all humans as it demands that those owned are 'subhuman beings who do not have a right to participate as full humans in the rights of self-ownership enjoyed by'³⁸ their owners. One criticism is that he fails to consider bodies as 'no property'. He touches on it later arguing, '[S]ince ownership signifies a range of control, this would mean that no one would be able to do anything, and the human race would quickly vanish'.³⁹ However, Rothbard has confused ownership and control because while 'ownership implies control,

³¹ Locke (n 19).

³² JW Harris, 'Who Owns My Body' (1996) 16(1) Oxford Journal of Legal Studies 55.

³³ 'A Critique of Rothbard's Arguments For The Natural Right to Self-Ownership' (*Anarchopac*, 2013)

<<http://www.anarchopac.wordpress.com/2013/12/08/a-critique-of-rothbards-arguments-for-the-natural-right-to-self-ownership>> accessed 4 December 2013.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

control does not necessarily imply ownership'.⁴⁰ Thus, Anarchopac argues that individuals may not own themselves but nonetheless control themselves,⁴¹ which is sufficient for survival. This, however, could be challenged on the basis that control can change from one's hands to the hands of an enemy. What happens when one falls under someone else's control? For example, prisoners at Guantanamo Bay are under the control of the United States government, with no control over the interference with their bodies. Many of the prisoners have not been charged with a crime, and during their time they are tortured via violent procedures of force-feeding and sleep deprivation. Once something and someone is in possession, control of that something or someone will become inevitable. In fact, one can even argue that some of the abhorrent ordeals these individuals face are akin to the ordeals of slaves.

Furthermore, possession and control falls under Honoré's eleven incidents of ownership. He identifies these as being the 'liberal concept of full individual ownership'.⁴² These are constitutive of, but not compulsory to ownership.⁴³ These include, inter alia, the right to possess, use and manage the body; the right to earn income from the body; and transmissibility. We already know that we possess, use and manage our bodies; we can put our bodies to work and get paid for our labour; and through our ability to donate blood and organs, we know that we can also transfer aspects of our body. This is similar to the 'bundle of rights approach' first advocated by Hohfeld: '[T]he right to exclude, the right to transfer and the right to possess and use'. As Elinor Ostrom notes, 'None of these rights is strictly necessary ... Even if one or more sticks [incidents] are missing, someone may still be said to "own" property'.⁴⁴ However, Driesen argues that if too many sticks are missing from the bundles, then ownership becomes 'an unhelpful – indeed, a misleading – concept'.⁴⁵ The primary bundles are present in relation to the body, thus, being indicative of self-ownership. Gray recognises that the right to exclude lies at the epitome of property and argues that '[property] is not about enjoyment of access but about control over access', further supporting self-ownership.⁴⁶

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Carl Wellman, *Rights and Duties: Property Rights and Duties of Redistribution*, vol 6 (Taylor & Francis 2002).

⁴³ Jesse Wall, 'The Legal Status of Body Parts: A Framework' (2011) 31(4) *Oxford Journal of Legal Studies* 783.

⁴⁴ Larry Lohmann, *Carbon Trading: A Critical Conversation on Climate Change Privatisation and Power* (Mediaprint 2006).

⁴⁵ David M Driesen, 'What's Property Got To Do With It' (2003) 30 *Ecology Law Quarterly* 1003 (reviewing Daniel Cole, *Pollution & Property: Comparing Ownership Institutions for Environmental Protection* (CUP 2002)).

⁴⁶ Kevin Gray, 'Property in Thin Air' (1991) 50(2) *Cambridge Law Journal* 252.

Moreover, Nozick argued that our rights stem from the fact that we are all self-owning individuals. His use of 'self-ownership' is deduced as meaning that we hold the same rights of 'use, abuse, loan, sale, rent, and in the end destruction, over our own bodies' in the same way we attribute these rights over other 'things' we think of as being property. He demonstrates this using the analogy of ten pounds withdrawn from a cash machine and argues that one can do whatever one wishes with it – whether he spends it, gives it away or burns it – the same applies to the body. Thus, everyone deserves to have this right respected and one falls foul of injustice if this is violated.⁴⁷ However, Nozick views government redistribution of tax as being akin to theft and also fails to recognise people as self-owners: 'Taxation of earning from labour is on par with forced labour ... [T]aking the earnings of n hours labour is like taking n hours from the person; it is like forcing the person to work n hours for another's purpose'.⁴⁸ This is akin to Locke's labour theory, for essentially, the money one should receive for his labour is going to someone else. Vallentyne, agreeing, adds that from 'the cardinal principle that each person is the legitimate owner of his own powers'⁴⁹ it necessarily follows that redistribution taxation is tantamount to theft. Both these views maintain that we have self-ownership, for otherwise redistribution taxation would not be regarded as being wrong.

Contrary to Nozick, Cohen argues that we do not in fact own ourselves. He uses 'eyes' to demonstrate this: suppose the state were to hold a lottery every time someone went blind, and if your national insurance number came up and you still had your sight, it would take one of your eyes and give it to the blind person.⁵⁰ Many people would view this as unjust. Nozick argues that this would occur in a Rawlsian state in order to benefit the least well off, whereas Cohen denies that the state could justly do this because of Rawls' first principle of autonomy, as this would be a 'gross unwarrantable interference in your life by the state'.⁵¹ But he argues that this injustice does not result from self-ownership. Instead, he argues, taking his first example, imagine a world where everyone is born without sight and the state has the patent on mechanical eyes which, if implanted shortly after birth, work into adulthood even if they are not in the body of the person they were first transplanted into.⁵² At death the state takes them back, refurbishes them and reuses them. They remain the state's

⁴⁷ Helen McCabe, 'John Rawls & Justice' (*Philosophy Now*, 2014)

<http://philosophynow.org/issues/92/John_Rawls_and_Justice> accessed 15 February 2014.

⁴⁸ Robert Nozick, *Anarchy State and Utopia* (Basic Books 1974).

⁴⁹ Barbara H Fried, 'Left-Libertarianism: A Review Essay' (2004) 32 *Philosophy & Public Affairs* 66.

⁵⁰ McCabe (n 47).

⁵¹ *ibid.*

⁵² *ibid.*

property but the state lets people borrow them for free over their lifetimes. Now imagine both eyes break for someone, the state has a lottery and your number comes up; so the state retrieves one of their eyes from you and give it to the person with broken eyes. You might think this is also unjust – but, Cohen argues, if you do think this is unjust, then this shows it is not self-ownership at work (as the state retains the eye), but that people have a right to bodily integrity: '[T]he suggestion arises that our resistance to a lottery for natural eyes shows not belief in self-ownership but hostility to severe interference in someone's life'.⁵³

David Gordon argues that a defender of self-ownership could likewise acknowledge the wrongfulness of the removal of someone's eyes in Cohen's scenario. All he needs to maintain his proposition is that you own your eyes and this 'adds to the moral badness of making you enter the eye lottery', and questions, what is wrong with that?⁵⁴ He asserts that bodily integrity and self-ownership 'supplement each other, rather than compete for allegiance as Cohen appears to think'.⁵⁵ Furthermore, Cohen's scenario disregards consent because the lottery would undoubtedly be involuntary and hence, a violation against all the people included in it. In addition, his model does not make sense in application to the body for this would assume that the government owned our bodies, or that a person could be separated from their bodies in the same way they could with their eyes.

At the core of people's rejection of our body as property lies the perception that others will be able to own us. However, such critics fail to realise that the assertion of self-ownership will only allow *the individual* to view *his* body as property and no other person can own it. As Hyde argues, 'If my body is property, it may neutralise others' domination of it ...'⁵⁶ The lack of self-ownership in the law has left scientists and researchers with the ability to remove bodily materials from others, patent it and make windfall profits from this. Therefore, it is not the recognition of self-ownership that will result in other people's domination of your body, but rather the non-recognition of it. As a result, self-ownership is a necessity and will only enhance one's autonomy.

Advocates of self-ownership argue that the same applies to body parts. Boulter argues that if society regards an individual's body as their property, it is only

⁵³ *ibid.*

⁵⁴ David Gordon, 'A Reluctant Marxist' (*The Mises Review*, 1998) <http://mises.org/misesreview_detail.aspx?control=106> accessed 16 January 2014.

⁵⁵ *ibid.*

⁵⁶ Alan Hyde, *Bodies of Law* (Princeton University Press 1997) 56.

logical that property rights are acknowledged in excised body parts.⁵⁷ Campbell further argues that self-ownership stipulates that individuals ought to be able to alienate their separated biological material. Therefore, if one owns their body parts, sale should not be prohibited for one should be able to do as one wishes with one's own property.⁵⁸ However, others disagree. The plethora of arguments for and against demonstrates a lack of consensus on self-ownership and ownership of body parts. Even the law is clouded on this matter. Therefore, it may be helpful to look at utilitarianism and Kantian ethics, which provide an ideal way of thinking about property in the kidney.

2.1.1 Utilitarianism

Based on the maxim, '[T]he greatest happiness for the greatest number that is the measure of right and wrong',⁵⁹ utilitarianism is one of the greatest defences for a kidney market. Happiness was characterised as pleasure over pain. In order to satisfy this, Bentham created a hedonistic calculator in which to weigh pleasure versus pain. The criteria was categorised by 'intensity, duration, certainty, proximity, productiveness, purity and extent'.⁶⁰ The creation of a kidney market would bring the greatest happiness to both parties where the donor is compensated and the recipient receives a life-saving kidney – 'both parties would receive a benefit from the fulfilment of their end of the bargain'.⁶¹ The pain experienced, which is realistically experienced by both parties, would be far less than the benefit gained. Though some believe this will allow the killing of a person to harvest organs to save the lives of many, Bentham argued that the law would 'define inviolable rights, such as the fundamental right to life, which would protect the well-being of individuals'.⁶²

Alternatively, J.S. Mill, who was strongly against state paternalism, argued that power can only be legitimately exercised over an individual 'against his will to prevent harm to others'.⁶³ Therefore, to achieve the highest form of good, people should be allowed to decide for themselves what to do, including what to do with their bodies. Only an individual knows his own body, and the state has a duty to respect one's liberty. Therefore, on this basis, the sale of an organ is not 'injurious to others and therefore ... the state has no interest in governing

⁵⁷ Wall (n 43).

⁵⁸ *ibid.*

⁵⁹ Jeremy Bentham, *Fragment on Government* (CUP 1988).

⁶⁰ *ibid.*

⁶¹ Heather Hausleben, 'Property Rights in Organs – An Argument for Commodification of the Body' [2013] Law School Student Scholarship Paper 350.

⁶² *ibid.*

⁶³ Mill (n 6).

this type of choice for people'.⁶⁴

Concurring, Cohen argued that legalising a kidney market would not only promote the 'welfare and "good" of those involved' by saving the recipient's life, who would perhaps have died waiting under the current system, but it would also give the 'vendor' a 'chance for financial enrichment' whilst helping someone in need.⁶⁵ Therefore, the greatest good, or as Aristotle would say, *eudemonia*, is achieved when a kidney market is legalised as more people would benefit. Rather, denying compensation to the donor would go against utilitarian principles because there is a striking opportunity to maximise the 'greatest happiness for the greatest number of people' but is simply being deprived.

2.1.2 Kantian Argument

Philosopher Immanuel Kant emphasised that individual freedom is the only innate right and prohibits coercion by others.⁶⁶ He condemned 'assaults on the freedom and property of others' and declared freedom as 'a human being's quality of being *his own master*'.⁶⁷ As Taylor argues, the understanding of 'being one's own master' combined with 'emphasis on non-interference with the freedom of others, seems tantalizingly close to the concept of self-ownership'.⁶⁸ Thus, it is surprising that Kant rejected self-ownership. In fact, his reasoning for this is because it is inconsistent with his second formulation of the categorical imperative, that rational beings must 'so act that you use humanity ... always at the same time as an end, never merely as a means'.⁶⁹ Thus, for Kant, self-ownership licenses suicide, voluntary servitude, organ sales, self-mutilation and prostitution,⁷⁰ which all violate the second formulation. More specifically, the removal of an organ 'constitutes partial self-murder to the same degree as suicide'.⁷¹ However, Heather Hausleben argues that his term 'self-murder' implies that the individual is harmed. But based on the nature of the organs, 'the body can remain a functioning whole and therefore is not "murdered" in

⁶⁴ *ibid.*

⁶⁵ McCabe (n 47).

⁶⁶ Marcus Verhaegh, 'The A Priori of Ownership: Kant on Property' (*Ludwig von Mises Institute*, 2004) <<http://mises.org/daily/1605/The-A-Priori-of-Ownership-Kant-on-Property>> accessed 16 November 2013.

⁶⁷ Immanuel Kant, *Groundwork of the Metaphysics of Morals* (CUP 1785) 38.

⁶⁸ Robert S Taylor, 'A Kantian Defense on Self Ownership' (2004) 12(1) *The Journal of Political Philosophy* 66.

⁶⁹ Wall (n 43).

⁷⁰ *ibid.*

⁷¹ Kant (n 67).

any manner'.⁷² She considers that though it may be immoral to cause such harm for no purpose, 'the donation of an organ takes from one living body that can do without the organ to give to another body that will die without the benefit of that organ'.⁷³ Therefore, there is an overall benefit and, if the donor is compensated, the benefit is experienced by both parties.

For Kant, 'things' either have a price or a dignity; things with a price are replaceable, but those above a price instead have dignity. Thus, for Kant, the removal of a kidney is 'inappropriately ascribing a price to a person's body, which should have a dignity rather than a price'.⁷⁴ However, Hausleben argues that it should not matter that we treat a single organ 'as a unit with a "price" ... when the uniqueness of the individual as a whole is respected and preserved'.⁷⁵ Furthermore, a market in kidneys could eliminate the waiting lists and prevent people from resorting to the black market. Such a market 'advantages the health and integrity of persons as ends in themselves'.⁷⁶ Surely, not giving compensation is using someone merely as a means. Hausleben argues the market should exist 'free from intrusion as a place for consensual interaction'.⁷⁷ She adds that there is no need for a shared moral outlook and therefore, because morality is irrelevant, a commercial organ market would be allowed without 'an analysis of moral underpinnings of the business deal' provided that both parties have consented.⁷⁸

2.2 Current Law

The common law fails to establish consistent principles regulating ownership interests in the body. It questions whether the body is the property of the person seeking to control it.⁷⁹ Generally there is no property; however, that is subject to one fundamental exception that forms the underlying 'conceptual discrepancy'⁸⁰ that arguably subverts the legal framework on which the traditional principles have been founded.

⁷² Hausleben (n 61).

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ Mark J Cherry, *Kidney for Sale: Human Organs, Transplantation and the Market: When Altruism Isn't Enough: The Case for Compensating Kidney Donors* (Georgetown University Press 2005) 89.

⁷⁷ Hausleben (n 61).

⁷⁸ *ibid.*

⁷⁹ Alexandra George, 'Property in the Human Body & Its Parts: Reflections on Self-Determination in Liberal Society' [2001] EUI Working Paper LAW No.2001/8, Italy 18.

⁸⁰ *ibid.*

2.2.1 Cadavers

The common law reluctance in recognising property rights in the body dates back to *Hayne's Case*.⁸¹ William Haynes was 'indicted for the larceny of four winding sheets used in the burial of three men and a woman'.⁸² The question was 'in whom should the property be laid in the indictment'.⁸³ It was held that the property of the sheets remained in the owners, 'in him who had property therein, when the dead body was wrapped therewith; for the dead body is not capable of it ...'.⁸⁴ Sir Edward Coke refers to the case in stating that a cadaver was '*nullius in bonis*'⁸⁵ – in other words, the legal ownership of no one – and belonged to the ecclesiastical jurisdiction. However, Matthews argues that the phrase, 'the dead body is not capable of it [ie property]', here means not that the dead body is not capable of being property, but that it is not capable of owning property.⁸⁶ Therefore, Coke's statement, Matthews argues, refers to either objects belonging to no one because they are sacred to God, 'such as are churchyards ...', or 'some things which in their natural state are no one's property',⁸⁷ such as freemen, and thus, neither of his citations can properly be said to refer to dead bodies.⁸⁸ Furthermore, that the body belongs to the Church's cognisance is not a justified reason for denying property rights in corpses, for, even as Coke admits, '[C]hurch fabric and monuments ... are protected by the common law'.⁸⁹ This would not prevent a corpse from being buried in unconsecrated ground or remaining unburied. The case of *R v Sharpe*⁹⁰ demonstrated that despite Coke's statement, corpses did not belong exclusively to the ecclesiastical jurisdiction and that civil courts would intervene to prevent the exhumation of bodies for dissection or for reburial according to different rites.⁹¹ Lastly, if they are capable of belonging, does this not make them property?

Despite the arguments above, the no-property rule is firmly embodied in English law. Founded on dubious *obiter dicta*, the general scholastic consensus

⁸¹ *Hayne's Case* (n 27).

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ Paul Matthews 'Whose Body? People as Property' (1983) 36 *Current Legal Problems* 193.

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ *R v Sharpe* [2001] 1 SCR 45.

⁹¹ *George* (n 79).

is that the 'rule is now ripe' for revaluation in light of modern technologies'.⁹² Price states that these obiter remarks are 'ghosts of the past'⁹³ and thus, no longer have standing. In contrast, most American states favour a more flexible right of 'quasi-property' in the deceased's body in favour of the surviving spouse or next of kin for the purposes of burial.⁹⁴ The person who possesses the right is not the owner of the body but holds it 'on trust' for family. Such right entitles an action for damages for unlawful interference with the body before and after burial. To the degree that the next of kin has 'legally recognised rights of custody, control and disposition'⁹⁵ – essentials of ownership – it is clear this quasi-right is akin to property in the corpse. The next of kin or surviving spouse retains an ongoing right to have the body remain undisturbed in the grave.⁹⁶ Historically, damages for emotional distress suffered by the next of kin were awarded for the treatment of their relatives' corpse. In doing so, the courts opened up, if only a fraction, the doors to the commercialisation of body parts.⁹⁷ Though the claim was not a property right, it was not dissimilar in substance. Nonetheless, in *State v Powell*,⁹⁸ the Supreme Court of Florida examined US case law, holding that 'the next of kin has no property right but merely a limited right to possess the body for burial purposes'.⁹⁹ Thus, their right was encompassed by tort law instead of the 'ancient and discredited quasi-fiction'.¹⁰⁰

2.2.2 Property in Body Parts

The law's exception to the no-property rule is based on the Lockean principle that the application of skill, modifying the part to some extent, gives rise to a property interest. Interestingly, the only person who cannot come to own any aspect of their body has been the person themselves.

The first exception to the no-property rule in the UK can be found in *R v Kelly*.¹⁰¹ Here, the defendants were prosecuted for the theft of body parts from

⁹² Pawlowski (n 8).

⁹³ TW Price, 'Legal Rights and Duties in Regard to Dead Bodies, Post-Mortems and Dissections' (1951) 68 South African Law Journal 403.

⁹⁴ Pawlowski (n 8).

⁹⁵ *ibid.*

⁹⁶ Rosalind Atherton, 'En Ventre Sa Frigidaire: Posthumous Children in the Succession Context' (2006) 19(2) Journal of the Society of Legal Scholars 139; *Meek v State* [1933] 185 NE 899.

⁹⁷ George (n 77).

⁹⁸ *State v. Powell*, 497 So. 2d 1188 (Fla. 1986).

⁹⁹ *ibid.*

¹⁰⁰ *Carney v. Knollwood Cemetery Association*, 514 N.E.2d 430, 435 (Ohio Ct. App. 1986) (Jackson, J).

¹⁰¹ *R v Kelly* [1999] 2 WLR 384.

the Royal College of Surgeons. They had obtained a number of body parts to cast mould for sculptures, consisting of 'three human heads, part of a brain, six arms, ... ten legs or feet and part of three human torsos'.¹⁰² They were not returned and some were found in a field near the defendant's home. The defendants argued that 1) the body parts could not be considered property for the purposes of the Theft Act 1968; and 2) the Royal College was not in lawful possession of the body parts. It was, however, held that 'parts of a corpse *are* capable of being property within s.4 of the Theft Act, if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, or for exhibition or teaching purposes'.¹⁰³ The Court, implicitly applying Locke, held that the specimen in question would have been subject to 'many hours, sometimes weeks of skilled work'¹⁰⁴ and therefore, acquired different attributes. In reaching this conclusion, the Court relied on the Australian judgment of *Doodeward v Spence*,¹⁰⁵ a case concerning the preservation of a pair of stillborn conjoined twins. Here the Court stated that where the human body or parts of it in lawful possession 'acquire[s] some attributes differentiating it from a mere corpse awaiting burial' via application of skill, it could be considered property.

Third party possession entitlements were also litigated in *Dobson v North Tyneside Health Authority*.¹⁰⁶ However, the Court of Appeal was unwilling to recognise a property interest in the brain, because the 'minimal work and skill that was applied to the biological material (preservation) was insufficient for the application of skill exception'.¹⁰⁷ Interestingly, Rose LJ submitted that the common law is not still on the matter of 'no property' or even its application of skill exception. His Lordship argued that on some future occasion, the courts might hold that human body parts are capable of being property, 'even without the acquisition of different attributes, if they have a use or significance beyond their mere existence';¹⁰⁸ for example, if they are 'intended for use in an organ transplant operation, [or] for the extraction of DNA ...'¹⁰⁹ Therefore, arguably, the kidney intended to be used in a transplant could be considered property; and because this can be so even without the application of skill changing its nature, one could argue that it is one's property and it remains so when it is taken out.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ *Doodeward v Spence* [1908] 6 CLR.

¹⁰⁶ *Dobson v North Tyneside Health Authority* [1996] EWCA Civ 1301.

¹⁰⁷ *ibid.*; Wall (n 43).

¹⁰⁸ *Dobson* (n 106).

¹⁰⁹ *ibid.*

Extending the common law of the dead to the realms of the living, in other words, applying Locke to live bodies creates further contradiction. These are most evident in the following patent cases demonstrating the Courts' unjustified denial of self-ownership due to commodifying the body, yet allowing such commodification through permitting other ownership.

Although patent legislation typically prohibits the patenting of humans, it has permitted property rights through patents in living things 'whose "creation" embody a degree of human skill or effort'.¹¹⁰ In *Diamond v Chakrabarty*,¹¹¹ the US Supreme Court allowed the first patent over an invention consisting of living matter. Arguably, patent law 'proffers a surreptitious method of awarding property rights over aspects of human bodies or their parts'.¹¹² The Court focused on the 'polymerase chain reaction', the process by which genes are replicated after DNA is extracted from the individual. *Doodeward*¹¹³ was applied, satisfying that researchers and scientists exercised enough 'skill and effort' over the isolated gene to acquire some form of property right. Such reasoning was further applied in *Moore v Regents of University of California*,¹¹⁴ where the California Supreme Court affirmed *Diamond*,¹¹⁵ recognising that those involved in applying skill and effort to Moore's body were entitled to the property that resulted from their exertions. Moore was prohibited from owning his own body, yet others 'could own derivatives from body parts that they had appropriated from him'.¹¹⁶

Moore suffered from hairy cell leukaemia, a rare form of cancer. His treatment involved the removal of his spleen, along with follow up treatments over seven years. A T-cell line was patented in the process and, though the 'Mo cell line' was a great commercial and medical success, Moore was unaware his spleen had been used this way. Once he attained knowledge of this process, including the profits that the expropriators derived as a result of their extraction, he sued for conversion of his spleen. The California Court of Appeal recognised the existence of property rights within the body and declared that the possessor had an absolute right of dominion over his body; thus, held that Moore owned his body and its parts. However, the California Supreme Court reversed this verdict, but failed to determine conclusively whether Moore possessed property interests in his body. Its reluctance to recognise such a right stemmed

¹¹⁰ George (n 79) 26.

¹¹¹ *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

¹¹² George (n 79).

¹¹³ *Doodeward* (n 105).

¹¹⁴ *Moore v. Regents of University of California*, 51 Cal. 3d 120 (1990).

¹¹⁵ *Diamond* (n 111).

¹¹⁶ George (n 79).

from fears of opening a market trade in body parts and 'chilling' scientific research using human biological materials. By allowing researchers to profit from such derivatives of Moore's body, the law set the precedent for the commodification of body parts. Furthermore, they implicitly used Locke to deny that which he actually advocated for: self-ownership. Patent law sees the personification of the Lockean exception by granting 'monopoly ownership of creations' to pharmaceutical companies.¹¹⁷ One could also posit that without Moore's genes, the doctor would not have been able to find such a cure, and thus, would not have profited. It therefore seems inequitable that Moore was not permitted to share in the profits. Significantly, Moore had to give consent for his gene to be extracted in the first place, which is indicative of the right to exclude. Justice Mosk, in his dissent, argued that to deny a property right in our own body violates the 'profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona'.¹¹⁸

However, the majority held differently, perceiving the situation as being one in which the doctor, by exerting his labour on Moore's cell line, transformed the body part from non-property into property. The outcome contradicts the policy reflected in patent law and collides with liberal principles of autonomy: '[T]he court's decision denied bodily property to the inhabitant of the body while simultaneously allowing other people to derive property rights in that body'.¹¹⁹ Justice Mosk rightly argued that Moore had a '... right to do with his own tissue whatever the defendants [including his doctor and the University] did with it: ie he could have contracted with researchers and pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products'.¹²⁰ Though the Supreme Court agreed, it held that everyone has genetic information coded for the manufacture of the types of cells Moore had in his spleen; thus, the particular nature of Moore's spleen was 'no more unique to Moore than the number of vertebrae in the spine or the chemical formula of haemoglobin'.¹²¹ They emphasised that it was the doctors who made something out of the cells, not Moore, and therefore, when the cells were removed from him, 'Moore becomes a "naturally occurring raw material", whose "unoriginal" genetic material is transformed into something unique and valuable by the "inventive effort", "ingenuity", and "artistry" of his doctors'.¹²²

Ironically, the Courts denied the self-interest due to the fear of commodifying

¹¹⁷ *ibid.*

¹¹⁸ Moore (n 114).

¹¹⁹ George (n 79).

¹²⁰ Moore (n 114) (Mosk J, dissenting).

¹²¹ *ibid.*

¹²² Halewood (n 11).

the body, yet the cell was commodified via commercial exploitation. Thus, as Peter Halewood rightly asserts, '[W]hat undid Moore in the case was not an excess of commodification but a dearth of it'.¹²³ Had Moore had the opportunity to exercise self-ownership in the form of property rights 'with a capacity to exercise rights of inclusion and exclusion, his autonomy would have been strongly augmented not diminished'.¹²⁴ As a result, the decision had a perverse effect of depriving Moore the right to self-determination and autonomy 'that self-ownership symbolised in the earlier period of degradation of people's bodies under chattel slavery'.¹²⁵ This case demonstrates a more communal approach to the body, for the majority wanted to promote medical research beneficial to the whole community. To allow Moore a share in the valuable commodity produced when doctors mixed their labour with the cell would supposedly lower the incentive to carry out medical research on human tissue.

Moore highlights the inherent difficulties of using Locke's theory as the foundation of our reasoning. The Court failed to provide a reasonable explanation for not recognising Moore's property interest in his body or his body parts. Such a property right would incentivise people to participate and help science move forward. Furthermore, it seems absurd that one would allow someone else to have some sort of proprietary right over his or her bodily material. If property rights are justified via the application of skill and effort, then as discussed, should one not be entitled to own one's own body through the investment of time, effort and skill? But how much skill and effort is required to modify something? Or as George questions, must one operate or perform surgery on oneself in order to satisfy the criteria of skill and effort?¹²⁶ What if a 'thing' has not been altered from the state it was naturally in? For example, in *Dobson*, the brain was merely preserved in paraffin and had not been altered. What if a doctor takes out someone's kidney and merely preserves it until he transplants it into someone else? Effectively, the nature of the kidney has not changed, much in the same way the brain was not regarded as having been altered by its preservation, and even then it had been removed from the original source.

The case of *Myriad Genetics*¹²⁷ denied pharmaceutical companies the ability to patent genes. Myriad patented its discovery of the location and sequence of BRCA1 and BRCA2 genes, mutations of which significantly increase risk of

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ George (n 79).

¹²⁷ *Myriad Genetics* (n 29).

breast and ovarian cancer. The primary issue was that the location and order of the nucleotides existed in nature before Myriad found them and thus, no invention or modification occurred; Myriad simply isolated them. Therefore, the Court held that the isolated genomic DNA themselves were 'unpatentable products of nature' because Myriad did not 'alter any of the genetic information encoded in the ... genes' nor did they possess 'markedly different characteristics from any found in nature'.¹²⁸ However, applying Locke once more, the Courts permitted the patenting of complementary DNA, which removes the non-coding region, creating a new molecule declared not found in nature.¹²⁹ Similarly, our kidneys are naturally occurring. Therefore, doctors who remove our kidneys and simply transplant them into another body do not change the nature of the kidney itself, but merely isolate it from the original body and place it into another. Furthermore, we personally can change the nature of our kidneys, making them our own. For example, Medical Director Leslie Spry¹³⁰ points out that using pain killers for a long period of time can harm the kidney tissue and structures; smoking can reduce the kidney's ability to function properly; and consuming high sodium foods, which increases blood pressure, can lead to the failure of our kidneys. These are ways in which we change the nature of our kidneys via the induction of labour into our bodies. Just as we can damage our kidneys, we can also ensure they remain healthy; therefore, mixing our labour changes the nature of our kidneys to the extent that we own them. Donna Rawlinson Maclean made this argument when she filed for a patent named 'myself', submitting, 'It has taken [thirty] years of hard labour for me to discover and invent myself, and now I wish to protect myself from unauthorised exploitation ...'¹³¹

Perhaps the law is moving towards the recognition of a property right within the body. In *Yearworth v North Bristol NHS Trust*,¹³² six cancer patients produced samples of semen, prior to their chemotherapy treatment, that were to be frozen and stored for possible future use. Unfortunately, the hospital

¹²⁸ *ibid.*

¹²⁹ Jake Sherkow 'A Closer Look at the Supreme Court's Decision on Gene Patenting' (*Stanford Medicine*, 2013)

<<http://www.scopeblog.stanford.edu/2013/06/13/a-closer-look-at-supreme-courts-decision-on-gene-patenting>> accessed 5 October 2013.

¹³⁰ Leslie Spry, '5 Surprising Ways You Could Be Damaging Your Kidneys' (*HuffPost Healthy Living*, 2014) <http://www.huffingtonpost.com/leslie-spry-md-facp/national-kidney-month_b_2949750.html> accessed March 18 2014.

¹³¹ Lori B Andrews, 'The Gene Patenting Dilemma: Balancing Commercial Incentives with Health Needs' (2002) 2 *Houston Journal of Health Law & Policy* 65.

¹³² *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37.

inadequately stored the semen, which subsequently thawed and expired. The men claimed under personal injury, negligence and bailment and succeeded in the latter two actions. The Court of Appeal referred to *Moore* – ie that conversion did not lie for body parts excised from the body of a ‘consenting living patient by a physician who then proceeded to use the cells for a potentially lucrative research purpose that had not been disclosed to the patient’.¹³³ However, the Court perceived it would have no trouble declaring that the preserved sperm had been subjected to work and skill, changing its character, and thus, were inclined to apply *Doodeward*.¹³⁴ But, it deemed the ‘skill exception’ ‘not entirely logical’ and thus, did not want the common law on the matter founded upon it.¹³⁵ Furthermore, because it was devised as an exception to a principle of exceptional character, it held that ‘such ancestry does not commend it as a solid foundation’.¹³⁶ Instead, it wanted to develop a broader basis for decisions in this context. It held that the men had ownership of the sperm, which they produced. They alone generated it from their bodies, with the sole object that it might be used for their benefit. Their ‘negative control over it was absolute’ and they had the power to order its destruction at any point. Thus, although the hospital had a duty to store it, it had no rights in respect of it. The Court ensured their decision was limited to cases involving ‘products of living human bodies intended for use by the person whose bodies had produced them’,¹³⁷ recognising bailment. As Mr. Stallworthy, acting on behalf of the NHS, submitted, bailment is a doctrine confined to personal property that requires the Court to find that human tissue constitutes a chattel susceptible of being property that can be owned; bailment can only exist where the bailor retains some ultimate or reversionary possessory right.¹³⁸ It appears that the Court has done just this. However, one could argue that this ‘used for their benefit’ requirement applies to kidneys. Even if one is satisfied that the kidney is not owned prior to being removed out of the body, once removed, the *sale* of the kidney would be for the person’s benefit and for the benefit of another, just as the sperm was to be used later for the person’s benefit, thus justifying ownership of it. The case also asserted that ‘parliament must either update the concept of ownership in this connection or ... make further provision which if without updating it would remedy any perceived injustices in other ways’.¹³⁹

¹³³ Cynthia Hawes, ‘Tortious Interference with Goods in New Zealand: The Law of Conversion Detinue, and Trespass’ (University of Canterbury 2010).

¹³⁴ *Doodeward* (n 105).

¹³⁵ *ibid.*

¹³⁶ Shawn H Harmon, ‘Yearworth v North-Bristol NHS Trust: A Property/Medical Case of Uncertain Significance?’ (2010) 13(4) *Medicine, Health Care & Philosophy* 343.

¹³⁷ Cynthia Hawes, ‘Property Interests in Body Parts: Yearworth v North Bristol NHS Trust’ (2010) 73(1) *Modern Law Review* 130.

¹³⁸ *Yearworth* (n 132).

¹³⁹ *ibid.*

Counsel for the trust argued that the provisions of the HFE Act 1990 successfully precluded claims based on property, arguing that ‘the men ... could only have requested the unit to use their sperm in a particular way’.¹⁴⁰ However, the Court of Appeal argued that although the claimants could not direct the use of their sperm, such limitations on their usage did not negate their ownership of their sperm. The Courts enforced that the units holding such licences ‘pursuant of the 1990 Act are required to use stored gametes and embryos only for the purposes set out in Schedule 3 and for which consent has been obtained’.¹⁴¹ This was confirmed in *Evans v Amicus Healthcare Ltd*,¹⁴² which permits individuals to withdraw their consent at any time. The Court viewed the ability to withdraw as being powerful confirmation of their ownership, taking a stringent view of the consent provisions of the Act: ‘The fact that the control granted under the Act is a negative rather than positive control does not dissuade their Lordships in this matter’.¹⁴³ Furthermore, the Court pointed to a number of statutes that limit one’s ability to use property without eliminating one’s ownership and also to consent provisions that preserved the men’s ability to control how their sperm was to be used, and therefore upheld ownership.

In reaching its conclusion, the Court referred to *Hecht v Superior Court of Los Angeles County*.¹⁴⁴ Here, a woman’s deceased partner deposited sperm for use at a later date. The Court held the sperm was capable of being property and thus ‘capable of being subject to the provisions of the deceased’s will’.¹⁴⁵ As the Lord Chief Justice rightly pointed out, ‘[I]t is logically difficult to see how the self-same sample of sperm (or indeed any tissue sample) could be considered to be property once the source of that sample has died if it was not already capable of being property before their death’.¹⁴⁶ Therefore, as Quigley notes, ‘*Hecht* cannot simply be taken to be the recognition of a proprietary interest that begins after death’.¹⁴⁷ Essentially, the sperm must have been property at the time the will was written. In discussing bailment, their Lordships drew on *Washington University v Catalona*,¹⁴⁸ reinforcing their stance on property in human tissue. Fundamentally, the case questioned whether individuals who had donated tissue to the university had ‘continuing rights in relation to it as bailors’.¹⁴⁹ Clarke LCJ considered that the donated tissue implied that it ‘was property

¹⁴⁰ *ibid.*

¹⁴¹ Muireann Quigley, ‘Property: The Future of Human Tissue?’ (2009) 17(3) *Med Law Review* 457.

¹⁴² *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727.

¹⁴³ Quigley (n 141).

¹⁴⁴ *Hecht v. Superior Court of Los Angeles County*, 16 Cal. App. 4th 836 (1993).

¹⁴⁵ *ibid.*

¹⁴⁶ Quigley (n 141) 461.

¹⁴⁷ *ibid* 463.

¹⁴⁸ *Washington University v. Catalona*, 490 F.3d 667 (8th Cir. 2007).

¹⁴⁹ *ibid.*

capable of passing from the donors to the donee'.¹⁵⁰ This challenges those who deny ownership yet want individuals to be allowed to determine the fate of their organs and tissues. This is significant, Quigley asserts, because it demonstrates that the Court does not essentially associate proprietary considerations to commercial ones and that individuals can *donate* because they own the organ and tissue to begin with.¹⁵¹

McBride and Bagshaw argue that the development in the law after *Yearworth* was inevitable given the growing secularisation of society and the concomitant popularity of the idea that people 'own themselves'¹⁵² and should be allowed to do what they like with their bodies.¹⁵³ Others argue that the recognition of self-ownership is the highest form of allowing a person to regard their bodies as being sacred thus upholding integrity. Harmon rightly argues that the law has not appreciated the essentiality of the human body: 'As a nexus of human value on the one hand, and the vessel of instrumentalisation on the other, it has been a source of both respect and confusion'.¹⁵⁴ A source of respect for the body and its integrity, yet confused through the law's resistance of the 'ultimate expression of value and identity – self-ownership'.¹⁵⁵ Property rights in separated biological material simply 'represents a natural extension of the right to bodily integrity'.¹⁵⁶

III. IT'S MY KIDNEY, I CAN DO WHAT I WANT

This Section seeks to negate fears of commodifying the body through the recognition of self-ownership by using contemporary examples where law and society permit the commodification of the body. It seeks to analyse the issue of consent, as well as utilitarianism and Kantian ethics, to promote a regulated kidney market.

3.1 Commodification

Commodification has been defined as the 'production of a good or service for a

¹⁵⁰ *ibid.*

¹⁵¹ Quigley (n 141).

¹⁵² Nick McBride, 'Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37' (*McBridesGuides*, 2013) <<http://mcbridesguides.files.wordpress.com/2013/09/yearworth-v-north-bristol-nhs-trust.pdf>> accessed 18 December 2013.

¹⁵³ *ibid.*

¹⁵⁴ Harmon (n 136).

¹⁵⁵ *ibid.*

¹⁵⁶ Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (1st edn, Hart Publishing 2009) 147.

profit'.¹⁵⁷ It has been argued that sale of kidneys would result in the commodification of the body and its parts, and such fears have greatly impeded the development of a kidney market. However, these fears are highly hypocritical. Calandrillo argues that society endorses the view that commerce in human parts is immoral and contravenes human dignity. However, this justification conflicts with other 'practices that we feel no such qualms about permitting'.¹⁵⁸ For example, the reality of a thriving black market makes it difficult to reconcile the view that organs and tissues should not be traded. Sperm and ova banks flourish as Americans seek to remedy infertility, charging customers thousands of dollars for their services.¹⁵⁹ In *United States v Garber*,¹⁶⁰ a woman was given \$200 per week along with \$2,5000 in cash, 1,000 shares of stock and use of a car in exchange for regular extractions of her blood containing a rare antibody. Arguments have been made that these are regenerative cells and therefore, it is acceptable. However, sales have not simply been limited to such cells and tissue. One hundred and fifty dollars was given to a graduate student at the University of Pennsylvania for ten grams of 'non-regenerative thigh muscle'.¹⁶¹ This commercial trade in tissues demonstrates many of the 'indicia of tangible property'.¹⁶² However, Harre argues that disposal of body material should be permitted provided it does not threaten the individual's integrity. This integrity remains intact even with the removal of hair, blood and one kidney.¹⁶³ Andrews argues that there is no reason to prohibit the sale of all body parts and that only a prohibition is justified for sale of non-generative body parts where its donation or sale entails the death of the donor.¹⁶⁴ Some extremists, such as Harris, question why we should not be allowed to sell our heart. He posits that if this is what he wills to do and fully knows what he is doing, then he should not be prevented from doing so.¹⁶⁵ The contention here signals the dangers of a slippery slope: acceptance of the commodification of a kidney will lead to the argument that because I can sell my kidney, I can sell any organ or body part. However, it is significant to note

¹⁵⁷ Gordon Laxer and Dennis Soron, 'Thematic Introduction: Decommodification, Democracy and the Battle for the Commons' in Gordon Laxer and Dennis Soron (eds), *Not For Sale: Decommodifying Public Life* (Broadview Press 2006) 17.

¹⁵⁸ Steve P Calandrillo, 'Cash For Kidneys? Utilising Incentives To End America's Organ Shortage' (2004) 13 *George Mason Law Review* 69, 97.

¹⁵⁹ Calandrillo (n 3).

¹⁶⁰ *United States v. Garber*, 607 F. 2d 92 (5th Cir. 1979).

¹⁶¹ *ibid.*

¹⁶² Roy Hardiman, 'Toward the Right of Commerciality' (1986) 34 *UCLA Law Review* 207, 221.

¹⁶³ HAT Have, Stuart F Spicker and Jos VM Velie, *Ownership of the Human Body: Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare* (Kluwer Academic Publishers 1998).

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

that this Article simply promotes the implementation of a legal regime strictly for kidneys (ie limited property right), like that of Iran. It is not indicative of a market in human body parts per se because death should never be the end result of the vendor.

Others fear that commodifying body parts might result in practices where people are compelled to sell body parts to pay outstanding debts. Thus, the phrase 'it cost me an arm and a leg' would be too real to invoke laughter.¹⁶⁶ The advantage of a regulated market, however, means the removal of a kidney is controlled by this system. Titmuss argues that a society where people are willing to donate blood to help strangers is better than one in which people only sell blood for money. Permitting a market in blood 'promotes self-interest at the expense of altruistic motives'.¹⁶⁷ However, such thinking cannot be applied to a kidney market, because, as Philips points out, Titmuss is only sympathetic to such a notion because the work of donating blood or semen is relatively undemanding in comparison to a kidney.¹⁶⁸

3.1.1 Distributive Justice

The main concern with accepting a kidney market is the exploitation of the poor – in other words, it would have a 'perverse distributive impact'. It is argued that if such a market were to be legal, a disproportionate number of poor people would be the majority vendors. Studies show that poverty is the driving force behind black markets. For example, the Journal of the American Medical Association conducted a study verifying that 96% of black market kidney sellers in India sold a kidney to escape financial hardship.¹⁶⁹ Adversely, many reported continued debt six years later, now accompanied by deteriorated health. Subsequently, it would primarily be the wealthy who could afford to buy such organs. However, this does not need to be the case. Charles Erin and John Harris argue that it is unfair that in a system of organ donation, everyone is paid but the donor. They argue, 'Only the unfortunate and heroic donor is supposed to put up with the insult of no reward, to add to the injury of the operation'.¹⁷⁰ Thus, they suggest that an ethical market would include an organ purchaser, an organisation like the NHS, which would distribute organs according to 'medical priority'. Direct sales and purchases

¹⁶⁶ DB Resnik, 'The Commodification of Human Reproductive Materials' (1998) 24(6) *Journal of Medical Ethics* 388.

¹⁶⁷ Anne Philips, *Our Bodies, Whose Property?* (Princeton University Press 2013).

¹⁶⁸ *ibid.*

¹⁶⁹ Calandrillo (n 3).

¹⁷⁰ Charles A Erin and John Harris, 'An Ethical Market in Human Organs' (2003) 29 *Journal of Medical Ethics* 137, 138.

would not be permitted, and thus no exploitation of low-income countries and 'no buying in ... India to sell in Harley Street' would exist.¹⁷¹ The organs would go through a screening process and strict controls, and penalties would be implemented to prevent abuse.¹⁷² This would be similar to the hybrid Iranian kidney model, a free market with individuals selling to the government, which acts as the intermediary.¹⁷³ Calandrillo agrees with this, arguing that a 'government provision of funding for organ purchases based on income or wealth levels of potential buyers' will alleviate such fears of exploitation and unfair advantages for the poor.¹⁷⁴ Such a system is highly beneficial as it prevents holdouts from donors who, if direct sales were permitted, would perhaps auction off their kidney at unrealistic prices. In Iran, vendors receive money from the government and additional compensation from the recipient. For this reason, as Doctor Delmonico points out, the government is not the final arbiter of payments. Rather, market forces 'determine the under the table price ... Thus, the Iranian system is, not surprisingly, far from regulated'.¹⁷⁵ This Article advocates a fixed price without under the table offers, as it would be inequitable if various vendors received more than others based on their luck in recipient. To ensure this, the system must ensure anonymity; in Iran, parties know each other prior to the sale, which makes it easier for them to enter into private contractual transactions.

Even if only the privileged could buy organs, denying a person the right to purchase an organ to save his life or someone else's life should not be subject to a vote or others' ethical hang-ups.¹⁷⁶ Littau argues, 'If I want to remove a kidney and sell it to a willing buyer for \$30,000 ... I ought to have that right'.¹⁷⁷ Lord Plant of Highfield similarly argues that it is an exercise of choice and autonomy: if 'you find it distasteful it has got absolutely nothing to do with you because you have your values and I have mine'.¹⁷⁸ No one stops you from

¹⁷¹ *ibid.*

¹⁷² *ibid.*

¹⁷³ Marcia Clark and William Travis Clark, 'Selling Your Organs: Should it be Legal? Do You Own Yourself?' (*Forbes Magazine*, 2013) <<http://www.forbes.com/sites/marciac Clark/2013/06/13/selling-your-organs-should-it-be-legal-do-you-own-yourself>> accessed 9 January 2014.

¹⁷⁴ Calandrillo (n 3).

¹⁷⁵ Anne Griffin, 'Iranian Organ Donation: Kidneys on Demand' (2007) 334 *British Medical Journal* 502.

¹⁷⁶ Stephen Littau, 'Free Market Organs: The Case for Capitalism in the Organ Transplant System' (*United Liberty*, 2013) <<http://www.unitedliberty.org/articles/13852-free-market-organs>> accessed 8 December 2013.

¹⁷⁷ *ibid.*

¹⁷⁸ Lord Plant, 'Selling Yourself Short: The Body, Property and Markets' (*Museum of London*, 2013) <<http://www.gresham.ac.uk/lectures-and-events/selling-yourself-short-the-body-property-and-markets>> accessed 10 December 2013.

donating blood, but 'I just want to sell mine, and to prevent me ... is an infringement of my rights, my right of ownership over my body'.¹⁷⁹ The body belongs to the individual; thus, he is the decider of how its parts are to be exchanged.

Without such a system, we expose individuals to the exploitation by middlemen who have 'dramatically marked up' transplantation costs to retain the surplus. A libertarian would argue that if a person values '\$50,000 more than she values her kidney so that she can fund education or provide food for her family why does society have the right to tell her she's wrong?'¹⁸⁰ Therefore, given an ultimatum between starving children and living with one kidney to continue providing for them, 'isn't the poor person (and even society) better off than she was previously?'¹⁸¹ Despite equal access, the poor will inevitably be the majority of vendors.¹⁸² Notwithstanding its illegalisation, it is the poor who sell their kidney on the black market, therefore, is it not more favourable to regulate it, ensuring safe procedures and follow ups? A legal market would provide a safe transaction for both the vendor and the buyer, ensuring that healthy kidneys are given in exchange for compensation promised.

Another hypocritical aspect of our system today is our value in saving life. If we believed that money should never be exchanged for life, why do we unhesitatingly accept the billing of medical services?¹⁸³ A patient in need of antibiotics 'is no less relieved of her obligations to pay than if she were visiting the grocery store'.¹⁸⁴ Calandrillo argues that there is no reason why such transactions should not be funded by a universal state health care system, allowing everyone access. He argues that 'if healthcare is indeed a fundamental right, requiring that people pay for life-saving medicines or operations is not morally different than making them pay for life-saving human organs'.¹⁸⁵ To avoid the rich being the only buyers, the government should aid the poor through suitable payment programmes (eg instalments).

This concern of exploiting the poor is pretentious for it is the poor and uneducated who are allowed and 'even encouraged' to 'fill the ranks of dangerous professions and military service' but are prevented from taking the

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

¹⁸² Calandrillo (n 3).

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid.*

measured risk of selling an organ.¹⁸⁶ In America, the top five most dangerous jobs include agriculture, fishing, forestry and construction jobs.¹⁸⁷ As Dean L'Hospital argues, not one of these jobs has the 'immediate, life-saving impact of an organ transaction' yet are deemed as 'honourable professions' whilst selling your kidney 'is considered shameful and/or taboo'.¹⁸⁸ It is hypocritical of the law to assert that it cares about the well-being of the poor, when it allows individuals to be exploited every day through dangerous occupations. However, we allow this to continue because we know that it is the right of every individual to assume the risk of a dangerous job if they deem the reward worthwhile¹⁸⁹ in the same way we would expect it to be the right of the individual to choose whether to take on the risk of donating a kidney.

Libertarians will not agree that the poor are exploited because the 'possession of resources has absolutely nothing to do with freedom'.¹⁹⁰ As Sir Keith Joseph stated, '[P]overty is not unfreedom; the lack of resources is not a restriction on liberty'.¹⁹¹ Thus, Lord Plant argues that buying the kidney of a poor person is not exploitative, but 'a perfectly legitimate form of freedom of exchange'.¹⁹² Furthermore, the risk of death is widely accepted when the kidney is altruistically donated. So why does this acceptance change with the introduction of profit motives? 'What had historically been deemed "minimal risks" suddenly escalated into intolerable dangers when profit became an obvious motive!'¹⁹³ This paternalistic attitude prevents the patient from exercising his or her right of self-determination and is illogical because people risk their lives everyday for profit, for example, with stunt doubling.

3.1.2 Consent

Based on notions of autonomy and bodily integrity, Justice Benjamin Cardozo stated, 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body'.¹⁹⁴ The doctrine of informed consent draws on the 'body as property' view, declaring that competent

¹⁸⁶ Dean L'Hospital, 'The Medium of Exchange Paradigm: A Fresh Look at Compensated Live Organ Donation' (2008) 2 Human Rights and Globalisation Law Review 1.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

¹⁸⁹ Clark and Clark (n 173).

¹⁹⁰ *ibid.*

¹⁹¹ Lord Plant (n 178).

¹⁹² *ibid.*

¹⁹³ Arthur L Caplan, 'Blood, Sweat, Tears and Profits: The Ethics of the Sale and Use of Patient Derived Material in Biomedicine' (1985) 33 Clinical Research 448.

¹⁹⁴ *Shloendorff v. Society of New York Hospital*, 11 N.Y. 125, 105 N.E. 92 (1914).

individuals have a right to exclusive control over their bodies.¹⁹⁵ This is confirmed through the laws of trespass against the person that requires proof of consent to relieve a person of criminal liability.

Rape in its earliest version was regarded as a property crime.¹⁹⁶ Since women were seen as chattel, it was a crime against the person whose property had been damaged in the rape – usually the husband or father was compensated for the wrongdoing. Today, the question of the woman's consent is central to the crime. This is a historical demonstration that the body is not anyone else's but your own, and it is not acceptable for people to do with it that which you have not agreed to.

Opponents to a market in kidneys argue that commercial incentives negate the poor's consent. Furthermore, arguments propose the poor to be too uneducated to understand the inherent risks, which precludes informed consent.¹⁹⁷ As is known, duress and necessity in criminal law preclude voluntary action. Therefore, Taylor submits that poverty drives people to make choices to make ends meet, ergo, organ markets compel sale by those in financial need.¹⁹⁸ Despite this, people may still 'autonomously choose to sell an organ since they are still directing their own actions within their impoverished economic circumstances'.¹⁹⁹ Thus, autonomy is not necessarily impaired, even if the sale was out of desperation. Taylor argues that control is an intentionally characterised concept: '[A] person can only cede control to another intentional agent'.²⁰⁰ However, economic forces are not intentional agents; thus, it is not possible to cede control to them. Therefore, coercion by poverty or other economic factors cannot happen. Consequently, this argument fails to counter the argument that autonomy supersedes economic coercion when individuals choose to sell their kidney.²⁰¹

¹⁹⁵ Roger F. Friedman, 'It's My Body and I'll Die If I Want to: A Property-Based Argument in Support of Assisted Suicide' (1995) 12(1) *Journal of Contemporary Health Law and Policy* 183, 207.

¹⁹⁶ Anne Phillips, 'Your Body, Whose Property?' (*The Body Sphere*, 2013)

<<http://www.abc.net.au/radionational/programs/bodysphere/your-body2c-whose-property3f/4931122#transcript>> accessed 18 January 2014.

¹⁹⁷ J Radcliffe-Richards et al, 'The Case for Allowing Kidney Sales' (*The Lancet*, 1998) <http://ac.els-cdn.com/S0140673697082111/1-s2.0-S0140673697082111-main.pdf?_tid=e658f6f8-470e-11e3-add3-00000aacb360&acdnat=1383761687_23109363ca8d75573301eeb2323a77d4> accessed 9 February 2014.

¹⁹⁸ Paul M Hughes, 'Constraint, Consent, and Well-Being in Human Kidney Sales' (2009) 34 *Journal of Medicine and Philosophy* 606.

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

²⁰¹ James Stacey Taylor, *Stakes And Kidneys: Why Markets in Human Body Parts are Morally Imperative* (Ashgate Press 2005).

For Wilkinson, financial incentives *can* unduly influence the poor because the poor find them difficult to resist.²⁰² Although it is important to consider the free will and ethics of economic temptation to the financially desperate, consent to sell is fundamental to the decision, not whether it was voluntary.²⁰³ Therefore, commercial kidney markets are morally permissible because when individuals choose to sell they do so autonomously and are not being exploited; and even if they were being exploited, their consent trumps exploitative concerns. It would be morally wrong to deny such a market when we are aware that most sellers live in poverty, since 'the chance to receive a few thousand dollars to escape the slums in exchange for taking on an added risk to their health is rational and well worth it'.²⁰⁴ All labour can be seen as commodifying the body. The following specifically demonstrates the reality of commodification.

3.2 Prostitution

Prostitution exemplifies body commodification. Whilst prostitution is illegal in some countries, it is legal in others, demonstrating societies' hypocrisy in permitting the commodification of the body while stigmatising organ sales for fear of exactly that. It has, however, been contested that with prostitution, what is sold is not a body, or a self, but a 'service'.²⁰⁵ Others, including Carol Pateman, argue that sexuality is one of the most intimate aspects of the self. It is integral to it and cannot be separated from the self; therefore, a prostitute who sells her sexuality is also selling her 'self'.²⁰⁶ It is argued that because it is the use of the woman's body that is sold, and sexuality and the self are unified, it is classified as selling the self. On a similar note, Julian Savulescu argues that if we are allowed to sell our labour, why not sell the means to that labour?²⁰⁷ We have free market activity wherein we publicise sex through open advertising on billboards and TV. According to Radin, prostitution should be decriminalised in places where it is prohibited, 'so as to protect poor women from the degradation and danger of the black market'.²⁰⁸ However, sexual services such as 'brokerage (pimping), recruitment and ... advertising should be prohibited' because these initiate someone else's ownership via control.²⁰⁹ Whilst this is similar to a kidney market, it is important to note that one is simply

²⁰² Hughes (n 198).

²⁰³ *ibid.*

²⁰⁴ Calandrillo (n 3).

²⁰⁵ Marjolein Van Der Veen, 'Rethinking Commodification and Prostitution: An Effort at Peacemaking in the Battles over Prostitution' (2001) 13(2) *Rethinking Marxism* 30.

²⁰⁶ *ibid.*

²⁰⁷ Phillips (n 196).

²⁰⁸ Margaret Jane Radin, 'Market Inalienability' (1987) 100 *Harvard Law Review* 1849.

²⁰⁹ *ibid.*

commodifying a part of oneself, not the whole body. Commodification of the kidney does not mean commodification of the body in the same way that commodification of blood does not mean commodification of the body. To say a kidney market leads to commodification is to be blind to the numerous ways society is commodifying the person already.

3.3 Commercial Surrogacy

Another example of commodification is surrogacy. There are two forms: traditional, where the surrogate is the child's biological mother, and gestational surrogacy, where the mother is unrelated. Gestational surrogacy usually involves a commercial transaction. Titmuss argues that few would agree that women have a moral or civic duty to undergo 'the intrusive medical procedure involved in the donation of eggs, or the physically and emotionally draining pregnancy of a surrogate mother' just in the same way we would not 'think people in general had a duty to provide spare kidneys to complete strangers'.²¹⁰ And thus, he questions, 'When the acts themselves are regarded as so much beyond the call of duty, is it appropriate nonetheless to refuse compensation?'²¹¹ It is difficult to imagine that in such a situation, people would not want to show their gratitude by some form of compensation, not necessarily money, but some value. Titmuss argues, 'If surrogacy arrangements of any kind are permitted, it seems exploitative not to recognise the work involved and offer some reward'.²¹² Radin argues that a surrogate is paid for the same reasons that an ordinary adoption is commissioned: 'to conceive, carry and deliver a baby'.²¹³ However, some view surrogacy as analogous to prostitution because what is being sold is not the baby, but the use of the woman's body, thus commodifying her. This view seems reasonable because if the surrogate decides she wants to keep the baby, no contract can be enforced in court that she must go through with giving up the baby – thus, one does not contract for the baby, but for gestational services.

3.4 Kidney Exchange Programme

The final illustration of commodification is the Kidney Exchange Programme. This programme is designed to aid those whose partners want to donate a kidney but unfortunately do not match in blood type. As a result, they can match with a couple in a similar situation and the two healthy spouses or partners can exchange the kidneys for transplant in their sick spouses or

²¹⁰ Phillips (n 196).

²¹¹ *ibid.*

²¹² *ibid.*

²¹³ Radin (n 208).

partners. This is deemed a 'money-less market'. But looking closely, is this really what it is? Valuable consideration can be money or, alternatively, something capable of being computed in financial terms. Historically, a peppercorn was enough to constitute valuable consideration and therefore, money is not mandatory. Therefore, is this programme not simply another mechanism of compensation without actual money being handed over, but rather money's worth? If this kind of program is permitted, compensation in the form of actual money should also be permitted. It is just a substitution of one for the other.

IV. PRIVATE VS COMMUNAL JURISDICTIONS

4.1 Iranian Kidney Model

An old sign in Tehran reads 'Association of Kidney Patients'. It is one of twenty-three such 'Dialysis and Transplant Patient Association' clinics found across Iran, the only nation with legal kidney sales.²¹⁴ In 1998 Iran created a compensated, living-unrelated kidney transplant programme, which has proven to be highly beneficial, allowing on average 1,400 Iranians per year to leave '\$3,000 richer, and 120-160 grams lighter'.²¹⁵ The promise of \$1,200 from the Iranian government, which also subsidises surgery and recovery costs, including an additional negotiable gift from the recipient of the organ donation, has been sufficient to convince individuals to part with their organ.

Whilst Iran is not always the most forward-thinking country, we should take a page out of their legal system. Iran's kidney market demonstrates a limited ownership of one's body view. The lethargic supply of kidneys skyrocketed when a legal market was created. Kidneys from living-unrelated donors now constitute around 80% of the supply.²¹⁶ The market is regulated through a process where potential donors and recipients are subjected to a number of psychological and clinical evaluations. Once deemed competent, participants are referred to government officials who then set up payments. This process acts as an efficient filtering mechanism, ensuring that all participants are Iranian citizens between the ages of twenty and thirty-five, thus safeguarding the citizens by creating a 'regional transplant hub', preventing the country from being regarded as a 'haven for international organ traders'.²¹⁷ Screening processes protect recipients from HIV and hepatitis B and ensure that

²¹⁴ L'Hospital (n 186).

²¹⁵ *ibid.*

²¹⁶ *ibid.*

²¹⁷ Sarah-Louise Johnson, 'Making Beans Out of Kidneys: An Argument Against Kidney Sale' (MA dissertation, University of Birmingham).

individuals are psychologically prepared. Black markets do not cater to such health checks; doctors are barely qualified to carry out the operation; donors rarely receive the full money they are promised; and transplants are not always successful, leaving both donor and recipient with grave difficulties later on. Black markets thrive because it is easy to mask diseases of desperate poor people; therefore, the regulation of such a market will be safer for society as a whole.

Broker price mark-ups are no longer an issue for compensated donors and recipients, and transplant surgeries are no longer carried out by 'marginally qualified surgeons in substandard facilities'.²¹⁸ Further, living-unrelated kidneys provide better medical outcomes than cadaveric kidneys.²¹⁹ It seems that despite placing a price on the kidney, Iranians still value human life equally as before the legal market was created. Contrary to market critics' predictions, the poor have not been picked clean of organs, commoditised or taken advantage of in the legal market; instead, these problems have plagued other nations that prohibit organ sales and that fail to control black markets. For example, a study by Ghods demonstrated that the rich and poor were transplanted almost equally. The study consisted of 500 kidney recipients: 50.4% were poor, 36.2% were middle class and 13.4% were wealthy.²²⁰ Whilst some people may be exploited, it is their decision to consent to the procedure as adults aware of the risks. As Leonardo De Castro points out, '... [T]he possible disadvantages of compensated organ donation are not greater than the possible benefits and these can be minimised through the implementation of safeguards'.²²¹ Furthermore, compensation for a kidney is only temporary and does not constitute long-standing improvements to socio-economic status. However, even a small sum could dictate life over death.

The success of the Iranian Kidney Model lends itself to a number of factors. Firstly, the rationale for the 2000 Organ Transplant Act was based on Iran's desire for society to bear responsibility and show appreciation to organ donors. The country saw the deprivation of a 'rightful claim to be compensated' as morally wrong, especially because everyone in the exchange is compensated, except for the donor.²²² Secondly, such a system ties in well with the significant

²¹⁸ Dean L'Hospital, 'The Medium of Exchange Paradigm: A Fresh Look at Compensated Live Organ Donation' (2008) 2 Human Rights and Globalisation Law Review 21.

²¹⁹ Ahad J Ghods and Shekoufeh Savaj, 'Iranian Model of Paid and Regulated Living Unrelated Kidney Donation' (2006) 1(6) Clinical Journal of the American Society of Nephrology 1136.

²²⁰ *ibid.*

²²¹ LD de Castro, 'Commodification and Exploitation: Arguments in Favour of Compensated Organ Donation' (2003) 29 Journal of Medical Ethics 142.

²²² Bagheri (n 1).

value of saving life in Islam. It could be argued that Iranian donors are not paid for their kidney, but merely rewarded for their altruistic donation. However, this is debatable because the altruistic gesture might not exist but for the payment in the first place. Robert Veatch has called 'rewarded gifting' a blatant corruption of the language and argues that the transfer of money is not a 'reward' but a payment.²²³ However, he believes that rewarded gifting is more justified where a non-monetary reward such as 'bonus points' are provided by the programme. On the other hand, Bagheri states that compensation of donors is not the same as purchasing a good with a price tag on it; instead, it is recognition, appreciation and reimbursement for someone who has come forward to donate an organ, taken time from work, travelled, and forgone earnings.²²⁴ He argues that such compensation is no different than paying the doctors for their services. However, difficulties may arise in determining where to create a boundary between 'compensation' and 'persuasive incentives' that pressure people into donating organs.²²⁵ Furthermore, he adds that it should be left to the individual whether to accept the compensation or to waive it, but he fails to explore why a donor has this option. Libertarians would argue that he can do so because he is free to choose and he is free to sell his kidney; therefore, the argument reverts to 'the kidney is "mine", and therefore I can do what I want with it', even if I commodify myself.

4.2 Opt-In and Opt-Out Systems

The Iranian model can be compared to systems in both Spain and the UK. Unlike in Iran, where there is a limited ownership right, such that only Iranians may sell their own kidneys, the UK and Spain have a system of opting in and out. The UK uses the opt-in system, which is voluntary and altruistic. According to this system, a person must give explicit informed consent before his death, confirming that he wants to donate his organs. In contrast, in the opt-out system, everyone is a potential donor unless a person registers to opt out of donation prior to death. Countries with this system generally have a higher success rate, though not significant enough to eradicate the long waiting list. Wales granted Royal Assent to The Human Transplantation Act in 2013. The Act introduces a soft opt-out system where on the death of an individual who has not opted out, his or her family is contacted, and if they want to opt-out on behalf of the deceased then they may do so. In contrast, in hard opt-out systems, where an individual has failed to opt out, the family is not contacted and his organs will be taken out for donation. A hard opt-out system

²²³ *ibid.*

²²⁴ *ibid.*

²²⁵ *ibid.*

introduced in England would open challenges under the European Convention on Human Rights.²²⁶

Stephen Littau states that the distinctions between the opt-in and the opt-out systems are important because of the presumption of ownership. He argues that if citizens have an option of opting in, this shows self-ownership; to suggest that an individual has to opt out shows citizens' bodies are property of the government.²²⁷ Thus, it could be regarded that countries using the opt-out system, such as Spain and France, are running on a system of collective ownership. This system has been criticised for its similarities with conscription, where tissues and organs can be removed posthumously for transplantation, irrespective of any consent.²²⁸ Under such a system, human bodies are treated as public property either indefinitely, or for a limited period of time, before what remains is released for burial.²²⁹ However, the 'presumed consent' system is somewhat misleading, because family members can refute the choice of an individual who has chosen not to opt out and the deceased cannot do anything to ensure that his donation is carried out. This could violate his freedom of choice.

America presumes consent only where hospital staff and police are unable to trace any possible family members. However, in 1999, police made a mistake when using a deceased John Doe's fingerprints to trace his relatives.²³⁰ After confirming that no relatives could be found, his heart, liver, pancreas, intestines, kidneys and remaining lung were removed.²³¹ Four days later, it was discovered that he was Arthur Forge Jr. of Fort Worth. Police were unable to explain why their analysis was unsuccessful.²³² It has been argued that the 'presumed consent organ donation law might scare people [into believing] that the state could be body snatchers'.²³³ The future may be faced with such problems that violate individual rights. Unfortunately, such systems lack transparency for those in control usually cause the mistakes.

²²⁶ Simon Bramhall, 'Presumed Consent for Organ Donation: A Case Against' (2011) 93 Annual Royal College Surgeon England 270.

²²⁷ Littau (n 176).

²²⁸ J Kaushik, 'Organ Transplant and Presumed Consent: Towards an "Opting Out" System' (2009) 6(3) Indian Journal of Medical Ethics 149.

²²⁹ *ibid.*

²³⁰ Maryellen Liddy, 'The "New Body Snatchers": Analyzing the Effect of Presumed Consent Organ Donation Laws on Privacy, Autonomy and Liberty' (2000) 28(3) Fordham Urban Law Review 815.

²³¹ *ibid.*

²³² *ibid* 816.

²³³ *ibid.*

Doctors in the UK are now encouraging people on waiting lists to accept surgery using illegally trafficked kidneys at a government-controlled hospital in Sri Lanka. The organs were said to be on sale for tens of thousands of pounds, with promises of surgery at a Colombian hospital.²³⁴ This is transplant tourism, defined by The United Network for Organ Sharing as ‘the purchase of a transplant organ abroad that includes access to an organ while bypassing laws, rules or processes of any or all countries involved’.²³⁵ It is easy for the West to travel to the South where the black markets are obtrusive and where such markets are not deterred. For example, in India, kidney sales were banned in 1994, but to circumvent the law, donors are simply asked to sign an affidavit stating they were not paid. How can we deny a legally regulated kidney market when we know that a black market in kidneys is thriving?

The opt-in system is fairer in that it provides individuals the opportunity to ‘empower their anti-donation preference’,²³⁶ but the opt-out system is perhaps worse than a regulated kidney market for it goes against the foundations of one’s autonomy and integrity, which is exactly the reason courts fear a compensated market in kidneys. As Dorry L. Segey states, ‘[O]pt-out is not ... the magic answer we have been looking for’.²³⁷ He adds, ‘[W]ith opt-out the perception becomes, “we will take your organs unless you take the time to fill out a form”. That’s a dangerous perception to have. We only want to use donated organs from people who intended to donate’.²³⁸

V. CONCLUSION

Despite the discrepancies that inundate this evocative debate, this Article has attempted to reconcile the differing attitudes towards the body, arguing for the implementation of a legal, compensated kidney market. The law’s paternal

²³⁴ Miranda Prynne, ‘Britons Being Sold Illegal Kidneys for Surgery in Sri Lanka’ (*The Telegraph*, 2013)

<<http://www.telegraph.co.uk/news/worldnews/asia/srilanka/10442714/Britons-being-sold-illegal-kidneys-for-surgery-in-Sri-Lanka.html>> accessed 4 January 2014.

²³⁵ DA Budiani-Saberi and FL Delmonico, ‘Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities’ (2008) 8 *American Journal of Transportation* 925.

²³⁶ Jennifer Dolling, ‘Opting In to an Opt Out System: Presumed Consent as a Valid Policy Choice For Ontario’s Cadaveric Organ Shortage’ (*University of Toronto*, 2009)

<http://tspace.library.utoronto.ca/bitstream/1807/18276/1/Dolling_Jennifer_M_200911_LLM_the_sis.pdf> accessed 10 March 2014.

²³⁷ ‘Presumed Consent Not Answer to Solving Organ Shortage in US Researchers Say’ (*John Hopkins Medicine*, 2011)

<http://www.hopkinsmedicine.org/news/media/releases/presumed_consent_not_answer_to_solving_organ_shortage_in_us_researchers_say> accessed 10 March 2014.

²³⁸ *ibid.*

reluctance in recognising property in oneself stems from fears of commodifying the body and the unsettling notion that such acceptance would simply exploit the poor. However, irony subsumes this fear for our society is guilty of these exploitative accusations regardless of a market in kidneys. Whilst paternalism deems such a market an affront on human dignity, it is not the acceptance of payment that violates human dignity but rather its prohibition that is pernicious to an individual's autonomy.

In a world with thriving markets in blood, ova and sperm, biological material is at the epitome of commodification generating large economic gains. Therefore, extending the market to include 'non-vital solid organs such as kidneys', which can be removed safely, is not such a stretch.²³⁹ Where altruism has failed, financial compensation has succeeded. In Iran the vibrant legal market demonstrated its benefits and destroyed the illegal market for organs that flourished prior to 1998. With correct safeguards intact such a market will protect individuals from abusive black markets. This debate is obscured by morality and, whilst subjectivity is inevitable, we must not let it blur the glaring legal needs. Thus, utilitarianism, despite its ability to create injustices in certain scenarios, offers an ideal solution in this case. As Kohler correctly states, property is a social construct – nothing more than a normative set of relationships that might be attached to whatever subject matter society deems necessary or beneficial to make the subject of property.²⁴⁰ As waiting lists expand, a limited property right in the body becomes mandatory. Advancements in biotechnology will most likely see a future in which engineered kidneys can be transplanted. However, until then, both the poor and sick fight for survival. We are merely digging their graves by denying them this right.

²³⁹ Denis Cummings, 'Should it be Legal to Sell Organs?' (*Finding Dulcinea*, 2009) <<http://www.findingdulcinea.com/news/health/2009/july/should-it-be-legal-to-sell-organs.html>> accessed 14 December 2013.

²⁴⁰ Alison Clarke and Paul Kohler, *Property Law Commentary and Materials* (CUP 2005).

BIBLIOGRAPHY**BOOKS**

- Bentham J, *Fragment on Government (1781)* (CUP 1988)
- Cherry M.J, *Kidney for Sale by Owner: Human Organs, Transplantation, and the Market* (Georgetown University Press 2005)
- — ‘When Altruism Isn’t Enough: The Case for Compensating Kidney Donors’ (Aei Press 2009)
- Clarke A and Kohler P, *Property Law Commentary and Materials* (CUP 2005)
- Cohen G.A, *Self-Ownership, Freedom and Equality* (CUP 1995)
- Hardcastle R, *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing 2009)
- Have H.A.T, Spicker S.F and Velie J.V.M, *Ownership of the Human Body: Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare* (Kluwer Academic Publishers 1998)
- Hoppe N, *Bioequity: Property and the Human Body* (Ashgate Publishing Ltd 2009)
- Kant I, *Groundwork of the Metaphysics of Morals* (CUP 1785)
- Lohmann L, *Carbon Trading: A Critical Conversation on Climate Change Privatization and Power* (Mediaprint 2006)
- Mill J.S, *On Liberty* (J.W. Parker and Son 1859)
- Patterson D, *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd 2010)
- Price D, *Legal and Ethical Aspects of Organ Transplantation* (CUP 2000)
- Rothbard M, *The Ethics of Liberty* (New York University Press 1998)
- Shaw G.B, *Man and Superman* (United Holdings Group 1931)
- Smith G.W, *Liberalism: Rights, Property and Markets* (Routledge 2002)
- Soron D and Laxer G, ‘Thematic Introduction: Decommodification, Democracy and the Battle for the Commons’ in Soron D and Laxer G (eds), *Not for Sale: Decommodifying Public Life* (Broadview Press 2006)
- Waldron J, *God, Locke and Equality: Christian Foundations in Locke’s Political Thought* (CUP 2002)
- Wellman C, *Rights and Duties: Property Rights and Duties of Redistribution*, vol 6 (Taylor & Francis 2002)

JOURNAL ARTICLES

- Andrews L.B, ‘My Body, My Property’ (1986) 16 *The Hastings Center Report* 28
- Archard D, ‘Informed Consent: Autonomy and Self-Ownership’ (2008) 25 *Journal of Applied Philosophy* 19
- Bachmann L.M, Rid A and Wettstein V, ‘Would You Sell a Kidney in a Regulated Kidney Market? Results of an Exploratory Study’ (2009) 35 *Journal of Medical Ethics* 558
- Bagheri A, ‘Compensated Kidney Donation: An Ethical Review of the Iranian Model’ (2006) 16 *Kennedy Institute of Ethics Journal* 269
- Bardon A, ‘From Nozick to Welfare Rights: Self-Ownership, Property and Moral Desert’ (2000) 14 *Critical Review* 481

- Beyleveld D and Brownsword R, 'My Body, My Body Parts, My Property?' (2000) 8 Health Care Analysis 87
- Bramhall S, 'Presumed Consent for Organ Donation: A Case Against' (2011) 93(4) Annual Royal College Surgeon England 270
- Budiani-Saberi D.A and Delmonico F.L, 'Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities' (2008) 8(5) American Journal of Transplantation 925
- Buttle N, 'Prostitutes, Workers and Kidneys: Brecher on the Kidney Trade' (1991) 17(2) Journal of Medical Ethics 97
- Calabresi G, 'Do We Own Our Bodies?' (1991) Paper 2011 Yale Law School Legal Scholarship Repository 5
- Calandrillo S.P, 'Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage' (2004) 13 George Mason Law Review 69
- Caplan A, 'Blood, Sweat, Tears and Profits: The Ethics of the Sale and Use of Patient Derived Material in Biomedicine' (1985) 33 Clinical Research 448
- Cherno M, 'Locke on Property: A Reappraisal' (1957) 68 Ethics 51
- Cherry M.J, 'Embracing the Commodification of Human Organs: Transplantation and the Freedom to Sell Body Parts (2009) 2 Saint Louis University Journal of Health Law & Policy 359
- Chau P.L and Herring J, 'My Body, Your Body, Our Bodies' (2007) 15(1) Medical Law Review 34
- Chuan Voo T and Holm S, 'Organs as Inheritable Property?' (2013) 40(1) Journal of Medical Ethics 62
- Comminos P, 'A Radical Solution to a Problematic Situation: Inter Vivos Transplant and Sale of Kidneys' (1995) 2 UCL Jurisprudence Review 81
- De Castro L.D, 'Commodification and Exploitation: Arguments in Favour of Compensated Organ Donation' (2003) 29 Journal of Medical Ethics 142
- De Faria P.L, Karlsen J.P and Solbakk J.H, 'To Know the Value of Everything – A Critical Commentary on B Björkman and SO Hansson's "Bodily Rights and Property Rights"' (2005) 32(4) Journal of Medical Ethics 215
- Dickens B.M, 'The Control of Living Body Materials' (1977) 27 The University of Toronto Law Journal 142
- Driesen D.M, 'What's Property Got To Do With It' (2003) 30 Ecology Law Quarterly 1003 (reviewing Daniel Cole, *Pollution & Property: Comparing Ownership Institutions for Environmental Protection* (CUP 2002)).
- Erin C.A and Harris J, 'An Ethical Market in Human Organs' (2003) 29 Journal of Medical Ethics 137
- Feldman R, 'Whose body is it anyway? Human cells and the strange effects of property and intellectual property law' (2010) 63(6) Stanford Law Journal 1377
- Friedlaender M.M, 'The Right to Sell or Buy a Kidney: Are We Failing our Patients?' (2002) 359 The Lancet 971
- Friedman R.F, 'It's My Body and I'll Die If I Want to: A Property-Based Argument in Support of Assisted Suicide' [1995] 12(1) Journal of Contemporary Health Law and Policy 183

- George A.E, 'Is Property Necessary? On Owning the Human Body and Its Parts' (2004) 10 *Res Publica* 15
- Ghods A.J and Savaj S, 'Iranian Model of Paid and Regulated Living Unrelated Kidney Donation' (2006) 1(6) *Clinical Journal of the American Society of Nephrology* 1136
- Gold R, 'Body Parts: Property Rights and the Ownership of Human Biological Materials' (1997) 10(2) *Harvard Journal of Law and Technology* 369
- Gray K, 'Property in Thin Air' (1991) 50(2) *Cambridge Law Journal* 252
- Griffin A, 'Iranian Organ Donation Kidneys on Demand' (2007) 334 *British Medical Journal* 502
- Grubb A, "'I, Me, Mine": Bodies, Parts and Property' (1998) 3 *Medical Law International* 299
- Halewood P, 'On Commodification and Self-Ownership' (2013) 20 *Yale Journal of Law & the Humanities* 131
- Hansmann H, 'The Economics and Ethics of Markets for Human Organs' (1989) 14 *Journal of Health Politics, Policy and Law* 57
- Hardiman R, 'Toward The Right Of Commerciality: Recognising Property Rights in the Commercial Value of Human Tissue' (1986) 34 *UCLA Law Review* 207
- Harmon S, 'Yearworth v North Bristol NHS Trust: A Property/Medical Case of Uncertain Significance?' (2010) 13(4) *Medicine, Health Care & Philosophy* 343
- Harris J, 'Who Owns My Body' (1996) 16(1) *Oxford Journal of Legal Studies* 55
- Hausleben H, 'Property Rights in Organs – An Argument for Commodification of the Body' [2013] *Seton Hall Law eRepository* 350
- Hawes C, 'Property Interests in Body Parts: Yearworth v North Bristol NHS Trust' (2010) 73(1) *Modern Law Review* 130
- Hippen B, 'The Case for Kidney Markets' (2006) 14 *The New Atlantis* 47
- Hughes P.M, 'Constraint, Consent, and Well Being in Human Kidney Sales' (2009) 34 *Journal of Medicine and Philosophy* 606
- Jackson S, 'Uniform Civil Procedure Rules r150: Orders Relating to "Property" – Whether Sperm Extracted and Stored May be Characterised as "Property"' (2010) 30(6) *Proctor* 43
- Kaushik J, 'Organ Transplant and Presume Consent: Towards an 'Opting-out'' (2009) 6(3) *Indian Journal of Medical Ethics* 149
- Katsikis D, 'Philosophical Justification of the Individual's Proprietary Right to Sell Her Body Parts' (2009) 15 *UCL Jurisprudence Review* 72
- Kennedy I et al, 'The Case for "Presumed Consent" in Organ Donation' (1998) 351 *The Lancet* 1650
- Kerstein S.J, 'Autonomy Moral Constraints, and Markets in Kidneys' (2009) 34 *Journal of Medicine and Philosophy* 573
- Kishore R.R, 'Human Organs, Scarcities, and Sale: Morality Revisited' (2005) 31 *Journal of Medical Ethics* 362
- L'Hospital D, 'The Medium of Exchange Paradigm: A Fresh Look at Compensated Live Organ Donation' (2008) 2 *Human Rights and Globalisation Law Review* 1
- Liddy M, 'The "New Body Snatchers": Analysing the Effect of Presumed Consent Organ Donation Laws on Privacy, Autonomy and Liberty' (2000) 28 *Fordham Urban Law Review* 815

- Lori A.B, 'The Gene Patenting Dilemma: Balancing Commercial Incentives with Health Needs' (2002) 2 *Houston Journal of Health Law & Policy* 65
- Mack E, 'Self-Ownership, Marxism, and Egalitarianism: Part I: Challenges to Historical Entitlement' (2002) 1 *Politics, Philosophy & Economics* 237
- Matthews P, 'Whose Body? People as Property' (1983) 36 *CLP* 193
- McLachlan H, 'Property, Bodies and Wittgenstein' (2009) 3 *The Open Ethics Journal* 28
- Medlock N and Robinson D, 'Diamond v Chakrabarty: A Retrospective on 25 Years of Biotech Patents' (2005) 17 *Intellectual Property & Technology Law* 12
- Mills S, 'Owning My "Self": A Reconciliation of Perspectives on the Body' (1999) 6 *UCL Jurisprudence Review* 191
- Min Loh H, 'Selling Organs Ethically: Disentangling Exploitation Arguments' (2012) 1(1) *UCL Journal of Law and Jurisprudence* 1
- Moulds H, 'Private Property in John Locke's State of Nature' (1964) 23 *The American Journal of Economics and Sociology* 179
- Munzer S.R, 'An Uneasy Case Against Property Rights in Body Parts' (1994) 11 *Social Philosophy and Policy* 259
- Pateman C, 'Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts' (2002) 10 *Journal of Political Philosophy* 20
- Pawlowski M, 'Property in Body Parts and Products of the Human Body' (2009) 30(1) *Liverpool Law Review* 35
- Philips A, 'It's My Body and I'll Do What I Like With It: Bodies as Objects and Property' (2011) 39 *Political Theory* 724
- Price T.W, 'Legal Rights and Duties in Regard to Dead Bodies, Post-Mortems and Dissections' (1951) 68 *South African Law Journal* 403
- Quigley M, 'Property Rights in the Human Body: Applying Honoré' (2007) 33(11) *Journal of Medical Ethics* 631
- — 'Property in Human Biomaterials – Separating Persons and Things' (2012) 32 *Oxford Journal of Legal Studies* 659
- Radin M.J, 'Market Inalienability' (1987) 100 *Harvard Law Review* 1849
- — 'Property and Personhood' (1981-1982) 34 *Stanford Law Review* 957
- Richards R et al, 'The Case for Allowing Kidney Sales' (1998) 351 *The Lancet* 1950
- Resnik D.R, 'The Commodification of Human Reproductive Materials' (1998) 24 *Journal of Medical Ethics* 388
- Ryan A, 'Self-Ownership, Autonomy and Property Rights' (1994) 11 *Social Philosophy and Policy* 241
- Scott C, 'Why Law Pervades Medicine: An Essay on Ethics in Health Care' (2014) 14 *Notre Dame Journal of Law, Ethics & Public Policy* 245
- Skene L, 'Proprietary Interests in Human Bodily Material: Yearworth, Recent Australian Cases on Stored Semen and their Implications' (2012) 20 *Medical Law Review* 227
- Spinello A.S, 'Property Rights in Genetic Information' (2004) 6 *Ethics and Information Technology* 29
- Storrow R.F, 'New Thinking on Commercial Surrogacy' (2013) 88 *Indiana Law Journal* 1281
- Svenaesus F, 'The Body as Gift, Resource or Commodity? Heidegger and the Ethics of Organ Transplantation' (2010) 7 *Bioethical Enquiry* 163

- Taylor J.S, 'Autonomy and Organ Sales, Revisited' (2009) 34 *Journal of Medicine and Philosophy* 632
 — — 'Black Markets, Transplant Kidneys and Interpersonal Coercion' (2006) 32 *Journal of Medical Ethics* 698
 Taylor R.S 'A Kantian Defense on Self-Ownership' (2004) 12 *The Journal of Political Philosophy* 65
 Vein M.V.D, 'Rethinking Commodification and Prostitution: An Effort at Peacemaking in the Battles over Prostitution' (2001) 13 *Rethinking Marxism* 30
 Velasco N, 'Organ Donation and Kidney Sales' (1998) 352 *The Lancet* 483
 Wall J, 'The Legal Status of Body Parts: A Framework' (2011) 31 *Oxford Journal of Legal Studies* 783
 Wall S, 'Self-Ownership and Paternalism' (2009) 17 *Journal of Political Philosophy* 399
 Watner C, 'The Proprietary Theory of Justice in the Libertarian Tradition' (1982) 6 *Journal of Libertarian Studies* 289

CASES

- Association for Molecular Pathology v. Myriad Genetics, Inc.*, 132 S.Ct. 1794 (2012)
Carney v. Knollwood Cemetery Association, 514 N.E.2d 430 (Ohio Ct. App. 1986)
Diamond v. Chakrabarty, 447 U.S. 303 (1980)
Dobson v North Tyneside Health Authority [1996] EWCA Civ 1301
Doodeward v Spence (1908) 6 CLR
Evans v Amicus Healthcare Ltd [2004] ECA Civ 727
Gregson v Gilbert (1783) 99 ER 629
Hayne's Case [1614] 77 ER 1389
Hecht v. Superior Court of Los Angeles County, 16 Cal. App. 4th 836 (1993)
Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974)
Meek v State (1933) 185 N.E 899
Moore v. Regents of University of California, 51 Cal. 3d 120 (1990)
United States v. Garber, 607 F. 2d 92 (5th Cir. 1979)
R v Sharpe [2001] 1 SCR 45
R v Kelly [1999] 2 WLR 384
State v. Powell, 497 So. 2d 1188 (Fla. 1986)
Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37
Washington University v. Catalona, 490 F.3d 667 (8th Cir. 2007)

STATUTES

- Human Tissue Act 2004
 Human Fertilisation and Embryology Act 1990
 The Human Transplantation (Wales) Act 2013
 Theft Act 1968

INTERNATIONAL LAW SOURCES AND TREATIES

- European Convention on Human Rights

WEBSITES AND OTHER SOURCES

- 'A Critique of Rothbard's Arguments for the Natural Right to Self-Ownership' (*Anarchopac*, 2013) <<http://www.anarchopac.wordpress.com/2013/12/08/a-critique-of-rothbards-arguments-for-the-natural-right-to-self-ownership>> accessed 3 December 2013
- Andre C and Velasquez M, 'Kidneys for Sale' (*Santa Clara University: Marakula Center for Applied Ethics*, 1988) <<http://www.scu.edu/ethics/publications/iie/v1n2/kidneys.html>> accessed 14 December 2013
- Becker G.S and Elias J.J, 'Cash for Kidneys: The Case for a Market for Organs' (*The Wall Street Journal*, 2014) <<http://online.wsj.com/news/articles/SB10001424052702304149404579322560004817176>> accessed 8 December 2013
- Clark M and Clark W.T, 'Selling Your Organs: Should it be Legal? Do You Own Yourself?' (*Forbes*, 2013) <<http://www.forbes.com/sites/marciac Clark/2013/06/13/selling-your-organs-should-it-be-legal-do-you-own-yourself/>> accessed 17 December 2013
- Cleaver G.M, 'The Idea of Self Ownership' (*Cardiff University*, 2011) <<http://orca.cf.ac.uk/34870/1/2012cleavergphd.pdf>> accessed 8 December 2013
- Dolling J, 'Opting in and Opt out System: Presumed Consent as a Valid Policy Choice For Ontario's Cadaveric Organ Shortage' (*University of Toronto*, 2009) <http://tspace.library.utoronto.ca/bitstream/1807/18276/1/Dolling_Jennifer_M_200911_LLM_thesis.pdf> accessed 4 January 2014
- Feser E, 'Robert Nozick (1938-2002)' (*Internet Encyclopedia of Philosophy*) <<http://www.iep.utm.edu/nozick>> accessed 14 December 2013
- Gaus G, 'Property and Ownership' (*University of Arizona*) <<http://www.gaus.biz/PropertyOwnership.pdf>> accessed 14 December 2013
- George A, 'Property in the Human Body & Its Parts: Reflections on Self Determination in Liberal Society' (*EUI, Florence, Working Paper Law No.2001/82001*) <<http://cadmus.eui.eu/bitstream/handle/1814/172/law01-08.pdf?sequence=1>> accessed 18 November 2013
- Ghatak M, 'Buying Land and Selling Kidneys' (*The Financial Express*, 2009) <<http://econ.lse.ac.uk/staff/mghatak/FE7.pdf>> accessed 28 January 2014
- Hippen B.E, 'Organ Sales and Moral Travails: Lessons from the Living Kidney Vendor Program in Iran' (*Cato-Institute*, 2008) <<http://www.cato.org/publications/policy-analysis/organ-sales-moral-travails-lessons-living-kidney-vendor-program-iran>> accessed 17 December 2013
- Holcberg D, 'To Save Lives, Legalise Trade in Organs' (*Capitalism Magazine*, 2008) <<http://capitalismmagazine.com/2008/01/to-save-lives-legalize-trade-in-organs-2/>> accessed 18 December 2013
- James D, 'Organ Donation: Ethical and Legal Concerns Surrounding Autonomy for Presumed Consent' (*Manchester Metropolitan University*, 2012) <http://www.law.mmu.ac.uk/wp-content/uploads/2013/07/James_Thesis.pdf> accessed 14 January 2014

- Johnson S.L, 'Making Beans out of Kidneys: An Argument Against Kidney Sale' (*Academia, University of Birmingham*)
<http://www.academia.edu/4241615/Making_Beans_out_of_Kidneys_an_Argument_Against_Kidney_Sale> accessed 10 December 2013
- Kinsella S, 'How We Come to Own Ourselves' (*Ludwig von Mises Institute, 2006*)
<<http://mises.org/daily/2291>> accessed 15 December 2013
- Koepsell D, 'Naturally Occurring Genes and the Commons by Necessity' (*Council for Responsible Genetics*)
<<http://www.councilforresponsiblegenetics.org/genewatch/genewatchpage.aspx?pageid=305>> accessed 14 November 2013
- Littau S, 'Free Market Organs: The Case for Capitalism in the Organ Transplant System' (*United Liberty, 2013*) <<http://www.unitedliberty.org/articles/13852-free-market-organs>> accessed 8 December 2013
- Lord Plant, 'Selling Yourself Short: The Body, Property and Markets' (*Gresham College Lecture at the Museum of London, 2013*) <<http://www.gresham.ac.uk/lectures-and-events/selling-yourself-short-the-body-property-and-markets>> accessed 10 December 2013
- Mcable H, 'John Rawls & Justice' (*Philosophy Now, 2014*)
<http://philosophynow.org/issues/92/John_Rawls_and_Justice> accessed 15 February 2014
- McBride N, 'Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37' (*McBridesGuides, 2013*)
<<http://mcbridesguides.files.wordpress.com/2013/09/yearworth-v-north-brisol-nhs-trust.pdf>> accessed 18 December 2013
- Schulman M, 'Kidneys for Sale: A Reconsideration' (*Santa Clara University: Marakula Center for Applied Ethics, 2012*)
<<http://www.scu.edu/ethics/practicing/focusareas/medical/kidney-sale.html>> accessed 15 December 2013
- Mizrahi I, 'The Complexity of Self Ownership in Libertarian Ideology: The Corporate Self' (*Duke Space, 2010*)
<<http://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/5208/Mizrahi%20Political%20Science%20Honors%20Thesis%20Spring%202012.pdf?sequence=>> accessed 19 February 2014
- 'Organ Donation: Statements and Stances' (*Organ Donation, March 2010*)
<http://www.organdonation.nhs.uk/newsroom/statements_and_stances/> accessed 20 January 2014
- Penner J, 'Ownership, Co-Ownership and the Justification of Property Rights' (*UCL*)
<http://www.ucl.ac.uk/laws/academics/profiles/docs/penner_01.pdf> accessed 16 February 2014
- Petterson M, 'Episode 12, Anne Phillips on Ownership and the Body' (*Public Ethics Radio*)
<http://publicethicsradio.files.wordpress.com/2010/04/per_episode_12_transcript1.pdf> accessed 19 December 2013

- 'Presumed Consent Not Answer to Solving Organ Shortage in US Researchers Say' (John Hopkins Medicine, 2011)
<http://www.hopkinsmedicine.org/news/media/releases/presumed_consent_not_answer_to_solving_organ_shortage_in_us_researchers_say> accessed 10 March 2014
- Prynne M, 'Britons being sold illegal kidneys for surgery in Sri Lanka' (*The Telegraph*, 2013)
<<http://www.telegraph.co.uk/news/worldnews/asia/srilanka/10442714/Britons-being-sold-illegal-kidneys-for-surgery-in-Sri-Lanka.html>> accessed 4 January 2014
- 'Right of Revolution' (*The Founders' Constitution*, 1765)
<<http://www.press-pubs.uchicago.edu/founders/documents/v1ch3s3.html>> accessed 14 December 2013
- Sherkow J, 'A Closer Look at the Supreme Court's Decision on Gene Patenting' (*Stanford Medicine*, 2013) <<http://www.scopeblog.stanford.edu/2013/06/13/a-closer-look-at-supreme-courts-decision-on-gene-patenting>> accessed 5 October 2013
- Smith L, 'Sale of Human Organs Should be Legalised, Say Surgeons' (*The Independent*, 2011)
<<http://www.independent.co.uk/life-style/health-and-families/health-news/sale-of-human-organs-should-be-legalised-say-surgeons-2176110.html>> accessed 18 December 2013
- Spry L, '5 Surprising Ways You Could be Damaging Your Kidneys' (*Huffpost Healthy Living*, 2014) <http://www.huffingtonpost.com/leslie-spry-md-facp/national-kidney-month_b_2949750.html> accessed 18 March 2014
- Taylor R.S, 'Self-ownership and the Limits of Libertarianism'
<<http://www.polisci.ucdavis.edu/people/rstaylor/homepage/papers/Limits%20of%20Libertarianism>> accessed 17 December 2013
- 'The Common Law and Doctrine of Informed Consent'
<<http://www.mullawaysmedicalcannabis.com.au/CLHR.pdf>> accessed 3 March 2014
- Verhaegh M, 'The A Priori of Ownership: Kant on Property' (*Ludwig Von Mises Institute*, 2004) <<http://mises.org/daily/1605/>> accessed 16 November 2013
- Watson J, 'Do We Own Our Bodies?' (*Daily Speculations*, 2010)
<<http://www.dailyspeculations.com/wordpress/?p=5141>> accessed 8 December 2013
- 'Your Body, Whose Property' (*The Body Sphere*, presented by Amanda Smith, 2013)
<<http://www.abc.net.au/radionational/programs/bodysphere/your-body2c-whose-property3f/4931122#transcript>> accessed 18 January 2014
- Wilsterman J.M, 'The Human Commodity' (*The Harvard Crimson*, 2008)
<<http://www.thecrimson.com/article/2008/6/4/the-human-commodity-nice-harvard-degree/>> accessed 15 January 2014

(UN)chartered Territories: The Paragon of Global Governance (Inside Out)

Lizzy Willmington*

I. INTRODUCTION

Guidance is offered across a confusing and chaotic landscape of international law and global orders across the pages of legal articles, books, judgments and documents. They map out and define what constitutes the hegemonic understanding of the international legal institution today. This guidance requires an inexhaustible quantity of resources to maintain and reproduce itself. The pedagogy of international legal entities is endless and cyclical, requiring definition and redefinition for one to achieve a superior understanding of the complexities of the institution. When considering these factors it is useful to envisage them through geographic and cartographic language, through the metaphors of maps, cartography and space. This motivates a visual conceptualisation of the terrain of international law and how it is constituted through position, scale and space. In this Article, I will explore the metaphor of the map and pay particular attention to the role of the cartographer as 'expert'¹ in this process of mapping. My analysis of global governance and the role of international law within this will draw on concepts of critical legal geography and cartography.

Annelise Riles' *The Network Inside Out*² explores a new form of decentralised global governance instituted in the 1990s. Using her text I will develop the concepts of cyclical legitimisation and the consequences of achieving institutional standards rooted in aesthetic formalism. Linking Riles' analysis of what happens when the brackets and quotations are taken out of an international document and when entities are put into a map, I will explore the process of concretisation and fact production in global governance using an

* Lizzy Willmington is currently studying an MA in International and Comparative Legal Studies at SOAS, University of London and received a BA in History of Art from University of Leeds. I would like to thank the Feminist Theory Writing Group for their thoughtful suggestions and reviews.

¹ David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27 *Sydney Law Review* 5, 6.

² Annelise Riles, *The Network Inside Out* (University of Michigan Press 2000).

aesthetic and formatting technique (bracketing) found in Derrida's 'The Parergon'.

Using Damrosch, Henkin, Murphy and Smit's *International Law: Cases and Materials*³ I will explore how the privileged hegemonic map of international law is made and maintains its visibility. Through a close reading of *Introduction to the Study of International Law*⁴ and borrowing approaches from Riles and the methodologies as explored in critical legal geography and cartography, I demonstrate how even seemingly subtle texts are in need of critique in order to make visible the background levels of construction.

In approaching my understanding through these concepts, I will focus on the spheres and boundaries of the 'hyper-visible' and 'invisible'⁵ and how this defines our understanding of where and how international law happens. By investigating whom the cartographer is and his or her role, I will explore the impact and importance this position has in defining international law.

II. TAKING ANOTHER LOOK AT THE MAP: HOW WE ARE GUIDED AROUND THE INTERNATIONAL LANDSCAPE

When you arrive somewhere new the first thing you seek is a map. A need for orientation around an unknown territory prompts the desire for guidance. At first the map fulfils a function; it helps navigate you and highlights landmarks of importance. Maps are an abstract representation of the unfamiliar, yet are themselves physical representations using the familiar and the identifiable. It is assumed that an 'expert' or cartographer (or expert cartographer), in creating a replica, has made partially visible a territory which would otherwise be too grand for one to comprehend. However, through critical geographical analysis we are encouraged to consider how this map has been constructed, by whom and with what effect. As with all knowledge, there are specific modes of knowledge production, coupled with specific intentions and outcomes. Within each discipline boundaries are created and learned. An understanding of what is inside (and therefore included), and outside (and therefore excluded) is taught. This produces opposing spheres of what is accepted and normal, and what is not; what is understood to be true, and what is not. Through critical engagement, it is possible to gain a more contextual understanding of the

³ Lori Fisler Damrosch, Louis Henkin, Sean D Murphy and Hans Smit (eds), *International Law: Cases and Materials* (Thomson Reuters 2009).

⁴ Lori Fisler Damrosch, Louis Henkin, Sean D Murphy and Hans Smit, 'Introduction to the Study of International Law' in Lori Fisler Damrosch, Louis Henkin, Sean D Murphy and Hans Smit (eds), *International Law: Cases and Materials* (Thomson Reuters 2009) xv-xvii.

⁵ Zoe Pearson, 'Spaces of International Law' (2008) 17 Griffith Law Review 489, 494.

construction of knowledge. Both law and cartography have had a long relationship with politics, power and the powerful. As such, they both possess the means of boundary creation and the ability to present a discourse as ubiquitously 'hyper-visible' and the dissenting discourses as 'invisible'.⁶

Boundaries mean. They signify, they differentiate, they unify the insides of the spaces that they mark. What they mean refers to constellations of social relational power. And the form that this meaning often takes – the meaning that social actors confer on lines and space – is legal meaning.⁷

By securing a boundary, the creator is delimiting what is authorised and what is not. It determines how you see what is inside and what is outside the boundary and creates cohesion across each boundary of opposition. The impact of this binary is the notion that there are only two possibilities: inside or outside, which indicate right or wrong. This in turn removes the possibility of any alternative. 'Unless one is careful, it is made into a basis of images that govern all thoughts of positive and negative. Logicians draw circles that overlap or exclude each other, and all their rules immediately become clear'.⁸ Thinking about space in this way leads us to appreciate space as a place that is being actively constructed rather than a state of passive being.⁹ The question that remains is who is constructing it.

The understanding that mapping the international legal landscape is not only descriptive but also prescriptive¹⁰ allows us to see the authorised spaces that constitute privileged positions, like that of the cartographer; mapping out the 'orders', constructing 'designs' and building 'paths across territor[ies]'¹¹ of this continually chartered world. When a diverse social reality is repeatedly reduced to one interpreted 'fact' it is difficult to challenge and understand the process of its creation as something other than truth and try to conceive of other possibilities, particularly when this takes place in such a coveted sphere. As Zoe Pearson explains:

⁶ Pearson (n 5).

⁷ Nicholas Blomley, David Delaney and Richard T Ford, 'Preface: Where is law?' in Nicholas Blomley, David Delaney and Richard T Ford (eds), *The Legal Geographies Reader: Law, Power, and Space* (Wiley-Blackwell 2001) xviii.

⁸ Gaston Bachelard, 'The Dialectics of Outside and Inside' in Clive Cazeaux (ed), *The Continental Aesthetics Reader* (Routledge 2000) 151.

⁹ Blomley (n 7) xvi.

¹⁰ Pearson (n 5) 492.

¹¹ Riles, *The Network Inside Out* (n 2) 1.

The weakness of what might be characterised as a 'traditional' map of international law, which privileges state actors as the main feature of the terrain and is drawn from a masculine, Eurocentric pedigree, is the extent to which it has become the dominant map of the international law landscape, making other cartographies and other understandings of space invisible. The risk of this dominance is that it fails to adequately acknowledge or accommodate the complexity of the emergent, fluid processes of regulation in international law.¹²

The post-war efforts led by Arthur Robinson forced the severance of map production from state utility. A rejection of cartography's role in state propaganda resulted in the idea that 'maps should be used to tell the truth'.¹³ As such, cartography shifted from the political sphere into the technical and scientific sphere. The belief that there is one 'truth' that can be represented in a map, despite acknowledging its limitations, reduces the vastness of possibility into the rigidity of a fixed structure. Believing that the production of maps and the effect produced from their information is without influence can only be illusory and naïve. It is nevertheless one that has been long maintained since the modernising process¹⁴ with grave implications that shall be explored when looking at *The Network Inside Out*.

I have found Pearson's methodological approach in 'Spaces of International Law' very useful in conceptualising the international legal discipline. Her framework engages in critical cartography and draws parallels with the two historic fields of study. She applies the methodology in three stages:¹⁵ firstly, she challenges the neutrality of supposedly objective representations of truth and facts that have been present in the cartographic process and in maps. This process ossifies the abstract, inevitably resulting in the removal of and invisibilisation of that which does not conform to the hegemonic norm (and therefore illuminates diversity). Secondly, she draws attention to the role of the international lawyer, whom she depicts as a cartographer. This challenges the perception of the international lawyer as an authoritative and neutral interpreter, and highlights the impact the identity of these gatekeepers have in defining what is included and excluded as international law. This perception is in constant need of disruption in order for us to try and gain a fuller understanding of the subjectivities that surround the constitution of such inclusive and exclusive interactive spaces. It also redirects our focus onto the

¹² Pearson (n 5) 496.

¹³ Jeremy W Crampton, *Mapping: A Critical Introduction to Cartography and GIS* (Wiley-Blackwell 2010) 11.

¹⁴ See below Section IV: The Split Personality of International Law.

¹⁵ Pearson (n 5) 491-94.

power dynamics, assumptions and identities of those implicit in the process. Thirdly, we are prompted to consider these conceptual and physical spaces of inclusion and exclusion. The perceived neutrality and ubiquity of international law obscures our understanding of where it is. A cartographic approach allows one to locate the structure and analyse how it facilitates the constitution of hyper-visible and invisible spaces where international law happens.

III. THE AESTHETICS OF LEGITIMACY

Using Pearson's framework, I shall explore international legal governance through Annelise Riles' *The Network Inside Out*. Riles gives her own account of the global orders through her involvement with the Pacific Platform for Action. Positioned in Fiji, she worked with activists and bureaucrats in the Pacific Platform for Action and the South Pacific Commission in preparation for the United Nations (UN) Fourth World Conference on Women (the Beijing Conference) in 1995. This change in professional environment (to fieldwork) provided Riles a different perspective to that which was available to her in her usual capacity as an academic legal anthropologist. With this move, new anthropological artefacts were made visible to her through her work. Having already been through the background processes of analysis, a UN document usually arrives in the visible sphere as a finished document. However, Riles turns this around and asks, 'How might one transform this kind of ending point into a beginning point of one's own?'¹⁶

Riles echoes Pearson's call to critically analyse the ordinary rather than the extra-ordinary. She shows that academic contribution in this field 'lies not in the discovery of new knowledge but in the effort to make what we already know analytically accessible'.¹⁷ While Riles adopts an anthropological critique, there are parallels with the metaphor of the map. By linking ethnographic data to the map, and the ethnographer to the cartographer, I will show that the same conceptual territory is being explored by both Riles and Pearson. She expresses the need for an anthropological approach to the sphere of international governance and law precisely because they – the international actors – are so close to it. They already know it (because they already do it), but it is not within their field of vision and analysis; they are inside 'the Network'.¹⁸ She goes so far as to say that the data is inseparable from the ethnographer; as such, the data is the aesthetic physicality of the ethnographer's conceptual structure, or 'turns that mind inside out'.¹⁹ The challenge then is to position oneself 'outside' the

¹⁶ Riles, *The Network Inside Out* (n 2) xiv.

¹⁷ *ibid* 18.

¹⁸ *ibid* 16.

¹⁹ *ibid* 19.

network with this knowledge to allow for an ethnographic critique of what it is that they already know, to shift this information from the invisible to the hyper-visible²⁰ – from the background to the foreground.²¹ In Riles' own words, '[I]t will require turning the Network Inside Out'.²²

Riles goes into great detail in explaining her analogy of mat making (which is so important in Fijian culture), and document making (which is so important in the global orders culture). Her most developed comparison analyses the methods of inclusion of documents/mats into one bigger composition. Through describing the process (of arrangement when laying, layering and composing the mats) we are drawn to see parallels when incorporating individual documents into one (large, cohesive (aesthetically pleasing)) master document. The (performance of) discussion (processing, counting, seeing, layering of meaning, repeating, discarding and starting again) all contributes to the production of a (complex, diverse and predetermined) structure. As with the document created at the Beijing Conference, the process (of layering obscures (and privileges) certain aspects (be they word or mat patterns), for the effect that it) achieves (the prescribed form of) a document.²³

We learn about the (painstaking) editorial process of the document, which privileges the maintenance of an aesthetic and linguistic veil over actual meaning and content. Riles replicates the attention to detail, repetition and extensiveness of the process through her writing. We feel her frustration and hear her exasperation as infinite potential and meticulous work is being undone with every essentialising repetition of 'woman' and every vacuous partnering of 'universal' and 'human rights' throughout the inclusionary editorial process of the documents.²⁴ Gridlocked negotiations ensue and true consensus is substituted with a success story derived from a prior document. These championed quotes²⁵ are patch-worked seamlessly into the document (as any reproduction is forbidden to be placed in the editorial sphere (inside the brackets), but must stand as they came (transported with their previous success (without brackets (and therefore post-negotiation (the end point) (fact)))))).²⁶ This act of reproduction evokes a chartered territory (conquered and mapped). This further (simplification and erasure of layers of meaning) serves to reinforce (and legitimize) previous negotiations (and in turn the triumph) of the

²⁰ Pearson (n 5) 494.

²¹ Kennedy (n 1) 7.

²² Riles, *The Network Inside Out* (n 2) 6.

²³ *ibid* 77.

²⁴ Riles, *The Network Inside Out* (n 2) 81.

²⁵ *ibid* 88.

²⁶ *ibid* 172.

system. 'Success' is achieved in the end. But for whom and at what expense? Questions about the measurability of success need to be asked. How is success assessed? For whom is it deemed successful, and by whom? The markers of success described by Riles are so far removed from the (perceived) intentions of the people attending the Beijing Conference ('women's empowerment ... removing all the obstacles to women's active participation ... [e]quality between women and men ...').²⁷ However, '[t]he objective [is] form and quantity' contained within the neutral markers of aesthetics and numbers.²⁸ To be able to count the number of word repetitions (and therefore their (assumed) strength) is a good measure, and percentages of (infinitely possible (yet illegitimate)) words inside the brackets are a sign of failure.²⁹ The institution has broken the rules of aesthetics by making rules of aesthetics (institutional disobedience to achieve legitimacy). So we must then critique the standards that have been set. Jacques Derrida questions:

What does the lack depend on? What lack is it? And what if it were the frame. What if the lack formed the frame of the theory. Not its accident but its frame. More or less still: what if the lack were not only the lack of a theory of the frame but the place of the lack in a theory of the frame.³⁰

The presence of standards creates the potential to not achieve them – to lack. The framing of the document creates a lack in its meaning. It removes the unquantifiable potential from them. In Derrida's case this is aesthetics. In the Beijing Conference's case it is gender equality. The achievement is so universal in its appeal it is impossible to represent (the individual) and therefore its impact cannot be implemented back in the states, communities and women for whom the document is (supposedly) made. It is hyper-visible yet invisible;³¹ it connects to everything, yet nothing. This is why Riles is turning the *Network Inside Out*, to anthropologically investigate the cause and effect of what is actually happening here.

(Aesthetical) judgement is a wholly subjective discipline (though not uninstitutionalised), and as we can see, it is controlled with alarming measures. If we take this at face value, the measure of authority and management that

²⁷ 'Report of the Fourth World Conference on Women', UN Doc A-CONF.177/20/Rev.1 (Fourth World Conference on Women, Beijing 4-15 September 1995) 7.

²⁸ Riles, *The Network Inside Out* (n 2) 88.

²⁹ *ibid* 86-88.

³⁰ Jacques Derrida, 'The Parergon' in Clive Cazeaux (ed), *The Continental Aesthetics Reader* (Routledge 2000) 416.

³¹ Pearson (n 5) 494.

goes into the form of a document shows how administrative regulation can stifle transformative potential. A strict pattern of order and rejection of disorder is at play for '[t]he argument happened within the brackets'.³² Dissidence and '[i]nfinity within the [b]rackets'³³ are constrained by the structural patterns and rules. Like the cartographer, standards are highly regarded (to the uncritical eye). The perception of standards (through which legitimacy is sought) is one of improvement and progression. But again, we must question these concepts of improvement and progression; to what, for whom and at what consequence? Riles challenges the assumption that improvement and progress are inherently good. Who has the legitimacy to say what these standards are, and who approves and legitimates these standards? The cyclical potential of this statement is a telling one. These boundary frontiers expand to incorporate and define norm and law production and reinforcement through these self-perpetuating and legitimating systems (created to retain power). The occupants of these spaces claim it as their rightful territory and propagate narratives in favour of such claims. As we can see, the legitimacy of these occupations and the expansion of these boundaries are robustly defended. Gaining legitimacy through the process of achieving standards is important, and so a deregulation of standards to satisfy the legitimacy that assures the standards will maintain the legitimacy of the process. It is confusing, cyclical and self-contained. But most worryingly, it is obscured, and a slow change within these spheres affect what is then found to be acceptable. 'Indeed, it is striking how often we downplay the work of experts, attributing everything to foreground and context. And yet it is the experts who decide what is foreground and what is context ...'³⁴ Without any accountability or public regulation, it is unclear what exactly is happening in this space. These experts define their own rules (for self-protection) and also the rules for all the spheres of global governance and what happens within them. An example, as discussed above, is the depoliticisation of the map. Shifting away from the political and public sphere and into the technical, private sphere does not mean that the political has been replaced by the technical, but it does mean that it has moved from the public into the private. Another question to ask is who decided that the political and the technical were necessarily separate.

IV. THE SPLIT PERSONALITY OF INTERNATIONAL LAW

Riles enters into the international sphere through the experience of activists and bureaucrats working at the grassroots level. She scales the levels of networks

³² Riles, *The Network Inside Out* (n 2) 85.

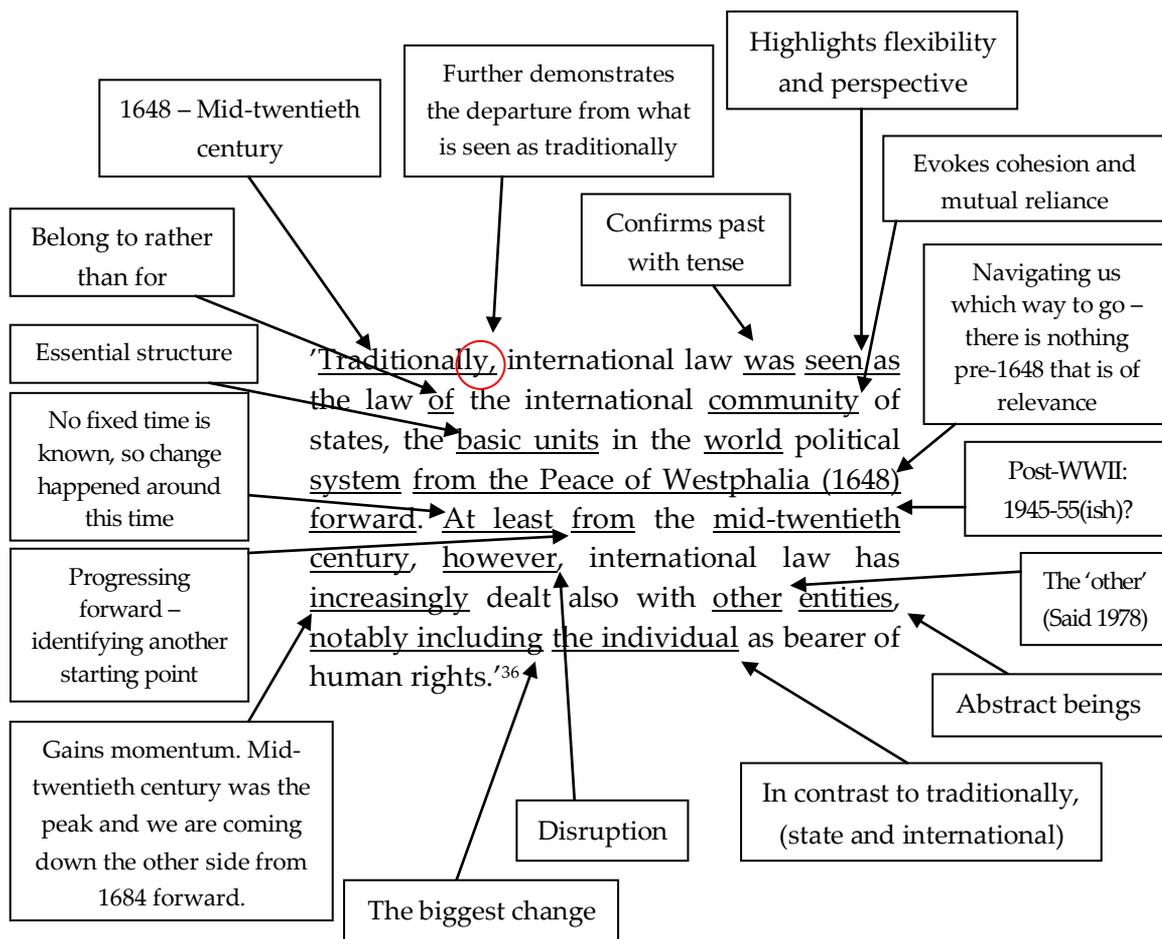
³³ *ibid* 70.

³⁴ Kennedy (n 1) 9.

and processes but maintains a viewpoint at ground level as she cannot reach the peak(s) of the institution: her network does not have access. She is denied admission (beyond the street view) into the site of negotiations. While international law boasts a horizontal power dynamic, Riles unveils a confusing myriad of unequal relations and dead ends. While it has been useful to see how Riles has transformed the 'ending point into a beginning',³⁵ it is also useful to see what she is reacting to by taking this approach. A shift in perspective allows new things to be brought to light. A panoramic view allows for a broader assessment of the discipline. However, the location of the viewing platform is also important. Height gives perspective, clarity and concision to see how landmarks, pathways and systems are organised. But a vertical positioning needs contrasts and challenges the notion of the horizontal.

By analysing a text of the discipline, I seek to demonstrate how traditional thought (despite the word 'traditional' evoking conceptions of the past) is still dominant in the functioning of contemporary international law and global orders. In the 'Introduction to the Study of International Law' in Damrosch and others' *International Law: Cases and Materials*, the reader is presented a timeline of international law. Following Riles' example, I will demonstrate how analysis of subtle linguistic and aesthetic construction can unveil the prescriptive nature of this material source. The first two sentences in the opening of the book overflow with connotations and direction. While I appreciate that an introduction sets the scene and therefore must hold a lot of preliminary information for its reader, we have already critiqued the significance of guidance and mapping as above. These two sentences introduce the conceptual framework with which the reader will follow and employ as they progress through reading and understanding international law in *International Law: Cases and Materials*.

³⁵ Riles, *The Network Inside Out* (n 2) xiv.



This demonstrates a link between prescriptive writing, the way we are encouraged to read the text (and therefore introduced to international law) and a visual mapping out of this process.

Following this Damrosch and others go on to alternate between vague and clear language. They write '[t]hat international law has been understood as ... implies an important frame for the conception of ... and accordingly for ...'³⁷ The assertion here is highlighting a knock-on effect. The first is implicit in the second, which therefore leads to the third. But there is no confirmation that the first is indeed true. On the one hand, we are told 'there are convincing reasons to maintain a focus on interstate relations and institutions, even while recognizing that one must attend to all other rings in the world circus as well'.³⁸ Then in the next paragraph, they declare one 'can also benefit from broader

³⁶ Damrosch, *International Law: Cases and Materials* (n 3) xv.

³⁷ *ibid.*

³⁸ *ibid* xv-xvi.

perspectives'.³⁹ This demonstrates an internal struggle with what constitutes international law. While telling the reader that 'it is no longer accurate to think of international law as strictly an interstate system', Damrosch and others counterbalance this by stating that it is 'a conceptually distinctive system'⁴⁰ in the very next paragraph. So what is the purpose of telling the reader international law is both traditional and modern, both explicit and conceptual? By initially presenting these identities as separate from one another, the authors position them in opposition. As I have stated above, this boundary constructs an inside/outside dichotomy. As such, traditional international law is inside and explicit, making the other modern entities outside and conceptual. The text is the foundational map for the discipline, and from inside this tradition a progressive and active inclusion of the modern is taking place 'by virtue of decisions made through interstate processes';⁴¹ therefore it does so while retaining its own distinction and consequent hierarchy. By starting with the traditional and returning to the traditional as 'a conceptually distinctive system' we can understand that this way of seeing law has retained law's spatial dominance through the modernisation process. It is still considered the fundamental structure of international law and we still observe its relevance to our learning of international law in this post-traditional era; and as I have demonstrated above, we can see how it is so. The continued relevance of cartography to international law highlights a maintained resistance to an ideological shift; to conceding substantive power away from the traditional.

This text is useful insofar as it allows for a close analysis to draw meaning from it, and it is representative of a lot of conventional texts. It furthers the discussion on the directive nature of maps, whether aesthetically, spatially, visually, conceptually and/or linguistically. The purpose of the text is to guide students, and the authors are four high-ranking university professors with a wealth of knowledge and experience – from the Office of the Legal Adviser, United States (US) Department of State (Murphy and Damrosch), to the North Atlantic Treaty Organisation (NATO) (Henkin) to The Hague (Smit). I list these to demonstrate the richness in their combined experience, but also to highlight their commitment and investment to the institution of international law. However, the text is limited as to demonstrating the nuances of global institutional supremacy and the complex myriad within boundaries and spheres of the international and therefore allowing the reader this understanding. The fact that Damrosch and others are experts in their fields is a relevant fact. They have demonstrated their privileged position and how they

³⁹ *ibid* xvi.

⁴⁰ *ibid*.

⁴¹ Damrosch, *International Law: Cases and Materials* (n 3) xv.

are using it. Published in 2009, *International Law: Cases and Materials* is restrictive as a lead into international law through the traditional manner as it immediately structures and 'traditionalises' your conceptual process, and places the 'emergent, fluid processes of regulation'⁴² outside the mainstream discourse. We only need to look to Philip Allott's 'New International Law: The First Lecture of the Academic Year 20-'⁴³ to see how different an introduction to the subject could be. In contrast to the prescriptive nature of the previous text, Allott imparts four slogans to his imagined audience. 'Society and the individual make society and the individual ... Society is a system constituting itself as a system ... The law is an ever-changing set of retained acts of social willing ... International law is a social phenomenon, like any other'.⁴⁴ The approach with these four slogans opens the reader to a fluid and inquisitive approach to thinking '[i]nfinity within',⁴⁵ rather than merely indoctrinating in one the historical linear structure of the discipline.

The split identity of international law is a recurring theme throughout legal criticism. This split is visible not only within the traditional/modern and explicit/conceptual dichotomies but also in cartography. There is a symmetry of crisis: '[O]n the one hand maps are incredibly powerful devices for creating knowledge and trapping people within their cool gleaming grid lines, on the other they seem to be nothing at all, just mere bits of fluff in the air. Maps are sovereign; maps are dead'.⁴⁶ To conceive the space and boundaries of the international is harder than initially imagined. Further, Pearson highlights the conflict of location and scale: '[I]t is seen as both applicable everywhere and a view from nowhere'.⁴⁷ It is a discourse at odds with, and constantly going back on itself, occupying the space in-between. While it is a discourse that can be defined by these concepts, 'one would be at pains to go to the international'.⁴⁸ Doris Buss points out we understand what international law is by what it is not (national law (sovereign)), by its 'spatial lack'.⁴⁹ But I would go further to say it is a reaction to a desire for definition due to its abundance of space (and

⁴² Pearson (n 5) 496.

⁴³ Philip Allott, 'New International Law: The First Lecture of the Academic Year 20-' in The British Institute of International and Comparative Law and International Law Group, Society of Public Teachers of Law (eds), *Theory and International Law: An Introduction* (The British Institute of International and Comparative Law 1991) 109-13.

⁴⁴ *ibid* 109-10.

⁴⁵ Riles, *The Network Inside Out* (n 2) 85.

⁴⁶ Crampton (n 13) 8-9.

⁴⁷ Pearson (n 5) 493.

⁴⁸ Doris Buss, 'Austerlitz and International Law: A Feminist Reading at the Boundaries' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing 2005) 87.

⁴⁹ *ibid*.

therefore lack), and a need to create boundaries (frames) to assert its spatial property (using an ownership and physical understanding of property). It is what it is not. It is defined by what it is not, as the space in between. In Derridian terms the ergon is defined by the parergon; the space is defined by the boundaries.

What constitutes [a link] is not simply their exteriority as a surplus, it is the internal structural link which rivets them to the lack in the interior of the ergon. And this lack would be constitutive of the very unity of the ergon. Without this lack, the ergon would have no need of a parergon.⁵⁰

So I claim it is not only because the spatiality of international law is so abundant but also because of the link connecting national and international law that exposes the (spatial) lack. That it is united in its own definition of what it is not (bounded). Without this lack of unboundedness it would not need the definition of boundary. The boundary is sovereign. There is limitless potential in international law ('a utopian space as well as a set of scientific and moral values')⁵¹ but it is disabled through the functional application of what is involved when removing the brackets. The value of linguistic legal language is misplaced when it is unenforceable in non-binding international documents. It needs the traditional to give it definition. But that is what is so appealing about it for so many and what brings enthusiasm to the decentralised 'quasi-detachment' aesthetic of the traditional.

V. CONCLUSION

I have rejected the traditional approach to international law and fully embraced the interdisciplinary opportunities afforded by modern international legal thought. By incorporating critical cartography and aesthetic philosophy, as well as analysing texts that explore the interdisciplinary connections between legal anthropology and critical legal geography, I have approached the question of how we are governed on a global level from a range of intersections. To further my analysis, I have demonstrated approaches using brackets and deconstructing quotes. Through the use of the brackets, borrowed from Derrida but also inspired by Riles' explanation of the construction of a UN document, I illustrate the vacuous institutional process of document writing by maintaining coherent sentences outside the brackets but exploring my critique and furthering the

⁵⁰ Derrida (n 30) 423.

⁵¹ Annelise Riles, 'The Architecture of Colonial International Law' in Nicholas Blomley, David Delaney and Richard T Ford (eds), *The Legal Geographies Reader* (1st edn, Wiley-Blackwell 2001) 281.

depth of analysis inside the brackets. I chose this approach to explore my own understanding of how we are governed at a global level. Critical legal geography and cartographic approaches have encouraged a conceptual shift as to how we see international law, what we see in international law and where we see international law.

BIBLIOGRAPHY**BOOKS**

- Allott P, 'New International Law: The First Lecture of the Academic Year 20-' in The British Institute of International and Comparative Law and International Law Group, Society of Public Teachers of Law (eds), *Theory and International Law: An Introduction* (The British Institute of International and Comparative Law 1991)
- Bachelard G, 'The Dialectics of Outside and Inside' in Cazeaux C (ed), *The Continental Aesthetics Reader* (Routledge 2000)
- Blomley N, Delaney D and Ford R.T, 'Preface: Where is law?' in Blomley N, Delaney D and Ford R.T (eds), *The Legal Geographies Reader: Law, Power, and Space* (Wiley-Blackwell 2001)
- Buss D, 'Austerlitz and International Law: A Feminist Reading at the Boundaries' in Buss D and Manji A (eds), *International Law: Modern Feminist Approaches* (Hart Publishing 2005)
- Crampton J.W, *Mapping: A Critical Introduction to Cartography and GIS* (Wiley-Blackwell 2010)
- Damrosch L.F, Henkin L, Murphy S.D and Smit H (eds), *International Law: Cases and Materials* (Thomson Reuters 2009)
- Derrida J, 'The Parergon' in Cazeaux C (ed), *The Continental Aesthetics Reader* (Routledge 2000)
- Riles A, *The Network Inside Out* (The University of Michigan Press 2000)
- — 'The Architecture of Colonial International Law' in Blomley N, Delaney D and Ford R.T (eds), *The Legal Geographies Reader* (Wiley-Blackwell 2001)

JOURNAL ARTICLES

- Crampton J.W and Krygier J, 'An Introduction to Critical Cartography' (2006) 4(1) ACME 11 <<http://www.acme-journal.org/vol4/JWCJK.pdf>> accessed 21 March 2014
- Kennedy D, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27 Sydney Law Review 5
- Pearson Z, 'Spaces of International Law' (2008) 17 Griffith Law Review 489

REPORTS

- 'Report of the Fourth World Conference on Women', UN Doc A-CONF.177/20/Rev.1 (Fourth World Conference on Women, Beijing 4-15 September 1995) 7

WEBSITES AND OTHER SOURCES

- The Trustees of Columbia University in the City of New York, 'Lori Fisler Damrosch' (*Columbia Law School*, 2014) <http://www.law.columbia.edu/fac/Lori_Damrosch> accessed 21 March 2014
- — 'Louis Henkin' (*Columbia Law School*, 2014) <https://www.law.columbia.edu/fac/Louis_Henkin> accessed 21 March 2014
- — 'Hans Smit' (*Columbia Law School*, 2014) <http://www.law.columbia.edu/fac/Hans_Smit> accessed 21 March 2014

The George Washington University Law School, 'Sean D. Murphy' (*The George Washington University: Washington, DC*)

<<http://www.law.gwu.edu/faculty/profile.aspx?id=1756>> accessed 21 March 2014

Neglected Bodies in International Law: Sexual Violence Against Boys

Helena Van Roosbroeck*

I. INTRODUCTION

This Article investigates how international law interacts with sexual violence against boys through the United Nations Security Council (UNSC) Resolutions on Women, Peace and Security (WPS) and Children and Armed Conflict. While recent years have seen increased attention towards sexual violence against men in the context of armed conflict, there are still considerable research gaps with regards to sexual violence against boys.¹ In recent armed conflicts in Afghanistan, the Democratic Republic of Congo (DRC), Liberia, Sri Lanka and Sudan there has been word of widespread sexual violence against boys.² This Article examines to what extent these events have remained absent from the research agenda of academics, international institutions and Resolutions issued by the UNSC. It further explores in what ways readings of armed conflict and international law that employ a gender perspective should award special attention to boys as a category in their own right, separate from men and in addition to the often employed categories of children and girls. Furthermore, the Article contends that only through specific attention to boys will their experiences of sexual violence during armed conflict and in post-conflict societies be heard.

The first Section of the Article constitutes a discourse analysis of the UNSC Resolutions on WPS and on Children and Armed Conflict. This discourse analysis is merged with a literature review of recent critical feminist writings on the UNSC's discursive interpretations of gender. These discursive interpretations of gender are usually seen to have an impact on international

* Helena Van Roosbroeck obtained a BA in Sinology and an MA in European Studies at the University of Leuven, Belgium. She is currently a candidate for an MA in International Law at SOAS, University of London.

¹ UN Office for the Coordination of Humanitarian Affairs (OCHA) – Policy Development and Studies Branch, 'Use of Sexual Violence in Conflict: Identifying Research Priorities to Inform More Effective Interventions' (*Meeting Report*, 26 June 2008) <http://www.peacewomen.org/portal_resources_resource.php?id=1258> accessed 27 February 2013, 5.

² *ibid* 6.

norms surrounding national, transnational and international governmental and non-governmental organizations' practice with regards to sexual violence in armed conflict. The second Section explores whether or not boys remain invisible as survivors of sexual violence in recent armed conflicts. This Section also assesses the possible consequences of overlooking boy survivors of sexual violence, using research on sexual violence in the DRC as a case study. In the last three Sections the Article explores a conceptual understanding of boyhood that is crucial to constituting boys as a valid category within understandings of gender. Particularly, in the third Section, second wave feminists' interpretation of 'doing gender' and gender as performative are employed in relation to childhood studies through the work of Barry Thorne. The fourth Section will explore the emerging field of girlhood studies and try to assess whether the paradigms employed in this field can aid a novel conceptualization of boys' experiences. The last Section will employ an understanding of gender as 'embodiment' and 'lived body experience' as conceptualized by Iris Marion Young to engage in an understanding of boyhood as a separate category, without losing sight of how divergent institutional structures can impact the lived body experience of subjects.

This Article limits a reading of international law to the UNSC Resolutions and there is little exploration of the different armed conflicts and studies on armed conflicts, apart from the DRC and Afghanistan, in which systematic sexual abuse of boys has been noted. Further research could potentially aim at constituting a database of boy survivors of sexual violence in armed conflicts globally. Furthermore, there has been little exploration and in-depth engagement in the Article with questions of military masculinities. Such theoretical insight is nonetheless important for understanding the gendered dynamics that lie at the basis of many instances of sexual violence. As such, this Article aims primarily to constitute an overview of the current situation of studies on boyhood in relation to armed conflict. Moreover, it primarily attempts to constitute an understanding of boys beyond binary understandings of gender.

II. FROM ABSENT BODIES TO AWKWARD PRESENCE

When in 2000 the first gender-sensitive Resolution with regards to armed conflict was issued by the UNSC, many feminists rejoiced. In its operative paragraphs, Resolution 1325 on WPS called on all parties to armed conflicts to adopt measures in order to protect women and girls from sexual violence and other types of gender-based violence.³ The Resolution also urged member-

³ UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325.

states to pay attention to the particular needs of women and girls in post-conflict settings and urged the Secretary-General to report on the situation of gender-mainstreaming and women and girls in peacekeeping.⁴ While the efforts cited in Resolution 1325 have met with little opposition from feminists,⁵ there is an ever-growing amount of critical literature that questions the particular discursive construction of gender and women present in Resolution 1325. Surprisingly, the Resolution uses both the phrase 'women and children' and 'women and girls' when emphasizing the need of gender perspectives in armed conflict. As such, it has been argued that the Resolution equates women with children, thus highlighting 'recurrent definitions of women as vulnerable individuals'⁶ which in turn 'removes women's agency and maintains them in the subordinated position of victims'.⁷ The Resolution also continuously alternates between the terms 'children' and 'girls'. A detailed discourse analysis revealed that while 'children' are mentioned in the preamble, the operative paragraphs talk solely about women and 'girls'. Boys are mentioned nowhere and men are only referred to in the context of ex-combatants.⁸ In UNSC Resolution 1820 a similar problem is noted.⁹ While the Resolution has been lauded extensively for its 'ground-breaking' recognition of sexual violence as a weapon of war, it alternates between discussing sexual violence against 'civilians', 'women and children' and 'women and girls'. While the operative paragraphs – employing terms such as 'civilian' and 'children' seem to encompass boys and men up to a certain extent, the specific sections that discuss issues of accountability for gender-based violence again limit sexual violence to 'women and girls'.¹⁰ Sandesh Sivakumaran also emphasized this remarkable absence of boys in Resolution 1820, stating that '... when the matter shifts to the more onerous prevention of sexual violence, the objects of protection are exclusively women and girls'.¹¹ This in itself purports problematic consequences for the meanings of gender identities as constructed by the UNSC:

⁴ *ibid.*

⁵ Hilary Charlesworth and Mary Wood "'Mainstreaming Gender" in International Peace and Security: The Case of East Timor' (2001) 26 *Yale Journal of International Law* 313, 313.

⁶ Nadine Puechguirbal, 'Discourses on Gender, Patriarchy and Resolution 1325: A Textual Analysis of UN Documents' (2010) 17 *International Peacekeeping* 172, 172.

⁷ *ibid.*; See also Judy El-Bushra, 'Feminism, Gender, and Women's Peace Activism' (2007) 38 *Development and Change* 131, 135.

⁸ UNSC Res 1325 (n 3).

⁹ UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820.

¹⁰ Sahla Aroussi, 'Women, Peace and Security: Addressing Accountability for Wartime Sexual Violence' (2011) 13 *International Feminist Journal of Politics* 576, 581.

¹¹ Sandesh Sivakumaran, 'Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict' (2010) 92 *International Review of the Red Cross* 259, 269.

On closer inspection, 'women and girls' are particularly vulnerable to violation (UNSC 2008: Art 3), particularly embodied in a way that their constitutive others ('civilians') are not. This is a construction that echoes the essentialist logics of gender in UNSCR 1325, logics which draw a clear link between sex and security in suggesting that women are 'metaphor[s] for vulnerable/victim in war' (Charlesworth 2008: 358). The discursive constitution of women as subjects of security does not, at first glance, seem to have changed very much.¹²

This essentialist interpretation of gender identity with regards to women can also have detrimental consequences for men. The above discourse does little to challenge the current gendered manner in which international institutions understand 'who is to be secured, characterized by the exclusion of civilian males as subjects of "protection" or as victims of "gender-based violence"'.¹³ While it can be argued that the subsequent UNSC Resolution 1889 became remarkably more inclusive, employing terms such as 'civilian population', 'survivors' and 'women and children', such terms are often gendered in themselves.¹⁴ In effect, the 'construction of innocence and vulnerability according to gender essentialisms'¹⁵ has often left men and adolescent boys outside of the civilian paradigm. For many actors in armed conflict, age and gender are one of the primary ways in which civilian status is assessed.¹⁶ In addition, talking about 'civilians' can also produce gendered outcomes as a large amount of sexual violence, which happens against men and adolescent boys, takes place in situations of detention.¹⁷ With regards to combatants, boys are 'particularly vulnerable to sexual violence when they are conscripted or abducted into armed forces'.¹⁸ Resolution 2106, issued in 2013, seems to have taken the above critiques into account. The Resolution specifically refers to 'men and boys' as potential victims for sexual violence. In addition, it also explicitly asks for the enlistment of boys and men in efforts to prevent violence against women.¹⁹ This certainly is a giant step forward, as the Resolution interrupts the discursive pattern in which boys and men are constructed as perpetrators and women and girls as victims. However, as noted by Chloé Lewis, this does not

¹² Laura J Shepherd, 'Sex, Security and Superhero(in)es: From 1325 to 1820 and Beyond' (2001) 13 *International Feminist Journal of Politics* 504, 507.

¹³ R Charli Carpenter, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations' (2006) 37 *Security Dialogue* 83, 85.

¹⁴ UNSC Res 1889 (5 October 2009) UN Doc S/RES/1889.

¹⁵ R Charli Carpenter, *Innocent Women and Children: Gender, Norms and the Protection of Civilians* (Ashgate 2006) 3.

¹⁶ *ibid* 2-3.

¹⁷ Sivakumaran (n 11) 270.

¹⁸ *ibid*; this is also the case for girls.

¹⁹ UNSC Res 2106 (24 June 2013) UN Doc S/RES/2106.

necessarily signal 'a concrete shift in understandings of conflict-related sexual violence'.²⁰ The UNSC Resolutions on WPS as a whole – notwithstanding Resolution 2106 – have led many critics to comment that within the UN context, gender identity is little reflected upon.²¹ 'Gender' has become conflated with 'women',²² and there is a consequent failure to investigate, 'analyse or influence male gender identities and patterns of behaviour'.²³ Additionally, gender in the WPS Resolutions falls prey to heteronormativity and essentialism. There is little mention of women and of girls as perpetrators and as encouragers of violence and war.²⁴ Moreover, men's experience of war is highly simplified, their resistance to war and violence silenced.²⁵

Nevertheless, recent years have seen increased attention being paid to sexual violence against boys in armed conflict. The website of the UN Office of the Special Representative of the Secretary General for Children and Armed Conflict mentions six grave violations against children common to armed conflict and refers to sexual violence as one of them.²⁶ Sexual violence against boys gets a particular mention in this rubric, highlighting the increased saliency of the topic and the urgency of the matter.²⁷ The UNSC Resolutions on Children and Armed Conflict also reflect a broader approach with regards to sexual violence than the WPS Resolutions. Sexual violence and abuse of 'children' during armed conflict is mentioned in UNSC Resolutions 1261, 1998, 2068, 2143.²⁸ However, Resolutions 1314, 1379, 1460, 1539 and 1612 refer to sexual violence against 'women and children', and further specify that such violence is 'mostly committed against girls'.²⁹ They also refer to policies for the

²⁰ Chloé Lewis, 'Systemic Silencing: Addressing Sexual Violence Against Men and Boys in Armed Conflict and Its Aftermath' in Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security* (Palgrave Basingstoke 2004).

²¹ Shepherd (n 12) 509.

²² El-Bushra (n 7) 141; Carol Cohn, Sheri Gibbings and Helen Kinsella, 'Women, Peace and Security' (2004) 6 *International Feminist Journal of Politics* 130, 136.

²³ Charlesworth and Wood (n 5) 316.

²⁴ El-Bushra (n 7) 135; Laura Sjoberg and Caron E Gentry, *Mothers, Monsters, Whores: Women's Violence in Global Politics* (Zed Books 2007).

²⁵ El-Bushra (n 7) 136.

²⁶ UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 'Sexual Violence' (*Children and Armed Conflict*)

<<http://childrenandarmedconflict.un.org/effects-of-conflict/six-grave-violations/sexual-violence/>> accessed 11 April 2014.

²⁷ *ibid.*

²⁸ UNSC Res 1261 (25 August 1999) UN Doc S/RES/1261; UNSC Res 1998 (12 July 2011) UN Doc S/RES/1998; UNSC Res 2068 (19 September 2012) UN Doc S/RES/2068; UNSC Res 2143 (7 March 2014) UN Doc S/RES/2143.

²⁹ UNSC Res 1314 (11 August 2000) UN Doc S/RES/1314; UNSC Res 1379 (20 November 2001) UN Doc S/RES/1379; UNSC Res 1460 (30 January 2003) UN Doc S/RES/1460; UNSC

survivors of sexual violence in the context of girls' 'special needs'.³⁰ As mentioned by Sivakumaran, one of the reasons why there is so little consideration for instances of sexual violence against boys is that they hardly fit into any of these existing categories employed, both in the WPS and in the Children and Armed Conflict Resolutions.

By their very language, the rubric of 'sexual violence against women', or 'sexual violence against women and girls', rules out consideration of boy victims. Even the category of 'sexual violence against women and children' is not a natural fit, as the interchange between 'women and children' and 'women and girls' has often led to children being taken as shorthand for girls. In any event, it is not clear that 'women and children', read as including boys, should be the appropriate categorization ... and if boys are sometimes subjected to sexual violence in situations of armed conflict because they are men-in-waiting, that would suggest that they should be grouped with sexual violence against men, or treated as a separate category in their own right.³¹

III. BOYS BEING OVERLOOKED

So far, girls have indeed been established as the category most likely to suffer from sexual violence during armed conflict. Nevertheless, the lack of data on sexual violence against boys can conceal equally systematic occurrences of sexual violence against boys. It is by no means clear how many boys are affected by sexual violence during different armed conflicts.³² While societal stigma can shame boys into keeping silent, international institutions might overlook boys and NGOs may consequently fail to address their needs.³³ Sexual violence against men and boys is not only widely under-reported, but also widely under-researched. Empirical studies that purport to look at sexual violence against children in conflict regions are often solely conducted amongst women and girls, thus carrying a gender-bias within the studies' designs.

In the DRC, for example, the Eastern region has seen a large instance of sexual violence. In the context of the 2009 conflict and post-conflict situation, most

Res 1539 (22 April 2004) UN Doc S/RES/1539; UNSC Res 1612 (26 July 2005) UN Doc S/RES/1612.

³⁰ *ibid.*

³¹ Sivakumaran (n 11) 269-70.

³² OCHA (n 1) 4; existing data on sexual violence against boys and men tends to be largely anecdotal.

³³ El-Bushra (n 7) 144.

studies and reports published work with narrow definitions of sexual violence and were consequently only administered to women, thus excluding male victims.³⁴ Even more, studies that purport to research sexual violence against 'children' do not include boys within their quantitative research design.³⁵ Such research methodologies clearly depart from the assumption that women and girls are the primary subjects of sexual violence in conflict settings, and that the amount of sexual violence against men and boys is negligible. Most evidence of sexual violence taking place against men and boys in the DRC is anecdotal and only gets mentioned as a side note or small subchapter in reports that are primarily concerned with women and girls.³⁶ This in turn has led to the prioritization of women and girls in humanitarian programming in relation to conflict-related sexual violence, as they are perceived to be 'the most affected by the violence afflicted upon them. There is no time to look into the needs of vulnerable men'.³⁷

Nonetheless, a study by Kirsten Johnson pointed out that 15.2% of adult men experienced sexual violence related to armed conflict in the Eastern DRC, while 29.5% of women reported having been subjected to conflict-related sexual violence.³⁸ Sexual violence here includes being subjected to molestation, forced undressing, being stripped of clothing, raped, gang raped, being forced into marriage, being abducted and/or submitted to sexual slavery and being forced to perform sexual acts with another civilian.³⁹ This study indicates a surprisingly high amount of male victims, thus calling to question research that

³⁴ Kirsten Johnson et al, 'Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo' (2010) 304 *Journal of the American Medical Association* 553, 553; Birthe Steiner et al, 'Sexual Violence in the Protracted Conflict of DRC: Programming for Rape Survivors in South Kivu' (2009) 3 *Conflict and Health*.

³⁵ Brett Nelson et al, 'Impact of Sexual Violence on Children in the Eastern Democratic Republic of Congo' (2011) 27(4) *Medicine Conflict and Survival* 211.

³⁶ See for example Human Rights Watch (HRW), 'You Will be Punished: Attacks on Civilians in Eastern Congo' (*Report*, December 2009) <<http://www.hrw.org/reports/2009/12/13/you-will-be-punished>> accessed 19 April 2014, 92-92, 107-08.

³⁸ Johnson (n 34).

³⁷ Serena Cruz and Rosan Smits, 'Increasing Security in DR Congo: Gender-Responsive Strategies for Combating Sexual Violence' (*Clingendael Conflict Research Unit (CRU) Policy Brief #17*, June 2011)

<http://www.clingendael.nl/sites/default/files/20110531_cru_policybrief_rsmit.pdf> accessed 18 April 2014, 3 (quoting an interview with UN Official in January 2011); Desiree Lwambo,

'"Before the War, I was a Man": Men and Masculinities in Eastern Congo' (*HEAL Africa Study*, 2011)

<<http://www.heal africa.org/wp-content/uploads/2011/10/men-and-masculinities-in-eastern-dr-congo.pdf>> accessed 18 April 2014, 6.

³⁸ Johnson (n 34).

³⁹ *ibid* 555.

takes little effort to incorporate or gather such data. The costs hereof for male survivors can be significant. As mentioned by Megan Rybarzyck the insufficient attention to the occurrence of sexual violence against men in the DRC has detrimental consequences for the allocation of aid in the form of primary care and essential medical supplies, which may be different from those required by women.⁴⁰ The constant underestimation of sexual violence against men can have further negative consequences for male survivors' long-term physical, mental, economic and social needs, as a study by Mervyn Christian documented.⁴¹ The fact that sexual violence is often defined as a women's issue can thus prove counterproductive for male survivors and for the further understanding of cycles of gendered violence within the DRC.⁴² It should be noted that the research design of the above studies on male survivors included only adult males. In fact, to date, there is no study of conflict-related sexual violence in the DRC that exclusively looks at male survivors of armed conflict who are under eighteen years of age. Studies often indicate that girl children are a majority among children surviving sexual violence.⁴³

The fact that no attention is given to boys as a category in and of themselves within studies can lead to a limited understanding of the needs of boy survivors of sexual violence. As established before, this can lead to negative consequences for wider support available to boy survivors of sexual violence.⁴⁴ Moreover, this can also result in a limited understanding of the root causes of sexual and gendered violence against boys and a consequent failure to prevent such sexual violence from taking place.⁴⁵ Indeed, the argument of this Article is that boys should be considered as a category in their own right, and not only as 'children' – which in this context often reads as girls only – or merely as 'men-in-waiting'. So far, the Author has found no academic or other research that focused solely on the sexual violence experienced by boys in armed conflict. Articles often consider both men and boys, and fail to do justice to the

⁴⁰ M Rybarzyck et al, 'Evaluation of Medical Supplies Essential for the Care of Survivors of Sex- and Gender-based Violence in Post-Conflict Eastern Democratic Republic of Congo' (2011) 27 *Medicine, Conflict and Survival* 91, 107.

⁴¹ Mervyn Christian and others, 'Sexual and Gender Based Violence against Men in the Democratic Republic of Congo: Effects on Survivors, their Families and the Community' (2011) 27 *Medicine, Conflict and Justice* 227, 236-40.

⁴² Séverine Autesserre, 'Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences' (2012) 111 *African Affairs* 202, 216-17; Lwambo (n 37) 5.

⁴³ See for example HRW, 'Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo' (*Report*, July 2009) <<http://www.hrw.org/reports/2009/07/16/soldiers-who-rape-commanders-who-condone-0>> accessed 19 April 2014, 13-15.

⁴⁴ Autesserre (n 42) 216-17.

⁴⁵ Lewis (n 20).

divergent ways in which men and boys can become subject to sexual violence. In effect, the specific nature of adult oppression of children is little considered when masculinity in itself is generalised and when 'men and boys' becomes a catch phrase in itself instead of two distinct categories. It fails to show the diversity present within masculinities, as it offers little insight into the specific intersectionalities of masculinity and age.

IV. BOYS ARE NOT JUST 'MEN-IN-WAITING'

As Barrie Thorne stated in 1987, '... feminists' re-visioning of women may provide leads for similar re-visioning of children'.⁴⁶ Just as gender-theorists and feminists emphasize the social and cultural construction of gender and the dualism of womanhood and manhood, we can also perceive of an age-based dualism of 'adults and children' as socially – rather than biologically – constructed.⁴⁷ Judith Butler argues that gender performativity entails the presence of a 'tacit collective agreement to perform, produce, and sustain discrete and polar genders'.⁴⁸ These genders are in turn fully constructed and in no way inherently related to male or female bodies.⁴⁹ The understanding of gender as performed can also inform an understanding of childhood as performed, its meanings produced and reproduced by society. Utilizing such concepts with regards to childhood entails that meanings of childhood are not fixed and can vary throughout time and place.⁵⁰ Additionally, this performative understanding of children also increases the understanding of how the specific experiences of childhood in any given time and place also depend 'upon the intersectionality of gender, class, race, religious affiliation, disability status, location in international imperial hierarchies, and relation to forces of globalization'.⁵¹ As Thorne notes, however, the specific meanings of childhood are rarely constructed through the voices of children, as

... whatever the conception of children, adults do the defining. Currently, adults use children to define themselves, in an ideological process of dominance and self-definition analogous to the way in

⁴⁶ Barrie Thorne, 'Revisioning Women and Social Change: Where Are the Children?' (1987) 1 *Gender and Society* 85, 94.

⁴⁷ *ibid* 95-96; Jo Boyden and Joanna de Berry, 'Introduction' in Jo Boyden and Joanna de Berry (eds), *Children and Youth on the Front Line: Ethnography, Armed Conflict and Displacement* (Berghahn Books 2004) xx-xxi.

⁴⁸ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 179.

⁴⁹ *ibid* 60.

⁵⁰ See for example David F Lancey (ed), *The Anthropology of Childhood: Cherubs, Chattel, Changelings* (CUP 2008).

⁵¹ Heidi Morrison, 'Introduction to Part Two' in Heidi Morrison (ed), *The Global History of Childhood Reader* (Routledge 2012) 115.

which men have defined women and colonialists have defined those they colonized, as 'the other' (DeBeauvoir 1953; Fanon 1967). Adult power over children, including the power of definition, constitutes the usually unspoken context within which modern studies of socialization and child development take shape.⁵²

When exactly children become gendered or socialized into the adult gendered system is a contested question. Most anthropological research into childhood has focused exactly on such explorations, by focusing on rites of passage for boys and girls and on the learning of gender roles.⁵³ However, these questions themselves already purport an adult-centred ontology, understanding children as only receivers of and not as contributors to adult culture.⁵⁴ While

Adults are understood by their present actions and experiences in the world; children are understood more by their becoming, as adults-in-the-making. Socialization frameworks are deeply teleological, referring children's present lives to their presumed adult futures. They also assume an ontology, a division between the supposedly completed nature of the adult and the incomplete child (Jenks 1982).⁵⁵

This 'adult ideological viewpoint'⁵⁶ has specific consequences for understandings of girlhood and boyhood. A commonplace understanding of 'girlhood' and 'boyhood' focuses on both the age as the gender-to-be of a child, yet what it means – exactly – to be a boy or a girl is little explored.⁵⁷ As such, the adult-oriented context in which children are understood is especially prevalent when investigating intersections between childhood and gender. Such intersectional investigations often fail to take the simple premise into account that the identity and subjectivity of children exist of more than intersecting

⁵² Thorne (n 46) 93.

⁵³ Jo Boyden, 'Anthropology Under Fire: Ethics, Researchers and Children in War' in Jo Boyden and Joanna de Berry (eds), *Children and Youth on the Front Line – Ethnography, Armed Conflict and Displacement* (Berghahn Books 2004) 255.

⁵⁴ *ibid.*

⁵⁵ Thorne (n 46) 92-93.

⁵⁶ Matthew Speier, 'The Adult Ideological Viewpoint in Studies of Childhood' in Arlene Skolnick (ed), *Rethinking Childhood: Perspectives on Development and Society* (Little, Brown and Company 1976) (using this term).

⁵⁷ Jackie Kirk, Claudia Mitchell and Jacqueline Reid-Walsh, 'Towards Political Agency for Girls: Mapping the Discourses of Girlhood Globally' in Jennifer Helgren and Colleen A Vasconcellos (eds), *Girlhood: A Global History* (Rutgers University Press 2010) 14; Frances Gateward and Murray Pomerance, 'Introduction' in Murray Pomerance and Frances Gateward (eds), *Where the Boys Are: Cinemas of Masculinity and Youth* (Wayne State University Press 2005) 1.

categories. Such limited understanding can be seen in the understanding which the UNSC Resolutions put forward of boys' experience of sexual violence. There, boys are only considered as young-men-in-the-making, being discursively structured together and behind adult men in Resolution 2106. This Article argues that the specific ways in which children may experience armed conflict and sexual violence are not necessarily limited to their experience of age and masculinity. It can exist of a complex dialogue between these categories that far transcends the exact intersection of these categories. Take for example the practice of *Bacha bazi* – 'Dancing Boys' – in Afghanistan, where warlords and influential men employ – often under exploitative circumstances – boys between the ages of twelve and eighteen to dance for them and lend them sexual favours. These boys are required to wear feminine attire and dress and move in a feminine manner, and are often handpicked for their slender bodies.⁵⁸ These boys are often led into the profession with false promises. Few of them predict that they will have to lend sexual favours to men, sometimes getting passed around after parties to the highest bidder for a night.⁵⁹ Many of the boys who try to escape this cycle of abuse find their lives in danger.⁶⁰ Not only Afghan warlords have engaged in the exploitation of these boys; but staff from private military contractor Dyncorp has also been accused of, if not participating then at least condoning, the *Bacha bazi* practice.⁶¹ It is clear that such instances of sexual violence can be little understood without an explicit attention to the specific meanings attached to boyhood in different societies at divergent moments in time. Investigations of boyhood thus need to incorporate how boys' bodies are discursively structured and infused with meaning in comparison to – but also beyond comparison to – the discursive meanings attached to the dominant heteronormative male body.

V. 'I AM A BOY'⁶²

Such a conceptualization of boys can only be achieved by viewing boys'

⁵⁸ Najibullah Quraishi, 'The Dancing Boys of Afghanistan' (Clover Films 2010).

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ Assistant AMB Mussomeli and MOI Minister Atmar, 'Kunduz Dyncorp Problem Transport for Presidential Candidates and other Topics' (*Meeting Cable*, 23 June 2009) <https://wikileaks.org/plusd/cables/09KABUL1651_a.html> accessed 20 April 2014; Jon Boone, 'Foreign contractors hired Afghan "dancing boys"', *WikiLeaks cable reveals* (*The Guardian*, 2 December 2010) <<http://www.theguardian.com/world/2010/dec/02/foreign-contractors-hired-dancing-boys>> accessed 19 April 2014.

⁶² See Rebecca Barry, 'I Am a Girl' (Testify Media Pty Ltd. 2013) (proving a timely intervention in the study of girlhood by awarding girls the chance to speak for themselves and contributing their experiences); See also Hannah McCann, 'Girls, Girlhood and Feminism' (*Binary This*, 11 October 2013) <<http://binarythis.com/2013/10/11/girls-girlhood-and-feminism/>> accessed 3 April 2014.

identities as constituted by more than 'the sum of different structural categories' intersecting 'parts'.⁶³ As such, this Article calls for an establishment of boyhood studies, investigating and conceptualizing the experiences of boys and boys' experiences of gender. Recent years have seen a surge in attention to girls as a special group within gender studies.⁶⁴ The emerging literature around the 'girl child' has followed feminists' efforts to emphasize the worldwide oppression and inequality prevalent among women, concluding that girls – as female – suffer from similar discrimination. This literature is based on the premise that '[w]hen the woman is unequal to the man, the girl is unequal to the boy as well'.⁶⁵ The emerging literature on the 'girl child' focuses mostly on empirical issues from which girls suffer in the developing world, stating that they face both age- and gender-based discrimination and are as such worst off.⁶⁶ While the 'girl child' is premised upon both the female status and the age of a person, the empirical literature on girl children is vague with regards to these constructs: it is unclear whether a biological interpretation of sex or a sociological interpretation of gender lie at its basis.⁶⁷ Additionally, this body of literature often constructs girls around a 'deficits-based conceptualization',⁶⁸ ignoring or devaluing their skills and strengths.⁶⁹ Such understandings of girls and girlhood are problematic as they fail to perceive of girls as active agents.⁷⁰ Consequently – even within feminist writings – girls are often only considered as 'women-in-the-making', and not as a category in their own right.⁷¹ This trend is also visible in the UNSC Resolutions on WPS, where girls are only referred to in relation to, and after, women. This discursive structure invites little research and engagement with the specific experiences of girlhood, and reduces girls together with women to a status of passive victimhood. It is important to thus warn the incumbent research on sexual violence against men and boys to take these critiques of girlhood studies into account and seek a conceptualization of boys that does not limit boys' agency and subjectivity. Such a conceptualization would have to understand gender as

⁶³ Ange-Marie Hancock, 'Intersectionality as a Normative and Empirical Paradigm' (2007) 3 *Politics & Gender* 248, 251.

⁶⁴ Kirk, Mitchell and Reid-Walsh (n 57) 14.

⁶⁵ Neera K Sohoni, *The Burden of Girlhood: A Global Inquiry into the Status of Girls* (Third Party Publishing Company 1995) vii.

⁶⁶ *ibid* 1-2.

⁶⁷ Kristin M Ferguson and Gretchen Heidemann, 'The Girl Child: A Review of the Empirical Literature' (2009) 24 *Affilia* 165, 178.

⁶⁸ *ibid* 179.

⁶⁹ *ibid*.

⁷⁰ *ibid* 183; Kirk, Mitchell and Reid-Walsh (n 57) 14.

⁷¹ McCann (n 62).

not just theorizing social structures, but also as theorizing subjects.⁷² This is not to deny that during warfare there are larger gender dynamics at play, and that a structural account of gender 'offers a way of understanding inequality of opportunity, oppression and domination, that does not seek individualized perpetrators but rather considers most actors complicit in its production, to a greater or lesser degree'.⁷³ It is merely to say that our specific understanding of boys can be much aided by looking at their being-in-the-world as subjects, interacting with and through gendered social structures.

VI. BOYS' LIVED BODY EXPERIENCES

Paying attention to boys' actual experiences – awarding them full subjectivity and identity – might best be achieved by following an interpretation of gender that incorporates Iris Marion Young's theory of embodiment. Young seeks to create an understanding of the lived body experience of women and girls within the context of existential phenomenology without moving away from the social criticism present in the work of Butler, Foucault and Bourdieu.⁷⁴ This Article argues that Young's specific theory of embodiment and lived body experience can provide a better theoretical model according to which boys can be understood as subjects in their own right, and as subjects that warrant specific legal and academic attention.

According to Young, in order to transcend the dichotomy between sex and gender – which reconstitutes a heteronormative understanding of reality – one should understand the subject as both crucially embodied and as unconditionally being-in-the-world.⁷⁵ Consequently, when we talk about the subject we do not talk about an abstract being, disconnected from a body. The body as a subject, however, is also by no means disconnected from the world around or from the discursive meanings which society constitutes upon the subject as a body. As Young posits, on the one hand '... there is no situation ... without embodied location and interaction' and on the other hand '... the body as lived is always layered with social and historical meaning and is not some primitive matter prior to underlying economic and political relations or cultural meanings'.⁷⁶ The exact manner in which the body is constituted within the world, as subject but sometimes also as mere object, is crucial to understanding power inequalities and oppression. As Stephen Whitehead further elaborates on

⁷² Iris Marion Young, *On Female Body Experience: "Throwing Like a Girl" and other Essays* (OUP 2005) 21.

⁷³ *ibid.*

⁷⁴ *ibid.* 8.

⁷⁵ *ibid.*

⁷⁶ *ibid.* 7.

Young's theory, despite a man's 'existential status as "[s]ubject", the male body has other potential inscriptions, many of which render it precarious and serve to position it as "[o]ther".⁷⁷ As such, age, race and sexuality can constitute diverging masculine bodies that are then objectified and understood as other. While these meanings can indeed influence the body experience and body comportment of the boy, they are in no way fixed. The boy's body is always already inscribed with meaning, as embodiment is not to be separated from a being-in-the-world. The boy can experience his being-in-the-world through the meanings which patriarchal adult culture inscribes upon him, yet these meanings do not constitute the identity of the subject. Most important to his identity is the centrality of present meaning and present subjectivity for the lived body experience. The being-in-the-world of boys' bodies can entail their lived body experiences being influenced by a status of men-in-waiting, yet their body experience also constitutes many other intersecting identities which together inform their subjectivity as boys. While past, present and future can express and award significances to the body, the boy's ultimate lived experience cannot be reduced to a single one of them. To fully understand boys as a category in their own right thus entails a full appreciation to boys' present lived body experience – which exists of so much more than the possible men-to-be-status with which it is often inscribed.

This is not to deny that sexual violence against boys can be understood through an investigation of masculinity, and military masculinities in general. Most research that has understood sexual violence in conflict within a wider gender dynamic has indeed mentioned that 'the cultural glorification of the power of armed force, and the social construction of masculinities and femininities ... support a militarized state'⁷⁸ and support sexual violence as a tool of humiliating and intimidating – sometimes through feminization – of the enemy. In a way, this is more of an attempt to move beyond heteronormative interpretations of gender where power is understood as feminine/masculine. The boy – but also the girl and the child in general – are often posited in between binary interpretations of gender. Falling not within either dominant notion of masculinity and femininity, they challenge a hegemonic 'heterosexual matrix' that functions around binary notions of a stable male/stable female dichotomy.⁷⁹ To fully pay attention to boys' body experiences, gender has to be understood as something that is fluid, its meanings never fixed.

⁷⁷ Stephen M Whitehead, *Men and Masculinities: Key Themes and New Directions* (Polity Press 2002) 194.

⁷⁸ Carol Cohn, *Women and Wars: Contested Histories, Uncertain Futures* (Polity Press 2013) 21.

⁷⁹ Butler (n 48).

VII. CONCLUSION

The discursive construction of gender present in the UNSC Resolutions on WPS and on Children and Armed Conflict operates around a dichotomous and heteronormative interpretation of gender. This interpretation of gender can have detrimental consequences for those who constitute a challenge to such binary interpretations of gender. Boys who survive sexual violence are as such often overlooked in international law. This Article contends that this practice is due to a limited understanding of the adult-centred ontologies on which knowledge functions. This is also valid with regards to gender. Boys are too often considered as men-in-waiting, thus captured in a constant flux of becoming where they are always yet to receive their full value in society. In order to fully appreciate the subjectivity of boys – as being in the present moment – the boys' lived body experience must be considered.

BIBLIOGRAPHY**BOOKS**

- Boyden J, 'Anthropology Under Fire: Ethics, Researchers and Children in War' in Berry J.D and Boyden J (eds), *Children and Youth on the Front Line – Ethnography, Armed Conflict and Displacement* (Berghahn Books 2004)
- Berry J.D, 'Introduction' in Berry J.D and Boyden J (eds), *Children and Youth on the Front Line: Ethnography, Armed Conflict and Displacement* (Berghahn Books 2004)
- Butler J, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990)
- Carpenter R.C, *'Innocent Women and Children': Gender, Norms and the Protection of Civilians* (Farnham: Ashgate 2007)
- Cohn C, *Women and Wars: Contested Histories, Uncertain Futures* (Polity Press 2013)
- Kirk J, Mitchell C and Reid-Walsh J, 'Towards Political Agency for Girls: Mapping the Discourses of Girlhood Globally' in Helgren J and Vasconcellos C.A (eds), *Girlhood: A Global History* (Rutgers University Press 2010)
- Lancey D.F (ed), *The Anthropology of Childhood: Cherubs, Chattel, Changelings* (CUP 2008)
- Lewis C, 'Systemic Silencing: Addressing Sexual Violence Against Men and Boys in Armed Conflict and Its Aftermath' in Heathcote G and Otto D (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security* (Palgrave) (forthcoming)
- Morrison H, 'Introduction to Part Two' in Morrison H (ed), *The Global History of Childhood Reader* (Routledge 2012)
- Pomerance M and Gateward F, 'Introduction' in Pomerance M and Gateward F (eds), *Where the Boys Are: Cinemas of Masculinity and Youth* (Wayne State University Press 2005)
- Sjoberg L and Gentry C.E, *Mothers, Monsters, Whores: Women's Violence in Global Politics* (Zed Books 2007)
- Speier M, 'The Adult Ideological Viewpoint in Studies of Childhood' in Skolnick A (ed), *Rethinking Childhood: Perspectives on Development and Society* (Little, Brown and Company 1976)
- Sohoni N.K, *The Burden of Girlhood: A Global Inquiry into the Status of Girls* (Third Party Publishing Company 1995)
- Whitehead S.M, *Men and Masculinities: Key Themes and New Directions* (Polity Press 2002)
- Young I.M, *On Female Body Experience: 'Throwing Like a Girl' and other Essays* (OUP 2005)

JOURNAL ARTICLES

- Aroussi S, 'Women, Peace and Security: Addressing Accountability for Wartime Sexual Violence' (2011) 13 *International Feminist Journal of Politics* 576
- Autesserre S, 'Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences' (2012) 111 *African Affairs* 202
- Carpenter R.C, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations' (2006) 37 *Security Dialogue* 83
- Charlesworth H and Wood M, "'Mainstreaming Gender" in International Peace and Security: The Case of East Timor' (2001) 26 *Yale Journal of International Law* 313

- Christian M et al, 'Sexual and Gender Based Violence against Men in the Democratic Republic of Congo: Effects on Survivors, their Families and the Community' (2011) 27 *Medicine, Conflict and Justice* 227
- El-Bushra J, 'Feminism, Gender, and Women's Peace Activism' (2007) 38 *Development and Change* 131
- Ferguson K.M and Heidemann, 'The Girl Child: A Review of the Empirical Literature' (2009) 24 *Affilia* 165
- Hancock A, 'Intersectionality as a Normative and Empirical Paradigm' (2007) 3 *Politics and Gender* 248
- Johnson K et al, 'Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo' (2010) 304 *Journal of the American Medical Association* 553
- Nelson B et al, 'Impact of Sexual Violence on Children in the Eastern Democratic Republic of Congo' (2011) 27(4) *Medicine, Conflict and Survival* 211
- Puechguirbal N, 'Discourses on Gender, Patriarchy and Resolution 1325: A Textual Analysis of UN Documents' (2010) 17 *International Peacekeeping* 172
- Rybarzyck M et al, 'Evaluation of Medical Supplies Essential for the Care of Survivors of Sex- and Gender-based Violence in Post-Conflict Eastern Democratic Republic of Congo' (2011) 27 *Medicine, Conflict and Survival* 91
- Shepherd L.J, 'Sex, Security and Superhero(in)es: From 1325 to 1820 and Beyond' (2001) 13 *International Feminist Journal of Politics* 504
- Sivakumaran S, 'Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict' (2010) 92 *International Review of the Red Cross* 259
- Steiner B et al, 'Sexual Violence in the Protracted Conflict of DRC Programming for Rape Survivors in South Kivu' (2009) 3 *Conflict and Health*
- Thorne B, 'Revisioning Women and Social Change: Where Are the Children?' (1987) 1 *Gender and Society* 85

INTERNATIONAL LAW SOURCES

- United Nations Security Council Resolution 1261 (25 August 1999) UN Doc S/RES/1261
- United Nations Security Council Resolution 1314 (11 August 2000) UN Doc S/RES/1314
- United Nations Security Council Resolution 1325 (31 October 2000) UN Doc S/RES/1325
- United Nations Security Council Resolution 1379 (20 November 2001) UN Doc S/RES/1379
- United Nations Security Council Resolution 1460 (30 January 2003) UN Doc S/RES/1460
- United Nations Security Council Resolution 1539 (22 April 2004) UN Doc S/RES/1539
- United Nations Security Council Resolution 1612 (26 July 2005) UN Doc S/RES/1612
- United Nations Security Council Resolution 1820 (19 June 2008) UN Doc S/RES/1820
- United Nations Security Council Resolution 1889 (5 October 2009) UN Doc S/RES/1889
- United Nations Security Council Resolution 1998 (12 July 2011) UN Doc S/RES/1998
- United Nations Security Council Resolution 2068 (19 September 2012) UN Doc S/RES/2068
- United Nations Security Council Resolution 2106 (24 June 2013) UN Doc S/RES/2106
- United Nations Security Council Resolution 2143 (7 March 2014) UN Doc S/RES/2143

WEBSITES AND OTHER SOURCES

- Assistant AMB Mussomeli and MOI Minister Atmar, 'Kunduz Dyncorp ProblemTransport for Presidential Candidates and other Topics' (*Meeting Cable*, 23 June 2009) <https://wikileaks.org/plusd/cables/09KABUL1651_a.html> accessed 20 April 2014
- Boone J, 'Foreign contractors hired Afghan 'dancing boys', WikiLeaks cable reveals' (*The Guardian*, 2 December 2010) <<http://www.theguardian.com/world/2010/dec/02/foreign-contractors-hired-dancing-boys>> accessed 19 April 2014
- Cruz S and Smits R, 'Increasing Security in DR Congo: Gender-Responsive Strategies for Combating Sexual Violence' (*Clingendael Conflict Research Unit (CRU) Policy Brief #17*, June 2011) <http://www.clingendael.nl/sites/default/files/20110531_cru_policybrief_rsmits.pdf> accessed 18 April 2014
- HRW, 'Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo' (*Report 1-56432-510-5*, July 2009) <<http://www.hrw.org/reports/2009/07/16/soldiers-who-rape-commanders-who-condone-0>> accessed 19 April 2014
- HRW, 'You Will be Punished: Attacks on Civilians in Eastern Congo' (*Report 1-56432-583-0*, December 2009) <<http://www.hrw.org/reports/2009/12/13/you-will-be-punished>> accessed 19 April 2014
- Lwambo D, "'Before the War, I was a Man": Men and Masculinities in Eastern Congo' (*HEAL Africa Study*, 2011) <<http://www.healafrika.org/wp-content/uploads/2011/10/men-and-masculinities-in-eastern-dr-congo.pdf>> accessed 18 April 2014
- McCann H, 'Girls, Girlhood and Feminism' (*Binary This*, 11 October 2013) <<http://binarythis.com/2013/10/11/girls-girlhood-and-feminism/>> accessed 3 April 2014
- UN Office for the Coordination of Humanitarian Affairs (OCHA) – Policy Development and Studies Branch, 'Use of Sexual Violence in Conflict: Identifying Research Priorities to Inform More Effective Interventions' (*Meeting Report*, 26 June 2008) <http://www.peacewomen.org/portal_resources_resource.php?id=1258> accessed 27 February 2013
- UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 'Sexual Violence' (*United Nations Office of the Special Representative of the Secretary-General for Children and Armed Conflict*) <<http://childrenandarmedconflict.un.org/effects-of-conflict/six-grave-violations/sexual-violence/>> accessed 11 April 2014

FILM

- Barry R, 'I Am a Girl' (Testify Media Pty Ltd. 2013)
- Quraishi N, 'The Dancing Boys of Afghanistan' (Clover Films 2010)

Perverted Peace

Mia Tamarin*

I. INTRODUCTION

The entire system of international law exists primarily for the aims of world *peace and security*.¹ But what do we mean by peace; what international society do we aim to sustain? Peace scholars theorise peace in regards to harmony and successful approaches to peace-building. Within the legal framework, laws have developed to regulate the legality of wars as well as their conduct; scholars have written extensively on *Jus ad bellum*, *Jus in bello*, the Use of Force, intervention, Responsibility to Protect, etc. However, the United Nations (UN) has never defined peace; in its most common sense peace is understood to be the absence of war. Indeed 'law is about distinguishing war from peace'.² Thus under international law, war and the Use of Force are not merely legalised under certain conditions, but regulated through laws.³ Their distinction varies and changes in kind and degree of what is legal and illegal⁴ or 'who could do what, when, to whom?'⁵ Notwithstanding, some forms of force (or violence) are

* Mia Tamarin is a candidate for an MA of International Law at SOAS, University of London and is a graduate of BA Peace Studies and International Relations. She recently published a paper on the Israeli female soldier as part of the Women in War Conference (Sarajevo 2014) and will be presenting this paper at the Critical Legal Conference September 2014.

¹ The purpose of the UN is to maintain international peace and security; remove and suppress threats to the peace and breaches of the peace; and bring about, by peaceful means and in conformity with the principles of justice and international law, adjustment of international disputes that might lead to a breach of the peace. United Nations, 'Charter of the United Nations' (1 UNTS XVI, A.1, 24 October 1945)

<<http://www.refworld.org/docid/3ae6b3930.html>> accessed 6 January 2014.

² David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 158.

³ Wars in themselves can be 'justifiable' and their conduct can be legal; thus it is regulated. So 'if you kill *this way* and not that, *here* and not there, *these people* and not those – what you do is privilege. If not, it is criminal'. *ibid* 162 (emphasis in original); see also Simon Chesterman, *Just War Or Just Peace?: Humanitarian Intervention and International Law* (OUP 2001); David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004) ch 8; David Kennedy, *Of War and Law* (Princeton University Press 2006).

⁴ *ibid*.

⁵ *ibid* 164.

necessary for implementing the rule of law.⁶ As such, it is 'the way of force that leads to peace'.⁷

This Article attempts to step back to challenge what it is we aim to achieve through peace.⁸ Drawing on Critical Legal Studies (CLS) and Marxist theories of international law, the Article firstly theorises the notion of violence within the *legal framework*, specifically the demarcation of peace and war, to find that peace remains ambiguous and understood negatively. Following this, the Article explores Mieville's analysis of the commodity-form theory of law, in order to demonstrate the violence *embedded within the Rule of Law* as the perversion of peace under international law. Thus, in the fourth Section, it draws on Foucault and David Kennedy to suggest that law is the continuation of war by other means. Consequently, it shows that emancipation and/or fundamental transformation cannot derive from law. It concludes that the perversion of peace, acting as a cosmetic mask, conceals the violent means of social relations that dominate our lives and alienate us through the application of law. Lastly, through a short analysis of post-conflict studies, it aims to demonstrate that the peace agenda under the international legal system predominantly means liberalisation of fiscal policies, imposing not merely liberal economics but a liberal ideology.⁹ It argues that capitalist expansion means imperialism continues, and further, it is legitimised and naturalised through international law and peace.

II. NEGATIVE PEACE

Peace is often seen as the absence of (direct) violence – 'negative peace' – however peace scholars have also coined the term 'positive peace' to describe transforming structural violence.¹⁰ If we only account for 'negative peace', what societal transformation do we seek, if any? Traditionally, peace was assumed to begin with the signing of treaties or at the end point of war, even when it was won by victory in battle, thus reflecting the power balance. In

⁶ Otherwise, we have anarchy. Hans Kelsen, *Peace Through Law* (5th edn, The Lawbook Exchange Ltd 2007) 3.

⁷ *ibid* 6.

⁸ It is beyond this research to analyse laws of/in war and Marxist ideologiekritik. But there is relevance to investigate into liberal democracies waging wars. The Democratic Peace Theory, for example, has been put forward to suggest that democracies do not go to war with one another (but *not* against non-democracies), although this has been critiqued on several grounds. See Sebastian Rosaton 'The Flawed Logic of Democratic Peace Theory' (2003) 97 *American Political Science Review* 585.

⁹ In a similar vein to the Human Rights discourse. See China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 303; Kennedy, *The Dark Sides of Virtue* (n 3).

¹⁰ Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6(3) *Journal of Peace Research* 167.

international law, the firm distinction of peace and war is deeply rooted and had always existed.¹¹ Though some shift has occurred to recognise a spectrum of peacefulness (peace can also be a 'pause' in war)¹² it is still a linear understanding of moving from one end of war to peace.¹³ Inasmuch as this is our reading of peace and war, their demarcation remains.¹⁴ When we talk about war, we emphasise its dichotomy from 'normal peacetime'.¹⁵ This distinction 'establishes the legal privilege to kill'¹⁶ since, in law, the meaning of legal words is the political struggle, of whose policies will be included or excluded.¹⁷

Thus violence is seen as external; it is done by criminals or outcasts, or simply elsewhere. Rather, force itself is regulated through the rule of law and its institutions. This view of war assumes that in liberal democracies – where the rule of law can be upheld by a supposedly independent judiciary – in peacetime (being the absence of violence) there is no violence, and peace itself is institutionalised. So peace *is the move to liberalism*; as Kennedy puts it, the shift from war to peace is the shift 'from ideologies to liberal pluralism'.¹⁸ Nonetheless, peace and war have somewhat merged – mainly because warfare has changed and 'has become more mixed up', whereas the legal distinction through procedures and institutions has increased.¹⁹ As Kennedy suggests, 'It is ever less clear where the war begins and ends or which activities are combat, which "peacebuilding"',²⁰ explaining that this merging is also due to the increasingly fluid materials of legal doctrines and concepts.²¹ In other words, the doctrinal material of armed conflict is elastic in the sense that it allows for diversity of interpretation.²² CLS highlights this indeterminacy from a structural

¹¹ Philip C Jessup, 'Should International Law Recognize an Intermediate Status between Peace and War?' (1954) 48 *American Journal of International Law* 98.

¹² In reference to Clausewitz. David Kennedy, 'Remarks: Violence in International Law' (Eighth Annual Meeting of the American Society of International Law, Washington, D.C., 9-12 April 1986) <http://www.law.harvard.edu/faculty/dkennedy/publications/ViolenceInIntnlLaw86_20100621150414.pdf> accessed 6 January 2014, 168.

¹³ See Nathaniel Berman 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 *Columbia Journal of Transnational Law* 1.

¹⁴ See Kennedy, *Of War and Law* (n 3) ch 2.

¹⁵ *ibid* 2.

¹⁶ Kennedy, 'Lawfare and Warfare' (n 2) 165.

¹⁷ Martti Koskeniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113.

¹⁸ David Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures' (1991) 32 *Harvard International Law Journal* 373, 376.

¹⁹ Kennedy, 'Lawfare and Warfare' (n 2) 161.

²⁰ Kennedy, *Of War and Law* (n 3) 11.

²¹ Kennedy, 'Lawfare and Warfare' (n 2) 164.

²² *ibid* 167.

analysis of liberal legalism.²³ Following this, Miéville argues that this is characteristic of the system: "[F]ree competition" between interpretations ... is in fact a constitutive feature of [international law]²⁴ as will be elaborated below.

III. LAW AS VIOLENCE

The legal discipline asserts its own autonomy, independent from politics and economics.²⁵ However, in applying a Marxist historical materialist analysis of the Rule of Law, productive relations must be examined to understand international law as a social reality.²⁶ Further, access to, and control over, productive resources is class conflict.²⁷ Read this way, the rule of law developed for enforcing the policies of the ruling class. Miéville drawing primarily on the work of Pashukanis in *The General Theory of Law and Marxism* describes the social relations of production as the contradictory foundation of liberalism that underpins international law.²⁸ The legal form of both is analogous, suggesting a 'body of rules' that implies their 'law-ness';²⁹ Miéville theorises 'the specificity of the legal form itself'³⁰ which he believes lacks in other traditions of international legal scholarship. This is also where he departs sharply from CLS. He applies the capitalist logic that regulates individuals to explain that 'states, like individuals, interact as property owners'.³¹ Miéville concludes that 'in its very neutrality, law maintains capitalist relations'.³² Following, for him, to achieve change or emancipation is not to work for institutional reform but to 'eradicate the forms of law'; thus there must be a political-economy fundamental reformulation that 'would mean the end of law'.³³

Capitalism aims for violent ends, namely open markets and free trade, by violent means, namely the monopoly of force and the Rule of Law. The alienation and segregation that individuals undergo with capitalism *is* violence.

²³ Nigel Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 *Harvard International Law Journal* 81, 105-06.

²⁴ China Miéville, 'The Commodity-Form Theory of International Law: An Introduction' (2004) 17(2) *Leiden Journal of International Law* 271, 278.

²⁵ Disputes between states are political and economic but this does not void treating them as legal. Kelsen (n 6) 24; Purvis (n 23) 114; Miéville, 'The Commodity-Form' (n 24) 278 (referencing Chimni).

²⁶ Miéville 'The Commodity-Form' (n 24) 276.

²⁷ See Miéville, *Between Equal Rights* (n 9) 65; Miéville, 'The Commodity-Form' (n 24) 281.

²⁸ Miéville 'The Commodity-Form' (n 24) 274.

²⁹ *ibid* 275.

³⁰ *ibid*.

³¹ *ibid* 274.

³² Miéville, *Between Equal Rights* (n 9) 101.

³³ *ibid* 318.

As Miéville affirms, '[V]iolence — coercion — is at the heart of the commodity form', since for an exchange to occur from mine to yours, which implies exclusion, force and coercion are implicit.³⁴ Or as Miéville highlights Marx's articulation, '[B]etween equal rights, force decides'.³⁵ To extrapolate this notion under international law, recalling that states act as individual property owners, the same exclusion and 'self-help' violence³⁶ is implied. Further, under capitalist competition for resources, or accumulation of capital, the economic division is brought about by the political means of the state, and precisely through international law, the economic and political have emerged.³⁷

Miéville's distinct analysis comes through in his elaboration on the legal commodity-form, that is, the structure of international law beyond its content of principles and policies.³⁸ For him, the commodity form approximates to the legal form since it is underpinned by the same logic, and the legal subject 'is very closely related to the commodity owner'.³⁹ This is so due to the fact that law allows for the social relations of labour commodity-exchange to be conceived;⁴⁰ thus 'the legal form is the form of a particular kind of relationship' from which the legal norm, i.e. the rule, can only be derived.⁴¹ This correlates back to his critique of the prediction of 'rules as the fundamental particles of international law'.⁴² The emphasis here is that in a commodity-exchange, two *equal private property owners* who reach a dispute necessitate a formalised form of social regulation, which is the law, 'pervasive in capitalism'.⁴³

IV. LAW: THE CONTINUATION OF WAR BY OTHER MEANS

Building on Clausewitz, that war is the continuation of politics by other means, Kennedy suggests that politics is legalised.⁴⁴

Law has become — for parties of all sides of even the most asymmetric confrontations — a vocabulary for marking legitimate

³⁴ Miéville, 'The Commodity-Form' (n 24) 287.

³⁵ *ibid* 291.

³⁶ *ibid*.

³⁷ *ibid* 292.

³⁸ *ibid* 281.

³⁹ Miéville, 'The Commodity-Form' (n 24) (quoting Pashukanis); Miéville 'The Commodity-Form' (n 24) 282.

⁴⁰ Miéville 'The Commodity-Form' (n 24) 282.

⁴¹ *ibid* 283.

⁴² *ibid* 278.

⁴³ *ibid* 282.

⁴⁴ Kennedy, 'Lawfare and Warfare' (n 2) 163.

power and justifiable death ... [W]ar has become a legal institution
 – the continuation of law by other means.⁴⁵

But law has not developed to *become* the institutional arm of war. Rather, it developed under the discourse of such war. Indeed as Kennedy himself recognises, violence gave birth to the law,⁴⁶ and it is respectful of it as its origin and companion.⁴⁷ He goes as far as to imply that it would be hard 'to avoid thinking that law is also the continuation of war by other means'.⁴⁸ Foucault has inverted Clausewitz to propose that 'politics is the continuation of war by other means'.⁴⁹ To apply this inversion building on Kennedy, it is the Author's suggestion that *law is* the continuation of war by other means. It is worth noting here Foucault's analysis in detail:

... [P]ower relations ... are essentially anchored in a certain relationship of force that was established in and through war at a given historical moment that can be historically specified. And while it is true that political power puts an end to war and establishes or attempts to establish the reign of peace in civil society, it certainly does not do so in order to suspend the effects of power or to neutralize the disequilibrium revealed by the last battle of the war ... [T]he role of political power is perpetually to use a sort of silent war to re-inscribe that relationship of force, and to re-inscribe it in institutions, economic inequalities ... Politics, in other words, sanctions and reproduces the disequilibrium of forces manifested in war.⁵⁰

Continuing on the application, the entire passage can be read with law understood as power, of which the 'legal form' sits inseparably at the base of said power and coercion. Accordingly, law itself, established as a result of war at a given historically specified moment, and whilst it can put an end to war as the establishment of 'peace', does not aim to suspend the imbalance of power and its effects. Accordingly, law is to use this 'silent war', or embedded violence, to engrave the relations of force in its institutions, meaning law repeats the unequal forces as they were evident in war. Foucault's thesis continues as follows:

⁴⁵ *ibid* 162.

⁴⁶ Kennedy, 'Remarks' (n 12) 163.

⁴⁷ *ibid*.

⁴⁸ *ibid* 161.

⁴⁹ Michel Foucault, '*Society Must Be Defended*': *Lectures at the Collège de France, 1975-1976* (Picador 2003) 15.

⁵⁰ *ibid* 15-16.

... [W]ithin this 'civil peace,' these political struggles, these clashes over or with power, these modifications of relations of force — the shifting balance, the reversals — in a political system, all these things must be interpreted as a continuation of war. And they are interpreted as so many episodes, fragmentations, and displacements of the war itself. We are always writing the history of the same war, even when we are writing the history of peace and its institutions.⁵¹

Similarly, we can replace this understanding of power with that of the law; that legal institutions, coercion, hegemony and modification of the political relations of power — or what Mieville calls strong states' 'enforcement of their own interpretation of law'⁵² — should all be understood as a continuation of war. Indeed it is true that we are writing the history of the same war under the Rule of Law, especially when we are referring to peace. Seen in this light, legal peace is but a perverted version of war.

V. LAW'S CAPACITY FOR RADICAL STRUGGLE

Though most legal commentators have 'faith in law's freedom from imperialist desire',⁵³ CLS highlights the imperialist history of international law. However, that colonialism served the protection of the empires' needs within a 'humanist'⁵⁴ discourse is not merely a history of international law that is to be transformed or rejected as CLS argues,⁵⁵ but a structural violence, an embedded characteristic of the system. In asserting so they fail to critique the shape, or form of the law, as was developed above. Therefore, contrasting to Kennedy's claim, legal resolution, however much expanded, cannot lead to such international transformation.⁵⁶

Neither is the violent history of international law, as Third World Approaches to International Law (TWAAIL) scholarship describes it, a shift from past political oppression to an economic one.⁵⁷ Rather, it emerges through the

⁵¹ *ibid* 16.

⁵² Mieville, 'The Commodity-Form' (n 24) 294.

⁵³ Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2003) 21.

⁵⁴ Kennedy, 'Lawfare and Warfare' (n 2) 160 (stating, 'The humanist vocabulary ... is mobilised as an asset in war').

⁵⁵ Law comes in certain preferences, thus we can choose between the better or worse ones, or we can conceive international law's universal ambition without 'civilising'. Koskenniemi (n 17) 123.

⁵⁶ Kennedy, 'Remarks' (n 12) 169.

⁵⁷ Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World' (2000) 32 *New York University Journal of International Law and Politics* 243.

political economy of capitalist domination. Law itself is an Ideology as CLS suggests,⁵⁸ but as posited by Miéville, to critique it on this ground is to fail to theorise the legal form.⁵⁹ Thus it is asserted that law's lack of neutrality means it cannot be reconciled. Building on B.S. Chimni, Miéville highlights that international law, being class law, does not allow for a radical struggle. But beyond being its 'limitation' for emancipation, Miéville does not see any potential for it.⁶⁰ This notion is stressed all throughout Miéville's work; law does not have the capacity to be a force for progressive transformation.⁶¹

'The power of international law is ... the armed might of powerful states enforcing their interpretation of legal rules with cluster bombs and gunship ... [I]t is the power of violent coercion'.⁶² This notion has today been updated through the Human Rights discourse of international law.⁶³ For Kennedy, however, law remains outside the sphere of violence, or rather it is its antagonist,⁶⁴ thus his theory is constrained to legal discourse that believes in law's transformative attribute, since law continues 'both innocent of and engaged with violence'.⁶⁵ Rather than recognising that it is precisely under these conditions that the Rule of Law, and International Law specifically, came to being. Therefore, legal rules do not have the potential for progressive change.⁶⁶ As Miéville so adequately concludes in his research, 'A world structured around international law cannot but be one of imperialist violence. The chaotic and bloody world around us *is the rule of law*'.⁶⁷

VI. PERVERTED PEACE

International law tells us how violence is regulated, in a negative sense, but the conducts of war develop as the international system changes, reflecting the needs and interest of the elite. Peace, demarcated from war, remains vague and ambiguous, changing its meaning, similarly to international law itself, with the development of capitalism, or its 'phases'.⁶⁸ So the entire international system exists for the maintenance of a certain undefined status quo, or 'peace', as a

⁵⁸ Purvis (n 23) 99-102.

⁵⁹ Miéville, *Between Equal Rights* (n 9) 80-82.

⁶⁰ Miéville, 'The Commodity-Form' (n 24) 278.

⁶¹ Miéville, *Between Equal Rights* (n 9) 98.

⁶² Miéville, 'The Commodity-Form' (n 24) 280.

⁶³ *ibid* 279.

⁶⁴ Kennedy, 'Remarks' (n 12) 163.

⁶⁵ *ibid*.

⁶⁶ Miéville, *Between Equal Rights* (n 9) 278.

⁶⁷ *ibid* 319 (emphasis in original).

⁶⁸ BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3.

perverted form of war. In its development, international law meant western 'civilised' nations had the right (and duty) of waging wars against the savages who opposed them.⁶⁹

Peace in the international structure as we know it today, the UN and the security council, 'itself established to institutionalise the outcome of the second world war as a system of "collective security"'.⁷⁰ Thus this Article asserts that, seen in this light, peace is but a cynical tool for imperialist domination, in Chimni's words, '[I]t is the function of dominance'.⁷¹ Moreover, it is legitimised as order, and naturalised as universal. But the colonial development of international law was not parallel to the development of capitalism; it was its manifestation in the age of empire. Imperialism is embedded in the structures that expressed international law.⁷² To recall Miéville's argument, 'Modern Capitalism is an imperialist system, and a juridical one',⁷³ as both international law and imperialism developed under and as part of capitalism. Hence the formal aims themselves – international peace – which gave birth to the system from the first instance, should be challenged.

Today there is less of a need to apply the laws of war and the Use of Force in regards to international warfare 'proper', rather they apply to interventions, peace and security, human rights and development discourses, through which the 'international community' continues to 'civilise the savages'. Additionally, there is less of a need for domination through force, since it is exercised through 'the world of ideas'.⁷⁴ Furthermore, when discussing the nature of law and war, Kennedy asserts that an exploration of the role of law in war would not result in 'a great deal of time thinking of doctrines of international law which explicitly purport to deal with warfare' since 'background doctrines of property and contract ... channel the legal mobilisation of violence'.⁷⁵ Miéville argues that 'internationally there is ... no body with a monopoly of violence with which to enforce [competing claims]'.⁷⁶ Peace itself, it is being argued, is serving to legitimate the monopolisation of violence in the form of UN forces, as well as its role in economic expansion. As Orford explains, 'By structuring the debate around the use of force, we never get around to talking about those

⁶⁹ 'Since they are by definition violent, barbarians are legitimate objects of violence. Civility is for civil, barbarity for the barbaric'. *ibid* 32 (quoting Bauman).

⁷⁰ Kennedy, *Lawfare and Warfare* (n 2) 161; see also D Zolo, *Victor's Justice* (Verso 2009).

⁷¹ Chimni (n 68) 19.

⁷² Miéville, *Between Equal Rights* (n 9) 297.

⁷³ *ibid* 293.

⁷⁴ Chimni (n 68) 19.

⁷⁵ Kennedy, 'Lawfare and Warfare' (n 2) 163.

⁷⁶ Miéville, 'The Commodity-Form' (n 24) 293.

other issues',⁷⁷ referring to economic liberalisation. This will be elaborated further below.

VII. PRACTICAL PEACE: ECONOMIC LIBERALISATION

Conversely, the picture that is given to us is inverted, that peace is achieved through trade, and post-conflict economic development is the cure.⁷⁸ As General Assembly Resolution 60/180 states: 'Recognizing that development, peace and security and human rights are interlinked and mutually reinforcing'.⁷⁹ This ideological imposition, that peace is achieved by economic means, and is understood in material 'prosperity', is evident in the practice of peace. Thus the following Section of the Article will briefly draw on some research of post-conflict reconstruction.

Peace is seen as intertwined with development and this notion prevails all through the discourse of the international system. Outlined under the 'responsibility of the Security Council in the maintenance of international peace and security':

The members of the Council agree ... to address urgently all the other problems, in particular those of economic and social development ... They recognize that peace and prosperity are indivisible and that lasting peace and stability require effective international cooperation ...⁸⁰

As such, financial institutions have a major role⁸¹ in the development of post-conflict societies and humanitarian needs of 'failed states' – from post-WWII Marshall Plans in Europe to IMF and WTO mandates⁸² in the third world today, the discourse has remained and the same economic policies apply. Moreover,

⁷⁷Anne Orford 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443, 481.

⁷⁸ See Erik Gartzke, 'Capitalist Peace' (2007) 51 *American Journal of Political Science* 166.

⁷⁹ UN General Assembly, 'Implementation of the recommendations contained in the Report of the Secretary-General on the causes of conflict and the promotion of durable peace and sustainable development in Africa', (Resolution A/RES/67/293 adopted by the General Assembly, 3 September 2013) <<http://www.refworld.org/docid/5236bd994.html>> accessed 5 January 2014.

⁸⁰ UN Security Council, 'Security Council resolution 1645' (S/RES/1645, 20 December 2005) <<http://www.refworld.org/docid/44168ba50.html>> accessed 6 January 2014.

⁸¹ The Peacebuilding Commission '[d]ecides that representatives from the World Bank, the International Monetary Fund and other institutional donors shall be invited to participate in all meetings of the Commission in a manner suitable to their governing arrangements'. *ibid.*

⁸² Orford, *Reading Humanitarian Intervention Law* (n 53) 25-27; Orford 'Locating the International' (n 77).

peacebuilding, peacemaking and humanitarian interventions reinforce dependence in post-conflict peacebuilding which 'rehearse colonial fantasies about the need for benevolent tutelage of uncivilised people'.⁸³ Orford emphasises the role of economic liberalisation in the international community, which 'appears sacrosanct' when we consider 'how to guarantee peace'.⁸⁴

Research suggests that growth in GDP indeed takes place in the aftermaths of war, due to foreign investment increasing sharply.⁸⁵ Multi-National Corporations (MNCs) and Foreign Direct Investment are key in the international processes of post-conflict reconstruction, and though researchers found that they have a negative impact on local economies in the short term,⁸⁶ they are seen crucial to growth and long-term technological and economic development. Thus International Foreign Institutions' policies in the form of foreign investment, penetration of MNCs and privatisation – or put differently, international capitalist expansion⁸⁷ is not seen as a part of the problem,⁸⁸ but rather plays the key role in part of the solution for war-torn societies.

Moreover, even when peace is considered beyond 'negative peace' to include sustainable long-lasting peace, there has been a call for more economic reform⁸⁹ and focus on developmental institutions,⁹⁰ accompanied by the use of force as the required response to any 'security crisis'.⁹¹ As Chimni emphasises, these processes widen the rule of capital and allow for the global accumulation of capital,⁹² though for him this signals a shift from a past international law.⁹³ But

⁸³ Orford, *Reading Humanitarian Intervention Law* (n 53) 11.

⁸⁴ Orford, 'Locating the International' (n 77) 479.

⁸⁵ Siyan Chen, Norman V Loayza and Marta Reynal-Querol, 'The Aftermath of Civil War' (2008) 22(1) *The World Bank Economic Review* 63, 75.

⁸⁶ Obijiofor Aginam, Vesselin Popovski and Nicholas Turner, *Policy Brief: Post-conflict Countries and Foreign Investment* (United Nations University 2008).

⁸⁷ See William I Robinson, *A Theory of Global Capitalism: Production, Class, and State in a Transnational World* (John Hopkins University Press 2004) (discussing a Transnational Capitalist Class and the internationalisation qualitatively and quantitatively of the production process).

⁸⁸ Economic reconstruction is a cause of violence. See Orford, *Reading Humanitarian Intervention Law* (n 53) 13, 18; Orford, 'Locating the International' (n 77) 455-59, 480.

⁸⁹ Allan Gerson, 'Peace Building: The Private Sector's Role' (2001) 95 *American Journal of International Law* 102.

⁹⁰ Nicholas Sambanis, 'The Long and Short Term Effects of Peace Operations' 22(1) *The World Bank Economic Review* 9.

⁹¹ Orford, 'Locating the International' (n 77) 480.

⁹² Chimni (n 68) 9.

⁹³ 'No longer confined to questions of war and peace or diplomacy, international law has ... seen the adoption of a network of laws which seek to establish the legal and institutional framework favorable to the accumulation of capital in the era of globalization'. BS Chimni, 'Marxism and International Law: A Contemporary Analysis' (1999) 34 *Economic & Political Weekly* 337, 337.

as posed by Orford, how is it that economic exploitation occurs along post-conflict reconstruction, and for both to be seen as an international humanitarian intervention?⁹⁴ Though some scholars have argued in favour of such interventions in certain circumstances,⁹⁵ based on the above framework the discourse of peace in post-conflict reconstruction is a continuation of economic exploitation.

It can be argued that protection of property rights — a core capitalist feature of liberal freedom — itself facilitates the international monopoly of violence,⁹⁶ as the Human Rights discourse that serves their protection also allows for justifying wars and interventions.⁹⁷ International legal institutions specifically allow the process of transnationalisation of capital. Globally, this meant reconstitution (as internationalisation) of legal governing agencies; ‘international law now aspires to *directly* regulate property rights’.⁹⁸ In addition, in transitional justice, constitutional changes maintained the protection of property rights and contributed greatly to the unequal distribution of wealth domestically. For example in post-apartheid South Africa inequality continues through securing of rights of the white, hence maintaining high levels of black poverty.⁹⁹ Evidently, violent relations are maintained in the veil of peaceful transformation and justice.

Ultimately, how we measure peacefulness should shed light on what we indicate as factors for peace. What we find is that the picture is severe; levels of death, polity (i.e. processes of democratisation), economic growth (measured by GDP) as well as health and education, are the main sources of ‘peacefulness’ as understood in most academic research.¹⁰⁰ Upon reflection though, GDP tells us about a country’s growth, not how that growth is shared or how violent the conditions for achieving this growth are. Hence, income and consumption levels become indicators of peace, instead of levels of societal harmony, equality, trust and nonviolence. That ‘liberal democratisation’ is an indicator should also tell us about the ideological imposition, that a certain liberal triumph must take place for peace to prevail. Consequently, the notion of peace is perverted.

⁹⁴ Anne Orford, ‘Feminism, Imperialism and the Mission of International Law’ (2002) 71 *Nordic Journal of International Law* 288.

⁹⁵ See for example Christopher Greenwood, ‘Scope of Application of Humanitarian Law’ in D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP 1995).

⁹⁶ It is beyond the scope of this Article to discuss this in detail. For a projection of this theory see Robinson (n 87) 2004.

⁹⁷ Mieville, *Between Equal Rights* (n 9) 313.

⁹⁸ Chimni (n 68) 8 (emphasis in original).

⁹⁹ Aeyal M Gross, ‘The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel’ (2004) 40 *Stanford Journal of International Law* 47.

¹⁰⁰ For example, the World Bank and United Nations University studies on post-conflict reconstruction. See Chen (n 85); Turner (n 86).

In wartime, that is to say, during armed conflict or direct violence, the severity of violence is measured by the number of deaths and Human Rights violations.¹⁰¹ However, during 'peacetime' under capitalism, in which violent social and political relations continue to dominate our lives, we find 125,000 daily preventable deaths from hunger and disease, under the conflict of Capitalism vs. Humanity.¹⁰² Legally, though, this state of being is not distinguished as war. As Kennedy explains, during such 'peacetime' the partnership of war and law means we are left feeling that just causes are fought, whilst having no sense of responsibility for the deaths of war; thus we lose our moral compass, while politics and ethics are at bay.¹⁰³

VIII. CONCLUSION

This Article attempted to locate the position of the international legal scholarship and practice on the notion of peace. Evidently, we find that the notion remains unclear, complex and correlated to war and violence, in spite being the prime and most valuable aim of the entire system. It is a paradox for all international lawyers and institutions to work extensively toward a notion that remains unknown. Nonetheless, this Article found that the demarcation of peace and war draws clear lines between which violence is lawful and which is not. Applying Mieville's analysis of international law, it has found that the violent means of the commodity-exchange are characteristic of the system itself, since it is underpinned by capitalism. That international law developed under imperialism was not by chance; it was so in part of the development of capitalism. As such, the same demarcation began to change and merge, reflecting the ends of those in power, but remained linear and continued to be told in a black-and-white discourse. Clearly, the story is told in this manner to legitimise and conceal the violence embedded within the rule of law itself.

Drawing on CLS and applying its premise to Foucault's notion on violence, the Author suggested that law itself is the continuation of war by other means. Meaning, the violence that was at the origin of international law — that same violence that it regulates and involves itself in — remained at the core of the system in both form and content. In this sense, peace is but a perverted version of war. Finally, this Article found that in practice, the course of 'peace', which increasingly encompasses all kinds of 'civilising' processes, predominantly means economic and political liberalisation. Consequently, in every sense peace is perverted, since peace, under capitalism, is war.

¹⁰¹ Even then, deaths are often 'curtained off as the function of kitsch'. See Martti Koskenniemi (n 17) 121 (drawing on Kundera).

¹⁰² Johan Galtung, *50 Years – 100 Peace & Conflict Perspectives* (Kolofon 2008).

¹⁰³ Kennedy, 'Lawfare and Warfare' (n 2) 181.

BIBLIOGRAPHY**BOOKS**

- Aginam O, Popovski V and Turner N, *Policy Brief: Post-Conflict Countries and Foreign Investment* (United Nations University 2008)
- Anghie A, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005)
- Chesterman S, *Just War Or Just Peace?: Humanitarian Intervention and International Law* (OUP 2001)
- Foucault M, *'Society Must Be Defended': Lectures at the Collège de France, 1975-1976* (Picador 2003)
- Galtung J, *50 Years – 100 Peace & Conflict Perspectives* (Kolofon 2008)
- Greenwood C, 'Scope of Application of Humanitarian Law', in Fleck D (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP 1995)
- Kelsen H, *Peace Through Law* (5th edn, The Lawbook Exchange Ltd 2007)
- Kennedy D, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004)
- — *Of War and Law* (Princeton University Press 2006)
- — 'Lawfare and Warfare' in Crawford J and Koskeniemi M (eds), *The Cambridge Companion to International Law* (CUP 2012)
- Marks S (ed), *International Law on the Left: Re-examining Marxist Legacies* (CUP 2008)
- Miéville C, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005)
- Orford A, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2003)
- Robinson W.I, *A Theory of Global Capitalism: Production, Class, and State in a Transnational World* (John Hopkins University Press 2004)
- Zolo D, *Victor's Justice* (Verso 2009)

JOURNAL ARTICLES

- Anghie A, 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World' (2000) 32 *New York University Journal of International Law and Politics* 243
- Berman N, 'Privileging Combat – Contemporary Conflict and the Legal Construction of War' (2004) 43 *Columbia Journal of Transnational Law* 1
- Chen S, Loayza N.V and Reynal-Querol M, 'The Aftermath of Civil War' (2008) 22(1) *The World Bank Economic Review* 63
- Chimni B.S, 'Marxism and International Law: A Contemporary Analysis' (1999) 34 *Economic & Political Weekly* 337
- — 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3
- Galtung J, 'Violence, Peace, and Peace Research' (1969) 6 *Journal of Peace Research* 167
- Gartzke E, 'Capitalist Peace' (2007) 51 *American Journal of Political Science* 166
- Gerson A, 'Peace Building: The Private Sector's Role' (2001) 95 *American Journal of International Law* 102
- Gross A.M, 'The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel' (2004) 40 *Stanford Journal of International Law* 47

- Jessup P.C, 'Should International Law Recognize an Intermediate Status between Peace and War?' (1954) 48 *The American Journal of International Law* 98
- Kennedy D, 'Turning to Market Democracy: A Tale of Two Architectures' (1991) 32 *Harvard International Law Journal* 373
- — 'The International Style in Postwar Law and Policy' (1994) 1 *Utah Law Review* 7
- Koskenniemi M, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *The European Journal of International Law* 113
- Miéville C, 'The Commodity-Form Theory of International Law: An Introduction' (2004) 17(2) *Leiden Journal of International Law* 271
- Orford A, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443
- — 'Feminism, Imperialism and the Mission of International Law' (2002) 71 *Nordic Journal of International Law* 275
- Przetacznik F, 'A Definition of Peace' (1999) 11 *Sri Lanka Journal of International Law* 165
- Purvis N, 'Critical Legal Studies in Public International Law' (1991) 32 *Harvard International Law Journal* 81
- Rosaton S, 'The Flawed Logic of Democratic Peace Theory' (2003) 97 *The American Political Science Review* 585
- Sambanis N, 'The Long and Short Term Effects of Peace Operations' 22(1) *The World Bank Economic Review* 9
- Stark B, 'What We Talk about When We Talk About War' (1996) 32 *Stanford Journal of International Law* 91

INTERNATIONAL LAW SOURCES

- United Nations, 'Charter of the United Nations' (1 UNTS XVI, A.1, 24 October 1945) <<http://www.refworld.org/docid/3ae6b3930.html>> accessed 6 January 2014
- UN General Assembly, '2005 World Summit Outcome: resolution / adopted by the General Assembly' (A/RES/60/1, 24 October 2005) <<http://www.refworld.org/docid/44168a910.html>> accessed 7 January 2014
- UN General Assembly, 'Implementation of the recommendations contained in the report of the Secretary-General on the causes of conflict and the promotion of durable peace and sustainable development in Africa: resolution adopted by the General Assembly' (A/RES/67/293, 3 September 2013) <<http://www.refworld.org/docid/5236bd994.html>> accessed 5 January 2014
- UN Security Council, 'Security Council resolution 1645 [on establishment of the Peacebuilding Commission]' (S/RES/1645, 20 December 2005) <<http://www.refworld.org/docid/44168ba50.html>> accessed 6 January 2014

WEBSITES AND OTHER SOURCES

- United Nations, 'Charter of the United Nations' (1 UNTS XVI, A.1, 24 October 1945) <<http://www.refworld.org/docid/3ae6b3930.html>> accessed 6 January 2014
- Kennedy D, 'Remarks: Violence in International Law' (Eighth Annual Meeting of the American Society of International Law, Washington, D.C., 9-12 April 1986) <http://www.law.harvard.edu/faculty/dkennedy/publications/ViolenceInIntnlLaw86_20100621150414.pdf> accessed 6 January 2014

The History of International Law in the Caribbean and the Domestic Effects of International Law in the Commonwealth Caribbean

Andrew Welch*

I. INTRODUCTION

The Caribbean has a rich history.¹ The languages and dialects, the racial makeup of the different islands and the legal systems present in the region are a few examples of the outcome of history in the region. This Article seeks to analyse the international legal history that resulted in the reception of English law into the Commonwealth Caribbean. In making its analysis, the Article will highlight the following themes: the role of international law in the initial colonisation of the Caribbean islands; the arguments used to debase the sovereignty of the first Caribbean islanders; and the effect of the involvement of international law in the history of the region upon the legal systems of the Commonwealth Caribbean. It will argue that international law played an under-researched role in the initial development of the history and the legal systems of the Caribbean islands. This role is only highlighted by using a multidisciplinary approach that relies on history and international law scholarship to locate the position of international law in the history of the Caribbean.²

The Article begins with an investigation of the role of international law through international action in the pre-colonisation years and the initial colonisation of the Caribbean islands. Then it critiques the legal rhetoric and the application of

* Andrew Laurence Welch studied for a Bachelor of Laws (LL.B) at the University of the West Indies and for a Legal Education Certificate (L.E.C.) at the Sir Hugh Wooding Law School before studying for a Master of Laws (LL.M.) in International Law at SOAS, University of London between 2013-2014.

¹ The word 'Caribbean' has many different connotations. The focus of this Article shall be the islands of the Caribbean Sea, excluding the continental territories, with a special focus on the Commonwealth Caribbean. The Commonwealth Caribbean is used to describe the English-speaking islands of the Caribbean that were colonies of England.

² For a discussion of linkages between history and international law, see Matthew Craven, 'Introduction: International Law and its Histories' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff Publishers 2007).

Eurocentric legal norms to indigenous peoples. The fourth Section explores the effect of international action and international law upon the legal systems of the region with an emphasis on the reception of English law into the former English colonies of the region. In concluding, this Article argues that the enterprise of colonialism in the Caribbean was underpinned by international law that was used to debase the sovereignty of the indigenous people and rival European powers. Moreover, it will assert that international law doctrines of title to territory contributed to the doctrine of reception of law being applied to the Commonwealth Caribbean islands.

II. THE ROLE OF INTERNATIONAL LAW IN THE INITIAL COLONISATION OF THE CARIBBEAN

2.1 The Papal Bulls

The first known pieces of international law to affect the Caribbean region sparked a colonial and commercial rivalry between European powers that would last for centuries. Williams put it best when he stated, 'Caribbean history, conceived in international rivalry, was reared and nurtured in an environment of power politics'.³ Even before Christopher Columbus rediscovered the region, the people and islands of the Caribbean were pawns in the power politics of European powers: a series of papal bulls predetermined the rights to explore and conquer the land west of the Iberian Peninsula.⁴ The immediate consequences of the papal bulls are obvious, but the reactionary responses of other European powers should be considered in order to highlight the role of international law in the initial colonisation of the region.

In 1493, the assumption existed that the pope had temporal authority over pagans and Christians. Given his position as head of the Roman Catholic Church the pope had the authority to issue decrees, known as papal bulls. Among other applications, papal bulls were used to sanction and legitimise the actions of European powers. Any decree by the pope granting sovereignty would have legitimacy backed by this temporal authority.⁵

³ Eric Williams, *From Columbus to Castro: The History of the Caribbean 1492-1969* (Vintage Books 1984) 71.

⁴ For description and analysis of the relevant papal grants commencing from 1452, see WG Grewe, *The Epochs of International Law* (de Gruyter 2000) ch 8; David Berry, 'The Caribbean' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of The History of International Law* (OUP 2012); Matthew Craven, 'Colonialism and Domination' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of The History of International Law* (OUP 2012).

⁵ Anthony Pagden, 'Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians' in David Armitage (ed), *Theories of Empire, 1450 – 1800* (Ashgate Publishing Ltd 1998) 162.

A series of five papal bulls gave dominion of the theretofore unknown Caribbean islands to the Spanish. The fourth and most pertinent papal edict, *Inter caetera*, granted the Spanish rights to all lands discovered, or to be discovered, beyond an imaginary line drawn from north to south, one hundred leagues west of the Azores and the Cape Verde Islands. One writer likened it to a form of 'spiritual guardianship that granted title to the discovering Christian prince, who was commanded in turn to instruct the inhabitants in the Catholic faith'.⁶ Thus, east of this line was the Portuguese sphere of influence; west, the Spanish. The fifth, *Dudum siquidem*, quashed all other grants and extended the previous grants to include 'all islands and mainlands whatever, found or to be found ... in sailing towards the west and south,' even if followed by actual possession.⁷ Not satisfied with the imaginary line of demarcation the Portuguese government entered into negotiations with the Spanish government to fix the line. These negotiations resulted in the Treaty of Tordesillas on June 7, 1492, which fixed the line at 370 leagues west of the Cape Verde Islands.⁸

According to Berry, the meaning and legal effect of the papal bulls was, and remains, subject to controversy. He details three theories concerning the meaning and effect of the papal bulls. Firstly, that the papal bulls were meant to grant full title – literally to divide the world in two. Secondly and conversely, that the papal bulls only mandated Christian conversion of heathens in the west by the Spanish. Thirdly, that the pope's decrees merely granted 'inchoate' title to the lands, which would be perfected following occupation.⁹ Albeit the final meaning and legal effect of the bulls remained vague, the Spanish used a wide interpretation of the grants. This is evident in the *Requerimiento* which was read by the Spanish Conquistadores to the indigenous people upon landing:

On the part of the King, Don Fernando, and of Doña Juana, his daughter, Queen of Castille and Leon, subduers of the barbarous nations, we their servants notify and make known to you, as best we can One of these Pontiffs, who succeeded that St. Peter as Lord of the world ... made donation of these isles and Tierra-firme to the aforesaid King and Queen and to their successors, our lords, with all that there are in these territories So their Highnesses are King and

⁶ Christopher Tomlins, 'The Legalities of English Colonizing: Discourse of European Intrusion upon the Americans, c. 1490-1830' in Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan 2010) 53.

⁷ Berry, 'The Caribbean' (n 4) 580.

⁸ For the full text of *Inter caetera* and the Treaty of Tordesillas, see WG Grewe (ed), *Fontes Historiae Iuris Gentium: Sources Relating to the History of the Law of Nations*, vol 2 (de Gruyter 1988-1995) 107-17.

⁹ Berry, 'The Caribbean' (n 4) 580-81.

lords of these islands and land of Tierra-firme by virtue of this donation.¹⁰

At that time, it was meaningless to the indigenous people whether the papal edicts granted full title, a mandate to convert or radicate title. Nevertheless, the objects intended to be covered by the legal effect of the papal bulls are clear: the lands and people west of the Cape Verde Islands. The papal bulls constituted an international action that had its origins in and was sanctioned by shaky international law – the legitimacy of the temporal authority of the pope.

2.2 Response of European Powers

Spain and Portugal never succeeded in persuading the other colonial powers to recognise the legitimacy of the papal legal titles, or the Iberian colonial monopoly that was based upon them.¹¹ As a consequence of the papal bulls and the rediscovery of the New World, Spain and Portugal's European rivals sought to delegitimise the effects of the papal bulls and to challenge their claims of sovereignty. The states that challenged the Iberian claims viewed the New World as 'foreign' to all Europeans and asserted that sovereignty over the land could not be maintained by the papal bulls or by the Treaty of Tordesillas.¹² In effect, the French and English attempted to reference and mould international law to suit their own colonial interests.

The English sought to oppose papal donation and prove their legitimacy and *dominium* in the Caribbean by citing biblical precedents, freedom of navigation (*mare liberum*) and agriculturalist justifications – vacancy (*vacuum domicilium*) or absence of ownership (*terra nullius*).¹³ For example, Berry cites a 1580 letter from Queen Elizabeth to the Spanish envoy in London, Mendoza. In speaking of the effect of the papal bulls, the Queen stated:

[T]his donation of what does not belong to the donor and this imaginary right of property ought not to prevent other princes from carrying on commerce in those regions or establishing colonies there in places not inhabited by the Spaniards. Such action would in no

¹⁰ Grewe, *Fontes Historiae Iuris Gentium* (n 8) 68 (quoting *Requerimiento*, Proclamation read to the American-Indian natives by the Conquistadores after their landing' (1513)).

¹¹ Grewe, *The Epochs of International Law* (n 4) 240.

¹² Elizabeth Mancke, 'Empire and State' in David Armitage and MJ Braddick (eds), *The British Atlantic World 1500–1800* (2nd edn, Palgrave Macmillan 2009) 196-97.

¹³ See for example David Armitage, *The Ideological Origins of the British Empire* (CUP 2000) ch 3; Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500 – c. 1800* (Yale University Press 1995) ch 3.

way violate the law of nations, since prescription without possession is not valid. Moreover all are at liberty to navigate that vast ocean, since the use of the sea and the air are common to all. No nation or private person can have a right to the ocean, for neither the course of nature nor public usage permits any occupation of it.¹⁴

Nevertheless, the fact that the English Crown challenged Iberian claims of *dominium* in the New World did not preclude it from using the same language found in the papal bulls. As observed by David Ramsay in 1789, the words used in Henry VII's letters patent to John Cabot of 1496 were a replica of the terms used by Alexander VI's Bulls of Donation by granting him rights to 'conqueror and possess' for the King any territory not already in Christian hands.¹⁵

In France, unlike England, the authority of the pope and his edicts was not questioned. However, it was contested whether the Spanish were honouring the obligations derived from their missionary mandate. Moreover, the French relied on arguments grounded in the principle of freedom of the seas and that the edicts of Alexander VI did not exclude France from the division of the world.¹⁶

The principles cited by the English and French jurists drew heavily upon ancient legal thought, principally Roman law.¹⁷ These colonial powers utilised analogies drawn from Roman private law to develop new international law rules for the circumstances at hand. For instance, in diplomatic correspondence between Queen Elizabeth I and Mendoza, it is evident that the Queen relied on the arguments that no one could claim ownership or exclusive rights to the sea, *mare liberum*. The core of such a rationale was based on Roman legal scholarship, which asserted that such things are common by nature.¹⁸ Moreover, one of the most influential principles of Roman law on early modern international law was *res nullius*. Roman law demanded that a thing acquired by occupation be *res nullius*. This meant that the object acquired could not be someone else's property; it was the common property of all mankind. Ownership could be acquired by capturing the object and putting it to some,

¹⁴ Grewe, *Fontes Historiae Iuris Gentium* (n 8) 151 (quoting 'Queen Elizabeth of England to the Spanish envoy in London Mendoza' (1580)).

¹⁵ David Ramsay, *The History of the American Revolution*, vol 2 (Philadelphia 1789).

¹⁶ Grewe, *The Epochs of International Law* (n 4) 244.

¹⁷ Kaius Tuori, 'The Reception of Ancient Legal Thought in Early Modern International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of The History of International Law* (OUP 2012).

¹⁸ Hugo Grotius, *The Freedom of the Seas* (OUP 1916) 26-27.

generally agricultural, use.¹⁹ By capturing the object and putting it to some use dominium over the object would be acquired. *Res nullius* therefore provided the rationale for the establishment of *dominium* (lawful possession). This doctrine was embraced in international law under the name *terra nullius* as a way to legitimise possession.²⁰

III. INTERNATIONAL LAW SCHOLARSHIP AND THE SOVEREIGNTY OF INDIGENOUS PEOPLE OF THE CARIBBEAN

International law at the time of first contact between Europeans and the people of the Caribbean was still in its formative stages.²¹ Without any precedent or international custom to reinforce European claims to the Caribbean and characterisations of the indigenous people, principles of Roman law were again utilised. The same principles that were appropriated in international law to discredit Spanish claims to possession of the islands of the Caribbean were also used, in addition to ideologies of natural rights, to deny sovereignty to the indigenous people of the region. Furthermore, international law at the time was almost exclusively Eurocentric, and consisted of a number of common rules developed from natural law and pre-existing custom. Consequently, the questions surrounding the international legal status of the indigenous people and their territory, as well as rules that would govern European-indigenous relations would be shaped by European powers and their colonial ambitions.

Hurbon has recognised that the Caribbean in the early 16th century was the testing ground for Western ideology.²² The Spanish, being the first Europeans in the region to gain territory, were first to adopt an exclusionary rhetoric aimed at characterising the indigenous people as primitive pagans. Sude-Badillo in his research describes that the indigenous people were never recognised as the Spaniard's equals, but rather only as their disempowered 'vasals'. The significance of labelling the indigenous people as 'vasal' meant that the Spanish claimed to have a right to require tributes from them.²³ Additionally, according to Hurbon, it was propagated that there were two

¹⁹ Pagden, *Lords of All the World* (n 13) 76.

²⁰ Tuori (n 17) 1028.

²¹ David Berry, 'Legal Anomalies, Indigenous Peoples and the New World' in Barbara Saunders and David Halijan (eds), *Whither Multiculturalism?: A Politics of Dissensus (Studia Anthropologica)* (Leuven University Press 2003).

²² Laennec Hurbon, 'Ideology in Caribbean History' in BW Wigman (ed), *General History of the Caribbean Volume VI: Methodology and Historiography of the Caribbean* (UNESCO Publishing 1999).

²³ Jalil Sued-Badillo, 'The Indigenous Societies at the Time of Conquest' in Jalil Sued-Badillo (ed), *General History of the Caribbean Volume I: Autochthonous Societies* (UNESCO Publishing 1999).

types of Indians in the islands – the Caribs, who were cruel and cannibalistic because they rebelled against the evangelisation and power of the *conquistadores*, and the Arawaks, who were gentle and obedient, and who were the victims of the Caribs and open to the protection of the Spanish. This encouraged the Catholic monarchs of Spain to invest more in the expeditions to the islands, in keeping with the concession of the papal edicts to promote evangelisation.

This exclusionary rhetoric was extended to the sovereignty of the indigenous people, specifically concerning the lands they occupied which were treated as *res nullius*. The Spanish theologians and jurists of that era were debating the nature of right and *dominium*.²⁴ They transposed this debate into the discussions about the legitimacy of the conquests in the New World. *Dominium* had many meanings: a person could hold it over things (*dominium rerum*, including natural elements), over one's fellows (*dominium iurisdictionis*), over one's own acts (*dominium suis actus*), over one's own liberty, and even over one's own life (*dominium suis*).²⁵ One jurist in particular, Palacios Rubios, justified Spanish occupation of the Caribbean islands on the basis that if civil society is defined as a society based upon property, and property relations were what constituted the basis for all exchanges between men in society; if a society possessed no such relationships, and could not be regarded as a civil society, the individuals of this society could not make claims to *dominium rerum* when confronted by invaders.²⁶ Furthermore, these writers claimed that since all *dominium* derives from God's grace, not from God's law, no non-Christian, and no 'ungodly' Christian, could be the bearer of rights.²⁷ Thus, as a result of being non-Christian and having the title of uncivilised the indigenous people of the region were denied any standing in law and thus the entitlement of being considered sovereign by the Spanish. In essence, the indigenous people would not have superior property claims over the Spanish.

While the aim of many early European writers was to reinforce their state's claims to *dominium* and *imperium* in the Caribbean islands, writers such as Francisco de Vitoria argued that indigenous people merited equitable treatment before the law.²⁸ For instance, in his *De indis* lecture, de Vitoria asserted that the

²⁴ For analysis of Spanish debates over the rights of the indigenous population, see Pagden, 'Dispossessing the Barbarian' (n 5).

²⁵ Xavier Gill, 'Spain and Portugal' in Howell A Lloyd, Glenn Burgess and Simon Hodson (eds), *European Political Thought 1450-1700: Religion, Law and Philosophy* (Yale University Press 2007).

²⁶ Pagden, *Lords of All the World* (n 13) 163.

²⁷ *ibid* 75.

²⁸ Ken Coates, 'North American Indigenous People's Encounters' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of The History of International Law* (OUP 2012).

indigenous Indians possessed the minimal requirements for social life and reason and as such could not be the 'natural slaves' described in Books I and III of Aristotle's *Politics*.²⁹ While some credit de Vitoria as advocating a potentially more benign, humanist approach towards indigenous peoples, it should be recognised that his writings neither supported complete equality nor granted sovereignty to the indigenous people.³⁰ Moreover, the equitable treatment de Vitoria intended would have comported with notions of fairness defined by those in a position of physical power and geographically removed, thus ignoring reality of the indigenous people. At the end of the same lecture, de Vitoria, unable to conclusively reason the Spanish claim to *dominium* in the New World, claimed that since the Spanish were already there any attempt to abandon the colonies would result in '... a great prejudice and detriment to the interests of our princes which would be intolerable'.³¹

Like the Spanish, the English and French did not recognise the full legal status and rights of the indigenous people they encountered. Their arguments for justifying their possession and bolstering their claims to *dominium* were based in one way or another upon the principle of *res nullius*.³² Using *res nullius*, which was transformed in international law to the rule of *terra nullius*, the colonising powers easily dismissed indigenous occupation of the Caribbean islands and did not consider this occupation to be an obstacle to colonisation and acquiring sovereignty.

The work of English writer John Dee was influential in the initial enterprise of English colonisation. Dee claimed that occupation rather than mere discovery was the way to establish English sovereignty over the New World.³³ He proclaimed the right of Queen Elizabeth I to draw into her *dominion* those lands that were discovered by English subjects and were not currently in the actual possession of a Christian prince by Roman law and the law of nature and nations.³⁴ Accordingly, the English Crown had no reservations in granting title to lands 'not possessed by Christians'.³⁵ Claims of sovereignty underpinned by Cromwell's 'Western Design' as well as the 'godliness' of individuals were also the basis of early British assertions of occupation. The French initially based

²⁹ Francisco de Vitoria, 'De indis recenter inventis' in Teofilo Urdanoz (ed), *Obras de Francisco de Vitoria* (Biblioteca de Autores Christianos 1960).

³⁰ Berry, 'The Caribbean' (n 4) 593.

³¹ de Vitoria (n 29) 725.

³² Pagden, *Lords of All the World* (n 13) 86.

³³ Ken MacMillan, *Sovereignty and Possession in the English New World: Legal Foundations of Empire 1576-1640* (CUP 2006) 52.

³⁴ *ibid* ch 2.

³⁵ Ramsay (n 15).

their claims on the assumption that God had approved their venture with the purpose of peaceful evangelisation.³⁶

In the absence of a sustained argument to the right of occupation grounded on the supposed nature of the indigenous inhabitant, the British and French recognised that some claim of legitimate possession of the lands, which excluded the indigenous people, was necessary for successful occupation. Both adopted the Roman law argument known as *res nullius*.³⁷ The British and the French used this argument to treat the lands of the indigenous people as juridically vacant and therefore subject to discovery and occupation.

IV. THE DOMESTIC EFFECTS OF INTERNATIONAL LAW ON THE LEGAL SYSTEM OF THE CARIBBEAN REGION

The modern legal systems of the Caribbean islands were born out of their experience with colonialism, during which law was transplanted into the region.³⁸ The transplantation of laws is the foundation of the doctrine of reception of law.³⁹ This doctrine describes the process by which or through which laws from one state are exported to another state. In the Caribbean, the process of reception involved the exportation of existing sources of law such as statute, common law and equity, from England, into the Commonwealth Caribbean. The law so received has generally been regarded as a 'natural birth right' or 'inheritance' that was carried overseas by the first colonial settlers.⁴⁰ England would obtain title through various doctrines of title to territory that would evince and reinforce her claims to the individual islands. When and how the doctrine of reception was applied to the Commonwealth Caribbean islands is directly related to how England obtained title to the island.

Before starting the investigation into the specific domestic effects of international law within the Commonwealth Caribbean, one must be conscious that use of the word 'reception' has been questioned by contemporary writers

³⁶ Pagden, *Lords of All the World* (n 13) ch 3; JHM Salmon, 'France' in Howell A Lloyd, Glenn Burgess and Simon Hodson (eds), *European Political Thought 1450-1700: Religion, Law and Philosophy* (Yale University Press 2007).

³⁷ For an account of English debates concerning the principle of *res nullius* see, Tomlins (n 6) 55-56; Pagden, *Lords of All the World* (n 13) 76-80.

³⁸ For a discussion of the legal systems of the Commonwealth Caribbean, see Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (2nd edn, Routledge-Cavendish Oxford 2008); Sir Fred Phillips, *Commonwealth Caribbean Constitutional Law* (Cavendish Publishing 2002).

³⁹ Antoine (n 38) ch 5.

⁴⁰ *Anonymous* (1722) 2 P Wms 75, 24 ER 646; *United States v. Worrall*, 28 F. Cas. 774, 779 (1798) (Chase J).

and jurists. Writers such as Allot contend that the common law was forced onto the colonies and '... migrated because they were made to migrate'.⁴¹ Likewise, Lord Diplock in *Kaadesevaran v AG* explained that 'in the case of most former British colonies ... the English common law is incorporated as part of the domestic law of the new independent State because it was imposed upon the colony ...'.⁴² This view can be seen in the case of *Rudling v Switch* in which Lord Stowell opined, 'When the King of England conquers a country ... the Conqueror by saving the lives of the people conquered gains a right and property in such people; in consequence of which he may impose what law he pleases'.⁴³

Around 1539, European powers started to utilise a wide range of modern legal arguments to further validate their claims to territory in their expanding empires in the Caribbean.⁴⁴ The dominant arguments used to evince title in international law were discovery, conquest, cessation and occupation. Discovery is an original form of title; conquest is a derivative form of title.⁴⁵ The other dominant doctrines are cessation and occupation, which are the most persuasive of the arguments; they could be established according to the status of the territory that was ceded or occupied.⁴⁶ Moreover, the legal inconsistencies that existed in relations between European powers, such as entering into treaties and informal alliances with indigenous groups,⁴⁷ can also be seen to be against the doctrines of discovery and conquest.⁴⁸ For the purposes of reception, while there is no practical distinction between conquered and ceded territories or settled and occupied, there is a difference between conquered and settled.

Since the doctrine of imposition is closely linked to the historical background of the region it is necessary to make the distinction between territories that were settled or occupied and those that were conquered or ceded. The settled

⁴¹ Antony N Allot, *The Limits of Law* (Butterworths 1980) 109-10.

⁴² *Kaadesevaran v AG* [1970] AC 1111, 1116.

⁴³ *Rudling v Switch* (1821) 2 Hag Con 371, 380.

⁴⁴ Grewe, *The Epochs of International Law* (n 4) 250.

⁴⁵ See generally J Crawford and I Brownlie, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) pt III; Bryan A Garner (ed), *Black's Law Dictionary* (7th edn, West Group 1999) 298 (defining 'conquest' as '[a]n act of force by which, during a war, a belligerent occupies territory within an enemy country with the intention of extending its sovereignty over that territory').

⁴⁶ For a discussion on the legal arguments used to justify title to territory, see A Fitzmaurice, 'Discovery, Conquest, and Occupation of Territory' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of The History of International Law* (OUP 2012).

⁴⁷ Neil L Whitehead, 'Carib Ethnic Soldiering in Venezuela, the Guianas, and the Antilles, 1492 – 1820' (1990) 37 *Ethnohistory* 357.

⁴⁸ Berry, 'Legal Anomalies' (n 21).

territories of the Commonwealth Caribbean received the English common law by the end of the 17th century and include Anguilla, Antigua, the Bahamas, Barbados, British Virgin Islands, Jamaica, Montserrat, and Saint Kitts. The conquered territories are Dominica, Belize, Guyana, Grenada, Saint Lucia, Saint Vincent and Trinidad and Tobago. A settled colony is commonly described as one where there was no previous inhabitation by indigenous or 'civilised' peoples, or that had been inhabited by peoples from imperialist countries who had subsequently abandoned the territory or had been destroyed.⁴⁹

Such a definition ignores the existence of the indigenous people and their sovereignty. Conversely, the concept of a conquered territory refers to that which was first held by one imperialist power and which was subsequently transferred to another imperialist conquering power after battle. The total contempt with which conquerors viewed the indigenous peoples, whom they regarded as 'uncivilised' and their laws betray the biases inherent in the reception of law doctrine and in the doctrines of title to territory.⁵⁰ According to Antoine, English common law was introduced into the region by two methods:

(a) For colonies settled or occupied, the colonists carried with them only so much of the English law that was applicable to the necessities of their situation and the conditions of the infant colony.

(b) With respect to conquered territories, the colonists retained the existing legal system of the colony once it was not repugnant to natural justice. The existing legal system was retained until such time as English law could be introduced into the colony.⁵¹ In most cases, the date of reception is the date that the English Crown directed that English law would come into operation.

While it may seem clear-cut, the two methods of introducing English common law into the region resulted in complex issues. One of the enduring consequences with respect to the conquered territories is the phenomenon of hybrid or mixed legal systems that are present in Guyana and Saint Lucia. In fact, Antoine posits that because of the regions' peculiar historical development, all jurisdictions in the Commonwealth Caribbean could, at one time or another, have been described as mixed.⁵² A hybrid legal system contains a plurality of legal traditions that are mainly composed of common law and civil law. These type of systems are products of multiple instances of imposition of law due to colonisation, cessation, purchase or annexation by a

⁴⁹ St George Tucker (ed), *Blackstone's Commentaries 1803*, vol 1 (Kelly 1969).

⁵⁰ Antoine (n 38) 76.

⁵¹ *ibid* 77.

⁵² *ibid* 58.

state or power with a legal system that is different from that of the jurisdiction acquired.⁵³

In the conquered territories of Saint Lucia and Guyana, common law was imposed on civil law systems; these countries were once colonies of France and the Netherlands, respectively. Nevertheless, civil law endured and a hybrid legal system was created in those territories. For instance, the constitutional law of Saint Lucia is English in origin. On the other hand, the introduction of English contract law was qualified in that the term 'consideration' was not to be interpreted in like manner to that under the common law tradition but referred to the civilian concept of 'cause'.⁵⁴

One is further reminded of the region's colonial history when considering a noticeably absent component of the legal systems of the Commonwealth Caribbean – the legal traditions of the indigenous people of the Caribbean. Their laws and experiences were disregarded in the development of the legal systems and traditions of the region. Antoine asserts that laws that claim to be 'Amerindian', such as the Carib Reserve Act 1991 of Dominica, are false and were designed by the colonisers and their successors to compartmentalise the indigenous peoples and preserve their minority status.⁵⁵

V. CONCLUSION

The central argument of this Article has been that international law is a fundamental component of the rich history of the Caribbean. Moreover, that an appreciation of the role of international law in the history of the region is necessary in order to understand the international legal history that resulted in the reception of law doctrine being applied to the Commonwealth Caribbean. This is revealed though the different, sometimes contradictory, ways in which international law was used in its formative years to demarcate indigenous Caribbean people from Europeans, and also claims and assertions of rights between European powers.

In the period leading up to and including the rediscovery of the Caribbean, international actions, their effects and consequences, such as *Inter caetera* and the *Requerimiento*, were endorsed by the belief in the temporal authority of the pope over the world. English and French jurists sought to dismantle this belief

⁵³ *ibid* 59.

⁵⁴ See Antoine (n 38) 66; *Velox and Another v Helen Air Corporation & Others* (1997) 55 WIR 179 (CA).

⁵⁵ Antoine (n 38) 57; it is worthy to note section 149G of the Constitution of Guyana 1980 guarantees that 'Indigenous peoples shall have the right to the protection, preservation and promulgation of their language, cultural heritage and way of life'.

using predominantly Roman law extrapolations into international law in an effort to carve out a piece of the Caribbean for themselves. It is evident that the different uses of Roman law in international law were utilised for the combined purpose of disenfranchising the native people of the Caribbean. By embracing arguments that delegitimised the papal grants and the rights of the Iberian powers to explore the land west of the Azores, the English and French not only questioned Spain and Portugal's rights but also ultimately dismissed the original sovereignty and native title of the indigenous people. Furthermore, the adoption of Roman law into international law was also used to strip the indigenous people of the region of their rights, legal status and thereby their sovereignty. Mutual doubts and issues surrounding the rival powers lead to the development of the principles of discovery, conquest and occupation. These principles were used by England in order to bolster its claims to islands within the Caribbean. As a result of the territories being settled or conquered the doctrine of reception was then applied to import English law into the islands.

This analysis leads to the conclusion the legal systems of the Caribbean did not solely originate from the relevant colonial power that imposed upon the population the laws of the metropole. In fact, the reception of English law into legal systems of the Commonwealth Caribbean can be traced to the use of international law and the reception of Roman law into international law. It was the use of international law, coloured by the Roman law notion of *res nullius*, that directed the English to make the distinction between conquered and settled territories. The origin of the historical distinction between conquered and settled is critical for the reception of law not only because it dictated how English law would be introduced but more so to appreciate the historical origin of the legal systems of the Commonwealth Caribbean.

BIBLIOGRAPHY**BOOKS**

- Allot A.N, *The Limits of Law* (Butterworths 1980)
- Antoine R.M.B, *Commonwealth Caribbean Law and Legal Systems* (2nd edn, Routledge-Cavendish Oxford 2008)
- Armitage D, *The Ideological Origins of the British Empire* (CUP 2000)
- Berry D, 'Legal Anomalies, Indigenous Peoples and the New World' in Saunders B and Halijan D (eds), *Whither Multiculturalism? A Politics of Dissensus* (Leuven University Press 2003)
- — 'The Caribbean' in Fassbender B and Peters A (eds), *The Oxford Handbook of The History of International Law* (OUP 2012)
- Coates K, 'North American Indigenous People's Encounters' in Fassbender B and Peters A (eds), *The Oxford Handbook of The History of International Law* (OUP 2012)
- Craven M, 'Introduction: International Law and its Histories' in Craven M, Fitzmaurice M and Vogiatzi M (eds), *Time, History and International Law* (Martinus Nijhoff Publishers 2007)
- — 'Colonialism and Domination' in Fassbender B and Peters A (eds), *The Oxford Handbook of The History of International Law* (OUP 2012)
- Crawford J and Brownlie I, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012)
- de Vitoria F, 'De indis recenter inventis' in Urdanoz T (ed), *Obras de Francisco de Vitoria* (Biblioteca de Autores Christianos 1960)
- Fitzmaurice A, 'Discovery, Conquest, and Occupation of Territory' in Fassbender B and Peters A (eds), *The Oxford Handbook of The History of International Law* (OUP 2012)
- Garner B.A (ed), *Black's Law Dictionary* (7th edn, West Group 1999)
- Gill X, 'Spain and Portugal' in Lloyd HA, Burgess G and Hodson S (eds), *European Political Thought 1450-1700: Religion, Law and Philosophy* (Yale University Press 2007)
- Grewe W.G, *The Epochs of International Law* (de Gruyter 2000)
- — *Fontes Historiae Iuris Gentium: Sources Relating to the History of the Law of Nations*, vol 2 (de Gruyter 1988-1995)
- Grotius H, *The Freedom of the Seas* (OUP 1916)
- Hurbon L, 'Ideology in Caribbean History' in Wigman BW (ed), *General History of the Caribbean Volume VI: Methodology and Historiography of the Caribbean* (UNESCO Publishing 1999)
- MacMillan K, *Sovereignty and Possession in the English New World: Legal Foundations of Empire 1576 – 1640* (CUP 2006)
- Maingot A.P, Parry J.H and Sherlock P.M, *A Short History of the West Indies* (4th edn, MacMillan Education 1987)
- Mancke E, 'Empire and State' in Armitage D and Braddick MJ (eds), *The British Atlantic World 1500–1800* (2nd edn, Palgrave Macmillian 2009)
- McPherson B.H, *The Reception of English Law Abroad* (Supreme Court of Queensland Library 2007)

- Newton V, *Commonwealth Caribbean Legal Systems: A Study of Small Jurisdictions* (W.M.W Gaunt & Sons, Inc. 1989)
- Pagden A, 'Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians' in Armitage D (ed), *Theories of Empire, 1450 – 1800* (Ashgate Publishing Ltd 1998)
- — *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500 – c. 1800* (Yale University Press 1995)
- Phillips Sir F, *Commonwealth Caribbean Constitutional Law*, vol 2 (Cavendish Publishing 2002)
- Ramsay D, *The History of the American Revolution* (Philadelphia 1789)
- Williams E, *From Columbus to Castro: The History of the Caribbean 1492-1969* (Vintage Books 1984)
- Salmon K.H.M, 'France' in Lloyd H.A, Burgess G and Hodson S (eds), *European Political Thought 1450-1700: Religion, Law and Philosophy* (Yale University Press 2007)
- Sued-Badillo J, 'The Indigenous Societies at the Time of Conquest' in J Sued-Badillo (ed), *General History of the Caribbean Volume I: Autochthonous Societies* (UNESCO Publishing 1999)
- Tomlins C, 'The Legalities of English Colonizing: Discourse of European Intrusion upon the Americans, c. 1490-1830' in Dorsett S and Hunter I (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan 2010)
- Tuori K, 'The Reception of Ancient Legal Thought in Early Modern International Law' in Fassbender B and Peters A (eds), *The Oxford Handbook of The History of International Law* (OUP 2012)

JOURNAL ARTICLES

- Whitehead N.L, 'Carib Ethnic Soldiering in Venezuela, the Guianas, and the Antilles, 1492–1820' (1990) 37 *Ethnohistory* 357

CASES

- Anonymous* (1722) 2 P Wms 75, 24 ER 646
- United States v. Worrall*, 28 F. Cas. 774, 779 (1798)
- Rudling v Switch* (1821) 2 Hag Con 371
- Kaadesevaran v AG* [1970] AC 1111
- Velox and Another v HelenAir Corporation & Others* (1997) 55 WIR 179 (CA)

Law, Land and Identity: Property and Belonging in Colonial Kenya

Amelia Hopkins*

I. INTRODUCTION

This Article explores the relation between the British colonial presence in Kenya and the complex negotiations of cultural identity that accompanied it, with specific reference to the understanding of the law of property, and of dispossession and displacement. This is discussed in terms of hypotheses about the experience of the Kikuyu ethnic group, and the Mau Mau uprising. It is argued that the Mau Mau revolt was neither a race war, nor a heroic nationalist movement for independence.¹ It was, rather, a struggle for identity, spurred by the loss of land entailed by colonial legislation that underpinned 'lawfare'² and explicit and tacit violence. The unrelenting colonial pursuit of territoriality resulted in the creation of Kikuyu reserves, forced residence and labour on European farms, leaving the Kikuyu humiliated and as insecure tenants of their own traditional property, threatened by further loss of their cultural and personal identity. The rebellion that followed can be seen as an attempt to restore and reshape that identity, for which the relation between property, and individual and group identity, were crucial.

Reliance shall be placed on socio-legal research, human and critical geography, and psychoanalytic theory, to argue that an understanding of colonial dispossession and alienation requires the legal notion of land to be more deeply conceptualised. One's experience of land is far more complex and diversified than a traditional understanding of property law would propose; the latter imposing an analysis of land as a neutral asset of possession. In order to correctly understand the impact of the colonial encounter in Kenya, land needs to be thought of as space for self-realising action, in which identities are continually formed and reconstituted. Once land becomes theorised as

* Amelia Hopkins studied for an LL.B at SOAS, University of London.

¹ C Rosberg and JC Nottingham, *The Myth of 'Mau Mau': Nationalism in Kenya* (East African Publishing House 1966).

² Nicholas Blomley, 'Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid' (2003) 93(1) *Annals of the Association of American Geographers* 121, 128.

constitutive of social relations, we see that what was of concern for the indigenous Kenyans was not simply property and its relative rights, but the issue of belonging – the role of place in the constitution of social and cultural identities, and hence questions as to which identities should be reinforced, which should be considered out of place, and ‘how the space is to be oriented in the future’.³

This understanding of property and belonging suggests that land is implicated within broader networks, giving the law of property substance through the way in which it regulates people’s activities in space and the way this relates to their self-representation and identity. The laws regulating property have far-reaching effects, with the ability to reinforce, or damage, people’s sense of their identity and orientation within particular spaces or places. Colonial law established a foundation of ownership for colonial settlers, against which stands the indigenous sense of belonging, home and place ‘in its incommensurable difference’.⁴ Although much of the research relied upon is historical, the issues raised should not be viewed as belonging to an era of history that has now ended – indigenous subjectivity continues to ‘unsettle’⁵ the spaces of postcolonial areas such as Kenya.⁶

This Article will begin by discussing how one may understand property and the power to exclude as situated in the context of belonging and contextual continuity, enabling an exploration of the effects of property on identity. It will then move to discuss the colonial reconstruction of space in Kenya and the idea that property served as a tool of governance through the ways in which the British controlled space, and thus where people were allowed to go, and what they were allowed to do, with far reaching implications for individual and collective identity.

With specific reference to the Kikuyu ethnic group, this Article will discuss the contradictory feelings of belonging held by the settlers and the indigenous residents, with English property law forcefully disseminated to suppress the latter. This ‘legal’ dispossession is discussed in relation to identity and

³ Sarah Keenan, ‘Property as Governance: Time, Space and Belonging in Australia’s Northern Territory Intervention’ (2013) 76(3) *Modern Law Review* 464, 486.

⁴ Aileen Moreton-Robinson, ‘I Still Call Australia Home: Indigenous Belonging and Place in a White Postcolonising Society’ in Sarah Ahmed (ed), *Uprootings/Regroundings: Questions of Home and Migration* (Berg Publishing 2003) 23.

⁵ Sarah Keenan, ‘Subversive Property: Reshaping Malleable Spaces of Belonging’ (2010) 19(4) *Social Legal Studies* 423.

⁶ Interview with Dr Christian Turner, British High Commissioner in Kenya (London, 24 February 2014).

selfhood, with the settlers developing colonial law to ascertain their identities, to the detriment of the Kikuyu and their various constitutions of self-representation.

The Article will continue to argue that in order to produce a perceived hegemonic self, the Mau Mau insurgency transpired as a violent negotiation of collective identity, inextricably linked to property and the sense of belonging.

The Article will conclude that the Mau Mau uprising demonstrates that the law of property has a deeper dimension, as it plays a significant role in the processes by which we assign meanings to our own perceptions and behaviours. It will therefore suggest that the law must engage more deeply with the spatial to comprehend its centrality, requiring a re-articulation of law itself.

II. (RE)CONCEPTUALISING PROPERTY

This Section sets out the ideas and understandings of space that will be relied upon throughout the Article, discussing legal and philosophical work to explore the concept of property, and the power to exclude, moving to discuss its implications and connections with individual and collective identity. It will discuss the ways in which property may be understood and will draw on Hegelian and Lockean theory to situate the self in particular networks and relations of ownership, allowing us to reconceptualise property centred on belonging, which forms the basis of our analysis concerning the colonial encounter in Kenya and the Mau Mau uprising.

Despite exhaustive and extensive legal and philosophical work, 'property' remains difficult to define. Indeed, theorists such as Waldron have asserted that property is an essentially contested concept.⁷ There is, however, some consensus that, most significantly, property gives the subject the power to exclude. Thus, Merrill asserts that 'the right to exclude others is a necessary and sufficient condition of identifying the existence of property'.⁸ The works of Cohen have embraced the analysis of those such as Demsetz to argue that the essence of property is 'always the right to exclude others'.⁹ The key to property therefore lies in the *in rem* nature of the right to exclude – property is 'good' against the

⁷ Jeremy Waldron, *The Right to Private Property* (OUP 1990).

⁸ Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730, 731.

⁹ Adam Mossoff, 'The False Promise of the Right to Exclude' (2011) 8(3) *Econ Journal Watch* 255, 256.

world. Indeed, Penner defines property itself as ‘the right to determine the use or disposition of a ... thing ... in so far as that can be achieved or aided by others excluding themselves from it’.¹⁰ This intangible power to exclude has far reaching material effects, including the dispossession and the appropriation of indigenous Kenyan land that we will be discussing.

The understanding of property as a proper part or extension of the subject has a long history in Western philosophy, most prominently in the works of Locke and Hegel. Locke famously argued that every man has property in his own person, which he could develop by mixing his labour with uncultivated land.¹¹ Thus, property is seen to be an inherent part of the subject – one’s labour – and an extension of it – the land upon which one is labouring.¹² This unilateral act of appropriation does not require permission, so long as the appropriator leaves enough and as good for others. Hegelian theory centres on the contribution property makes to the development of the self – the subject only achieves selfhood through such a process of appropriation. Thus, ownership of property allows the individual to ‘supersede the mere subjectivity of personality’¹³ by translating his free will into the external sphere through so altering objects as to make them his own. This externalised will is then to be understood as property to be recognised by others, and the individual so recognised is to be regarded as a subject. Both Lockean and Hegelian theory remain influential, and although neither will be the focus here (and the former will be a point of criticism), much of this Article will be consistent with these understandings of property as an essential part of the subject.

Although some legal theorists have pointed out the socially constructed nature of property,¹⁴ it is still understood as something fixed and permanent. Property/land law has also tended to assume that space is static – a neutral asset of possession – and an inert backdrop to socio-political or legal action. But despite both the philosophical and legal separation of the subject and his/her property, the subject is in fact always connected to that which is outside it. An individual influences, and is influenced by, their relationship to a place or space. As detailed later, it is through the continuous relationship with certain meaningful spaces and objects, in relation to the self, that people are able to

¹⁰ James Penner, *The Idea of Property in Law* (OUP 1997) 152.

¹¹ John Locke, *The Second Treatise of Government* (Barnes & Noble Publishing 1690).

¹² Sarah Keenan, ‘Bringing the Outside(r) in: Law’s Appropriation of Subversive Identities’ (2013) 64(3) Northern Ireland Legal Quarterly 299, 300.

¹³ Georg Hegel, *Philosophy of Right* (George Bell & Sons 1896) 73.

¹⁴ Kevin Gray, ‘Property in Thin Air’ (1991) 50(2) Cambridge Law Journal 252.

conceive of themselves and relate to one another as full persons. Self-representation and intersubjectivity are therefore processes involving identity that are intimately connected with property – as Davies has argued, and as shown in the case of the Kikuyu, ‘having’ is inextricably linked to ‘being’.¹⁵ Behaviours or identities are guided spatially by that which ‘fits in’ or ‘is at home’ in a particular place.¹⁶ Property is not a dead or inert matter; it is informed by a relationship of belonging – a relationship that is in many ways the inverse of the power of exclusion. The power of belonging, as one might say, is the power of inclusion.

It therefore becomes necessary to look at one’s right to possess and/or exclude in the broader context of belonging and contextual continuity. Land is not simply property to be transferred in a single exchange. The activities in which it plays a role are constantly evolving, in ways that constitute social relations, and thus implicitly define who belongs where and how. According to this understanding of property and belonging, property is not defined by law alone, but through a whole variety of social norms of relations.

This enables us to see the far-reaching implications of laws regulating property and the significant power of property itself. Taken in this way, property law is not simply about property – it is situated in, and so should be conceived as a broader context of belonging, and hence a context of human norms, practices and actions. As Keenan has persuasively argued, legal appropriations are not merely a matter of bringing the colonial ‘outsiders’ in, but about reshaping what is to be understood as the outside.¹⁷

Through this discussion, it is apparent that the present conception of property law does not adequately engage with property’s deeper dimensions and so should be reconceptualised as constituting and influencing various networks of belonging, and thus identities. It is with this understanding, and this connection between identity and property, that the British appropriation of Kenyan land and its relation to the Mau Mau insurgency itself is discussed in the following Section.

¹⁵ Margaret Davies, ‘Queer Property, Queer Persons: Self-Ownership and Beyond’ (1999) 8(3) *Social & Legal Studies* 327.

¹⁶ Davina Cooper, *Governing out of Order: Space, Law and the Politics of Belonging* (Rivers Oram Press 1998).

¹⁷ Keenan, ‘Bringing the Outside(r) in’ (n 12).

III. 'I DO NOT SEEM TO TRUST OR LIKE THESE PINK PEOPLE'¹⁸

3.1 Parasites in Paradise¹⁹

This Section offers an account of the British acquisition of Kenya, and the ideological justifications that accompanied it, legitimising forceful appropriation and reconstruction of indigenous land. It will then discuss the legal processes of alienation and dispossession, arguing that property served as a tool of governance, and will finally explore the powerful effect of this on identity.

The British colonial encounter in Kenya was inspired by the early imperialist 'explorers' as the 'almost unspeakable richness'²⁰ of East Africa became visible to the European eye. The opinion began to emerge 'that one of the finest parts of the world's surface is lying waste under the shroud of malaria which surrounds it'.²¹ Explorers such as David Livingstone were represented as being the 'first' to see 'new' land; bringing about a conceptual 'emptying' of land by rewriting pre-existing space as unoccupied. This spatial (re)construction took place through a heroic narrative, in which the explorer used technical vocabulary and measurements to describe the land as vacant from his privileged position.

This can be seen as a strategy for converting space into an imaginable object that the European mind could possess. Indigenous space, dense with meanings and cultural relations, was conceptually remapped as vacant land, in 'an organised forgetting',²² that left the space desocialised and depoliticised. Indigenous individuals could thus no longer fit into this empty landscape without 'spoiling the picture', and so were depicted as if in a harmonious existence with the landscape and with nature itself – effectively as part of it.

This wholly natural space was thus suited to the introduction of European land-owning, and therefore, as persuasively argued by Ryan,²³ a whole social system that went with it. Accordingly, the Berlin Conference of 1885 purported to set out the law relating to the acquisition of authority over territory in Africa.

¹⁸ William Ochieng, *Eastern Kenya and Its Invaders* (East African Literature Bureau 1975) (quoting an indigenous Kenyan, Waiyaki Wa Hinga, describing his experience of the British invasion).

¹⁹ Ngugi Wa Thiong'o, *Detained: A Writer's Prison Diary* (Heinemann Publishers Ltd 1981) 29 (using this phrase to describe the presence of the British in Kenya).

²⁰ Verney Cameron, *Across Africa* (Harper & Brothers Publishers 1877) 179.

²¹ J Baker, 'December Issue' *The Times Newspaper* (1873) 1.

²² Blomley (n 2) 128.

²³ Simon Ryan, *The Cartographic Eye: How Explorers Saw Australia* (CUP 1996) 8.

This marked the creation of new spaces of property – the geographies of land ‘underwent a fundamental redrawing’.²⁴ Here, the European nations with an interest in Africa were given the right to partition any part of it, as long as they informed the other European nations of their intention to do so. Thus, Africa was divided into spheres of influence – to avoid confrontation, among other things, for the saving of African souls.²⁵

Such appropriation of indigenous land was not merely an act of accumulation and acquisition. It was supported and driven by ideological notions that certain territories and their residents require domination, ‘as well as forms of knowledge affiliated with that domination’.²⁶ Acquisition was justified using explicitly racial and cultural criteria to label certain states as ‘civilised’ and sovereign, and other states as ‘uncivilised’ and non-sovereign.²⁷ Non-European states such as Kenya were said to lack legal personality, and (reflecting the notion of ‘organised forgetting’ mentioned above) their land was termed *terra nullius* (land belonging to no one).²⁸ This portrayed its property as the relation between the colonial power and an inert space, diverting attention from the set of socialised relations between the colonisers and others.

The belief in the inherent inferiority of the indigenous owners legitimised military invasion and the forcible appropriation of the territory occupied by indigenous individuals. The law constructed boundaries between legitimate and illegitimate violence, and ‘socio-spatial zones where violence was tolerated’.²⁹ For colonial law, the racialised figure of the ‘savage’ played an essential role, legitimising violence by conceiving indigenous people as incapable of understanding legal rights and duties, including property law.³⁰ The ‘savages’ of Kenya – who in fact had a sophisticated and traditional understanding of the social use of land – were thus set conclusively apart from the West, their resistance deemed illegitimate. Conquest and exploitation were justified as part of a civilising mission, as the British had ‘a duty of civilising the inferior races’,³¹ kindly discharging the white man’s burden.

The justification behind such invasion lay in a profound belief in the rightness

²⁴ Blomley (n 2) 129.

²⁵ Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain’s Gulag in Kenya* (Henry Holt & Company 2005) 5.

²⁶ Edward Said, *Culture & Imperialism* (Vintage Books 1993) 8.

²⁷ Elkins (n 25) 5.

²⁸ Yash P Ghai, *Public Law and Political Change in Kenya: a Study of the Legal Framework of Government from Colonial Times to the Present* (OUP 1970).

²⁹ Blomley (n 2) 132.

³⁰ Elkins (n 25) 7.

³¹ Robert Klein, *Sovereign Equality Among States* (University of Toronto Press 1974) 51.

of this mission, which could not be understood outside of a Euro-centric historical tradition. The British were going to shed light on the 'dark continent' by helping the 'natives' on their journey to modernity and turning them into enlightened residents. With superior British management and firm paternalistic love, Kenyans could be transformed into civilised men and women.³²

3.2 Spatial Governance

The declaration of a protectorate over much of what is now Kenya on June 15, 1885 marked the beginning of official British rule and was followed by a systematic and 'legal' process of alienation and dispossession. Again, this was made possible by the claim that the Kenyans were not civilised enough to govern themselves – and quite without the intellect to administer property rights.³³ According to this understanding, the colonial power was not stealing land, but acting as self-appointed trustees for the 'hapless natives who had not yet reached a point on the evolutionary scale'³⁴ to make decisions on their own, as later confirmed in the White Paper of 1923.

In 1883 the British were advised by the Law Officers that the exercise of protection over a state did not carry with it the power to alienate the land contained therein; a major obstacle to the colonial authorities.³⁵ Their answer, however, came in the form of the Indian Land Acquisition Act of 1894, which was extended in 1896 to allow the acquisition of land for the railway, government buildings and for other 'public' purposes.³⁶ By 1897 the Commissioner could offer certificates of occupancy to settlers valid for ninety-nine years.³⁷ This, seemingly not enough, led the Law Officers to lay out a new set of principles in 1899 whereby the right to deal with any land was accrued to Her Majesty, by virtue of her right to the protectorate.³⁸ With 1899 being a creative year for the colonial legislators, the Law Officers decided that the Foreign Jurisdiction Act of 1890 empowered the Crown to control and dispose of waste and 'unoccupied land' in the protectorates with no settled forms of government.³⁹ Unsurprisingly, most land turned out to be unoccupied on this account. In 1901 the East African (Lands) Ordinance-in-Council was enacted, conferring on the Commissioner of the Protectorate (later named Governor) the

³² Elkins (n 25) 5.

³³ Blomley (n 2) 125.

³⁴ Elkins (n 25) 5.

³⁵ Ghai (n 28) 36.

³⁶ The Land Acquisition Act 1894, s 4(1).

³⁷ The British East Africa Lands Regulations Act 1897.

³⁸ Ghai (n 28) 39.

³⁹ *ibid* 40.

power to dispose of all public lands on such terms and conditions as he might think fit.⁴⁰ Following this, in 1902, the Crown Lands Ordinance was promulgated, which provided for outright sales of land and leases of ninety-nine years duration – the land was thus ‘absorbed for settlement as necessary’.⁴¹

The relationship between the control of a population and the preservation of sovereignty over territory is an established and well-publicised one. International law has repeatedly required proof of control over an identifiable area of space before regarding a state to be sovereign.⁴² Edward Said has emphasised that the relation between imperialism and land is an essential one, stating that ‘at some very basic level, imperialism means thinking about, settling on, and controlling land that you do not possess, that is distant, that is lived on and often involves untold misery for others’.⁴³

When the British invaded Kenya, they were not merely deciding to whom the land belonged to in law; rather they were determining whose space of belonging mattered and how that space was to be shaped in the future.⁴⁴ Through facilitating extensive settler occupancy with legislation such as the Crowns Land Ordinance, the British were establishing their identities as white settlers, giving priority to their sense of belonging through the alienation of the indigenous owners. By lengthening occupancy periods and securing leases of land, they were strengthening British ownership and ensuring its permanent nature. Fanon and Ahmed emphasise that doing things depends not so much on one’s inherent capacity, but on the ways in which the world is available as a space for action – the way bodies are oriented affects what they are able to do.⁴⁵ Those such as Foucault have demonstrated that governance works not only through the channel of direct state control, but a more subtle control of identities through the medium of permissible behaviour and thoughts.⁴⁶ Actions necessarily take place within a spatial context: as Waldron contends, ‘Everything that is done has to be done somewhere’.⁴⁷ Kenyans were not free to perform an action unless there was somewhere they were free to perform it. Subjects and behaviour that did not fit correctly into the spaces constructed by colonialism were to be excluded or adjusted, through the toleration or refusal of

⁴⁰ *ibid.*

⁴¹ Geoffrey Snell, *Nandi Customary Law* (Macmillan & Company 1954) 42.

⁴² Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007).

⁴³ Said (n 26) 7.

⁴⁴ Keenan, ‘Bringing the Outside(r) in’ (n 12).

⁴⁵ Frantz Fanon, *The Wretched of the Earth* (Penguin Books 1967).

⁴⁶ Victor Tadros, ‘Between Governance and Discipline: The Law and Michel Foucault’ (1998) 18(1) *Oxford Journal of Legal Studies* 75.

⁴⁷ Waldron (n 7) 296.

particular actions and ways of being. This shaped specific social norms that encouraged individuals to govern themselves in a desired way, making space a powerful tool in attempts to control the population. Harris acknowledges the importance of land as a disciplinary power of the British as 'it defined where people could and could not go, as well as their rights to land use'.⁴⁸ Indigenous land was alienated for private settlement and to build commercial railways, which in turn would encourage the arrival of more settlers. Any land alienated, whether for construction or occupation, became Crown land that was subject to the control of Her Majesty. Indigenous owners were excluded from vast areas of their own land and lost control of its use and settlement – 'the land system itself became powerfully regulative'.⁴⁹

The British were able to use the land system as a tool of governance due to the network of relationships it was a part of – property is connected to how one is able control and use space, which itself is related to cultural identity. These connections were particularly salient for the Kikuyu. The dispossession of their land and lack of resources affected where they were oriented in space, which related to what they were able to do, which in turn affected who they understood themselves to be, that is, their self-representation. As Elkins demonstrates, to be a male or female, to progress from childhood to adulthood, a Kikuyu needed land and the freedom to do certain things with it.⁵⁰ A Kikuyu man needed land to gather the resources to pay bridewealth for a wife who would give him children. This property, and family, would entitle him to certain privileges within the system of patriarchy; without it he would continue to be seen as a boy rather than as a man, a father and the head of a family.⁵¹ A female needed land to labour on and cultivate, to feed and sustain her family; without such she too was not seen as an adult. Much in line with Hegelian theory, '[a] Kikuyu could not be a Kikuyu without land'.⁵² Their property was to them inalienable, captured in the proverb '*ilmeishooroyu Emurua oolayioni*', which means that sons and land cannot be given out.⁵³ Some of the importance of these connections is illustrated by the reply Sam Thebere, a former guerrilla, gave to the question, 'Why did you join the Mau Mau?' He answered with the

⁴⁸ Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (University of British Columbia Press 1997) 83.

⁴⁹ *ibid.*

⁵⁰ Elkins (n 25) 13.

⁵¹ *ibid.* 14.

⁵² *ibid.*

⁵³ John G Galaty, 'The Land is Yours: Social and Economic Factors in the Privatization, Sub-Division and Sale of Masaai Ranches' (1992) 30 *Nomadic Peoples* 26.

twofold reply, 'to regain stolen lands and to become an adult'.⁵⁴ Thus, control of the land to which he belonged, and the possibility of Kikuyu adulthood, were naturally linked in his mind.

Thus, it is evidenced that the British encounter in Kenya and the colonial reconstruction of land enabled a conceptual 'emptying' of space, which was justified by the notion that the indigenous owners were incapable of governing their own property. Property and the land system itself were employed as tools of governance, as the dispossession and alienation of indigenous land meant that the British were able to influence individual and collective behaviour through land allocation and use. Drawing on our understanding of property and belonging, we will further see that the 'legal' dispossession of indigenous land would have profound effects, beyond the loss of relative rights – a partial loss of identity.

IV. 'THEY ARE BUILDING THEIR HOUSES WITH STONES, AND I FEAR THEY WILL STAY HERE LONGER THAN WE WISH'⁵⁵

4.1 Settling In

With the dispossession of indigenous lands and British settlement, Kenya emerged as the 'White Man's Country'. This Section discusses the increased settler occupancy and security, the very foundation of which was the alienation of the Kenyan citizens. It considers the effects of this more specifically on the Kikuyu ethnic group, arguing that Lockean theory and English property law were disseminated, disrupting previous patterns of ownership and possession formed through customary law – an integral component to Kikuyu identity.

The Section will detail the establishment of Kikuyu reserves, arguing that such control of space blurred familiar parameters between communities previously invested with meaning of distance and difference, resulting in feelings of displacement and the formation of an 'us' and 'them' within Kikuyu society.

Various agricultural policies will be examined, describing the subordination of Kikuyu land use which forced the Kikuyu to accept their place as squatters on European farms – their movement further controlled and restricted. The Section aims to illustrate the combination of various legal measures concerning

⁵⁴ John Lonsdale, 'The Moral Economy of Mau Mau: Wealth, Poverty & Civic Virtue in Kikuyu Political Thought' in Bruce Berman and John Lonsdale, *Unhappy Valley: Conflict in Kenya & Africa*, vol 2 (East African Educational Publishers 1992) 315.

⁵⁵ Moreton-Robinson (n 4).

property and land use and their powerful effects on collective and individual identity, which we will later discuss as the foundation of the Mau Mau revolt.

Following British acquisition settlers were soon to arrive, building themselves a small piece of England in a foreign land. By 1905, nearly 3,000 settlers had landed, acquiring estates of enormous size; with aristocrats such as Lord Delamere receiving title to approximately 100,000 acres and acquiring another 60,000 a few years later.⁵⁶ Many settlers such as Michael Blundell were quick to become members of the Kenya Legislative Council, having a direct input to the colony's laws and regulations.⁵⁷ The Council hastily assured that there would be ample land and labour to support settler production, both of which would of course come from the Kenyans. The settlers successfully lobbied for greater security in their new land, and their leases in the Highlands were extended from 99 to 999 years.⁵⁸

The foundation of the apparent entitlement to Kenyan space and territory owed itself to a belief predicated on a profound racial superiority.⁵⁹ This was aptly demonstrated by a settler in Kenya, Margery Perham, who wrote, 'I think I now understand the immigrant community. To own a bit of this virgin country; to make it a house; to feel the sense of singularity, of enhanced personality that comes from having white skin among dark millions'.⁶⁰ The settlers perceived themselves to be acquiring both land and belonging, against the background of the displaced indigenous, who were losing both.

Although undoubtedly many ethnic groups were affected by the colonial policies forcibly opening up their land for settlement, there is no better illustration than the Kikuyu, who lost over ninety-four square miles of their rich highlands (later to become known as the White Highlands) to the settlers.⁶¹ Contrary to the common misconception that 'African communities only began to come to grips with the concept of limited land during the colonial period',⁶² the Kikuyu, as we shall see, had a complex traditional system of norms and customs governing the use of land. The Kikuyu had previously relied upon

⁵⁶ Elkins (n 25) 10.

⁵⁷ *ibid* 12.

⁵⁸ *ibid* 11.

⁵⁹ See Cheryl Harris, 'Whiteness as Property' (1993) 106(8) *Harvard Law Review* 1707 (raising the question of whether one's skin colour is itself property).

⁶⁰ Margery Perham, *East Africa Journey: Kenya and Tanganyika, 1929-30* (Faber & Faber 1976) 190.

⁶¹ Elkins (n 25) 12.

⁶² Elizabeth Colson, 'The Impact of the Colonial Period on the Definition of Land Rights' in Victor Turner (ed) *Colonialism in Africa 1870-1960, Profiles of Change: African Society and Colonial Rule* (CUP 1971) 193.

negotiations of territorial expansion to ease population pressures or to soothe internal civil struggles. However, with the coming of colonial rule, they found themselves 'hemmed in on all sides'.⁶³

The very foundation of the settler community was the alienation of Kenyan land – settlers were determined to make it their home, albeit with the concession that 'there will possibly be somewhat of a crush later'.⁶⁴ After much lobbying, settlers obtained further assurances about the racially exclusive, and more permanent, nature of white settlement in the Highlands.⁶⁵ The Crown Lands Ordinance 1915 and the Kenya (Annexation) Order in Council 1920 iterated that no 'native' rights were reserved, and the Kenya Colony Order in Council 1921 reserved the Kikuyu's land for the Crown. The Report of the East Africa Commission 1925 thus stated that 'the legal position appears to be that no individual native and no native tribe as a whole has any right to land in the Colony which can be recognised by the courts'.⁶⁶ Thus, any legal rights or title the Kikuyu held in their land, whether communal or individual, had disappeared in law, and were superseded by the apparent rights of the Crown. The disinheritance of the Kikuyu from their land was swiftly completed, confirmed in the case of *Wainaina*⁶⁷ in which it was held that all rights to their land had been stripped from the indigenous owners, and those rights were vested in the Crown, leaving the Kenyans tenants of what they justifiably understood as their own property and exiles in their own country.

Conceiving of property as a relationship of belonging, capable of being described, formalised and organised by law, but *not* ultimately constituted by it, encourages a clearer understanding of property law as highly culture-specific. English property law was widely disseminated, with few questions asked about the previous pattern of relationships this system had disturbed.⁶⁸ It was declared that such relationships did not give rise to legal title, as the British were both unable and unwilling to translate indigenous patterns to their English counterparts. As colonisation spread British law and culture across the Empire,⁶⁹ such understanding of property spread on a supposedly Lockean basis, and the Kikuyu were not recognised as proper self-owning subjects, however much they seemed to mingle their labour with the local soil.

⁶³ Elkins (n 25) 14.

⁶⁴ Ainsworth to Wright (DC/MKS/10A/1/2, 12 July 1905).

⁶⁵ Elkins (n 25) 12.

⁶⁶ Report of the East Africa Commission (CAB/24/173, 1925) 23.

⁶⁷ *Wainaina v Murito* [1922] 9 KLR 102.

⁶⁸ Alison Clarke and Paul Kohler, *Property Law: Commentary and Materials* (CUP 2005) 138.

⁶⁹ Eugene Cotran, 'The Place and Future of Customary Law in East Africa' (1996) 5(19) Commonwealth Law Series 72.

Simultaneously, the Kikuyu did not regard the British claim to their land as justified by the British forcefully taking control and implementing their own kind of agriculture.

Varied networks of belonging and contradictory conceptions of property existed in both hybridity and ambiguity within the same space, but with the European understanding being enforced, and where necessary with violence, through the law. As the legal system was the root of settler land title, the law overwhelmingly protected non-indigenous property.⁷⁰ The Government Land Act 1915 further dispossessed Kikuyu inhabitants of their land, whilst introducing the English law of conveyancing by registering deeds to European settlers, requiring title to be traced back to the government grant. The Torrens system of title was subsequently introduced by the Registration of Title Act 1919, giving settlers an indefeasible title to their registered property.⁷¹ Such measures established the rights of white settlers, to the exclusion and detriment of the Kikuyu inhabitants.

The Kikuyu however, asserted that they had customary rights of ownership for their families and descendants; legal rights they termed *githaka*. The holding of *githaka* rights bestowed full control and tenure security to the owner, which could not normally be removed.⁷² The Kikuyu law determined that original use and longevity of residence in an area provided a *ngundu* (land claim), which had been passed down through generations, with different sub-branches and estates. Many of those alienated by colonial law from their land nonetheless believed they had lineage rights to it, which gave them absolute ownership, with rights of cultivation and management held in perpetuity.⁷³ The British were happy to ignore 'any rights existing under customary law',⁷⁴ but were forced to acknowledge some evidence of proprietary interests, deciding that these were rights of occupancy rather than ownership.⁷⁵ Thus former *githaka* holders were informed they were instead '*ahoi* (tenants) and would be dispossessed if they did not obey the settlement rules and the instructions of the Settlement Officer'.⁷⁶

⁷⁰ Keenan, 'Property as Governance' (n 3).

⁷¹ Ghai (n 28).

⁷² Peter Dewees, *Social and Economic Incentives for Smallholder Tree Growing: A Case Study of the Murang'a District, Kenya* (Food and Agriculture Organisation of the United Nations 1993).

⁷³ *ibid.*

⁷⁴ Patricia Kameri-Mbote, 'Righting Wrongs: Confronting Dispossession in Post-colonial Contexts' (2009) 1 *East African Law Review* 103, 109.

⁷⁵ Sara Berry, *No Condition is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (University of Wisconsin Press 1993) 113.

⁷⁶ David Throup, *Economic & Social Origins of Mau Mau: Eastern African Studies* (Ohio University Press 1987) 126.

As Singh offers, customary law itself is 'intrinsic' to the identity of an individual, providing rules and enforcement procedures, as well as punishment for breaches or violations.⁷⁷ Property is reliant upon both formal and informal authoritative practices, which give recognition to particular relations of belonging, while ignoring or rejecting others. In systematically upholding English law over Kikuyu law and custom, the British were producing a space in which the Kikuyu identities, practices and ways of life 'may not be held up in the future'.⁷⁸ As Pottage demonstrates, by privileging abstracted legal rules over local networks that had been developed and modified over many centuries, the British were removing titles 'from networks of organic or practical memory' and depositing them 'in an administrative archive, accessible and decipherable only to the index of the archive'.⁷⁹ Pottage's research thus shows that when the organic memory belongs to one set of laws (the Kikuyu) and the index of the archive to another (the British), then that removal of the title is likely to have devastating effects.

The Kikuyu continued to assert an ontological relation to their land, claiming that their land was constitutive of their being, and their property was thus inalienable. The 'legal' dispossession of the Kikuyu's land was thus not simply practically problematic, but a threat to their selfhood. The Kikuyu's knowledge and practices were 'lost in legal space', owed to the way in which the law 'divides, parcels, registers and bounds peoples and places'.⁸⁰ What was at stake was not simply a positional good; the Kikuyu were struggling to belong in their own land.

4.2 Continuing Lawfare

The white settlers were developing colonial law to reflect their control of space and place and to ascertain and strengthen their own identities. The British created a legal system that both established and reinforced particular practices and actions within their colonial space, working as a framework in which their sense of belonging was constituted. The development of the legislature mirrored the development of their identities as white Kenyans; their sense of belonging paralleled the disenfranchisement of the Kikuyu and the ongoing destruction of their alternative sense of identity and belonging. A new order of belonging was being established, as the settlers were constructing their own

⁷⁷ Kumar Singh (ed), *Tribal Ethnography, Customary Law, and Change* (Concept Publishing Company 1993) 7.

⁷⁸ Keenan, 'Property as Governance' (n 3).

⁷⁹ Alain Pottage, 'The Measure of Land' (1994) 57(3) *Modern Law Review* 361.

⁸⁰ John Borrows, 'Living between Water and Rocks: First Nations, Environmental Planning and Democracy' (1997) 47(4) *The University of Toronto Law Journal* 417, 422.

sense of self by building their houses on Kikuyu land, in effect attempting to bury indigenous rights and entitlements.

But, alternatives were provided. The Native Lands Trust Ordinance 1930 established Kenyan reserves, which were defined rural areas – eventually with official boundaries⁸¹ – similar to the homelands in South Africa or the Native American Reserves in the United States. The Kikuyu thus had their own reserves in the Central Province districts of Kiambu, Fort Hall and Nyeri. Ethnic groups in the colony were expected to live separately, with the Maasai residing in the Southern Province and the Luo in the Nyanza Province.

The establishment of the reserves was a form of disciplinary governance, underlining the fact that ‘power and space/place are deeply intertwined’.⁸² The British co-ordination of society altered the meanings of space and place, also conveying the message that the Kikuyus’ land outside of the reserves was not an indigenous place of belonging anymore; rather it was that of the British. Areas such as Murang’a, a place where the Kikuyu had previously felt free to call their own, were not simply physical places where they were now unable to go, but locations whose significance had been destroyed. Colonial law ignored the spatial parameters by which the Kikuyu assigned significance, so that the natural process by which such practices evolved, and are modified and reconstituted, were disrupted.

Once established, the reserves were ‘gazetted’, thereby giving them ‘some sort of legal status’;⁸³ but this did not restore any legal rights to Kikuyus in their land. This created a deep sense of insecurity. Familiarity and predictability are important components to a person’s life – there is a desire to live in a place that is stable; where social interaction involves what Mead refers to as a ‘conversation of gestures’; gestures that are mutually understood.⁸⁴ In addition to their dispossession, the Kikuyu desire for stability and order was so radically disregarded that their anxiety and frustration increased exponentially over time.

Some Kikuyu were able, through allegiances with the colonial government, to retain their land and even appropriate that of others. This had further social

⁸¹ ‘Government Notice No. 100’ *Kenya Gazette* (1934).

⁸² Sarah Radcliffe, ‘Popular and State Discourses of Power’ in Doreen Massey and John Allen (eds), *Human Geography Today* (Polity Press 1999) 225.

⁸³ Martin Kilson, ‘Land and the Kikuyu: A Study of the Relationship between Land and Kikuyu Political Movements’ (1955) 40(2) *The Journal of Negro History* 103, 123.

⁸⁴ Donald Bushman, ‘A Conversation of Gestures: George Herbert Mead’s Pragmatic Theory of Language’ (1998) 16(2) *Rhetoric Review* 253.

consequences in the words of General George Crook, 'Nothing breaks them up like turning their own people against them',⁸⁵ and the privilege allocated to certain members within their community became a divisive and damaging occurrence. Inside the reserves many were fostering a more certain feeling about their own identity in relation to those who remained outside of the reserve that they believed had betrayed them.

British ownership provided both the means and landscape through which particular behaviour could occur, and it is the response to this behaviour – the indigenous reassertion of rights – that produced a perceived hegemonic collective self. Thus, an 'us' formed – those who recognised the grievance and shared responsibility alongside the collective frustration felt towards dispossession. In perceived opposition was the 'them' who were felt to have betrayed 'us' for the privilege of retaining or acquiring property in accord with colonial law and practice and who were no longer seen as part of the collective.

With insufficient land to live on, many Kikuyu migrated to find shelter in the Mau Forest, which was straddled by both the Maasai and the Ogiek who were struggling to establish ownership following their own dispossession by the Anglo-Maasai treaties of 1904 and 1911. The area assigned to the Maasai was not freely open to the different and distant understanding of the Kikuyu, and vice versa. Property and land clearly become invested with a further meaning, emphasising the distance and difference between what is close and what is far away.

Moreover, the idea that many communities 'wish to be open to all comers ... where anyone can automatically belong',⁸⁶ was not necessarily true of pre-colonial Kenyan communities. There was undoubtedly the appearance of equilibrium amongst Kenyan communities, with much focus on the social order and cohesion. However, this 'mutual good-will characteristic'⁸⁷ has been over-emphasised, an idealisation perhaps due to sympathetic postcolonial discourse, but rather misguided in its implications, as it undermines the complexity of the individual in his/her social and cultural context, it is unlikely that there was such a 'Garden of Eden from which colonial intervention caused Africa to fall'.⁸⁸ Thus, despite the promotion of the idea that 'membership was fluid',⁸⁹ it

⁸⁵ Douglas Porch, *Imperial Wars: From the Seven Years War to the First World War* (OUP 2005) 108.

⁸⁶ Davina Cooper, 'Opening Up Ownership: Community Belonging, Belongings, and the Productive Life of Property' (2007) 32(3) *Law & Social Inquiry* 625, 654.

⁸⁷ Snell (n 41) 12.

⁸⁸ Sally F Moore, 'Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts' (1992) 26 *Law & Society Review* 11, 16.

in fact remains true that Kikuyu, Maasai and Ogiek spaces were distinct and contested, meaning their sense of self was constructed in relation to their individual areas and their position in relation to others.

When people belong somewhere, they are usually out of place somewhere else, and how one imagines these spaces and boundaries significantly influences how we construct perceptions of self and other. As Susan Smith has argued, people define themselves and label others partly as a means to an end – ‘an end which is often about access to, and control over, symbolic and territorial resources’.⁹⁰ Through our everyday lives we constantly negotiate space, positioning ourselves socially, politically and physically in relation to others. Forced into a new space, the Kikuyu constructed an introverted sense of place, where imaginings of there (the Mau Forest) and here (Southern Kiambu) created a sense of self.

Here, one may draw on Melanie Klein’s psychoanalytic object-relations theory. In this account the self is socially positioned, and there are internalised representations of others as good or bad objects.⁹¹ The self seeks to identify itself with the good objects and to dissociate itself from the bad and keep them at a distance.⁹² The process of locating badness at a distance from the self, in ‘bad’ others, is described as projection. This is the process by which the kind of good ‘us’ opposed to a bad ‘them’ was created among the Kikuyu in the reserves, by contrast with the ‘loyalists’ who had retained their property. The effect of such identification and projection is to create a sense of parameter – the boundaries of the self may be defined in terms of good and bad objects, and hence good and bad groups, to whom the self is felt to be related. This, it may be argued, can be extended to an understanding of property. Thus, the creation of difference is not just an expression of anxiety about people who we see as ‘not like us’; it is also a manifestation of negative feelings about spaces that are ‘not like our space’.

To avoid tension and encroachment onto other ethnic groups, many families dispersed to distant areas in Nairobi to seek help from even more distant relatives. Such separation disturbed how the Kikuyu imagined their community – a group of people (an ‘us’) bound together by ‘some kind of belief stemming from particular historical and geographical circumstances in their

⁸⁹ Mbugua Wa-Mungai (ed), *(Re)Membering Kenya: Vol.1 Identity, Culture and Freedom* (Twaweza Publications 2010) 38.

⁹⁰ Susan Smith, ‘The Cultural Politics of Difference’ in Doreen Massey and John Allen (eds), *Human Geography Today* (Polity Press 1999) 133.

⁹¹ Jay Greenberg, *Object Relations in Psychoanalytic Theory* (Harvard University Press 1983).

⁹² *ibid.*

own solidarity'.⁹³ In the Report of the Kenya Land Commission, Elders had described the dispersion of their group as 'causing great loss to the Kikuyu community'.⁹⁴ The cultural certainties disturbed through the blurring of familiar lines between 'here' and 'there' resulted in a feeling of displacement. Whether the collective connection to land is regarded in a structuralised sense or indeed an essential connection between space and culture, it is nonetheless partially severed.

4.3 The Story of the Squatter

As British lifestyle and agriculture developed, the legal system catered to the different modifications and progression of British identity and the building of another 'us' – the white collective. In Central Province, the Kikuyu, who had retained enough land, adapted by increasing their maize production and selling it in the developing internal market.⁹⁵ The British were not slow to understand the significance of this threat, and they sought to limit Kenyan agricultural production. Legislation such as the Outlying Districts Ordinance 1902 (now the Outlying Districts Act) and the Special Districts Administration Ordinance 1934 (today the Special Districts Administration Act) meant that Kenyans were prevented from growing the most profitable crops such as coffee, tea and sisal. Each of these legislative steps was not simply putting down words, but strengthening the British variants of identity, as farmers, as employers and as superior white Kenyans. They were building on their collective 'us', expanding the law to enable them to 'fit in', or 'be at home' in Kenya, reinforcing their belonging.

These measures subordinated Kikuyu land use and agriculture, while the British were left with more land than they possibly could farm. Consequently, British and European employers relied upon coercion by the colonial government to recruit Kenyan labour from the Kikuyu population, then living on the margins of what had been their own land. The government's guarantee of 'cheap and bountiful kikuyu labour'⁹⁶ was based on a complex set of laws aimed at driving Kikuyu to European settler farms, described as 'working for their own extinction, since every hectare of trees they plant is a hectare of their birth right lost forever'.⁹⁷

⁹³ Gillian Rose, 'Performing Space', in Doreen Massey and John Allen (eds), *Human Geography Today* (Polity Press 1999) 250.

⁹⁴ Report of the Kenya Land Commission 126.

⁹⁵ Elkins (n 25).

⁹⁶ *ibid* 15.

⁹⁷ Towett Kimaiyo, *Ogiek Land Cases and Historical Injustices 1902-2004* (Kenyatta University Publishing 2004) 12.

To force the Kikuyu to accept their place on the European farms, the government promulgated The Hut Tax Regulations of 1901 and the Hut and Poll Tax Ordinance of 1910, together amounting to the payment of nearly twenty-five shillings, the equivalent of almost two months wages at the going local rate.⁹⁸ This led to the practice of squatting, a form of sharecropping that provided the Kikuyu access to alternative fertile land outside of their reserves. Thousands of Kikuyu left for the White Highlands with their families to settle on European farms, where in return for labour they were able to graze their livestock and cultivate a plot of land. In the Kiambu district, as early as 1911, seventy-five farms were reported to contain between 15,000-20,000 Kenyans.⁹⁹ This caused the settlers to fear that the squatters would start to demand tenant rights, since 'land within that area should be reserved for the support and maintenance of a white population'.¹⁰⁰ But they were reluctant to end squatting, as their economy had come to depend on it. To soothe such concerns, the government introduced the first of several Resident Native Labourers' Ordinances in 1918 – which drastically reduced squatter wealth by limiting the amount of cattle they could own and the size of their tenant farms on European land, whilst increasing the number of days they were required to work for their settler landlords. The Ordinance of 1937 transferred virtually all responsibility for the squatters to settler-controlled district councils, imposing new limits on cultivation and restricting each squatter family to only one or two acres. The power granted to the settlers meant that they were in fact able to forcefully remove the indigenous even from their positions of labourers, with more than 100,000 squatters being repatriated between 1946 and 1952.¹⁰¹

The movement of the indigenous workers was rigidly controlled. The Registration of Natives Ordinance (1919) required all Kenyan men leaving reserves to carry a *kipande* (passbook) with name, fingerprint, ethnic group, past employment history and current employer's signature.¹⁰² Individuals had to carry these cards at all times, and failure to answer the question '*Wapi kitambulisho?*' (Where is your ID?) in the affirmative resulted in a fine, imprisonment or both. Unsurprisingly this became one of the most detested symbols of British colonial power,¹⁰³ felt as another tactic to separate and

⁹⁸ Elkins (n 25) 16.

⁹⁹ David Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of the Empire* (Weidenfeld & Nicolson 2005) 78.

¹⁰⁰ Alice Kurgat, 'Change and Continuity: Land and Identity Construction in Eldoret West District, Kenya' (Land Policies in East Africa: Technological Innovation, Administration and Patrimonial Stakes International Conference, Kampala, 2-4 November 2011) 4.

¹⁰¹ Anderson (n 99) 30-31.

¹⁰² Mbugua Wa-Mungai (ed), *(Re)Membering Kenya: Vol. 1 Identity, Culture and Freedom* (Twaweza Publications 2010).

¹⁰³ Although this was, controversially, reintroduced in 1980 with the Registration of Persons Act.

rigidify ethnic boundaries and groups, 'so as to rule and oppress them'.¹⁰⁴ As one recalls 'I was no longer a shepherd but one of the flock, going to work on the white man's farm with my *mbugi* (goats bell) around my neck'.¹⁰⁵

This discussion highlights the various ways in which land law was implemented to control Kikuyu behaviour, and the devastating effects of this on collective and individual identity. As we will see, such legislative violence regulating the Kikuyu's use of space, and thus understanding of self, served as the catalyst for reactive violence, and the Mau Mau uprising.

V. 'WE WANT OUR LAND, THE EUROPEANS HAVE TAKEN TOO MUCH'¹⁰⁶

5.1 The Dawn of the Rebellion

This Section argues that the aforementioned 'lawfare'¹⁰⁷ triggered members of the Kikuyu community to radicalise their traditional oathing ritual, developing a collective identity in response to their dispossession and alienation. It will discuss the formation of the Mau Mau, and the increasingly violent acts committed against their dispossessors in their struggle to regain their property and the right to belong in their own land.

The combination of *kipande* laws signifying British control of indigenous use of space, together with the re-introduction of the Kikuyu to the spaces that had once been those in which – as they had not forgotten – they had truly belonged, produced a double insult to Kikuyu identity. The Kikuyu were no longer those at home, but those displaced, and no longer shepherds but goats. They were in their own property as visitors, on their own land as tenants, and in their own fields as employees. They had little alternative but to find new and perhaps more extreme ways to fight off this destruction of their way of life. Grappling with their sense of selfhood, place and all that their space embedded, the Kikuyu sought to redress their grievances against the Europeans and those they saw as African agents of colonialism. Humiliated and dispossessed but living – albeit like 'goats'¹⁰⁸ – where they felt themselves to belong, the Kikuyu began to form a new identity as insurgents, fighting for their land.

¹⁰⁴ Wa-Mungai (n 102) 37.

¹⁰⁵ Elkins (n 25) 16.

¹⁰⁶ Dagoretti Political Record Book, Report of the Land Committee, vol 1 (1905) (quoting a Kikuyu Elder expressing his grief).

¹⁰⁷ Blomley (n 2).

¹⁰⁸ Elkins (n 25) 16.

Rebellion grew slowly but fervently, but early attempts to be heard were quashed through the 'catch-all piece of colonial legislation',¹⁰⁹ the Removal of Natives Ordinance of 1909, which gave the authority to remove of citizens without recourse to a proper trial.¹¹⁰ However, in 1943 a group of several thousand Kikuyu squatters, who had been forced to resettle in an area called Olenguruone, were threatened with yet another eviction from the government.¹¹¹ This triggered the residents to radicalise the traditional Kikuyu legal practice of 'oathing'. Typically, oathing was used to forge solidarity during times of war or internal crises – morally binding the men together in the face of challenge.¹¹² This was modified into an effort to develop a collective identity and fight the injustices of their dispossession. By 1950 mass oathing had spread rapidly, detected by the African Affairs Department as an 'illegal oath ... to evict all Europeans from the country'.¹¹³ At this point, 1,250,000 Kikuyu had ownership of just 2,000 square miles, while 30,000 British settlers owned 12,000 square miles.¹¹⁴

Although the Mau Mau are often depicted as a unified force, the reality was that of diversification, splitting and discontent within the movement. Young militants began splitting from the moderate political elite (Kenya African Union), disappointed in their efforts to attain significant reforms or redress their grievances. The militants' demand for *ithaka na wiyathi* (land and freedom) successfully connected the dissatisfied rural and urban Kikuyu.

Remaining squatters in the White Highlands found hope in the fight to reclaim their land, as well as the poor in Nairobi and those left in the Kikuyu reserves. As evictions from Olenguruone began, the oath reached the Kikuyu of Nairobi and central Kenya. Here it was taken up and promoted by the leaders of the urban militants, a group who would later become known as the *Muhimu* (important) and would form Mau Mau's central organising committee.¹¹⁵

The oathing ceremony required the participant to pass through an arch of banana leaves and strip naked. The oath administrator would then ask, 'Do you agree to become a Kikuyu, a full Kikuyu, free from blemish?' which, if answered in the affirmative, would be followed by the ingestion of goat meat.

¹⁰⁹ Anderson (n 99) 35.

¹¹⁰ *ibid* 16 (quoting the Removal of Natives Ordinance of 1909 no. 17 of 100).

¹¹¹ *ibid* 43.

¹¹² Elkins (n 25) 54.

¹¹³ *ibid*.

¹¹⁴ Anderson (n 99) 10.

¹¹⁵ Gretha Kershaw, 'Mau Mau from Below: Fieldwork and Experience, 1955-57 and 1962' (1991) 25(2) *Canadian Journal of African Studies* 274.

The administrator would then ask if the candidate wanted to know the secret of the Kikuyu people and went on to tell the history of the Kikuyu and their goals of land and freedom. They were then asked to vow 'If I reveal this oath to any European may this oath kill me', the breaking of such would invoke the wrath of Kikuyu creator god Ngai.¹¹⁶ As the movement progressed, Mau Mau leadership devised seven different oaths, each level representing greater commitment to the movement. After the fourth oath, the participant was bound together with fellow initiates using goat intestine, then cut on his arms and compelled to lick blood from the wounds of his fellow oath takers.

This ceremony can be seen as a negotiation of identity; a symbolic stripping of an imposed identity and a need to reaffirm whom they understood themselves to be amidst 'a song of self and others'.¹¹⁷ This, for them, was directly related to regaining their land and laying a claim to their property. As one man illustrates, 'After taking the blood, one felt how a woman feels towards her harvest ... That was how someone who had taken the oath felt about his land. He could do anything to protect it, even if it meant death'.¹¹⁸ As in the instance of Sam Thebere cited above, who joined the Mau Mau to regain his land and become an adult, property and identity were joined in the sense of belonging.

Although commonly described as a war that pitted oppressive British forces against noble Kenyan nationalist rebels,¹¹⁹ the Mau Mau insurgency was in fact more complex. Within Kikuyu society it took the form of a civil war, as so-called 'loyalists' from among the community forged alliances with the colonial government. As Branch illustrates, the sheer number of loyalists should not be underestimated, and one should not assume that the division between opponents and supporters of the Mau Mau revolt were pre-determined by existing social, political or economic separations within Kikuyu society.¹²⁰ Branch argues, '[A] more subtle explanation is needed'¹²¹ – the motivations of loyalists were far more complex than too often assumed.

Branch illustrates the complexity of the loyalist/Mau Mau divide, explaining that at different stages of the war, most Kikuyu were both supporters of Mau

¹¹⁶ Daniel Branch, *Defeating Mau Mau, Creating Kenya: Counterinsurgency, Civil War, and Decolonisation* (CUP 2009) (showing an example of an oathing ceremony; the various questions and vows varied).

¹¹⁷ Chinua Achebe, *No Longer at Ease* (Random House 1960) 66.

¹¹⁸ Elkins (n 25) 27.

¹¹⁹ See Rosberg (n 1).

¹²⁰ Branch (n 116) 11.

¹²¹ *ibid.*

Mau and allies of the government,¹²² and occasionally both simultaneously. Some sought to exploit the conditions of war, while others were driven by revenge, the majority of the Kikuyu however simply sought to survive.¹²³ Similarly, Kershaw suggests that it was the violence and its consequences that produced and shaped the identities of Mau Mau and loyalist, and not those identities that drove the conflict.¹²⁴

Thus, behaviour of both the insurgents and the loyalists was informed by the fluctuating dynamics of the conflict – what Kalyvas terms the ‘logic of violence’.¹²⁵ These complex dynamics produced new formations of individuals and temporary allegiances that cut across prior divisions. Such allegiances were determined in conditions of anxiety and violence and were initially more fluid than generally assumed; it was with the growth of violence that individuals were forced to pick sides. Thus, at the beginning of the movement, the majority of the Kikuyu population was neither loyalist nor Mau Mau; their behaviour a response to the need to survive rather than an ideological choice, lending the civil war its chief characteristic – ambiguity.¹²⁶

It is submitted that the violence of the Mau Mau uprising indeed forced many Kikuyu individuals to align themselves with either the insurgents or the loyalists, but the cause of the conflict stems from the connections between property, space and identity that have been identified, which repeatedly formed part of both the legislative and physical violence of the British, and that fostered the indigenous reassertion of rights and the Mau Mau revolt.

5.2 The Idiom of Blood

In January 1952 the Mau Mau movement escalated into open violence in Nyeri, and there were eleven cases of arson in the Aguthi and Thengenge areas. In the following month there was an outbreak of fifty-eight grass fires on the European farms in the nearby Nanyuki district, destroying several thousand acres of valuable grazing land. The destruction of property was followed by violent attacks on perceived ‘loyalists’, with the first bodies found floating in the Kirichwa river in Nyeri, shot and mutilated and left for weeks. This was followed by a second wave of attacks on ‘loyalists’, including government headmen, those who worked in the local courts as clerks and interpreters, and

¹²² *ibid* 100.

¹²³ *ibid* 11.

¹²⁴ Kershaw (n 115).

¹²⁵ Stathis Kalyvas, *The Logic of Violence in Civil War* (CUP 2006).

¹²⁶ Branch (n 116) 97.

people who had given evidence or provided the police with information on Mau Mau activities.¹²⁷

By early September there had been twenty-three known assassinations and many others missing. Non-Kikuyus living on white farms were deemed a threat to the secrecy and solidarity of the movement, resulting in the brutal murder of those such as Mutuaro Onsoti.¹²⁸ Onsoti was attacked by four squatters, who took his body and forced his neighbours and friends to take a *panga* (machete) and hack the corpse, and then touch his flesh and touch their hands to their lips.¹²⁹ The passer-by who had reported the body to the police was killed a few weeks later. By then, two more police informers had been murdered in Kiambu, and a chief's messenger in Murang'a had disappeared. His body was later found, strangled, mutilated and tossed into the river.¹³⁰ August saw the further murders of three pro-government Kikuyu at Rumuruti for refusing to take the oath, eight murders in Murang'a and a dramatic wave of killings and assaults in Nyeri, where a curfew was imposed in the Aguthi location through the enactment of the Public Order Ordinance of 1952. A detachment of police were sent out from Nairobi to try to stem the rising tide of violence.¹³¹

As the violence increased the government passed the Collective Punishments Ordinance in 1952, where collective fines were to be charged against communities who refused to co-operate with police investigations.¹³² This was not well received and was followed by a wave of arson attacks on farm buildings and the maiming and disembowelling of hundreds of settler-owned livestock. This seemingly shocked the white settlers more than the deaths of twenty or so Kenyans had, and on October 1952 Governor Baring cabled London to request that a State of Emergency be declared. He informed London of the 'deteriorating situation', warning that 'drastic legislation' might be needed in order to regain control.¹³³

On September 23rd, seven existing ordinances were amended. Among measures that allowed for the protection of witnesses by the police, restrictions on traffic movement at night and the control of printing presses, changes to the

¹²⁷ Anderson (n 99) 45.

¹²⁸ Elkins (n 25) 76.

¹²⁹ *ibid* 77.

¹³⁰ Anderson (n 99) 46-47.

¹³¹ Frank Corfield, *The Origins and Growth of Mau Mau: An Historical Survey* (Government of Kenya 1960) 19.

¹³² Anderson (n 99).

¹³³ Corfield (n 131) 21.

rules of evidence were promulgated. It was now permitted for a senior police officer to attest a prisoner's confession and for this to be accepted as evidence before a court.¹³⁴ The next day, not coincidentally, there was a further spate of Mau Mau activities, leading up to the murder of Chief Waruhiu wa Kungu of the Kiambu district – the government's Paramount Chief for Central Province. This was one Kenyan murder that unnerved even the white highlanders. If the colonial state could not protect their 'tower of strength',¹³⁵ who was safe from Mau Mau?¹³⁶

Indeed, the settlers were not safe. In 1953 many of the Mau Mau returned to property they rightfully thought of as theirs, serving typed eviction notices on British settlers, giving them seven days to vacate their farms.¹³⁷ Returning to their place of belonging, but in circumstances of dispossession and humiliation, the Kikuyu had established a tightly cohesive community; an 'us' determined to regain what had been stolen from them. The Mau Mau were reasserting their identity in their space of belonging, attempting to gain the power and forms of control that came with it; because, as one of the leaders of Mau Mau lamented, 'It is the property of Africans!'¹³⁸ In these circumstances, their words explicitly conflicted with the claims of ownership of the British who still called Kenya home.

The first European victim to be murdered was Eric Bowker who had taken up his farm in the Rift Valley as a retirement home.¹³⁹ He was hacked to death as he lay in his bath, and the news circulated through the European community quickly. The next victims were the Meiklejohns, who were cut on the head and body and left to die, both unrecognisable owing to the extent of their injuries. Subsequent attacks against white settlers were met with demands for more draconian law and action, with the promise of vigilantism if this did not occur. It was however, the slaughter of the Ruck family at their farm in Kinangop in January 1953, which was to be the 'definitive moment of the war'¹⁴⁰ – at least for the white highlanders. Mr. Ruck's domestic staff lured him onto his farm, pretending to have caught a Mau Mau suspect. As he emerged, an assailant hacked at his legs with a heavy *panga* until he fell, followed by his wife who

¹³⁴ Anderson (n 99) 44.

¹³⁵ District Commissioner Kennaway, Chiefs' Character Book (DC/KBU/11/1, Kenya National Archives 1952).

¹³⁶ Anderson (n 99) 56.

¹³⁷ ES Atieno Odhiambo and John Lonsdale (eds), *Mau Mau & Nationhood: Arms, Authority & Narration* (Ohio State University Press 2003) 91.

¹³⁸ EUL Gen/1786/3: Dedan Kimathi, 9 September 1953.

¹³⁹ Anderson (n 99) 92.

¹⁴⁰ *ibid* 93.

had come to his aid. A farm worker, Muthura Nagahu, who came running to assist the family was killed too, his body left on the lawn where he fell. Lastly, the attackers viciously hacked the Rucks' six-year-old son, breaking through the lock on the door to get to him.¹⁴¹ The details of the violent and 'disproportionate' reaction of the British and Kenyan Home Guards are important, but outside of the scope of this Article.

VI. 'GRIEVANCES HAVE NOTHING WHATEVER TO DO WITH THE MAU MAU, AND MAU MAU HAS NOTHING WHATEVER TO DO WITH GRIEVANCES'¹⁴²

Descriptions of the Mau Mau insurgency as characterised by 'indiscipline and random violence',¹⁴³ leads me to believe that despite the prominent connection between law and geography, the laws' engagement with space remains to be explored.

The original interpretation, offered initially by colonial authorities, and later their apologists, explained Mau Mau as rooted in a 'mass psychosis' affecting a tribe left unstable as a consequence of their journey towards modernity. Although failing to acknowledge the justness of Kikuyu grievances, this does partially recognise the importance of the effects of legislation on belonging. Still it ignores the fact that the Mau Mau's acts were the violence of those displaced in a space they traditionally considered home.

In the early 1960s, anthropological studies began to challenge this explanation. These identified the factors lying behind the insurgency as 'the increasing deprivations resulting from rapid socio-economic development in the colony which, among the peoples of Kenya, fell disproportionately on the Kikuyu'.¹⁴⁴ This work definitively departs from the belief that the Mau Mau were a group of savages with irrational terrorist impulses. Nonetheless, the connections between colonial law, Kikuyu property and space of action, and Kikuyu identity remain to be described.

It has been argued that if these connections were sufficiently iterated, what was seen as indiscipline and random violence would be seen to have an underlying logic, and one that depends upon the relation between law, property and identity. As stressed from the outset, the law should not be seen as an empty or

¹⁴¹ Elkins (n 25) 40.

¹⁴² Lonsdale (n 54) (quoting the Kenyatta trials).

¹⁴³ Anderson (n 99) 51.

¹⁴⁴ Bruce Berman and John Lonsdale, *Unhappy Valley: Conflict in Kenya & Africa*, vol 2 (East African Educational Publishers 1992) 227. See also Roseberg and Nottingham (n 1).

objective category. It has a direct bearing on the way in which power and control are deployed and thus the ways social life and identity are constituted.

Sarat may not be incorrect in his assertion that 'law is a creature of both literal violence, and imaginings and threats of force, disorder and pain ... in the absence of such ... there is no law'.¹⁴⁵ The violence entailed by the colonial laws dispossessed and alienated the Kikuyu from their land and ultimately caused the intense revolt amongst their community. When the law provided for British entitlement and ownership, the reaction was justifiably passionate, as it had given priority to the wrong set of belongings. As Broche-Due has asserted, '[V]iolence enacted is but a small part of violence lived'.¹⁴⁶ Space matters to such violence; being more than a passive template, land was not the background to the Mau Mau movement – it was at the heart of it.

The British were attempting to construct their own identities through the dispossession of the Kikuyu, strengthening their sense of belonging through the disenfranchisement of others. They were appropriating identities, by reshaping the spaces that hold up those identities,¹⁴⁷ and the Kikuyu would later do the same.

In returning to their spaces of belonging, the Mau Mau partly re-appropriated their identity, asserting their sense of entitlement against the foreign other or those they saw as collaborators in their own displacement. The Kikuyu were 'caught within relations of dispossession, alienation and ownership that did not allow for mutual recognition',¹⁴⁸ giving rise to dramatic rupture. The Mau Mau movement itself was defined and joined by a sense of belonging to their land and the idea that they would fight to reclaim their own freedom to be the people who they took themselves to be in their own place.

Overall, in this analysis, Mau Mau insurgency demonstrates that the law of property has a deeper dimension, as it plays a role in human psychology and the processes by which we assign meanings to our own perceptions and behaviours. Insofar as this is accepted, we should accept that the study of law has not fully apprehended the centrality of space/place and its network of

¹⁴⁵ Austin Sarat and Thomas Kearns (eds), *Law's Violence* (Michigan University Press 1993) 1.

¹⁴⁶ Vigdis Broche-Due (ed), *Violence and Belonging: The Quest for Identity in Post-Colonial Africa* (Routledge 2005) 1.

¹⁴⁷ Keenan, 'Bringing the Outside(r) in' (n 12).

¹⁴⁸ Brenna Bhandar, 'Plasticity and Post-Colonial Recognition: Owning, Knowing and Being' (2011) 22(3) *Law and Critique* 227, 228.

relations and power, and it has failed to 'experiment with its spatiality'.¹⁴⁹ This has practical consequences: the injustices of the dispossession of indigenous owners remain a problem that is 'echoing around in current policy in Kenya'.¹⁵⁰ The Truth, Justice and Reconciliation Commission of Kenya 2008 has attempted to follow in the footsteps of South African mediation, but 'legal' land-grabbing issues remain 'hugely relevant'.¹⁵¹ The 'pandora's box'¹⁵² of tensions and competing claims of the Kikuyu and others is still being dealt with as the law attempts to redress 'colonial misdemeanours'.¹⁵³

VII. CONCLUSION

This Article began with a theoretical rethinking of the idea of property and expressed the need to focus on the inverse of the power to exclude – the sense of belonging. This is a powerful and important part of identity, and it means that property is indeed 'not just the soil'¹⁵⁴ but all that is connected to it. This theoretical position was demonstrated through an account of the British acquisition of Kenya, and the reconstruction of space, with the land system employed as a tool of governance through controlling and restricting indigenous movement and use of land. These ideas were discussed with regard to collective and individual identity, making reference to the development of the British settler identity, alongside the disenfranchisement of the Kenyan owners and their sense of belonging.

This Article examined the forceful dissemination of English property law and various agricultural policies that enabled the recurrent dispossession and alienation of the indigenous residents, arguing that the Mau Mau was a movement of the displaced, who formed a unified group and fought not simply to regain their physical place, but their right to belong – and the power and control of their own individual and cultural identity that comes with it.

Through an engagement with the relationship between the land and the Kikuyu, it is clear that the law *must* engage more deeply with the spatial than contemporary understandings of concepts such as jurisdiction and sovereignty and the transference of physical space; space is not simply another parameter

¹⁴⁹ Andreas Philippopoulos-Mihalopoulos, 'Law's Spatial Turn: Geography, Justice and a Certain Fear of Space' (2010) 5 *Law, Culture and the Humanities* 205.

¹⁵⁰ Turner (n 6).

¹⁵¹ *ibid.*

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ John Hill, *At Home in the World: Sounds and Symmetries of Belonging* (Spring Journal Books 2010) 575.

for law, nor a background against which law and its consequences takes place. The legal conception of property should include an understanding of the networks of belonging and an ontological claim to indigenous land. Thinking about the human use of space and what it means to us should force a philosophical re-articulation of law.

BIBLIOGRAPHY**BOOKS**

- Anderson D, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of the Empire* (Weidenfeld & Nicolson 2005)
- Anghie A, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007)
- Achebe C, *No Longer at Ease* (Random House 1960)
- Ahmed S, *Queer Phenomenology: Orientations, Objects, Others* (Duke University Press 2006)
- Berman B and Lonsdale J, *Unhappy Valley: Conflict in Kenya & Africa*, vol 2 (East African Educational Publishers 1992)
- Berry S, *No Condition is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (University of Wisconsin Press 1993)
- Branch D, *Defeating Mau Mau, Creating Kenya: Counterinsurgency, Civil War, and Decolonisation* (CUP 2009)
- Broche-Due V (ed), *Violence and Belonging: The Quest for Identity in Post-colonial Africa* (Routledge 2005)
- Cameron V, *Across Africa* (Harper & Brothers Publishers 1877)
- Clarke A and Kohler P, *Property Law: Commentary and Materials* (CUP 2005)
- Colson E, 'The Impact of the Colonial Period on the Definition of Land Rights' in Turner V (ed), *Colonialism in Africa 1870-1960, Profiles of Change: African Society and Colonial Rule* (CUP 1971)
- Cooper D, *Governing out of Order: Space, Law and the Politics of Belonging* (Rivers Oram Press 1998)
- Corfield F, *The Origins and Growth of Mau Mau: An Historical Survey* (Colony and Protectorate of Kenya 1960)
- Dewees P, *Social and Economic Incentives for Smallholder Tree Growing: A Case Study of the Murang'a District, Kenya* (Food and Agriculture Organisation of the United Nations 1993)
- Elkins C, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (Henry Holt & Company 2005)
- Fanon F, *The Wretched of the Earth* (Penguin Books 1967)
- Ghai Y, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (OUP 1970)
- Greenberg J, *Object Relations in Psychoanalytic Theory* (Harvard University Press 1983)
- Harris C, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (University of British Columbia Press 1997)
- Hegel G, *Philosophy of Right* (George Bell & Sons 1896)
- Hill J, *At Home in the World: Sounds and Symmetries of Belonging* (New Orleans Spring Journal Books 2010)
- Kalyvas S, *The Logic of Violence in Civil War* (CUP 2006)
- Kearns T and Sarat A (eds), *Law's Violence* (Michigan University Press 1993)
- Kenyatta J, *Facing Mount Kenya* (Random House 1965)
- Kimaiyo T, *Ogiek Land Cases and Historical Injustices 1902-2004* (Kenyatta University Publishing 2004)

- Klein R, *Sovereign Equality Among States* (University of Toronto Press 1974)
- Locke J, *The Second Treatise of Government* (Barnes & Noble Publishing 1690)
- Lonsdale J, 'The Moral Economy of Mau Mau: Wealth, Poverty & Civic Virtue in Kikuyu Political Thought' in Berman B and Lonsdale J, *Unhappy Valley: Conflict in Kenya & Africa*, vol 2 (East African Educational Publishers 1992)
- Moreton-Robinson A, 'I Still Call Australia Home: Indigenous belonging and Place in a White Postcolonising Society' in Ahmed S and Castaneda C (eds), *Uprootings/Regroundings and Migration* (Berg Publishing 2003)
- Ochieng W, *Eastern Kenya and Its Invaders* (East African Literature Bureau 1975)
- Odhiambo A and Lonsdale J, *Mau Mau & Nationhood: Arms, Authority & Narration* (Ohio State University Press 2003)
- Penner J, *The Idea of Property in Law* (OUP 1997)
- Perham M, *East Africa Journey: Kenya and Tanganyika, 1929-30* (Faber & Faber 1976)
- Porch D, *Imperial Wars: From the Seven Years War to the First World War* (OUP 2005)
- Radcliffe S, 'Popular and State Discourses of Power' in Allen J and Massey D (eds), *Human Geography Today* (Polity Press 1999)
- Rosberg C and Nottingham J.C, *The Myth of 'Mau Mau': Nationalism in Kenya* (East African Publishing House 1966)
- Rose G, 'Performing Space' in Allen J and Massey D (eds), *Human Geography Today* (Polity Press 1999)
- Ryan S, *The Cartographic Eye: How Explorers Saw Australia* (CUP 1996)
- Said E, *Culture & Imperialism* (Vintage Books 1993)
- Singh K (ed), *Tribal Ethnography, Customary Law, and Change* (Concept Publishing Company 1993)
- Smith S, 'The Cultural Politics of Difference' in Allen J and Massey D (eds), *Human Geography Today* (Polity Press, 1999)
- Snell G, *Nandi Customary Law* (Macmillan & Company 1954)
- Throup D, *Economic & Social Origins of Mau Mau: Eastern African Studies* (Ohio University Press 1987)
- Wa Thiong'o N, *Detained: A Writer's Prison Diary* (Heinemann Publishers Ltd 1981)
- Wa-Mungai M (ed), *(Re)Membering Kenya: Vol. 1 Identity, Culture and Freedom* (Twaweza Publications 2010)
- Waldron J, *The Right to Private Property* (Clarendon Press 1990)
- Wilson G, *Luo Customary Law and Marriage Laws Customs* (South Africa: Government Printer 1961)

JOURNAL ARTICLES

- Bhandar B, 'Plasticity and Post-Colonial Recognition: Owning, Knowing and Being' (2011) 22(3) *Law and Critique* 227
- Blomley N, 'Law, Property and the Geography of Violence: The Frontier, the Survey, and the Grid' (2003) 93(1) *Annals of the Association of American Geographers* 121
- Borrows J, 'Living between Water and Rocks: First Nations, Environmental Planning and Democracy' (1997) 47(4) *The University of Toronto Law Journal* 417

- Bushman D, 'A Conversation of Gestures: George Herbert Mead's Pragmatic Theory of Language' (1998) 16(2) *Rhetoric Review* 253
- Cooper D, 'Opening Up Ownership: Community Belonging, Belongings, and the Productive Life of Property' (2007) 32(3) *Law & Social Inquiry* 625
- Cotran E, 'The Place and Future of Customary Law in East Africa' (1996) 5(19) *Commonwealth Law Series* 72
- Davies M, 'Queer property, queer persons: Self-ownership and beyond' (1998) 8(3) *Social & Legal Studies* 327
- Galaty, J.G, 'The Land is Yours: Social and Economic Factors in the Privatization, Sub-Division and Sale of Masaai Ranches' (1992) 30 *Nomadic Peoples* 26
- Gray K, 'Property in Thin Air' (1991) 50(2) *Cambridge Law Journal* 252
- Harris C, 'Whiteness as Property' (1993) 106(8) *Harvard Law Review* 1707
- Kameri-Mbote P, 'Righting Wrongs: Confronting Dispossession in Post-colonial Contexts' (2009) 1 *East African Law Review* 103
- Keenan S, 'Property as Governance: Time, Space and Belonging in Australia's Northern Territory Intervention' (2013) 76(3) *Modern Law Review* 464
- — 'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19(4) *Social and Legal Studies* 423
- — 'Bringing the Outside(r) in: Laws' Appropriation of Subversive Identities' (2013) 64(3) *Northern Ireland Legal Quarterly* 299
- Kershaw G, 'Mau Mau from Below: Fieldwork and Experience, 1955-57 and 1962' (1991) 25(2) *Canadian Journal of African Studies* 274
- Kilson M, 'Land and the Kikuyu: A Study of the Relationship between Land and Kikuyu Political Movements' (1955) 40(2) *The Journal of Negro History* 103
- Kurgat A, 'Change and Continuity: Land and Identity Construction in Eldoret West District, Kenya' (Land Policies in East Africa: Technological Innovation, Administration and Patrimonial Stakes International Conference, Kampala, 2-4 November 2011)
- Merrill T, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730
- Moore S, 'Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts' (1992) 26 *Law & Society Review* 11
- Mossoff A, 'The False Promise of the Right to Exclude' (2011) 8(3) *Econ Journal Watch* 255
- Philippopoulos-Mihalopoulos A, 'Law's Spatial Turn: Geography, Justice and a Certain Fear of Space' (2010) 5 *Law, Culture and the Humanities* 205
- Pottage A, 'The Measure of Land' (1994) 57(3) *Modern Law Review* 361
- Tadros V, 'Between Governance and Discipline: The Law and Michel Foucault' (1998) 18(1) *Oxford Journal of Legal Studies* 75

CASES

- Isaka Wainaina Wa Gathomo and Kamau Gathomo v Murito Wa Indagara and Others* [1922] 9 KLR 102
- Wainaina v Murito* [1922] 9 KLR 102

STATUTES

Collective Punishments Ordinance 1952
Crown Lands Ordinance 1902
Crown Lands Ordinance 1915
East African (Lands) Ordinance-in-Council 1901
Foreign Jurisdiction Act 1890
Government Land Act 1915
Hut Tax Regulations 1901
Hut and Poll Tax Ordinance 1910
Indian Land Acquisition Act 1894
Kenya (Annexation) Order-in-Council 1920
Kenya Colony Order-in-Council 1921
Native Lands Trust Ordinance 1930
Outlying Districts Ordinance 1902
Public Order Act 1952
Registration of Natives Ordinance 1919
Registration of Title Act 1919
Removal of Natives Ordinance 1909
Resident Native Labourers' Ordinance 1918
Special Districts Administration Act 1934

REPORTS

Report of the East Africa Commission (CAB/24/173, 1925)
Report of the Kenya Land Commission
White Paper (1923)

ARCHIVES AND RECORDS

Ainsworth to Wright (DC/MKS/10A/1/2, 12 July 1905)
District Commissioner Kennaway, Chiefs' Character Book (DC/KBU/11/1, Kenya National Archives 1952)
Baker J, 'December Issue' *The Times Newspaper* (1873) 1
Dagoretti Political Record Book, Report of the Land Committee, vol 1 (1905)
EUL Gen/1786/3: Dedan Kimathi, 9 Sept.1953
'Government Notice No. 100' *Kenya Gazette* (1934).

INTERVIEWS AND PERSONAL COMMUNICATIONS

Interview with Dr Christian Turner, British High Commissioner in Kenya (London, 24 February 2014)

Decolonising Australia's Native Title System

Kayla Gebeck*

I. INTRODUCTION

There was a strange thing, a buffalo with horns of steel. One day a man came upon it in the plain, just there where once upon a time four trees stood close together. The man and the buffalo began to fight. The man's hunting horse was killed right away, and the man climbed one of the trees. The great bull lowered its head and began to strike the tree with its black metal horns, and soon the tree fell. But the man was quick, and he leaped to the safety of the second tree. Again the bull struck with its unnatural horns, and the tree soon splintered and fell. The man leaped to the third tree and all the while he shot arrows at the beast; but the arrows glanced away like sparks from its dark hide. At last there remained only one tree and the man had only one arrow. He believed then that he would surely die. But something spoke to him and said: 'Each time the buffalo prepares to charge, it spreads its cloven hooves and strikes the ground. Only there in the cleft of the hoof is it vulnerable; it is there you must aim.' The buffalo went away and turned, spreading its hoof, and the man drew the arrow to his bow. His aim was true and the arrow stuck deep into the soft flesh of the hoof. The great bull shuddered and fell, and its steel horns flashed once in the sun.¹

The purpose of this Article is to survey the development of collective rights,²

* Kayla Gebeck received an MA in Human Rights Law at SOAS, University of London prior to working as a Policy Analyst at the Native American Finance Officers Association in Washington D.C., United States. Special acknowledgements for this Article include Cinnamon Spear and Dr Sarah Keenan.

¹ Navarre Scott Momaday, *The Way to Rainy Mountain* (University of New Mexico 1976) 54.

² Includes but is not limited to: the right to group and collective rights; right to self-determination; right to economic and social development; right to a healthy environment; right to natural resources; and right to participate in one's cultural heritage. While third generation rights build on civil, political, economic, social and cultural rights of the first and second generations of human rights, third generation rights highlight the collective nature of indigenous legal systems to determine their own governments, education, health, natural resources and environment. For further explanation of rights mentioned see Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP 2013) 409-51.

more specifically Native Title rights and the right of free, prior and informed consent (FPIC) in Australia. Given Australia's recent colonial history, it is of particular interest to examine whether the effects of domestic legislative mechanisms – *Mabo and others v Queensland (No 2)*³ [hereafter referred to as *Mabo*], the Native Title Act 1993 (Cwlth) and the National Native Title Tribunal (NNTT) – align with collective rights recognised in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁴ and the Alta Outcome Document (2013).⁵ Holders of collective rights shall be referred to as 'indigenous' when discussing rights recognised under the UNDRIP and 'indigenous Australian' when discussing land rights specific to Australia.

On the international level, the development of collective rights has played an essential role in the conception of legal resources that support indigenous communities' rights to land and traditional ways of life. N. Scott Momaday's oral tradition mentioned above advocates for indigenous people to identify and target weak legislation and gaps in land and development policy along with actively creating resources that assist in and further legal claims to protect these rights. Thus far, this approach has been extremely effective in developing international dialogue about the need and reason for protecting indigenous social and economic rights. Andrea Muehlebach states, 'Experts in international law and politics have noted that international indigenous political activism has placed itself squarely within the cracks, crevasses, and absences in these fields'.⁶ Muehlebach's observation is a Western understanding of Momaday's tradition.

While Deborah Bird Rose argues that indigenous people become participants in their own colonisation by utilising institutions, resources and legislation created by the colonial power, the position of this Article is that in the case of Australia, it is beneficial for Native Title holders to actively seek out avenues within domestic and international legal frameworks to protect their Native Title rights. Engaging in said legal frameworks provides indigenous Australians the

³ *Mabo and others v Queensland (No 2)* HCA 23, (1992) 175 CLR 1.

⁴ UNGA, 'United Nations Declaration on the Rights of Indigenous Peoples' (UN Doc A/RES/61/295, 2 October 2007).

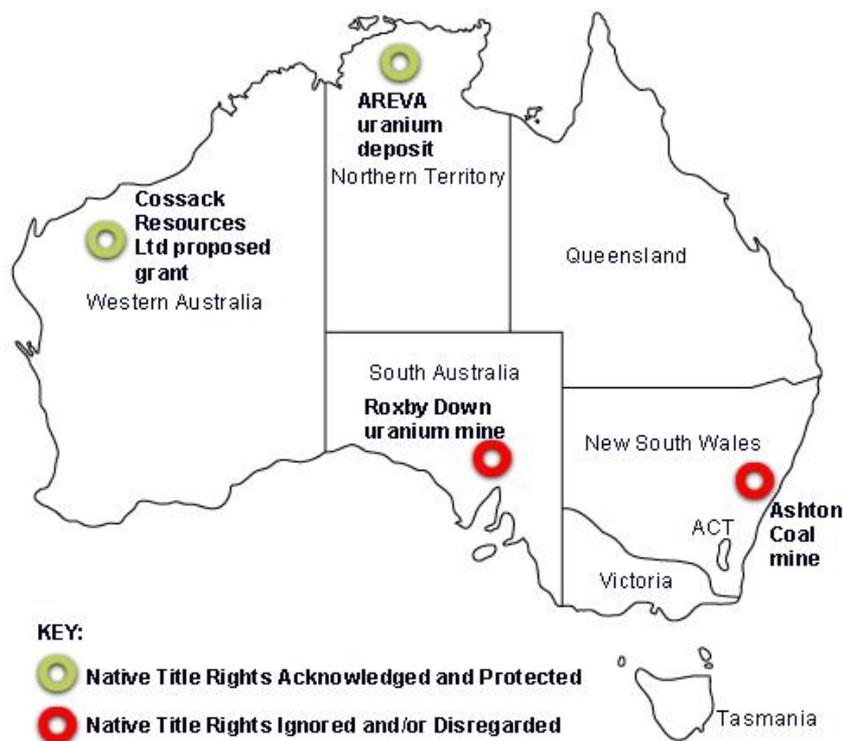
⁵ UNGA, 'Letter dated 10 September 2013 from the Permanent Representatives of the Plurinational State of Bolivia, Denmark, Finland, Guatemala, Mexico, New Zealand, Nicaragua, Norway and Peru to the United Nations addressed to the Secretary-General' (UN Doc A/67/994, 13 September 2013).

⁶ Andrea Muehlebach, "'Making Place" at the United Nations: Indigenous Cultural Politics at the U.N. Working Group on Indigenous Populations' (2011) 16(3) *Cultural Anthropology* 415, 418; Catherine Iorns, 'Indigenous Peoples and Self-Determination: Challenging State Sovereignty' (1992) 24(165) *Case Western Reserve Journal of International Law* 199; Chris Tennant, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993' (1994) 16 *Human Rights Quarterly* 1.

opportunity to align the Australian legal framework with international human rights law without ‘fractur[ing] the skeleton of principle which gives the body of [Australian] law its shape and internal consistency’.⁷

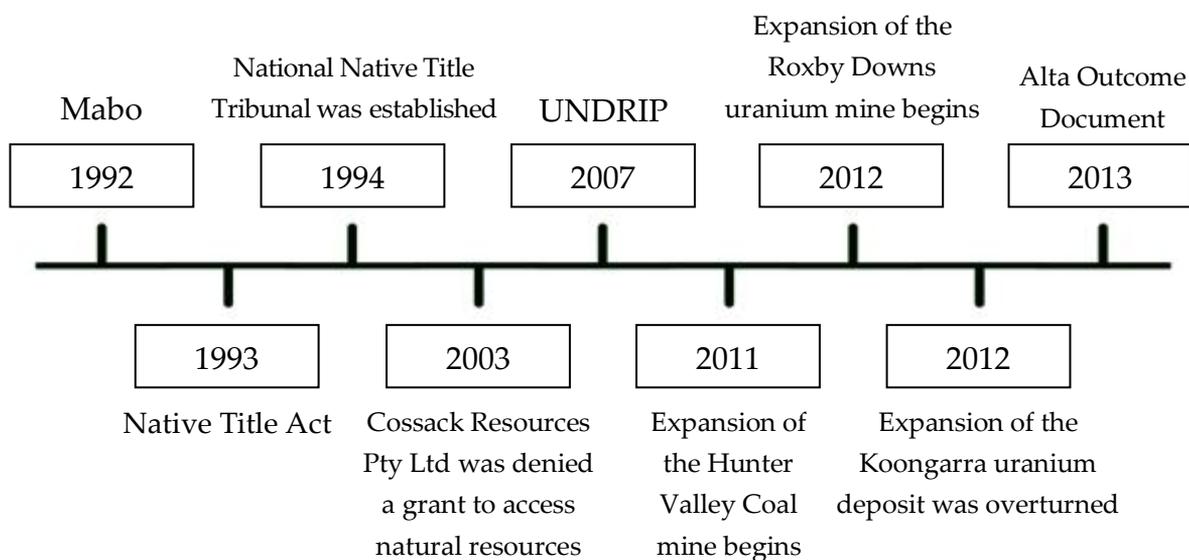
This Article will use the rights established in UNDRIP and the Alta Outcome Document as a foundation for assessing the realisation of Native Title rights in Australia. To paint a broad picture of Native Title rights in Australia, this Article analyses four cases in which Native Title rights and the conflicting rights of extractive industries have collided: (1) Wonnarua Native Title rights and the Ashton Coal mine; (2) Arabana Native Title rights and the Roxby Down uranium mine; (3) Monadee Native Title rights and Cossack Resources Ltd.; and (4) Koongarra Native Title rights and the AREVA uranium deposit. (Figure 1 maps the locations where these Native Title rights have been contested while Figure 2 outlines the development of domestic and international legal legislation regarding the four mentioned cases).

Figure 1: Cases in Which Native Title Rights Were Challenged



⁷ *Mabo* (n 3) [29] (Brennan J).

Figure 2: Domestic and International Legislation Recognising and Protecting Indigenous Social and Economic (Third Generation) Rights



To be clear, this Article does not promote indigenous engagement in mining or exploitative practices. Instead, it supports the notion of FPIC and further encourages indigenous communities to ‘make place’ for themselves in domestic and international legal frameworks by constructing resources that target gaps and/or weak areas in existing legislation.

II. ‘MAKING PLACE’⁸ IN THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK⁹

Since the late 1970s, indigenous peoples have used the United Nations (UN) ‘to protest the destruction of their territories, resources and, by implication, their cultures’,¹⁰ and furthermore protect their collective rights to land and natural resources. Collective rights, or what Muehlebach describes as ‘eco-political politics of morality’, integrate indigenous traditional ecological knowledge (TEK) into a ‘larger framework of valuable knowledge, cultural diversity and

⁸ Prior to the creation of third generation rights, the collective rights of indigenous peoples were neither recognised nor protected under international law. Rather, indigenous peoples were subjected to individual civil, political, economic, social and cultural rights governed, through the positive obligation of due diligence, by their colonial state government. Given the settler colonial legacy that plagues many indigenous peoples’ histories and rights, third generation rights legally, politically and physically ‘make places’ for the protection of their collective rights in international law. For further information, see Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP 2013) 409-51.

⁹ Muehlebach (n 6).

¹⁰ *ibid* 420.

bio-diversity'.¹¹ Emanating from a unique and continued relationship with a specific land base, the inclusion of indigenous TEK in extractive development policy can significantly contribute to more long-term, sustainable projects and furthermore help foster improved relations between indigenous communities, states and corporations.

After roughly twenty-five years of discourse on the need to protect indigenous social and economic rights alongside an increased support for the incorporation of TEK in the construction of sustainable development projects, UNDRIP was adopted by the United Nations on September 13, 2007. UNDRIP serves as an international instrument concerning the protection of collective rights. Comprised of 46 articles, UNDRIP recognises:

[T]he right to unrestricted self-determination, an inalienable collective right to the ownership, use and control of lands, territories and other natural resources, [indigenous] rights in terms of maintaining and developing their own political, religious, cultural and educational institutions along with the protection of their cultural and intellectual property.¹²

Although UNDRIP is non-binding, the document itself is representative of international norms and the UN's commitment to validating and, more importantly, protecting indigenous people's social and economic rights.

It is important to note that while 144 countries initially adopted the international instrument, four countries possessing settler colonial histories – Australia, New Zealand, Canada and the United States – voted against it. Each state opposing the document argued, '[T]he level of autonomy recognized for Indigenous peoples in the UNDRIP was problematic and would undermine the sovereignty of their own states, particularly in the context of land disputes and natural resource extraction'.¹³ It was not until 2009-2010 that these countries overturned their previous decision and endorsed UNDRIP.

Stemming directly from UNDRIP's recognition of the right to self-determination, 'the right to freely pursue their economic, social and cultural

¹¹ *ibid* 423.

¹² 'The UN Declaration on the Rights of Indigenous Peoples' (International Work Group for Indigenous Affairs)

<<http://www.iwgia.org/human-rights/international-human-rights-instruments/undeclaration-on-the-rights-of-indigenous-peoples>> accessed 19 December 2013.

¹³ *ibid*.

development',¹⁴ and more specifically the ideas codified in Article 32, the notion of FPIC was formed. Article 32 states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources;
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources;¹⁵

FPIC 'is the principle that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use'.¹⁶ FPIC furthermore, provides a framework for sustainable development, promotes a thorough assessment of environmental and social impacts and establishes an 'equal level playing field between [indigenous] communities and the government or companies'.¹⁷ More importantly, when consultation principles set forth by FPIC are followed, 'negotiated agreements provide companies with greater security and less risky investments'.¹⁸

In June 2013, indigenous delegates prepared the Alta outcome document at the Global Indigenous Preparatory Conference for the United Nations high-level plenary meeting of the General Assembly to be called the World Conference on Indigenous Peoples. This document was formally submitted to the UN Secretary-General, Ban Ki-moon, by nine member states – Australia was not one of them¹⁹ – and identifies four primary themes in which indigenous delegates urge states to align their domestic legal frameworks with: (1) Indigenous people's lands, territories, resources, oceans and waters; (2) United Nations system action for the implementation of the rights of indigenous

¹⁴ Christina Hill, Serena Lillywhite and Michael Simon, 'Guide to Free Prior and Informed Consent' (*Oxfam Australia*, 2010)

<https://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf> accessed 19 December 2013.

¹⁵ UNGA, 'United Nations Declaration' (n 4) 12.

¹⁶ 'Free, Prior and Informed Consent (FPIC)' (*Forest Peoples Programme*) <<http://www.forestpeoples.org/guiding-principles/free-prior-and-informed-consent-fpic>> accessed 20 December 2013.

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ The nine member states include Bolivia, Denmark, Finland, Guatemala, Mexico, New Zealand, Nicaragua, Norway and Peru.

peoples; (3) Implementation of the rights of indigenous peoples and; (4) Indigenous people's priorities for development with free, prior and informed consent.²⁰ Unlike UNDRIP, this document not only recognises the rights of indigenous peoples but also provides recommendations by which a state can progressively realise indigenous social and economic rights.

UNDRIP and the Alta Outcome Document are symbolic for reasons threefold. First, these documents 'make place' for indigenous perspectives in the international human rights dialogue enabling the deconstruction of colonial ideologies of aboriginality²¹ and metaphor of the 'savage, victim, savior' (SVS).²² These concepts reduce indigenous peoples to 'savages' who are 'in need of settler-imposed control',²³ constructing the idea that state is the 'savior' who will provide development and civilisation. Historically, aboriginality and the SVS metaphor have '[legitimised] and [supported] the policies and practices of the state'.²⁴ By actively engaging in such dialogue, input from indigenous communities serves as a moral compass for states attempting to align their domestic legal frameworks with international human rights law. Secondly, in dismantling notions of aboriginality and the SVS metaphor, indigenous TEK is validated and embedded in international human rights law. Finally, allowing indigenous people to participate in the international discourse creates a more democratic system, which ensures that collective rights 'reflect the evolving needs and practices of [the] aboriginal claimants'.²⁵

III. AUSTRALIAN COLONIAL HISTORY AND LEGISLATION

Considering Patrick Wolfe's notion that 'invasion is a structure not an event',²⁶ it is argued that in order to protect the settler colonial state's position as a sovereign nation, colonialism is embedded in the structural composition of the state through legislative policy and is reinforced through the use of colonial myths. By examining Deborah Bird Rose's idea of 'deep colonisation' and

²⁰ UNGA, 'Letter' (n 5) 5-10.

²¹ Alissa Macoun, 'Aboriginality and the Northern Territory Intervention' (2011) 46(3) *Australian Journal of Political Science* 519.

²² Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) *Harvard International Law Journal* 201.

²³ Macoun (n 23) 519.

²⁴ Michael Dodson, 'The Wentworth Lecture – The End in the Beginning: (Re)defining Aboriginality' (1994) 1 *Australian Aboriginal Studies* 1, 2-13; Macoun (n 23).

²⁵ Brenna Bhandar, "'Spatializing History" and Opening Time: Resisting the Reproduction of the Proper Subject' in Scott Veitch (ed), *Law and the Politics of Reconciliation* (Ashgate Publishing 2007) 102.

²⁶ Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387, 388.

practices of 'erasure', this argument becomes clearer. Bird Rose uses the metaphor of two hands to discuss colonial efforts, which minimise indigenous integrity on a multitude of fronts. While the left hand provides *tabula rasa*, a clean slate,²⁷ the right hand, which is attributed with progress and civilisation, creates a new society void of any prior history.²⁸ In early Australian legislative history, this 'clean slate' was achieved through the implementation of *terra nullius*,²⁹ which utilised Lockean notions of property³⁰ to justify the 'lie that a space existed/exists for [colonial] invasion and settlement', on indigenous Australian lands.³¹ By denying indigenous Australians' history and undermining the extensive knowledge and customary legal systems in which they possess, Imperial Britain created a new 'civilised' society – Australia – in which they possessed exclusive autonomy and ownership of the land including its natural resources.

It was not until 1992 that the High Court of Australia overturned *terra nullius* in *Mabo*. While the Queensland government argued that *terra nullius* could not be overturned because upon settlement, the colonial government attained sovereignty as well as 'absolute beneficial ownership of all land in the territory',³² Eddie Mabo, a Torres Strait Islander, argued that since the Crown's exertion of sovereignty did not disrupt his family's occupation of the island, the Queensland government did not possess the right to extinguish title over his family's land.³³ In proving that Australia was not, in fact, *terra nullius* at the time of colonial settlement nor ceded or conquered, Mabo's claim challenged Australian sovereignty, forcing Brennan J to innovatively deliver his judgment.

Brennan J acknowledged the validity of Mabo's claim when he stated, 'Judged by any civilized standard, such a law is unjust and its claim to be part of the

²⁷ Valerie Kerruish and Jeannine Purdy, 'He "Look" Honest – Big White Thief' (1998) 4(1) Law Text Culture 146, 151.

²⁸ Deborah Bird Rose, 'Land Rights and Deep Colonising: The Erasure of Women' (1996) 3(85) Aboriginal Law Bulletin 6.

²⁹ *Terra Nullius* is a Latin expression meaning 'land belonging to no one'. *Terra Nullius* derives from Roman Property Law. For further information on the Doctrine of *Terra Nullius*, see Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Macleay Press 2005) 362.

³⁰ John Locke theorized that land becomes property through the labour. If the land is seen as wilderness, it is considered 'empty' or 'belonging to no one'. This theory was used amongst many settler colonial states as a way to exert sovereignty over land in which indigenous people lived. See John Locke, *The Second Treatise of Civil Government* (CB McPherson edn, Hackett Publishing Company 1980).

³¹ Irene Watson, 'Aboriginal Laws and the Sovereignty of Terra Nullius' (2002) 13(3) Law and Critique 253, 257.

³² *Mabo* (n 3) [25] (Brennan J).

³³ *Mabo* (n 3) [1], [13], [19] (Brennan J).

common law to be applied in contemporary Australia must be questioned'.³⁴ Although the government's use of *terra nullius* was unjust and the country was illegitimately founded, the court does not possess the capability to discontinue their sovereignty. Brennan J states:

[I]n discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would *fracture the skeleton of principle, which gives the body of our law its shape and internal consistency*.³⁵

In order to remedy this dilemma, Brennan J suggested that Australia should recognise Native Title rights:

[T]here is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.³⁶

This led to the creation of the Native Title Act 1993 (Cwlth). According to the Native Title Act, Native Title is 'the recognition by Australian law that some Indigenous people have rights and interests to their land that come from their traditional laws and customs'.³⁷ Native Title rights³⁸ can include, but are not

³⁴ *Mabo* (n 3) [28] (Brennan J).

³⁵ *Mabo* (n 3) [29] (Brennan J), emphasis added.

³⁶ *Mabo* (n 3) [52] (Brennan J).

³⁷ 'Exactly what is native title?' (*National Native Title Tribunal*) <<http://www.nntt.gov.au/Information-about-nativetitle/Pages/NativetitleRightsandInterests.aspx>> accessed 29 December 2013.

³⁸ A. the right to access the application area; B. the right to camp on the application area; C. the right to erect shelters on the application area; D. the right to live on the application area; E. the right to move about on the application area; F. the right to hold meetings on the application area; G. the right to hunt on the application area; H. the right to fish on the application area; I. the right to use the natural water resources of the application area including the beds and banks of watercourses; J. the right to gather the natural products of the application area (including: food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs; K. the right to conduct ceremony on the application area; L. the right to participate in cultural activities on the application area; M. the right to maintain places of importance under traditional laws, customs and practices in the application area; N. the right to protect places of importance under traditional laws, customs and practices in the application area; O. the right to conduct burials on the application area; P. the right to speak for and make non-exclusive decisions about the application area; Q. the right to cultivate and harvest native flora according to traditional laws and customs; R. the right to control access to, and use of, the area by those Aboriginal people who seek access or use in accordance with traditional laws and custom. Susan Walsh, 'Registration Test Decision' (*National Native Title Tribunal*, 2012)

<http://www.nntt.gov.au/Applications-And-Determinations/Registration-Test/Documents/2012/November%202012/NN12_4%2006112012.pdf> accessed 29 December 2013.

limited to, rights to continued occupation in the claimed territory, access to land for traditional practices or ceremonies and/or to employ usufructuary rights.³⁹ All applications for native title are subject to the Federal Court of Australia, while the NNTT assists indigenous Australians in any stage of the native title application, applies registration tests for native title, registers indigenous land use agreements and serves as an arbitral resource for disagreements between indigenous and development parties.⁴⁰ It is important to note that the NNTT 'is not a court and cannot decide whether native title exists or does not exist. However, the President of the Tribunal and its Members make arbitral decisions, chiefly in relation to future statutory matters'.⁴¹

IV. CRITICISMS OF AUSTRALIA'S LEGISLATION AND CASE LAW

Although *Mabo* and the Native Title Act are considered progressive in terms of indigenous Australian land rights, criticisms expose the state's continued use and reinforcement of myths to control these rights. Irene Watson argues that while *Mabo*, and later the Native Title Act, undermined Australia's sovereignty, the myth of *terra nullius* was only overturned in language, not in practice.⁴² Returning to Deborah Bird Rose's notion of 'deep colonising' and the metaphor of two hands, the overturning of *Mabo* triggered a need to reassert colonial power. While the left hand wiped clean and voided the colonial myth of *terra nullius*, the right hand – the hand of the coloniser – reaffirmed its power by assigning the High Court of Australia the role of determining Native Title.

This reassertion of the settler colonial power is demonstrated through the challenging and lengthy process of obtaining Native Title. Native Title cases often take years, if not decades, to determine and requires extensive amounts of resources and financial support. Additionally, in order to attain Native Title, a community must be able to demonstrate a continued and uninterrupted connection with their ancestral lands, one that has not been extinguished, 'by a valid exercise of sovereign power inconsistent with the continued right to enjoy Native Title.'⁴³ This prerequisite is disconcerting because it denies aboriginal communities their collective right 'to borrow ideas, change and evolve over

³⁹ 'Exactly what is native title?' (n 37).

⁴⁰ 'Tribunal Overview' (*National Native Title Tribunal*)

<<http://www.nntt.gov.au/au/Pages/Tribunaloverview.aspx>> accessed 29 December 2013.

⁴¹ *ibid.*

⁴² Watson (n 33) 260.

⁴³ *Mabo* (n 3) [29] (Brennan J).

time, and maintain their economic rights in the process.’⁴⁴ Australia’s ‘progressive’ Native Title rights thus forces indigenous Australians to remain culturally stagnant in order to protect and realise their inherent rights as indigenous peoples.

Finally, the recognition of Native Title does not grant indigenous Australians exclusive jurisdiction over their traditionally used lands, nor does it equate to or allow the veto of development practices, which threaten Native Title rights. ‘The main argument against the right to veto is that it restricts access to minerals that are owned by the Crown’.⁴⁵ This is concerning for Native Title holders, especially when considering the lengthy process and amount of resources that it takes to recognize these rights in the first place. As seen in *Mabo*, the Crown’s possession of ‘beneficial ownership of land’ and view that indigenous Australian rights are indispensable continues to determine the realization of Native Title rights.

V. NATIVE TITLE RIGHTS IN PRACTICE

Below are four cases that exemplify the complexity of Native Title rights. These cases not only demonstrate the convoluted hierarchy of rights in Australia but also examine approaches taken to protect and uphold Native Title rights in Australia.

5.1 Ashton Coal Mine

The expansion of the Ashton Coal mine in the Hunter Valley region in New South Wales is one example in which Native Title rights of the Plains Clans of the Wonnarua people were disregarded. In 2011, the Planning Assessment Commission (PAC) rejected the project due to popular concern about the pollution of waterways and health concerns⁴⁶ alongside archaeological evidence that Wonnarua burial and traditional ceremonial grounds were widespread in

⁴⁴ Bhandar (n 27) 102; Louise Mandell, ‘Offerings to an Emerging Future’ in Halie Bruce and Ardith Walkem (eds), *Box of Treasures or Empty Box? Twenty Years of Section 35* (Theytus Books Ltd 2003) 157-74.

⁴⁵ Jon Altman and Nicolas Peterson, ‘A case for retaining Aboriginal mining veto and royalty rights in the Northern Territory’ (*Australian Aboriginal Studies*, 1984) <http://www.anu.edu.au/caepr-dev/sites/default/files/StaffProfiles/stafffiles/jon-altman/1984_AusAboriginalStudies.pdf> accessed 29 December 2013.

⁴⁶ David Shoebridge, ‘PAC approves Ashton coal mine’ (*David Shoebridge*, 9 October 2012) <<http://davidshoebridge.org.au/2012/10/09/pac-approves-ashton-coal-mine-media/>> accessed 29 December 2013.

the desired region. One year later, the ruling of the PAC was appealed and overturned in the Land and Environment Court without the introduction of any new evidence.⁴⁷ For the Wonnarua people, the most troubling aspect of the expansion of the Ashton Coal mine included the partial removal of waterways where traditional Wonnarua sites are located. Ashton Coal's plan was to replace these waterways 'with man-made channels', 1.7 kilometres away from its original location.⁴⁸

Two Native Title holders, Barbara Foot and Scott Frank, petitioned against the expansion of the coal mine and repeatedly asked for a reassessment of the grant. Frank has also brought this case to the 'NSW Land and Environment Court and, separately, lodged a request with the federal Environment Minister, Tony Burke, for an emergency declaration of protection under the Aboriginal and Torres Strait Islander Heritage Protection Act'.⁴⁹ Despite these efforts, many of the traditional sites have already been ruined to the point that Native Title holders can no longer utilise these lands for reasons granted through Native Title.⁵⁰

Despite repeated FPIC efforts of the Native Title holders of Hunter Valley to protect their traditional and sacred sites, their Native Title rights have once again become subject to the interests of the state. This is in clear violation of UNDRIP Article 12(1) which recognises 'the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects'.⁵¹ Furthermore, despite extensive efforts from both Foot and Frank, all rights to FPIC were ignored altogether.

5.2 Roxby Downs Uranium Mine

The Roxby Downs uranium mine is another example in which the Native Title rights of the Arabana have been compromised. After a fourteen-year long Native Title case, the Arabana attained Native Title rights to 'unlimited access for hunting, camping, fishing and traditional ceremonies'.⁵² The expansion of

⁴⁷ Malavika Santhebennur, 'Court told unfavourable coal mine advice snubbed' (*Australian Mining*, 3 September 2013) <<http://www.miningaustralia.com.au/news/courttoldunfavourable-coalmineadvicesnubbed>> accessed 21 December 2013.

⁴⁸ Liesel Rickarby, 'Coal versus Hunter native title claims' (*Newcastle Herald*, 24 June 2011) <<http://www.theherald.com.au/story/471945/coal-versus-hunter-native-title-claims/#slide=1>> accessed 29 December 2013.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ UNGA 'United Nations Declaration' (n 4) 6.

⁵² Paddy Gibson, 'Twenty years since Mabo: why Native Title hasn't delivered' (*Solidarity*, 14 June 2012)

the mine has been approved despite civil opposition to its negative impacts on economic and social rights protected under Native Title. It is expected that the mine will 'use 100,000 [litres] of water a minute, much of it pumped from Arabana country, devastating the fragile eco-system of the Mound Springs and surrounding areas'.⁵³ The expansion of the Roxby Downs mine is in clear violation of the principles of FPIC as codified in Articles 18 and 32 of UNDRIP alongside Article 20 which recognises that the Arabana people should be 'secure in the enjoyment of their own means of subsistence and development, and [they should be able] to engage freely in all their traditional and other economic activities'.⁵⁴ Article 20 also states that if the Arabana usufructuary rights are ignored or eroded, they are 'entitled to just and fair redress'.⁵⁵ Regrettably, neither were the Arabana people's Native Title rights upheld, nor were any efforts to provide redress taken.

5.3 Monadee/Western Australia/Cossack Resources

While the existing Native Title policy has failed to uphold the rights of indigenous Australians in the Ashton Coal mine and the Roxby Down Uranium mine, not all extractive practices have undermined the integrity of Native Title rights in Australia. In the case of *Monadee/Western Australia/Cossack Resources*,⁵⁶ Cossack Resources Pty Ltd sought access to natural resources in Karratha, Western Australia. In effort to protect their Native Title rights, the Monadee Native Title party members presented extensive evidence to the NNTT. They argued that the practices of Cossack Resources Ltd would disrupt religious and related activities of the indigenous church in the subject area; that the practices would conflict with an existing indigenous owned pastoral lease; and that because there had been little to no surveying of the land and its natural resources, the environmental and social impacts could not be properly assessed. The NNTT ruled in favour of the Monadee noting that the grant sought by Cossack Resources would 'likely to have substantial impact on community and social activities'.⁵⁷

This ruling is an important step in aligning Australian domestic law with international norms. Whilst the religious practices of the Native Title party had evolved from the traditional practices of their community, their rights to Native

<<http://www.solidarity.net.au/aboriginal/twenty-years-since-mabo-native-title-is-not-land-rights/>> accessed 29 December 2013.

⁵³ *ibid.*

⁵⁴ UNGA 'United Nations Declaration' (n 4) 8.

⁵⁵ *ibid.*

⁵⁶ *Monadee/Western Australia/Cossack Resources* [2003] NNTTA 38.

⁵⁷ *ibid* [31] (Member Sosso).

Title had not been extinguished despite the need, under Australian Native Title legislation, to prove a continued and uninterrupted connection with the land. The ruling explains:

[F]ollowing Members of the *Yorta Yorta Aboriginal Community v Victoria* ... where it was recognised that some evolution and development of traditional law and custom may be acceptable, the [NNTT] held it was open to it to take into account the fact that members of the first Native Title party are members of an indigenous church which meets on the subject area for religious and related activities.⁵⁸

This explanation is the realisation of Article 11 of UNDRIP, which states:

[I]ndigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.⁵⁹

Thus, while Monadee's religion has adapted as a result of colonial assimilation and integration efforts, their cultural and religious development did not violate their Native Title rights nor did it 'fracture the skeleton of principle which gives the body of [Australian] law its shape and internal consistency.'⁶⁰

5.4 Koongarra Uranium Deposit

The Koongarra uranium deposit in Australia's Northern Territory is yet another example in which indigenous Australians' efforts to protect Native Title rights contributed to the veto of the mine.⁶¹ Jeffery Lee of the Djok clan ended repeated efforts of AREVA, a French nuclear giant, to mine the massive uranium deposit.⁶² Realising that 'the deposit is estimated to hold 14,540 tonnes of uranium ore worth approximately \$5 billion',⁶³ the Australian government

⁵⁸ *ibid.*

⁵⁹ UNGA 'United Nations Declaration' (n 4) 6.

⁶⁰ *Mabo* (n 3) [29] (Brennan J).

⁶¹ Ahni, 'Indigenous peoples win major victory against uranium mining corporation in Australia' (*DGR News Service*, 5 June 2012) <<http://dgmnewsservice.org/2012/06/05/indigenous-peoples-win-major-victory-against-uranium-mining-corporation-in-australia/>> accessed 29 December 2013.

⁶² *ibid.*

⁶³ *ibid.*

left Koongarra out of Kakadu National Park's original borders. However, after continued efforts by Lee to create awareness about the damaging impacts of the mine, letters sent to the UN Secretary General Ban Ki-moon asking for international legal assistance⁶⁴ and gaining support from UNESCO World Heritage Center, the borders of the Kakadu National Park were redrawn in 2012 to include the uranium deposit, successfully discontinuing AREVA's efforts.

Lee's main concern regarding the uranium deposit was continued access to clean water and a healthy environment. Lee argued:

[I] want to ensure that the traditional laws, customs, sites, bush tucker, trees, plants and water at Koongarra stay the same as when they were passed on to me by my father and great grandfather. Inscribing the land at Koongarra as [a] World Heritage [site] is an important step in making this protection lasting and real.⁶⁵

Although introduced a year later, arguments put forth to protect the Koongarra uranium deposit also paralleled notions presented in the Alta Outcome Document, specifically theme 1(6) which states:

[W]e recommend that States uphold and respect the right of self-determination and the free, prior and informed consent of indigenous peoples who do not want mining and other forms of resource extraction, 'development' and technologies deemed to be degrading to their human, cultural, reproductive and ecosystem health ...⁶⁶

With help from international organisations, the incorporation of the Koongarra uranium mine as a part of the Kakadu National Park was an important step in recognizing the collective right to a healthy environment, FPIC and subsequent rights of UNDRIP in domestic Australian law.

VI. CONCLUSION

As a settler colonial state, Australia has historically used legislative mechanisms and colonial myths, such as the Native Title Act and *terra nullius*, to assert colonial power and limit the affirmation of the rights of indigenous Australians.

⁶⁴ Ahni (n 61).

⁶⁵ 'Koongarra' (*Australian Map*, 2012) <<http://australianmap.net/koongarra/>> accessed 2 January 2014.

⁶⁶ UNGA 'Letter' (n 5) 5.

The expansion of the Ashton Coal mine and the Hunter Valley mine are only two examples in which Native Title rights have been compromised due to interests of the state. However, given continued efforts of indigenous Australians working within both domestic and international legal frameworks, 'a picture emerges as to what might happen in the rest of Australia over the coming years as indigenous people become familiar with the Native Title Act 1993 (Cwlth), and Australians learn to live with the *Mabo* High Court decision'.⁶⁷ As exemplified by the Monadee people and Lee, through the extensive compilation of resources and by working collaboratively with international organizations, it is clear that indigenous Australians are 'making place' for themselves in domestic and international legal frameworks, disabling colonial ideologies, protecting the social and economic rights of their people and more importantly aligning Australia's domestic framework with rights codified in UNDRIP and the Alta Outcome Document in a way that does not 'fracture the skeleton of principle which gives the body of [Australian] law its shape and internal consistency'.⁶⁸

⁶⁷ Ian McIntosh, 'Australian Aboriginal Property Rights Under Threat' (*Cultural Survival*, 25 March 2010)

<<https://www.culturalsurvival.org/ourpublications/csq/article/australian-aboriginal-property-rights-under-threat>> accessed 21 December 2013.

⁶⁸ *Mabo* (n 3) [29] (Brennan J).

BIBLIOGRAPHY**BOOKS**

- Bantekas I and Oette L, *International Human Rights Law and Practice* (CUP 2013)
- Bhandar B, "'Spatializing History" and Opening Time: Resisting the Reproduction of the Proper Subject' in Veitch S (ed), *Law and the Politics of Reconciliation* (Ashgate Publishing 2007)
- Borrows J, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002)
- Connor M, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Macleay Press 2005)
- Locke J, *The Second Treatise of Civil Government* (C.B McPherson edn, Hackett Publishing Company 1980)
- Momaday N.S, *The Way to Rainy Mountain* (University of New Mexico 1976)
- Williams N.M and Baines G (eds), *Traditional Ecological Knowledge: Wisdom for Sustainable Development* (Centre for Resource and Environmental Studies, Australian National University 1993) vol 2

JOURNAL ARTICLES

- Dillon J, Reid A and Teamey K, 'Traditional Ecological Knowledge for Learning with Sustainability in Mind' (2002) 18(1) *The Trumpeter: Journal of Ecosophy* 113
- Dodson M, 'The Wentworth Lecture – The End in the Beginning: (Re)defining Aboriginality' (1994) 1 *Australian Aboriginal Studies* 1
- Iorns C, 'Indigenous Peoples and Self-Determination: Challenging State Sovereignty' (1992) 24(165) *Case Western Reserve Journal of International Law* 199
- Kerruish V and Purdy J, 'He "Look" Honest - Big White Thief' (1998) 4(1) *Law Text Culture* 146
- Lertzman D.A and Vredenburg H, 'Indigenous Peoples, Resource Extraction and Sustainable Development: An Ethical Approach' (2005) 56(3) *Journal of Business Ethics* 239
- Macoun A, 'Aboriginality and the Northern Territory Intervention' (2011) 46(3) *Australian Journal of Political Science* 519
- Muehlebach A, "'Making Place" at the United Nations: Indigenous Cultural Politics at the U.N. Working Group on Indigenous Populations' (2011) 16(3) *Cultural Anthropology* 415
- Mutua M, 'Savages, Victims and Saviors: the Metaphor of Human Rights' (2001) 42(1) *Harvard International Law Journal* 201
- Rose D.B, 'Land Rights and Deep Colonising: The Erasure of Women' (1996) 3(85) *Aboriginal Law Bulletin* 6
- Tennant C, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993' (1994) 16 *Human Rights Quarterly* 1
- Watson I, 'Aboriginal Laws and the Sovereignty of Terra Nullius' (2002) 13(3) *Law and Critique* 253
- Wolfe P, 'Settler colonialism and the elimination of the native' (2006) 8(4) *Journal of*

Genocide Research 387

CASES

Mabo and others v Queensland (No 2) [1992] HCA 23, (1992) 175 CLR 1

Monadee/Western Australia/Cossack Resources [2003] NNTTA 38

STATUTES

Native Title Act 1993

WEBSITES AND OTHER SOURCES

Ahni, 'Indigenous peoples win major victory against uranium mining corporation in Australia' (*DGR News Service*, 5 June 2012) <<http://dgrnewsservice.org/2012/06/05/indigenous-peoples-win-major-victory-against-uranium-mining-corporation-in-australia/>> accessed 29 December 2013

Altman J and Peterson N, 'A case for retaining Aboriginal mining veto and royalty rights in the Northern Territory' (*Australian Aboriginal Studies*, 1984) <http://www.anu.edu.au/caepr-dev/sites/default/files/StaffProfiles/stafffiles/jon-altman/1984_AusAboriginalStudies.pdf> accessed 29 December 2013

'Exactly what is native title?' (*National Native Title Tribunal*) <<http://www.nntt.gov.au/Information-about-nativetitle/Pages/Nativetitlerightsandinterests.aspx>> accessed 29 December 2013

'Free, Prior and Informed Consent (FPIC)' (*Forest Peoples Programme*) <<http://www.forestpeoples.org/guiding-principles/free-prior-and-informed-consent-fpic>> accessed 20 December 2013

Gibson P, 'Twenty years since Mabo: why Native title hasn't delivered' (*Solidarity*, 14 June 2012) <<http://www.solidarity.net.au/46/twenty-years-since-mabo-native-title-is-not-land-rights/>> accessed 6 November 2013

Hill C, Lillywhite S and Simon M, 'Guide to Free Prior and Informed Consent' (*Oxfam Australia*, 2010) <https://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf> accessed 19 December 2013

'Koongarra' (*Australian Map*, 2012) <<http://australianmap.net/koongarra/>> accessed 2 January 2014

Mcintosh I, 'Australian Aboriginal Property Rights Under Threat' (*Cultural Survival*, 25 March 2010) <<https://www.culturalsurvival.org/ourpublications/csqa/article/australian-aboriginal-property-rights-under-threat>> accessed 21 December 2013

Rickarby L, 'Coal versus Hunter native title claims' (*Newcastle Herald*, 24 June 2011) <<http://www.theherald.com.au/story/471945/coal-versus-hunter-native-title-claims/#slide=1>> accessed 29 December 2013

Santhebennur M, 'Court told unfavourable coal mine advice snubbed' (*Australian Mining*, 3 September 2013)

Shoebridge D, 'Pac approves Ashton coal mine [Media]' (*David Shoebridge*, 9 October 2012) <<http://davidshoebridge.org.au/2012/10/09/pac-approves-ashton-coal-mine-media/>> accessed 29 December 2013

- 'The UN Declaration on the Rights of Indigenous Peoples' (*International Work Group for Indigenous Affairs*)
<<http://www.iwgia.org/human-rights/international-human-rights-instruments/undeclaration-on-the-rights-of-indigenous-peoples>> accessed 19 December 2013
- 'Tribunal Overview' (*National Native Title Tribunal*) <<http://www.nntt.gov.au/au/Pages/Tribunaloverview.aspx>> accessed 29 December 2013
- Walsh S, 'Registration Test Decision' (*National Native Title Tribunal*, 2012)
<http://www.nntt.gov.au/Applications-And-Determinations/Registration-Test/Documents/2012/November%202012/NN12_4%2006112012.pdf> accessed 29 December 2013
- UNGA, 'United Nations Declaration on the Rights of Indigenous Peoples' (UN Doc A/RES/61/295, 2 October 2007)
- 'Letter dated 10 September 2013 from the Permanent Representatives of the Plurinational State of Bolivia, Denmark, Finland, Guatemala, Mexico, New Zealand, Nicaragua, Norway and Peru to the United Nations addressed to the Secretary-General' (UN Doc A/67/994, 13 September 2013)

Judicial Independence and the Media in China: An Exercise in Modelling Interfering Relationships as A Means of Assessment

Thomas Van Mourik*

I. INTRODUCTION

In the Post-Mao era, China initiated numerous legal reforms to reinstate the peace and stability that had been lost during the Cultural Revolution. However, as pointed out by scholars such as Zhu and Wang, this development is taking a distinctly Chinese form as longstanding historical and societal influences pull China's legal system off the conventional western path to Rule of Law to which we are most accustomed.¹ The most significant difference in the paths taken by China and Western liberal democracies is the existence of the Chinese Party-State, which continues to operate above the law.² As the judiciary remains a tool of the Party-State, some scholars describe the legal system of China as Rule *by* Law rather than Rule *of* Law.³ This ambiguity is further compounded by the 1999 amendment to Article 5 of the Constitution of the People's Republic of China that states that China must be 'a socialist country ruled by law', insinuating that law is a tool of the rulers. Whether one follows Stanley Lubman's view that Rule of Law will continue to be caged under Party-State control, or one agrees with Randall Peerenboom's argument that Rule of Law has already begun to take shape within the framework of increasing economic and social freedoms, one thing is clear: judicial independence is crucial in order for the Party to be truly accountable for their actions. Only then will China evolve into a true Rule of Law state.⁴

* Thomas Van Mourik graduated with a BA Hons in Chinese Studies from the University of Sheffield before studying an MA in International Law at SOAS, University of London.

¹ Wang Chenguang, 'From the Rule of Man to the Rule of Law' in Cai Dingjiang and Wang Chenguang (eds), *China's Journey toward the Rule of Law: Legal Reform, 1978-2008*, vol 1 (Brill 2010) in John Fitzgerald (ed), *Social Scientific Studies in Reform Era China* (Brill 2010); Sanzhu Zhu (ed), *Laws and Institutions of Modern China* (Routledge 2011) 1-34.

² Stanley B Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press 1999) 298-306.

³ *ibid*; Randall P Peerenboom, *China's Long March Toward Rule of Law* (CUP 2002) 8; Zhu (n 1).

⁴ Lubman (n 2).

China is experiencing significant transformations in the modern era: increasing social and geographical stratification exacerbated by uneven economic development, environmental degradation, labour violations and pockets of social unrest.⁵ Both Peerenboom and Gu identify that the state is unlikely to focus on the liberal ideal of judicial independence whilst manipulation of the judiciary can aid the resolution (or suppression) of these more threatening social issues.⁶ However, both authors agree that the problems facing judicial independence are multifaceted and do not simply revolve around direct state intervention.⁷ The object of this Article is to assess the literature and theories surrounding the Chinese media's role in judicial independence in order to map this relationship. Using example cases, I outline the three main models that I have identified for this relationship: 1) State Censorship, 2) Media Watchdog and 3) 'Tyranny of the Majority'. I conclude by arguing that the third model is particularly useful when considering the problems of a non-independent judiciary in terms of the individual rights of defendants. Before undertaking this analysis, it would be useful to discuss Chinese legislation on judicial independence.

1.1 Chinese Legislation for Judicial Independence

The rights and duties of the Chinese judiciary are vested primarily through the Judges Law (1995, amended in 2001).⁸ As Peerenboom points out, there were significant problems facing judicial independence in China and the Judges Law was introduced to address some of these problems.⁹ For example, Article 9 requires a judge to attain a higher academic and legal experience. The Supreme People's Court (SPC) has introduced various measures in an attempt to realise Article 1, which calls for the enhancement of the 'quality of judges' and to ensure that 'judges perform their functions and duties according to law'. Achievement of these goals would build public confidence in the courts and lay the foundations of judicial independence. Many improvements have been made to the collective independence of the judiciary and the personal independence of judges, but there are still significant issues – particularly regarding social and political pressures that judges face.¹⁰ However, it is arguable that this struggle

⁵ Human Rights Watch, 'World Report 2013: China' (*Human Rights Watch*, January 2013) <<http://www.hrw.org/world-report/2013/country-chapters/china>> accessed 25 June 2014.

⁶ Randall P Peerenboom, 'Judicial Independence in China: Common Myths and Unfounded Assumptions' in Randall P Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP 2010); Weixia Gu, 'The Judiciary in Economic and Political Transformation: Quo Vadis Chinese Courts?' [2013] *The Chinese Journal of Comparative Law* 1.

⁷ *ibid.*

⁸ Judges Law of the People's Republic of China (1995; 2001 revision).

⁹ Peerenboom, *China's Long March Toward Rule of Law* (n 3) 13-4.

¹⁰ Peerenboom, 'Judicial Independence in China' (n 6).

for judicial independence is not unique to China and has been characteristic of many developing legal systems, especially when conflicting interests are exaggerated by rapid economic development.¹¹

With regards to the relationship between the media and the judiciary, the most relevant section of the Judges Law is Article 8, which provides protection to the judiciary. It outlines, *inter alia*, that judges shall 'brook no interference from administrative organs, public organisations or individuals in trying cases according to law'.¹² Article 45 of the same law, which outlines a complaint mechanism to be used in case of interference by 'public organisations' or 'individuals', also accompanies this right embodied in Article 8.¹³ This Article implies that judges have the right to be free from the influence of the media, for they can be defined as either 'public organisations' or 'individuals'. Since rights are usually accompanied by corresponding duties, it would therefore also be assumed that the media has a duty to refrain from interfering in the functions of the judiciary. However, this assumption ignores Gu and Peerenboom's identification of the extra-legal effects that influence judicial independence in China.¹⁴ Indeed, the recent economic liberalisation and social emphasis on anti-corruption has led to the phenomenon of *yulun jiandu* (舆论监督). This is often translated as 'public opinion supervision' and involves the mobilisation of public awareness to influence the state and judiciary. This is usually done under the pretext of contributing to safeguarding against corruption.¹⁵ Cheung argues that the role of Chinese media is more complex than simply acting as a watchdog against corruption, as the media often do in liberal democracies.¹⁶ This is because the Chinese state is run under the ideology of 'democratic centralisation', in which the state derives its power from the will of the people, and therefore is subject to the scrutiny of this public will. However, the Chinese public is simultaneously guided by the Party, which is presumed to act in the best interests of the people. Cheung therefore states that 'attempts by the media and the Party to articulate the exact contours of this relationship have led to a variety of interpretations of what 'public opinion' means in the Chinese context'.¹⁷

This complex relationship is constantly in flux as the public and media explore

¹¹ *ibid*; Gu (n 6).

¹² Judges Law of the People's Republic China, art 8(2) (1995; 2001 revision).

¹³ *ibid* art 45.

¹⁴ Peerenboom, 'Judicial Independence in China' (n 6); Gu (n 6).

¹⁵ Anne SY Cheung, 'Public Opinion Supervision: A Case Study of Media Freedom in China' in Perry Keller (ed), *The Citizen and the Chinese State* (Ashgate 2011).

¹⁶ *ibid*.

¹⁷ *ibid*.

their areas and extent of scrutiny. The state balances the specific social pressures of public scrutiny with the myriad of other social, economic and administrative pressures that threaten to undermine its authority. Therefore, even though the Judges Law outlines the legal prohibition of interference with the judiciary, the Law outlines an ideal to which China aspires, rather than a pre-existing norm to be upheld.

II. MODELLING MEDIA INTERFERENCE IN JUDICIAL INDEPENDENCE

Since it has been established that the relationship between the media, state and judiciary is complex and does not strictly adhere to the legislation, it is necessary to model the true relationship. An accurate model may serve well in identifying the ramifications of a non-independent judiciary. The following Sections will outline three models for this relationship: 1) State Censorship, 2) Media Watchdog and 3) 'Tyranny of the Majority'. Although I map these three models independently, they are, in fact, not mutually exclusive. In most situations, influences from all three models are present. Yet, isolating these models will help place the issues in specific frameworks to identify targeted remedies or development paths for judicial independence in China's future.

2.1 State Censorship Model

Under Deng Xiaoping's leadership, the media in China underwent significant reform. Previously, in the Maoist era, the media was considered the 'mouth and throat' of the state, effectively tasked with promulgating propaganda under the axiom that 'good news is news, bad news is not news'.¹⁸ This role developed during the Post-Mao reforms when advertising was first allowed in 1979, and all broadcasting (except the China Central Television (CCTV) service) was decentralised in 1983.¹⁹ Newspapers were required to become self-sufficient by 1994 and the Ministry of Propaganda allowed the first newspaper conglomerate to be established in 1996.²⁰ However, as noted by Cheung, traditional media in China is still predominantly state-controlled.²¹ This either occurs directly through official state-controlled media, such as the *People's Daily* newspaper or CCTV, or indirectly through supervision departments tasked with censoring and influencing the material of Non-Party media.²² As Richard Baum describes, 'Reporters who probe sensitive issues are harassed and their editors

¹⁸ *ibid.*

¹⁹ *ibid* 498-99.

²⁰ *ibid.*

²¹ *ibid.*

²² *ibid.*

reprimanded – or worse’.²³ Traditional media around the globe often occupies a dual role of a state watchdog and disseminating information on behalf of the state or other powerful social actors.²⁴ In China, state interference in media activities is exaggerated and journalists therefore lean towards the role of state mouthpiece more readily than that of watchdog.²⁵ This interference manifests itself both at the national and provincial level in many ways, such as the dangling of financial ‘carrots’ for those who report stories that represent the Party-State positively.²⁶

The Party-State in China implements many forms of indirect interference that compound the effect of state censorship. For instance, as pointed out by Liebman, the CCP has increasingly encouraged various non-state actors to assume a supervisory role.²⁷ The court and the media play two such mutually supervisory roles: the media has informal influence over court decisions and the courts have heard a growing number of libel cases.²⁸ Liebman argues that competition between these supervisory bodies is encouraged by the state as it has the potential to lead to positive supervision. This supervision is primarily achieved through a combination of increasing media coverage of court cases and legal development, and through a growing number of defamation cases being brought against media bodies.²⁹ However, in a state in which Rule of Law is not well established, and where instead of law, connections and influence provide more protection to individuals, the outcome of competitive supervision can be equally dangerous and may lead to personal attacks and institutional power struggles.

The Jiahe housing scandal is an example of the aforementioned relationship of state censorship. In 2003, the county government of Hunan province expropriated land in the city of Jiahe to develop a commercial area.³⁰ The purchasing affected 1,100 households and 7,000 individuals. Those affected felt extremely aggrieved because of the forced purchasing and the received compensation was only a fraction of the real value of their property (around

²³ Richard Baum, ‘Political Implications of China’s Information Revolution: The Media, the Minders, and Their Message’ in Cheng Li (ed), *China’s Changing Political Landscape: Prospects for Democracy* (Brookings Institution Press 2008).

²⁴ Jianlan Zhu, ‘Roadblock and Roadmap: Circumventing Press Censorship in China in the New Media Dimension’ (2009) 30(2) *University of La Verne Law Review* 404, 428-29.

²⁵ Baum (n 23) 161.

²⁶ *ibid* 163.

²⁷ Benjamin L Liebman, ‘The Media and the Courts: Towards Competitive Supervision?’ (2011) 208 *The China Quarterly* 833, 835.

²⁸ *ibid* 840-46.

²⁹ *ibid*.

³⁰ Cheung (n 15) 370.

3.7%).³¹ Furthermore, the local government took draconian administrative steps to coerce the residents to leave.³² A number of the affected residents travelled to Beijing to petition the relevant Ministry of Construction, but were not successful.³³ When residents resisted the evictions, three residents were arrested and detained without charge. Media coverage of this event spread across China but was met with resistance by state censorship. Editors and journalists at all levels were torn between reporting the injustice or conforming to the Party's wishes.³⁴ However, when institutional corruption in the case became apparent, both state-run and non-state media suddenly became interested in the story.³⁵ When *Oriental Horizon*, an investigative programme on CCTV, was given state permission to continue investigating the story in 2004, awareness of the injustices spread nationwide and human rights lawyers were commissioned by Qinghua University to work on the cases of the detainees.³⁶ The courts held a particularly quick hearing (lasting only one day) and the detainees were immediately released.³⁷ Although this may sound like a success story, the court never dealt with the full extent of the corruption; some local officials were exposed but it is likely that the corruption originated higher up the ladder than those who were punished.³⁸

It is important to note here that Cheung was very reliant on personal interviews that she conducted to collect evidence on this particular incident. The lack of media coverage of events prior to the discovery of corruption is very telling of the conundrum that journalists face in politically charged situations. We can therefore assume that the lack of published evidence that corroborates this phenomenon does not necessarily undermine the argument for its frequent occurrence.

So what can we learn from this model? The relationship between media, state and judiciary seems inherently opaque and therefore, decisive evidence is hard to come by. We can however, make some notable inferences. First, it is important to note that reportage was restricted when the case was seemingly limited to individual grievances. It was only when wider corruption emerged that the state permitted widespread media coverage. This may be attributed to

³¹ *ibid* 374.

³² *ibid*.

³³ *ibid*.

³⁴ *ibid* 371-73.

³⁵ *ibid*.

³⁶ *ibid* 377.

³⁷ Fu Jing, 'Gov't Pays Residents For Wrong Arrest' (*China Daily*, 3 June 2004)

<http://www.chinadaily.com.cn/english/doc/2004-06/02/content_335944.htm> accessed 25 June 2014.

³⁸ Cheung (n 15) 379.

the fact that the state has become more outspoken against anti-corruption in recent times³⁹ and is therefore willing to use the media to gain support. Secondly, the judiciary only held hearings for those held in indefinite custody once the state-run Qinghua University sent lawyers to offer defence; other possible criminal offences were not heard and corruption was mostly dealt with privately.⁴⁰ In the aftermath of this scandal, state-run media lauded the Party officials as heroes who had punished corruption on behalf of the people, while the suspected main perpetrator of the institutional corruption, Zhou Xiangyong, received a light punishment from the Party and was untouched by the Procuratorate (the Chinese prosecution body).⁴¹ Therefore, the state seems to have manipulated the media to gain public support whilst determining the progress of cases before the judiciary and procuracy by dictating which cases could be heard. In this model, state censorship controls the avenues and intensity of public debate through the media. As a result, when the state interferes with the actions of the judiciary, it does so with apparent public backing – backing that it has fostered for its own means.

2.2 Media Watchdog Model

The media watchdog model has emerged due to post-Mao media reforms, rapid economic liberalisation in China and developments on the Internet. These three factors have led to the rise of ‘new media’ (online magazines, blogs, etc.) and traditional media to become more thorough with their reporting.⁴² Online magazines such as *chinaSMACK*, microblogging sites such as *Sina Weibo*, and countless blogs have contributed to a huge increase in citizens’ engagement in ‘new media’. ‘New media’ possesses a unique potential for mass citizen participation that can directly influence the state and other powerful institutions.⁴³ Traditional media has also begun to report on more legal cases due to the post-Mao legal reforms.⁴⁴ The subsequent increase in written law and its public dissemination has made it easier for journalists to highlight wrongdoing in the legal system; a development that was supported by a contemporaneous increase in liberalisation of media.⁴⁵ Marketisation of traditional media and the requirement that all non-state media companies become self-

³⁹ Wang Xiaomei, ‘Full Text of Hu Jintao’s Speech at CPC Anniversary Gathering’ (*CCTV News*, 1 July 2011) <<http://english.cntv.cn/20110701/107756.shtml>> accessed 13 June 2014.

⁴⁰ Cheung (n 15) 379-80.

⁴¹ *ibid.*

⁴² Zhu (n 24).

⁴³ *ibid.* 419-20.

⁴⁴ Benjamin L Liebman, ‘Watchdog or Demagogue? The Media in the Chinese Legal System’ (2005) 105(1) *Columbia Law Review* 1, 69.

⁴⁵ *ibid.*

sufficient has led to many traditional media outlets focusing on stories of public interest rather than serving solely as 'party mouthpieces'.⁴⁶ Liebman argues that papers such as *Southern Metropolitan Daily* and *Caijing* have combined opportunities in economic liberalisation, relaxation in content restrictions and Party efforts to popularise legal issues, to create sections of traditional media that not only challenge traditional state scrutiny limits, but also popularise their content.⁴⁷ Even though the post-Mao media reforms did not themselves lead to full media liberalisation, when combined with the above socio-economic developments, they created a space in which limited media independence could be established. The two cases below illustrate how this space for independence in the Chinese media allows for supervision over corruption in the courts.

The first of these is the Qiu and Cai rape case of 2009. Qiu and Cai were two security personnel who raped two women in a hotel room in Huzhou, Zhejiang Province.⁴⁸ When tried for their crime, the court found that each defendant had committed a 'provisional kind of spontaneous crime' and sentenced them both to three years in prison – the minimum penalty for rape.⁴⁹ After the case was reported, it gained widespread attention and the public voiced their dissatisfaction over the use of the term 'provisional kind of spontaneous crime'.⁵⁰ Many believed that the courts had been extremely lenient owing to the relationship that the culprits had with the local police.⁵¹ Commentators began highlighting the fact that such an act should be considered a 'gang rape', a more serious crime.⁵² It was also pointed out that while judges should be given autonomy, their actions should be supervised. The increasing pressure on the courts resulted in a retrial, and the defendants were separately sentenced to eleven years and eleven-and-a-half years in prison; a punishment that commentators agreed was more in-keeping with China's criminal code that dictates a minimum sentence of ten years.⁵³

⁴⁶ Zhu (n 24) 427.

⁴⁷ Liebman, 'The Media and the Courts' (n 27) 835.

⁴⁸ Southern Weekend Editorial Board, 'The Ten Most Influential Cases That Changed China in 2009' (2012) 13(2) *Asian-Pacific Law & Policy Journal* 1, 14.

⁴⁹ *ibid*; Criminal Law of the People's Republic of China (1979; 1997 revision), art 236.

⁵⁰ Southern Weekend Editorial Board (n 48) 14.

⁵¹ Wen Hua, 'Chinese Court Coins New Term: "Temporary Rape"' (*The Epoch Times*, 15 November 2009)

<<http://www.theepochtimes.com/n2/china-news/temporary-rape-china-25237.html>> accessed 25 June 2014.

⁵² *ibid*.

⁵³ *ibid*; 'Court reviews "lenient" sentence for rape in E China's Zhejiang' (*People's Daily Online*, 9 November 2009) <<http://english.people.com.cn/90001/90776/90882/6807693.html>> accessed 25 June 2014.

The second case is that of Deng Yujiao, a waitress who was accused of murder after she stabbed two of three men who attempted to rape her. In 2009, Deng was working in an entertainment complex in a town in Hubei Province when three local officials advanced on her asking for 'special services'.⁵⁴ When she refused, one of the men forced her on to a sofa and tried to remove her clothes. This prompted Deng to stab two of the officials, resulting in the death of one of them. Despite efforts from the local government to censor media coverage and compel the courts to issue a death sentence against Deng, both traditional media and new media created a surge of public support for her.⁵⁵ When the sentence was finally concluded, the court completely ignored the request from local officials for the death penalty against Deng. In fact, Deng was released on bail and charged with the lesser crime of intentional injury in self-defence. Furthermore, the two surviving officials were removed from office.⁵⁶ Therefore, in this case, the media had uncovered attempted corruption and miscarriage of justice, and had effectively saved Deng's life.⁵⁷

Both cases evidence the media's potential to play the role of watchdog in effecting justice in China. In each case, there was an imminent miscarriage of justice stemming from corruption, where the judiciary was pressured by the local governments to overlook certain aspects of a case or protect local officials. However, as evidenced in Deng's case, this potential has limitations. In that case, the media could protect the individual, but could not fully affect justice. The officials who attempted to rape Deng were not convicted but simply removed from office.

From this study, it can be inferred that the media influences the judiciary both directly and indirectly through the state. The indirect influence is achieved through rousing enough popular support to worry the government and press for changes in the course of law.⁵⁸ As with the two cases above, pressurising the government is much easier if it is connected with its own rhetoric – in these cases, it is the state's promotion of anti-corruption. The direct influence is much simpler and relies on social pressure.⁵⁹ It is sometimes easy to objectify the judiciary as an inanimate institution, forgetting that the media spotlight affects judges in the same way as any other individual. In either case, this model shows how the media can provide safeguards against corruption, but it is important to note that this model cannot act independently from the others.

⁵⁴ Liebman, 'The Media and the Courts' (n 27) 833.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ Liebman, 'Watchdog or Demagogue?' (n 44) 121.

⁵⁹ Peerenboom, *China's Long March Toward Rule of Law* (n 3) 315.

The influence of coexisting models results in partial justice where the full extent of corruption is not completely exposed and the Party often deals with state officials internally.

2.3 Tyranny of the Majority: Theoretical Framework

One of the main criticisms of media intervention in the outcome of legal cases is the obstruction that it poses to Rule of Law. As Cheung points out in the Jiahe housing development case, 'In the absence of media exposure, it is highly doubtful whether a legal proceeding would have been of any use'.⁶⁰ This observation is convincing, regardless of whether the media watchdog model or the state censorship model is used. This phenomenon highlights the fact that in the resolution of many cases, external social pressure remains more effective than the Rule of Law.⁶¹ This is because the courts still lack legitimacy and attacks by the media on courts inhibit the development of legitimacy. Liebman argues that this occurs because the traditional media in China uses its influence over the public like a 'demagogue' – rousing fear and preying on prejudices to achieve political motives.⁶² Through the following cases, I show how marketisation and increased public participation in both traditional media and 'new media' allow this model to be inverted so as to represent 'Tyranny of the Majority'.

The concept of 'Tyranny of the Majority' dates back to ancient Greece when it was identified that the will of the people must be constrained by law in order for due legal process to occur.⁶³ If left unconstrained, the majority might force their will upon minorities or individuals; a problem first linked to modern democracies by John Stuart Mill and that set the foundation for Separation of Powers championed by Locke and Montesquieu.⁶⁴ This model places an ethical emphasis on the courts, which are meant to act as a safeguard against such tyranny, like draconian punishments or witch-hunts instigated by pre-existing prejudices.⁶⁵ By inverting the idea of the media demagogue, we can highlight serious issues caused by the 'Tyranny of the Majority' undermining the rights of defendants – particularly those in serious criminal cases.

⁶⁰ Cheung (n 15) 379.

⁶¹ Liebman, 'Watchdog or Demagogue?' (n 44) 130.

⁶² *ibid* 131.

⁶³ Robert K Fleck and F Andrew Hanssen, 'Judicial Review as a Constraint on Tyranny of the Majority' (2013) 29(2) *Journal of Law, Economics and Organisation* 303.

⁶⁴ *ibid*.

⁶⁵ *ibid*.

III. TYRANNY OF THE MAJORITY MODEL

As Zhu notes, the marketisation of traditional media has led to increasing focus on 'public interest' stories. The emergence of 'new media' has allowed the public to become involved in debates and have their views potentially read by millions of people.⁶⁶ However, traditional media has not evolved in a vacuum and has been significantly influenced by the 'new media'. Many traditional media outlets also operate online and allow readers to publish comments. Through this interaction between the traditional media and its customer base, the marketisation needs of the media are made easier as the people are directly engaged with the media, allowing the companies to tailor their coverage. I argue that by tailoring their coverage to the majority, the media reinforces pre-existing prejudices that are conducive to the opinions of their readers. When combined with the outlet of blogs and microblogs, the opinions of the public are more pervasive through all levels of society – affecting both the actions of the state and the mindset of judges. This is particularly noticeable in China, where the 'public is quick to condemn the criminal and call for his arrest and punishment', levying serious pressure on the court and state to realise 'justice' as soon as possible while condoning the use of dubious methods such as torture to extract confession.⁶⁷

The first case I rely upon to illustrate this model is that of the gangster Liu Yong in 2002-2003. Liu was a well-connected gangster who was sentenced to death but had his conviction overturned by the Liaoning Province High People's Court.⁶⁸ The *Bund Pictorial* published a report suggesting that it was Liu's connections with local officials that had influenced the Liaoning Province High People's Court's decision.⁶⁹ This led to accusations of corruption by the media.⁷⁰ For example, *China Youth Daily* called for the court to disclose the reasons behind its decision.⁷¹ According to Liebman, media pressure led the state to issue direct instructions to the Supreme People's Court (SPC) to retry the case *de novo*, in accordance with the 1996 Criminal Procedure Law (CPL).⁷² The SPC found Liu guilty and sentenced him to death; he was executed just hours after his sentencing and merely four months after the initial media speculation.⁷³

⁶⁶ Zhu (n 24).

⁶⁷ Wu Xiaofeng, 'An Analysis of Wrongful Convictions in China' (2011) 36 *Oklahoma City University Law Review* 451, 455.

⁶⁸ Liebman, 'Watchdog or Demagogue?' (n 44) 89-90.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.*; Criminal Procedure Law of the People's Republic of China, art 205 (1996).

⁷³ Liebman, 'Watchdog or Demagogue?' (n 44) 90.

Although Liebman views this case as a success for the media watchdog model, he seems to have ignored the information released by the court, which explains the Liaoning High People's Court decision to overturn Liu's death penalty. The Liaoning High People's Court claimed Liu's confession had been obtained through torture, which invalidated the confession.⁷⁴ Due to the inherently opaque nature of the evidence needed to support the media's allegations of corruption and the courts' general lack of legitimacy, it was impossible for the court to establish convincing torture allegations to the public. The media uses the public's lack of trust in the Rule of Law to satisfy the 'Tyranny of the Majority' and overturn what may have been a correct legal decision. The speed of the retrial, conviction and execution of Liu also raises serious doubts about the following of due process and further supports the notion of popular justice.

The second case supporting this view is that of Zhang Jinzhu, a public security official in Zhengzhou who, in August 1997, was convicted of running over two cyclists, killing one.⁷⁵ Although the identity of the driver was not initially verified, *Dahe News*, a local paper, commented extensively on both the public outrage and the suspicion that the culprit was an official,⁷⁶ creating a cycle that reinforced prejudices held by the public and the media. As Zhang was driving under the influence of alcohol and did not stop his car to check on the two victims, he was immediately vilified when the story gained publicity.⁷⁷ Zhang was arrested but the prosecution did not proceed until the story hit national media. At this point, Zhang became a symbol of national corruption problems; the public and media were calling for his head.⁷⁸ Pressure from local officials led to the court passing a death sentence, stating in their reasoning that if any lighter punishment had been issued, 'it would not be enough to assuage public rage'⁷⁹ – the 'Tyranny of the Majority' had sentenced Zhang to death.

These two cases are merely the tip of the iceberg when it comes to negative interference levied on the courts by the media.⁸⁰ They show how media influence often leads to unjust heavy sentencing and swift court hearings, which may impede due legal process. Unlike Liebman's view that this relationship is best explained by the media acting as a 'demagogue', I argue that advances in the way people interact with and influence the media affects the state and the court, and that Liebman's concept is better described as the 'Tyranny of the Majority' model.

⁷⁴ Shumei Hou, Ronald C Keith and Zhiqiu Lin, *China's Supreme Court* (Routledge 2013) 128.

⁷⁵ Liebman, 'Watchdog or Demagogue?' (n 44) 69.

⁷⁶ *ibid* 70.

⁷⁷ *ibid*.

⁷⁸ *ibid*.

⁷⁹ *ibid* 71.

⁸⁰ Liebman (n 44) 72-73.

IV. CONCLUSION: PROSPECTS FOR RIGHTS OF DEFENDANTS

Throughout this Article, I have shown how the relationship between the media, the state and the courts has negative implications for judicial independence. As well as contributing to the retardation of developing Rule of Law in China, media interference has a significant impact upon the right to due process. This breach of the defendant's rights is most noticeable concerning violations of the CPL, which require that there be no public accusations of guilt prior to the decision of the courts;⁸¹ that decisions based on the facts of the case are dealt within the confines of the court;⁸² and that defendants are sentenced according to the law.⁸³ The first two models I have presented – State Censorship and Media Watchdog – allow us to map the undermining influence of the state and media upon judicial independence by placing it within a *political* framework. The media and the courts play out the struggle for supervisory authority while the state controls this contest or interferes directly in an attempt to maintain legitimacy and appease the masses – all at the expense of defendants.

However, I believe the third model I have outlined – 'Tyranny of the Majority' – can be used to assess this power struggle and breach of rights through an *ethical* framework. When combined with the two previous models, it gives further credence to the goal of establishing Rule of Law in China by allowing us to focus on the problem from a non-political angle, while also focusing on the rights of the individual. As above, these three models are not intended to be mutually exclusive, nor do they constitute an exhaustive list. The exercise of modelling the relationship of interference upon the courts allows us to assess this complex problem from various angles. I believe further socio-legal studies and identification of other models will help to build an opus of frameworks that will provide further insight into this problem and allow us to apply these models to real legal issues.

⁸¹ *ibid.*

⁸² Criminal Procedure Law of the People's Republic of China, art 42 (2012).

⁸³ Criminal Procedure Law, Part One, Chapter 1: Aim and Basic Principles.

BIBLIOGRAPHY**BOOKS**

- Baum R, 'Political Implications of China's Information Revolution: The Media, the Minders, and Their Message' in Li C (ed), *China's Changing Political Landscape: Prospects for Democracy* (Brookings Institution Press 2008)
- Cheung A.S.Y, 'Public Opinion Supervision: A Case Study of Media Freedom in China' in Keller P (ed), *The Citizen and the Chinese State* (Ashgate 2011)
- Hou S, Keith R.C and Lin Z, *China's Supreme Court* (Routledge 2013)
- Lubman S.B, *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press 1999)
- Peerenboom R.P, 'Judicial Independence in China: Common Myths and Unfounded Assumptions' in Peerenboom R.P (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP 2010)
- — *China's Long March Toward Rule of Law* (CUP 2002)
- Wang C.G, 'From the Rule of Man to the Rule of Law' in Dingjiang C and Chenguang W (eds), *China's Journey toward the Rule of Law: Legal Reform, 1978-2008*, vol 1 (Brill 2010) in Fitzgerald J (ed), *Social Scientific Studies in Reform Era China* (Brill 2010)
- Zhu S, *Laws and Institutions of Modern China* (Routledge 2011)

JOURNAL ARTICLES

- Fleck R.K, 'Judicial Review as a Constraint on Tyranny of the Majority' (2013) 29(2) *Journal of Law, Economics and Organisation* 303
- Gu W.X, 'The Judiciary in Economic and Political Transformation: Quo Vadis Chinese Courts?' [2013] *The Chinese Journal of Comparative Law* 1
- Liebman B.L, 'Watchdog or Demagogue? The Media in the Chinese Legal System' (2005) 105(1) *Columbia Law Review* 1
- — 'The Media and the Courts: Towards Competitive Supervision?' (2011) 208 *The China Quarterly* 833
- Southern Weekend Editorial Board, 'The Ten Most Influential Cases That Changed China in 2009' (2012) 13(2) *Asian-Pacific Law & Policy Journal* 1
- Wu X.F, 'An Analysis of Wrongful Convictions in China' (2011) 36(2) *Oklahoma City University Law Review* 451
- Zhu J, 'Roadblock and Roadmap: Circumventing Press Censorship in China in the New Media Dimension' (2009) 30 *University of La Verne Law Review* 404

STATUTES AND CODES

- Criminal Law of the People's Republic of China (1979; 1997 revision)
- Criminal Procedure Law of the People's Republic of China (2012)
- Criminal Procedure Law of the People's Republic of China (1996)
- Judges Law of the People's Republic of China (1995; 2001 revision)

REPORTS

Human Rights Watch, 'World Report 2013: China' (*Human Rights Watch*, January 2013)
<<http://www.hrw.org/world-report/2013/country-chapters/china>> accessed 25
June 2014

WEBSITES AND OTHER SOURCES

China Daily, 'Court reviews "lenient" sentence for rape in E China's Zhejiang' (*China
Daily*, 9 November 2009)

<<http://english.people.com.cn/90001/90776/90882/6807693.html>> accessed 25
June 2014

Hua W, 'Chinese Court Coins New Term: "Temporary Rape"' (*The Epoch Times*, 15
November 2009)

<[http://www.theepochtimes.com/n2/china-news/temporary-rape-china-
25237.html](http://www.theepochtimes.com/n2/china-news/temporary-rape-china-25237.html)> accessed 25 June 2014

Jing F, 'Gov't Pays Residents For Wrong Arrest' (*People's Daily Online*, 3 June 2004)

<http://www.chinadaily.com.cn/english/doc/2004-06/02/content_335944.htm>
accessed 25 June 2014

Xiaomei W, 'Full Text of Hu Jintao's Speech at CPC Anniversary Gathering' (*CCTV
News*, 1 July 2011) <<http://english.cntv.cn/20110701/107756.shtml>> accessed 13
June 2014

soaslawjournal.org

Knowledge Is Power



SOAS
University of London