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# FOREWORD

Welcome to Volume 4, Issue 1 of the SOAS Law Journal. The five articles in this Issue separately explore important and contemporary legal issues relating to Islamic law, human rights law, and legal pluralism. In contemporary times, these are three topical areas of law in, for which the SOAS School of Law is recognised as a leading world-class expert. This foreword briefly overviews the topicality of those three areas of law in the context of the five articles contained in this Issue.

Regarding the contemporary topicality of Islamic law, the past sixteen years after 9/11 have witnessed increased global discourse, often entrapped in controversy and misunderstanding, about the nature and application of Islamic law in the modern world. Intriguingly, there is a paradox about how Islamic law is perceived in the Western world, with aspects such as Islamic penal law perceived negatively but aspects such as law of Islamic finance perceived positively, particularly with recent advancements in Islamic banking and finance. The two articles on Islamic law in this Issue reflect both sides of this paradox. On the one hand, the first article, titled “Zinā: The ‘Forgotten Problem’ of the Shari’a in Nigeria”, examines the issue of zinā in Islamic law by exploring its application in Nigeria. The application of zinā laws in some modern Muslim-majority States, including Northern Nigeria, has raised international human rights concerns about the protection of women’s rights, and the prohibition of torture or cruel, inhuman, or degrading treatment or punishment under international human rights law. In the few Muslim-majority States that apply Islamic penal laws, zinā laws are often obsessively misapplied leading to adverse consequences on women’s rights in many cases. The States often seek, controversially, to justify their application of zinā laws on grounds of religious identity or cultural relativism. The article critically engages with the controversies surrounding the application of zinā laws in Nigeria and its impact on the rights of women, seeking thereby to revive discussion on what it describes as a ‘forgotten problem’ in the application of Islamic law in Nigeria. On the other hand, the second article titled “In Defence of Hawala: Rethinking Regulation of Customary Banking” examines the concept of hawāla, which has been used by Arab and

Muslim traders since the 8th century as an informal customary means of monetary transfer based on trust, and eventually recognised as a valid means of financial transaction under the law of Islamic finance. The hawāla system continues to be used today, especially by Muslims in Diaspora, as an expedient customary means for legitimately transferring money to different parts of the Muslim world. In recent times, however, the hawāla system has faced allegations of being used fraudulently for monetary transfers to finance terrorism, money laundering, and tax evasions. Different regulatory restrictions are therefore being put in place in different countries aimed at stemming the abuse of the system and consequently impacting on its expediency. The article critically engages with the regulatory regime of the hawāla system in the United States, arguing that the hawāla system is not particularly suited to conform with the stringent expectations of the current regulations and thus leading to non-compliance with the law. It thus endeavours to identify and propose alternative regulatory measures and policies that could bring the hawāla industry into better regulatory compliance in the United States.

Regarding the contemporary topicality of human rights, there is no gainsaying the fact that “human rights” has become the contemporary catch-phrase for freedom and justice globally. It is, evidently, the single most important catalyst for evaluating the actions of States in the modern world. It is well established today as a universal project grounded on the moral idea of respecting the inherent dignity of every human being without discrimination. Over the past sixty years, the concept of human rights has acquired legal positivisation through the adoption of different legally binding regional and international human rights instruments guaranteeing the rights of individuals through positive law. However, despite its established nature, there are still some unsettled questions about human rights, such as the scope of its coverage and the legal justiciability of economic, social, and cultural rights, amongst others. Despite the volume of adopted human rights instruments covering different subjects and protecting the rights of different entities, there is continued academic discourse and advocacy for expanding the scope of human rights further to protect other necessary rights and vulnerable entities. The third article in this Issue titled “Exploring New Territories: The Adoption of Human Rights for the Protection of Indigenous Knowledge and Natural Resources from Biopiracy” aims at breaking new human rights grounds by arguing for the possibility of extending human rights to protect indigenous knowledge and natural

resources from biopiracy. In doing so, the article makes an important academic contribution to debates on the scope of the rights of indigenous people and intellectual property rights within international human rights discourse. The second article titled “Social, Economic and Cultural Rights in Transitional Justice: A Case Study of Food Rights in Palestine” also engages with a topical issue in human rights discourse in the context of economic, social, and cultural rights, with reference to the right to food in Palestine. The article uses the legal frameworks of international humanitarian law and international human rights law to analyse legal obligations and violations of food rights in Palestine during and post-occupation. It seeks to apply existing literature on socio-economic rights to assess whether a transitional justice approach may provide appropriate remedies for the violations food rights. Since the question of the legal justiciability of economic, social, and cultural rights, particularly the right to food, is still not fully settled, recourse to a transitional justice approach could bring a unique perspective to finding appropriate remedies to the question of the right to food in Palestine and other similar situations.

Finally, we turn to the contemporary topicality of legal pluralism. Due to the complex plurality of legal orders domestically, regionally and internationally, the concept of legal pluralism has become a global phenomenon in our contemporary world and influencing global legal discourse in different ways. This has led to the so-called notion of “Global Legal Pluralism”, which describes how different legal disciplines and legal orders are now interacting globally and gradually adopting some ideas of traditional legal pluralism in their interaction. Through this, different legal systems are impacting on one another and learning comparatively from one another in ways that could not have been perceived some 50 years ago. The fifth article in this Issue titled “Conceptualising Crown Accountability: Lessons from Legal Pluralism” seeks to utilise the interdisciplinary debate and methodological approaches in the study of legal pluralism in tackling the methodological problems in the analysis of English legal history, with particular reference to Crown accountability in English law. It acknowledges the usefulness of the concept of comparative accountability but identifies the methodological problem in this regard, which it seeks to address through lessons from legal pluralism; this provides different approaches that can be used in tackling the problems of methodology inherent in comparative accountability. The discussion is in the context of the exercise of Crown’s power in relation to the 2015 House of Commons

debate and vote on the Syrian Air-Strikes, which continue to be an issue of strong legal debate and public controversy both in the UK and internationally.

There is no doubt that each of the five articles in this Issue makes original and inspiring academic contributions to the debates on the legal issues addressed in these three important areas of law. As a student-run law journal, the quality of this Issue must be commended. In closing this foreword, it is appropriate to note that since the debate on these legal issues does not show signs of abating yet, this Issue of the SOAS Law Journal will certainly be a relevant reference material for researchers on these issues far into the future. Happy reading!

**Mashood Baderin, LL.M, PhD.**

Professor of Law  
SOAS School of Law

# INTRODUCTION

It is with great pride that we present to you Volume 4, Issue 1 of The SOAS Law Journal. In our world, recent events have us in a flit of panic. Our once perceived safe spaces have been intruded upon by alternative facts, there are stark reminders that our borders are no longer open, and a constant drone that our societal values are at stake. We live in a world divided along religious, national, and cultural lines; where the lucky rule with an iron fist, and parts of the world are used as international political fodder.

In this Issue, we look primarily at the human rights concerns that plague every corner of the legal discourse. As a leading institution for the study of Asia, Africa and the Middle East, SOAS prides itself on its interdisciplinary nature and its strengths lie in its scholarship on otherwise lesser-known and niche regions and areas of the law. In keeping with the Law Journal's aims of facilitating and contributing to legal scholarship and discussion, we have put together an Issue which, we hope, draws attention and analysis to some of the untold legal predicaments in places otherwise uncovered by traditional scholarship. Regardless of the branch of law we concern ourselves with, the debates on basic rights, morality, and accountability continue; in light of current events, we are proud to put these controversies front and centre, and we encourage our readers to face these questions and dilemmas with an open mind.

We would like to thank Dr Mashood Baderin for taking the time to provide us with his insightful Foreword. We would also like to extend our gratitude the Honorary Board, the Academic Board, the SOAS Law Faculty and Dr Carol Tan for their continued support and dedication in helping the Law Journal achieve its aims. We are also grateful for the contributions by the authors, and hard work by the editorial staff, without whom this Issue would not have been possible.

Finally, we would also like to to thank David Kanaan and Nikhil Gangadharan for being our first online editors for the newly launched Law Journal blog in January 2017. We have chosen to launch a blog-style editorial to continue engaging ourselves in legal discourse

while we are in the midst of publication. We hope that it continues evolving into a mouthpiece for writers of all backgrounds to express their opinions on pressing, contemporary legal issues, and we are excited for the depth that such a mouthpiece is sure to add to the SOAS Law Journal.

No one is immune to the changing of times, but it is our hope that regardless of the times, the Law Journal will strive to be a leading publication for regional and international legal discourse, critique, and analysis. In doing so, we hope it will continue providing scholarship for those who wish to know more about their contemporaries and the legal intricacies of the world around them.

A handwritten signature in black ink, appearing to read 'Kay Lee', is centered on a light gray rectangular background.

**Kay Lee**

Editor-in-Chief

# **Social, Economic, and Cultural Rights in Transitional Justice:**

## **A Case Study of Food Rights in Palestine**

Gemma Daly

*This article seeks to use the legal frameworks of international humanitarian law (IHL) and international human rights law (IHRL) to analyse legal obligations and violations of food rights in Palestine during and post-occupation. This analysis intentionally builds on critiques surrounding the relationship between IHL and IHRL, post-occupation obligations, and emerging concerns of food sovereignty. The author intends to apply existing literature around socio-economic rights to assess whether a transitional justice approach may provide appropriate remedies for the violations identified. The author acknowledges the importance of complementarity between different disciplines and hopes to offer a useful analysis of food issues in Palestine from a legal perspective.*

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### **1. INTRODUCTION**

This article analyses social, economic, and cultural rights violations and remedies in an elusive post-conflict Palestine through a case study of food rights. Generally, I endeavour to further the discourse that social, economic, and cultural rights are essential to transitional justice processes, using the issue of food as a paradigm. Specifically, I hope to provide greater legal clarity on food issues in Palestine and the post-occupation duties of the occupier and emerging State. I consciously explore these issues amidst a climate of stale peace processes in Palestine and Israel, maintaining the standpoint that transitional justice considerations can play a valuable and necessary role in conflict resolution. Whilst my approach may be critiqued as utopian, I maintain that it is necessary to adequately address violations of international law, and break from the stagnant frameworks from which the occupation has been debated and peace agreements failed. The consequences of the Oslo negotiations have demonstrated that postponing key rights issues is not a productive

approach to peace and human rights; I endeavour to encourage discussion of human rights obligations, violations, and remedies throughout all stages of the peace-making process.

The scope of this project is necessarily limited and there are certain boundaries that I have had to impose. Firstly, despite a practical overlap between food, water, land, and other issues in occupied Palestine, this article is restricted to food issues alone. This is because I intend to build on social, economic and cultural rights which have been secondary in human rights discourse, and select food as an issue that has established norms in both international humanitarian law and international human rights law, as well as the emerging framework of food sovereignty. Secondly, the scope of the transitional justice mechanisms to be considered are restricted to post-conflict Palestine. Finally, I adopt a legal approach to these issues, whilst acknowledging the importance of complementarity across disciplines such as politics, economics, and conflict resolution. This project is based on the presumption that the Israeli-Palestinian conflict would result in two separate States. Whilst there is some overlap, generally I refer to the 'occupied Palestinian territory' (oPt) to signify Palestine during occupation and 'Palestine' as post-occupation. Although Palestine's statehood has already been recognised by the UN,<sup>1</sup> this is to explicitly acknowledge the infringements on Palestinian sovereignty under occupation and the consequent Israeli obligations. Transitional justice is understood to be the way in which a post-conflict society responds to legacies of past abuse,<sup>2</sup> applying human rights and humanitarian law to the peace process.<sup>3</sup>

This project begins by exploring the relationship between transitional justice and conflict resolution, followed by a brief exposition of social, economic, and cultural rights in transitional justice. Once these preliminary issues have been addressed the legal frameworks of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) shall be outlined and their potential complementarity or dissonance explored. There shall be exploration of the food sovereignty framework and the emerging doctrine of 'jus post bellum'. The legal obligations outlined shall then be applied to particular food issues in the

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<sup>1</sup> Status of Palestine in the United Nations (4 December 2012) GA Res 67/19.

<sup>2</sup> Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press 2006) 4; Lisa J Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 *Virginia Journal of International Law* 921.

<sup>3</sup> Christine Bell, 'The New Law of Transitional Justice', *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) 239.

opt to exemplify violations of food protections. Final transitional justice mechanisms can be discussed.

The key questions to be addressed and borne in mind throughout this project are:

- Who has or has had obligations in relation to food towards the Palestinian people?
- Who has violated food rights or obligations?
- Who is responsible for addressing and recompensing for these violations?
- Does an occupier's obligations end when occupation ends?
- When does occupation end?
- What if occupation never ends?

The questions posed are not necessarily all answerable in the limited confines of this essay, but underlie the purpose of this project and shall be considered throughout.

## 2. TRANSITIONAL JUSTICE AND CONFLICT RESOLUTION

It is useful to consider transitional justice processes prior to the end of a conflict as they can contribute to conflict resolution and peace agreements. Transitional justice can even be understood as 'particularised practices of conflict resolution'.<sup>4</sup> Human rights violations can trigger conflicts,<sup>5</sup> whilst their promotion can be a tool of conflict resolution,<sup>6</sup> functioning as interdependent disciplines.<sup>7</sup> It is thus appropriate to analyse violations of food rights and consider transitional justice in Palestine prior to any final resolution, as transitional justice plays a key role in its 'attempt to apply the normative constraints of human rights and humanitarian law to peace agreement[s]'.<sup>8</sup>

Linking human rights and transitional justice with conflict resolution is criticised for adding a further burden to the already stale negotiations, and can be problematic when the two

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<sup>4</sup> Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"' (2009) 3 *The International Journal of Transitional Justice* 5, 13.

<sup>5</sup> Oskar NT Thoms and James Ron, 'Do Human Rights Violations Cause Internal Conflict?' (2007) 29 *Human Rights Quarterly* 674, 676.

<sup>6</sup> Dr BG Ramcharan, 'Human Rights and Conflict Resolution' (2004) 4 *Human Rights Law Review*.

<sup>7</sup> Ellen L Lutz, Eileen F Babbitt and Hurst Hannum, 'Human Rights and Conflict Resolution from the Practitioners' Perspectives' (2003) 27 *The Fletcher Forum of World Affairs* 173, 192.

<sup>8</sup> Bell, 'The New Law of Transitional Justice' (n 3) 239.

disciplines adopt 'mutually exclusive approaches to the same problem'.<sup>9</sup> Conflict resolution fundamentally seeks to end conflict with minimal loss of life,<sup>10</sup> whereas transitional justice aims to incorporate human rights into the process of transition and peace agreements.<sup>11</sup> However, I do not find these critiques undermine my approach as it is essential that IHL and IHRL grievances are considered and addressed prior to final settlement.

### 3. SOCIAL, ECONOMIC AND CULTURAL RIGHTS IN TRANSITIONAL JUSTICE

Transitional justice and human rights discourse have traditionally side-lined social, economic, and cultural rights in favour of civil and political rights violations.<sup>12</sup> I maintain that there is no justification for a 'hierarchy of rights',<sup>13</sup> as socio-economic rights are intrinsically linked to civil and political rights violations,<sup>14</sup> which if unaddressed 'are likely to fuel the next conflagration'.<sup>15</sup> The Universal Declaration of Human Rights (UDHR) protects both sets of rights, which have been consistently affirmed as 'universal, indivisible and interdependent and interrelated'.<sup>16</sup> Disregard for this interdependence disadvantages societies because, as Barak-Erez and Gross expose, solely protecting civil and political rights without addressing 'material welfare... cannot guarantee equal enjoyment of the civil rights themselves'.<sup>17</sup> This is the case with transitional justice in Palestine. If the underlying economic issues are not addressed then Palestinians' rights will be unfulfilled and their food security threatened. Whilst 'second generation' rights have persistently been neglected in international human rights and transitional justice discourse,<sup>18</sup> their use is gradually increasing<sup>19</sup> to the benefit of emerging societies.<sup>20</sup>

Critics of addressing social, economic, and cultural rights violations in transitional justice, such as Lars Waldorf, argue:

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<sup>9</sup> Lutz, Babbitt and Hannum (n 7) 173.

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid*; Bell, 'The New Law of Transitional Justice' (n 3) 239.

<sup>12</sup> Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40 *International Law and Politics*.

<sup>13</sup> *ibid* 26.

<sup>14</sup> *ibid* 8.

<sup>15</sup> *ibid.*

<sup>16</sup> The World Conference on Human Rights, *Vienna Declaration and Programme of Action* (12 July 1993) A/CONF.157/23, para 5.

<sup>17</sup> Daphne Barak-Erez and Aeyal Gross, *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007) 2.

<sup>18</sup> *Ibid* 26; Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' [2008] 2 *The International Journal of Transitional Justice* 266.

<sup>19</sup> Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' [2012] 21 *Social & Legal Studies* 171, 4.

<sup>20</sup> Arbour (n 12) 26.

First, those [transitional justice] mechanisms are already over-stretched and under-funded... Second, there is a danger of raising already inflated expectations of what transitional justice mechanisms can accomplish... Third, transitional justice mechanisms have a relatively short life-span during periods of political transition. By contrast, the remedying of socio-economic injustices is a long-term political project.<sup>21</sup>

Waldorf also suggests 'victims often prioritize present economic needs' over past socio-economic violations.<sup>22</sup> However, this critique neglects that victims' concerns with current socio-economic status may be connected to past wrongs and both may need to be addressed in tandem. The practical concerns do not prohibit socio-economic rights in transitional justice; they could be addressed by longer-lasting measures that are specifically aimed at addressing all rights violations. The failure to do so may leave Palestine comparable to South African 'economic apartheid'.<sup>23</sup>

Former United Nations High Commissioner for Human Rights Louise Arbour reasoned:

Many aspects of economic, social, and cultural rights are, nevertheless, as immediately realizable as many civil and political rights... Other aspects of economic, social, and cultural rights call for long-term investment; yet, contrary to widespread misconceptions, the same is true for many aspects of civil and political rights.<sup>24</sup>

The proposition that these rights are non-justiciable is criticised by Arbour,<sup>25</sup> and contradicted by recent court cases.<sup>26</sup> Arbour acknowledges transitional justice measures which have already addressed these rights. The prosecutions before the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>27</sup>; reparations programmes in South

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<sup>21</sup> Waldorf (n 19) 9.

<sup>22</sup> *ibid* 5.

<sup>23</sup> John Pilger, 'South Africa: 20 Years of Apartheid by Another Name' (*johnpilger.com*, 13 April 2014) <<http://johnpilger.com/articles/south-africa-20-years-of-apartheid-by-another-name>><http://johnpilger.com/articles/south-africa-20-years-of-apartheid-by-another-name>> accessed 31 May 2015.

<sup>24</sup> Arbour (n 12) 11.

<sup>25</sup> *ibid* 12.

<sup>26</sup> *ibid* 13.

<sup>27</sup> *ibid* 15.

Africa, Guatemala, and Bosnia and Herzegovina;<sup>28</sup> and recommendations for educational reforms in Guatemala and Peru.<sup>29</sup> Commentators including Zinaida Miller, Ron Dudai, and Leila Hilal are similarly supportive of greater incorporation of social, economic, and cultural rights in transitional justice processes.<sup>30</sup>

#### 4. LEGAL FRAMEWORKS

There are various legal frameworks from which food rights and violations can be assessed. The key relevant structures are the human rights framework of a right to food and food-related obligations under international humanitarian law. Food security<sup>31</sup> and food poverty<sup>32</sup> are common terms for addressing food rights, but are incorporated into the broader right to food. Therefore, I shall not consider them independently. There are clear advantages of using a human rights framework with defined rights and obligations, but some would criticise my rights approach as based on Western liberal ideals,<sup>33</sup> overestimated,<sup>34</sup> not 'fit for purpose'<sup>35</sup> and, specifically problematic in Palestine.<sup>36</sup>

Zurayk and Gough propose a new approach to food security incorporating food sovereignty and food entitlements,<sup>37</sup> but this is not an established framework. I maintain that an approach focused on international law is the most effective way to assess obligations, violations, and remedies.

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<sup>28</sup> *ibid* 17.

<sup>29</sup> *ibid* 18.

<sup>30</sup> Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 *The International Journal of Transitional Justice* 266; *ibid*; Ron Dudai, 'A Model for Dealing with the Past in the Israeli-Palestinian Context' [2007] 1 *The International Journal of Transitional Justice* 249; Leila Hilal, 'Transitional Justice Responses to Palestinian Dispossession: Focus on Restitution' (ICTJ 2012) Case Studies on Transitional Justice and Displacement.

<sup>31</sup> Definition of 'Food security': 'when all people at all times have access to sufficient, safe, nutritious food to maintain a healthy and active life'. Food security includes physical and economic access to food, as with the RTF. World Health Organization, 'Food Security' (*WHO*) <<http://www.who.int/trade/glossary/story028/en/>> accessed 21 March 2015.

<sup>32</sup> Definition of 'Food poverty': 'the inability to afford, or to have access to, food to make up a healthy diet.' Department of Health, 'Choosing a Better Diet: A Food and Health Action Plan' (Department of Health 2005).

<sup>33</sup> Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' [2001] 42 *Harvard International Law Journal* 201.

<sup>34</sup> Stuart A Scheingold, *Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd Edition, University of Michigan Press 2010).

<sup>35</sup> Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013).

<sup>36</sup> Aeyal Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' [2007] 18 *The European Journal of International Law*.

<sup>37</sup> Rami Zurayk and Anne Gough, *Control Food Control People: The Struggle for Food Security in Gaza* (Institute for Palestine Studies 2013) 18.

I shall also apply food sovereignty<sup>38</sup> debates to Palestine because of its prevalence in the literature, and move away from conventional food security towards self-reliance and self-determination.<sup>39</sup> Due to the differing levels of control by Israel, and contemplation of a post-occupation Palestine, it will also be relevant to consider post-occupation obligations. I prioritise food protections under both IHL and IHRL, as I acknowledge that the two frameworks overlap and 'a comprehensive approach is necessary in order to strengthen respect, protection and fulfilment of the right to food'.<sup>40</sup>

#### 4.1. The Human Right to Food

The human right to food (RTF) is enshrined in various international instruments,<sup>41</sup> but is particularly explicit in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>42</sup>:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food...
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger...

The ICESCR permits lawful limitations compatible with ICESCR rights 'solely for the purpose of promoting the general welfare in a democratic society'.<sup>43</sup>

The UN Committee on Economic, Social and Cultural Rights (CESCR) has expanded on the human right to food in General Comment 12:

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<sup>38</sup> 'Food sovereignty' is a 'concept according to which peoples define their own food and own model of food production...' OHCHR and FAO, 'The Right to Adequate Food' (United Nations 2010) Fact Sheet No.34 4.

<sup>39</sup> Samer Abdelnour, Alaa Tartir and Rami Zurayk, 'Farming Palestine for Freedom' (Al Shabaka the Palestinian Policy Network 2012); Zurayk and Gough (n 37) 13–14; Caroline Abu Sa'da and Alaa Tartir, 'From Food Security to Food Sovereignty Without a State: The Case of Palestine' [2014] First draft (forthcoming).

<sup>40</sup> Lorenzo Cotula and Margaret Vidar, 'The Right to Adequate Food in Emergencies' (FAO 2002) FAO Legislative Study 77 3.

<sup>41</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 25; Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 12(2); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 24(2)(c) and art 27.

<sup>42</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

<sup>43</sup> ICESCR, art 4.

4. The Committee affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all...

8. The Committee considers that the core content of the right to adequate food implies:

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

The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.<sup>44</sup>

Israel has signed and ratified the ICESCR and is thus obliged to 'progressively realise' the rights within,<sup>45</sup> for its own citizens and 'protected persons' in Palestinian territory it occupies. But what about the areas where Israel has ceased to exercise effective control? According to Yuval Shany<sup>46</sup> and Bashi and Feldman:

human rights standards apply to Israel irrespective of the question of effective control of the Gaza Strip... Israel owes obligations under human rights law everywhere actions taken by its official representatives have a direct and substantial effect on Gaza's residents.<sup>47</sup>

For example, because Israel continues to control Gaza's borders and the movement of Gazans, it must protect their freedom of movement under the ICCPR and must protect their

<sup>44</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No.12: The Right to Adequate Food (Art.11 of the Covenant) (12 May 1999) E/C.12/1999/5. (General Comment 12).

<sup>45</sup> ICESCR, art 2(1); UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No.3: The Nature of States Parties' Obligations (Art.2, Para 1 of the Covenant) (14 December 1990) E/1991/23 (General Comment 3).

<sup>46</sup> Yuval Shany, 'The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel' [2009] International Law Forum of the Hebrew University of Jerusalem Law Faculty 15–16.

<sup>47</sup> Sari Bashi and Tamar Feldman, 'Scale of Control: Israel's Continued Responsibility in the Gaza Strip' (Gisha 2011) 61.

ICESCR rights where it exercises control relevant to these, such as movement of goods.<sup>48</sup> Therefore Israel's human rights obligations to Palestinians are concurrent to its IHL obligations where it occupies territory, and where the territory is no longer occupied, Israel continues to have human rights obligations to the population, if the residents are dependent on it, or it has a 'direct and substantial effect' on the residents.<sup>49</sup>

Palestine acceded to various treaties in April 2014, including the ICESCR which entered into force in July 2014.<sup>50</sup> Hamas, a non-State party to the conflict, is unable to ratify international treaties but nevertheless is under human rights obligations where it exercises control.<sup>51</sup> The Optional Protocol to the ICESCR<sup>52</sup> which allows for individual complaints to be submitted to the CESCR has not been accepted by Israel nor Palestine;<sup>53</sup> therefore individuals who claim that their ICESCR rights have been violated do not have recourse to the Committee.

Furthermore, it is arguable that the right to food 'has presumptively attained the status of customary international law.'<sup>54</sup> However, on further analysis this appears to be a 'premature' overestimation of the extent of a customary right to food.<sup>55</sup> I support Smita Narula's approach that 'the right to adequate food... may not yet be part of customary law, but a strong case can be made that the right to be free from hunger has achieved this status.'<sup>56</sup> This is supported by the FAO's legislative study in 2002, which presented the argument that 'the right to adequate food, at least in its basic form of right to be free from hunger, is part of customary international law', directly linked to the right to life.<sup>57</sup> Narula and Niada refer to the proliferation of international ratification of the ICESCR and national

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<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

<sup>50</sup> Rupert Colville, 'Press Briefing Notes on South Sudan, Ethiopia, United States, Palestine and Thailand/South East Asia' (OHCHR, 2 May 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=14556>> accessed 14 August 2015; Dalia Hatuqa, "'Paradigm Shift': Palestinians Join Treaties' (*Al Jazeera*, 22 April 2014) <<http://www.aljazeera.com/news/middleeast/2014/04/shift-palestinians-join-treaties-2014418111950813313.html>> accessed 14 August 2015.

<sup>51</sup> Bashi and Feldman (n 47) 62.

<sup>52</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 5 March 2009) UNGA Res 63/117 (Optional Protocol).

<sup>53</sup> OHCHR, 'Status of Ratification: Interactive Dashboard' (OHCHR) <<http://indicators.ohchr.org/>> accessed 17 August 2015.

<sup>54</sup> Randle C DeFalco, 'The Right to Food in Gaza: Israel's Obligations Under International Law' [2009] 35 *The Internet Journal of Rutgers School of Law* 14; Laura Niada, 'Hunger and International Law: The Far-Reaching Scope of the Human Right to Food' (2006) 22 *Conn J Int'l L* 131, 173–6; John Dugard, 'Human Rights Situation in Palestine and Other Occupied Arab Territories' (Human Rights Council 2008) Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 A/HRC/7/17; Anthony Paul Kearns, 'The Right to Food Exists Via Customary International Law' [1998] 22 *Suffolk Transnational Law Review* 223, 256; *The Right to Food* 2009 (63/187).

<sup>55</sup> Smita Narula, 'The Right to Food: Holding Global Actors Accountable Under International Law', *Center for Human Rights and Global Justice Working Paper* (NYU School of Law 2006) 78.

<sup>56</sup> *ibid.* 69.

<sup>57</sup> Cotula and Vidar (n 40) 6.

rights to food with varying breadth.<sup>58</sup> Nevertheless, Israel and Palestine have both ratified the ICESCR and are thus bound by its relatively extensive right to food provisions.<sup>59</sup>

The international community – other State Parties to the ICESCR – also have obligations to ‘take steps to respect the enjoyment of food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.’<sup>60</sup>

## 4.2. Food under IHL

The nature of the Israeli-Palestinian conflict remains disputed. It is broadly accepted, including by the ICJ in its 2004 Advisory Opinion on the Wall,<sup>61</sup> but disputed by Israel, that the West Bank including East Jerusalem continues to be occupied territory.<sup>62</sup> This is still the case since the Oslo Accords,<sup>63</sup> despite the creation of the Palestinian Authority (PA).<sup>64</sup> There is less consensus as to whether Gaza is occupied. The Israeli Supreme Court categorised the conflict in Gaza as an international armed conflict,<sup>65</sup> whilst others have distinguished between periods of violence,<sup>66</sup> or analysed the level of control Israel exerts to determine Israel’s responsibilities.<sup>67</sup> Casey-Maslen defines ‘the conflict in Gaza in November 2012 was an armed conflict of a non-international character (NIAC)... within the context of a broader military occupation.’<sup>68</sup> Firstly, I shall consider IHL obligations in circumstances of occupation, applying to the West Bank and arguably Gaza. Secondly, obligations during a

<sup>58</sup> Narula (n 55) 67; Niada (n 54) 173–4.

<sup>59</sup> Although Vite considers the ‘core content’ of the RTF is freedom from hunger and the right to adequate food must be progressively realised, the CESCR outlined the core content included both availability and accessibility. CESCR, General Comment 12, para 8. Sylvian Vite, ‘The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property’ (2008) 90 International Review of the Red Cross 638 <<https://www.icrc.org/eng/assets/files/other/irrc-871-vite.pdf>> accessed 15 August 2015.

<sup>60</sup> CESCR, General Comment 12, para 36.

<sup>61</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 <<http://www.icj-cij.org/docket/files/131/1671.pdf>> accessed 18 July 2015 (ICJ Advisory Opinion on the Wall) para 78.

<sup>62</sup> ‘Legal Status of East Jerusalem and Its Residents’ (*B’T Selem*, 9 May 2010) <[http://www.btselem.org/jerusalem/legal\\_status](http://www.btselem.org/jerusalem/legal_status)> accessed 18 July 2015.

<sup>63</sup> Declaration of Principles on Interim Self-Government Arrangements (13 September 1993) (Oslo I); Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (28 September 1995) (Oslo II).

<sup>64</sup> Geneva Academy, ‘Rule of Law in Armed Conflicts Project: Israel’ (*Geneva Academy*, 28 March 2012) <[http://www.geneva-academy.ch/RULAC/applicable\\_international\\_law.php?id\\_state=113](http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=113)> accessed 9 June 2015.

<sup>65</sup> *The Public Committee Against Torture in Israel & Palestinian Society for the Protection of Human Rights and the Environment v The Government of Israel et al* [2005] The Supreme Court sitting as the High Court of Justice, HCJ 769/02, [18]. See also Antonio Cassese, *International Law* (2nd edition, Oxford University Press 2005) 420.

<sup>66</sup> Geneva Academy (n 64).

<sup>67</sup> DeFalco (n 54) 19.

<sup>68</sup> Stuart Casey-Maslen, ‘Part II Situations of Armed Conflict in 2012, Armed Conflict in Gaza in 2012’, *The War Report: 2012* (Oxford University Press 2013) 110, footnote 1.

non-international armed conflict will be discussed. Lastly, I shall consider the nature of post-occupation obligations.<sup>69</sup>

### *Food under Occupation*

The 1949 Fourth Geneva Convention<sup>70</sup> and Hague Regulations 1907<sup>71</sup> constitute customary international law governing situations of occupation.<sup>72</sup> Although the GCIV does not define an occupation, the Hague Regulations provide an early definition:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.<sup>73</sup>

Whilst I concur with the consensus that the West Bank, including East Jerusalem, continues to be occupied post-Oslo as Israel exercises effective control, the situation in Gaza is less clear since Israeli 'disengagement' in 2005. Israel denies there is any ongoing occupation of the West Bank or Gaza,<sup>74</sup> and the Israeli High Court held in the 2008 *Al-Bassiouni* case that Israel does not occupy Gaza.<sup>75</sup> As noted by Benvenisti however: 'declarations by the occupant on the establishment or dismantling of administration are legally irrelevant.'<sup>76</sup> Outside of Israel the discourse focuses on whether Israel's control of Gaza's borders amounts to 'effective control',<sup>77</sup> or for Benvenisti 'potential control'.<sup>78</sup>

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<sup>69</sup> At chapter 4.5.

<sup>70</sup> ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention or GCIV).

<sup>71</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) Second International Peace Conference, The Hague (Hague Regulations).

<sup>72</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume 1: Rules (Cambridge University Press 2005) xxxvi. GCIV, art 2; Hague Regulations, art 42.

<sup>73</sup> Hague Regulations, art 42.

<sup>74</sup> Bashi and Feldman (n 47) 5, 44.

<sup>75</sup> HCJ 9132/07 *Al-Bassiouni v Prime Minister* (30 January 2008) (unpublished) <[http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/state\\_response\\_2\\_11\\_07.pdf](http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/state_response_2_11_07.pdf)> accessed 7 August 2015.

Aeyal Gross, 'Rethinking Occupation: The Functional Approach' 1 <<http://opiniojuris.org/2012/04/23/rethinking-occupation-the-functional-approach/>> accessed 18 July 2015.

<sup>76</sup> Eyal Benvenisti, 'The Law on the Unilateral Termination of Occupation' (*Tel Aviv University Law Faculty*, 2008) 5 <<http://law.bepress.com/cgi/viewcontent.cgi?article=1099&context=taulwps>> accessed 19 July 2015.

<sup>77</sup> DeFalco (n 54) 19.

<sup>78</sup> Benvenisti (n 76) 2.

I am interested in the development of a ‘functional approach’ to occupation; coined by Aeyal Gross<sup>79</sup> and adopted by Bashi and Feldman:

...the law of occupation continues to apply to the Gaza Strip (in addition to the West Bank) in the areas in which Israel maintains control over the lives of Palestinian residents, while in the areas in which It has transferred or relinquished its powers and allows others to exercise them – its responsibility vis-à-vis the civilian population is diminished or extinguished.<sup>80</sup>

This keeps in line with the Hague Regulations’ definition,<sup>81</sup> but is more nuanced than declaring the entirety of Gaza occupied or not. Gross identifies international case law that adopts this ‘functional approach’ to occupation based on the principle that ‘accountability... should flow from the exercise of power.’<sup>82</sup> Therefore the occupier may have control, and thus, responsibility for certain areas, such as electricity and fuel in Gaza, but not for example for education, where Israel exercises no effective control and is within the responsibility of the Palestinian Authority and Hamas.<sup>83</sup> Bashi and Feldman conclude that both the law of occupation and post-occupation duties apply to Israel concurrently,<sup>84</sup> varying over time as the end of occupation is a gradual process.<sup>85</sup> I find this functional approach useful to ensure occupation law ‘create[s] accountability rather than impunity’.<sup>86</sup> For the purposes of this project I shall consider the laws that would apply both in circumstances of occupation and non-international armed conflict in Gaza, as well as post-occupation duties, as depending on the level of control over particular areas any may separately or concurrently apply.<sup>87</sup>

The law of occupation under IHL, prescribed in The Hague Regulations and Fourth Geneva Convention, therefore applies to the West Bank and possibly Gaza. Article 43 of the Hague

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<sup>79</sup> Gross, ‘Rethinking Occupation: The Functional Approach’ (n 75); Aeyal Gross, *Rethinking the International Law of Occupation: The Writing on the Wall* (Cambridge University Press forthcoming 2016) 104.

<sup>80</sup> Bashi and Feldman (n 47) 26.

<sup>81</sup> Hague Regulations, art 42.

<sup>82</sup> Gross, ‘Rethinking Occupation: The Functional Approach’ (n 75) 2; Gross, *Rethinking the International Law of Occupation: The Writing on the Wall* (n 79) ch 2.

<sup>83</sup> Except where Israel’s effective control of other areas, such as movement, impacts on these issues. Gross, ‘Rethinking Occupation: The Functional Approach’ (n 75) 3.

<sup>84</sup> Bashi and Feldman (n 47) 6.

<sup>85</sup> *ibid* 37–8.

<sup>86</sup> Gross, ‘Rethinking Occupation: The Functional Approach’ (n 75).

<sup>87</sup> For a thorough analysis of the different approaches to the definition of occupation see: Gross, *Rethinking the International Law of Occupation: The Writing on the Wall* (n 79) ch 2.

Regulations generally obliges an occupier to ensure protected persons' safety and public order. Article 53 of GCIV prohibits destruction of individual, collective, or State property. Article 55 obliges the occupier to ensure and, if necessary provide adequate food and prohibit the requisitioning of foodstuffs without taking into account civilian needs. Article 59 requires the occupier to facilitate relief schemes for inadequately supplied populations. Nevertheless, Article 60 importantly prevents relief consignments from relieving the occupier of its aforementioned responsibilities. Certain limitations are permitted for military necessity.<sup>88</sup> Thus the occupier has responsibility for the wellbeing, including with regards to food, of the occupied population.

Violations of certain GCIV articles amount to 'grave breaches' and require specific State action or remedy. Under Article 146, Contracting Parties are obliged 'to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.' Relevant Article 147 breaches include:

...any of the following acts, if committed against persons or property protected by the present Convention: wilfully causing great suffering or serious injury to body or health... extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Article 148 prevents any absolution of responsibility by a Contracting Party for a 'grave breach'.

Despite these IHL rules, since the Oslo Accords the Palestinian Authority has had 'explicit responsibility for Palestinian welfare and duties to control population' whilst Israel has retained 'overall territorial control and an overriding responsibility for security';<sup>89</sup> an arrangement that conflicts with the law of occupation. Due to this paradigm shift, Zinaida Miller proposes that 'thinking about the relationship between Israel and Palestine solely as one of occupation now hides more than it reveals'.<sup>90</sup> Miller discusses post-Oslo as a period

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<sup>88</sup> GCIV, art 53 and 55.

<sup>89</sup> Zinaida Miller, 'Perils of Parity: Palestine's Permanent Transition' (2014) 47 Cornell International Law Journal 331, 334. Oslo II.

<sup>90</sup> *ibid* 335.

of ‘permanent transition’, wherein the framework of occupation has moved towards a ‘tripartite system of governance’ between Israel, the PA, and international involvement.<sup>91</sup> Although the law of occupation continues to apply, the Oslo Accords have created a unique situation that construes a situation of ‘parity’ undermining IHL’s ‘protected person’ and imposing occupier obligations on Palestine. Al-Haq takes the stance that any agreement made during occupation that diverges from Palestinians’ legal protections ‘is illegal under international law and as such is null and void.’<sup>92</sup> Thus whilst it remains appropriate to apply the law of occupation to Palestine post-Oslo, ‘defending or denouncing the current dispensation in those terms alone misses the way that power and authority function today.’<sup>93</sup> I acknowledge this situation and accordingly focus in this article not only on Israeli occupier obligations, but also Palestinian, Hamas and international community obligations where relevant during and post-occupation.

### *The Protection of Food during a Non-International Armed Conflict*

On the other hand, if Gaza is not conceived of as under occupation now or in the future, the situation is debated as either an international (IAC) or non-international armed conflict (NIAC). For example, The Turkel Commission construed an IAC,<sup>94</sup> whereas academics Kevin Heller and Stuart Casey-Maslen define a NIAC.<sup>95</sup> The relevance of different categorisations is that protection under IAC is greater than under NIAC, though less than under occupation law.<sup>96</sup> Unfortunately neither framework adequately categorises Gaza outside of occupation. Israel could be engaged in an international armed conflict with Palestine, part of which involves an occupation of the West Bank and IAC in Gaza, or Israel could be involved in a non-international armed conflict with Hamas alongside the broader occupation context. I do not agree that there is an IAC in Gaza without occupation; I side with Heller and Casey-Maslen and consider protection of food under NIAC IHL. In such circumstances, as outlined by DeFalco, this is problematic for protection of Gazans’ food

<sup>91</sup> *ibid* 336, 349, 383.

<sup>92</sup> Elisabeth Koek, ‘Exploring the Illegality of Land Swap Agreements under Occupation’ (Al-Haq 2011) 21.

<sup>93</sup> Miller (n 89) 412.

<sup>94</sup> Turkel Commission, ‘The Public Commission to Examine the Maritime Incident of 31 May 2010 (The Turkel Report Part One)’ (2010) paras 37–44 <<http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf>> accessed 15 August 2015.

<sup>95</sup> Kevin Jon Heller, ‘Why Is Israel’s Blockade of Gaza Legal? (Updated)’ <<http://opiniojuris.org/2010/06/02/why-is-israels-blockade-of-gaza-legal/>> accessed 13 August 2015; Casey-Maslen (n 68).

<sup>96</sup> Jelena Pejic, ‘The Right to Food in Situations of Armed Conflict: The Legal Framework’ (2001) 83 IRRC 1097.

under IHL. This is because the only relevant NIAC protections are under the second Protocol Additional to the Geneva Conventions.<sup>97</sup> Protection is limited to the prohibition of ‘starvation of civilians as a method of combat’ under Article 14, and the obligation to allow humanitarian relief activities, including the provision of foodstuffs, under Article 18.<sup>98</sup>

### 4.3. Human Rights and Humanitarian Law

IHRL applies concurrently with IHL in all cases of armed conflict and occupation.<sup>99</sup> This position took some time to develop<sup>100</sup> but is now generally accepted, including by international courts.<sup>101</sup> Whilst this may initially appear advantageous to the population under occupation, Gross raises concerns that ‘the merging of IHRL into IHL, rather than expanding human protection may serve to undermine it as well as legitimize violations of the people living under occupation.’<sup>102</sup> Conversely, in Vite’s article on occupation and social, economic, and cultural rights, he assesses food rights to be complementary to occupation law, particularly in the long term.<sup>103</sup> My analysis of food rights under IHL and IHRL demonstrates complementarity between the regimes; IHRL steps in where IHL is lacking such as movement rights, whilst occupation law is more comprehensive on land seizure or destruction.

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<sup>97</sup> ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII); DeFalco (n 54) 20. Common Article 3 does apply in circumstances of non-international armed conflict but provides no relevant protection for Palestinians’ food.

<sup>98</sup> Palestine has acceded to APII, Israel has not. ICRC, ‘Treaties and States Parties to Such Treaties’ (ICRC) <<https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp>> accessed 17 August 2015. Nevertheless the ICRC confirms this is customary international law. Henckaerts and Doswald-Beck (n 72) 105, 193.

<sup>99</sup> Vite (n 59) 630.

<sup>100</sup> Pejic (n 96) 1097.

<sup>101</sup> *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<http://www.icj-cij.org/docket/files/131/1671.pdf>> accessed 7 August 2015 [2]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1995 <<http://www.icj-cij.org/docket/files/95/7495.pdf>> accessed 7 August 2015 [25]; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Judgment) 2005 <<http://www.icj-cij.org/docket/files/116/10455.pdf>> accessed 7 August 2015; *Cyprus v Turkey* (App no 25781/94) ECHR 10 May 2001.

<sup>102</sup> Gross, ‘Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?’ (n 36) 4–5.

<sup>103</sup> Vite (n 59) 637–640.

#### 4.4. Food Sovereignty

Food sovereignty is a 'concept according to which peoples define their own food and own model of food production...'<sup>104</sup> Many construe food sovereignty as a form of political 'resistance',<sup>105</sup> which Sa'da and Tartir advocate for Palestine.<sup>106</sup> It is the 'practice of, and quest for, self-determination',<sup>107</sup> both inextricably link people to territory,<sup>108</sup> and natural resources.<sup>109</sup> For the purpose of this project, I focus on food sovereignty as opposed to the framework of self-determination because it is more specific on food issues and dominates the literature. Any violation of food sovereignty will most probably also violate the right to self-determination.<sup>110</sup> Whilst I acknowledge food sovereignty, my focus remains on the established legal frameworks of IHL and IHRL.

#### 4.5. Post-Occupation Obligations

In a post-occupation Palestine, which might include current areas as well as a future incarnation of the State, the question arises as to when Israel's occupier obligations will end? Critics such as Kirsten Boon perceive IHL as 'limited' in its 'applicability to modern war-to-peace transitions', and thus turn to the emerging doctrine of 'jus post bellum'.<sup>111</sup> This post-occupation law prevents a 'vacuum of responsibility',<sup>112</sup> with obligations under the rules of occupation gradually lessening and post-occupation duties emerging.<sup>113</sup> Bashi and Feldman apply the 'jus post bellum' to Palestine, in the current context of Gaza:

<sup>104</sup> OHCHR and FAO, 'The Right to Adequate Food' (n 38) 4.

<sup>105</sup> Chaka AK Uzundu, 'The Imperial Relations of Food: Food Sovereignty and Self-Determination in World Politics' (Doctoral Articles, Paper AA13451310, University of Connecticut 2010) 220 <<http://digitalcommons.uconn.edu/articles/AA13451310/>> accessed 2 August 2015; Abdelnour, Tartir and Zurayk (n 39). Caroline Abu Sa'da and Alaa Tartir, 'From Food Security to Food Sovereignty Without a State: The Case of Palestine' [2014] First draft (forthcoming) 4.

<sup>106</sup> Abu Sa'da and Tartir (n 105) 3.

<sup>107</sup> Uzundu (n 105) 220.

<sup>108</sup> Catriona Drew, 'Self-Determination, Population Transfer and the Middle East Peace Accords', *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories* (1997) 135.

<sup>109</sup> *ibid* 132.

<sup>110</sup> For a full analysis of the Israeli occupation of Palestine from a right to self-determination perspective see: Drew (n 108).

<sup>111</sup> Kristen Boon, 'Obligations of the New Occupier: The Contours of a Jus Post Bellum' [2009] 31 *Loy LA Int'l & Comp L Rev* 57, 63.

<sup>112</sup> Bashi and Feldman (n 47) 49.

<sup>113</sup> *ibid* 37–8.

Israel continues to bear obligations toward residents of the Gaza Strip even in areas in which it no longer exercises direct control and even if it no longer occupies Gaza at all...<sup>114</sup>

However, the specificities of a 'jus post bellum' remain unclear. Bashi and Feldman consider many factors affect post-occupation obligations:

...the duration of control; the level of fulfilment of [Israel's] obligations under the law of occupation, including forward-looking duties; [Palestine's] residual dependence; and the acts (or omissions) of other actors which assumed control.<sup>115</sup>

It is very difficult to identify when occupation law obligations end and post-occupation begin, because defining occupation and its conclusion is itself controversial.<sup>116</sup> Furthermore, according to Benvenisti, an occupier may have ongoing obligations under GCIV to ensure 'the continuation of "public order and civil life" during and immediately after the termination of the occupation and the transition to indigenous rule'.<sup>117</sup> Considering Bashi and Feldman's assertion that 'there will be areas in which Israel owes duties under the law of occupation and others in which it owes duties under post-occupation law',<sup>118</sup> the applicable law during transition becomes very uncertain. This is a concern as legal uncertainty can problematize enforcement.

Furthermore, Freeman and Djukic's key questions remain unanswered: 'would [jus post bellum] place higher or lower demands upon states than international human rights law'?<sup>119</sup> When do post-occupation obligations commence and end?<sup>120</sup> Would post-occupation obligations be compatible with transitional justice?<sup>121</sup> I question how food protections might be affected by post-occupation obligations? The literature acknowledges the potential usefulness of this emerging doctrine to provide transitional obligations and aim for 'durable

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<sup>114</sup> *ibid* 49.

<sup>115</sup> *ibid* 57.

<sup>116</sup> Gross, 'Rethinking Occupation: The Functional Approach' (n 75); Benvenisti (n 76).

<sup>117</sup> Benvenisti (n 76) 4–7.

<sup>118</sup> Bashi and Feldman (n 47) 57.

<sup>119</sup> Mark Freeman and Drazen Djukic, 'Jus Post Bellum and Transitional Justice', *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 225.

<sup>120</sup> *ibid* 226.

<sup>121</sup> *ibid* 224.

peace'<sup>122</sup>; goals akin to transitional justice. It remains unclear precisely what post-occupation obligations might be, and how they may be distinct from IHRL and transitional justice. Boon argues that 'jus post bellum' holds the former occupier accountable, whereas transitional justice seeks 'accountability within populations'<sup>123</sup>. However, I consider that transitional justice can incorporate post-occupation obligations and cross-State transitional justice could hold occupiers accountable.<sup>124</sup> The crucial element of the post-occupation literature for my analysis is the affirmation that an occupier's obligations do not end immediately with troop withdrawal and the decline of effective control.

## 5. FOOD RIGHTS VIOLATIONS IN PALESTINE

There are many aspects of the Israeli-Palestinian conflict that affect Palestinians' food rights under international law. I shall consider particular practices and aspects of the occupation regime which have a directly negative impact on Palestinian food. I acknowledge that in practice it is not possible to dissociate a restriction on food from the entirety of the conflict and occupation regime, but intend this theoretical analysis to contribute to debate on food rights in Palestine, and how violations may be addressed through transitional justice. There are also food issues for Palestinians in Israel, for example Bedouin in the Negev,<sup>125</sup> but this article focuses solely on food issues in the oPt.

In turn I shall assess potential violations of IHL, IHRL, and where relevant food sovereignty, arising from:

- Destruction and seizure of food and agricultural land;
- Restrictions on freedom of movement and access to livelihoods;
- Restrictions on food and food aid in Gaza; and
- Culturally inappropriate food.

<sup>122</sup> Kristen Boon, 'The Future of the Law of Occupation' (2009) 47 *The Canadian Yearbook of International Law* 28.

<sup>123</sup> Boon (n 111) 78.

<sup>124</sup> Dudai proposes both independent and joint transitional justice initiatives between Israel and Palestine. Dudai (n 30).

<sup>125</sup> For example, Ahmad Amara, Ismael Abu-Saad and Oren Yiftachel (eds), *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Nagab/Negev* (Harvard University Press 2013).

These issues are by no means an exhaustive list of food problems in the oPt, and broader issues such as land confiscation generally and restrictions on access to water will also inevitably impact food. However due to the necessary confines of my research, I have selected these practices as demonstrative examples of how Palestinian food rights are being violated under occupation. I have consciously chosen issues with different relationships to international law. All four issues are not equally protected by IHL or IHRL, demonstrating the limits of international legal frameworks and that not every circumstance affecting Palestinians' food equally amounts to a legal violation.

### 5.1. Destruction and Seizure of Food and Agricultural Land

For decades it has been widely reported that Palestinian land is seized and crops destroyed by the Israeli military and settlers.<sup>126</sup>

Since the beginning of the occupation in 1967, Palestinians have seen over 1 billion square metres (m<sup>2</sup>) of their land seized and placed within the jurisdictional boundaries of local and regional settlement councils.<sup>127</sup>

In addition to land seized for illegal settlements,<sup>128</sup> Israel has declared various areas military zones,<sup>129</sup> 'state land',<sup>130</sup> and ordered Palestinian farmers to destroy or uproot their own trees.<sup>131</sup> MA'AN is just one organisation that concludes 'these mechanisms are used as a means to forcibly displace Palestinian communities from their homes, in order to open

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<sup>126</sup> WFP, 'State of Palestine' (*World Food Programme*, 2015) <<http://www.wfp.org/countries/palestine>> accessed 1 August 2015; UNRWA, 'Food Insecurity in Palestine Remains High' (*UNRWA*, 3 June 2014) <<http://www.unrwa.org/newsroom/press-releases/food-insecurity-palestine-remains-high>> accessed 11 May 2015; Dugard (n 54); Human Rights Council, 'Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem' (Human Rights Council) 22nd session, agenda item 7; ICAHD UK, 'Home' (*The Israeli Committee Against House Demolitions*) <<http://icahduk.org/>> accessed 1 August 2015; Ben Lynfield, 'Israel Accused of "War Crime" over Bulldozing of Palestinian Olive Groves' (*The Independent*) <<http://www.independent.co.uk/news/world/middle-east/israel-accused-of-war-crime-over-bulldozing-of-palestinian-olive-groves-10321936.html>> accessed 1 August 2015.

<sup>127</sup> UN General Assembly, 'Economic and Social Repercussions of the Israeli Occupation on the Living Conditions of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan' (General Assembly Economic and Social Council 2014) A/69/81-E/2014/13 para 35.

<sup>128</sup> MA'AN Development Center, 'Farming the Forbidden Lands: Israeli Land and Resource Annexation in Area C' (2014).

<sup>129</sup> *ibid* 11; 17–19.

<sup>130</sup> *ibid* 13.

<sup>131</sup> Allison Deger, 'Major Olive Producing Village Ordered to Uproot 1,400 Trees by May 1' (*Mondoweiss*, 28 April 2012) <<http://mondoweiss.net/2012/04/major-olive-producing-village-ordered-to-uproot-1400-trees-by-may-1>> accessed 27 June 2015.

these areas up to illegal Israeli colonisation.<sup>132</sup> Former Special Rapporteur Jean Ziegler reported concern in 2003 about 'the pattern of land confiscation' based on 'an underlying strategy of "Bantustanization"... reducing the capacity of the Palestinians to be able to feed themselves and amount[ing] to the gradual dispossession of the Palestinian people.'<sup>133</sup>

Israeli actors have also damaged Palestinian farmland.<sup>134</sup> In June 2015 the largest reported uprooting of olive trees in three years was conducted by the Israeli army on the basis that this land was allegedly Israeli 'state land' in the West Bank.<sup>135</sup> In addition to Israeli state actions, illegal Israeli settlements in areas such as the Jordan Valley have 'monopolize[d] water and land resources', which according to the MA'AN Development Center has 'led to the impoverishment of Palestinians'.<sup>136</sup> Furthermore, Israeli settlers illegally colonising the West Bank frequently vandalise Palestinian crops and land. For example, in 2013, 'settlers uprooted 13,097 trees and burned over 280,000m<sup>2</sup> of agricultural and grazing land.'<sup>137</sup> Additionally, many Palestinians in the West Bank have reported on destruction of their crops by settlers dumping wastewater into Palestinian water supplies.<sup>138</sup> With few exceptions, Israeli settlers responsible for attacking Palestinians and their property enjoy a high degree of impunity.<sup>139</sup> Concurrently, bombings of Gaza have damaged agricultural lands and irrigation systems.<sup>140</sup> I shall apply the rules of IHL and IHRL to these acts to assess whether they constitute violations of international law.

## IHL

<sup>132</sup> MA'AN Development Center, 'Farming the Forbidden Lands: Israeli Land and Resource Annexation in Area C' (n 128) 13.

<sup>133</sup> Jean Ziegler, 'Economic, Social and Cultural Rights: The Right to Food Addendum Mission to the Occupied Palestinian Territories' (Commission on Human Rights 2003) Report by the Special Rapporteur E/CN.4/2004/10/Add.2 2–3.

<sup>134</sup> UN Meetings Coverage and Press Releases, 'Agricultural Development, Food Security Unattainable without Self-Determination, Sovereignty of Palestinian People, Speakers Say in Second Committee' GA/EF/3410 <<http://www.un.org/press/en/2014/gaef3410.doc.htm>> accessed 26 June 2015.

<sup>135</sup> Lynfield (n 126).

<sup>136</sup> MA'AN Development Center, 'The Jordan Valley Through Our Eyes' (2014) 10 <<http://maan-ctr.org/old/pdfs/Pamphlet/Booklet/ThroughOE.pdf>> accessed 1 August 2015.

<sup>137</sup> UN General Assembly (n 127) 49.

<sup>138</sup> Deger (n 131); Mel Frykberg, 'Villages Contaminated by Settlement Sewage' (*The Electronic Intifada*, 28 April 2010) <<https://electronicintifada.net/content/villages-contaminated-settlement-sewage/8804>> accessed 7 August 2015; Eyal Hareuveni, 'Foul Play: Neglect of Wastewater Treatment in the West Bank' (B'Tselem 2009) <[http://www.btselem.org/download/200906\\_foul\\_play\\_eng.pdf](http://www.btselem.org/download/200906_foul_play_eng.pdf)> accessed 7 August 2015. This also raises issues of water rights. ICESCR, articles 11–12; UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No.15: The Right to Water (Arts 11 and 12 of the Covenant)' (20 January 2003) E/C.12/2002/11 (General Comment 15); The Human Right to Water and Sanitation (3 August 2010) UNGA Res 64/292.

<sup>139</sup> UN General Assembly (n 127) 46.

<sup>140</sup> ICRC, 'Farmers in Gaza Finally Able to Farm Their Lands' (*International Committee of the Red Cross*, 9 July 2015) <<https://www.icrc.org/en/document/farmers-gaza-get-back-work-thanks-icrc>> accessed 8 August 2015; Zurayk and Gough (n 37) 22–24; World Bank, 'Fact Sheet: Gaza Strip Water and Sanitation Situation' (7 January 2009) <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/WESTBANKGAZAEXTN/0,,contentMDK:22279205~pagePK:1497618~piPK:217854~theSitePK:294365,00.html>> accessed 18 July 2015.

Under the international humanitarian law provisions discussed above, the occupying power is responsible for the wellbeing, including food security, of the occupied population. The destruction of Palestinian property engages Article 53 of GCIV and requisition of foodstuffs Article 55.

Seizure of land and destruction of crops and trees in the West Bank by the Israeli military has been justified by the authorities on the basis that the area destroyed was 'state land'.<sup>141</sup> Under IHL, an occupying power cannot legally annex land and therefore this argument falls short of international humanitarian law.<sup>142</sup> The peculiarities of Palestine post-Oslo mean that Israel has security and civil control over Area C, but nevertheless does not have legal title to the occupied land under IHL. Even if there was an agreement during occupation for land swap,<sup>143</sup> as has been proposed by Israel and the PLO. Nevertheless Al-Haq's Elizabeth Koek has argued that this land swap would not be permitted by international law and thus void.<sup>144</sup> Israel cannot acquire territory by occupation,<sup>145</sup> and the 'inherent imbalance of power' between Palestinians and Israel means that the PLO could not give valid consent to land swap.<sup>146</sup> Palestinians retain legal title to the occupied land, regardless of any purported agreements.<sup>147</sup> This is a fundamental tenet of the right to self-determination.<sup>148</sup>

In other circumstances, Israel has claimed military necessity for seizures and destruction of land. However the location of these 'military zones' in close proximity to settlements amounting to 30.5% of the land in Area C, and leaked political comments, brings 'the strategic nature of land requisition for military and training purposes in Area C [...] into considerable question.'<sup>149</sup> If there is 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' this constitutes an Article 147 'grave breach' of the Fourth Geneva Convention. Such breaches are non-absolvable<sup>150</sup> and put the Contracting Party – Israel – under an obligation to bring those

<sup>141</sup> Lynfield (n 126); MA'AN Development Center, 'Farming the Forbidden Lands: Israeli Land and Resource Annexation in Area C' (n 128) 13.

<sup>142</sup> ICJ Advisory Opinion on the Wall.

<sup>143</sup> If land swap was part of a final settlement to end occupation this is a different matter.

<sup>144</sup> Koek (n 92).

<sup>145</sup> GCIV, art 47; Charter of the United Nations (24 October 1945) 1 UNTS XVI, art 2(4).

<sup>146</sup> Koek (n 92).

<sup>147</sup> *ibid.*

<sup>148</sup> According to Drew's understanding of self-determination a people's right is linked to the territory. Drew (n 108) 135.

<sup>149</sup> MA'AN Development Center, 'Farming the Forbidden Lands: Israeli Land and Resource Annexation in Area C' (n 128) 17–18.

<sup>150</sup> GCIV, Art.148.

responsible 'before its own courts' with 'effective penal sanctions' under national legislation.<sup>151</sup> If these violations constitute 'collective punishment', as surmised by Former Special Rapporteur Jean Ziegler,<sup>152</sup> Israel violates GCIV Article 33. Grave breaches of IHL also engage other States' international legal obligations: all States are obliged under customary international law not to recognise the situation as lawful nor provide aid or assistance that would maintain the situation.<sup>153</sup>

The acts of settlers engage Israel's state responsibility because Israel violates GCIV Article 49 by permitting and facilitating the 'transfer [of] parts of its own civilian population into the territory it occupies'. Settler violence violates Israeli obligations to protect Palestinians as 'protected persons' under IHL.<sup>154</sup>

Were Gaza not occupied then IHL for NIAC may apply. There is no provision in the APII for destruction or seizure of food, property, or land, unless it amounts to prohibited 'starvation of civilians as a method of combat'.<sup>155</sup> Israel may continue to have some GCIV obligations to the Gazan population post-occupation,<sup>156</sup> but this would only be temporary. Non-occupied Gazans' food rights are better protected by IHRL and past violations addressed by transitional justice.

### *IHRL*

Destruction and seizure of foodstuffs and agricultural land undermines the RTF requirement of 'availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals'.<sup>157</sup> Under occupation a third of Palestinian households are food insecure,<sup>158</sup> infringing the availability element of the RTF. Damage to Palestinian food quality further breaches the right to adequate food.

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<sup>151</sup> GCIV, Art.146.

<sup>152</sup> Ziegler (n 133) 3.

<sup>153</sup> This is customary international law reproduced in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001), Article 41.

<sup>154</sup> GCIV, art 27; Hague Regulations, Article 43.

<sup>155</sup> GCIV, art 14, Protocol II.

<sup>156</sup> As discussed at chapter 4.5.

<sup>157</sup> General Comment 12 [8].

<sup>158</sup> UNRWA (n 126).

Israel as occupying power is responsible for ensuring the IHRL right to food alongside its IHL obligations. If Gaza is not occupied Israel still has to abide by human rights law. An emerging Palestinian State would also have responsibilities for Palestinians' right to food, whilst the departing occupier 'must do its utmost to alleviate the human condition it leaves behind', and may have ongoing post-occupation obligations.<sup>159</sup> The right to food therefore engages both Palestinian and Israeli obligations depending on who exercises control. Additionally, other States' RTF obligations are engaged when they trade with illegal Israeli settlements that violate IHL and IHRL.<sup>160</sup>

## 5.2. Restrictions on Freedom of Movement & Access to Livelihoods

The Israeli authorities implement a system of restrictions on movement of Palestinians and their goods which affects access to their livelihoods as well as access to food. Occupation's negative impact on the Palestinian economy also adversely effects Palestinians' access to livelihoods and thus food.<sup>161</sup>

The separation wall is one significant hindrance on West Bank Palestinians' movement.<sup>162</sup> The wall separates villages from agricultural lands and restricts Palestinians' access to 'farmland and water resources'.<sup>163</sup> Restrictions on freedom of movement are even greater for Palestinians attempting to move outside the separation wall, controlled by Israeli military checkpoints.<sup>164</sup> Significantly, Palestinians in the West Bank, East Jerusalem, and Gaza are separated; undermining the completeness of the territory of Palestine and the movement of people and commodities throughout the territory. The ICJ acknowledged the wall's negative impact on food security in its 2004 Advisory Opinion.<sup>165</sup> Palestinians' freedom of movement is also inhibited within the West Bank, dependant on the different zones and road restrictions: '[b]y September 2013, 65.12km of roads in the West Bank were classified by

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<sup>159</sup> Benvenisti (n 76) 9.

<sup>160</sup> Hugh Lovatt and Mattia Toaldo, 'EU Differentiation and Israeli Settlements' (European Council on Foreign Relations 2015) Policy Brief ECFR/140 <<http://www.ecfr.eu/page/-/EuDifferentiation-final3.pdf>> accessed 12 August 2015.

<sup>161</sup> Zurayk and Gough (n 37) 3, 24–25.

<sup>162</sup> The impact of the wall on Palestinians' right to food was briefly considered by the court in *Mara'abe v The Prime Minister of Israel* (2005) HCJ 7957/04 (unpublished), English translation [http://elyon1.court.gov.il/Files\\_ENG/04/570/079/A14/04079570.A14.pdf](http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.pdf), 30–31

<sup>163</sup> UN General Assembly (n 127) 12.

<sup>164</sup> *ibid* 13.

<sup>165</sup> ICJ Advisory Opinion on the Wall, 190–191.

Israel for the sole, or virtually sole, use of Israelis'.<sup>166</sup> Palestinians seeking to access their agricultural lands 'inside or near settlements face regular restrictions on access and settler attacks against them and their properties',<sup>167</sup> which undermines their ability to work and access food.<sup>168</sup>

Gazans have been similarly restricted from their lands and had their movement severely inhibited before, during, and since Israeli blockades on the Gaza Strip.<sup>169</sup> The UN's 2014 report confirms that the 'import of essential goods and materials for public use in Gaza remains very limited',<sup>170</sup> and it is extremely difficult for Gazans to leave Gaza as Israel controls all crossings.<sup>171</sup> Access to Gazan agricultural land is restricted by 'no-go areas' which has 'a crippling effect on the land's productive capacity.'<sup>172</sup> Gazans' ability to access food is also limited by Israeli restrictions on sea borders and fishing.<sup>173</sup> '[L]ongstanding access restrictions imposed by Israel have undermined Gaza's economy, resulting in high levels of unemployment, food insecurity and aid dependency.'<sup>174</sup>

I shall now assess the extent to which these practices may constitute violations of international law. Restrictions on the movement of food and food aid in Gaza, whilst also a problem of restrictions on movement, shall be discussed separately below.<sup>175</sup>

### *IHL*

The ICJ classified land excluded from Palestinians' access, located between the Green Line and the separation wall, as de facto annexed by Israel in violation of IHL.<sup>176</sup> Generally, however, protected persons' movement within the occupied territory is not protected under IHL, although it is unlawful to forcibly transfer protected persons outside the occupied

<sup>166</sup> UN General Assembly (n 127) 14.

<sup>167</sup> *ibid* 16.

<sup>168</sup> MA'AN Development Center, 'Farming the Forbidden Lands: Israeli Land and Resource Annexation in Area C' (n 128) 27–28.

<sup>169</sup> Zurayk and Gough (n 37) 20–21.

<sup>170</sup> UN General Assembly (n 127) 12.

<sup>171</sup> Dugard (n 54) 9–10.

<sup>172</sup> Zurayk and Gough (n 37) 21.

<sup>173</sup> UN Meetings Coverage and Press Releases (n 134); Zurayk and Gough (n 37) 29–30.

<sup>174</sup> OCHA, 'The Gaza Strip: The Humanitarian Impact of the Blockade' (OCHA 2015) 1

<[http://reliefweb.int/sites/reliefweb.int/files/resources/ocha\\_opt\\_gaza\\_blockade\\_factsheet\\_may\\_2015\\_english.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/ocha_opt_gaza_blockade_factsheet_may_2015_english.pdf)> accessed 5 July 2015.

<sup>175</sup> At chapter 5.3.

<sup>176</sup> ICJ Advisory Opinion on the Wall, para 121.

territory.<sup>177</sup> Therefore, we must look to IHRL for specific protections of Palestinians' freedom of movement.

Connected to Palestinians' freedom of movement is their livelihood and economic development, which Israel has obligations towards under both occupation and post-occupation law. Where Israel continues to occupy the West Bank and exercise control in Gaza, such as fishing areas:

...it bears direct responsibilities in these areas under the law of occupation. Israel must allow economic activity in these areas, specifically farming and fishing. This activity must be restricted only when absolutely necessary for security reasons.<sup>178</sup>

If legitimately restricted, then Israel 'would be obligated to provide alternative employment (for example, inside Israel) as well as nutritional and financial alternatives'.<sup>179</sup> In areas of Gaza, and incarnations of post-occupation Palestine, Bashi and Feldman understand Israel to have post-occupation obligations as 'a result of its omission in failing to facilitate appropriate and independent economic development throughout the years of direct physical control of the Gaza Strip'.<sup>180</sup>

### *IHRL*

Whilst international human rights law protects freedom of movement,<sup>181</sup> I am interested in how restrictions on movement affect the right to food. Former Special Rapporteur Jean Ziegler surmised:

An unprecedented level of restrictions on the movements of Palestinians inside the Occupied Territories is depriving Palestinians not only of their freedom of movement, but also of their right to food.<sup>182</sup>

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<sup>177</sup> GCIV, art 49.

<sup>178</sup> Bashi and Feldman (n 47) 73.

<sup>179</sup> *ibid.*

<sup>180</sup> *ibid* 72.

<sup>181</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 13; ICCPR, Article 12.

To an extent Israeli occupation policies restricting freedom of movement undermine the availability of food, but primarily they adversely impact food accessibility. The right to food includes physical and economic accessibility; restrictions on freedom of movement 'are severely restricting the movement of people and economic trade, impeding physical and economic access to food and water and causing economic collapse.'<sup>183</sup> Additionally, occupation is undermining the sustainability of Palestinian food, which undermines RTF requiring food 'accessible for both present and future generations.'<sup>184</sup> Israel fails to provide the necessary additional support to 'indigenous population groups whose access to their ancestral lands may be threatened.'<sup>185</sup>

Access to livelihoods is intrinsic to the right to food concept of economic accessibility.<sup>186</sup> Therefore the impact on Palestinian economy and access to livelihoods by Israeli restrictions on freedom of movement contributes to further erosion of the right to food. Palestinians have restricted access to their farmlands which has led to many 'abandoning agriculture altogether',<sup>187</sup> and they are constrained in finding alternative work due to Israeli movement restrictions. Furthermore, Israeli actions have contributed to increasing food prices and economic shocks,<sup>188</sup> which has increased unemployment within the oPt, negatively affecting economic accessibility to food. This will affect the capacity of 'any future viable Palestinian State with a functioning economy to be able to realize the right to food of its own people.'<sup>189</sup>

Israel is evidently not fulfilling its positive obligations to ensure Palestinians' RTF. Furthermore, Israel's restrictions on freedom of movement violate the 'obligation to *respect* existing access to adequate food [which] requires States parties not to take any measures that result in preventing such access.'<sup>190</sup> Equally, 'the obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.'<sup>191</sup> Thus the actions of settlers and restrictions to

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<sup>182</sup> Ziegler (n 133) 7.

<sup>183</sup> *ibid* 2.

<sup>184</sup> CESCR, General Comment 12, para 7.

<sup>185</sup> CESCR, General Comment 12, para 13.

<sup>186</sup> CESCR, General Comment 12, para 13.

<sup>187</sup> Zurayk and Gough (n 37) 30.

<sup>188</sup> UNRWA (n 126).

<sup>189</sup> Jean Ziegler, 'The Right to Food: Report by the Special Rapporteur' (Economic and Social Council 2003) Addendum: Mission to the Occupied Palestinian Territories 3.

<sup>190</sup> CESCR, General Comment 12, para 15.

<sup>191</sup> CESCR, General Comment 12, para 15.

Palestinians' movement for the benefit of settlements contributes further to Israeli violations of Palestinians' right to food.

### 5.3. Restrictions on Food and Food Aid in Gaza

Restrictions on the transport of food has been a particularly pertinent problem in Gaza before, during, and since the blockade.<sup>192</sup> UNRWA, as well as the WFP and ICRC, provides food aid to Palestinians across the occupied territory.<sup>193</sup> The unique circumstances in Gaza and the Israeli blockade have made food aid even more important but less accessible. According to the UN General Assembly:

A fully fledged food insecurity crisis has been prevented only by the large-scale humanitarian assistance provided. Since 2000, UNRWA has spent more than \$900 million in food and cash assistance benefiting the poorest refugees in Gaza, where more than 800,000 refugees now depend on the Agency's food assistance programme.<sup>194</sup>

The extent to which Israel has controlled and restricted the entry of food into Gaza has varied, yet the detrimental impact of occupation on Gazans' food has persisted.<sup>195</sup> During the blockade starting in 2007<sup>196</sup> food supplies were severely restricted and calculated to allow for an amount just above the humanitarian minimum.<sup>197</sup> Before the blockade and since the restrictions on food were lifted in 2010 Israeli policies that 'control through food' continue.<sup>198</sup> Israel's 2014 bombardment of Gaza again pushed Gaza into a state of emergency.<sup>199</sup> In addition to Israeli actions, Hamas was reported stealing food aid in 2009.<sup>200</sup>

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<sup>192</sup> Zurayk and Gough (n 37) 1, 3–4.

<sup>193</sup> UNRWA, 'Food Aid' (UNRWA) <<http://www.unrwa.org/ar/tags/food-aid>> accessed 21 August 2015; WFP, 'State of Palestine: WFP Activities' (WFP) <<https://www.wfp.org/countries/state-of-palestine/operations>> accessed 21 August 2015; ICRC, 'Gaza: One Year after War, Still No Prospect of Decent Life' (ICRC, 22 December 2009) <<https://www.icrc.org/eng/resources/documents/update/palestine-gaza-update-211209.htm>> accessed 8 August 2015.

<sup>194</sup> UN General Assembly (n 127) 97.

<sup>195</sup> Zurayk and Gough (n 37) 3–4.

<sup>196</sup> Although the siege on Gaza started in 2006. *ibid* 1.

<sup>197</sup> Aeyal Gross and Tamar Feldman, "'We Didn't Want to Hear the Word Calories': Rethinking Food Security, Food Power, and Food Sovereignty - Lessons from the Gaza Closure' (2015) 33 *Berkeley Journal of International Law* (Forthcoming).

<sup>198</sup> Zurayk and Gough (n 37) 2.

<sup>199</sup> Food Security Sector, 'Report of the Rapid Qualitative Emergency Food Security Assessment (EFSA) Gaza Strip' (2014).

<sup>200</sup> Associated Press, 'UN Halts Aid into Gaza after "Hamas Steals" Thousands of Tonnes of Aid' (*The Guardian*, 6 February 2009) <<http://www.theguardian.com/world/2009/feb/06/gaza-un-aid-hamas>> accessed 11 July 2015; United Nations News,

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'Israel's siege of Gaza violates a whole range of obligations under both human rights law and humanitarian law.'<sup>201</sup> Israel violates GCIV Article 59 by not allowing the free passage of consignments of foodstuffs, and Article 43 of the Hague Regulations requiring the maintenance of civil life. Israel claims that its obligations to Gaza are "minimal", whilst Gisha maintains that Israel continues to be bound by IHL.<sup>202</sup> Following from my discussion of occupation and post-occupation obligations in Gaza,<sup>203</sup> if we adopt Gross' functional approach, Israel is bound by the law of occupation,<sup>204</sup> and even if we adopt Benvenisti's approach Israel continues to have post-occupation obligations.<sup>205</sup> Where Israel effects control, such as the passage of goods, its responsibility flows from this power.<sup>206</sup> This applies beyond the scope of the siege as Israel persists in its control of food through 'underlying political and economic factors'.<sup>207</sup>

Israel claimed security reasons for food restrictions, but 'Gisha's work demonstrate[d] that the official policy included restrictions on food that had nothing to do with any direct and immediate security need.'<sup>208</sup> Furthermore, it is of significant concern that the blockade on Gaza may constitute collective punishment in violation of IHL.<sup>209</sup> The Occupying Power is obliged to allow relief schemes under Article 59, but nevertheless Article 55 ensures that where Israel exercises control it continues to have 'the duty of ensuring the food and medical supplies of the population'.<sup>210</sup> However, the international community's provision of food aid means that 'the Israeli state has never been forced to bear responsibility for its

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'Gaza: UN Suspends Aid Operation after Second Hamas-Linked Theft of Supplies' (*UN News Service Section*, 6 February 2009) <[http://www.un.org/apps/news/story.asp?NewsID=29802#.VaEld\\_lViko](http://www.un.org/apps/news/story.asp?NewsID=29802#.VaEld_lViko)> accessed 11 July 2015.

<sup>201</sup> Dugard (n 54) 26.

<sup>202</sup> Bashi and Feldman (n 47) 67.

<sup>203</sup> At chapter 4.5.

<sup>204</sup> Gross, 'Rethinking Occupation: The Functional Approach' (n 75).

<sup>205</sup> Benvenisti (n 76).

<sup>206</sup> Gross, 'Rethinking Occupation: The Functional Approach' (n 75); Bashi and Feldman (n 47) 68.

<sup>207</sup> Zurayk and Gough (n 37) 7.

<sup>208</sup> 'Gisha, 'Reader: "Food Consumption in the Gaza Strip - Red Lines"' (Gisha 2012) Position Paper 2 <<http://www.gisha.org/UserFiles/File/publications/redlines/redlines-position-paper-eng.pdf>> accessed 8 July 2015.

<sup>209</sup> GCIV, art 33; UN General Assembly (n 127) 55; Dugard (n 54) 26.

<sup>210</sup> GCIV, art 55.

actions',<sup>211</sup> and international appeals 'temporarily alleviate the crises... without confronting the occupation.'<sup>212</sup>

If Gaza is not occupied, then under NIAC IHL Israel may be accused of infringing Article 14 of APII prohibiting the starvation of civilians, and Article 18 on relief actions. Israel has always claimed to permit enough food into Gaza to sustain the population on 'a level of "just above minimum"',<sup>213</sup> but third party reports contradict this.<sup>214</sup> Gross and Feldman criticise such a limited approach to Israeli actions for neglecting to consider the restrictions on foodstuffs from the broader perspective of 'food power'.<sup>215</sup>

### *IHRL*

Restrictions on food and food aid undermine both right to food principles of available and accessible food. During the height of the Israeli blockade on Gaza from 2007 to 2010, Israel let in far less supplies than required,<sup>216</sup> resulting in chronic malnutrition,<sup>217</sup> which undermines RTF availability. Israel determined permitted food according to alleged security needs and other considerations, such as 'the perception of the product as a luxury or non-luxury item'.<sup>218</sup> However, '[s]ome food products were dropped from the [permitted] list for no apparent reason.'<sup>219</sup> Furthermore, during and after the blockade Israeli actions have 'caused supply to be unpredictable and contributed to a significant rise in food prices in Gaza',<sup>220</sup> which inhibits accessibility to food and damages farming affecting long-term availability and sustainability of food.<sup>221</sup>

In 2009 UNRWA temporarily 'suspended all imports of desperately needed aid after Hamas confiscated hundreds of tons of food'.<sup>222</sup> As a non-State actor Hamas has obligations

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<sup>211</sup> Zurayk and Gough (n 37) 45.

<sup>212</sup> *ibid.*

<sup>213</sup> Gross and Feldman (n 197).

<sup>214</sup> Gisha (n 208) 7–8; Donald Macintyre, 'Chronic Malnutrition in Gaza Blamed on Israel' (*The Independent*, 15 November 2008) <<http://www.independent.co.uk/news/world/middle-east/chronic-malnutrition-in-gaza-blamed-on-israel-1019521.html>> accessed 8 August 2015.

<sup>215</sup> Gross and Feldman (n 197).

<sup>216</sup> Gisha (n 208) 2, 7–8.

<sup>217</sup> Macintyre (n 214).

<sup>218</sup> Gross and Feldman (n 197) 13.

<sup>219</sup> *ibid.* 11.

<sup>220</sup> Gisha (n 208) 1.

<sup>221</sup> *ibid.* 7.

<sup>222</sup> United Nations News (n 200).

to ensure human rights protection where it effects control.<sup>223</sup> It is unclear whether the food reached Palestinians in need in Gaza as ' Hamas said it would give out the aid itself'.<sup>224</sup> In any case, seizure of food aid destined for Gazans infringes upon Palestinians' right to available and accessible food.

#### 5.4. Culturally Inappropriate Food

The availability of an adequate right to food also incorporates the concept of food that is 'acceptable within a given culture'.<sup>225</sup> Occupation generally, and the Israeli blockade in particular, have undermined Palestinian food culture in Gaza.<sup>226</sup> Many of the excluded items during the siege were core foods in the traditional Palestinian diet; for example, fresh meat was prohibited in 2009 and sesame seeds to make traditional Gazan red tahini banned during certain periods.<sup>227</sup> Furthermore, Zurayk and Gough criticise Israel's appropriation of Palestinian foods, such as freekeh and olives, whilst Israeli policies reduce Gaza's production capacity and increase its reliance on imports.<sup>228</sup> Israel undermines Palestinians' cultural RTF.

In addition to Israel's restrictions affecting the cultural aspect of the right to food, Gross and Feldman have criticised international food aid as having an even greater impact on Gazans' diet:

International aid agencies in Gaza distribute mainly white flour and less of the traditional grains, like frika (green wheat), burghul, and barley. Due to the Gazan population's dependence on aid agencies for food, these nutritive grains have been almost entirely eliminated from their diet, undermining both the local cultural cuisine and nutrition.<sup>229</sup>

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<sup>223</sup> Bashi and Feldman (n 47) 62.

<sup>224</sup> United Nations News (n 200).

<sup>225</sup> CESCR, General Comment 12, para 8.

<sup>226</sup> Zurayk and Gough (n 37) 39–40.

<sup>227</sup> Gross and Feldman (n 197) 11–12.

<sup>228</sup> Zurayk and Gough (n 37) 40.

<sup>229</sup> Gross and Feldman (n 197) 12.

Food aid also prolongs dependency and ‘can reduce local capacity for food production’.<sup>230</sup> The international organisations and States providing aid are responsible for undermining Palestinians’ RTF and food sovereignty, as well as Israel being responsible for causing the dependence on international aid which ‘prevented the residents of Gaza from enjoying their right to food sovereignty’.<sup>231</sup> Gazans are clearly not enjoying sovereignty over ‘their own food systems, including their own markets, production modes, food cultures, and food environments’.<sup>232</sup> Zurayk and Gough propose that Palestinian ‘[a]gricultural policies based on community goals and agroecology are crucial in resisting Israeli control’.<sup>233</sup>

As well as culturally inappropriate food, the other food issues discussed can also undermine Palestinians’ food sovereignty. Destruction and seizure of land and restrictions on movement have resulted in Palestinians only having use of ‘54.4% of possible agricultural land in the oPt’ and ‘herders are able to access only 31%... of Palestinian rangeland’.<sup>234</sup> MA’AN report that ‘[t]he reduction of independent Palestinian agricultural, livestock, and fishing production demonstrates a lack of food sovereignty’.<sup>235</sup> According to MA’AN this lack of food sovereignty has a directly negative impact on Palestinians such that ‘they are unable to create the economic and social conditions necessary to alleviate the effects of food insecurity’.<sup>236</sup> The issues around food aid in Gaza discussed above are further evidence of a lack of Palestinian food sovereignty; reliance on food aid demonstrates the population does not have sustainable food self-sufficiency. Finally, the fundamental nature of occupation of Palestinian territory contradicts the principle of food sovereignty, as by definition the Palestinian people are not in control of their own territory.

## 6. TRANSITIONAL JUSTICE MECHANISMS

As discussed above, it is useful to consider potential transitional justice processes prior to the end of a conflict or occupation. However, transitional justice is criticised for allowing

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<sup>230</sup> Zurayk and Gough (n 37) 31.

<sup>231</sup> Gross and Feldman (n 197) 52.

<sup>232</sup> *ibid* 54.

<sup>233</sup> Zurayk and Gough (n 37) 44.

<sup>234</sup> MA’AN Development Center, ‘Food Security in the Occupied Palestinian Territories’ (2015) 6–7 <<http://reliefweb.int/sites/reliefweb.int/files/resources/FS.pdf>> accessed 1 August 2015.

<sup>235</sup> *ibid* 7.

<sup>236</sup> *ibid* 10.

lesser forms of justice,<sup>237</sup> being state-centric and neglecting victims.<sup>238</sup> Others criticise the field as gendered,<sup>239</sup> western liberal theory.<sup>240</sup> The value of transitional justice is that it attempts to respond to a ‘legacy of mass abuse’<sup>241</sup> within the particular circumstances of a post-conflict State. Whilst some post-conflict societies bury the past in amnesties<sup>242</sup> and encourage forgiveness,<sup>243</sup> this does not provide satisfaction.<sup>244</sup> Even if violations of IHL and IHRL ceased upon the end of occupation, this would not provide adequate remedy for wrongs nor address the long-term economic effects of occupation on food rights. Transitional justice can include traditional and innovative devices; incorporating food rights violations into transitional justice discourse is itself rather unique.

With on-off peace negotiations the current feasible end to the Israeli-Palestinian conflict remains a negotiated settlement into two States. Thus a peace agreement will require ‘issues to be explored jointly by the two societies...’<sup>245</sup> However, due to the limited confines of this project, I consider transitional justice within Palestine only. Peace agreements can cause difficulties for transitional justice if amnesties or other caveats are incorporated into the peace agreement.<sup>246</sup> I propose that alternatively an Israeli-Palestinian peace agreement ought to include transitional justice arrangements to ensure remedies and future fulfilment of human rights.<sup>247</sup>

I do not intend to undermine the violations of IHL and IHRL assessed above, nor civil and political rights violations ordinarily within the transitional justice remit, but aim to further

<sup>237</sup> Where criminal trials are not pursued; for example, apartheid victims’ families challenged the creation of the South African Truth and Reconciliation Commission and its conditional amnesty process. *Azanian Peoples Organization (AZAPO) & Others v President of the Republic of South Africa & Others* (CCT17/96) [1996] ZACC 16.

<sup>238</sup> Diane F Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 11 *The Yale Law Journal* 2547–8.

<sup>239</sup> O’Rourke analyses gender and feminist approaches to transitional justice in her book: Catherine O’Rourke, *Gender Politics in Transitional Justice* (Routledge 2013).

<sup>240</sup> Stephanie Vieille, ‘Transitional Justice: A Colonizing Field?’ 4 *Amsterdam Law Forum* 58, 59.

<sup>241</sup> Carsten Stahn and Jann K Kleffner (eds), *Just Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 214.

<sup>242</sup> There is a comprehensive list of countries that have used amnesties at: Leigh A Payne, Tricia D Olsen and Andrew G Reiter, ‘Transitional Justice Database Project: Amnesty’

<<http://www.tjdbproject.com/index.php?mtype%3A%3A3=Amnesty&startyear=&endyear=&go=Search>> accessed 8 August 2015.

<sup>243</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998) ch 2; Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Second edition, Routledge 2011) ch 14.

<sup>244</sup> UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (adopted by the General Assembly 21 March 2006) A/RES/60/147 (‘The UN Principles’).

<sup>245</sup> Dudai (n 30) 249.

<sup>246</sup> Diane F Orentlicher, ‘“Settling Accounts” Revisited: Reconciling Global Norms with Local Agency’ (2007) 1 *The International Journal of Transitional Justice* 11–13.

<sup>247</sup> Dudai proposes transitional justice within a peace agreement to prevent further violence. Dudai (n 30) 253–4.

discuss and inspect how transitional justice can address food violations. I consider post-occupation obligations will run concurrent, and possibly incorporated, to transitional justice. As I am working in the context of the unknown my analysis is inevitably predictive and conditional. I shall consider how particular transitional justice processes may address food violations in Palestine,<sup>248</sup> after first considering the fundamental need to remedy the underlying economic impacts of occupation. I have selected mechanisms dominant in transitional justice literature which are feasible for Palestine:

- Truth commission;
- Reparations; and
- Constitutional reform.

I do not consider criminal trials because food rights violations do not clearly fit within the framework of international crimes and there would be other issues with greater prosecutorial priority.<sup>249</sup>

### 6.1. Economic Reform and Development

Palestine experiences high levels of poverty, unemployment, and dependency on aid,<sup>250</sup> as a result of decades of occupation imposing an “impermeable barrier” to Palestine’s economic potential.<sup>251</sup> This inhibits Palestinians’ food security and right to food which require economic accessibility to food and a sustainable food system,<sup>252</sup> incorporating buying power<sup>253</sup> and a functioning economy.<sup>254</sup> Concurrently, ‘food security brings economic

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<sup>248</sup> A comprehensive transitional justice analysis for Palestine would need to consider all rights violations and aims of ‘justice, peace and truth’; Gemma Daly, ‘Should Truth Commissions Be Viewed as Second-Best Alternatives to Prosecutions?’ (2015) 2 SOAS Law Journal 176, 181.

<sup>249</sup> Rome Statute of the International Criminal Court (17 July 1998) ISBN No. 92-9227-227-6, article 5.

<sup>250</sup> The World Bank, ‘Investing in Palestinian Economic Reform and Development’ (The World Bank 2007) Report for the Pledging Conference.

<sup>251</sup> The World Bank, ‘Palestinian Economic Prospects: Aid, Access and Reform’ (The World Bank 2008) Economic Monitoring Report to the Ad Hoc Liaison Committee 39–40; Sami Halabi, ‘Palestinian Economy: Foundation of a State or Common Burden?’ (*The Electronic Intifada*, 27 January 2009) <<https://electronicintifada.net/content/palestinian-economy-foundation-state-or-common-burden/8026>> accessed 16 August 2015.

<sup>252</sup> CESCR, General Comment 12, para 8, 13, 25; Rome Declaration on World Food Security (Rome, FAO; 13-17 November 1996) World Food Summit.

<sup>253</sup> Gross and Feldman ‘showed that it was the [Gaza] closure’s effect on buying power that has had the most detrimental effect on food security’. Gross and Feldman (n 197) 57; Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press 1981) chs 5 & 10.

growth'; Palestine needs to address the general economy and specifically provide a 'food security strategy' and 'multi-sectoral policies aimed at reducing inequalities and targeting vulnerable populations.'<sup>255</sup> Food sovereignty might form part of this but Palestinians' economic accessibility to food depends on a functioning economy.<sup>256</sup> Gaza is a prime example of how a weak economy inflicts food rights; inflated food prices and high unemployment have contributed to Gazans' food insecurity.<sup>257</sup> South Africa demonstrates that without economic equality the population will not be universally food secure.<sup>258</sup> Suffice it to say that Palestine's economy has been damaged by Israeli occupation; this would need to be addressed by transitional justice mechanisms to secure Palestinians' food rights.

The correlation between transitional justice and development is not unique to Palestine, with many countries emerging from conflict in need of development.<sup>259</sup> What is unusual is that another State is responsible for the economic troubles and will thus have ongoing obligations, which should be cemented in a peace agreement.<sup>260</sup> Economic reform in post-conflict Palestine would require Israel's collaboration to fulfil post-occupation obligations and remedy the violations committed. I am interested in how transitional justice mechanisms may be able to incorporate economic reform and development to lay the foundations for Palestinian food rights.

## 6.2. Truth Commission

Post-conflict Palestine may choose to implement a truth commission, following in the footsteps of South Africa and a number of South American States.<sup>261</sup> Truth commissions can fulfil the right to truth,<sup>262</sup> as well as make recommendations for 'systemic transformations'.<sup>263</sup>

<sup>254</sup> Anne Thomson and Manfred Metz, 'Implications of Economic Policy for Food Security: A Training Manual' (FAO 1998) ch 4 <<http://www.fao.org/docrep/004/x3936e/X3936E06.htm>> accessed 16 August 2015.

<sup>255</sup> Maximo Torero, 'Food Security Brings Economic Growth - Not the Other Way Around' (*International Food Policy Research Institute*, 16 October 2014) <<http://www.ifpri.org/blog/food-security-brings-economic-growth-not-other-way-around>> accessed 16 August 2015.

<sup>256</sup> For food sovereignty critiques see: Kees Jansen, 'Food Sovereignty: Re-Peasantization/Dispossession/Agroecology versus Expanded Reproduction', *Food Sovereignty: A Critical Dialogue* (International Institute of Social Studies 2014) <[http://www.iss.nl/fileadmin/ASSETS/iss/Research\\_and\\_projects/Research\\_networks/ICAS/92\\_Kees\\_Jansen.pdf](http://www.iss.nl/fileadmin/ASSETS/iss/Research_and_projects/Research_networks/ICAS/92_Kees_Jansen.pdf)> accessed 22 August 2015.

<sup>257</sup> The World Bank (n 250); Food Security Sector (n 199) 11–14.

<sup>258</sup> Ambar Narayan and Sandeep Mahajan, 'The State of Opportunities in South Africa: Inequality Among Children and in the Labor Market' (2013) 2 *Inequality in Focus*, The World Bank 1.

<sup>259</sup> Pablo de Greiff, 'Articulating the Links Between Transitional Justice and Development: Justice and Social Integration', *Transitional Justice and Development: Making Connections* (International Center for Transitional Justice 2009) 29.

<sup>260</sup> Dudai supports incorporating economic relations into a peace agreement. Dudai (n 30) 264.

<sup>261</sup> Hayner's book provides a comprehensive review of a number of truth commissions. Hayner (n 243).

<sup>262</sup> ICRC, Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API), art 32; OHCHR, 'Updated Set

Hecht and Michalowski summarise that in the current literature ‘scholars advocate truth commissions as the most appropriate framework to address structural violence’,<sup>264</sup> but warn that ‘truth commissions so far largely avoided [economic inequalities].’<sup>265</sup> Nevertheless, truth commissions have recommended reforms of institutions ‘strongly linked with development’,<sup>266</sup> and could have broader mandates to address violations of social, economic, and cultural rights.<sup>267</sup>

The particular circumstances of a two-State solution would raise difficulties for the legitimacy of a truth commission’s truth, if a Palestinian institution lacked input from Israeli actors. A truth promulgated by one side of the conflict may lack legitimacy, even if valid and based on accurate evidence,<sup>268</sup> as it may appear to silence other narratives and debate.<sup>269</sup> A truth commission in Palestine could in theory acknowledge food violations and make recommendations for remedy and reform, including economic transformation. It appears unlikely, however, that the truth process itself would be truly ground-breaking or reconciliatory without Israeli involvement; in such circumstances implementation of a Commission’s recommendations for reparation and reform may be most valuable.

### 6.3. Reparation & Restitution

Reparations could be recommended by a Palestinian truth commission or the Palestinian government,<sup>270</sup> or incorporated into a peace agreement. As Hilal identifies, the obligation on States to make reparations for breaches of international law involves ‘restor[ing], to the extent possible, the situation that existed before the illegality occurred.’<sup>271</sup> Bashi and Feldman attribute the former occupier with responsibility for restoring infrastructure ‘to the

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of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’ (Economic and Social Council 2005) E/CN.4/2005/102/Add.1, Principle 2; OHCHR, ‘Promotion and Protection of Human Rights: Study on the Right to the Truth’ (Economic and Social Council 2006) E/CN.4/2006/91 4; *Chumbipuma Aguirre et al. v. State of Peru (The Barrios Altos Case)*, 30 November 2001, Inter-American Court of Human Rights (Ser. C) No.87 (2001).

<sup>263</sup> Rolando Ames Cobian and Reategui, ‘Toward Systemic Social Transformation: Truth Commissions and Development’, *Transitional Justice and Development: Making Connections* (International Center for Transitional Justice 2009) 146–7.

<sup>264</sup> Lisa Hecht and Sabine Michalowski, ‘The Economic and Social Dimensions of Transitional Justice’, *ETJN Concept Paper* (ETJN 2012) 6 <<https://www.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf>> accessed 10 July 2015.

<sup>265</sup> *ibid.*

<sup>266</sup> de Greiff (n 259) 36.

<sup>267</sup> *ibid.* 37; Lisa J Laplante, ‘Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework’ (2008) 2 *The International Journal of Transitional Justice* 331, 334–7.

<sup>268</sup> Hayner (n 243) 75–84.

<sup>269</sup> Onur Bakiner, ‘One Truth Among Others?: Truth Commissions’ Struggle for Truth and Memory’ [2015] *Memory Studies*.

<sup>270</sup> The UN Principles, para 15.

<sup>271</sup> Hilal (n 30) 7.

level to which Israel developed its own civilian institutions in its sovereign territory.’<sup>272</sup> Reparation includes restitution of appropriated property or compensation for the market value.<sup>273</sup> Hilal focuses on restitution for refugees, but the same principles could apply to Palestinians whose agricultural lands were seized or destroyed in violation of international law.<sup>274</sup> Land swaps might form part of a peace agreement, possibly with compensation for loss,<sup>275</sup> which could also be considered to remedy restrictions on access to food and agricultural lands. Reparations can contribute to development, but land redistribution and reparations alone may not address occupation’s underlying economic issues undermining food security.<sup>276</sup> Furthermore, land reform is rarely implemented extensively enough to address economic inequalities; South Africa’s limited land reform has left property ‘concentrated in the hands of a largely white minority’.<sup>277</sup>

Zinaida Miller is wary of reparations masking the ‘lack of significant redistribution during or after transition,’<sup>278</sup> critical that transitional justice institutions addressing ‘economic questions... focus primarily on reparations or compensation for a victim group defined by the institution.’<sup>279</sup> Miller conceives that this narrow ‘focus on reparations makes structural factors doubly invisible, as they are not only backgrounded in the project as a whole but also reduced to a singular definition for resolution.’<sup>280</sup> Reparations may be too narrow to address ‘resource and power inequality’.<sup>281</sup> It is foreseeable that Palestinians would seek restitution and reparation from Israel for land appropriation and human rights violations. Reparations would need to address development,<sup>282</sup> as well as specific food violations, to ensure sustainable Palestinian food rights. However, Arbour cautions:

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<sup>272</sup> Bashi and Feldman (n 47) 56.

<sup>273</sup> Hilal (n 30) 7–8.

<sup>274</sup> De Greiff proposes the expansion of reparations for economic crimes. de Greiff (n 259) 38.

<sup>275</sup> For example, South Africa has set up a limited system of land claims. Constitution of the Republic of South Africa, no.108 of 1996, s84(2)(a). Department of Rural Development and Land Reform, Republic of South Africa, ‘Commission on Restitution of Land Rights’ (*Rural Development & Land Reform*) <<http://www.ruraldevelopment.gov.za/component/content/article/347-land-claim/re-opening/771-faq#.VdderPIVikp>> accessed 21 August 2015; E.C.S., ‘Land Reform in South Africa: Seeds of Change’ (*The Economist*, 20 June 2013) <<http://www.economist.com/blogs/baobab/2013/06/land-reform-south-africa>> accessed 21 August 2015.

<sup>276</sup> Naomi Roht-Arriaza and Katharine Orlovsky, ‘A Complementary Relationship: Reparations and Development’, *Transitional Justice and Development: Making Connections* (International Center for Transitional Justice 2009).

<sup>277</sup> ‘South Africa’s Zuma Outlines Land Reform Plans’ (*BBC News*, 14 February 2015) <<http://www.bbc.co.uk/news/world-africa-31471427>> accessed 17 August 2015; Bernadette Atuahene, ‘South Africa’s Land Reform Crisis’ (*Foreign Affairs*, August 2011) <<https://www.foreignaffairs.com/articles/africa/2011-06-16/south-africas-land-reform-crisis>> accessed 17 August 2015.

<sup>278</sup> Miller (n 30) 280.

<sup>279</sup> *ibid* 278.

<sup>280</sup> *ibid*.

<sup>281</sup> *ibid* 279.

<sup>282</sup> Laplante (n 267) 351–2; Roht-Arriaza and Orlovsky (n 276).

...individual reparations and collective reparations to individual victims will never substitute for more broad-based and longer term socio-economic policies that aim to redress and prevent widespread inequalities and discrimination.<sup>283</sup>

The possible 'spillover effect' of reparations on long-term development can only be achieved if a well-designed programme is properly implemented.<sup>284</sup> In many post-conflict societies recommendations for reparations are inadequately implemented, undermining their potential value.<sup>285</sup> For example, the South African Truth and Reconciliation Commission (SATRC) made recommendations for reparations that were unsupported politically,<sup>286</sup> and thus inadequately fulfilled.<sup>287</sup> These recommendations were made by South Africa's TRC to South Africa's government and unimplemented; one can imagine the implementation problems of recommendations from a Palestinian institution to Israel. This exposes the importance of including reparations, and other transitional justice measures, in an Israeli-Palestinian peace agreement. Reparations and development could support constitutional and legislative reforms to ensure practical improvements to the Palestinian economy to address social, economic, and cultural rights generally, and food rights specifically.

#### 6.4. Constitutional Reform

A peace agreement is 'a form of transitional constitution',<sup>288</sup> which could be particularly pertinent in the Israeli-Palestinian two-State context. This could be supplemented with a Palestinian Constitution, protecting human rights including the right to food as in the South African Constitution,<sup>289</sup> and a right to food strategy.<sup>290</sup> It is important that a Palestinian constitution does not neglect Israeli obligations for human rights and humanitarian law violations, including the right to food and underlying economic impact of occupation. Thus

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<sup>283</sup> Arbour (n 12) 20.

<sup>284</sup> Roht-Arriaza and Orlovsky (n 276) 205.

<sup>285</sup> Miller (n 30) 278.

<sup>286</sup> Hayner (n 243) 31.

<sup>287</sup> *ibid* 176–7.

<sup>288</sup> Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 9.

<sup>289</sup> Constitution of the Republic of South Africa, no.108 of 1996, s 27(b).

<sup>290</sup> A Palestinian National Food Security Strategy was implemented between 2004 and 2006, but there would be a separate need for a specific right to food strategy in post-conflict Palestine. On the existing Palestinian National Food Security Strategy see: John Ashley and Nedal Jayousi, 'Setting a Palestinian National Food Security Strategy' (2006) 13 *Palestine-Israel Journal of Politics, Economics & Culture* 112.

the combination of an Israeli-Palestinian peace agreement and Palestinian constitution may be required.

However, the value of an obligation-based peace agreement and human-rights protecting constitution depends on implementation. Whilst this may seem obvious, it is important to acknowledge the South African legacy that constitutional protection is worthless without effective implementation.<sup>291</sup> In addition to constitutional protection Palestine needs enforcement mechanisms such as judicial recourse, a national human rights institution,<sup>292</sup> and ratification of the ICESCR Optional Protocol to permit complaints to the CESCR. Even with these tools<sup>293</sup> a South African RTF is unfulfilled because of inadequate enforcement and underlying economic factors that need to be concurrently addressed.<sup>294</sup> With the additional Palestinian complication of two States, constitutional reform alone appears inadequate transitional justice. A combination of mechanisms would be required to remedy and protect Palestinian food rights, connected to the broader economy, with contribution from both Israel and Palestine. These would be best addressed prior to and within a peace agreement to ensure Israeli responsibility for food violations.

## 7. CONCLUSION

In this article I have sought to analyse the legal frameworks around food in Palestine and identify violations of food law. I have sought to consider obligations during and post-occupation, adopting a transitional justice approach. The purpose of this work is to focus oft-neglected attention on social, economic, and cultural rights in contemplation of transitional justice for Palestine, with a particular focus on food issues.

The questions posed at the start of this process were:

- Who has or has had obligations in relation to food towards the Palestinian people?

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<sup>291</sup> Kristina Bentley, Laurie Nathan and Richard Calland (eds), *Falls the Shadow: Between the Promise and the Reality of the South African Constitution* (University of Cape Town Press 2013); Pilger (n 23); 'Apartheid's Legacy Lingers on' (*DW.COM*, 22 April 2014) <<http://www.dw.com/en/apartheids-legacy-lingers-on/a-17572989>> accessed 16 August 2015; Dennis Davis, 'Socio-Economic Rights: The Promise and Limitation - The South African Experience', *Exploring Social Rights* (Hart Publishing 2007).

<sup>292</sup> FAO, 'The Right to Food in Practice: Implementation at the National Level' (FAO 2006) 16–17.

<sup>293</sup> Excluding the Optional Protocol which South Africa has not ratified.

<sup>294</sup> Busiso Moyo, 'South Africa's Fight for the Right for Food' (*Health24*, 17 March 2015) <<http://www.health24.com/Diet-and-nutrition/News/The-fight-for-the-right-for-food-20150316>> accessed 16 August 2015.

- Who has violated food rights or obligations?
- Who is responsible for addressing and recompensing for these violations?
- Does an occupier's obligations end when occupation ends?
- When does occupation end?
- What if occupation never ends?

I have identified food-related legal obligations in chapter 4; potential violations and responsibility in chapter 5; and transitional justice possibilities in chapter 6. The end of an occupation and the extinguishing or continuation of occupier's duties were analysed in the context of a potential 'jus post bellum' at the end of chapter 4. I have also acknowledged and explored the potential dissonance between IHL and IHRL; my analysis exposes that protection of Palestinians' food rights can be greater under IHL or IHRL, depending on the issue at hand.

My research for this article has exposed that it would be valuable for further academic discussion and research on the end of occupation and post-occupation obligations. It would be beneficial for there to be further exploration of social, economic, and cultural rights in potential transitional justice processes for Palestine. There is also a lack of dialogue around the question 'what if occupation never ends?' I have endeavoured to contribute to the existing literature by engaging in a case study of food rights in Palestine, which I intend to serve as one example of how transitional justice measures may begin to address some IHL and IHRL violations in Palestine. These considerations can usefully begin prior to the end of occupation as part of the conflict resolution process and contribute to peace agreements according to IHL and IHRL standards.

Palestine's challenge is first and foremost the end of occupation, but I maintain that it is not in Palestinians' long-term interest to neglect rights issues for a peace that may not be durable and a society that will be plagued by the legacy of occupation. I have sought to use food to demonstrate how social, economic, and cultural rights are protected in international law, but also the limits of legal frameworks and remedies available. As well as directly addressing food issues, Palestine will need Israeli collaboration to address the underlying economic situation that undermines food security. Importantly, I seek to encourage dialogue around

issues that are neglected but have a significant impact on Palestinians' current and future wellbeing. Social, economic, and cultural rights need to be confronted in Palestinian transitional justice to address specific violations as well as the underlying economic impacts of occupation.

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- International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)
- Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (28 September 1995) (Oslo II)
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 5 March 2009) UNGA Res 63/117 (Optional Protocol).
- Palestine – Progress Report of the United Nations Mediator (11 December 1948) GA Res 194 (III)
- Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab Population in the occupied Syrian Golan (19 December 2014) GA Res 69/241
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- Rome Declaration on World Food Security (Rome, FAO; 13-17 November 1996) World Food Summit
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HCJ 3239/02, *Ma'arab v The IDF Commander in Judea and Samaria*, 57(2) PD 349

HCJ 7957/04, *Mara'abe v The Prime Minister of Israel* (21 June 2005) (unpublished)

HCJ 9132/07 *Al-Bassiouni v Prime Minister* (30 January 2008) (unpublished)

*The Public Committee Against Torture in Israel, & Palestinian Society for the Protection of Human Rights and the Environment v The Government of Israel et al* [2005] The Supreme Court sitting as the High Court of Justice, HCJ 769/02

# Conceptualising Crown Accountability:

## Lessons from the Legal Pluralism Debate

Tristan Webb<sup>\*</sup>

*Comparative accountability has established itself as a fruitful sub-discipline within comparative law. But issues of methodology persist, particularly regarding the analytical applicability of familiar legal terms to new settings. The inter-disciplinary debate about 'legal pluralism' reveals several different approaches that can be taken in tackling these methodological issues. This article reviews the usefulness of these approaches in the analysis of English legal history. It does so specifically with regard to different conceptualisations of accountability for the exercise of Crown power, as advanced variously by Bracton, Sir Edward Coke, and Lord Diplock, and as seen in the 2015 House of Commons vote on Syrian Air-Strikes.*

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### INTRODUCTION

This Article is intended to be the first step towards a much fuller study of the comparative philosophy of public accountability in the legal histories of England and Korea. It was inspired by records of court practice in Chosun Korea, for the King was followed by two historians, who recorded the King's words and deeds but denied him the right to review their record. Even his instruction that an ignominious fall from a horse not be recorded was dutifully recorded. It struck me that one could view this as an ingenious practice, from which contemporary polities revisiting their Freedom of Information laws might wish to learn. I endeavoured to understand more about the different ways of conceptualising accountability in the exercise of public power.

Comparative accountability is a relatively new sub-discipline in comparative law, albeit one that is already well-established.<sup>1</sup> Two recent illuminating examples of the sub-discipline by Hahm<sup>2</sup> and by Dowdle<sup>3</sup> follow this Article's introduction. This Article will take some steps towards their approach of comparative accountability, but is limited at this stage to a mere sketch of certain moments in English legal history. Specifically, it limits itself to identifying some – not all – ideas about how the Crown might be accountable for its exercise of power. The materials used are the writings of Bracton from the first half of the thirteenth century,<sup>4</sup> Sir Edward Coke in the first half of the seventeenth century,<sup>5</sup> Lord Diplock's judgment at the end of the twentieth century,<sup>6</sup> and a Parliamentary vote on the Crown's prerogative to declare war in 2015.<sup>7</sup>

As the examples of Hahm and Dowdle will show, comparative accountability, as with comparative law, is bedevilled by significant methodological issues regarding the 'transferability and comparability of meaning'.<sup>8</sup> In short, what is meant by 'law' and 'accountability' in England today is different from what it may have meant 800 years ago, which provides certain challenges. Therefore, rather than attempting a grand analysis of public accountability in the exercise of Crown power throughout English legal history, this Article will merely make certain limited observations of that accountability at different moments in time, before turning to the 'Legal Pluralism' debate for assistance in tackling the aforementioned methodological issues.

## COMPARATIVE ACCOUNTABILITY

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\* The Author would like to thank Professor Lee Chulwoo for his enlightening classes on the sociology of law at Yonsei University, which inspired this paper. Any errors are his own.

<sup>1</sup> John Bell, 'Administrative Law in a Comparative Perspective' in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007); Marku Suksi, 'Governmental accountability in autonomies: Åland Islands in comparison with select autonomies in Europe and elsewhere' in Antoinia B Engelbrekt and Joakim Nergelius (eds), *New Directions in Comparative Law* (Edward Elgar Publishing Limited 2009); John Ohnesorge, 'Administrative Law in East Asia: a comparative-historical analysis' in Rose-Ackerman and Lindseth Cheltenham (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2010).

<sup>2</sup> Chaihark Hahm, 'Rituals and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity' (2009) 57(1) *Am J Comp L* 135.

<sup>3</sup> Michael W Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (CUP 2006).

<sup>4</sup> Henry de Bracton, *On the Laws and Customs of England* (Samuel E Thorne tr, HUP 1968).

<sup>5</sup> Steve Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (8th edn, Liberty Fund 2003 vol 1-2).

<sup>6</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (GCHQ case).

<sup>7</sup> HC Deb 2 December 2015, vol 603, cols 323-500.

<sup>8</sup> Mark R Rutgers, 'Comparative Public Administration: Navigating Scylla and Charybdis – Global Comparison as a Translation Problem' (2004) 26(2) *Administrative Theory & Praxis* 150, 152.

The comparative studies of constitutions and accountability by Chaihark Hahm<sup>9</sup> and Michael Dowdle<sup>10</sup> have inspired the approach of this Article. Dowdle's review of the intellectual history of public accountability in the Anglo-American tradition has the aim of illustrating to the reader how the meaning and articulation of a term as familiar to ourselves as 'accountability' has, within even just one legal-political tradition such as the US, changed considerably in emphasis and meaning.<sup>11</sup>

According to Dowdle, the first century of the US' constitutionalism was characterised by a *res publica* model, in which:

constitutional accountability<sup>12</sup> was thought to stem primarily from the constitution's capacity to populate elite levels of government with enlightened, public-minded intelligentsia, while at the same time leaving most political decision making in the hands of largely autonomous, generally intimate, local communities.<sup>13</sup>

Today, we have what Dowdle terms a 'regulatory model' of public accountability, which is 'a two-level construct' of elections and bureaucracy:

At the top-level, what we will call the 'electoral component' of constitutional accountability makes elite political actors accountable to the public via the process of subjecting them to popular election. At the subordinate level, what we will call the legal-bureaucratic component makes subordinate political actors accountable by subjecting them to the bureaucratic command and control of higher level, elected officials.<sup>14</sup>

Dowdle identifies the start of the regulatory model of accountability with the social changes that took place between the Civil War and the dawn of the twentieth century.<sup>15</sup> The intimate communities of pre-industrial America on which the *res publica* model of accountability had partially rested were being pulled by economic forces into regional and national networks of labour and commerce. The industrialisation of society hastened two other processes: the rise

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<sup>9</sup> Hahm (n 2).

<sup>10</sup> Dowdle (n 3).

<sup>11</sup> *ibid.*

<sup>12</sup> Dowdle uses constitutional and public accountability nearly interchangeably.

<sup>13</sup> Dowdle (n 3).

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*

of a national system of regulation and administration, leading to the legal-bureaucratic element of today's regulatory model of accountability; and an increase in impact and importance of decisions made at the height of the political system, which increased its power and consequently the perceived need for rejuvenated accountability – the 'electoral component' of the regulatory model.<sup>16</sup>

Chaihark Hahm, in 'Ritual and Constitutionalism', challenges modern US ideas about what 'constitutionalism' really means.<sup>17</sup> Taking as his starting point the idea that constitutionalism is 'concerned with ideas and institutions related to restraining and regulating power' and 'about making sure that self-aggrandising power is kept under control', he proceeds to show how this was achieved in seventeenth-century Korea, not through the terms familiar to US jurists, but through rituals.<sup>18</sup> One may see that should the ruler's authority be constrained, discussed, and even challenged through the performance and discourse of rituals, not law or institutional structures, it strikes a heavy blow against contemporary positivist assumptions that see constitutionalism's contemporary manifestation as somehow the necessary model by which constitutionalism can be achieved, and against which all other models fall short.<sup>19</sup>

Through analysing the role of rituals in resolving a constitutional crisis regarding the question of hereditary succession in Korea, Hahm concludes that underpinning the constitutional role of rituals may lie the weight of tradition.<sup>20</sup> Hahm then considers the role of tradition in other constitutional settlements to suggest that this may be an important factor in the maintenance of constitutional orders more generally, which has hitherto been overlooked.<sup>21</sup> He cites the Roman concept of *mos maiorum* ('the ways of our ancestors') as 'constitutional restraint on the government of the Roman republic', refers to the importance placed in Britain on the idea of 'ancient constitution', and notes that even in the US, ideas such as *stare decisis* and 'original intent' are means by which tradition underpins the constitutional order.<sup>22</sup>

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<sup>16</sup> *ibid.*

<sup>17</sup> Hahm (n 2) 197.

<sup>18</sup> *ibid.* 135-136.

<sup>19</sup> *ibid.* 197.

<sup>20</sup> *ibid.* 149-150.

<sup>21</sup> *ibid.* 200-201.

<sup>22</sup> *ibid.* 201.

Hahm's research therefore progresses the field of comparative accountability in two ways: it warns against any assumption that legal concepts must basically be articulated as they are in our own system, and reminds us that this is a failure of intellectual creativity and imagination on our part, rather than a conclusion drawn from careful empirical observation.<sup>23</sup> Secondly, it shows some of the value in analysing and connecting examples of comparative accountability, for example by forcing us to re-examine the importance of tradition in the efficient and just functioning of our own contemporary constitutional order.<sup>24</sup>

These issues, centred on the issue of what Rutger terms 'the transferability and comparability of meaning,' will be reconsidered after a brief inquiry into some of the conceptualisations of accountability in the exercise of the Crown's power in English legal history.

## IDENTIFYING CONCEPTIONS OF CROWN ACCOUNTABILITY IN ENGLISH LEGAL HISTORY

### Crown Accountability in Bracton's Laws and Customs of England

Henry of Bracton was an English jurist who lived from 1210 to 1268. His writings on the English legal system are the first known attempt to synthesise its laws, of a time in the English legal system when it was composed of several distinct parts – canon law, Roman law, customary law, and Teutonic law – each of which contained tensions against one another.<sup>25</sup> His (perhaps edited) *magnum opus*, 'The Laws and Customs of England', written around 1250, was an attempt to reconcile these parts into a coherent whole, and has been hailed as 'the most ambitious legal work from medieval England'.<sup>26</sup>

How was the King's accountability for his actions conceived of in Bracton's writings? My account seeks not to focus on the arrangements for the execution and restraint of the King's powers, nor on the sources of his authority, but rather on the philosophical

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<sup>23</sup> *ibid.* 201-203.

<sup>24</sup> *ibid.* 200-201.

<sup>25</sup> Bracton (n 4).

<sup>26</sup> British Library, 'On the Laws and Customs of England' (British Library) <<http://www.bl.uk/collection-items/on-the-laws-and-customs-of-england>> accessed on 12 December 2015.

conceptualisation of to whom or what the King was accountable for the exercise of his powers and why.

It is first necessary to outline the powers of the King at that time. Henry III, the King at Bracton's time of writing, was very far from holding absolute power. On the contrary, all jurisprudence that was deemed to belong to questions of religion was out of his power and came under the authority of the church led from Rome, to be settled in ecclesiastical courts. This included not only all matters pertaining to the church itself (such as lands, appointments), but also to whole areas such as family law. Bracton conceived this as 'two swords' – one ecclesiastical, held by the head of the church, and the other secular, held by the King.<sup>27</sup>

Within the secular field, the King still did not rule absolutely. Since the fall of the Roman Empire, England, as with elsewhere in Europe, operated under a feudal model. Barons had a free hand over their possessions, including land. They were to pay homage to the King or face death, but the King's jurisdiction did not extend into the affairs of the barons' fiefs. That which was under the control of the barons, was out of control of the King.<sup>28</sup>

The King then had two lawful areas of action. One was as lord of his own large fiefdom, much as the barons were lords of theirs. The second was all remaining secular affairs i.e. those which fell outside the jurisdiction of an individual fiefdom. In the latter area, the King was expected to rule in a very particular partnership with the barons, an arrangement which had been partially codified in the 1215 Magna Carta but was also governed by unwritten principles from customary law.<sup>29</sup>

Within his areas of power, then, to whom or what was the King answerable for his actions? From reading *Laws and Customs*, it seems that the King was accountable in three different ways. Firstly, the King, as with all mortals, was deemed to have to appear before the Lord on death and 'give account not only of [his] acts but even of every idle word that [he] utter[ed]'.<sup>30</sup> The significance of this is that the scope is wide enough to include every action or word of the King, whether in his personal capacity as lord of his fief, or as overlord of the

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<sup>27</sup> Bracton (n 4).

<sup>28</sup> *ibid.* 225.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

realm. Furthermore, it makes clear that the King, a mortal, is as equal as any other man before the Lord, even if men are not equal on earth. Bracton is explicit that 'gold and silver will be of no avail to set them free' from the judgment.<sup>31</sup>

It is noteworthy that the anticipated format for account-giving before the Lord would be the same as before a judge in England, though modified to allow for the Lord's supremacy: the form of 'a trial, where the Lord shall be the accuser, the advocate, and the judge'.<sup>32</sup> In a parallel with long-established ideas of delegation, 'the Father has committed all judgment to the Son' meaning that 'from his sentence there can be no appeal'.<sup>33</sup>

And what a terrible sentence awaits those who have committed iniquity on earth: the Son of Man shall dispatch his angels, who will bind the sentenced in bundles to be burnt, and

shall cast them into the fiery furnace, where there will be wailing and gnashing of teeth, groans and screams, outcries, lamentation and torment, roaring and shouting, fear and trembling, sorrow and suffering, fire and stench, doubt and anxiety, violence and cruelty, ruin and poverty, distress and dejection, oblivion and confusion, tortures and woundings, troubles and terrors, hunger and thirst, cold and heat, brimstone and burning fire for ever and ever.<sup>34</sup>

In weighing up the import of this form of account-giving, one ought to weigh that although it would not take place during the King's lifetime, it would encompass every deed or word of the King (as with all mortals), would be unimaginably severe, and would be eternal: therefore distant, but direct and terrifying.

Bracton was clear that the King's lawful actions could not be questioned by any private person.<sup>35</sup> However, should the King have acted without equity, then justices are obliged to charge the King to amend or give remedy for his actions, so that the King does not incur the

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<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.* 22 (emphasis added).

<sup>35</sup> 'Private persons cannot question the acts of kings, nor ought the justices to discuss the meaning of royal charters: not even if a doubt arises in them may they resolve it; even as to ambiguities and uncertainties, as where a phrase is open to two meanings, the interpretation and pleasure of the lord king must be awaited, since it is for him who establishes to explain his deed. And even if the document is completely false, because of an erasure or because the seal affixed is a forgery, it is better and safer that the case proceed before the king himself' in Bracton (n 4) 109-110.*ibid.*

wrath of the Lord's judgment. Bracton states that, 'No one may pass upon the king's act [or his charter] so as to nullify it, but one may say that the king has committed an *injuria*, and thus charge him with amending it, lest he (and the justices) fall into the judgment of the living God because of it'.<sup>36</sup> This has important consequences. According to Bracton, the King's temporal authority came from having been appointed as 'God's vicar on earth': the King's role was to give effect to the spiritual laws of God through earthly laws.<sup>37</sup> So long as the King is exercising his powers 'to distinguish *jus* from *injuria*, *equity* from *iniquity*' then he is a King, but when he fails in this regard, he is a tyrant. Accordingly, the King's council are obliged to ensure the 'bridle' of the law is placed upon him and that he does not operate outside of the law. If the King and barons are not bridled by the law, then the Lord will uproot them and cast them into 'the fiery furnace':

If even they, like the king, are without bridle, then will the subjects cry out and say 'Lord Jesus, bind fast their jaws in rein and bridle.' To whom the Lord (will answer), 'I shall call down upon them a fierce nation and unknown, strangers from afar, whose tongue they shall not understand, who shall destroy them and pluck out their roots from the earth.' By such they shall be judged because they will not judge their subjects justly.<sup>38</sup>

To summarise this second aspect of accountability, the King has his power in order to effect God's will on earth, which is *jus*, or law. Through loyalty to their overlord, the King's baronial council are obliged to ensure that the law is 'bridled' upon him so that he is not damned by the Lord. If they and the King failed to collectively bridle themselves by the law, the people shall call for the Lord to hasten to their aid, and he shall pass his terrible judgment upon the unbridled King and his council.<sup>39</sup>

This is no abstract theology. When King John, the previous King, interfered in the church's jurisdiction, it culminated in Pope Innocent III's excommunication of King John from the church in 1209, removing the Lord's authority from John's rule and absolving John's subjects of their allegiance to him. It seemed that Philip II of France was preparing to remove John

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<sup>36</sup> *ibid.*

<sup>37</sup> 'To this end is a king made and chosen, that he do justice to all men (that the Lord may dwell in him, and he by His judgments may separate) and sustain and uphold what he has rightly adjudged, for if there were no one to do justice peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them' in Bracton (n 4) 305.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

under the license of John's papal excommunication. John subsequently acquiesced to the Pope and surrendered England to him as a vassal state.<sup>40</sup>

### **Crown Accountability in Sir Edward Coke's Reports**

Sir Edward Coke (1552 - 1634) served as Chief Justice and later as a parliamentarian in the reign of James I of Great Britain. His reports of cases before the court and proceedings of Council are highly acclaimed and are still referred to in court judgments, such as the *GCHQ* case.<sup>41</sup>

The rebellion of Henry VIII against Papal authority had meant the English Crown now held both of Bracton's 'two swords', becoming both temporal and spiritual overlord. He was therefore no longer answerable to the Pope as to whether or not he was effecting God's law on earth, but instead due to his position as head of the church as 'God's vicar' was himself directly responsible. But conceptualisations of accountability had evolved too, as seen in Coke's report of the 'Proclamations' conference in 1610.<sup>42</sup>

The Proclamations conference of the King and the Privy Council sought opinions on 'the authority of the king to restrict building in London or to regulate the trade in starch'.<sup>43</sup> Coke's opinion, which appears to have been applied, was that the King's authority was insufficient to do so. Coke's reasoning as to why the King lacked sufficient authority in this case reveals a slightly different emphasis of accountability than that which guided the King's powers in Bracton's time (which had been based on direct and indirect accountability to God for ensuring the Lord's *jus* on earth). Coke advised, and it was accordingly resolved that, 'the King hath no Prerogative, but that which the Law of the Land allows him'.<sup>44</sup>

This was not a new conceptualisation because Bracton had already written that the King was subservient to the law which had made him King. But Coke emphasised a new character to that law, which was not based on God's law, but rather on reason:

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<sup>40</sup> *ibid.*

<sup>41</sup> *GCHQ* case (n 6) 407.

<sup>42</sup> Sheppard (n 5).

<sup>43</sup> *ibid.* 486.

<sup>44</sup> *ibid.* 489.

And as it is a grand Prerogative of the King to make Proclamation (for no Subject can make it without authority from the King, or lawfull Custom) upon pain of fine and imprisonment, as it is held in the 22 Hen. 8. Procl. B. but we do finde divers Precedents of Proclamations which are utterly against Law and reason, and for that void, for, *Quae contra rationem juris introducta sunt non debent trahi in consequentiam* [trans: 'Whatever is brought in contrary to the reason of the Law ought not to be treated with consequence'].<sup>45</sup>

This 'reason of the Law' which, if absent from a King's proclamation could make the proclamation void, was not to be found in God's law, or in natural justice, but by those justices who were 'learned' in the 'artificial reason' of law:

[T]he King said, that he thought the Law was founded upon reason, and that he and others had reason, as well as the Judges: To which it was answered by me, that true it was, that God had endowed his Majesty with excellent Science, and great endowments of nature; but his Majesty was not learned in the Lawes of his Realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reason but by the artificiall reason and judgment of Law, which Law is an act which requires long study and experience, before that a man can attain to the cognizance of it.<sup>46</sup>

Through this argument, Coke was conceiving a new form of accountability, where it was not to the Lord or his church that the King must be held accountable for the natural lawfulness of his actions, but to the judge. The judge was 'learned' of the precedents and expert in the 'artificial' reasoning that underpinned the law, which had since at least Bracton's age operated over the King.

Additionally, a separate conceptualisation of accountability was beginning to clearly emerge, regarding ministerial accountability to Parliament for the exercise of the King's power. With hindsight, we see that at the time of Bracton's writings the King enjoyed separate powers in his capacities, as both feudal lord of his own lands, and as overlord of

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<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.* 481.

the realm.<sup>47</sup> By Coke's time the conception was well known, if not commonly agreed, that conceptually the king had 'two bodies,' one mortal and personal, the other enduring and institutionalised through the Crown ('*le roi est mort, vive le roi*').<sup>48</sup>

Although some officials had been found liable at law in Bracton's time, this had tended to only be for 'officials of a humbler type, not the more exalted servants of the crown'.<sup>49</sup> The King himself and his closest advisors were not triable:<sup>50</sup> one reason being it would offend legal principles by making the King judge of his own case.<sup>51</sup> This was slowly beginning to change, in part due to the emergence of an expanded machinery of government, as, 'The King gradually lost the power to carry out the affairs of state in his own name, as ministers became the main actors of administration. Those ministers were not immune, and could be subject to challenge in both court and parliament'.<sup>52</sup>

Parliamentarians successfully impeached the King's ministers in parliament, charging that based on rights found in the *Magna Carta* Parliament had self-governing rights. In this way the executive application of the King's power was now partially accountable to the House of Commons.

### Crown Accountability in Lord Diplock's GCHQ Judgment

The judgment of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* illuminates an additional conceptualisation of accountability in English law regarding the exercise of Crown powers.<sup>53</sup>

The case at hand was the decision of the Crown's Secretary of State for Foreign and Commonwealth Affairs to change immediately and without consultation the terms and

<sup>47</sup> Ernst H Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (3rd edn, Princeton University Press 1970) 3.

<sup>48</sup> John Fortescue, *On the Laws and Governance of England* (CUP 1997).

<sup>49</sup> Guy I Seidman, 'The Origins of Accountability: Everything I know about the Sovereigns' Immunity, I learned from King Henry III' (2005) 49 Saint Louis University Law Journal 393, 444.

<sup>50</sup> 'When, in 1301, Parliament made a special demand for the removal of the treasurer – the precursor of impeachment – King Edward I firmly rejected any notion of ministerial responsibility to Parliament, stating '[t]hey might as well take his Kingdom as interfere with his choice of his servants' in *ibid.* 443.

<sup>51</sup> '[T]he king could not be sued in his central courts of law, because, like any other [feudal] lord, he could not be sued in his own courts' in *ibid.* 427.

<sup>52</sup> *ibid.* 431.

<sup>53</sup> GCHQ case (n 6).

conditions of employment for Crown employees at the Government Communications Headquarters (GCHQ). The effect of the change would be to remove the right of employees to remain in one of six independent unions, and instead have to join an employer-provided association.<sup>54</sup>

By the time of Diplock's judgment, it had long been established that the Crown may only exercise its public powers through ministers, and that those ministers were accountable to Parliament for their exercise of Crown powers.<sup>55</sup> And it had long been recognised that the law controlled the boundaries of powers enjoyable by the Crown, for example whether the Crown had authority to act under a particular head of law. But until *GCHQ*, it had not been found that the Crown was answerable to its own judges regarding how its actions fit *within* a lawful head of prerogative power; the scope had been limited to merely whether that lawful power existed or not.<sup>56</sup> Prior to the case, the Crown had only been accountable to God for this.

Lord Diplock advanced a standard, accepted by the Bench, to determine whether a Crown decision within a recognised Crown power ought to be controlled by the judiciary: namely, if the decision was illegal, irrational, or procedurally improper.<sup>57</sup> In terms of accountability, this filled a gap that had notionally been growing for several centuries. Prior to this discovery, the Crown was only accountable to God – per the discussion regarding Bracton above – for actions executed within the sphere of its lawful prerogative powers.<sup>58</sup> The direct accountability to God for those actions upon death, or the indirect accountability to God through the threat of papal excommunication while the King was alive, had now been supplemented by judicial review.

The re-conceptualisation implicitly represents a logical extension of Coke's assertions in the Proclamations Conference. Coke had argued, *pace* Bracton, that the King is under the law, and the law is discernible by learned judges applying 'artificial' reasoning, rather than

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<sup>54</sup> *ibid.* 375.

<sup>55</sup> Cabinet Office, *The Cabinet Manual* (1st edn, London 2011) 14.

<sup>56</sup> *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864; *R v Secretary of State for Home Affairs, ex parte Hosenball* [1977] 1 WLR 766.

<sup>57</sup> 'illegality' means 'the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it'; 'irrationality' meaning 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'; and 'procedural impropriety' including a 'failure to observe basic rules of natural justice' in *GCHQ* case (n 6) 410.

<sup>58</sup> Bracton (n 4) 305.

evoking natural justice.<sup>59</sup> Thus, perhaps it flows that subsequent judges could decide that this ‘artificial law’ could step inside the realm of the prerogative, subject to certain self-imposed limitations (primarily deference to claims of national security), to judge the decisions of the Crown’s servants.

### **Crown Accountability and Air Strikes in Syria**

More recently, new forms of accountability for the exercise of Crown powers have become apparent in the Parliament. The Crown’s power to declare war, now long exercised on the Crown’s behalf by the Prime Minister, has arguably, by emerging convention, started to require the consent of the House of Commons. Consequently, a vote was taken on 2<sup>nd</sup> December 2015 in the House of Commons on whether or not to support the Crown’s proposal to conduct air strikes against targets in Syria.

This was an invitation by the Crown to parliamentarians for them to participate in the exercise of the Crown power (being the power to declare war). Hansard, the parliamentary record, reveals several new conceptualisations of accountability for the exercise of that power.

Many parliamentarians emphasised that they felt accountable to their conscience in exercising the power:

- Alan Johnson (Labour): ‘This new convention places a responsibility on Members of Parliament to weigh up the arguments and *vote according to their conscience*’
- Mark Pritchard (Conservative): ‘It should be *the consciences of individual Members* of Parliament that determine the fate of the sombre motion’
- Mr James Gray (Conservative): ‘It is *truly a conscience vote*—a vote based on our instincts, on the balance of probabilities, on our feeling for things, on what our constituents said to us and, above all, our hopes for peace in the future’.
- John Glen (Conservative): ‘I also speak with *absolute clarity in my conscience* that

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<sup>59</sup> Sheppard (n 5) 489.

supporting this motion is the right thing to do’.

- John Glen (Conservative): ‘There is much I do not know—I concede that—but *my conscience is clear*. We must act and begin the long, intense, delicate and difficult process of facing up to a profound evil’.
- Fiona Bruce (Conservative): ‘Considering all of that, I have *concluded in good conscience* and good faith that supporting the Government’s motion tonight and the action proposed is both right and just’.
- Chloe Smith (Conservative): ‘My morals, *my conscience* and my heart and head say that it is Parliament’s duty to support the Government’.
- Hilary Benn (Labour): ‘[...] the gravity of the decision that rests on the shoulders and *the conscience of every single one of us*’.<sup>60</sup>

These parliamentarians’ conceptualisation of being answerable to one’s conscience for the exercise of the Crown’s power may remind the reader of Bracton, where the monarch was to face God in judgment, with his conscience as his witness. Here, although the mention of accountability to God is absent, and is instead replaced with conscience alone, a more personal form of accountability. It is less terrifying than God’s judgment which carried the threat of eternal fire, as described by Bracton but is nonetheless more immediate.

Other parliamentarians emphasised that as representatives of the people, the parliamentarians were accountable to their electorate. The leader of the Labour opposition urged members of his party to write to their Members of Parliament with their views and some MPs explicitly referred to their accountability to their electorate for their sharing this Crown power.<sup>61</sup>

Still, other parliamentarians felt accountable to their parties. The ruling and majority Conservative party imposed a whip on its parliamentary members, suggesting they would be accountable to the party office for their decisions (the party can decide whether or not to support them in the next election).

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<sup>60</sup> HC Deb (n 7) (emphasis added).

<sup>61</sup> *ibid.* Sir Gerald Howarth: ‘There can be no recriminations and we must be free to express our views as we think fit. We are accountable to our constituents for what we say and what we do’ in *ibid.* col 415 (emphasis added).

## **METHODOLOGICAL ISSUES AND POSSIBLE ASSISTANCE FROM THE LEGAL PLURALISM DEBATE**

The windows above into contemporary conceptualisations of accountability in the exercise of the Crown's powers reveal fundamental methodological issues with the task of understanding accountability in times and places foreign to here and now. One issue concerns the use of terminology, while the other concerns the analytical perspective of the researcher. Both issues are related.

The question of terminology arises when, for example, we consider the term 'law' in each of the above examples. Law in Bracton's time was different from the law today, conceptually and linguistically. Conceptually, because the sources and sanctions of law were different – there were feudal responsibilities to one's lord, rules pertaining to ecclesiastical matters that were to be settled in the Church's courts according to canon law, the Common law of the realm, and customary law that might be applied. The King was 'under the law', but what did this mean? He certainly could not be tried in his own courts. Furthermore, this law was closer to what we now think of as 'natural law', being God's law, and as 'God's vicar on earth' the king was expected to rule in accordance with it.

This dilemma then raises the question of perspective. Should the researcher take a teleological approach, taking law as it is today and then taking this concept back in time (or to another place) and find examples which conform to it, calling that which matches it 'law' and that which does not match it 'custom' or such?

The issues have been considered in an interdisciplinary debate of legal pluralism and have prompted several decades of lively exchange on the matter. In my opinion there have been four proposed approaches to addressing this issue. I shall consider each in turn and show how each approach could cast a different perspective on the examples of Crown accountability provided in the Article above.

### **Approach One: Universalising Our Society's Concepts when Appraising Another's**

This approach is perhaps the most intuitive for a legal scholar. It involves taking a concept with which we are currently familiar and have fairly clear views of its meaning, such as 'law', or 'accountability', and then looking at other times and places to see the extent to which those societies have applied this concept.

This is a familiar approach to advocates of ideas of natural or inherent justice, whether expressed in the Declaration of Independence<sup>62</sup> or at the Nuremburg Trials, where no immunity would be given, 'for those who obey orders which – whether legal or not in the country where they are issued – are *manifestly contrary to the very law of nature* from which international law has grown'.<sup>63</sup> Such concepts, familiar to our own society, are held to be 'self-evident' to all or implicit to one's membership of humanity. Where such concepts are not found, it is to be regarded as a deviation, distortion, failure or omission.

According to Dowdle, this approach can be found in contemporary scholarly research such as Alford's analysis of public accountability in the People's Republic of China. Dowdle criticises the approach taken by Alford in applying an Anglo-American 'regulatory' model of legal accountability to an analysis of the PRC's development of clean air legislation, saying that by analysing it in terms of our own conceptualisation of accountability, the nuances of the PRC's accountability order are lost.

Applying this approach to the research undertaken for this Article would clearly not have worked. For to take public accountability as understood in the UK today – periodically elected representatives holding some powers over unelected officials<sup>64</sup> – would require one of the two interpretations. Firstly, in terms of terminology, it might mean that we would have to disregard the conceptualisation of accountability advanced by Coke, of the Crown's prerogative being 'under the law' as determined by learned judges applying abstract reasoning, as being no accountability at all. We might also have to do the same with Bracton's description of the Crown being answerable to God directly upon death and indirectly through the Pope in life. Secondly, in terms of perspective, it might require us to look back teleologically and to see Bracton and Coke's accounts as being seeds that grew

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<sup>62</sup> Thomas Jefferson et al., United States Declaration of Independence (Second Continental Congress 1776): 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. [...] That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.'

<sup>63</sup> Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (OUP 2012).

<sup>64</sup> Joy M Moncrieffe, 'Reconceptualizing Political Accountability' (1998) 19 IPSR 387.

into our own fuller model or, in Seidman's terms, the start of a 'path' to our present position.<sup>65</sup> The danger of this approach is that it suggests inevitability to the change of conceptualisation, which denies the impact of the very real contingencies that affected the conceptualisations of accountability over the centuries.

### **Approach Two: Applying Our Concepts but Accepting Variation of those Concepts Elsewhere**

The second approach is one step away from the first approach. It recognises cultural variation in the articulation of an ideal familiar to us. For example, one might take a contemporary concept and then look for alternate ways in which that concept might be manifested in other cultures, or alternatively, explain another society's conceptualisation in terms of concepts familiar to us. One of the forerunners of this approach was the anthropologist Malinowski, who found that while the Trobriander Islanders may not have had 'law' in the sense then understood by his readers, with statutes and courts, the Western European concept of law could nonetheless be found if the analyst were to tolerate local variation. According to Malinowski, 'The binding forces of Melanesian civil law are to be found in the concatenation of the obligations, in the fact that they are arranged into chains of mutual services, a give and take extending long periods of time and covering wide aspects of interests and activity'.<sup>66</sup>

Hahm Chaihark's work is a recent illustration of this approach. Hahm took a very contemporary conceptualisation – constitutionalism – and looked back to the Chosun dynasty of Korea to explore whether or not there existed features which, even if they were not termed 'constitutional law' at the time, may have been regarded as such by contemporary scholars.<sup>67</sup> As mentioned earlier in this Article, Hahm did find analogous conceptualisations, but they were manifested in a manner very different to our own (centred around ritual), and would clearly have been missed entirely if one had applied the first approach above.

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<sup>65</sup> Seidman (n 49) 431.

<sup>66</sup> Bronislaw Malinowski, *Crime and Custom in Savage Society* (Kegan Paul, Trench, Trubner & Co Ltd 1926).

<sup>67</sup> Hahm (n 2).

In the context of this Article, such an approach would have taken the contemporary understanding of accountability (*infra*) and looked back in order to find whether there was anything in the writings of Bracton or Coke that appeared functionally similar, irrespective of its name or form. This is similar to the first approach, but differs because it accepts the 'other' manifestation of the concept in its own right, not perceiving it to be either an incomplete or nascent version of our own. It is still our conceptualisation that is the model however: Malinowski found 'civil law' in the Trobriands, not 'kula exchange' in Europe.

### **Approach Three: Study Conceptual Variations then Extrapolate**

In the first two approaches, the scholar takes familiar concepts and compares them to other times and places. The third approach jettisons the idea that our society manifests certain ideals against which other societies may or may not vary. Instead, it perceives that our society's concepts, like any other society's concepts, are variations of a broader, discoverable concept, the attributes of which can be induced through comparative research. This is partly a swing back to the approach adopted by naturalists and positivists, insofar as it posits a universal category, but takes a relativist's approach in identifying and analysing its manifestations.

For example, Griffiths has argued that 'law' is a type of social control.<sup>68</sup> in so doing he expanded his conceptualisation of 'law' to include examples across various societies, where the Anglo-American conceptualisation of law was just one variant among myriad equal others, and then induced a generalised concept that united them all (social control).

It is also the approach of Dowdle<sup>69</sup> in his analysis of public accountability in the PRC. Rather than follow Alford's approach of applying a US conceptualisation of public accountability and finding little that matched, he first sought to understand the Chinese model on its own terms, before identifying key aspects that might be considered common to other societies:

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<sup>68</sup> John Griffiths, 'The Division of Labor in Social Control' in Donald Black (ed), *Towards a General Theory of Social Control Volume I* (Academic Press Inc 1984) 62.

<sup>69</sup> *ibid.*

“[This inductive approach to understanding PRC] show[s] a picture of a parliament, despite its significant electoral and democratic infirmities, doing what parliaments everywhere do: working with a diversity of public and private constitutional actors to craft legal-regulatory responses to social problems. And, therefore, it is possible that there is nothing unique about its particular role in promoting constitutional development.”<sup>70</sup>

Applying such an approach to the examples of this essay, the researcher might find similarities common to the conceptualisations of accountability described by Bracton, Coke, and Diplock, and from this deduce certain generalisations or objective themes of which each instance is a variation. For example, one might highlight the centrality of the idea of conscience of the decision maker’s conscience, whether the judge of that conscience will be God in Bracton’s day or oneself in Diplock’s. Or one might observe the use of language around conceptualisations of accountability and how it was used discursively in each age to advance certain positions of social actors.<sup>71</sup>

#### **Approach Four: Find Linguistic Pairs, then Compare**

The fourth approach was developed by Tamanaha, and is seemingly without parallel. It was explicitly advanced in order to effect a breakthrough in the legal pluralism debate, conceptualising conceptions of law for the purposes of comparing different times and places. Tamanaha’s proposed solution was merely to accept whatever conception any particular society attached to their word for ‘law’:

*It is not necessary to construct a social scientific conception of law in order to frame and study legal pluralism. As proof of this point, notice that the first part of this paper extensively elaborated on situations of legal pluralism in the medieval period and during colonisation without positing a definition of law. The exploration in the first part avoided the conceptual problem by*

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<sup>70</sup> Dowdle (n 3) 357.

<sup>71</sup> The significance of the Magna Carta ebbed and flowed over the centuries, apparently depending to the extent to which social actors found it available and useful in pushing for a preferred normative order.

*accepting as 'legal' whatever was identified as legal by the social actors, as just described.*<sup>72</sup>

It is a neat theoretical approach that should be congratulated for shifting the debate, and for tackling the flaws of earlier approaches by being neutral in its comparison of term conceptualisations, and by basing the conceptualisation in reality of usage rather than in abstraction.

However, in my opinion, it faces seriously challenges because it is essentially constraining the researcher to an approach of comparing dictionary terms. What if a society does not use the term 'law'? Hahm's research exemplifies the potential problems with this approach. If we translate 'law' as 법(*beop*), which is a very standard thing to do, then when we start examining the Chosun polity we find ourselves looking at something very narrow and particular, and it seems unconvincing to say that we shouldn't also look at 예(*ye*) which, depending on the context, might also be translated as 'law'. Or should we instead start with 법 and then seek to translate that into English? In that case we get an entirely different field of enquiry and find ourselves back at the start of the debate about whose terms we should use.

Applying this approach to the review of certain forms of accountability of Crown power, one quickly gets stuck due to the different terminologies. Bracton did not use the term accountability in describing the relationship of the king to God but it seems perverse to therefore exclude his accounts because it was not identified as 'accountability'.

## CONCLUSION

*A key issue we face both in comparativist constitutional law and in our practical need to understand our rapidly evolving political, social, and regulatory environments is the need to develop analytic methodologies that are sensitive to as yet unfamiliar aspects of public accountability – aspects that are effective but do*

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<sup>72</sup> Brian Z. Tamanaha, 'Understanding Legal Pluralism: Past, Local to Global' (2007) 30 Syd LR 396 (emphasis added).

*not correspond to the structural, institutional, or cultural configurations we use to identify public accountability in our own environments.*

- Dowdle, 2006

Therefore, this Article enquired into how ideas of accountability have been conceived at certain points in English legal history regarding the exercise of power held by the Crown. It found that within a period of 800 years, there has been great change, consistency, and innovation. One example was conscience: it was paramount in Bracton's account in the thirteenth century, and again in 2015 where parliamentarians were invited to share in the Crown's power of war, though the threat of a terrifying but somewhat deferred judgment of that conscience by God is now seemingly replaced by a far milder but more immediate judgment of that conscience by the self. Another example is the consistent subservience of the Crown to the law, as asserted by Bracton, Coke, and Diplock.

But what that law was and to whom the Crown ought to be accountable to for their possible transgressions of it changed quite considerably across all three jurists. For Bracton, the law was God's *jus*, to whom the king was accountable. In an almost complete contrast, for Coke, the law was that which had been learned by the judges and was a law of skilled artificial, not natural reasoning. Diplock based his advancement in review of the manner of the application of prerogative power to statutory developments of recent decades and subsequent case precedents.

This is but one instance of a fundamental methodological challenge involved in comparative legal studies. How can we compare or draw insights from systems that may mean different things by the same terminology or not have those words at all? Related to this but even more fundamentally, what position should the researcher adopt in handling concepts that may have no equivalent between societies, past or present?

It was found that the interdisciplinary debate of Legal Pluralism has travailed much of these difficulties, and that the opinions within that debate can be summarised into four broad approaches. Applying these approaches to the preliminary research of the Article into comparative accountability in English legal history of the exercise of Crown powers, it was found that some are clearly unsuitable for this particular research task at hand and might

safely be left aside. The approach that would seem to be most worthy of following for further studies in this area is the approach adopted by Dowdle and by Hahm, that being a broad and inductive exploration of the concepts as they stand within each society to be compared, allowing possible new extrapolations from a comparison of the similarities and differences thus found.

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# Exploring New Territories: The Adoption of Human Rights for the Protection of Indigenous Knowledge and Natural Resources from Biopiracy

Gianda Girelli

*Human rights, a fairly recent experiment, have undergone rapid expansion while facing virtually unrivalled opposition and criticism. This article aims to assess the 'state of health' of human rights by investigating the system's evolutionary capabilities to respond to contemporary challenges, specifically in the interests of indigenous peoples in their struggle to protect their traditional knowledge and associated natural resources from biopiracy. This will begin by establishing a working definition of biopiracy and 'indigenous peoples', and briefly retracing these communities' growing participation and recognition at the international level. Specific attention will then be devoted to the regime of intellectual property, which, while recognised as one of the root causes of this problem, is also often proposed as a potential solution. The article reconstructs its cultural foundations and ideological tenets, from which emerge this system's inherent inability to protect the interests of indigenous peoples, which have a radically different approach to science and the natural world. Subsequently, the human rights framework will be considered: firstly, the article evaluates its ideological similarities with the regime of intellectual property and its consequent limitations, which support criticism that this system, much like intellectual property, is a tool of neo-colonialism. The article then examines the expanding, context-sensitive approach developed by the Inter-American Court of Human Rights in relation to indigenous land rights, arguing for the possibility of extending such interpretation (by continuing on a path led by the Court) to the protection of natural resources as well as related indigenous knowledge, notwithstanding an apparent separation and structural differences between the two.*

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## INTRODUCTION

Human rights as a body is still a young creature. Although its ideological foundations can be found in the 18<sup>th</sup> Century,<sup>1</sup> this corpus developed in the aftermath of World War II. Self-proclaimed 'civilized' nations, then recovering from the regime of the 'quintessential savage',<sup>2</sup> began to develop a supra-national system for the protection of the individual and the advancement of a peaceful international order.<sup>3</sup> In less than a century, this field has developed extensively, extending its reach to areas that were once inconceivable; it has become a dominant discourse that is fiercely defended and fervently criticised. For some, it has even reached its end-times – at least as an internationally dominated, quasi-religious movement.<sup>4</sup> Amongst the areas of expansion, one of the most interesting has been the recognition and protection of indigenous peoples, even though their peculiar, alternative conception of order arguably threatens the current system of international law that is built around nation-states and individual rights.

Biopiracy stands at the crossroads of several areas into which human rights are expanding, including science, business, and development. Much has been written and proposed about this hard-to-define phenomenon, and both international and local organisations around the world have made (and continue to strive toward) significant advances against biopiracy. In many cases, intellectual property rights, while recognised as one of the root causes of this problem, are also proposed as a potential solution, sometimes in coordination with other instruments. On the contrary, fewer actors value human rights as a valuable tool for confronting this issue.

This article does not aim to reconstruct or evaluate the many international, regional, and local mechanisms relevant to this matter, which have already been extensively analysed in the literature.<sup>5</sup> Rather, it considers whether human rights can be a useful instrument (as an alternative to, or alongside others) for the protection of the traditional knowledge of

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<sup>1</sup> Ilias Bantekas & Lutz Oette, *International Human Rights Law and Practice* (CUP 2013) 11.

<sup>2</sup> Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2008) 15.

<sup>3</sup> Bantekas (n 1) 19.

<sup>4</sup> Doutje Lettinga & Lars van Troost (eds), *Debating the Endtimes of Human Rights: Activism and Institutions in a Neo-Westphalian World* (AI 2014) 8.

<sup>5</sup> Among others, see Tzen Wong & Graham Dutfield, *Intellectual Property and Human Development: Current Trends and Future Scenarios* (CUP 2011) 143.

indigenous communities and the natural resources to which such knowledge is inherently tied. Therefore, after framing the issue, attention will be dedicated to the regime of intellectual property, and its dual role in relation to biopiracy. Subsequently, the human rights framework will be considered, specifically pausing on the jurisprudence of the Inter-American Court of Human Rights and its expanding approach in relation to rights to land ownership. Biopiracy is investigated here as a test-case: indeed, by assessing the ability of human rights to protect traditional knowledge from exclusionary interests, the aim is to reach a more general conclusion on whether this system carries any potential to 'survive' its ideological limitations and still play a meaningful role in a changing world, or whether this discourse is inherently and fatally limited.

## **BIOPIRACY: THE COLONISATION OF KNOWLEDGE**

### **Indigenous peoples: an ongoing struggle for autonomy and survival**

Indigenous peoples<sup>6</sup> are, in many parts of the world, among those most affected by human rights violations. They are often marginalised (lacking representation in the formal state structure) and cornered in a state of poverty. At the same time however, they are also among the groups most fiercely fighting for their survival and autonomy, and whose increased activism and recognition in international arenas have brought to the forefront the problem of defining 'indigenous' in such a way as to acknowledge and value unique worldviews and social organisations, do justice to histories of exploitation, and respect the distinctness of each community while at the same time avoiding their depiction as merely victims or folkloristic characters. As a result, a mixed approach is widely employed, which accords primary relevance to self-identification (indigenous peoples' right to characterise themselves as such)<sup>7</sup> supported by the presence of some 'typical' and recurring features, such as: non-dominant positions in society linked to experiences of marginalisation and exclusion,<sup>8</sup> historical continuity with the 'pre-invasion' period, a strong, vital connection – both spiritual

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<sup>6</sup> Indigenous peoples constitute approximately 5% of the world population, and the very definition of the term is disputed. Therefore, in addressing indigenous issues some generalisation is unavoidable. However, indigenous peoples often share a similar relationship with lands and resources, and a similar history of marginalisation and abuse.

<sup>7</sup> Ilias Bantekas & Lutz Oette, *International Human Rights Law and Practice* (CUP 2013) 436.

<sup>8</sup> Bantekas and Oette, (n 13) 437.

and material – to the land, and voluntary and conscious perpetuation of the community's cultural distinctiveness.<sup>9</sup> Also characteristic is a social order built on and around the community, perpetuated through oral transmission of a complex system of customary rules, and an appreciation for restorative justice strictly dependent on harmony within the group.<sup>10</sup>

As aforementioned, a defining feature of these communities is precisely their being the objects of long-standing marginalisation and violence, a process which began with colonisation. This, together with the very fact that the term 'indigenous' is now synonymous with the minority and the marginalised, speaks volumes about the faults of colonialism, exploitation, and forced development.

Despite their being often pushed to the margins of social and political life, indigenous peoples have proven able to organise and effectively advocate for more substantial recognition and participation at the international level.<sup>11</sup> The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>12</sup> coupled with growing attention by scholars and practitioners, testifies to their ability to capitalise on human rights discourse, one developed for the protection of a very different 'archetypal subject'. Notably, the Declaration is subject to several criticisms, mostly related to its soft-law character and to the dynamics surrounding the drafting process,<sup>13</sup> and violations against indigenous communities are still being reported on a daily basis.<sup>14</sup>

### **Clash of Cultures or instrument of inevitable development?**

One of the reasons for this complex relationship between indigenous peoples and human rights is these groups' communitarian conception of society, which contrasts with the one underlying the development of international human rights law to the point of threatening it.

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<sup>9</sup> ICTJ (n 4) 8.

<sup>10</sup> Taiaiake Alfred and Jeff Cornassel, 'Being Indigenous: Resurgences Against Contemporary Colonialism' (2005) 40(4) *Government and Opposition* 597, 609.

<sup>11</sup> Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) *International and Comparative Law Quarterly* 957, 2.

<sup>12</sup> United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295 (UNDRIP).

<sup>13</sup> Barelli (n 11), 969..

<sup>14</sup> For updated news and data in relation to indigenous peoples and violations of human rights see: <https://www.amnesty.org/en/what-we-do/indigenous-peoples/>.

Indeed, the latter is essentially built around nation states, and focused (at least in its original conception) on the protection of the individual from the state within a neoliberal economic system. In contrast, among the peculiarities of indigenous peoples are their symbiotic relationship with land and natural resources and the defining role played by traditional knowledge. This integrated and holistic system,<sup>15</sup> refined over centuries, represents more than a mere set of notions about the natural world; it is valued as 'a means of physical survival and of cultural identity',<sup>16</sup> incorporating a physical, spiritual and cultural dimension. It is collective and fluid, in constant development, and passed down to the new generations according to specific rules.

This knowledge and its source natural resources are threatened by the phenomenon of 'biopiracy'; while commonly understood as the 'misappropriation and monopolisation of long-held medicinal and agricultural knowledge about nature, and the related physical resources',<sup>17</sup> the term 'biopiracy' has been used somewhat broadly.<sup>18</sup>

Following the growing need for and interest in natural resources and their beneficial effects, researchers and corporations quickly realised that significant time and money could be saved by exploiting indigenous knowledge of the natural world.<sup>19</sup> Consequently, products and processes are appropriated from local communities through various means. They are then patented or subjected to other monopolistic legal instruments without the consent (and often the awareness) of the original 'owners', who are typically also denied any benefit resulting from the exploitation of their knowledge.<sup>20</sup>

Biopiracy affects communities virtually everywhere natural resources have been traditionally employed for medicinal, agricultural, cosmetic and other purposes.<sup>21</sup> It often leads to the exclusion of the local community from access to the natural resources they have

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<sup>15</sup> J. Michael Finger & Philip Schuler (eds), *Poor People's Knowledge. Promoting Intellectual Property in Developing Countries* (World Bank & OUP 2004) 210.

<sup>16</sup> Wong (n 5) 140.

<sup>17</sup> Daniel F Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates* (Earthscan 2010) 14.

<sup>18</sup> Robinson (n 17) 21.

<sup>19</sup> Winston P Nagan, 'The Conceptual and Jurisprudential Aspects of Property in the Context of the Fundamental Rights of Indigenous People. The Case of the Shuar of Ecuador' (2013) 58 NYL Sch L Rev 875, 903.

<sup>20</sup> Martin Khor, *Intellectual Property, Biodiversity and Sustainable Development. Resolving the Difficult Issues* (Zed Books & Third World Network 2002).

<sup>21</sup> Finger (n 15) 144.

been relying upon for generations, with consequential loss of biodiversity.<sup>22</sup> Due to the unique relationship of these populations with their territories, biopiracy threatens their very existence;<sup>23</sup> it is not simply humiliation, but also ‘the most offensive and dangerous form of expropriation, because it touches on the very core processes of life and survival’.<sup>24</sup>

### INTELLECTUAL PROPERTY RIGHTS: CAN THE PROBLEM BE PART OF THE SOLUTION?

The issue of biopiracy is ultimately rooted in the current system of intellectual property (IP) (which, like human rights, is also constantly expanding in scope),<sup>25</sup> as sanctified in several international instruments.<sup>26</sup> In particular, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),<sup>27</sup> adopted by the World Trade Organisation in 1994, set minimum standards of IP regulation for its members.<sup>28</sup> This instrument expanded internationally, irrespective of the stage of development of its host countries, bringing into uniformity the high standards of IP employed in the West, including its strong enforcement mechanisms.<sup>29</sup> Particularly relevant to biopiracy is Article 27, which requires that states ensure the patentability of any product and process recognised to be new,<sup>30</sup> involving an inventive step, and capable of industrial application.<sup>31</sup> States are allowed to exclude plants and related processes from patentability, but they must nevertheless envisage some form of protection (through patents, *sui generis* systems, or a combination of the two).<sup>32</sup> This provision, although introducing a level of flexibility,<sup>33</sup> in fact requires all member states to establish a system of private property over life forms – traditionally excluded from

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<sup>22</sup> Ana Isla, ‘An Ecofeminist Perspective on Biopiracy in Latin-America’ (2007) 32(2) *Journal of Women in Culture and Society* 323, 328.

<sup>23</sup> Federico Lenzerini, ‘Indigenous Peoples’ Cultural Rights and the Controversy over Commercial Use of their Traditional Knowledge’ in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus-Nijhoff Publishers 2008) 15.

<sup>24</sup> Isla (n 22) 324.

<sup>25</sup> Laurence R Helfer, ‘Toward a Human Rights Framework for Intellectual Property’ (2007) 40 *Davis Law Review* 971, 973.

<sup>26</sup> Maria Dolores Mino, ‘Traditional Knowledge Under International Human Rights Law: Applying Standards of Communitarian Property Over Ancestral Land to Traditional-Knowledge Related Claims’ (2001) *ExpressO* 1, 7.

<sup>27</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (1994). Marrakesh Agreement Establishing the WTO, Annex 1C. 1869 UNTS 299 (TRIPS).

<sup>28</sup> Khor (n 20) 9.

<sup>29</sup> Helfer (n 25) 984.

<sup>30</sup> This particularly problematic condition has been interpreted increasingly widely: see Wong (n 5) 11.

<sup>31</sup> TRIPS (n 22), Article 27(1), 331.

<sup>32</sup> TRIPS (n 22), Article 27(3)(b), 331.

<sup>33</sup> This flexibility has been exploited by several states, which have developed *sui generis* systems to prevent biopiracy. See Robinson (n 17) 141.

property by many countries<sup>34</sup> – while remaining strikingly silent on the issue of protecting and preserving traditional knowledge.<sup>35</sup>

The IP regime has emerged out of specific social and economic circumstances. It originated in Europe around the 15<sup>th</sup> Century,<sup>36</sup> and developed with the primary purpose of protecting and rewarding creativity and scientific development while also allowing authors to enjoy, for a limited period of time, exclusive control over the products of their efforts. IP is based on a peculiar understanding of knowledge as developed by a solo, god-like author, which creates a ‘something’ from a ‘nothing’, and thus deserves to protect the products of his mind from external claims or invasions;<sup>37</sup> the way in which this protection is accorded is through recognising his proprietary rights over this creation – a property that is by definition private and antagonistic.<sup>38</sup>

Due to the circumstances of its origins, IP is also founded upon a peculiar understanding of science and knowledge, which tends to justify acts of biopiracy. Indeed, according to classical western perceptions, science is technological, anthropocentric, written, and isolated by other spheres of life such as culture or religion; it is objective and aseptic. From this also follows a ‘reductionist approach’ to biology and nature, thoroughly analysed by Vandana Shiva,<sup>39</sup> which justifies and even encourages the patenting of life forms. Evidently, this understanding of nature and science clashes with the holistic comprehension many indigenous communities have of the natural world to which they are closely connected. Traditional knowledge is mainly oral, trans-generational, and integrated within a complex social and religious system, regulating its transmission and use in such a way as to ensure its conservation, in turn safeguarding both the community and the environment.<sup>40</sup> The stark contrast between these two approaches, coupled with the triumph at the global level of a western model of development, causes a misperception of traditional knowledge and any

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<sup>34</sup> Khor (n 20) 77.

<sup>35</sup> Christoph Beat Graper & Martin A. Girsberger, ‘Traditional Knowledge at the International Level: Current Approaches and Proposals for a Bigger Picture that Includes Cultural Diversity’ in Jason Schimid & Hansjorg Seiler (eds), *Recht des ländlichen Raums* (Schulthess 2006) 243, 21.

<sup>36</sup> Mpazi Sinjela (ed), *Human Rights and Intellectual Property Rights. Tensions and Convergences* (Martinus-Nijhoff Publishers 2007) 242.

<sup>37</sup> Sinjela (n 36) 244.

<sup>38</sup> Khor (n 20) 57.

<sup>39</sup> Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (South End Press 1997) 18-41.

<sup>40</sup> Marcelin Tonye Mahop, *Intellectual Property, Community Rights and Human Rights. The Biological and Genetic Resources of Developing Countries* (Routledge 2010) 15.

knowledge that has not been 'claimed' for profit generally as *terra nullius*;<sup>41</sup> as the territories inhabited by indigenous populations were plundered by colonial powers, so too traditional knowledge is conceived as lying 'buried, unknown, unused and without value'<sup>42</sup> until a Creator (typically white, male, and from the Global North) discovers it and claims exclusionary rights on it, misinterpreting his ignorance as 'novelty'.<sup>43</sup>

### Employing IP for the protection of traditional knowledge

As a consequence of these structural biases, several authors highlight the imperialistic dynamic underlying IP, which dispossesses indigenous populations of their science and resources, and imposes the 'conqueror's way of life';<sup>44</sup> building on this interpretation, biopiracy is nothing more than the most recent expression of ideological, cultural, and scientific colonialism.<sup>45</sup> Surprisingly, however, IP is also regarded by many as a potential solution to the problem of biopiracy, mainly by adopting some of its categorisation, or recalibrating the scope of certain instruments. By way of example, different authors and institutions have considered creating *sui generis* systems, designed specifically for traditional knowledge by exploiting the flexibility provided by TRIPS,<sup>46</sup> using trademarks or trade secrets,<sup>47</sup> and modifying TRIPS, to incorporate key provisions of the Convention on Biological Diversity<sup>48</sup> amongst other measures.

However, these and other sources<sup>49</sup> also acknowledge the strong limitations of IP in providing protection to indigenous knowledge, which are linked to the ideological foundations of this regime, as outlined above. In particular, the main purpose of IP is to allow for the economic exploitation of resources and ideas,<sup>50</sup> thus making the system

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<sup>41</sup> Shiva (n 39) 10.

<sup>42</sup> Shiva (n 39) 73.

<sup>43</sup> Shiva (n 39) 4.

<sup>44</sup> Siegfried Wiessner, 'Re-enchanting the World: Indigenous Peoples' Rights as Essential Parts of a Holistic Human Rights Regime' (2010) *Intl L Foreign Aff* 239, 243.

<sup>45</sup> Robinson (n 17) 3.

<sup>46</sup> Among others, Khor (n 20) 64.

<sup>47</sup> Robinson (n 17) 85.

<sup>48</sup> Khor (n 20) 41 and 68.

<sup>49</sup> See Robinson (n 17) 46; Wong (n 5) 155.

<sup>50</sup> Mino (n 26) 10.

intrinsically unfit to provide adequate recognition of their religious and social significance.<sup>51</sup> Additionally, this system is based on a dichotomous private-public dynamic, centred around the exclusion of one from the other, while indigenous systems defy these categories. Traditional knowledge, while not linked to any individual 'author', is also not considered as belonging to the public domain, nor freely available. Rather, it is organised according to a regulated system of communal ownership;<sup>52</sup> introducing private entitlements. Thus, one of the many risks at hand is the potential of limiting the possibility of circulating the knowledge within the community.<sup>53</sup> Finally, the content of such knowledge is by definition fluid<sup>54</sup> and cannot be fixed into any current form, while the very idea of owning a life is irreconcilable with an indigenous understanding of nature and of one's place in the universe.<sup>55</sup>

In conclusion, IP rights and traditional knowledge appear to be fundamentally incompatible;<sup>56</sup> they emerge from contrasting worldviews, and follow different rationales and purposes, such that the adoption of the former for the protection of the latter would inevitably corrupt one, or both, systems.

The discussion will now continue on to focus on another potential instrument: human rights discourse. It will consider whether, despite some intrinsic limitations similar to those characterising IP, this corpus of norms carries the potential for more respectful protection of indigenous knowledge.

## RE-INTERPRETING RIGHTS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE: CAN HUMAN RIGHTS OVERCOME THEIR OWN LIMITATIONS?

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<sup>51</sup> Mino (n 26) 11.

<sup>52</sup> Emanuela Arezzo, 'Struggling around the 'Natural' Divide: The Protection of Tangible and Intangible Indigenous Property' (2007) 25 *Cardozo Journal of Arts & Entertainment* 367, 399.

<sup>53</sup> Arezzo (n 52) 406.

<sup>54</sup> Arezzo (n 52) 400.

<sup>55</sup> Keith Aoki, 'Neocolonialism, Anticommons, Property and Biopiracy in the (Not-so-Brave) New World Order of International Intellectual Property Protection' (1998) 6(1) *Indiana Journal of Global Legal Studies* 11, 46.

<sup>56</sup> Shiva (n 39) 56.

The regime of human rights has developed in similar cultural and economic circumstances as IP<sup>57</sup> and thus faces analogous criticisms. For example human rights, at least in their original Western conception, are similar to IP in their being 'private, individual and autonomous'<sup>58</sup> devices. This is primarily aimed at the protection of individual civil and political rights<sup>59</sup> while arguably underestimating the essentially social character of the human being and the importance of culture as a necessarily collective phenomenon. This bias, perceived in the majority of the international and regional human rights treaties,<sup>60</sup> is not reflective of the way in which many societies were (and in the case of indigenous peoples, are) organised. Consequently in more recent times, a development has been witnessed: on one side, human rights have increasingly expanded into the private sphere,<sup>61</sup> and on the other, stronger emphasis has been placed on social, cultural, economic rights, and collective rights (such as, notably, indigenous peoples' rights).<sup>62</sup>

Additionally, the same 'cultural' critique levelled against IP, of bias against non-Western science, is often voiced against human rights and international law. There are valid accusations of marginalising and undermining traditional customs, and of considering informal justice as undeserving of the quality of 'law'.<sup>63</sup> This renders many local systems a sort of legal *terra nullius*, devoid of rules and values and in need of a new set of standards to occupy the normative space, carrying with them a unique, and perhaps, out-of-place understanding of order, civilisation, and development.

Thus the human rights corpus is sometimes criticised for serving this same colonising project of transformation of 'non-Western' into 'Western', working through the fiction of universalism<sup>64</sup> as an instrument for the imposition of a particular cultural and economic ideology, and the suppression of alternative cosmo-visions, marginalising alternative means and understandings of justice. As IP is a moral concept,<sup>65</sup> so is the modern principle of

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<sup>57</sup> Chidi Oguamanam, 'Indigenous Peoples' Rights at the Intersection of Human Rights and Intellectual Property Rights' (2014) 18 Marq Intell Prop L Rev 263, 265.

<sup>58</sup> Rhoda E Edward, 'Dignity, Community and Human Rights' in Abdullahi A An-Nai'm (ed), *Human Rights in Cross-Cultural Perspective: a Quest for Consensus* (University of Pennsylvania Press 1992) 82.

<sup>59</sup> Oguamanam (n 57) 290.

<sup>60</sup> Bantekas & Oette (n 1) 411.

<sup>61</sup> Bantekas & Oette (n 1) 468.

<sup>62</sup> Bantekas & Oette (n 1) 411.

<sup>63</sup> Shiva (n 39) 71.

<sup>64</sup> Makau Mutua, 'The Transformation of Africa: A Critique of the Rights Discourse' ,899, 901.

<sup>65</sup> Aoki (n 55), 25.

human rights; in the eyes of some, it is an ideologically charged standard of civilisation brought by the Global North as antibiotics to the ‘sick’<sup>66</sup> and ‘savages’<sup>67</sup> of the Global South. In light of these criticisms, can human rights protect indigenous knowledge? Are they able to overcome their intrinsic biases and offer protection to a different culture? Are they able to do so without transforming into an imperialistic tool, or are they too – like the intellectual property regime – fatally constrained by their own origins?

### **A more sensitive understanding of property: the expansive efforts of the Inter-American Court of Human Rights**

Guidance in answering these questions comes from the tracing and analysis of the evolution of the field. The jurisprudence of the Inter-American Court of Human Rights (IACtHR) surrounding biopiracy is particularly telling, especially in the creative manner by which it has dealt with indigenous peoples’ issues.

The Court has not ruled specifically on biopiracy yet; nevertheless, it has developed an innovative approach to land issues, increasingly clarifying states’ obligations towards the protection of indigenous communities. Building mainly (but not solely) upon the American Convention on Human Rights (ACHR),<sup>68</sup> the United Nations Declaration on Indigenous Peoples Rights (UNDRIP),<sup>69</sup> and ILO Convention no. 169;<sup>70</sup> the IACtHR has shaped a culturally-sensitive approach to ‘property’ in its interpretation of Article 21 ACHR,<sup>71</sup> which states that:

Everyone has the right to the use and enjoyment of his property.

The law may subordinate such use and enjoyment to the interest of society.

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<sup>66</sup> Makau Mutua, ‘The Transformation of Africa: A Critique of the Rights Discourse’, Buffalo Legal Studies Research Papers, 911.

<sup>67</sup> Mutua, *Human Rights* (n 2), 10.

<sup>68</sup> American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR).

<sup>69</sup> UNDRIP (n 12).

<sup>70</sup> International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 January 1989, entered into force 05 September 1991) 72 ILO Official Bull. 59.

<sup>71</sup> Mino (n 21), 23.

As the following paragraph aims to demonstrate, this interpretation could easily be brought one step forward, so as to bring traditional knowledge and the related natural resources under the protection of this same provision, and thus clarifying state obligations and granting indigenous communities an additional instrument for advocacy and redress. Such an evolution would also support the argument that human rights, although born out of specific contingencies, can be valuably employed for the promotion of interests that were not central at the time of the drafting of key instruments, due largely to an inherent adaptability to the context.

The IACtHR issued its first judgment on ancestral lands in 2001, in the case of *Awas Tingni v Nicaragua*.<sup>72</sup> For the first time, the Court inferred from Article 21 ACHR the obligation of the state to protect communal forms of ownership claimed by indigenous peoples on their traditional territories. The Court, also highlighting how property is not qualified as ‘private’ by the Convention,<sup>73</sup> stressed:

The close ties of indigenous people with the land must be recognized and understood as the *fundamental basis* of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy [...] and transmit it to future generations.<sup>74</sup>

Through this interpretation, the Court went beyond the archetypal understanding of property as private and individual, integrating it with the holistic conception of ownership adopted by indigenous communities themselves; accordingly, it required the state to develop (and ensure compliance with) effective mechanisms for the delimitation and protection of this communal property, also taking into primary consideration its cultural dimensions as well as the customary norms followed by indigenous communities.<sup>75</sup>

Since 2001 the Court has adopted other similar decisions, in which it reaffirmed and progressively expanded this interpretation, typically in cases in which states had granted

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<sup>72</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Series C, No. 79.

<sup>73</sup> Nagan (n 14), 890.

<sup>74</sup> *Awas Tingni* (n 71), 149.

<sup>75</sup> Mino (n 26), 24.

private actors the right to exploit ancestral lands and resources, and/or were lacking in an appropriate system for ensuring participation and recognition of indigenous rights. For example, in *Moiwana v Suriname*,<sup>76</sup> the Court qualified this right to communal property, which the state must protect, as a necessary prerequisite for the enjoyment of indigenous peoples' right to cultural identity and integrity.<sup>77</sup> This principle was reinforced the same year in *Yakye Axa v Paraguay*,<sup>78</sup> where the Court stressed how preventing these communities from accessing territories they have a special connection to (and the resources therein) can affect their 'right to cultural identity', as well as their very survival.<sup>79</sup>

In its second judgment on ancestral lands against Paraguay, *Sawhoyamaxa*,<sup>80</sup> the IACtHR further extended the reach of Article 21 ACHR, by clarifying that 'traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title',<sup>81</sup> and therefore maintained that even when the community loses material possession of ancestral lands, the spiritual and cultural attachment to such territories survives.<sup>82</sup> Paraguay's obligations towards indigenous peoples were then once again assessed in the 2010 *Xákmok*<sup>83</sup> judgment. In deciding this case, the Court accorded primary relevance to the damages that the lack of ownership on ancestral lands and natural resources causes to the indigenous community's cultural identity,<sup>84</sup> also stressing the

Insufficiency of the merely 'productive' conception of the land when considering the conflicting rights of the indigenous peoples and the private owners of the lands claimed.<sup>85</sup>

Applying these same conclusions to the misappropriation of traditional knowledge and the related resources does not appear to be an excessive interpretative leap, especially in light of

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<sup>76</sup> I/A Court H.R., *Case of the Moiwana Community v. Suriname*, Judgment of June 15, 2005, Series C, No. 124.

<sup>77</sup> Lenzerini (n 23), 12.

<sup>78</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of February 6, 2006, Series C, No. 125. This judgment also adopts an innovative understanding of the right to life as right to a dignified life ('digna vida'), thus expanding on its original meaning.

<sup>79</sup> *Yakye Axa* (n 78), Par. 147.

<sup>80</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006, Series C, No. 146.

<sup>81</sup> *Sawhoyamaxa* (n 80), Par.128.

<sup>82</sup> *Sawhoyamaxa* (n 80), Par.131.

<sup>83</sup> I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*, Judgment of August 24, 2010, Series C, No. 214.

<sup>84</sup> *Xákmok* (n 83), Par. 182.

<sup>85</sup> *Xákmok* (n 83), Par. 182.

several provisions of the UNDRIP, and in particular, Article 31, which recognises the indigenous peoples' rights to:

Maintain, control, protect and develop their cultural heritage, traditional knowledge and [...] manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora.<sup>86</sup>

However, the most important judgments on this matter have been passed against *Suriname*. In the now famous *Saramaka case*,<sup>87</sup> indigenous communities complained about (among other things) the state's concessions to private bodies for mining and logging within traditionally indigenous territories,<sup>88</sup> made possible by state ownership of natural resources, and by a lack of recognition of legal status to indigenous communities at the domestic level.<sup>89</sup> Interestingly, in this case the IACtHR also interpreted the right to property in light of Article 1 of the International Covenant on Economic, Social and Cultural Rights<sup>90</sup> recognising the right to self-determination, and Article 27 of the International Covenant on Civil and Political Rights<sup>91</sup>, which protects the right to cultural identity, concluding that Article 21 of the ACHR encompasses the right of indigenous communities to

Freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied<sup>92</sup>.

This interpretation 'radically expands the content of Article 21'<sup>93</sup> to include a right to internal self-determination; it also locates a right to communal property beyond the American Convention within international human rights law, based on indigenous peoples' use and occupation of lands, while also linking self-determination to the very economic and cultural

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<sup>86</sup> UNDRIP (n 12), Article 31(1).

<sup>87</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*, Judgment of August 12, 2008, Series C, No. 172.

<sup>88</sup> *Saramaka* (n 87), Pars. 4, 142.

<sup>89</sup> *Saramaka* (n 87), Par. 4.

<sup>90</sup> International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966), 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976.

<sup>91</sup> International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976.

<sup>92</sup> *Saramaka* (n 87), Par. 95.

<sup>93</sup> Antkowiak T M, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court' (2014) 35(1) U Pa J Intl Law, 152.

survival of the community.<sup>94</sup> Even more importantly with respect to biopiracy, the Court stressed how these rights on ancestral lands would be meaningless without parallel rights on the resources therein.<sup>95</sup> Accordingly, it outlined certain safeguards that states must implement when considering restrictions to the property rights of indigenous peoples, specifically requiring governments to ensure effective participation of indigenous communities in the decision-making process – which becomes a duty to obtain free and informed consent in relation to large-scale projects – as well as a right of these communities to receive a reasonable benefit from such projects.<sup>96</sup> These conditions, inferred among others by the jurisprudence of the Human Rights Committee<sup>97</sup>, and by Article 32 of the UNDRIP, are strikingly similar to those required by the Convention on Biological Diversity (CBD).<sup>98</sup> This latter mechanism, a multilateral agreement currently signed by 168 states<sup>99</sup> and focused on the conservation and sustainable use of natural resources, is traditionally considered the key international reference in the fight against biopiracy. However, it is also strongly state-centric, as it is built around the principle of national sovereignty over natural resources,<sup>100</sup> and lacks effective enforcement mechanisms. Therefore, integrating a CBD-based approach with human rights would be highly beneficial, as the latter appears to be more victim-centred, more appreciative of self-determination and autonomy, as well as enjoying stronger enforcement mechanisms.

Finally, in January 2016, the judgment on the *Kaliña and Lokono v Suriname*<sup>101</sup> case was published, in which the Court reaffirmed the principles already expressed in *Awas Tingny* and *Saramaka*,<sup>102</sup> again drawing upon the right to internal self-determination, and stressed that the protection of ‘incorporeal elements’ derived from natural resources is necessary to ensure the economic, cultural and social survival of indigenous communities.<sup>103</sup> Also, the Court persisted on this path of innovation by building upon sources such as environmental law, stressing the pivotal role that indigenous peoples can play for the conservation of the

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<sup>94</sup> *Saramaka* (n 87), 96, 120-121.

<sup>95</sup> *Saramaka* (n 87), 122.

<sup>96</sup> *Saramaka* (n 87), 122-129.

<sup>97</sup> *Saramaka* (n 87), 30.

<sup>98</sup> Convention on Biological Diversity (Rio De Janeiro, 5 June 1992) 1760 U.N.T.S. 79, entered into force 29 Dec. 1993.

<sup>99</sup> For a complete and updated list of parties see: <https://www.cbd.int/information/parties.shtml>.

<sup>100</sup> Mahop (n 40), 31.

<sup>101</sup> I/A Court H.R., *Case of the Kaliña and Lokono Peoples v Suriname*, Judgment of November 25, 2015, Series C, No. 309.

<sup>102</sup> *Kaliña-Lokono* (n 101), Pars. 122-127.

<sup>103</sup> *Kaliña-Lokono* (n 101), Par. 129.

environment, through the implementation of traditional, sustainable practices;<sup>104</sup> in this context, the Court explicitly cited Articles 8 and 10 of the CBD<sup>105</sup> to reaffirm a duty of the state to implement adequate mechanisms for the respect of indigenous peoples' rights to life and cultural identity, in particular ensuring effective participation and benefit-sharing.

In conclusion, through its jurisprudence on indigenous peoples' ancestral lands the IACtHR capitalised on international treaties as well as soft law in order to provide a holistic interpretation of the right to property stated in Article 21 ACHR, which although born as a fairly 'standard' norm currently represents the 'repository of essential indigenous rights'<sup>106</sup> in the American system (incorporating fundamental rights such as self-determination and cultural identity). This interpretation could be expanded further (and reinforced in light of Article 31 UNDRIP) to include the protection of traditional knowledge from misappropriation; such an evolution would allow holding states accountable for failing to implement adequate systems of prevention and punishment of aggressive bio-prospecting.

Land and knowledge clearly present several differences.<sup>107</sup> Most notably, one is material and therefore physically 'appropriable' and limitable, while the other is not; however, these differences tend to fade (as the Court did in interpreting the concept of property) when adopting the indigenous understanding of the world as a circle of life. This understanding emphasises that land, resources and human beings are inextricably tied together, as resources are to knowledge and spiritual beliefs, to the point that the two are almost inseparable.<sup>108</sup> Following this perspective, the appropriation of one fatally affects the other, thus impinging on internationally recognised rights of indigenous peoples to self-determination and cultural identity, and on their very social and economic survival.<sup>109</sup>

Additionally, the approach of the Inter-American Court is significant and laudable, not only because of the substantial conclusions it reached, but also in the process employed. The adoption of a culturally-sensitive approach to human rights, which allowed movement beyond these rights' original meaning and scope, are strongly linked to the Western,

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<sup>104</sup> *Kaliña-Lokono* (n 101), Par. 173.

<sup>105</sup> *Kaliña-Lokono* (n 101), Par. 174-177.

<sup>106</sup> Antkowiak (n 93), 160.

<sup>107</sup> Mino (n 26), 25.

<sup>108</sup> *Lenzerini* (n 23), 14.

<sup>109</sup> *Lenzerini* (n 23), 15.

neoliberal culture in which they firstly developed, and are thus limited in their efficacy to address the challenges of the contemporary, neo-Westphalian world. In this way, through a sensitive and holistic interpretation that takes into primary consideration the context in which human rights are applied, the Court has shown that this discourse can ‘survive itself’ and expand for the protection of areas previously unimaginable (such as indigenous knowledge) without simultaneously imposing foreign values and principles.

#### CONCLUSIONS: THE IMPORTANCE OF CULTIVATING DIVERSITY

Intellectual property rights and human rights developed within a similar ideological framework, and have experimented with similar expansive dynamics. Consequently, they face analogous criticisms, often accused of being instruments of a neo-imperialistic process of globally imposing a specific conception of development and justice. Although much has been written on their effective or potential interactions and commonalities,<sup>110</sup> these two systems appear to be ultimately grounded on very different purposes: while one aims at facilitating trade and protecting exclusionary interests, the other – at least ideally – works towards the promotion of human dignity and equality. It is because of these conflicting ratios that one system has the potential to protect indigenous knowledge, while the other lacks it.

The issue of biopiracy clearly manifests in these competing interests and worldviews, which also emerge from the many voices and instruments proposed in order to address this phenomenon. Notably, this fragmentation of the potential responses<sup>111</sup> ultimately prejudices advocates and victims at the benefit of the TRIPS pro-patenting approach; a fragmentation arguably also resulting from its strong enforcement mechanisms, which competing instruments such as the CBD lack. For this reason, growing hopes have been placed on human rights as a potential discourse for contestation and redress, and because of the close ties between ancestral lands, biodiversity, and knowledge, the standards developed by

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<sup>110</sup> Among others, Helfer (n 25).

<sup>111</sup> Graper (n 35), 21.

bodies such as the IACtHR with regards to land and resources appear to be 'transferable' to the protection of traditional knowledge.<sup>112</sup>

Such an approach presents several benefits. For example, human rights instruments and bodies already impose on states precise positive obligations with regards to indigenous peoples, specifically requiring the involvement of these communities in decision-making processes that could affect their interests and are centred on the principles of free, prior informed consent and benefit-sharing. These are very similar obligations to those outlined in the CBD. However, this instrument considers states (and not local communities) as the main actors, while also lacking the stronger monitoring and enforcement mechanisms that the human rights system offers. Additionally, human rights bodies (especially regional courts) have already proven to be extremely attentive to issues of cultural identity, and willing to interpret human rights norms in a context-sensitive way; at the same time, they are better equipped to deal with collective (as opposed to individual) entitlements, and can envisage forms of reparation that go beyond the mere economic level, thus better appreciating the social and cultural significance of natural resources. It is also important to consider that indigenous peoples are already actively and strategically employing the language of human rights at both the local and at the international level. Thus, framing the protection of traditional knowledge in human rights terms would allow capitalising on resources and movements that are already operational.

On a more general level, the development of indigenous peoples' rights shows an intrinsic flexibility of the human rights system. Although flawed both in its original conception and in some of its practical manifestations, this system carries the strong potential to be expanded upon to cover the protection of interests and needs that were not remotely contemplated at its inception, without in this process imposing unfamiliar values. As demonstrated by the redefinition of the right to property operated by the IACtHR, this can occur when human rights are interpreted with sensitivity to the context and the specific needs of the final beneficiaries, capitalising organically upon the different instruments available including treaties, soft law, and the jurisprudence of other bodies.

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<sup>112</sup> Mino (n 26), 28.

Indigenous peoples are among the most 'diverse' members of the international system. The potential for human rights to adapt to a fast-changing world and still play a meaningful role in human development depends on whether they will be used not only to accommodate, but also to value and cultivate diversity within.<sup>113</sup> In other words, human rights have not reached their end times yet. However, 'in order to ultimately prevail, [they] must be moored in the cultures of all peoples'.<sup>114</sup> This requires promoting a holistic and culturally-appropriate interpretation of rights and making more space in the human rights arena (today too often occupied by large, western organisations)<sup>115</sup> for local actors and understanding, striving towards achieving a balance between the respect for fundamental principles of dignity and equality on one side, and sensitivity to the social, economic and cultural circumstances on the other. If this is achieved, it may be possible to overcome the ideological limitations of the human rights system while remaining faithful to its core purpose.

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<sup>113</sup> Shiva (n 39), 120.

<sup>114</sup> Makau Mutua, 'Savages, Victims, and Saviours: The Metaphor of Human Rights' (2001) 42(1) *Harvard International Law Journal*, 209.

<sup>115</sup> Among others, see Lettinga (n 4).

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# In Defence of Hawala: Rethinking Regulation of Customary Banking

Jacob W. Petterchak

*This article concerns the regulation of hawala in the United States under the existing financial services regulatory environment and how the hawala system is not particularly suited to conforming to these expectations. Originating in the Middle East, hawala is an ancient and highly decentralised system of transferring money using two independent brokers called hawaladars. In more recent history, it has gotten much bad publicity for the role hawala transactions play in financing terrorist operations, facilitating tax evasion and frauds through trade based money laundering. It is very informal and decentralized, making the hawala industry exceedingly difficult to regulate. Accordingly, few hawaladars voluntarily comply with existing anti-money laundering, know your customer and counter terror finance rules - let alone even follow standard principles of accounting. In an era of a hyper-globalised financial system, a failure to accommodate alternative models of finance and banking can have high costs on domestic institutions losing access to profitable frontier markets and even higher social costs on developing economies losing lifelines to remittances they depend on. In spite of this, there are a number of measures and policies that financial services regulators can implement that will assist in bringing the hawala industry into greater compliance with the existing financial regulatory programmes that apply to all money services businesses and financial institutions.*

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## I. INTRODUCTION

Hawala is definitely not a household word for those of us in the West. Few here have ever heard of it. Nor does it enjoy the sort of dominance it formerly enjoyed in the wider Middle East and North Africa region where it was once the sole means of moving money across great distances. It has been reduced in status to that of a sizable niche service. In many respects, hawala is the most basic banking service available, and like most extremely basic services, it has fallen victim to innovations like drafts and electronic transfers. But some corners of the world haven't been as lucky in joining the global economy as others. Even with its steep decline in

market share, hawala thrives in the Persian Gulf and in diaspora communities where it serves an important economic role in channelling remittances back home.

This is the background to our current conversation. The real issue at stake with hawala isn't so much that an anachronistic financial service still competes with more modern alternatives, but that it skirts consumer protections, state licensing and basic practices of good banking that are applied at great cost to the rest of this heavily-regulated industry. It is precisely for these reasons that terrorist cells in particular have used the hawala network to fund cells abroad that carry out attacks.<sup>1</sup> Being largely unregulated and outside the mainstream financial industry, it is very easy to see how this is a weak spot in countering the finance of terrorism. Tax evasion and frauds are also frequently tied to the hawala network for want of ordinary due diligence and a black market culture that is all too willing to turn a blind eye to financial crimes.

The article seeks to address ways that the regulatory state can more easily accommodate independent hawaladars and hawala businesses so that they move their operations out of the underground economy and into the mainstream where there is a smaller risk of facilitating the finance of terrorism and running afoul of the law. There are several key ways regulators at the state and federal level in the United States can improve the regulatory regime to work better for the hawaladars, their clients and the frontier markets where the global financial system does not compete for business, leaving nothing but the hawala system.

## II. THE HISTORY OF HAWALA

Hawala is an ancient money transfer system that came to play a prominent commercial role in the Middle East, but likely migrated there from South Asia or Europe where nearly identical or very similar systems of exchanging obligations through brokers formed the basis of the Medieval banking system.<sup>2</sup> It is a simple system of transferring money without movement through affiliated brokers known as 'hawaladars' using various means of communication. While newer banking methods developed in Europe and displaced customary channels in most of the world, the Middle East and North Africa have resisted this trend for various reasons. Although most people today consider the word synonymous with 'trust', as it is supposed to be the common element connecting transactions, the Arabic root for the word means 'to change' or 'transform'.

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<sup>1</sup> Joseph Wheatley, 'Ancient Banking, Modern Crimes: How Hawala Secretly Transfers The Finances Of Criminals And Thwarts Existing Laws' [2005] 26 University of Pennsylvania Journal of International Economic Law.

<sup>2</sup> Maryam Razavy, 'Hawala: An underground haven for terrorists or social phenomenon?' (2005) 44 Crime, Law & Social Change 277, 292.

This is somewhat ironic, since (as detailed below at greater length) there is little transformation or even physical movement of anything - it simply connects countervailing debits and credits in different locales to efficiently meet demands.

Its precise origins are not well documented, but given its lack of complexity and contemporary existence of similar banking methods elsewhere in Asia and a developing system of promissory notes in Europe, it is not likely that hawala developed in a complete vacuum. This type of system has many counterparts throughout the world, most of which verifiably predate hawala and Islam.<sup>3</sup> Given its lack of complexity, it is not hard to see why. A similarly ancient system called 'hundi' is prevalent in India.<sup>4</sup> Even China has two local equivalents: 'fei ch'ien' in the north and 'hui kuan' in Canton and Hong Kong.<sup>5</sup> Then the Philippines' local variety is called 'padala'. The Financial Crimes Enforcement Network (FinCEN), which is the national financial intelligence unit of the US Department of the Treasury, refers to all of these as Informal Value Transfer Systems (IVTS).<sup>6</sup> To some extent, they are all the same system under different names and used by different ethno-religious-linguistic communities. or the most part, they are all in decline today, thanks to modern banking institutions even in the Middle East, and face similar problems of being conduits of illicit proceeds and off the books frauds. In tracing these individual occurrences of the same phenomenon, the historical record indicates a common origin in China approximately 2000 years ago and arrival to the Middle East via India sometime in the 12<sup>th</sup> Century.<sup>7</sup>

There are various hadiths, Sunnahs and other religious authorities in Islamic jurisprudence that lend weight to a variety of Islamic banking practices, but none specifically name and explain the dynamics behind hawala until much later on.<sup>8</sup> There is no actual mention of it by name until 1327.<sup>9</sup> The theological and doctrinal foundations presented are rather vague and general, leading one to the conclusion that official religious sanction that came after hawala became a common and well-developed network of financial guarantors.<sup>10</sup>

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<sup>3</sup> Wheatley (n 1) 348-349.

<sup>4</sup> L. C. Jain, 'Indigenous Banking In India.' [1929] *Economica*.

<sup>5</sup> El Qorchi M, Mambo S and Wilson J, 'Informal Funds Transfer Systems: An Analysis Of The Informal Hawala System' [2003] Occasional Paper.

<sup>6</sup> 'Informal Value Transfer Systems' [2003] FinCEN Advisory.

<sup>7</sup> Razavy (n 2) 292ff.

<sup>8</sup> N.D. Ray, 'The Medieval Islamic System Of Credit And Banking: Legal And Historical Considerations' (1997) 12 *Arab Law Quarterly*. *Shi'a Islamic Laws on Hawala According to the Fatawa of Ayatullah al Uzama Syed Ali al-Husaini Seestani*, <<http://www.al-islam.org/laws/transactions3.html# 2298>> accessed 11 October 2015.

<sup>9</sup> Matthias Schramm and Markus Taube, 'Evolution and Institutional Foundation of the Hawala Financial System' [2003] 12 *International Review of Financial Analysis* 405, 405-407.

<sup>10</sup> See S. Kapoor, *Bad Money, Bad Politics: The Untold Hawala Story* (first published 1998, New Delhi: South Asia Books, 1998).

A more likely story, but arguably less popular for political and cultural reasons, is that hawala was developed by Crusader nobleman in the Levant who needed to transfer wealth from home to pay their soldiers. In the time of Julius Caesar, Rome employed *praescriptiones* in commercial transactions, which differ little from cheques today that involve syndicates of redeeming agents much like hawala.<sup>11</sup> The Knights Templar also operated as a banking group that accepted deposits and issued letters of credit for redemption to Crusaders and pilgrims.<sup>12</sup> In any event, it came into particular favour with merchants tied to the bandit-laden Silk Road and treacherous Indian Ocean trade sometime after the 11<sup>th</sup> Century.<sup>13</sup>

Up until perhaps the mid-20<sup>th</sup> Century, hawala dominated the Middle East financial services scene. There were few alternatives available and fewer still of any use to the majority of the populace. Outside of the more westernised regions on the peripheries of the Mediterranean like Egypt, Lebanon and coastal North Africa, western-style banks provided no checking and correspondent banking services in the region. But then urbanization happened, and an oil boom in the Persian Gulf closely followed by a little thing called globalization.

Today, hawala is a big business in the United Arab Emirates and acts as something of a global hub for hawala transactions. Immigrant communities in Europe, North America and Australia - of which Somalis are most frequently associated due to the outsize role remittances play in that country - and Afghanistan, Pakistan and many other countries in the Middle East, North Africa and Western Asia are frequent destinations of hawala transfers. Today, the hawala model is being applied to some extent via an online money transmitter called TransferWise based out of London that performs transactions through a sophisticated automated online system that essentially does the same thing as a hawaladars.<sup>14</sup> Once again, the pressures of disruptive innovations compete with existing forms of financial commerce. It is a story as old as time.

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<sup>11</sup> Will Durant, *Caesar and Christ: A History of Roman Civilization and of Christianity from their Beginnings to A.D. 325: The story of civilization* #3, (first published 1944, New York: Simon & Schuster 749.

<sup>12</sup> See Frank Sanello, *The Knights Templars: God's Warriors, the Devil's Bankers*, (Taylor Trade Publishing, USA, 2003); Alan Butler and Stephen Dafoe, *The Warriors and the Bankers: A History of the Knights Templar from 1307 to the Present* (first published 1998, Belleville: Templar Books); Sean Martin, *The Knights Templar: The History & Myths of the Legendary Military Order*, (first published 2005, New York: Thunder's Mouth Press) 47; Helen Nicholson *The Knights Templar: A New History*, (first published 2001, Stroud: Sutton) 4.

<sup>13</sup> Douglas Frantz, 'Ancient Secret System Moves Money Globally', *New York Times*, (New York, 3 October 2001) B5.

<sup>14</sup> Rob Price, 'London's \$1 Billion Finance Startup TransferWise Is Just Like An Ancient Islamic Money Transfer System' (2015) *Business Insider* <<http://www.businessinsider.com/transferwises-similarities-to-hawala-2015-1?r=UK&IR=T>> accessed 21 December 2015.

Today, the global hawala business potentially exceeds total receipts of US\$100 billion per year, with about 60% of it moving funds from developed countries to underdeveloped ones.<sup>15</sup> Unregulated flow of remittances across borders has implications for macroeconomic policy as well, and affects many national statistics.<sup>16</sup> Given the nature of the business though, it is very difficult to make exact estimates regarding informal economic activities through IVTS.

Although Somalia accounts for a large percentage of this traffic, Afghanistan's national economy is effectively dependent upon hawala.<sup>17</sup> Given the rampant corruption affecting the Afghan banking industry and high-profile bank failures marred by corruption, even most international aid organisations operating in the country utilise hawala for their banking out of necessity.<sup>18</sup>

### III. HAWALA IN THEORY AND PRACTICE

The theory behind hawala is fairly straightforward. As the most basic and among the first proper 'banking' services ever offered, its lack of complexity should surprise no one. But its origins and structure have substantial differences from the approach taken to most financial services in law and backend operations. For those with an interest in the law of equity, it is notable that Islamic law does not recognize equitable interests or constructive trusts like many other legal systems do. In an ordinary hawala transaction, the money in question always belongs to the receiver even if they are not in possession or are unaware of it.<sup>19</sup> For the outside observer, it may seem peculiar that the ownership vacuum so abhorred in Anglo-American jurisprudence goes ignored in the hawala system. Understanding these points are key to grasping the inner workings of a very unique service.

<sup>15</sup> Roger Ballard, 'Coalitions of Reciprocity and the Maintenance of Financial within Informal Value Transmission Systems: The operational dynamics of contemporary hawala networks' (2005) 6(4) *Journal of Banking Regulation* 319.

<sup>16</sup> Richard P. C. Brown, 'Migrant Remittances, Capital Flight, and Macroeconomic Imbalance in Sudan's Hidden Economy' (1992) 1(1) *Journal of African Economics* 86.

<sup>17</sup> Samuel Munzele Maimbo, 'The money exchange dealers of Kabul: a study of the Hawala system in Afghanistan' *World Bank Working Paper Series: No. 13* (Washington DC, 2003) <[http://www.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2003/10/16/000090341\\_20031016085357/Rendered/PDF/269720PAPER0Money0exchange0dealers.pdf](http://www.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2003/10/16/000090341_20031016085357/Rendered/PDF/269720PAPER0Money0exchange0dealers.pdf)> accessed 11 August 2015.

<sup>18</sup> Nikos Passas, 'Demystifying Hawala: A Look into its Social Organization and Mechanics' (2006) 7 (Supplement 1) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 46; James Risen, 'Intrigue in Karzai Family as an Afghan Era Closes' *New York Times* (New York, 4 June 2012) A1 <<http://www.nytimes.com/2012/06/04/world/asia/karzai-family-moves-to-protect-its-privilege.html>> accessed 23 December 2015; Adam B. Ellick and Dexter Filkins, 'Political Ties Shielded Bank in Afghanistan' *New York Times* (New York: 8 September 2010) A1 <<http://www.nytimes.com/2010/09/08/world/asia/08kabul.html>> accessed 23 December 2015; 'Kabul Bank fraud: Ghani reopens Afghan corruption case' *BBC News* (1 October 2014) <<http://www.bbc.com/news/world-asia-29450821>> accessed 23 December 2015.

<sup>19</sup> Mohammad H. Kamali, *Principles of Islamic Jurisprudence* (ITS: London, 3<sup>rd</sup> edn 2002) 157-164.

Furthermore, it is important to separate the formal rules to hawala from those not necessarily intrinsic to it, namely the illegal methods that likely permeate the majority of the industry today.<sup>20</sup> Rather than whitewashing or treating these practices as mere aberrations, it is imperative to see them as part of a flawed system in a flawed world. Given the degree to which the hawala industry is simply non-compliant with basic regulatory procedures and banking laws in the United States, it should help in assessing the extent of the current problems facing the hawala industry and why reform and the law must become a greater concern to the hawaladars, the regulators and the general public.

### 3.1 The 'Nuts and Bolts' of a Hawala Transaction

In theory, hawala is very simple. The hawala system refers to a customary informal channel for transferring funds from one person to another via an independent broker or agent known as a hawaladar.<sup>21</sup> The result is not all that different from Western Union or an ordinary bank draft cheque in that one party sends money to another, except that the hawaladar requires a corresponding independent hawaladar to complete the transaction at its destination and settle the account at a later date. No interest is paid on the accounts, since it is normally very short term and interest (*al-riba* / الربا, الربا in Arabic) is *haram* in Islamic law and thus forbidden.<sup>22</sup>

As long as there is a sender with some money for a distant receiver, the hawaladar will probably be able to find another hawaladar in close proximity to the latter and complete the transaction. Borders are rarely an obstacle. The hawala system relies heavily on trust, and it can take time to find someone to vouch for another hawaladar with whom he has no prior relationship. Mobile phones are the primary tool of these people. It may take him a few minutes or a few weeks, but they will eventually find a way through networking.

The most important aspect of the hawala network is the extent of personal relationships between hawaladars, as it provides a mechanism for bundling transactions between multiple hawaladars to balance accounts. Sometimes this bundling process is so efficient that no balance is ever exchanged amongst the middlemen; the outbound and inbound clientele of a hawaladar provide

<sup>20</sup> Divya Sharma, 'Historical Traces of Hundi, Sociocultural Understanding, and Criminal Abuses of Hawala' (September 2006) 16 (2) International Criminal Justice Review 99-121.

<sup>21</sup> Mohammed El-Qorchi, 'Hawala' (2002) 39 (4) *Finance and Development Magazine Quarterly* <<http://www.imf.org/external/pubs/ft/fandd/2002/12/elqorchi.htm>> accessed 23 December 2015.

<sup>22</sup> Kamali (n 19).

all the necessary liquidity and more or less balance out. If a more formal reconciliation is in order, it is done, but not always on the books. This will be discussed at greater length below. As such, the most intricate part of the hawala system is on the backend. Failures to make good on a deal are by most accounts extremely rare, and since they are already 'off the books', such instances are dealt with out of courts with either shunning or physical violence outside of places like Dubai where the industry operates with some level, however minimal, of regulation.<sup>23</sup>

Fees are noticeably low and rarely discussed. Hagglng is not an option to my knowledge. The commission on either end is factored into the receiving sum and rarely exceeds 1%.<sup>24</sup> Thrifty clients appreciate the value found in the hawala service, as most institutional money services business extract fees several times higher due to overhead such as brick and mortar facilities, commercial insurance, independent auditors, regulatory compliance costs and taxes (on the transaction or the income derived from the service) that are normally unknown to or simply ignored by the hawaladars.<sup>25</sup>

There are also limits to the service provided by non-hawala remitters in certain markets. For example, although Western Union charges about 7% to wire money to Somalia, it can only send it to one office in the far north of the country. In a country where most of the population is too poor to afford even a camel, it is easy to see the attractiveness of hawala and why more mainstream services are unsatisfactory to anyone who is poor.<sup>26</sup>

One of the more attractive aspects of hawala for consumers of certain regional origins is that it is convenient. Most hawaladars are available 24/7, reliable and almost hassle-free compared to their conventional rivals that extract higher fees and require multiple forms of photo identification.<sup>27</sup> Since local alternatives are so limited and can hardly be considered reputable by any objective measure, hawala has very limited competition in this type of environment where a

<sup>23</sup> Meenakshi Ganguly, 'A Banking System Built for Terrorism' Time Magazine (5 October 2001) <<http://content.time.com/time/world/article/0,8599,178227,00.html>> accessed 21 December 2015.

<sup>24</sup> Samuel Munzele Maimbo, *The Challenges of Regulating and Supervising the Hawaladars of Kabul*, in *Regulatory Frameworks for Hawala and other Remittance Systems* (International Monetary Fund: 2005) 47-52

<[http://siteresources.worldbank.org/INTAFGHANISTAN/Resources/AFRFW\\_3\\_Challenges\\_of\\_Regulating\\_and\\_Supervising\\_Hawaladars.htm](http://siteresources.worldbank.org/INTAFGHANISTAN/Resources/AFRFW_3_Challenges_of_Regulating_and_Supervising_Hawaladars.htm)> accessed 21 December 2015.

<sup>25</sup> Anna Fifield, 'How Iranians Are Avoiding Sanctions' Financial Times (London, 14 April 2008), <<http://www.ft.com/intl/cms/s/0/6ca69788-0a48-11dd-b5b1-0000779fd2ac.html#axzz2EmP2MaKm>> accessed 28 December 2015.

<sup>26</sup> Nicholas Kulish, 'Somalis Face a Snag in Lifelines From Abroad' New York Times (New York, 4 August 2013) A10.

<sup>27</sup> Organisation for Economic Co-Operation and Development (OECD), 'Report on Money Laundering Typologies 1999-2000' Financial Action Task Force FATF-XI (Paris, 3 February 2000) <[http://www.oecd.org/fatf/pdf/TY2000\\_en.pdf](http://www.oecd.org/fatf/pdf/TY2000_en.pdf)> accessed 29 December 2015.

weak and corrupt state combined with neglect by the international financial system has produced a rather moth-eaten financial sector.<sup>28</sup>

### 3.2 Criminal Elements Embedded in the Hawala System

The administrative aspect of the backend is rather problematic at times- particularly for those that make no effort to operate legally. Licensed hawala enterprises based in the Persian Gulf or in the United States follow standard accounting practices, while most unlicensed hawaladars follow tradition and keep extremely shorthand (arguably coded in “thieves’ cant”<sup>29</sup>) ledgers while some hawaladars simply go by memory, especially if illiterate.<sup>30</sup> These ledgers use unique abbreviations, rarely identify clients or consider the provenance of the funds in question.<sup>31</sup> Part of this is a traditional part of the business, but today it serves to obscure the paper trail if anything attracts the attention of civil authorities in dodgy deals. Given that about 83% of the hawala industry is not registered or licensed, the overwhelming majority of hawala bookkeeping is essentially done Al Capone-style.<sup>32</sup> Whether the style of hawala bookkeeping predates modern organized crime syndicates is anyone’s guess, but it remains useful to segments of the underground economy nonetheless.

Alternatively, ordinary financial institutions are used by hawaladars in the settlement and reconciliation process. Deposits are made into conventional western-style banks or channelled through regular money transmitters, but fragmented and wired to hundreds of banks around the world in a pattern known as the ‘starburst’. Sometimes, the money ends up in the account of origin to throw off audit trails in a technique referred to as the ‘boomerang’. Ardent defenders of hawala will reluctantly admit that the system is used to launder money and evade taxes because they are so well designed to work outside of the normal channels states use to track financial

<sup>28</sup> Adil Anwar Daudi, ‘The Invisible Bank: Regulating the Hawala System in India, Pakistan and the United Arab Emirates’ (2005) 15 *Indiana International & Comparative Law Review* 619, 628-29.

<sup>29</sup> See Julie Coleman, *A History of Cant and Slang Dictionaries* (vol 1, 1567-1784 OUP 2004).

<sup>30</sup> Patrick M. Jost, Harjit Singh Sandhu, *Hawala: The Hawala Alternative Remittance System and its Role in Money Laundering* (FinCEN/INTERPOL Joint Publication, 2000) (Monograph), Appendix D 18.

<sup>31</sup> Tina Susman, ‘Court cases shed light on money-transferring system’ *Los Angeles Times* (Los Angeles, 24 May 2010) <<http://articles.latimes.com/2010/may/24/nation/la-na-hawala-20100525>> accessed 22 December 2015: Stephen Hudak of the United States Treasury Department’s Financial Crimes Enforcement Network (FinCEN), which relies on bank alerts of suspicious activities to help track suspected illegal hawalas, stated concerning hawalas that, “They’re designed to be secretive, and they’re designed to have very little paper work involved. The record-keeping they do keep could be in another language.”

<sup>32</sup> Abdulrahman Al-Khalifa, ‘The use of Hawala as a Remittance System’ *George Mason University Terrorism, Transnational Crime and Corruption Center* (TraCCC) <[http://policy-tracc.gmu.edu/resources/publications/studentforum/Hawala\\_AR.pdf](http://policy-tracc.gmu.edu/resources/publications/studentforum/Hawala_AR.pdf)> accessed 19 December 2015.

crime.<sup>33</sup> Even when employed for legitimate purposes, to diversify the risk involved in the transfer of large sums, hawaladars use techniques borrowed from criminal money launderers.<sup>34</sup>

Other black market techniques utilised by professional money launderers and criminal syndicates are employed by hawaladars reconciling their accounts with others. Invoice fraud in international shipping is a common such tactic. One hawaladar will ship goods at a nominal value to avoid taxes and keep the deal under the radar of any preying authorities. EBay and other online sales systems provide an excellent medium for facilitating sham deals that appear legitimate barring extensive due diligence and incorporate a low-rate form of money exchange within the platform.<sup>35</sup> Shell companies are created with adequate funds or assets to settle balances and then transferred at nominal values to avoid scrutiny, taxes, fees and the like. Goods (both contraband and legitimate) are also sometimes smuggled to satisfy such accounts, chief among them gold and drugs.

It is important to note that in customary practice, it is normally a 'no questions asked' type of service. This is perhaps how hawala has earned its poor reputation among law enforcement and counterterrorism professionals. Even Swiss banks have effectively abandoned the 'I don't want to know' approach to banking.<sup>36</sup> Although there are licensed hawala businesses that comply with conventional customer due diligence and know-your-client best practices, the overwhelming majority are either ignorant of such things or wilfully ignorant. Sanctions are also rarely an obstacle.

As a matter of helping the books balance on both sides and encourage foreign exchange transfers through their system, hawaladars sometimes exempt expatriates from paying fees. In contrast, they reportedly charge higher fees to those who use the system to avoid exchange barriers,

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<sup>33</sup> Ballard (n 15) 321.

<sup>34</sup> Kulish (n 26).

<sup>35</sup> David Cook and Timothy Smith, 'The Malarkey of Money Transfers: Overlooking E-Bay whilst the Hawaladars are Hunted', Proceedings of the 1st Australian Counter Terrorism Conference (Edith Cowan University, Perth, Western Australia, 30 November 2010) <<http://ro.ecu.edu.au/cgi/viewcontent.cgi?article=1001&context=act>> accessed 31 Dec 2015.

<sup>36</sup> Foreign Account Tax Compliance Act (FATCA), Public Law 111-147, 124 Stat. 71 (2010); United States Department of the Treasury, 'Agreement Between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA' (Press Release), (U.S.A.-Switzerland, 13 February 2013) <<http://www.treasury.gov/resource-center/tax-treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf>> accessed 29 December 2015; also, see Jane G. Song, 'The End of Secret Swiss Accounts?: The Impact of the U.S. Foreign Account Tax Compliance Act (FATCA) on Switzerland's Status as a Haven for Offshore Accounts' (2015) 35 *Northwestern Journal of International Law & Business* 687 <<http://scholarlycommons.law.northwestern.edu/njilb/vol35/iss3/4>> accessed 21 December 2015.

capital controls, the authorities or administrative hurdles.<sup>37</sup> Money leaving common destinations of transfers is also given preferable rates.<sup>38</sup>

It is at this point that some commentators and authorities utilise special terminology to describe two separate patterns of hawala activity. 'White hawala' is used to describe ordinary money transfers, such as remittances and personal gifts, while 'black hawala' refers to black market deals handled by the hawala system involving drugs, frauds or terrorism.<sup>39</sup> There are several large, corporate hawala dealers operating in the United States and internationally, such as Amal and Dahabashiil that entirely deal in the 'white hawala' market, but as mentioned previously, very little of the hawala market operates legally licensed and regulated.<sup>40</sup> As such, even some of the 'white hawala' transactions are tainted a bit grey to some degree. They may also sit side by side in the dodgy ledgers with very 'black' transactions. It is also worth questioning whether nations have an obligation to root out and stop black market banking under international law.<sup>41</sup> Given that terrorists and other unsavoury sorts operate in the space between nations, nations have a duty to helping maintain global security by providing a safe atmosphere for conducting business, although this is not well-defined in international law.

This sort of mixing of legitimate and illegitimate business potentially ties law-abiding consumers to criminals and terrorists unnecessarily. It is practices like these that that should be avoided in the interests of the customers and the hawaladars themselves. Given that legal operation is distinctly possible, it should be sought. Such would blunt the criminal elements within the industry that has led it being a 'banking system built for terrorism'<sup>42</sup> that works in secrecy and deals with disputes mafia-style

#### IV. HAWALA AND THE LAW: LEGAL REQUIREMENTS AND CONSEQUENCES

In order to chart a better path for users and providers of hawala money services, it is imperative to understand the legal framework affecting it and the 'Western' counterparts in the market. Law

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<sup>37</sup> El-Qorchi (n 21).

<sup>38</sup> Ibid.

<sup>39</sup> Charles Falciglia, 'In Search of the Hawaladar' *ACAMS Today* (Miami, 29 August 2011) < <http://www.acamstoday.org/in-search-of-hawaladar/> > accessed 22 December 2015.

<sup>40</sup> Ibid.

<sup>41</sup> Joel Slawotsky, 'Partnering with Despots and Failed Regimes: Rogue Banking as a Primary Violation of International Law' (2014) 16 (1) *San Diego International Law Journal* 73.

<sup>42</sup> Ganguly (n 22).

and regulation is a challenging issue to all bank and financial services, and is constantly evolving due to endless scandals and pushback from the industry and its powerful political lobby. Also of great importance to this is the legal sanction associated with failure to adhere to the law.

Unlike that of some other countries, there is no general prohibition of hawala in the United States, nor for any other Islamic financial instruments and/or methods. Regulators and the law regard hawala as more of a brand than a separate financial system, so it does not play favourites over form rather than substance. But, as mentioned above, this has not encouraged many hawaladars to follow the law anyway except for some of the largest players in the business. Theory and good public policy might suggest this result is counterintuitive.<sup>43</sup>

After all, shouldn't a fair and open marketplace automatically encourage compliance by its participants? Moreover, given the harsh fines and penalties notoriously associated with the American justice system, shouldn't compliance be a chief concern of every American hawaladar? Apparently not. Although the theory of financial accommodation suggests opening previously unrecognised practices and industries to official status should help incorporate previously marginalised activities to seek regulation, licensing and ensure consumer protections, there are several reasons results have not materialised. For starters, the law is not well publicized to certain immigrant communities. It is also difficult to enter the market, legally speaking, as there are several costly barriers entering the market.

#### **4.1 Effects of Regulation on Non-Conforming Consumers and Remitters**

As a type of Money Services Business (MSB) described by the Bank Secrecy Act (BSA), and more specifically as a type of money transmitter, all forms of IVTS may legally operate in any state or territory.<sup>44</sup> Financial regulators emphasize the result rather than the form of the business, unlike some other jurisdictions (namely India) that take a hard stance against hawala and other forms of IVTS more generally. There is no barrier to accessing the market for an individual or incorporated hawaladar so long as they abide by applicable state and federal laws governing the conduct and operation of business.

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<sup>43</sup> Jonathan Ercanbrack, *The Transformation of Islamic Law in Global Financial Markets* (Cambridge University Press, 2015) 149.

<sup>44</sup> Bank Secrecy Act, Public Law 91-508 (1970) (codified as amended in various sections of Titles 12, 15, and 31 of the United States Code).

More importantly though, banks and money transmitters in the United States are heavily regulated in terms of their record keeping and which ones must be to disclose to the government.<sup>45</sup> There are also rules and regulations regarding what documentation individuals must have in order to do business with banks that were heavily revised under the USA PATRIOT Act following 9/11.<sup>46</sup> There are potentially very large civil and criminal penalties for failing to register with FinCEN and failure to comply with the necessary recordkeeping, financial reporting, anti-money laundering and counter terror finance requirements.<sup>47</sup>

As mentioned above, the overwhelming majority of hawaladars are not registered with FinCEN or in line with these expectations. Granted, most money transfer businesses operate without licenses according to national authorities.<sup>48</sup> But hawala services are especially non-compliant, with less than 20% seeking and obtaining requisite licensing and registration. To put it bluntly, they risk prosecution regardless of whether their hawala services are part-time humanitarian endeavours or vast criminal conspiracies.<sup>49</sup> Generally speaking, the law does not care. Worse yet, an aggressive prosecution case can convince a jury of the latter anyway simply thanks to the nature of hawala bookkeeping- it is intentionally deceptive by design, which is normally considered proof of criminal wrongdoing regardless of any explanation by the defendant.<sup>50</sup>

One thing that FinCEN does as a national financial intelligence unit is report regularly on their efforts at enforcing laws and regulations. As an arm of the US Treasury Department, it does this partly out of vainglory and partly out of statutory obligation to keep open records for the public regarding its often newsworthy work.<sup>51</sup> Another office within the Treasury, the Office of Foreign

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<sup>45</sup> 31 U.S.C. §§ 5313, 5316.

<sup>46</sup> USA PATRIOT Act, Public Law 107-56 (2001) (amending the following: Title III, Subtitle C, §§ 328, 330, 352-354, 359-365, 371, 372, 374, 18 U.S.C. §§ 1956, 1960, 1961, 31 U.S.C. §§ 5311 - 5313, 5317 - 5319, 5321, 5322, 5324, 5330-5332 and 5341.

<sup>47</sup> 18 U.S.C. § 1960; 31 U.S.C. § 5330.

<sup>48</sup> United States Government Accountability Office, 'Bank Secrecy Act: FinCEN and IRS Need to Improve and Better Coordinate Compliance and Data Management Efforts' (Washington, DC, GAO Report to Congress No. 07-212, 15 December 2006) 11-12 < <http://www.gao.gov/assets/260/254590.pdf> > accessed 21 March 2016.

<sup>49</sup> *United States v Ahmad* 213 F.3d 805 (4th Cir. 2000); *United States v Ismail* 97 F.3d 50 (4th Cir.1996).

<sup>50</sup> *United States v X-Citement Video Inc.* 513 U.S. 64 (1994) 68 (Supreme Court); *Liparota v United States* 471 U.S. 419 (1985) 426 (Supreme Court); *Bailey v United States* 516 U.S. 137 (1995) 144-145 (Supreme Court); Christopher R. Chase, 'To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes' (2003) 8(3) *Fordham Journal of Corporate and Financial Law* 721.

<sup>51</sup> United States Department of the Treasury: Financial Crimes Enforcement Network (FinCEN), 'Retail Store Owner Sentenced for Unlicensed Hawala Operation' *The SAR Activity Review – Trends, Tips & Issues* (Issue 8, April 2005) <[http://www.fincen.gov/law\\_enforcement/ss/html/056.html](http://www.fincen.gov/law_enforcement/ss/html/056.html)> accessed on 19 April 2015; United States Department of the Treasury: Financial Crimes Enforcement Network (FinCEN), 'Illicit Wire Activity Destined for Sanctioned Country' *The SAR Activity Review – Trends, Tips & Issues*, (Issue 18, October 2010) <[https://www.fincen.gov/law\\_enforcement/ss/html/Issue%2018-story%208.html](https://www.fincen.gov/law_enforcement/ss/html/Issue%2018-story%208.html)> accessed 26 December 2015; also, as such reports are numerous and not sorted by subject headers, see more generally *The SAR Activity Review – Trends, Tips & Issues* Archive compiled by the FinCEN, a section of the United States Department of the Treasury at <[https://www.fincen.gov/news\\_room/rp/sar\\_tti.html](https://www.fincen.gov/news_room/rp/sar_tti.html)>.

Asset Control (OFAC), has a similar gimmick, but involving sanctions.<sup>52</sup> Hawala makes up very little of this reporting and accounts for a tiny fraction of FinCEN's caseload, but incidents of off-the-books hawala rarely end well nonetheless.

Even for hawaladars not actively working as terror financiers, noncompliance can mean prison time and serious financial penalties. Such was the case of *United States v. Elfgeeh*, also known as the *Carnival Ice Cream Case*, since it involved a small ice cream shop in Brooklyn, New York that operated a \$21 million unlicensed hawala business on the side.<sup>53</sup> Two brothers were responsible for the hawala business. They used many techniques of money launderers to obscure their activities. It never made a profit and claimed to operate out of charity to the local Yemeni immigrant community with limited remittance options. They were notified by state and federal regulators of their registration and licensing obligations, but neglected warnings as they did not consider themselves to be a 'business' since they made no profit.<sup>54</sup> Some of the funds they handled, however, were delivered to individuals tied to Al-Qaeda and its front groups; although no proof was presented that the hawaladars knew of this or had any way to discover it. Both men received lengthy prison terms, one for 51 months and the other 188.<sup>55</sup>

Although it might not seem like it, *Elfgeeh* was a landmark case as it was the first successful prosecution of an unlicensed hawala business and only the second involving an unlicensed money transfer business to go to federal trial in the United States.<sup>56</sup> More importantly, it was one of the first cases following the oft-maligned USA PATRIOT Act and its numerous changes to the United States Code.<sup>57</sup> Prior to the USA PATRIOT Act, 18 U.S.C. § 1960(a) required that an individual have knowledge of licensing laws and regulations *and* intent to violate them, making prosecution of hawaladars nearly impossible. The USA PATRIOT Act removed the intent requirement. The case established an important new test under § 1960(a), deciding that knowledge of an MSB merely being unlicensed was sufficient for conviction.<sup>58</sup> Subsequently,

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<sup>52</sup> United States Department of the Treasury Press Center, 'Treasury Department Sanctions a Taliban Funding Conduit and Two Key Taliban Figures: Action Targets a Pakistan-based Hawala, Hawaladar and one Taliban Commander' 21 August 2014 <<https://www.treasury.gov/press-center/press-releases/Pages/jl2612.aspx>> accessed 26 December 2015; United States Department of the Treasury Press Center, 'Treasury Imposes Sanctions on a Hawala and Two Individuals Linked to the Taliban' 20 November 2012 <<https://www.treasury.gov/press-center/press-releases/Pages/tg1777.aspx>> accessed 26 December 2015; also, see *United States v Banki* 660 F.3d 665 (2d Cir. 2011).

<sup>53</sup> *United States v Elfgeeh* 515 F.3d 100 (2d Cir. 2008) (Appellate Court Decision) aka 'the Carnival Ice Cream Shop Case.'

<sup>54</sup> In terms of United States company and tax law, non-profit companies are expressly permitted under the Internal Revenue Code, 26 U.S.C. §§501-530; see Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* (New York: John Wiley and Sons 10 Ed., 2011) 879.

<sup>55</sup> *Elfgeeh* (n 53).

<sup>56</sup> *United States v Velastegui* 199 F.3d 590 (2d Cir. 1999); Due to the prevalent custom of plea bargaining and deferred prosecution agreements in the United States, approximately 95% of cases never actually go to trial.

<sup>57</sup> USA PATRIOT Act, Public Law 107-56 (2001) (n 41).

<sup>58</sup> *Elfgeeh* (n 53), 132; *United States v Elfgeeh* No. CR-03-0133 (E.D.N.Y. 20 September 2005) (Trial Court); 18 U.S.C. § 1960(a).

there have been numerous cases involving money laundering and hawala, many of which have allegations of terrorist financing at the heart of them.<sup>59</sup>

Outside of the hawaladars, some hawala customers may also be subject to prosecution for using unlicensed hawaladars even in otherwise legal transactions. One such case, *United States v Banki*, involved an affluent Iranian-American transferring family money stateside from Iran by way of an unlicensed hawala business in Dubai with access to an American bank account.<sup>60</sup> Given the extremely complex sanctions programme in place between the United States and Iran, most business deals and transactions between nationals of the two countries are prohibited.<sup>61</sup> Mahmoud Banki was tried for several sanctions violations and most notably for contravening 18 U.S.C. § 1960(a):

Whoever knowingly conducts, controls, manages, supervises, *directs*, or owns all or part of an unlicensed money transmitting business, shall be fined in accordance with this title or imprisoned not more than 5 years, or both.

The case against him rested on the fact that as the customer, he was ‘directing’ an unlicensed MSB enterprise and a transaction that would have required a special license from OFAC. The jury, however, was not instructed to consider an explicit exemption for both the licensure and sanctions regarding transfers of family assets in the Code of Federal Regulations.<sup>62</sup> The exemption in question is wide enough in scope that it should have led to a summary dismissal of charges at the trial stage, but the motion was denied. He was convicted and sentenced to a prison term of 30 months.

*Banki* is presently regarded as something of a prosecutorial error bordering on an Islamophobic witch hunt. Many notable supporters came to Mahmoud Banki’s defence, including a former director of OFAC who went to great lengths to explain the errors in the US Attorney’s case and the judge’s application of the law. Although the initial case was successful, the conviction was overturned on appeal due to the grievous jury misdirection and all charges were subsequently

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<sup>59</sup> *United States v El-Mezain* 664 F.3d 467 (5th Cir. 2011); *United States v Yassin Muhiddin Aref and Mohammed Mosharref Hossain* Unreported, Criminal Action No. 04-CR-402, (N.D.N.Y.; *Sentencing Memorandum*: 29 January 2007, *Court Transcript*: 8 March 2007; *United States v Uddin* 365 F. Supp.2d 825 (E.D. Mich. 2005); *Holy Land Foundation for Relief and Development v Ashcroft* 219 F. Supp. 2d 57 (D.D.C. 2002), *aff’d*, 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004); *United States v Bayan Elashbi, Ghassan Elashbi, Basman Elashbi, Infocom Corporation* 440 F. Supp. 2d 536 (N.D. Texas 17 December 2006).

<sup>60</sup> *United States v Banki* 660 F.3d 665 (2d Cir. 2011).

<sup>61</sup> See Kian Arash Meshkat, *The Burden of Economic Sanctions on Iranian-Americans* (2013) 44 *Georgetown Journal of International Law* 915.

<sup>62</sup> 31 C.F.R. § 560.550.

dropped. Banki spent 22 months in prison before being released. That being said, the legal consequence of using such a system as a mere customer or beneficiary to an unlicensed hawala transaction was not actually addressed by the Circuit Court of Appeals for the Second District in *Banki*. In essence, this point of law remains open due to a procedural technicality and prosecutorial discretion.

Of important note in this are civil penalties upon successful conviction, specifically relating to the civil asset forfeiture. The consequences are exceptionally high, as U.S.C. § 1960 is a “specified unlawful activity” that the government can forfeit any property, real or personal, which constitutes or is derived from any traceable proceeds.<sup>63</sup> The United States has peculiar civil asset forfeiture laws that put the property in question on trial, but deny it counsel or the right to be represented in proceedings, even by the individual in question. This results in a variety of strange case names.<sup>64</sup> It is arguably a summary revocation of due process and rights to property. But that does not detract from the main point, which is that any outlaw hawaladar will likely face complete financial ruin and disgorgement by federal authorities upon conviction. The price of noncompliance is exceptionally high.

In summary, consequences for operating, participating in and using unlicensed hawala MSBs are potentially very high. But as noted, this can easily be avoided by conforming to legal and regulatory expectations of the industry that are not so onerous as to preclude participation from most already in the hawala business. Given the potential cost of noncompliance, explaining the procedures and processes of entering the market lawfully must be communicated better. It is my hope to some extent that the following will serve as a better introduction regarding the relevant statutes, regulations, licenses and processes that apply to such people and enterprises.

#### 4.2 Federal Registration and Regulatory Requirements for the Hawala Industry

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<sup>63</sup> 18 U.S.C. § 1960(a)(1)(A-C); *United States v. Huber* 404 F.3d 1047 (8th Cir. 2005) 1056-57; Jon E. Gordon, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture* (1995) 44 Duke Law Journal 744, 770-71; Stefan D. Cassella, *The Forfeiture of Property Involved in Money Laundering Offenses* (2004) 7 Buffalo Criminal Law Review 583, 585ff.

<sup>64</sup> *United States v. Approximately \$44,888.35 in U.S. Currency* 385 F. Supp. 2d 1057 (E.D. Cal. 2005); *United States v. 47 10-Ounce Gold Bars, etc.* 2005 WL 221259 \*1 (D. Or. 2005); *United States v. \$734,578.82* 286 F.3d 641 (3d Cir. 2003), 650-53; *United States v. \$8,221,877.16 in U.S. Currency* 330 F.3d 141 (3d Cir. 2003); *United States v. All Funds on Deposit in the Name of Kahn* 955 F. Supp. 23 (E.D.N.Y. 1997); *United States v. Real Property 874 Gattel Drive* 79 F.3d 918 (9th Cir. 1996); *United States v. \$20,193.39 U.S. Currency* 16 F.3d 344 (9th Cir. 1994), 346; *United States v. 1988 Oldsmobile Cutlass Supreme* 983 F.2d 670 (5th Cir. 1993).

Navigating the regulatory state is normally cited as being the leading obstacle that small to medium sized businesses face.<sup>65</sup> Hawaladars are in all likelihood no different, as stiff penalties and a complicated regulation system *de facto* keep the overwhelming majority of them in the underground economy. Coming into compliance is not easy. The following will hopefully assist in some sense in understanding the regulatory expectation hawaladars face conducting their businesses in the United States, and more specifically in New York.

Due to the doctrine of dual sovereignty in American Federalism, there are overlapping regulatory responsibilities between states and the federal government. This article will only discuss the law as it applies in the state New York and at the federal level. The Federal approach to combatting money laundering in this political arrangement led to placing the licensing onus on respective states.<sup>66</sup>

The legal status in New York is of utmost importance, primarily because that is epicentre of the American financial system, but also because the author is based there. The legal system of New York is considered to be the most important since it leads the nation in many ways, specifically banking law, and many other states follow its lead by adopting provisions first promulgated here. Its judiciary is also held in high regard both nationally and abroad.<sup>67</sup>

It is important here to highlight the difference between registration and licensing, as each is sought by different levels of civil authorities in the United States. Registration processes require fewer conditions to be fulfilled at the time of entry, thus making it easier to enter the market. Licensing is much more difficult process though, as these involve proving and establishing certain conditions for licensure in addition to front-end screening of applicants. As a result, registration processes are less onerous, while extensive review and ongoing supervision are necessary for licensing programs. As a rule, the federal government pursues registration while state authorities license MSBs. Both, however, create a framework for the supervision of who can operate an MSB and ensure their compliance with anti-money laundering and counter terror finance obligations.

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<sup>65</sup> Dennis Jacobo, 'Gov't Regulations at Top of Small-Business Owners' Problem List', Gallup Inc. (24 October 2011) <<http://www.gallup.com/poll/150287/gov-regulations-top-small-business-owners-problem-list.aspx>> accessed 31 December 2015.

<sup>66</sup> See, Courtney J. Linn, 'One-hour Money Laundering Prosecuting Unlicensed Money Transmitting Businesses Under 18 U.S.C. § 1960' (2007) 8 University of California- Davis Business Law Journal 138.

<sup>67</sup> For much of the "Roaring Twenties", Benjamin Cardozo headed the state's unified judiciary as chief judge of the New York Court of Appeal and many considered his appointment to the United States Supreme Court in 1932 as something of a demotion.

At the federal level, those performing hawala services are subject to a number of conditions to operate legally. First among these requirements is that all hawala businesses register with FinCEN using Form 107, which all MSBs are required to complete.<sup>68</sup> It must also obtain a state license. This registration must be renewed every two years. Failing to register or renew with FinCEN can result in large civil and criminal penalties like those detailed above.<sup>69</sup> This is probably one of the simplest things hawala businesses can do to stave off scrutiny from the authorities and avoid consequences, but almost none ever do this much. Importantly, there is no excuse for failing to register with FinCEN or obtain a state license.<sup>70</sup>

After this, a hawala business is required to familiarize itself with potential risks it faces in terms of money laundering and create a set of policies and procedures to limit the abuse of their services by criminals and then to produce a written plan of action.<sup>71</sup> This can include asking questions and investigating about the source and destination of the funds, profiling clients based on the backgrounds depending on the circumstances. The program need not be as detailed and involved as that of major MSBs, but needs to fit the business' needs.

This is part of a larger goal all financial services providers and banks must operate under in terms of complying with anti-money laundering and counter-terrorist financing provisions of the Bank Secrecy Act, the USA PATRIOT Act and other relevant legislation.<sup>72</sup> There is no single answer to going about this challenge, and there is a wide margin of appreciation for its implementation, again, depending on the risk exposure of the particular hawala business.<sup>73</sup>

Accordingly, a number of special measures exist to comply with minimising criminal risk exposure. MSBs must file SARs if a transaction over \$2000 appears to have no business purpose

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<sup>68</sup> Form 107 is available via the e-file system at <<http://bsae filing.fincen.treas.gov/main.html>> accessed 4 January 2016; 31 U.S.C. s 5330 and 31 C.F.R. § 103.41; see 31 C.F.R. § 103.11(uu) for the definition of 'money service business' which is defined very broadly.

<sup>69</sup> 31 C.F.R. s 103.41(e).

<sup>70</sup> *United States v Barre* 324 F. Supp. 2d 1173 (D. Colo. 2004) 1177.

<sup>71</sup> 31 C.F.R. s 103.125; 31 C.F.R. s 102.210.

<sup>72</sup> United States Department of the Treasury, *A Report to the Congress in Accordance with Section 359 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)* (November 2002) 6-15 <[http://www.fincen.gov/news\\_room/rp/files/hawalarptfinal11222002.pdf](http://www.fincen.gov/news_room/rp/files/hawalarptfinal11222002.pdf)> accessed 21 April 2016; Money Laundering Suppression Act of 1994 (Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994), Public Law 103-325 (1994); Bank Secrecy Act, Public Law 91-508 (1970) (codified as amended in various sections of Titles 12, 15, and 31 of the U.S. Code); USA PATRIOT Act, Public Law 107-56 (2001), (Title III, Subtitle C, § 359 amended 31 U.S.C. s 5330(d)(1)(A))

<sup>73</sup> For more information, free resources are available from FinCEN's 'Requirements for BSA' site at <[https://www.fincen.gov/financial\\_institutions/msb/msbrequirements.html](https://www.fincen.gov/financial_institutions/msb/msbrequirements.html)> accessed 4 January 2016; also, see *FATF Guidance on the Risk-Based Approach for Money Services Businesses*, Financial Action Task Force Report (July 2009) <<http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Money%20Service%20Businesses.pdf>> accessed 23 December 2015.

or seems is suspicious enough to warrant further investigation.<sup>74</sup> Needless to say, knowingly providing of material support to a terrorist or to a designated terrorist organisation is a serious problem, so MSBs are required to go the extra step to make sure their operations are not conduits for the laundering of money funding terrorism.<sup>75</sup>

Also as a result, all MSBs, including those that could be characterized as IVTS, must obtain and verify customer identity and record beneficiary information for funds transfers of more than \$3,000.<sup>76</sup> There are also separate record keeping requirements applicable to the sale of MSB products, such as traveller's checks and money orders, as well as to currency exchange transactions.<sup>77</sup> These records must be maintained for five years.<sup>78</sup>

Aside from these strict record keeping requirements are in place under the Bank Secrecy which include geographical targeting orders (GTOs). These GTOs require strict reports and records regarding services rendered to specified geographical areas and certain persons therein for limited periods of time.<sup>79</sup>

Since hawala provides an opportunity to circumvent two legally required reporting requirements designed to catch money laundering, it is important to put these at the front of the compliance programme. The first is to report all cash transactions over \$10,000.<sup>80</sup> The second is to report any transfer of more than \$10,000 (cash or otherwise) to another country.<sup>81</sup> The filing of these special 'Suspicious Activity Reports' (SAR) is done through the same e-filing system mentioned above and requires a specific style of information gathering that is designed to assist law enforcement with following up.<sup>82</sup> They should be done within 30 days. Even if the client is deemed to be guiltless upon further investigation, an SAR must still be filed, although it can listed as a matter of low-concern in the profile.

A common misperception is that the Internal Revenue Service, Department of the Treasury and, more specifically, FinCEN require all MSBs to retain expensive outside auditors for independent

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<sup>74</sup> 31 C.F.R. s 103.20.

<sup>75</sup> 18 U.S.C. s 2339A, 2339B; *United States v Hammoud* No. 3:00CR147-MU (W.D. N.C. 28 March 2001); *United States v Abdi* 342 F.3d 313 (4th Cir. 2003)

<sup>76</sup> 31 C.F.R. s 103.33(f).

<sup>77</sup> 31 C.F.R. s 103.29; 31 C.F.R., s 103.37.

<sup>78</sup> 31 C.F.R. s 103.38.

<sup>79</sup> 31 C.F.R. s 103.26.

<sup>80</sup> 31 U.S.C. s 5313; 31 C.F.R., s 1010.311.

<sup>81</sup> 31 U.S.C. s 5316; 31 C.F.R., s 1010.100.

<sup>82</sup> For more information, see *Financial Crimes Enforcement Network Suspicious Activity Report (FinCEN SAR) Electronic Filing Instructions*, United States Department of the Treasury: Financial Crimes Enforcement Network (FinCEN) (Washington, D.C., October 2012) <<https://www.fincen.gov/forms/files/FinCEN%20SAR%20ElectronicFilingInstructions-%20Stand%20Alone%20doc.pdf>> accessed 29 December 2015.

tests of both their bookkeeping and an anti-money laundering programme. This is not correct, although MSBs do need to keep these records for several years.<sup>83</sup> Although reviews and audits are important, they are not formally required so long as the books and money laundering programme remain in order, up to date and subject to periodic review by the relevant management.<sup>84</sup> This is especially advantageous to independent and smaller MSBs that may not be financially able to hire retain outside auditors. An excellent resource for keeping abreast of a changing regulatory landscape is provided to members of the National Money Transmitters Association.<sup>85</sup> Simply remaining commercially aware of potential abuses of the business by black market actors and new regulatory requirements can avoid unwanted litigation.

Another means of achieving better compliance and a chief recommendation regarding federal regulatory requirements is not a formal requirement and more of an optional 'get out of jail free card'. Section 314(b) of the USA PATRIOT Act allows financial institutions and MSBs to share information for the purposes of reporting money laundering and terrorist financing upon providing notice to FinCEN under protection of legal safe harbour.<sup>86</sup> This section in some ways deputizes those in the program, and limits their liability regarding customer information privacy and for known cases of money laundering and terrorist finance so long as a good faith effort has been made to build a working reporting system. Participation may not be mandatory, but failing to take advantage of 314(b) is, simply put, irresponsible from a business perspective.

### 4.3 Licensing and Regulatory Requirements for Hawala in New York State

New York state law differs in many significant ways from the approach of the federal government in how it regulates MSBs. In New York, it is illegal to receive money for transmission, or to transmit money without a license issued by the Superintendent of Financial Services. The Superintendent heads the New York State Department of Financial Services, which is charged with implementing all state banking laws, including those pertaining to MSBs.<sup>87</sup>

Money transmitters are covered under Article XIII-B of the New York State Banking Law, and include a wide array of product lines including traveller's cheque vendors and cheque cashing services. Licensed MSBs may employ agents who do not require a license for most of their

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<sup>83</sup> 31 C.F.R. s 1010.430.

<sup>84</sup> 31 C.F.R. s 103.125; 67 Fed. Reg. 21114 (29 Apr 2002).

<sup>85</sup> The National Money Transmitters Association website <<https://nmta.memberclicks.net/>> accessed 2 January 2016.

<sup>86</sup> USA PATRIOT Act s 314(b), implemented by 31 C.F.R., s 103.110, available to MSBs through 31 C.F.R., s 103.125.

<sup>87</sup> N.Y. Banking Law, ss 11-12(a), s 14, s 641.

functions so long as they handle their accounts through licensed transmitter, although they must be supervised and conform to all applicable laws.<sup>88</sup> Operation of an unlicensed MSB can be either a felony or misdemeanour, and as such raises the potential for federal criminal penalties under 18 U.S.C. § 1960. There is only one possible exception to this rule, and that is the United States Postal Service, which does provide some money transfer services and enjoys a unique position in the market and law by virtue of being a federal agency established under the United States Constitution.

Getting a license in New York is not a straightforward process. Detailed instructions for the application are available.<sup>89</sup> Amazingly, New York State has not yet developed the convenient and completely digital type of portal that FinCEN, as the application for an MSB license can be found here and is only available in paper form and must be submitted by mail.<sup>90</sup> The process requires a detailed background check of all principals and corporate officers to be conducted by a licensed private detective at company expense and sent with the application. Further information for investigation by the Superintendent is also required, including histories of legal proceedings, financial dealings and details of the business structure listing all ultimate beneficial owners. The license costs US\$3,000. License applicants must also complete notarised affidavits regarding their knowledge and acceptance of numerous orders made regarding freezing terrorist assets and customer information privacy. Licenses are transferable, but the objects of such transfers are subject to detailed background checks by the Superintendent, just like for initial applicants.<sup>91</sup>

The anti-money laundering provisions under New York state law are comparable to that at the federal level, including the requirement to have designated staff in charge of developing the programme and file SARs.<sup>92</sup> These effectively mirror federal law, particularly those found in the Bank Secrecy Act, in substance and form.<sup>93</sup> This is intentional, and most states follow a similar legal path in harmonising AML/KYC/CDD programme expectations with federal authorities. Ongoing money laundering training is required for staff, and the appointment of a responsible compliance officer with a minimum of three years is experience is required.

<sup>88</sup> N.Y. Banking Law, ss 648(a-c), s 651(a); 3 N.Y. Comp. Codes R. & Regs, s 406.5(a)(6).

<sup>89</sup> *Instructions: Transmitter of Money License*, New York State Department of Financial Services, <<http://www.dfs.ny.gov/banking/ialfmti.htm>> accessed 4 January 2016.

<sup>90</sup> *Application for a License to Engage in the Business of Issuing Travellers Checks, Money Orders, Prepaid/ Stored Value Cards and/ or Transmitting Money*, New York State Department of Financial Services, (DFSMT Rev 10.03.2011) <<http://www.dfs.ny.gov/banking/ialfmdta.pdf>> accessed 4 January 2016.

<sup>91</sup> N.Y. Banking Law, s 652(a); s 3 N.Y. Comp. Codes R. & Regs., s 406.11.

<sup>92</sup> 3 N.Y. Comp. Codes R. & Regs., s 417.2.

<sup>93</sup> 3 N.Y. Comp. Codes R. & Regs., ss 406.2(a), s 406.9, s 416.1; s 31 C.F.R., s 103.28.

Meticulous bookkeeping is required by state law. All records are subject to inspection by the Superintendent and subordinate agents on demand and must be kept for a minimum period that, depending on the size of the transaction, can range from six months to five years.<sup>94</sup> All MSBs, including hawala businesses, are subject to detailed quarterly reports on their revenues, changes in operations and must further voluntarily report any misconduct within 45 days of the event.<sup>95</sup>

The continued operation of an MSB in good standing requires that all licensed MSBs acquire deposit/surety bond to protect customers in case the business goes into liquidation.<sup>96</sup> The precise costs for coverage vary widely, but are necessary for the protection of consumers who deposit funds into an account in good faith of performance. Private surety can be acquired on the open market, or alternatively it can be obtained from the Federal Deposit Insurance Corporation in some circumstances. Alternative to the surety bond, the principals may put up an independent security bond in an escrow account, subject to approval by the Superintendent.<sup>97</sup> Following industry best practice, the amount required would need to be close to 10% (at least) of the businesses quarterly receipts. The state also has specific provisions to provide for such surety if no alternative is made under Title XIII-C of the New York State Banking Law.<sup>98</sup> Given that many such businesses cannot obtain surety due to low overhead, limited market access, or participant risk, an alternative fund was created by statute. In these cases where alternative means of surety or insurance bonding is not achieved, a penalty or fee of 2% is levied on all transfers handled by the MSB, the total amount being capped at \$125,000 per year.<sup>99</sup> These fines go to the 'state transmitter money fund'. It is supposed to act in cases of insolvency, bankruptcy or inability to pay and will be capitalised enough to handle all customer claims in such an event.

Licenses can be revoked for any infractions by the Superintendent following a hearing.<sup>100</sup> No warnings are necessary and the rights of appeal, although subject to judicial review, are highly unlikely to be successful if evidence for cause is established.<sup>101</sup> The system permits very little leniency after a decision has been made regarding termination of licenses.

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<sup>94</sup> N.Y. Banking Law s 39 (6); 3 N.Y. Comp. Codes R. & Regs., s 406.7.

<sup>95</sup> 3 N.Y. Comp. Codes R. & Regs. s 406.10.

<sup>96</sup> N.Y. Banking Law, ss 641-643; 3 N.Y. Comp. Codes R. & Regs., s 406.13(a-b).

<sup>97</sup> N.Y. Banking Law s 643(3); 3 N.Y. Comp. Codes R. & Regs., s 406.14.

<sup>98</sup> N.Y. Banking Law, Title XIII-C, ss 653-659.

<sup>99</sup> N.Y. Banking Law s 657; 3 N.Y. Comp. Codes R. & Regs., s 406.15.

<sup>100</sup> N.Y. Banking Law, s 642; 3 N.Y. Comp. Codes R. & Regs., s 406.8.

<sup>101</sup> N.Y. Banking Law, s 647.

## V. REFORMS TO BRING HAWALA REGULATION INTO THE 21<sup>ST</sup> CENTURY

As is apparent by now, the present status quo of hawala in the eyes of the law and the marketplace is that it is an outlaw industry. The overwhelming majority of the industry is unlicensed and operates illegally. Extremely steep fines and prison sentences are doled out. Consumers are not afforded protections offered elsewhere in the marketplace, creating a second-class customer. It is a situation in which no one wins and it limps along by choice of both the hawaladars and legislators who have no impetus to ever change it. Many reforms are needed, and it is simply not realistic to expect conformity from a uniquely decentralised financial service such as hawala.<sup>102</sup> Given the *sui generis* small-market position, cultural affinity and traditional nature of hawala (and certain other IVTS systems for that matter), some special treatment is warranted.

It is apparent that regulating a customary, low cost and very basic banking service like a modern equivalent is not working. A new regulatory approach is needed. As noted above, while the cost of complying with federal registration procedures is low, state licensing is prohibitively expensive for all but the wealthiest of hawaladars. Barriers to entering the market exist that lock out all but the already well-heeled. It is in this way that the United States and its regulatory state mirror the corrupt regimes of the 'Global South' that over-regulate and tax everything the underprivileged have into the underground economy. This is how Osama Bin Laden was able to finance his terror so easily, after all, the blame of the potential hawaladars is incidental in this regard.

As such, a new strategy would behove the regulators in dealing with the hawala industry. Between the licensing fee, incidental costs like background investigations and hefty surety bond, the regulatory state effectively acts as a barrier to entry. A lower license fee needs to be available to hawala businesses and be combined with a separate surety pay-as-you-go surety fund. In effect, a parallel regulatory and surety scheme is necessary.

A necessary feature of this parallel system would be best practice guidance on anti-money laundering and customer due diligence programmes. As it is, these are nebulous and difficult to quantify in many respects for ordinary banking and financial services institutions. The current anti-money laundering and customer due diligence standards in place are extremely vague to

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<sup>102</sup>Smriti S. Nakhasi, 'Western Unionizing the Hawala: The Privatization of Hawalas and Lender Liability' [2006-2007] Northwestern Journal of International Law and Business 475.

the point that they create excessive false red flags. In this way, wealthier countries need to target the anti-money laundering regulations with greater precision. The Organisation for Economic Co-Operation and Development and the Financial Action Task Force need to specify in great detail specifically what makes transactions high-risk and banks need assurances that they will not be prosecuted for the actions of clients when they stick to the more clearly defined standards and report criminal activity appropriately. Technology (particularly telecommunications) and global diasporas have made hawala much more competitive and needed, but our current regulation paradigm has proven an obstacle.

Finally, a general amnesty for existing hawala businesses must be extended. A promise of prosecutorial immunity for past unlicensed hawala activity can reasonably be offered under the condition of future compliance. Coupled with an outreach effort to the communities most reliant on their services, this would incentivise those non-compliant hawaladars to leave the grey market and enter the parallel regulatory system. They would also suddenly be on the tax rolls and on the radar of the national financial intelligence unit, FinCEN.

## VI. CONCLUSION

Just like a river, commerce will follow the path of a least resistance in a free market. In the era of hyper-globalisation, this route will tell an incredible story about human geography. Hawala is just one of many no doubt, but its present channel is beset by many hurdles. The Organisation for Economic Co-Operation and Development's Financial Action Task Force has noted that hawala has remained popular it usually costs less than moving funds through other means, operates 24/7, is more reliable, and requires minimal paperwork.<sup>103</sup> The present status of hawala regulation in New York and the whole United States is really untenable in its present form. It fails to recognise the independent nature of the business, the communities it caters to, and regions which most frequently rely on it for basic things like remittances. The present policy of denying pluralism is not working. If it were, fewer hawaladars would be exposing themselves to criminal prosecution.

Hawala occupies a unique place in the history and the commercial culture of the Middle East and North Africa even to this day. And although the past century has brought more change to

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<sup>103</sup> OECD (n 26).

the region than the preceding twenty combined, hawala remains much as it was at its inception: a simple money transfer system dependent upon non-competitive brokers. Although representing a tiny slice of the global transfer business, it makes up a large proportion of the business in key markets and demographics both within the region and worldwide, namely in underdeveloped countries and their diaspora communities that use hawala as a lifeline for remittances. It is for this reason that it is of great importance.

In spite of its unique origins and niche market, domestic regulators (to their credit in all fairness) look to substance rather than form in the application of existing laws. If there is one thing this article should testify to, it is that the measures imposed on larger market participants in the MSB business are simply not scalable to either the hawaladars or their customers. It is a problem of the system being designed for economies of scale instead of small businesses, an all too common within the American system of government these days.

As such, it is important to consider potential remedies capable of fixing key problems affecting the hawala industry. Some 80% of hawaladars are not in compliance with licensing, taxation, and anti-money laundering requirements. Some are simply ignorant of the law and others have no means of complying given the hurdles in place for highly profitable players such as Western Union and large international banks. Rather than relying on the law as a cudgel to compel obedience, better outreach and an alternative regulatory system as loosely outlined above would better serve the interests of both the hawala industry and the government in creating a more open, transparent and ethical money transfer industry that is free from abuse by criminal elements.

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## ***Zina: The 'Forgotten Problem' of the Shari'a in Nigeria***

Timothy Little

*Timothy Little's paper takes up the vexed and knotted issue of zina laws in Nigeria. Through a careful tracing of the intertwined histories of Shari'a law and colonial legal structures that persist to this day, Timothy explores themes of religious identity, tradition, national identity and their relation to the idea of legality. He characterizes zina as a 'forgotten problem', and argues that the fact that the zina laws, while facially neutral, impact women to a far greater extent, allows the legal persecution of women to be narrated away as a form of maintenance of cultural norms. He draws upon themes of Islamic feminism and international solidarity to sketch a way forward in protecting the rights of women in Nigeria.*

Dr. Mayur Suresh

Lecturer, SOAS School of Law

### **INTRODUCTION**

Muslim men, like men everywhere, are the last to accept that gender inequality is a social contraption rather than a religious imperative. This is natural not only because men are the ultimate beneficiaries of this inequality, but also only those who are victims of injustice tend to see it and appreciate the absurdity of attributing it to God.<sup>1</sup>

These words by Sanusi Lamido Sanusi, the crowned Emir of Kano, encompass numerous aspects of the following Article. Prima facie, they optimistically suggest some of Nigeria's elite are willing to speak on gender-inequality; however, this statement is equally symbolic of the fact that in most communities around the world, societal concerns remain predominantly represented by men. Moreover, it highlights Islam is not responsible for

<sup>1</sup> Sanusi Lamido Sanusi, 'Shariah and the Woman Question' (2000) <<http://www.hartford-hwp.com/archives/34a/081.html>> accessed 15 March 2016.

patriarchal control over women. In truth, it is the long-established universal trend of men, colonising the divine through male-centric misinterpretations of religious texts that is responsible for the existing patriarchal power-structures in the 21st century. Lastly, these words suggest that legal change cannot occur without widespread change to the beliefs and attitudes of all gender-identities; to not support or accept unjust patriarchal dominance. Therefore, it is submitted that when beliefs are grounded in habitually patriarchal interpretations of religion, it must be appreciated the pursuit for legal reform requires a long-term solidarity strategy.

Despite *zina* being a gender-neutral concept, females from poorer communities remain at most risk of conviction. Attempting to provide *zina* with a definition may appear to be a contradiction in itself. Broadly, classic *fiqh* (Islamic jurisprudence) uses *zina* as a term to describe unlawful sexual activity or adultery. *Zina* is not defined in the Quran, however the guilty are subject to pre-determined *hadd* punishment (God specified) – a married offender is punished with *rajm* (death by stoning), and an unmarried offender is punished with 100 lashes. *Fiqh* provided *zina* rulings to ensure sexual order and legitimate paternity.<sup>2</sup> Therefore, the classical rhetoric on *zina* is a 'God-given moral stipulation' that Muslims should attempt to abide by.<sup>3</sup> Nevertheless, since the advent of the 1999 Constitution of Nigeria, *zina* has been legislated in 12 northern Nigerian states, under the 'Hudud and Hudud-Related Offences' section of the respective Muslim penal codes.<sup>4</sup> Following promising decisions in *shari'a* appellate courts, *zina* has become the *forgotten problem* of the Islamic criminal justice system of Nigeria.<sup>5</sup> Fortunately, there have been no *zina* convictions for well over a decade. However, the few promising judgments only established precedents in the respective jurisdictions, and the relevant legislative provisions remain unchanged. Thus, the law lacks certainty as to whether *zina* convictions will appear once again.

<sup>2</sup> Ziba Mir-Hosseini, 'Criminalising sexuality: *Zina* laws as violence against women in Muslim contexts' [2011] SUR 7, 18.

<sup>3</sup> Ziba Mir-Hosseini and Vanja Hamzic, *Control and Sexuality: Revival of Zina Laws in Muslim Contexts* (1st edn, Women Living Under Muslim Laws 2010) 7.

<sup>4</sup> All share structural similarities, save for Niger state. Niger state enacted the 2000 Niger State Penal Code (Amendment) Law. The Act also provides for *zina* and *zina*-related offences, however it is defined and grouped in a different structure to the other states. Nonetheless, the *zina* provisions of Niger state are equally as barbaric as its counterparts.

<sup>5</sup> Widespread international attention on *zina* in Nigeria has also ceased, partly because of other concerns in the region, e.g. the increasing prominence of the Islamic fundamentalist organisation, Boko Haram.

The federation of Nigeria and all of its states are theoretically secular, as per the Constitution.<sup>6</sup> Some post-colonial scholars argue the principle of secularism is poorly adhered to in a significant part of the country because it is an imposed Western ideology.<sup>7</sup> Thus, it appears reasonable to firstly consider the status of Islamic law and gender roles in pre-colonial, colonial and post-colonial Nigeria. This Section will argue that colonial interference resulted in an oppression of the Muslim identity which continues in the present-day. This has created space for the ruling elite to use Islam as a method of over-glorifying the region's pre-colonial history,<sup>8</sup> whilst holding the concept of 'culture' as a weapon that affirms patriarchal practices and ideologies.<sup>9</sup> Whilst it is accepted that legal pluralism underpins all of Nigerian history in some way, greater emphasis will be placed on a model of pluralist legal theory in the second Section. This will allow for an in-depth analysis of the Muslim populace's longstanding struggle for autonomy over *shari'a*, and how its eventual implementation occurred with legitimacy.

During discussion of Islamic criminal law in contemporary Nigeria, and its explicit human rights breaches, it will be questioned whether the '*shari'a* implementation' movement was actually intended to reflect the social climate of the Muslim community. Or alternatively, whether it was intended to protect the ruling class' political interests and power. The specific *zina* laws under the new Muslim penal codes will be examined in the third Section. Consideration will be given to how the gender-neutrality principle behind *zina* has been largely overlooked by the courts. Attention will then turn to, *inter alia*, patriarchal Sections of 9th century Maliki *fiqh* that have been interpreted in a way that does not safeguard female rape victims from facing *zina* convictions. The fourth Section submits that it is possible to change *zina* laws through a *solidarity strategy* that includes *formal* law reform, *informal* changes to communal power-structures, and reorienting international pressures. This article will conclude by amalgamating these arguments to support the overall argument; Nigerian

<sup>6</sup> Constitution of the Federal Republic of Nigeria 1999, Article 10: '[t]he Government of the Federation or of a State shall not adopt any religion as State Religion'.

<sup>7</sup> Leela Fernandes, *Transforming Feminist Practice: Non-Violence, Social Justice and the Possibilities of a Spiritualized Feminism* (1st edn, Aunt Lute Books, San Francisco 2003) 102.

<sup>8</sup> Andy Greenwald, 'Postcolonial Feminism in Anthills of the Savannah' (2012)

<<http://www.postcolonialweb.org/achebe/greenwald3.html>> accessed 9 December 2015.

<sup>9</sup> Ethel Crowley, 'Third World Women and the Inadequacies of Western Feminism' (2014)

<<http://www.globalresearch.ca/third-world-women-and-the-inadequacies-of-western-feminism/5372515>> accessed 9 December 2015.

*zina* laws must be incrementally dismantled in a way that ensures females are not subjugated to live under patriarchal interpretations of *shari'a*, and forces Nigeria to fulfil its domestic and international human rights obligations.

## I. BACKGROUND: HISTORY OF ISLAMIC LAW AND GENDER ROLES

An assessment of Islamic law and gender roles throughout Nigeria's history is imperative when understanding the context behind the present *zina* laws. Throughout this Section, emphasis will be placed on the form of Islamic law that existed in pre-colonial Nigeria, and how the colonial regime and its continuing legacy ultimately oppressed the Muslim identity. The focus will then shift to how the region's colonial past allowed for an 'over-glorification' of the pre-colonial era, and why such a movement inherently overlooks gender rights.<sup>10</sup>

### Islamic Law in Pre-Colonial Nigeria

The practice of Islam in Nigeria was introduced during either the 9th,<sup>11</sup> or 10th century,<sup>12</sup> and remains the predominant religion in the northern region. In 1804, the political landscape of northern Nigeria was heavily influenced by a religious movement sometimes referred to as the Jihad of Shehu Usman Dan Fodio. The movement resulted in the first application of Islamic law in formal judicial structures during the 19th century, following the creation of the Sokoto Caliphate.<sup>13</sup> By the time northern Nigeria was under colonial control, a court system already existed with Islamic law matters tried before an *alkali* (Islamic law judge).<sup>14</sup> The Quran, the Sunnah and sources of *shari'a* formed the body of Islamic law, and its application was without restrictions.<sup>15</sup> No formal building was used as a courthouse, and the *alkali* would hear cases in his home or travel to other locations.<sup>16</sup> Hiskett asserted that despite

<sup>10</sup> Please note: the spelling of many Islamic concepts and even names of certain individuals vary between sources.

<sup>11</sup> Auwalu H Yadudu, 'Colonialism and the Transformation of Islamic Law: in the Northern States of Nigeria' [1992] J Legal Plur Unoff Law 103, 110.

<sup>12</sup> Rose C Uzoma, 'Religious Pluralism, Cultural Differences, and Social Stability in Nigeria' [2004] BYU L Rev 651, 655.

<sup>13</sup> (n 11) 110.

<sup>14</sup> A B Yusuf, *Nigerian Legal System: Pluralism and Conflict of Laws in the Northern States* (1st edn, National Publishing House, New Delhi 1982) 33.

<sup>15</sup> (n 11) 110.

<sup>16</sup> C N Ubah, 'Islamic Legal System and the Westernization Process in the Nigerian Emirates' [1982] J Legal Plur Unoff Law 69, 70.

the administration of Islamic law developing considerably from the period of the 1804 Jihad, the Islamic identity and upholding of justice in accordance with *shari'a* 'was not seriously threatened' prior to colonial rule.<sup>17</sup> There is still much debate centred around the jurisprudential standing of *shari'a* in pre-colonial Nigeria. Yadadu claimed that 'Islamic law applied in a fairly unqualified manner throughout the region during the pre-colonial period'.<sup>18</sup> Nigeria consists of numerous heterogeneous Muslim communities which have resulted from a strong history of cultural exchange and legal pluralism in the northern region.<sup>19</sup> Within each separate group's interpretation and application of Islamic law, there has been a historic influence of individual customs and cultural practices.<sup>20</sup> Indeed, 'what is assumed to be Muslim in one community may be unknown or even considered un-Islamic in other Muslim communities'.<sup>21</sup> Hamzic highlighted that although *shari'a* formed the basis of jurisprudence in the Sokoto Caliphate,<sup>22</sup> it did not produce a homogenous *fiqh* or preclude the Hausa majority from also continuing the application of customary laws.<sup>23</sup> Furthermore,

[F]or Hausa Muslims[,] Shari'a did not exercise complete monolithic control over litigation, but was one of several possibilities for finding legal relief. The choice was... most likely weighed on the balance of personal experience and social identity as often as that of faith.<sup>24</sup>

In support, Salamone submitted Islamic law in the territory was 'strongly tempered by custom' and that "'pure" Islamic law is not and was not in the past practised in Northern Nigeria'.<sup>25</sup> However, Salamone seemingly formed this view by observing Islamic law's customary influences, and then recognising the lack of judicial evidence to suggest otherwise.<sup>26</sup> In contrast, it is argued that determining the 'purity' of Islamic law from court records alone is a misguided approach. Although Islamic law contains rules that are

<sup>17</sup> M Hiskett, *The Sword of Truth: The Life and Times of Shehu Usman dan Fodio* (1st edn, Oxford University Press, New York 1973) 144.

<sup>18</sup> (n 11) 108.

<sup>19</sup> (n 3) 121.

<sup>20</sup> *ibid.*

<sup>21</sup> Muhammad Umar, 'Gender Issues in Application of Islamic Law in Nigeria' [2007] AJ 29, 43.

<sup>22</sup> T Falola et al, *A History of Nigeria* (1st edn, Cambridge University Press, Cambridge 2008) 73.

<sup>23</sup> (n 3) 121.

<sup>24</sup> M Wren-Bivins, *Telling Stories, Making Histories: Women, Words, and Islam in Nineteenth-century Hausaland and the Sokoto Caliphate* (1st edn, NH: Heinemann, Portsmouth 2007) 126.

<sup>25</sup> Frank Salamone, 'The Clash Between Indigenous, Islamic, Colonial and Post-Colonial Law in Nigeria' [1983] J Legal Plur Unoff Law 15, 29.

<sup>26</sup> (n 11) 113.

judicially enforceable, adherence to its norms are largely dictated by the conscience of the believer.

Despite opposing views regarding the jurisprudential standing and 'purity' of Islamic law in pre-colonial northern Nigeria, it is clear that *shari'a* and a Muslim way of life was central to the majority's identity.

### Colonial Influence on Islamic Law

#### *The 'Indirect Rule'*

The majority of northern Nigerian Muslims feared Islam would be prohibited under British control.<sup>27</sup> However, the High Commissioner, Lord Lugard, enacted a policy which brought the pre-existing court system under the British style of administration, and became known as the 'Indirect Rule'. Some have argued that because the introduction of the Indirect Rule allowed for native administration, any transformations to the substance and form of customary laws could not be connected to colonial policies.<sup>28</sup> However, Lugard's intentions were clear. He had previously stated that some matters would become illegal 'even though sanctioned by native law or religion',<sup>29</sup> and the native courts were permitted to enforce customary laws provided they did not encroach on (the British perception of) 'natural justice and humanity'.<sup>30</sup> This clearly applied an 'irresistible pressure to modify [native laws] closer to the canons of Western societies'.<sup>31</sup> In support, Allot provided how colonialism ultimately transformed the pre-colonial judicial institutions:

These institutions were left in place, and originally were given considerable freedom to function in a traditional way. Reforms were however gradually introduced, which led to the native courts being progressively anglicised in their jurisdiction, their personnel and their procedure... the use of written process to summon parties and witnesses; the training of court members; the

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<sup>27</sup> (n 16) 71.

<sup>28</sup> (n 11) 109.

<sup>29</sup> Frederick Dealtry Lugard, 'Papers of Frederick Dealtry Lugard, Baron Lugard of Abinger' [1858-1919] MSS Brit Emp (Rhodes House Library), s 65.

<sup>30</sup> (n 16) 71.

<sup>31</sup> (n 16) 69.

eventual selection of court members on the basis of their qualifications rather than their customary position – all these changes were gradually introduced in most of the British territories. The end result was that by the closing of the period of the British colonial rule, the so-called native courts... bore little resemblance to the traditional institutions which they gradually replaced.<sup>32</sup>

Ubah described this transformation as the 'westernization process', and argued it impacted most substantially on *hudud* punishments,<sup>33</sup> as they did not operate in line with Lugard's concept of 'natural justice and humanity'. *Rajm* for *zina* was replaced with a fine or imprisonment.<sup>34</sup> This example is not submitted to support *hudud* punishments, but instead highlight how colonialism restricted Muslim autonomy over religious practices. Whilst some Muslim countries embraced Western values, they were clearly imposed on the Nigerian Muslims by external power.<sup>35</sup> Another argument is that the re-shaping of Islamic law was initiated by embracing the capitalist mode of production.<sup>36</sup> This argument may have merit regarding matters such as property rights under the land tenure system. However, it is difficult to find an isolated link between Marxist principles and the transformation of offences such as *zina*. In support, Yadadu questioned, '[W]here does economic determinism come in to give a plausible rationale for a principle of Islamic law decreed in the holy Qur'an or extracted from it and other sources of the Shari'ah?'<sup>37</sup>

As will be seen, weakened autonomy of Islamic law under the 'Indirect Rule' has enabled ruling elites in contemporary Nigeria to manipulate perceptions of what re-gaining the Muslim identity requires.

### *Over-Glorification of Pre-Colonial History*

Following the colonial regime, 'the North entrenched itself in a policy of self-protective withdrawal from Western culture, whereas people in the South were deeply influenced by

<sup>32</sup> A N Allott, 'What is to be done with African customary law?' [1984] *Journal of African Law* 57, 58.

<sup>33</sup> (n 16) 71.

<sup>34</sup> *ibid* 72.

<sup>35</sup> (n 16) 69.

<sup>36</sup> (n 11) 108.

<sup>37</sup> *ibid* 109.

it'.<sup>38</sup> This introduces another issue stemming from colonialism which results in inadequate recognition of women's rights.

Adultery laws appeared under the British-style of criminal and penal codes in the latter half of the colonial period, and capital punishment for the offence was prohibited.<sup>39</sup> Prima facie, this might add weight to the argument that colonialism could not have influenced existing *zina* laws in contemporary Nigeria. However, attention must turn to one of the cornerstones of post-colonial theory, described by Fanon as the 'cultural nationalist phase'.<sup>40</sup> It asserts the first step taken at the time of colonial independence is the 'reclamation of the previously disparaged and disrespected culture'.<sup>41</sup> Peterson stated this phase offers a 'service of dignifying the past and restoring...[Muslim] self-confidence'.<sup>42</sup> In contrast, it is submitted this phase also leads to an over-glorification of the pre-colonial society that once existed. Such over-glorifications can be problematic for gender-equality. Restoration of incompatible patriarchal practices establishes rigidity in the law to adapt to the gender-neutral principles that should be expected in the present-day. Indeed, Greenwald claimed the 'result of the glorification of pre-colonial culture is the acceptance of, or refusal to deal with, inherent issues of gender inequality or abuse within the society'.<sup>43</sup> In support, it is submitted that gender-inequality has been perpetuated partly by the ruling elite in contemporary northern Nigeria, who have implemented or supported, poorly drafted and gender-bias provisions of Islamic law. For example, the supposed 're-introduction' of *zina*, despite it being legally obsolete in the overwhelming majority of all Muslim countries prior to the 20<sup>th</sup> century.<sup>44</sup> In 1959, Anderson wrote of an unreported northern Nigerian case that concerned *zina* and homicide.<sup>45</sup> The married woman in question confessed to *zina*, however the Native Court rejected her testimony 'on the ground that a woman is not a competent witness in a criminal litigation'.<sup>46</sup> As will be seen in Section III, this example is in stark contrast to the evidential rules seen in contemporary *zina* trials. In addition, no documentation or evidence of capital

<sup>38</sup> Lissi Rasmussen, *Christian-Muslim Relations in Africa: The Cases of Northern Nigeria and Tanzania Compared* (1<sup>st</sup> edn, British Academic Press, London 1993) 43.

<sup>39</sup> O Kane, *Muslim Modernity in Postcolonial Nigeria: A Study of the Society for the Removal of Innovation and Reinstatement of Tradition* (1st edn, Brill, Leiden 2003) 93.

<sup>40</sup> F Fanon, 'National Culture' in Ashcroft B et al (eds), *Post-Colonial: Studies Reader* (Routledge 2003).

<sup>41</sup> (n 8).

<sup>42</sup> Kirsten Holst Petersen, 'First Things First: Problems of a Feminist Approach to African Literature' in Ashcroft B et al (eds), *Post-Colonial: Studies Reader* (Routledge 2003).

<sup>43</sup> (n 8).

<sup>44</sup> (n 3) 21.

<sup>45</sup> J N D Anderson, 'Conflict of Laws in Northern Nigeria. A New Start. ' [1959] ICLQ 443, 444.

<sup>46</sup> The woman's husband had murdered his friend, and so there were no other witnesses. see (n 14) 145.

punishment exists for *zina* offences in Nigeria before the introduction of the 1999 *hudud* legislation.<sup>47</sup> There appears to be a lack of evidence suggesting *zina* was an integral part of pre-colonial Nigerian society. Thus, it seems to have re-appeared as a result of over-glorification.

It has also been suggested the rights afforded to women in pre-colonial Nigeria were mostly determined by their social-class, not gender. For example, the majority of females were not allowed formal education under the rule of Shehu Usman dan Fodio. However, his daughter, Nana Asma'u, was a respected teacher, poet, writer and counsellor to the Caliph.<sup>48</sup> When the social status of the women convicted of *zina* in contemporary Nigeria is considered in Section III, it would appear class continues to influence which rights women are afforded. In addition, most women in the Sokoto Caliphate during the 19<sup>th</sup> century freely chose not to wear *hijab* (head covering).<sup>49</sup> During colonial times, *hijab* became symbolic of the Muslim resistance.<sup>50</sup> However, *hijab* did not remain symbolic of the Muslim female population's strength and unity against colonial oppression. It is now a compulsory part of the female dress code,<sup>51</sup> enforced by an over-glorified patriarchal interpretation of customs that supposedly existed in the Muslim communities of pre-colonial northern Nigeria.

#### *Use of 'Culture' as a Patriarchal Weapon*

The concept of 'culture' is used universally to facilitate patriarchal dominance in politics and the attached legal systems. Nigeria is of no exception. Crowley asserted the concepts of 'culture' and 'tradition' can be purposefully confused within politics, arguing the result of this confusion is often the subordination of women.<sup>52</sup> By appearing to take a religiously conservative approach, politicians are enabled to claim, for example, that they wish to preserve traditional family structures, for the 'cause' of restoring a lost 'culture'. It is therefore of little surprise that this most often subjugates women to the roles of mother and

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<sup>47</sup> (n 3) 122.

<sup>48</sup> Oluwakemi Adesina, 'Women, Shari'ah, and Zina in Northern Nigeria' [2010] *African Nebula* Issue 2 43, 44.

<sup>49</sup> (n 3) 121.

<sup>50</sup> *ibid.*

<sup>51</sup> (n 3) 121.

<sup>52</sup> (n 9).

housewife.<sup>53</sup> El Sadaawi suggested that when politicians are wanting to appeal to a Muslim majority, particular sections from the Islamic texts are taken to justify their political interests. Therefore, by supposedly 'restoring' *zina* into Muslim life,<sup>54</sup> politicians gather support from the Muslim populace. In practice, however, such religious politics reproduces gendered perceptions of religious 'purity', which is 'projected onto the material bodies of women', and encourages repressive beliefs regarding women's sexuality.<sup>55</sup>

A common trend in Nigerian politics is the claim to prioritise achieving social and political stability. As a result of colonialism, military rule, and tensions with the more secular South, a common view is that northern 'stability' will be achieved by restoring the Muslim identity through '*shari'a* implementation'. However, there is irony in hegemonic institutions using religious identity and tradition in the struggle against secularism, particularly because their own interests are gaining greater state power and control.<sup>56</sup> Nonetheless, the supposed restoration of 'culture' results in affirming patriarchal ownership of women in all aspects of life. As will be seen when attention turns to the turbulent journey towards *shari'a* implementation, supporter confidence was clearly placed in the image often portrayed by conservative leadership. However as highlighted by Crowley, '[this] conservatism is called "culture" but it really is "tradition": [here,] culture... is seen as something to which we return[,] rather than a complex and dynamic contemporary process'.<sup>57</sup>

Various regimes in Nigeria's history have resulted in a sense of oppression amongst the Muslim population. Crowley and Greenwald's submissions illustrate the grounds that have led to the ruling elite now using *zina* as a weapon that exacerbates the oppression of women with legitimacy in Nigeria's pluralist legal system. This argument is strengthened by considering the '*shari'a* implementation' movement, in the following Section.

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<sup>53</sup> *ibid.*

<sup>54</sup> Which *fiqh* delivered rulings on for the purpose of ensuring legitimate paternity in the family unit, as discussed.

<sup>55</sup> (n 7) 102.

<sup>56</sup> *ibid* 104.

<sup>57</sup> (n 9).

## II. LEGAL PLURALISM AND SHARI'A IMPLEMENTATION

The concept of legal pluralism is not confined to the colonial and post-colonial nations, however it is most commonly applied to such contexts.<sup>58</sup> This Section argues that the substance and form of Islamic law in post-colonial Nigeria has been re-shaped significantly by legal pluralism, and this is particularly clear under what is now a federal legal system. Legal pluralistic theory allows one to investigate the rationales behind legal change, and thus, how *zina* has 're-appeared' under *shari'a* implementation. Attention will also be given to the social impact of using religion in politics, and how this has transitioned into formalised law that oppresses the rights of women.

### Pluralist Legal Theory

The concept of 'legal pluralism' is without a set definition. Menski claims that Ehrlich made the earliest contribution to the body of pluralist legal theory,<sup>59</sup> through his assertion that law 'exists side by side with other factors in society which may heavily influence or even in practice override it'.<sup>60</sup> Northern Nigerian pluralist, Ahmed Beita Yusuf, defined legal pluralism as, 'the differential retention of some relatively distinctive legal institutions by individual groups and organisations within a single society'.<sup>61</sup> He added, '[t]hat is to say a legal system is pluralistic if there exist two or more interacting juridical sovereignties within a given community, region, state or political entity'.<sup>62</sup> Yusuf claimed this definition allowed for the assertion that legal pluralism applies to societies of all complexities, and would appear in all social environments that encompass a 'hierarchical politico-social structure'.<sup>63</sup> In support, Weber added, every sub-group that exists under any form of political organisation is undoubtedly subject to distinct rules and structures that aim to control the behaviour of its members.<sup>64</sup> In a submission that widens the boundaries of legal pluralism even further, Pospisil claimed that no 'human society' could even exist with only one legal institution.<sup>65</sup> He was of the opinion that each 'social segment' of a human society would

<sup>58</sup> J Griffiths, 'What is Legal Pluralism?' [1986] J Legal Plur Unoff Law 1, 5.

<sup>59</sup> Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd, Cambridge University Press, New York 2006) 92.

<sup>60</sup> J M Kelly, *A Short History of Western Legal Theory* (1<sup>st</sup> edn, Clarendon Press, Oxford, 1992) 362.

<sup>61</sup> (n 14) 13.

<sup>62</sup> *ibid.*

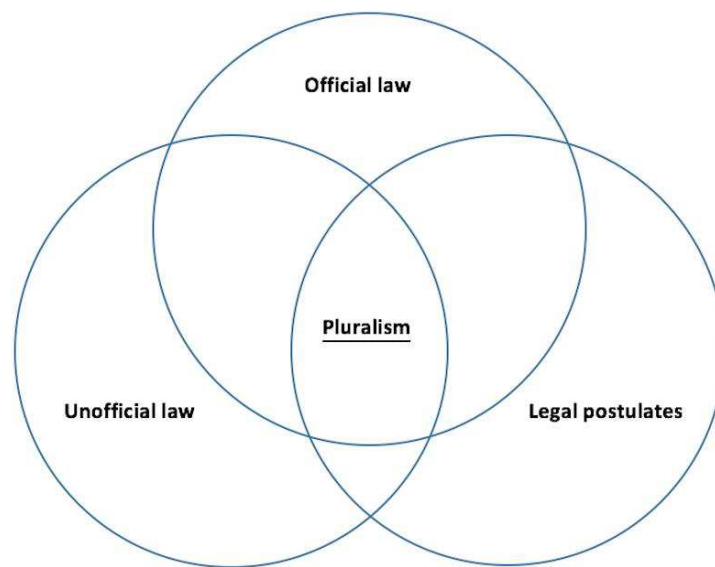
<sup>63</sup> (n 14) 13.

<sup>64</sup> Weber M et al, *Law in Economy and Society* (1st edn, Simon and Schuster, 1967) 17.

<sup>65</sup> L Pospisil, *Anthropology and Law: A Comparative Theory of Law* (1st edn, Harper and Row, New York 1971) 107.

possess a distinguishable legal-type structure that would regulate its members, and each structure would be distinguishable from all others.<sup>66</sup> Pospisil's argument appears to support Hamzic and Salamone's previous assertions regarding pre-colonial Nigeria, that the substance and form of Islamic law in each sub-group was heavily influenced by unique customs. Moreover, the theorem of Japanese pluralist, Masaji Chiba, illustrates the all-encompassing nature of legal pluralism.

*Masaji Chiba's 'Tripartite Model of Law'*<sup>67</sup>



*Figure 1*

Chiba's theorem of legal pluralism consists of *official law*, *unofficial law* and *legal postulates*. Whilst using Japanese law to illustrate the functionality of the tripartite model, he claimed that it would be entirely applicable in all societies.<sup>68</sup> It is acknowledged that when applied to a modern context, much of Chiba's work tends to inaccurately undervalue Western jurists' ability to detach from their own social conditioning. However, the tripartite model remains a useful tool when analysing the development of legal structures heavily influenced by natural, customary and positivist law.

<sup>66</sup> *ibid.*

<sup>67</sup> This diagram was influenced by Werner Menski's *Law as Overlapping Circles*. see (n 60) 189.

<sup>68</sup> Gordon R Woodman, 'Book Review: Masaji Chiba, *Legal Pluralism: Toward a General Theory Through Japanese Culture*' [1992] JLP 141, 143.

Chiba believed, '[t]he conception of legal pluralism emerged when other systems of law were found working in reality together with the "law", [whether] in harmony or in conflict'.<sup>69</sup> According to Chiba, *official law* includes positivist state law, as well as customary, religious, local and family law – provided it has been authorised by the State.<sup>70</sup> *Unofficial law* is the system made up of practices that are only authorised by 'a general consensus of a certain circle of people', and specifically not by the State.<sup>71</sup> Finally, Chiba held that any norms and values that are not rules created by the state or by a sub-group, are considered part of the *legal postulates* system.<sup>72</sup> Interestingly, despite clear attempts to weaken legal centralism, it is submitted that Chiba's three-level structure is clearly based on the assumption that *official law* i.e. positivist law, will always remain superior of other legal systems in the model. Chiba's model will be analysed in greater detail to illustrate how, *inter alia*, zina has been enacted with legitimacy, and why this creates difficulties in the pursuit for legal reform.

### The Struggle for Shari'a Implementation

Appeals were allowed from the Native Courts to the superior 'British' courts during the colonial era, and this was worrisome to the Muslim populace.<sup>73</sup> The introduction of the Moslem (*sic*) Court of Appeal was later championed as a safeguard from appeals being referred to the 'British' courts.<sup>74</sup> This was not successful, as criminal law was under the jurisdiction of the Moslem Court of Appeal, so appeals were nonetheless often referred to the 'British' High Court.<sup>75</sup> Furthermore, until 1960, northern Nigeria was the only region outside of Arabia where substantive and procedural Islamic criminal law was applied.<sup>76</sup> Therefore, due to the East and West's cultural differences with the North, much of the

<sup>69</sup> Masaji Chiba, *Legal Pluralism: Towards a General Theory Through Japanese Legal Culture*, (1<sup>st</sup> edn, Tokai University Press, Tokyo, 1989) 1-2.

<sup>70</sup> *ibid* 5-6.

<sup>71</sup> (n 70) 6.

<sup>72</sup> (n 60) 125.

<sup>73</sup> Philip Ostien and Albert Dekker, 'Sharia and National Law in Nigeria' in J M Otto (eds), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden, Leiden University Press 2010) 565.

<sup>74</sup> E A Keay and S S Richardson, *The Native and Customary Courts of Nigeria* (1st edn, Sweet & Maxwell, London, 1966), 56.

<sup>75</sup> *ibid*.

<sup>76</sup> N Anderson, *Law Reform in the Muslim World* (1st edn, Athlone Press, London, 1976) 27.

country felt legal reform in the North was necessary, especially regarding Islamic criminal law.<sup>77</sup>

### *The 'Settlement of 1960'*

Shortly before independence, the North's leaders agreed for its legal system to be federated with the East and West, in the 'Settlement of 1960'.<sup>78</sup> All forms of criminal law were replaced with new Penal and Criminal Procedure Codes, and were applicable in all courts, regardless of religion. Thus, all matters of criminal law became part of state law.<sup>79</sup> This compromise was reached because it was believed to be the North's best attempt to 'keep up with the pace set by the Eastern and Western Regions in the race for independence', however, it was supposedly less 'ready' than the others.<sup>80</sup> The agreement established a new plural legal structure consisting of state, religious and customary law. It is submitted the North reached such a compromise because of an engrained mind-set that non-Western legal systems are wholly dependent on Western legal structures, particularly so when creating a federal structure. Chiba added:

Western law is normally regarded as universal when considered from the fact that it has been received and utilised by non-Western countries as the basis of their own state legal systems. It is accordingly natural that jurisprudence ... tends to observe the development of a non-Western legal system as a history of received Western law.<sup>81</sup>

Chiba's assertion appears valid. Clearly, there was pressure on the North to conform with the political and legal climate set by the regions that were inherently more welcoming of a Western-style legal structure. In response, the Sharia Court of Appeal was established by the northern ruling elite. It was given the same judicial standing as the Regional High Court,<sup>82</sup> and had jurisdiction over both personal and civil Islamic law disputes, which were

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<sup>77</sup> (n 74) 566.

<sup>78</sup> (n 14) 33.

<sup>79</sup> (n 3) 124.

<sup>80</sup> (n 74) 567.

<sup>81</sup> Masaji Chiba, *Asian Indigenous Law in Interaction with Received Law*, (1<sup>st</sup> edn, KPI, London, 1986) v.

<sup>82</sup> (n 74) 567.

unappealable.<sup>83</sup> Chiba's theory of *official law* appears to explain how the North's ruling elite could legitimately establish the Sharia Court of Appeal under the state legal system, but with its own developing body of law; '...religious law may be partially included in or accommodated by state law, but partially functioning out of the jurisdiction of the latter, thus forming its own system from state law'.<sup>84</sup>

Despite it being said that the North was not as 'ready' to be incorporated into a federal legal system, it seems that commendable attempts were made to preserve a Muslim identity whilst remaining adequately flexible in a pluralistic legal system. Until the 'Settlement of 1960' dissolved in 1979, it has been claimed the arrangement for the most part worked properly and effectively.<sup>85</sup> Unfortunately, further setbacks to the Muslim identity ensued.

#### *1979 Constitution of Nigeria*

Following a military takeover, two state creation exercises meant that Nigeria was divided into 19 states by 1976,<sup>86</sup> 10 of which were situated in the northern region.<sup>87</sup> It has been said that the creation of states made the North 'more palatable to the rest of the country', however it must also be highlighted that at the time, all of the states were merely legal replicas of the regions from which they originated.<sup>88</sup> A result of the state creation exercises was the proposal to include a Federal Sharia Court of Appeal to the new constitution.<sup>89</sup> The proposal was highly contentious and is referred to as the '*Shari'a* debate of 1976-1978'. During this time, the 'Christian opinion on the Federal Sharia Court of Appeal had polarised and hardened'.<sup>90</sup> The Christians had the majority of the votes, therefore the proposal was subsequently ruled out.<sup>91</sup> It is submitted that this further oppressed the Muslim population's

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<sup>83</sup> Furthermore, the Moslem Court of Appeal was removed as a result, however as the Muslim jurists were now additionally seated on the Native Courts Appellate Division of the High Court. Thus, they were given a role in determining the development of not only Islamic Law, but all legal matters before the Native Courts. see (n 3) 124.

<sup>84</sup> (n 82) 5-6.

<sup>85</sup> (n 74) 567.

<sup>86</sup> *ibid* 570.

<sup>87</sup> *ibid*.

<sup>88</sup> (n 74) 570.

<sup>89</sup> Whereas having one *Shari'a* Court of Appeal for the northern region during the 'Settlement of 1960', there became 10 separate *Shari'a* appellate courts, i.e. one for each state. The judgments from these courts were unappealable. However, despite being legal replicas, conflicting judgments between each appellate court was possible, and thus a new federal appellate court that could deal with matters concerning the *shari'a* was seen by many as the best solution. see (n 74).

<sup>90</sup> (n 74) 571.

<sup>91</sup> *ibid*.

identity, culture and autonomy of *shari'a*. Once again, the space to later politicise a patriarchal interpretation of Islam expanded.

The resulting 1979 Constitution further oppressed the recognition of Muslims in the plural system. Importantly, it also changed the structure from the Westminster-style system, to a presidential system similar to the United States. *Shari'a* appellate courts were allowed, 'for any state that requires it', under Article 240(1).<sup>92</sup> However, decisions from these courts could then be heard before the Federal Court of Appeal, which could then appear before the Supreme Court.<sup>93</sup> This was not favourable amongst the Muslim populace;

As the Muslims saw it, these new losses for Islamic law in Nigeria were the result, not of a negotiated settlement voluntarily entered into by the Muslim leadership, as in 1960, but of humiliating defeat at the hands of Nigeria's Christians.<sup>94</sup>

The *shari'a* courts had lost autonomy over Islamic 'personal' law matters, and the previous right for Sharia Court of Appeal judges to sit in the High Court was eradicated.<sup>95</sup> Three years later the country was again under military rule, and various sections of the constitution were suspended.<sup>96</sup>

### **The Present Constitution: 1999 Constitution of Nigeria**

After two failed attempts at creating a constitution before the end of another military regime, the current 1999 Constitution was eventually introduced. All states are empowered to enact criminal legislation. The Constitution is 'essentially the 1979 constitution reinstated'.<sup>97</sup> Chapter VII of the 1999 Constitution establishes a five-level court hierarchy. At the top level is the Supreme Court, and the *shari'a* trial courts are at the bottom level. The jurisdiction of the *shari'a* appellate courts must be considered. Article 277(1) stipulates:

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<sup>92</sup> Constitution of the Federal Republic of Nigeria 1979, Article 241(1).

<sup>93</sup> (n 3) 124.

<sup>94</sup> (n 74) 572.

<sup>95</sup> *ibid.*

<sup>96</sup> (n 3) 124.

<sup>97</sup> (n 74) 574.

The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.<sup>98</sup>

Therefore, with consideration given to Article 277(2), this section appears to hold that a state's *shari'a* appellate court is competent to deal with matters concerning guardianship, marriage, divorce and inheritance. Furthermore, when read against Article 277(1), the *shari'a* appellate courts seemingly have jurisdiction in these areas, 'in addition to such other jurisdiction as may be conferred upon it by the law of the State'. Additionally, Article 277(2) provides that *shari'a* appellate courts may also be competent to deal with 'any other question' of Islamic personal law. The wideness of this provision has led to some describing it as the 'delegation clause', because it can quite easily be interpreted in a way that delegates power to *shari'a* appellate courts to hear matters of Islamic criminal law.<sup>99</sup> This is precisely what happened in the northern states, and the constitutionality of this will be discussed in Section II.C.1. Furthermore, 'Independent Sharia Panels' (ISPs) exist in some southern states, and are not included in Chapter VII.<sup>100</sup> Thus, ISPs would be considered *unofficial law* under Chiba's model, as they are bodies applying Islamic law in states without *shari'a* courts.<sup>101</sup> ISPs appear to be a type of private arbitration or alternative dispute resolution, established by Muslims desiring remedies in accordance with Islamic law.<sup>102</sup> Despite mostly hearing matters of Islamic personal law and family law, ISPs have ruled on criminal cases. In 2002, an ISP convicted Sulaiman Shittu of *zina* in Oyo state. As an unmarried man, he was punished with 100 lashes.<sup>103</sup> It is difficult to conclude whether the ISP would have considered *rajm* to be within its jurisdiction had Shittu been married. Clearly, the application of criminal law would be in contravention to the Constitution and the law of Oyo state.

<sup>98</sup> Constitution of the Federal Republic of Nigeria 1999, Article 277(1).

<sup>99</sup> (n 74) 580.

<sup>100</sup> (n 74) 577.

<sup>101</sup> Chiba claims the *unofficial law* category applies to 'those unofficial practices which have a distinct influence upon the effectiveness of official law; in other words[,] those which distinctively supplement, oppose, modify or undermine any of the official laws, including state law'. see (n 82) 6.

<sup>102</sup> (n 3) 126.

<sup>103</sup> (n 74) 577.

Thus, capacity for gender-bias rulings from ISPs that are relatively unrecognised, is particularly concerning.

The Constitution appears to have curtailed development of less gender-biased judicial decisions. Decades before the 1999 Constitution, evidence suggests departures from the 'markedly gender-biased' Maliki *fiqh* in Islamic personal and family law cases before *shari'a* appellate courts.<sup>104</sup> It is submitted judges deliberately departed from Maliki doctrines in cases concerning inheritance, marriage, divorce and guardianship,<sup>105</sup> to decide cases in a manner that was culturally relevant to the developing Muslim community.<sup>106</sup> However, since the introduction of the 1999 Constitution, evidence suggests that such promising judgments have been significantly reduced,<sup>107</sup> due to 'fear and intimidation, cultivated by the rise of Muslim right-wing politics'.<sup>108</sup> In addition, the plural system under the Constitution continues to provide religion as an ongoing topic of political debate.<sup>109</sup> This appears to be a method of arousing public attention and controversy rather than political importance. Furthermore, it is unhelpful in the pursuit for gender-equality. Hamzic argued many resulting statutory changes have been deeply patriarchal, 'whereby concerns for gender justice would be either completely neglected or politically misused in order to repudiate an opposing view'.<sup>110</sup> Nasir highlighted that the opinions of Muslims in politics and law have almost exclusively been represented by males,<sup>111</sup> adding that any deliberation and enactment of laws have 'unquestionably been... conceived and driven along by core groups of Muslim men, who tapped into deep reservoirs of emotion among the Muslim masses'.<sup>112</sup> The clear reluctance to recognise the positive attributes of mixed-gender representation in politics and law for all Muslims, displays Crowley's assertions in practice. Clearly, *culture* is the weapon continuing what the *traditional* female societal role *was*, and avoiding any consideration of what it *ought* to be.

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<sup>104</sup> (n 3) 128.

<sup>105</sup> *Sharia Implementation in Nigeria: The Journey So Far* (1st edn, BAOBAB for Women's Human Rights, Lagos 2003) 4.

<sup>106</sup> (n 3) 128.

<sup>107</sup> (n 106) 5.

<sup>108</sup> (n 3) 128.

<sup>109</sup> AA Oba, 'The Sharia Court of Appeal in Northern Nigeria: The Continuing Crisis of Jurisdiction' [2004] *Am J Comp L*, 859.

<sup>110</sup> (n 3) 125.

<sup>111</sup> J Nasir, 'Sharia Implementation and Female Muslims in Nigeria's Sharia States' in Ostien P (ed), *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook* (Ibadan, Spectrum Books Ltd 2007) 94-95.

<sup>112</sup> *ibid* 93.

*Constitutionality of Islamic Criminal Law*

Before considering the constitutionality of Islamic criminal law, the political approach behind its implementation must be considered. Public support for the new Muslim penal codes was achieved by the ruling elite praying upon the historic oppression of the Muslim identity. Indeed, religious-type language can be as charged as any 'secular' language of power.<sup>113</sup> Ahmad Sani Yerima was elected Governor of Zamfara State on 9 January 1999.<sup>114</sup> He stated that during his campaign for leadership in the province that was over 90% Muslim:<sup>115</sup>

[I]n any town I went to, I first started with... chanting Allahu Akbar 10 thrice. Then I always said, 'I am in the race not to make money, but to improve on our religious way of worship, and introduce religious reforms that will make us get Allah's favour. And then we will have abundant resources for development'.<sup>116</sup>

Of course, such statements have little relevance with Islam's 'deeper mystical truths'.<sup>117</sup> Governor Sani used Islam as a tool to gain secular power and political authority.<sup>118</sup> Furthermore, by putting faith at the forefront of his campaign, he was able to relegate matters usually of great political importance in a modern context, for example, appropriate utilisation of state resources to encourage economic growth. For a man who was supposedly determined to improve the Muslim way of worship, and explicitly stating he was not 'in the race to make money', it is interesting to note that throughout his position of leadership, he was persistently accused of bribery,<sup>119</sup> as well as misappropriating and mismanaging federal funds.<sup>120</sup> The Zamfara State Shari'a Penal Code,<sup>121</sup> was legislated on 27 January 2000, and conferred power to the lowest *shari'a* courts to determine Islamic civil *and* criminal matters.<sup>122</sup> This was popular amongst the Muslim population because it was perceived as a reclamation of autonomy over the Islamic criminal law they conceded in the 'Settlement of

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<sup>113</sup> (n 7) 12.

<sup>114</sup> (n 74) 575.

<sup>115</sup> *ibid.*

<sup>116</sup> (n 74) 575.

<sup>117</sup> (n 7) 103.

<sup>118</sup> *ibid.* 105.

<sup>119</sup> (n 3) 130.

<sup>120</sup> M Abubakar, 'Groups Petition Anti-Graft Panel over Alleged Fraud in Zamfara' (2002)

<<http://news.biafranigeriaworld.com/archive/ngguardian/2002/jun/15/article09.html>> accessed 21 March 2016.

<sup>121</sup> Zamfara State Shari'a Penal Code 2000.

<sup>122</sup> (n 3) 129.

1960'.<sup>123</sup> As a result, political leaders of the 11 other northern states also took advantage of the new constitutional power to implement similar legislation.<sup>124</sup>

The constitutionality of criminal matters being heard in the *shari'a* appellate courts is unclear. Save for Article 277, all other relevant Articles of the Constitution clearly stipulate the *shari'a* appellate courts' jurisdiction concerns only 'Islamic personal law'.<sup>125</sup> Adding to the confusion, appeals from *shari'a* appellate courts are to appear before the Federal Court of Appeal. However, under Article 244(1), the Federal Court of Appeal only has jurisdiction to deal with 'civil proceedings before the Sharia Court of Appeal with respect to any question of *Islamic personal law* which the Sharia Court of Appeal is competent to decide'.<sup>126</sup> Thus, what appears to be an accurate interpretation leads to the unreasonable conclusion that *shari'a* appellate courts are indeed the final courts of appeal for all Islamic criminal law cases. Furthermore, there has been no explicit or implicit guidance offered by the Supreme Court on the matter.<sup>127</sup> However, the High Courts of Borno and Niger have declared any matters heard beyond those of Islamic personal law are unconstitutional,<sup>128</sup> and thus appeals from *shari'a* appellate courts in these states go to the High Courts.<sup>129</sup> As already mentioned, Article 10 explicitly establishes that the federation of Nigeria and its states are secular, and criminal law does not appear on the Exclusive Legislative List.<sup>130</sup> Indeed, '[i]f Article 277 is read by itself, the position of sharia states looks strong. If it is read in the light of its history and of the rest of constitution (*sic*), the position looks much weaker'.<sup>131</sup> A more detailed analysis of the *hudud* sections of these codes will be discussed in Section III.

### *Domestic & International Human Rights Breaches*

Fundamental rights are supposedly guaranteed in Chapter IV of the 1999 Constitution. It is submitted the new Muslim penal codes, as well as the mechanisms for implementation,

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<sup>123</sup> (n 74) 575.

<sup>124</sup> *ibid.*

<sup>125</sup> Gunnar J. Weimann, 'Islamic Criminal Law in Northern Nigeria: Politics, Religion, Judicial Practice' in David Powers (ed) *Islamic Law and Society* (Amsterdam, Brill 2010) 91.

<sup>126</sup> (n 74) 581 (emphasis added).

<sup>127</sup> (n 3) 126.

<sup>128</sup> (n 126) 91.

<sup>129</sup> (n 74) 581.

<sup>130</sup> Constitution of the Federal Republic of Nigeria 1999, Part 1 Second Schedule.

<sup>131</sup> (n 74) 581.

'violate *all* of these constitutional rights'.<sup>132</sup> Article 42 sets out the right to freedom from discrimination,<sup>133</sup> and yet many of the rules of evidence are explicitly gender-biased. For example, a female witness's testimony being half of a male's, or in some cases, not allowing female witnesses at all.<sup>134</sup> Article 19 guarantees the right to freedom of expression, despite some of the Islamic Penal Codes explicitly forbidding 'acts of gross indecency by way of kissing in public,... and other related acts of similar nature capable of corrupting public morals'.<sup>135</sup> Such provisions also appear to breach the supposedly guaranteed right to freedom of thought, conscience and religion under Article 38. Quite clearly, *rajm* and lashing for *zina* offences would also be an infringement on the right to life (Article 33), and freedom from torture or other inhuman or degrading treatment (Article 34(1)(a)), respectively. Shivji argued that such reluctance to adequately protect fundamental rights in post-colonial nations stems from the fact that the 'human rights ideology is part of an imperialist ideology'.<sup>136</sup> This issue carries varied opinion, and it is not within the ambit of this article to consider in full. Nonetheless, it does not provide valid justification for inadequate protection of fundamental rights. All Nigerian constitutions have included a chapter safeguarding human rights since its independence.<sup>137</sup> It could be argued the provisions are merely 'window dressing', encouraged by the engrained mind-set that Western law should form the basis of non-Western legal systems.<sup>138</sup> Nevertheless, it is most certainly clear the ruling elite do not feel ensuring freedom of discrimination based on gender to be of much political importance. This is supported by Nigeria's compliance with its international human rights obligations.

Nigeria is party to a considerable number of international human rights treaties.<sup>139</sup> Parties to such treaties are required to implement the relevant human rights provisions by removing or amending any national legislation that would be in breach. However, despite the country ratifying such treaties, they are not applicable in domestic law until they have been

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<sup>132</sup> (n 3) 127.

<sup>133</sup> Constitution of the Federal Republic of Nigeria 1999, Article 42.

<sup>134</sup> (n 3) 127.

<sup>135</sup> Philip Ostien et al, 'Changes in the Law in the Sharia States Aimed at Suppressing Social Vices' in Philip Ostien (ed), *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook* (Ibadan, Spectrum Books Ltd 2007) 53.

<sup>136</sup> Issa G. Shivji, *The Concept of Human Rights in Africa* (1st edn, Codesria Book Series, London 1989) 3.

<sup>137</sup> (n 3) 127.

<sup>138</sup> As argued by Chiba. see Section III.B.1.

<sup>139</sup> The African Charter on Human and Peoples' Rights 1987; the Convention on the Elimination of All Forms of Discrimination against Women 1979; the International Covenant on Economic, Social and Cultural Rights 1966; the International Covenant on Civil and Political Rights 1966; the Convention on the Rights of the Child 1989.

'domesticated', as per Article 12 of the Constitution. Domestication requires enactment from the National Assembly, ratification by the majority of the individual states' houses of assembly, and signing by the Nigerian President.<sup>140</sup> This provision has allowed for international human rights treaties to be unenforceable in practice. Hamzic highlighted that treaties of regional political importance have been domesticated with little difficulty,<sup>141</sup> and yet numerous treaties aiming to protect the fundamental rights of woman remain without force.<sup>142</sup> This supports the argument that Nigeria's human rights obligations will only be upheld and protected if they are underpinned by ulterior political motives. This is problematic in the pursuit for gender-equality partly because, as already discussed, women are significantly under-represented in politics and law. Furthermore, many provisions of international law are protected by the *jus cogens* principle.<sup>143</sup> Therefore, the very existence of *zina* provisions clearly shows that Nigeria is unquestionably in violation of international human rights law, regardless of the caveat under Article 12. Menski argued that 'African people, despite legal attempts to root out discrimination are... made to feel that they cannot achieve those global standards, because these are predicted on "white" models and ideals'.<sup>144</sup> It is inaccurate and unhelpful to discuss in general terms, the legal, political and social climate of Africa as a continent. It is accepted that recognition of human rights in Nigeria as a legal concept is more recent than in Western jurisdictions. However, the supposed 'legal attempts to root out discrimination' have been largely perfunctory and superficial. Realistically, it is the ruling elite which maintains its autocratic rule by conveniently minimising its engagement in democratic processes that explains Nigeria's poor adherence to international human rights standards.<sup>145</sup> Indeed, the Human Rights Watch 2015 World Report placed government corruption and reluctance to suppress political violence as significant reasons for the reduced status of human rights in Nigeria.<sup>146</sup>

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<sup>140</sup> (n 74) 598.

<sup>141</sup> For example, the African Charter on Human and Peoples' Rights 1987.

<sup>142</sup> (n 3) 134.

<sup>143</sup> For example, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

<sup>144</sup> (n 60) 467.

<sup>145</sup> (n 3) 135.

<sup>146</sup> Anonymous, 'World Report 2015: Nigeria' (Report 2015) <<https://www.hrw.org/world-report/2015/country-chapters/nigeria>> accessed 27 February 2016.

### III. ZINA LAWS IN CONTEMPORARY NIGERIA

Despite the Penal and Criminal Procedure Codes (PCPC) of the North being evidently patriarchal, Hamzic submitted that its 'negative impact on access to gender justice has been relatively low compared to the detrimental consequences of the new *hudud*... provisions'.<sup>147</sup> Promising judgments in *zina* appellate cases received widespread domestic and international coverage, however there are numerous factors that firmly establish the fundamental rights of women under these provisions remain inadequately protected.

#### *Hudud Provisions, Social Status and Rape*

The Muslim penal codes all share similarities in relation to *zina*.<sup>148</sup> *Zina* appears under the 'Hudud and Hudud-Related Offences' section of these codes, and is described in the following manner:

Whoever, being a man or a woman fully responsible, has sexual intercourse through the genital (*sic*) of a person over whom he has no sexual rights and in circumstances in which no doubt exists as to the illegality of the act, is guilty of the offence of *zina*.<sup>149</sup>

If the convicted is married, the punishment is *rajm*. If unmarried, the convicted receives 100 lashes.<sup>150</sup> Furthermore, it is submitted that *zina* laws under the current procedure codes are absent of the previous provisions that presented difficulties for the prosecution in securing *zina* convictions.<sup>151</sup>

Despite reproducing some 89 per cent of the 1960 Penal Code's sections,<sup>152</sup> the Muslim penal codes are organised and articulated in an unprecedented way; they take Muslim-specific criminal justice to an extreme, liminal realm, infused with

<sup>147</sup> For example, despite the PCPC providing that women can only be accused of *zina* by their father, husband or *wali* (custodian), the current Muslim procedure codes omit this provision, and therefore *zina* accusations can be made by anyone who wishes to do so. see (n 74) 590.

<sup>148</sup> (n 74) 590.

<sup>149</sup> *Shari'a Penal Code Law 2002* (draft), Article 125.

<sup>150</sup> Depending on the state, a term of imprisonment may also be added to the punishment of 100 lashes for unmarried offenders. This is perhaps suggestive of the legacy left behind from the colonial regime, and thus would appear in line with Allot's assertions regarding the colonial transformation of Islamic legal structures and procedures. see (n 32).

<sup>151</sup> (n 3) 130.

<sup>152</sup> (n 74) 589.

both the neo-conservative interpretations of some classical Maliki *fiqh* and the 'innovative' compoundable injunctions that make the scope of 'Islamic' crimes and punishments even wider than in the old jurists' books.<sup>153</sup>

In addition, almost all women charged with *zina* have been poor, and from rural backgrounds.<sup>154</sup> This appears to support the argument that rights afforded to women in Nigeria continues to be largely determined by social status, in a similar way to Nana Asma'u receiving a formal education in pre-colonial Nigeria.<sup>155</sup> It has been submitted that '[i]t is curious that the [*hudud*] cases involve mostly the hewers of wood and the drawers of water in the society... why are the rich not also targets of this system?'<sup>156</sup> It is argued the upper echelons of Nigerian Muslims have suffered significantly less under the *hudud* provisions, partly because they were deliberately enacted to dictate public morality, and 'ensure social control..., [and] to mask the less-palatable vices of the ruling elite'.<sup>157</sup> Emir Sanusi claimed, '...even a cursory student of Islamic history knows that all the trappings of gender inequality present in Muslim Society have socio-economic as opposed to religious roots'.<sup>158</sup> Hamzic added, '[p]oor women... have been chosen to stand *hudud* trials because they are expected to have the least political and social connections, and legal and religious education, necessary to understand their situation'.<sup>159</sup> Case law strongly supports this claim, as will be discussed in Section III.B.

Moreover, also included under the *hudud* provisions are, *inter alia*, *qadhaf* (false accusation of *zina*) and rape. In regard to rape, the provisions hold that any '[s]exual intercourse by a man with his own wife is not rape'.<sup>160</sup> Furthermore, patriarchal selection of Islamic evidential rules have allowed for female rape victims to be convicted of *zina*, whilst males are acquitted due to lack of evidence. All of the most prominent classical *fiqh* do not consider pregnancy as proof of *zina*,<sup>161</sup> save for Maliki *madhhab*.<sup>162</sup> The majority position is that a defendant

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<sup>153</sup> (n 3) 130.

<sup>154</sup> Ayesha Imam and Sindi Medar-Gould et al, 'How Not to Help Amina Lawal' (Open Letter 2003) <<http://www.counterpunch.org/2003/05/15/how-not-to-help-amina-lawal/>> accessed 10 December 2015.

<sup>155</sup> Discussed in Section I.B.2.

<sup>156</sup> (n 106) 26.

<sup>157</sup> (n 3) 131.

<sup>158</sup> (n 1).

<sup>159</sup> (n 3) 131.

<sup>160</sup> *ibid*.

<sup>161</sup> For example, Hanafi, Shafi'i and Hanbali *fiqh* hold that unmarried pregnancy is not admissible evidence of *zina*, in absence of four witnesses or confession. see Quraishi A, 'Islamic Legal Analysis of Zina Punishment of Bariyu Ibrahim

cannot be prosecuted solely on circumstantial evidence. Moreover, in absence of a confession, the Quran explicitly requires four witnesses to prove *zina*.<sup>163</sup> However, Nigerian case law suggests otherwise. On 19 January 2001, *Bariya Ibrahim Magazu*, an 'unschooled and poor rural teenager',<sup>164</sup> received 100 lashes under the by-laws of Zamfara state.<sup>165</sup> The 13-year-old had been impregnated when raped by three men, as payment for her father's debts.<sup>166</sup> Unable to meet the high evidential threshold of four respectable male Muslim witnesses,<sup>167</sup> Magazu's pregnancy (i.e. circumstantial evidence) was considered to be proof of *zina*, as per Maliki *fiqh*. The men were acquitted due to lack of evidence.<sup>168</sup> This decision was significantly gender-bias, even under Maliki *fiqh*. A fundamental *shari'a* principle is that *hadd* punishment should not occur where there is *any* element of doubt.<sup>169</sup> Thus, the pregnancy evidence should have been negated by Magazu's clear claims of coercion and lack of consent. In support of Hamzic's statement above, this case certainly displays how the penal codes have capacity to take Islamic criminal law to new brutally patriarchal territory. This becomes particularly clear when the previously mentioned *zina* case during colonial times is considered, where even the woman's confession of *zina* was not sufficient evidence to secure a conviction.<sup>170</sup>

### Case Law and Precedence

*Safiyatu Hussaini*<sup>171</sup> was the first to be sentenced to *rajm* for *zina* under the new penal codes, following conviction in the Gwadabawa Upper Shari'a Court in Sokoto. Hussaini was allegedly raped by Yakuba Abubakar.<sup>172</sup> Pregnancy, *inter alia*, was considered evidence of *zina*. Abubakar was released for lack of evidence. The court refused to perform DNA testing

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Magazu' (Legal Analysis 2001) <[http://www.mwllusa.org/topics/marriage&divorce/islamic\\_legal\\_analysis\\_of\\_zina.htm](http://www.mwllusa.org/topics/marriage&divorce/islamic_legal_analysis_of_zina.htm)> accessed 8 March 2016.

<sup>162</sup> Ogbu Kalu, 'Safiyya and Adamah: Punishing Adultery with Sharia Stones in Twenty First Century Nigeria' [2003] African Affairs Vol 102 Issue 408 389, 396.

<sup>163</sup> Quran: Surah 24: verses 2-4.

<sup>164</sup> (n 155).

<sup>165</sup> (n 3) 7.

<sup>166</sup> (n 162).

<sup>167</sup> Yuksel Sezgin, 'The Role of Alternative Legalities in Bringing about Socio-legal Change in Religious Systems' [2010] J Comp L 245, 255.

<sup>168</sup> The trial court even convicted Magazu of *qadhif* in addition to *zina*, however the charge was lifted on appeal.

<sup>169</sup> (n 162).

<sup>170</sup> (n 45) 444.

<sup>171</sup> *Safiyatu Hussaini Tungar-Tudu* USC/GW/F1/10/2001.

<sup>172</sup> Anonymous, 'The Real Crime is Being a Woman' (News Article 2002) <<http://www.scotsman.com/lifestyle/the-real-crime-is-being-a-woman-1-594303>> accessed 12 March 2016.

on the child to establish whether Abubakar was the father, as it was 'contrary to Muslim law'.<sup>173</sup> Interestingly, other jurisdictions where Islam is constitutionally declared as the State religion, have held DNA testing should be mandatory in cases where rape has been alleged.<sup>174</sup> Moreover, the victim's social status contributed to her conviction, and many claim she was ignorant to the fact she could have even committed an offence.<sup>175</sup> In Hussaini's own words, '[i]t is because I am poor, my family is poor, and I am a woman [translation from Hausa as in the original]'.<sup>176</sup> Hussaini was later acquitted by the Sokoto Shari'a Court of Appeal on 26 October 2001. Moreover, the new Muslim procedure codes permit *zina* charges to be made by anyone, including police.<sup>177</sup> Promisingly, this judgment appears to have barred police from being empowered to file *zina* charges in Sokoto state.<sup>178</sup> At time of writing, no *zina* charges appear to have been filed by police in Nigeria since the judgment.

At present, the most widely publicised Nigerian *zina* trial is the case of *Amina Lawal*.<sup>179</sup> Lawal was charged with *zina* on 15 January 2002, and was later sentenced to *rajm* by the *shari'a* trial court at Bakari in Katsina state. Lawal's new-born daughter, Wosilat, was considered proof of *zina*. Whilst the Quran stipulates *zina* is gender-neutral, the male defendant – Yahayya Muhammad, was acquitted for lack of evidence. Once again, Lawal was uneducated,<sup>180</sup> and her confession was made when not understanding the charge.<sup>181</sup> Lawal's second appeal succeeded before the Katsina Shari'a Court of Appeal and she was acquitted on 25 September 2003. Lawal's defence purposefully did not contest the qualities of *shari'a*.<sup>182</sup> Instead, the central reasons for the positive judgment were procedural flaws and the Maliki doctrine of the 'sleeping embryo', as Lawal was a divorcee.<sup>183</sup> This judgment is promising as it seems to have established precedent that pregnancy or childbirth by an unmarried women is not, by itself, sufficient evidence of *zina*.<sup>184</sup> Despite the precedent only existing formally in

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<sup>173</sup> (n 107) 13.

<sup>174</sup> The Supreme Court of Pakistan (2013 SCMR 203) held that, '[a]dministration of DNA tests and preservation of DNA evidence should be mandatory in rape cases'.

<sup>175</sup> (n 48) 46.

<sup>176</sup> (n 173).

<sup>177</sup> (n 74) 590.

<sup>178</sup> (n 106) 14.

<sup>179</sup> *Amina Lawal* USC FT/CRA/1/02.

<sup>180</sup> Jeff Koinange, 'Woman Sentenced to Stoning Freed' (News Article 2004)

<<http://edition.cnn.com/2003/WORLD/africa/09/25/nigeria.stoning/>> accessed 12 March 2016

<sup>181</sup> (n 180).

<sup>182</sup> (n 168) 255.

<sup>183</sup> The Maliki doctrine of the 'sleeping embryo' provides that a divorcee may carry a pregnancy for up to 5 to 7 years. Therefore, Lawal's child was deemed to have been fathered by her ex-husband. see (n 180).

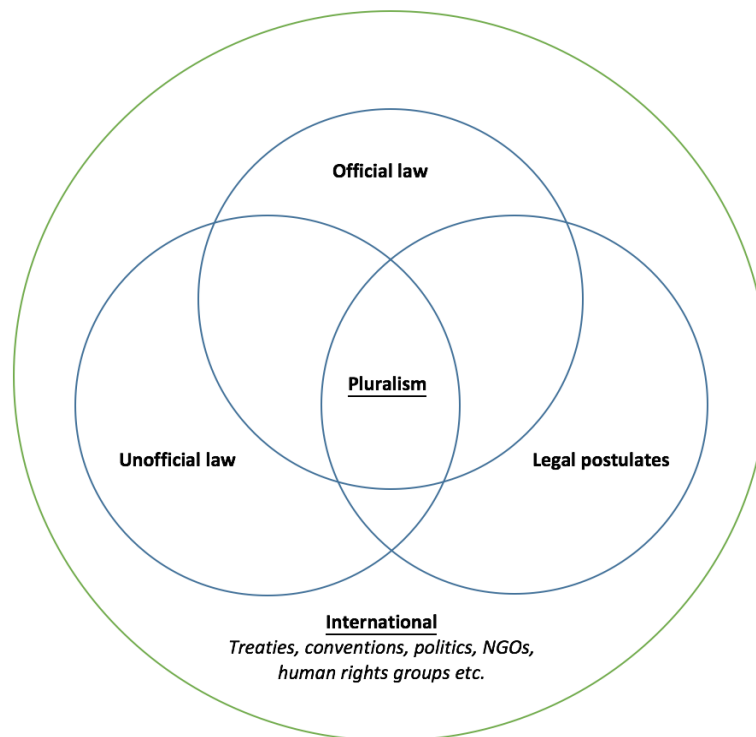
<sup>184</sup> (n 3) 139.

Katsina state, there have not been any subsequent *zina* proceedings at time of writing. In contrast, it is not entirely certain whether the precedent will only apply to previously married women. If so, females in similar circumstances of Magazu would not be protected, especially if a confession is obtained due to a misunderstanding of the offence or inadequate legal representation.

#### IV. LEGAL REFORM: THE SOLIDARITY STRATEGY

All of the previously mentioned cases attracted international attention and scrutiny. International pressure can significantly impact legal systems in a modern context. However, it is important to ensure these pressures are not counter-productive. This Section advocates for a *solidarity strategy* that ensures all international and domestic efforts are best utilised to achieve realistic and longstanding legal reform. Consideration of international influences appears to add a fourth system to Chiba's model. It is submitted legal pluralism in 21st century Nigeria is more accurately reflected in the following model:

Figure 2



### International Pressures: Western Misunderstanding of Muslims in a Nigerian Context

An appreciation of how international interference impacts Nigerian gender rights in practice is crucial in ensuring solidarity. Unfortunately, international pressures have been more damaging than beneficial at times. It has been argued that '[d]ominant discourses and the mainstream international media have presented Islam (and Africa) as the barbaric and savage Other'.<sup>185</sup> When many of the Western populace choose to believe the structurally racist and xenophobic media portrayals of Islam, ineffective attempts for change can result from clear misunderstandings by even the well-intentioned. It provides glib justification for the 'claims of right-wing politico-religious extremists' in all societies,<sup>186</sup> and this was exemplified in Magazu's sentence. An international letter campaign ensued and many contained misunderstood and inaccurate claims. This motivated Governor Sani to bullishly resist and react to the 'letters from the infidels'.<sup>187</sup> Magazu's sentence was illegally brought forward, despite the court holding that no punishment would occur before a minimum period of one year.<sup>188</sup>

One may be forgiven for assuming that mere letters from concerned individuals could not significantly impact on the outcome of *zina* cases. However, letter campaigns and petitions have been encouraged by international women's rights groups, unequipped with sufficient knowledge of Islam in the context of Nigeria. This was criticised by Imam and Medar-Gould,<sup>189</sup> in a public letter during the Lawal case.<sup>190</sup> It was highlighted there is an 'unbecoming arrogance in assuming that international human rights organisations... know better than those directly involved', and this results in 'actions that fly in the face of... express wishes'.<sup>191</sup> Indeed, international pressure has never resulted in a victim being pardoned for *zina*.<sup>192</sup> It is accepted that people will naturally want to help the victims and thus take immediate action. This carries great risk in practice. A common criticism of many Western feminisms is the misconception that '[f]eminism aspires to represent the

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<sup>185</sup> (n 155).

<sup>186</sup> *ibid.*

<sup>187</sup> *ibid.*

<sup>188</sup> *ibid.*

<sup>189</sup> Ayesha Imam (Board Member) and Sindi Medar-Gould (Executive Director) are part of 'BAOBAB for Women's Human Rights' – a NGO that focuses on protecting the rights of women, men and children in Nigeria, and in particular, those who have been convicted under new penal codes since 2000.

<sup>190</sup> (n 155).

<sup>191</sup> *ibid.*

<sup>192</sup> However, it is accepted that international attention could possibly encourage the appellate courts to make less gender-bias judgments.

experiences of all women'.<sup>193</sup> However, any aspirations to represent the experiences of *all* women is misguided, and not particularly helpful. Mohanty criticised the way some Western feminisms attempt to 'appropriate and "colonize" the fundamental complexities and conflicts which characterize the lives of women of different classes, religions,... [and] cultures'.<sup>194</sup> This is particularly problematic when such appropriations are attached to the view that Islam as a religion is an oppressive and patriarchal blockade in the pursuit for gender equality. To be in solidarity for legal reform, many Western activists must abandon the misconception that reforming gender-bias laws is simply a case of rescuing Muslim women from overtly-dominant Muslim men. Imposing morals without engaging in political, legal and religious understanding is a great omission in the pursuit to reform Nigerian *zina* laws. Of course, numerous knowledgeable non-governmental organisations (NGOs) and women's rights groups are central components to the solidarity strategy,<sup>195</sup> and will be discussed below. There are however, numerous ways that international human rights groups and concerned individuals can be of assistance without negatively impacting the pursuit of *zina* reforms. For example, by providing financial assistance to the victims and defence teams when possible,<sup>196</sup> gaining an understanding of Islamic feminism in a Nigerian context, and attempting to eradicate the many Western misconceptions of gender roles in Islam as a religion, through dialogue and discussion.

### Islamic Feminism and the Central Roles in the Solidarity Strategy

The central argument of Islamic feminism is that the Quran establishes the principle of equality for all people, but that the principle has been distorted by patriarchal interpretations, practices and ideologies.<sup>197</sup> When misogyny is asserted into select words of

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<sup>193</sup> Catharine A MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' [1983] *Journal of Women in Culture and Society* Vol 8 No 41 635, 637.

<sup>194</sup> Chandra T Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses', in Ashcroft B et al (eds), *Post-Colonial: Studies Reader* (Routledge 2003), 260.

<sup>195</sup> For example, BAOBAB, Women's Rights Advancement and Protection Alternative (WRAPA), the National Coalition on Violence against Women, and the International Federation of Women's lawyers.

<sup>196</sup> (n 155).

<sup>197</sup> Margot Badran, *Feminism in Islam: Secular and Religious Convergences* (1st edn, Oneworld Publications, Oxford 2009) 4.

the Quran, the egalitarian nature of the scripture in its totality is weakened.<sup>198</sup> Indeed, for the elite's own interests of having institutional control, they clearly treat Islam as a type of territory that they supposedly fight for, and then essentially stop those who do not comply with their interpretation from having access to it,<sup>199</sup> i.e. establishing the identity of 'the bad Muslim' or 'the sinner'. Thus, when consideration is given to the prominence of Maliki *fiqh*, promoting the non-patriarchal principle behind Islamic feminism is crucial.<sup>200</sup> Despite research suggesting awareness of Islamic feminism is increasing, it remains somewhat limited, and the idea is controversial in many communities.<sup>201</sup> Therefore, reforming *zina* provisions necessitates a long-sighted approach. Case law displays how *shari'a* can both uphold and violate women's rights. *Zina* acquittals in the appellate courts show that evidence and procedure can be changed by forcing the judiciary i.e. part of the ruling elite, to admit convictions were illegal under *shari'a*. Whereas, yielding to international pressure only suggests forgiveness for the guilty.<sup>202</sup> Therefore, the legal and non-legal defence teams in such cases play a *formal* role in the solidarity strategy. The appellate courts are less gender-biased than the lower courts.<sup>203</sup> However, by this stage the accused have suffered the trauma of social punishment, and the uncertainty of an appeal. Social change may result from acquittals, and subsequently encourage *informal* solidarity mechanisms as a result.

Beyond inadequate statutory drafting, Weimann argued that gender-bias judgments have arisen out of *shari'a* trial courts due to insufficient knowledge of Islamic criminal law.<sup>204</sup> This appears true, however the deep-seeded patriarchal ethos of a male judiciary would provide stronger reasoning for such outcomes. Thus, part of the strategy should be to encourage gender-neutral interpretations of Islam, by ultimately forcing the law to reflect the beliefs of society in judgments from all *shari'a* courts.<sup>205</sup> Indeed, Chiba's model establishes how beliefs

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<sup>198</sup> Asma Barlas, 'Globalizing Equality: Muslim Women, Theology, and Feminism', in Fereshteh Nourai-Simone (ed), *Shifting Ground: Muslim Women in the Global Era* (New York, Feminist Press 2005) 96.

<sup>199</sup> (n 7) 103.

<sup>200</sup> It is submitted that the phrase 'Islamic feminism' is less important than the promotion of the principle that the Quran establishes equality for both women and men.

<sup>201</sup> Margot Badran, 'Islamic Feminism Means Justice to Women' (Q&A 2004) <<http://www.milligazette.com/Archives/2004/16-31Jan04-Print-Edition/1631200425.htm>> accessed 9 December 2015.

<sup>202</sup> (n 155).

<sup>203</sup> *ibid.*

<sup>204</sup> (n 126) 104.

<sup>205</sup> As seen in the less patriarchal judgments of the for decades prior to the advent of the 1999 Constitution. (As discussed in Section II.C.).

can re-shape what is *official law*.<sup>206</sup> MacKinnon pessimistically claimed, 'it may be easier to change biology than society'.<sup>207</sup> In contrast, Imam quite rightly asserted part of the strategy should involve convincing the Muslim community, 'not to accept injustices even when perpetuated in the name of strongly held beliefs'.<sup>208</sup> It would be inaccurate to conclude this assertion calls for a type of Marxist revolution by only the poor communities. This article has already shown that patriarchy can stronghold the weapon of 'culture' equally as much as it is grounded in economic control. Therefore, in summary, *zina* reform firstly requires the *formal* involvement of appropriate organisations to work within the states' legal structures and achieve positive outcomes in the courts. This encourages the community to recognise religious manipulations in politics and legislation, and therefore *informally* support local counter-discourses.<sup>209</sup> Another common misconception is that women in poor communities are too concerned with basic survival to consider the status of their fundamental rights. This is not entirely correct. Adesina highlighted the dissent expressed by numerous women from poor communities during the Lawal case, primarily because they felt the gender-neutral principle of *zina* in the trial judgment was ignored.<sup>210</sup> This suggests clear engagement with Islamic feminism at the communal, and thus, *informal* level. In support, Crowley argued, '[i]nformal forms of solidarity are central to the development of such local initiatives which can be used to challenge... patriarchal power structures'.<sup>211</sup>

A strategy of solidarity has already proven to be effective in numerous ways. For example, there has been a decrease in forced marriages following activism by appropriate NGOs, in conjunction with changing social opinion, and not coincidentally, opposition by *shari'a* courts.<sup>212</sup> More specifically, during both of the Hussaini and Lawal cases, members of the community spoke publicly on the incorrect application of *shari'a*, and actively protected the victims from fundamentalist vigilantes, which would not have occurred prior to involvement of BAOBAB.<sup>213</sup> It has been said that following a general increase in women's

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<sup>206</sup> Chiba's model 'indicates... that a state may have to accept (and in that sense receive) bodies or elements or rules from other, non-state sources, which may then be formally incorporated into the official law, but were not made or created by it'. see (n 60).

<sup>207</sup> (n 194) 636.

<sup>208</sup> (n 155).

<sup>209</sup> *ibid.*

<sup>210</sup> (n 48) 53.

<sup>211</sup> (n 9).

<sup>212</sup> (n 3) 122.

<sup>213</sup> (n 155).

public opposition to some of the gender-bias provisions in Nigerian *shari'a*, politicians now appear less empowered to endorse them.<sup>214</sup> Thus, the execution of this strategy must continue.

## CONCLUSION

The *hudud* sections of the new Muslim penal codes have allowed Islamic criminal law in Nigeria to exist in a new territory of immense patriarchal dominance. Following the *few* promising judgments discussed, it might be claimed that *zina* laws no longer pose any threat to the rights of women. This claim would be incorrect. The relevant provisions remain unchanged. While this is the case, the law remains in an unsatisfactory state. *Zina* is a gender-neutral principle, and classical *fiqh* provided rulings to ensure legitimate paternity. Acquitting the male defendant whilst convicting the female, does not ensure legitimate paternity. Convicting a victim of rape does not ensure legitimate paternity. Women are still at risk.

There are multiple facets contributing to the formalised standing of Nigerian *zina* laws. Discussion of Islamic law and gender roles in pre-colonial, colonial and post-colonial Nigeria highlighted the Muslim populace's longstanding desire to have autonomy of *shari'a*, and strengthen the Muslim identity. From the reluctant compromise to conform with the legal structure of the more secular South and East in the 'Settlement of 1960', to the unfavourable further loss of legal autonomy under the 1979 Constitution, encouraged astute utilisation of certain provisions under the 1999 Constitution which resulted in increased autonomy of Islamic criminal law. Moreover, Crowley's argument clearly depicts how *culture* can be deliberately confused with the *traditions* of over-glorified pre-colonial times. This has ultimately created a blockade in the law considering what women's societal role and control over their own bodies *ought* to be. In support of this, Greenwald accurately highlighted the risks of such post-colonial movements, arguing that it results in acceptance and refusal to rectify gender-inequality. This article has clearly shown that both arguments are valid in the context of Nigeria. The analysis of religious politics has proven that solely for the benefit of the ruling elite, *culture* has been used as an impenetrable barrier guarded

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<sup>214</sup> (n 3) 140.

by patriarchal *traditions*, rather than accurately as a dynamic concept that embraces change. The applicability of *zina* laws were clearly not the main concern of the ruling elite. Governor Sani explicitly claimed money was not his concern. He will be tried for the equivalent of £3.5m fraud this year, under the common law system.<sup>215</sup> Sani also stated improving the Muslim way of worship was his aim, then did nothing whilst only Magazu was punished for *zina* – the gender-neutral concept he legislated, in violation of fundamental rights guaranteed by the Constitution and international law. Quite clearly, maintaining the appearance of restoring an oppressed *culture* was of greater importance than gender justice. Reforming *zina* laws cannot be left to men of similar moral substance to Sani. Thus, activism must continue.

This article has also highlighted the discrepancy regarding the *shari'a* appellate courts jurisdiction of Islamic criminal law, and how the constitutionality of such is unclear. Moreover, that the Constitution could even be interpreted to suggest the *shari'a* appellate courts are the final courts of appeal for all Islamic criminal law cases. As has been shown, this ambiguity can have significant impact on Nigerian citizens, and yet, any substantial authority to clarify the jurisdiction of *shari'a* appellate courts is seemingly non-existent. It seems absurd that the outcome of Magazu, Hussaini, and Lawal's cases could have been decided by potentially unconstitutional courts in regard to *zina*. The argument that gender-rights are of little importance to the ruling elite cannot be refuted. The political claim to strengthen the Muslim identity through *shari'a* implementation have included contradictory inconsistencies that have conveniently affirmed patriarchal practices.<sup>216</sup> In fact, the strongest pre-colonial element existing in contemporary *zina* laws appear to be that the rights of women are largely dictated by social class rather than gender alone. This must not continue. Regardless of the 'domestication' caveat under Article 12 of the Constitution, Nigeria must respect the *jus cogens* principle that underpins international treaties it is party to, and ensure the fundamental rights of *all* women are protected, irrespective of class. Thus, activism must continue in a way that incrementally dismantles *zina* laws, ensuring that women are not

<sup>215</sup> Yusuf Alli, 'Ex-Governor Sani to face trial for alleged N1 billion fraud' (2016) <<http://thenationonline.net/ex-governor-sani-face-trial-alleged-n1-billion-fraud/>> accessed 16 March 2016.

<sup>216</sup> For example, as previously discussed, evidence shows *hijab* was *optional* in pre-colonial times, but is now *compulsory* in the supposed 'restored culture'. In addition, the burden of proof for *zina* was historically so high that it became practically obsolete. No evidence or documentation of *rajm* for *zina* offences existed in the entirety of Nigerian history, until *shari'a* implementation after the 1999 Constitution.

subjugated to live under patriarchal interpretations of *shari'a*, and forces Nigeria to fulfil its domestic and international human rights obligations.

As the majority of the Muslim populace's beliefs are grounded in habitually patriarchal interpretations of Islam, the strategy for *zina* reforms require a long-term approach. In addition, when people from all systems under the pluralist model in Figure 2 are part of a *solidarity strategy*, the ruling elite are not as strongly positioned to ignore issues concerning gender-inequality. International pressures should be reoriented in a way that aims to achieve change by working within the Nigerian *shari'a* structure. The legal changes already achieved as a result of *formal* work by NGOs for gender-equality in Nigeria supports this claim. Importantly, *informal* activism holds considerable strength in the pursuit of reforming *zina* laws. Through the Muslim community engaging in dialogues that emphasise the equality principles of Islam, the elite will be forced to refrain from encouraging patriarchal religious practices and power-structures, that solely benefit their own power games. To conclude, attention turns to the words of James C. Scott, who claimed that:

[T]he main function of a system of domination is... to define what is realistic... and to drive certain goals and aspirations into the realm of the impossible, the realm of dreams, of wishful thinking.<sup>217</sup>

This article has shown that despite *zina* existing in a system of immense patriarchal domination, gender-equal legal reform need not remain as mere wishful thinking; it can be a reality. However, execution of the *solidarity strategy* must be persistent. *Zina* laws must not continue as the *forgotten problem*.

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<sup>217</sup> James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1st edn, Yale University Press, New York 1985) 326.

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