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EDITOR
PROFESSOR SALLY WHEELER

Queen's University Belfast
School of Law

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Guest Editors: Amanda Perry-Kessaris and Ting Xu

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Legal appropriation: taking of and by law

AMANDA PERRY-KESSARIS[1]

Kent Law School, Kent University

AND

TING XU[2]

School of Law, Queen's University Belfast

This special issue is formed of papers presented at, or inspired by, a workshop held in November 2011 on the theme of 'Legal appropriation: taking of and by law' at the London International Development Centre.[3] The purpose is to explore the many, often unexpected, ways in which law both enables appropriations and is also itself appropriated.

In order to facilitate broad discussion, the term 'appropriation' was not explicitly defined at the outset of the project. Nonetheless, a generally shared understanding is apparent in the papers collected in this special issue that: appropriation is the setting aside of a resource for a specified use; and that of special interest are cases in which the resource in question belongs, or perhaps ought to belong, at least in part, to another. Any potentially innocent appropriation is of concern when it is done without the informed consent and/or compensation of those present and future generations in whom the resources appear rightly to vest. So, it is also especially important to identify and dwell upon cases in which consent cannot ever be 'informed' and/or the appropriation can never be 'compensated'.

Law – of copyright, planning, environment, investment, land, labour – is a key technology of appropriation. It enables the appropriation of physical resources, such as when Chinese businesses buy up agricultural land in Africa, US soft-drink manufacturers dominate groundwater consumption in South India, and an Olympic park erases allotments in London's East End.[4] Law enables the appropriation of cultural resources when the stories and songs that are distinctive to the culture of a developing country are used in Hollywood films. It enables the appropriation of biological resources when European companies make pharmaceutical products based on traditional Indian remedies; and of labour when undocumented migrant workers are criminalised and

1 a.perry-kessaris@kent.ac.uk

2 t.xu@qub.ac.uk

3 Many thanks to Michelle Everson and Fiona Macmillan for their substantial contributions to the original idea; Catherine Fletcher and Jeff Waage at London International Development Centre for their patience and logistical support in relation to the workshop; the School of Law at the School of Oriental and African Studies, University of London, for financial support of the event; and Diamond Ashiagbor for co-organising it with Amanda Perry-Kessaris. Special thanks to all the participants in the workshop and this special issue.

4 For links to news reports, images and film footage, see the website in support of the Manor Gardens Allotments Society www.lifeisland.org.

subject to working conditions and poverty wages amounting to coerced or bonded labour. Contributors to this special issue show law enabling the appropriation of an enormous range of material and immaterial things: of land development rights (Xu and Gong) and women's reproductive labour (Kotiswaran); of history, and how such history 'relates to, or is translated into present-day identity' (Macmillan); of the rhetoric of sovereign credit ratings (Williams) and the discourses of Colombian gold-mining (Kane); of subversive (aboriginal and lesbian and gay) identities (Keenan); and of 'local realities' targeted by international aid projects in Afghanistan (Wimpelmann). Several papers document the facilitation by law of the appropriation of social relations – including 'networks and assemblages' in Dover (Bottomley and Moore), communal relations in the Chinese city of Wugang (Xu and Gong), and aboriginal communities in Australia's Northern Territory (Keenan). In these cases, law is seen to enable the (re)creation of insiders and outsiders; and of winners, to whom resources are given, and losers, from whom they are taken away.

Law is itself appropriated when it is reformed to support the interests and values of individuals (foreign or local) at the expense of the interests and values of those present and future generations whose welfare law ought also to serve. Law is stolen when environmental impact assessments are deregulated out of the pathway of investors in India;[5] when the laws of Iraq are rewritten by its conquerors (in preparation for further appropriations);[6] when copyright law permits an American film corporation to assert proprietary rights over a depiction of a traditional Balinese dance.[7] Participants in this special issue note the actual and attempted appropriation of whole justice systems, such as the informal justice sphere in Afghanistan (Wimplemann); and of substantive sections of the legal framework, such as the Indian criminal law regulating sex work, licensing law regulating bar-dancing and contract law regulating surrogacy (Kotiswaran).

Appropriators come in many guises: multinational corporations (Kane), governments (Xu and Gong), credit-rating agencies (Williams) and international aid organisations (Wimpelmann). Nor is there uniformity in the practicalities of appropriation. So, Anne Bottomley and Nathan Moore (in this issue) argue that we should think more of 'processes' – that is, of 'a series of asserting procedures' of appropriating. For appropriation is not only about 'the annexation of some pre-existing "thing", by some pre-existing entity that can subsequently act as "owner"'. It is also about how 'processes of appropriating assemble different agents and agendas, so as to constitute the possibility of both the "owner" and the "property" as such' (365). This processual point is also pursued by Sarah Keenan, who draws on legal geography to present appropriation 'as a spatial process' (299). The processes of appropriation may be quick, slow or of varying speed, continuous or intermittent, uni-directional or recursive: for appropriations are never fixed or complete; reshaping is an ongoing process, as is resistance of law's appropriations (Keenan). As Shimrit Lee shows, such resistance is to be found in some unlikely places – even in the unique methodology of oral history. Furthermore, resistance

5 A Perry-Kessaris, *Global Business, Local Law: The Indian Legal System as a Communal Resource in Foreign Investment Relations* (Ashgate 2008).

6 See U Mattei and L Nader, 'Constructing the Conditions for Plunder', in *Plunder: When the Rule of Law is Illegal* (Blackwell 2008) ch 5; Open Society Institute, 'III. The History of International Obligations in Iraq' and 'V.A Financial and Economic Reconstruction' in *Iraq in Transition: Post Conflict Challenges and Opportunities* (Open Society Institute and United Nations Foundation 2004) 9–20 and 55–74 <www.soros.org/initiatives/washington/articles_publications/publications/iraq_20041112>; Coalition Provisional Authorities: Regulation 1, Order 39, Order 54 <www.iraqcoalition.org/regulations/>.

7 See P Yu, 'Cultural Relics, Intellectual Property and Intangible Heritage' (2008) 81 Temple Law Review 433, 471–73 as cited by Macmillan in this volume.

to appropriation is also itself always open to appropriation: '[a]n oral history methodology does not preclude the danger of appropriation or exploitation of people's stories by researchers and practitioners' (346).

The intention of this brief introduction is to hint at the range of topics and approaches covered in this special issue. We warmly invite you to explore these and many other threads in the articles that follow.

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Appropriation of discourses: justice and corporate social responsibility in an artisanal mining community of rural Colombia

PATRICK KENNETH KANE[1]

Abstract

This article seeks to contribute to the academic debate on self-regulatory mechanisms such as corporate social responsibility (CSR) by identifying and exploring the significance of disparities in the discourses – ways in which 'aspects of the world' are 'construed' – of a multinational corporation and the community in which it operates. It focuses on a case study of a natural resource-extracting corporation in rural Colombia. In the terminology of this special issue, it is concerned with both the discourses of appropriation and the appropriation of discourses. The case study findings suggest that corporate self-regulation allows CSR to be used by corporations as a means of appropriating the discourse of justice, and at the same time leaves the impression (at least with the community) that CSR discourse is a 'discourse of appropriation'. The paper argues that this appropriation takes place in the context of Teubner's new economic and law paradigm, based on the 'almost world-wide institutionalisation of economic rationality'.

Introduction

This article seeks to contribute to the academic debate on self-regulatory mechanisms such as CSR by identifying and exploring the significance of disparities between the discourses[2] of corporations and communities. It focuses on a case study of a natural resource-extracting multinational corporation in rural Colombia. La Toma is an Afro-Colombian community located in the spectacular hills of Northern Cauca department, Colombia, where it was founded by escaped slaves over 500 years ago.[3] Since its foundation, the community's main economic activities have been independent, traditional artisanal mining and subsistence agriculture. AngloGold Ashanti has had a long-standing interest in beginning large-scale gold-mining in the area but has been met with fierce community opposition.[4]

1 Independent researcher. Dedicated to my inspirational father, Kenny Bell, who died while I was researching this paper. With special thanks to Amanda Perry-Kessaris for advice and support, and Ian Middleton and Mario Noveli for helpful and insightful comments.

2 Rose has defined discourse as 'groups of statements which structure the way a thing is thought, and the way we act on the basis of that thinking. In other words, discourse is a particular knowledge about the world which shapes the way the world is understood and how things are done in it': G Rose, *Visual Methodologies: An Introduction to the Interpretation of Visual Materials* (2nd edn, Sage Publications 2001) 142.

3 Interview with Francia Marquez, 10 August 2011.

4 Ibid.

In the terminology of this special issue, this article is concerned with both the discourses of appropriation and the appropriation of discourses. It demonstrates what insights might be gained if academics and policy makers were to take account of 'alternative, unspoken' discourses in their often somewhat narrow and self-referential debates. It is particularly timely given the 2011 adoption by the UN Human Rights Council of Professor John Ruggie's Guiding Principles on Business and Human Rights. Now the key international regulatory reference point for business and human rights, the Principles have been criticised by key groups of grassroots stakeholders for not having been incorporated in a meaningful way.[5]

The case study shows huge disparities between the discourse of the corporation and that of the community leader. It suggests that, in relying upon corporate voluntary self-regulation as a means of regulating corporations, we allow CSR to be used by corporations as a means of appropriating the discourse of justice. At the same time, the perception of supposed beneficiaries of the company's CSR initiatives is that its CSR talk is a 'discourse of appropriation', employed in an attempt to gain societal legitimacy for the corporation. The paper places the 'discourse appropriation' of CSR and corporate voluntary self-regulation in the context of Teubner's new economic and law paradigm, based on the expansion of the global market and the 'almost world-wide institutionalisation of economic rationality'.[6]

Corporate social responsibility

Economic globalisation[7] has arguably been the defining feature of the world economy during the twentieth century. Law is integral to this process, playing a facilitating or hindering role 'by either ensuring the free movement of services, goods and capital, or by erecting barriers against them'.[8] The increased mobility afforded to multinational corporations has been an important factor in what Guy Standing has termed 'the increase in the redistribution of power towards the interests of finance and industrial capital'.[9] In the context of economic globalisation, governments compete with one another to attract and retain foreign investment and thus a share of the global market, while multinational corporations are the 'drivers of the global economy, exercising dominant control over global trade, investment and technology transfers'.[10] Thus, in the globalised modern economy, multinational companies wield 'considerable political leverage in domestic and international spheres'.[11]

The economic power of multinational corporations, particularly in relation to developing countries, has given rise to concerns over the apparent lack of means for holding them accountable when they abuse that power.[12] As private actors, corporations

5 See May 2009 statement of NGOs participating in the Latin American regional consultation in Buenos Aires <www.business-humanrights.org/SpecialRepPortal/Home/Consultationsmeetingsworkshops/Regionalconsultations/under2008–2011mandate> accessed 1 October 2011. See also August 2010 letter by a group of human rights NGOs in the Democratic Republic of Congo www.escr-net.org/usr_doc/Colectif-Letter-JohnRuggie-final-eng.pdf> accessed 1 October 2011.

6 G Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses' in R Rawlings (ed), *Law, Society and Economy* (OUP 1997) 150.

7 M Wolf, *Why Globalisation Works* (Yale University Press 2004) 14.

8 B Heppel, *Labour Laws and Global Trade* (Hart Publishing 2005) ch 2, 5.

9 G Standing, 'Global Governance: The Democratic Mirage?' (2004) 35 Development and Change 1065, 1072.

10 D Kinley and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations in International Law' (2004) 44 Virginia Journal of International Law 933.

11 Ibid.

12 Kinley and Tadaki (n 10) 934.

may be held legally accountable under domestic laws (including, in some cases, by the extraterritorial application of a state's jurisdiction),[13] however they may not be held directly legally accountable under international law. Kinley and Tadaki argue that the lack of direct international legal obligations has meant that multinational corporations have been able to operate in a 'legal vacuum',[14] particularly given the context of deregulation and the 'withdrawal of the state from high levels of mandatory regulation in the business sphere', or in situations where the state is unwilling or unable to regulate.[15] This can be particularly problematic in a context where human rights violations or armed conflict are taking place.

. . . AS REGULATION

Multilateral efforts to regulate multinational corporations can be traced back to the 1970s. The New International Economic Order initiative at the UN, driven in part by concern over the economic power of multinational corporations and recognition of their capacity to inflict harm, sought inter alia to protect host state economic sovereignty and led to the establishment of UN bodies responsible for producing a UN Code of Conduct on Transnational Corporations (TNCs), an initiative which ultimately failed.[16] The most recent attempt at a multilateral initiative to regulate multinationals through binding obligations under international law was the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms), which were endorsed by the UN Sub-Commission on Human Rights and the main international human rights non-governmental organisations (NGOs), but which met with firm opposition from the international business community, which rejected the notion of binding obligations for corporations.[17] The proposal was subsequently spurned by the UN Commission on Human Rights.[18]

Following the rejection of the UN Norms in 2005, the UN Secretary General appointed Professor John Ruggie to the role of UN Special Representative for Business and Human Rights, with a mandate to 'identify and clarify international standards and policies in relation to business and human rights'.[19] In 2011, Professor Ruggie's 'Protect, Respect and Remedy' framework (henceforth the Ruggie Principles) was adopted by the UN Human Rights Council. The guiding principles take traditional international law as their starting point and reject the idea of direct legal obligations under international law for corporations, instead outlining a 'corporate responsibility to respect . . . a standard of expected conduct that is acknowledged in *virtually every voluntary and soft-law instrument related to corporate responsibility* . . . and . . . now . . . affirmed by the Human Rights Council' (my emphasis).[20] To the disappointment of those hoping for an evolutionary step in international law, Professor Ruggie has followed the traditional approach, whereby only states have the obligation to protect the human rights of their private citizens from violations by other private citizens (both legal and natural persons), and corporations, as private legal persons, are only

13 The issue of extraterritorial jurisdiction in the regulation of multinational enterprises is beyond the scope of this paper. For an in-depth analysis, see P Muchlinski, 'Multinational Enterprises and the Law' (2nd edn, OUP 2007) ch 4.

14 Kinley and Tadaki (n 10) 935.

15 Muchlinski (n 13) 113.

16 Ibid 120.

17 J Ruggie, *The Evolving International Agenda* (Harvard University John F Kennedy School of Government Faculty Research Working Paper Series 2007) 4.

18 UN Human Rights Commission Resolution 2004/11, UN Doc E/CN4/2004/L73/Rev 1 (20 April 2004).

19 Ruggie (n 17) 4.

20 Ibid 7.

accountable under domestic legal regimes.[21] Beyond domestic legal regimes, he stresses the voluntary, soft-law nature of the international responsibilities of multinational companies. Thus, the Ruggie Principles represent the pinnacle of the rise to prominence, since the 1980s, of voluntary corporate self-regulation 'as part of a business friendly climate created by the neoliberal ascendancy'.[22] Professor Ruggie's work in developing the guiding principles has been criticised by key groups of stakeholders, such as communities affected by business activities and victims' groups, for not incorporating them in a meaningful way.[23]

Voluntary corporate self-regulation falls under the umbrella of CSR. As is suggested by the name, CSR is based on the idea that a corporation bears a responsibility which extends beyond its legal duty to its shareholders to the society in which it is operating. It is a broad term which can cover a wide range of activities, 'from a philanthropic project, to engaging in political dialogue to define and redefine the standards of legitimate business behaviour'.[24] It includes voluntary self-regulation, such as corporate codes of conduct, or voluntary multilateral soft-law initiatives such as the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises.[25] Much has been written about CSR and this paper seeks to contribute by bringing in the crucial but little heard perspective of the communities which are recipients of some of the assumed benefits of CSR initiatives.

Joel Bakan has set out how the first real wave of CSR emerged during the 1930s, in response to public concern over the role which large corporations had played in causing the Great Depression, and in an effort to offer an alternative to the trend towards increased business regulation. The most recent wave of CSR began in the 1990s, after revelations about sportswear giant Nike's use of sweatshops in Asia. Such revelations led to increased scrutiny and pressure from civil society on corporations to sign up to voluntary codes of conduct, with particular emphasis on human rights and environmental protection.[26] Two defining elements can be identified in both waves: first, that CSR is a response to a decline in the poor public image of corporations and thus an attempt to improve public image and regain legitimacy; and, second, that CSR is presented as an alternative to formal sources of regulation.

High-profile allegations of involvement in human rights abuses, corruption scandals and, more recently, the financial crisis have seriously damaged corporate legitimacy over the past decade, to the point that public opinion has begun to see corporations as 'the enemies of public interest.'[27] According to Kostova and Zaheer, legitimacy has become one of the most important issues for multinational corporations.[28] The second wave of CSR initiatives can be seen as a response to the crisis of corporate legitimacy. Today CSR is a vital part of any large corporation's public relations strategy. A corporation may spend millions of pounds annually on CSR initiatives. An 'attendant industry' has grown up around them.[29]

21 For a comprehensive look at the parameters of the legal debate, see Kinley and Tadaki (n 10).

22 Muchlinski (n 13) 113.

23 See NGOs Buenos Aires consultation (n 5) and human rights NGOs letter (n 5).

24 I Castello and J Lozano, 'Searching for New Forms of Legitimacy through Corporate Responsibility Rhetoric' (2011) 100(1) Journal of Business Ethics 2.

25 See *OECD Guidelines for Multinational Companies 2011 Version* (OECD Publishing 2011) <www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf>.

26 L Roseberry, 'Towards a Discourse Analysis of the Corporate Social Responsibility/Accountability Debate' (Copenhagen Business School Center for Corporate Social Responsibility, Working Paper 02 2007) 8.

27 Costello and Lozano (n 24) 1.

28 T Kostova and S Zaheer, 'Organizational Legitimacy under Conditions of Complexity: The Case of the Multinational Enterprise' (1999) 24(1) Academy of Management Review 64–81.

29 Roseberry (n 26) 1. For further reading, see also A Crane, 'Corporate Greening as Amoralization' (2000) 21(4) Organisation Studies 673.

Legitimacy has been defined by Suchman as a 'generalised *perception or assumption* that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs and definitions' (my emphasis).[30] Key here is that legitimacy comes from a *perception* or *assumption* that the entity, in our case a corporation, is behaving in a way which society deems acceptable. That does not necessarily mean that the perception or assumption actually does reflect the reality, or that the corporation is necessarily concerned that it should reflect the reality: indeed, the corporation's central objective in its CSR activities is to gain legitimacy in the eyes of certain sectors of society. For Bakan, the legal make-up of corporations, whereby they are legally bound to prioritise the objective of creating profits for their shareholders above all else, means that they cannot be trusted to promote the public interest,[31] and thus sounds a note of caution over CSR initiatives and voluntary self-regulation: 'No one would seriously suggest that individuals should regulate themselves . . . yet we are asked to believe that corporate persons . . . should be left free to govern themselves.'[32]

In order to ascertain whether scepticism about CSR is well-founded, academics and policy makers must move beyond and beneath the corporate narrative. We must test the closeness of fit between that narrative and the perceived reality of those who experience first-hand the impacts of a corporation's presence, and supposedly benefit from its CSR initiatives.

. . . AS DISCOURSE

If the main aim of CSR initiatives is to construct societal legitimacy, a key way in which corporations construct such legitimacy is through discourse.[33] Rose has defined discourse thus: 'Discourse . . . refers to groups of statements which structure the way a thing is thought, and the way we act on the basis of that thinking. In other words, discourse is a particular knowledge about the world which shapes the way the world is understood and how things are done in it.'[34] Discourse – that is, the way that corporations communicate their CSR – can therefore be seen as a 'strategic resource' for corporations.[35] Consequently, a rich academic literature is emerging which focuses on CSR discourse. This paper builds on that literature, using discourse as a primary source.

The CSR debate has been characterised by Roseberry as one of 'competing discourses reflecting different subjective interpretations of the nature and activities of corporations, and their effects on humans and world'.[36] Underlying this debate is the 'assumption that CSR can be shaped and controlled by business'.[37] If business is allowed to define the CSR debate, there is a danger that corporations may seek to 'engineer moral legitimacy by manipulating public discourse'.[38] For example, Roseberry frames the CSR debate as one between legal discourse incorporating elements of environmental and human rights law and business-oriented discourse. This is not untypical of the lop-sided academic framing of the CSR debate. The success or otherwise of a particular discourse lies in its 'persuasiveness in

30 M Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) Academy of Management Review 574.

31 Bakan (n 32) 109.

32 J Bakan, T*he Corporation: The Pathological Pursuit of Profit and Pow*er (Constable 2004) 110.

33 C Hardy et al, 'Discourse as a Strategic Resource' (2000) 53(9) Human Relations 1230.

34 Rose (n 2) 142.

35 Hardy et al (n 33).

36 Roseberry (n 26) 2. Coupland agrees with this characterisation and points to a certain amount of 'neglect' on the part of academics to recognise and study how CSR is 'defined through argument'. C Coupland, 'Corporate Social Responsibility as Argument on the Web' (2005) 62(4) Journal of Business Ethics 355.

37 Coupland (n 36) 355.

38 Castello and Lozano (n 24) 11.

light of available alternative versions of company behaviour'.[39] Coupland does recognise that 'CSR activities are being negotiated in interaction in the light of often unspoken, alternative perspectives' and seeks to illuminate these through analysis of the CSR discourse of corporations.[40]

AngloGold Ashanti in Colombia

Colombia, located at the northwestern tip of South America, is a country of around 47 million people, of whom 15.2 million live in poverty according to government figures. In rural areas, 46.1 per cent live in poverty, and 22.1 per cent in extreme poverty.[41] Internal conflict between the Colombian state, left-wing guerrilla groups and paramilitary forces aligned to the government has been ongoing for more than 40 years. An apparent demobilisation of the paramilitaries in 2003 provided false hope and many of the same organisations continue to operate under different names.[42]

Amnesty International reports that all sides in the conflict continue to be responsible for 'serious human rights violations and violations of international humanitarian law'.[43] Indeed, Colombia's most prominent human rights defender, the Jesuit priest Father Javier Giraldo, asserts that the paramilitaries were created by the Colombian state during the 1980s as part of a 'dirty war strategy'[44] to deliberately target sections of civil society deemed to be opposed to the state.

Human Rights Watch reported in 2010 that 'human rights defenders, journalists, community leaders, trade unionists, indigenous and Afro-Colombian leaders, displaced persons' leaders, and paramilitaries' victims seeking land restitution or justice are frequently the targets of threats and violence by armed actors',[45] with paramilitary organisations the main culprits. In January 2011 the national prosecutor's office (f*iscalia general de la nacion*) announced that it had documented 173,183 civilian murders and 34,467 cases of forced disappearance by paramilitary organisations.[46]

Many multinational companies operating in Colombia have been accused of bearing responsibility for human rights violations by the Colombian army and paramilitaries. The widely respected international opinion tribunal Permanent Peoples' Tribunal (PPT)[47] in 2008 condemned 30 TNCs for 'clear, persistent and grave violations of general norms and principles and of international conventions which protect the civil, political, economic,

39 Coupland (n 36) 357.

40 Ibid 362.

41 Departamento Administrativo Nacional de Estadistica, press release, 17 May 2012, <www.dane.gov.co/daneweb_V09/files/investigaciones/condiciones_vida/pobreza/cp_pobreza_2011.pdf> accessed 25 February 2013.

42 Human Rights Watch, *Report: Paramilitaries' Heirs: The New Face of Violence in Colombia* (Human Rights Watch February 2010) <www.hrw.org/en/reports/2010/02/03/paramilitaries-heirs-0> accessed 25 July 2011.

43 Amnesty International, *Annual Report 2011*, Colombia section <http://thereport.amnesty.org/sites/default/files/AIR2010_AZ_EN.pdf#page=55> accessed 7 July 2011.

44 J Giraldo, 'Paramilitarism: A Criminal Policy of the State which Devours the Country' (2005) <www.javiergiraldo.org/spip.php?article131> accessed 23 July 2011.

45 Human Rights Watch, *World Report*, Colombia section (Human Rights Watch 2010) <www.hrw.org/en/node/87513> accessed 23 July 2011.

46 *El Espectador* (newspaper report), 'La Fiscalia tiene documentados 173,183 homicidios cometidos por "paras"' <www.elespectador.com/noticias/judicial/articulo-244826-fiscalia-registra-173183-homicidios-cometidos-paras-de-2005–2010?page=12> accessed 23 July 2011.

47 The PPT succeeded the Russell Tribunal which was initially set up to investigate war crimes committed by US forces against the Vietnamese people. The tribunal's panel is made up of prominent academics, lawyers and politicians. Its judgments carry moral, as opposed to legal, weight.

social, cultural and environmental rights of communities, nationalities and peoples'.[48] But admissions of guilt, such as that offered by Chiquita Brands,[49] and successful legal cases are rare. The majority of those companies which were condemned by the PPT reject such allegations flatly. They have also invested heavily in CSR initiatives. Colombia is, then, an ideal location in which to explore the discourses of corporations and communities, as they can be expected to differ widely.

AngloGold Ashanti, a South-African gold-mining corporation listed on the London Stock Exchange, is one of the largest gold-mining corporations in the world, and also one of the most controversial. Associations between natural resource extraction and human rights abuses generally are 'well-documented',[50] but AngloGold Ashanti has an especially poor reputation. In 2011 it was named by Greenpeace and *Private Eye* as the 'nastiest' corporation in the world for its alleged responsibility for human rights abuses and environmental degradation in Ghana.[51]

AngloGold Ashanti arrived in Colombia in the form of a subsidiary company in 2000 and, as in several countries in Africa, its presence has been highly controversial. It requested licences for over 13 million hectares for mining exploration, of which around 9 million were granted.[52] Although none of these projects has entered into the production phase, the corporation has been accused of benefiting from the ongoing conflict referred to above with its attendant human rights abuses, and of bearing responsibility for human rights violations against rural communities committed by regular state forces. It is also alleged that trade unionists who campaigned against the company's activities have been murdered by army units contracted to protect AngloGold Ashanti.[53] The corporation itself denies all allegations of wrongdoing and points to its substantial investment in CSR initiatives for the benefit of local communities.[54] In the case of La Toma, AngloGold Ashanti has had a long-standing interest in gaining access to the territory in order to start large-scale gold-mining and has got as far as carrying out exploration studies, but has not proceeded beyond that. According to Francia Marquez, this is partly because of the community's vociferous opposition to its presence.[55] As mentioned above, independent artisanal mining and agriculture are the community's key economic activities, both of which the community feels would be negatively impacted by large-scale mining.[56]

48 The full version of the PPT's verdict is available in Spanish at <http://colombia.indymedia.org/news/2008/07/90686.php>.

49 In 2007 Chiquita Brands admitted to having paid Colombian paramilitaries for 'protection'. 'Chiquita admits paying fighters' (*BBC News*, 14 March 2007) <http://news.bbc.co.uk/1/hi/world/americas/6452455.stm> accessed 23 July 2007.

50 Muchlinski (n 13) 125.

51 'South African Corporation "Wins" public eye award' (Greenpeace, 31 January 2011) <www.greenpeace.org/africa/en/News/news/South-African-Corp-Wins-Public-Eye-Award/> accessed 11 July 2011.

52 Meeting between Rafael Herz, President of AngloGold Ashanti Colombia, and and CSC, 7 June 2011 (transcription available..

53 Report by the NGO War on Want, *Anglo American: The Alternative Report* (2007) 2 <www.waronwant.org/campaigns/corporations-and-conflict/mining-conflict-and-abuse/inform/14777-anglo-american-the-alternative-report> accessed 14 July 2011.

54 Anglo Gold, formerly one of the main shareholders in AngloGold Ashanti, issued a response to the War on Want report <www.angloamerican.com/media/releases/2007pr/~/media/Files/A/Anglo-American-Plc/media/releases/2007pr/2007–08–09/2007–08–09.pdf> accessed 14 July 2011.

55 Interview with Marquez (n 3).

56 Ibid.

Community member surveys the landscape of La Toma, Northern Cauca, Colombia

Comparing discourses . . .

The aim of this article is not to judge the truth or otherwise of the claims of the community or the corporation, nor to try and prove the corporation's responsibility or otherwise for any wrongdoing. It simply seeks to highlight and explore the possible significance of differences between the discourses. Empirical observations underlying this paper are drawn from conversations with the president of AngloGold Ashanti Colombia and a community leader.

The data collected for the company discourse is taken mainly from an on-the-record, official meeting which took place between Rafael Herz, President of AngloGold Ashanti Colombia, and the Colombia Solidarity Campaign (CSC), a London-based organisation which campaigns for the protection of human rights in Colombia. Some data was also taken from company publications.

Data from the community leader was collected via semi-structured interviews using an ethnographically informed approach, which allows the interviewer to be flexible within the interview, and allow the interview to flow, deciding on its direction as the interview progresses, while having an overall framework and list of issues which are to be covered.[57] This gave a natural feel to the interview, allowing a rapport to be built with the interviewee, so that she might relax and speak more freely. This flexible approach also allowed the interviewer to be an 'active listener', in order to make constant judgments about what may or may not be relevant to the research focus and ask questions accordingly.[58] The utmost care was taken with regards to ensure the safety of this interviewee, in light of the nature of the information discussed, the risk of violent retribution against community leaders and civil society figures who speak out in Colombia, and the history of paramilitary intimidation

57 M Hammersley and P Atkinson, *Ethnography: Principles in Practice* (Routledge 1995) 152.

58 Ibid 153.

and violence against social leaders who have opposed AngloGold Ashanti in recent years.[59] After a lengthy discussion, the community leader interviewed, Marquez, decided that being named would not increase the risks that she and her community, La Toma, already face.

How do AngloGold Ashanti, on the one hand, and a community leader, on the other, construe the presence of the company and its impacts? The remainder of this section explores six different facets of that question through the discourse of each.

Justice

The discourse of AngloGold Ashanti Colombia president, Herz, reveals a strong sense of the company having a moral and social responsibility extending far beyond its legal responsibility to the interests of its shareholders. This responsibility was seen to extend well into the realm routinely associated with the state. For example, community members were encouraged to report human rights abuses directly to the company's internal mechanisms, including an 'anonymous complaints and reporting system',[60] and a 'human rights voluntary principles register [under the UN Voluntary Principles on Security and Human Rights] – a corporate register which records any accusation against the company. It isn't public, but it demands that you [the company] investigate'.[61] With regard to the most serious allegations against the company – that is, links to paramilitary death squads, responsibility for human rights violations and corruption – Herz stated on several occasions that the company had carried out 'exhaustive investigations'[62] into its own actions and had been able to find no evidence of any wrongdoing. So Herz's discourse is suggestive of an almost quasi-judicial role for the company.

Marquez is a member of the community council (*consejo comunitario*) of La Toma.[63] The community's main economic activities are artisanal mining[64] and subsistence agriculture. The discourse of Marquez diverged from that of Herz in almost every aspect. In direct contrast to the portrayal of a company with a strong sense of extended moral and social responsibility extending to quasi-legal functions, the company described by Marquez is criminal and immoral, bearing some responsibility for human rights violations:

> Before this multinational company (AngloGold Ashanti) became interested in our area, we hadn't suffered what we are suffering today. We hadn't had threats from armed groups that say that we are against mining; we hadn't had the murders which have happened here, nor the massacres; we hadn't had forced displacement of our leaders, nor the threat of forced displacement of all of our community in La Toma. So as soon as this company appears, so did all of these problems and human rights violations that have occurred – it may be that the company isn't directly responsible, but we are clear that they have benefited . . . so we began to investigate, and we realised . . . that AngloGold Ashanti had violated the human rights of people in South Africa, that it had financed armed actors, and we also realised that in 2001 they had been in Sur de Bolivar region in the middle of all of the human rights violations that paramilitary groups committed there.[65]

59 Hammersley and Atkinson (n 57) 71. The project proposal was given ethical approval by the SOAS, University of London <www.soas.ac.uk/researchoffice/ethics/>.

60 Herz and CSC (n 52).

61 Ibid.

62 Ibid.

63 Interview with Marquez (n 3).

64 Artisanal mining is small-scale, subsistence mining.

65 Interview with Marquez (n 3).

The company's assurances that it has carried out 'exhaustive' investigations into its own behaviour in line with the UN Voluntary Principles inspired no confidence in the communities and highlights problems with corporate self-regulation.

Development

A second noteworthy element in Herz's discourse is the tendency to portray the company in the role of benevolent educator, a role in which it is cast in relation to both the Colombian army and local communities in which it is operating. He explains how the company gives 'human rights workshops to soldiers and army officials – there is no solider that works under the agreement [between the Colombian army and AngloGold Ashanti] that hasn't been through our human rights training'. AngloGold Ashanti talks of how in Colombia it has increased its spending on 'education initiatives, public awareness programmes and economic development projects',[66] with the aim of the 'upliftment [sic] of communities'.[67] In both of these examples, there is a sense of the benevolent corporation bringing human rights or social projects to help the army or the local community to better themselves.

Marquez, however, is sceptical about the company's CSR investment in her community.

> [The company] arrived to speak to the municipal administrations to request permission to mine in the area, but they had already made the official requests to the Ministry of Interior, without previous consultation with the communities in the area. Then whilst the requests were being processed, they began to arrive to the communities and to show their money – what they say is social responsibility – so they began to put on parties for the community . . . so that people would say that the company was really good and bringing benefits. When the company announced it was leaving the community they said they had invested 120 million pesos [US$60,000], but they were giving a few pesos to each person . . . they organised a Christmas party and gave money for it, and two years ago, the road was in bad condition so the company took some pipes to fix it. But in reality, in terms of the impact that grand scale mining can have, and in terms of threatening the future existence of our community and our quality of life, I think this is disproportionate. Although they've given things, in no way have they changed the lives of people or made a difference . . . they're just tiny bits, and when you add it all up its a lot of money but in real terms its hasn't made an impact but it has divided some of the community because as they start to give these little presents, some people start to change their opinion about the company.
>
> I feel that the company speaks about social responsibility and everything but it sees us as little paupers and all they need to do is give us some crumbs because we have some basic needs, so it takes on the state's responsibilities so that it can obtain benefits for itself and carry out its activities, but it knows that what it is going to do will be to the detriment of our culture in our community.[68]

Marquez's view indicates that AngloGold Ashanti's CSR initiatives in La Toma community have failed to gain legitimacy for the company in the eyes of the community leadership. It appears that the company incurred the community's mistrust from the start by applying for a mining licence in the area without prior consultation with the community. The way that

66 AngloGold Ashanti 2010, *Sustainability Report Supplementary Information* <www.anglogold.com/Sustainability> accessed 14 July 2011.

67 Ibid.

68 Interview with Marquez (n 3).

Marquez describes the company's CSR activities in the community, for example, organising parties for the community and giving out 'crumbs' to individuals, is impossible to reconcile with the company's claim to seek the 'upliftment' of communities. What Marquez's discourse describes is a cynical tactic aimed at buying the support of individuals in the community and in this way avoiding community resistance to the corporation's activities, while acting at the same time to create divisions within the community.

Protection

Third, Herz portrays the corporation as protector and friend of local communities, including those who may oppose the company, such as community leaders and artisanal miners. Herz states that the agreement which AngloGold Ashanti has with the Colombian army is 'not only for the protection of the company, but also to protect the communities'.[69] Herz talked about a situation where a landowner whose land deeds the company was negotiating to buy in Marquez's territory, La Toma, was planning to forcibly evict the Afro-Colombian mining community which inhabits the area. He stated that, upon becoming aware of this, the company 'went straight to the High Councillor of Human Rights of the Vice-Presidency of Colombia, and we said look, we have this information, and as a company we don't agree with this. He did an investigation, and found that the company had nothing to do with the eviction.'[70] Here the company is cast in the role of the concerned citizen, going above and beyond the call of duty to look out for the welfare of the local community.

On the subject of artisanal miners he said:

> We consider artisanal miners as partners . . . the law has created a situation which makes enemies of the artisanal miner and the company, it demands that you say 'Mr Mayor, I've identified illegal miners in my mining concession area', and he must theoretically evict them, and if you don't report it then you're breaking the law . . . in a lot of cases, the company hasn't done it.[71]

Here, the company is cast again as the friend and protector of the artisanal miner, going as far as to break the law in order to protect the artisanal miner, while the blame for creating tensions between the miners and the company is deflected to the Colombian legal system. 'We always seek to talk to and inform communities, even when the law doesn't demand it.'[72] The image given here is of a dialogue-based approach by the company, seeking to engage important stakeholders who are opposed to the mine and overcome differences even if this involves considerable cost to the company.

This image is again difficult, if not impossible, to reconcile with Marquez's discourse, which displays a deep-rooted mistrust of the company: a sense that the company's public declarations are not to be believed, and that the company's friendly posturing hides its true, ruthless nature:

> I feel that it is a company that is very false, it's false because it has a very beautiful-sounding discourse but the reality is very different, and although we couldn't say that they are directly violating human rights, we can say that since they arrived in our community our human rights situation has deteriorated.[73]

69 Herz and CSC (n 52).

70 Ibid.

71 Ibid.

72 Ibid.

73 Interview with Marquez (n 3).

Artisanal miner at work in La Toma, North of Cauca region, Colombia

With regards to the proposed eviction of her community, Marquez rejected Herz's version of events:

> I am *convinced*, convinced, that the company was behind it [the proposed eviction], because they said that the only land deeds that they were interested in were Sarria's . . . they hadn't done a deal because they were waiting for him to carry out the eviction so that they didn't get the blame . . .[74]
>
> They said that they understand that they are today portrayed as monsters by many in this country, and that they accept and respect all positions and want dialogue, but in reality what we see in our communities is different – it's very nice to say they want dialogue, but they are always denying or doubting what we say about our situation . . . when we asked them 'why are they violating our human rights in your name', for example, the threat we received that said that we [are being targeted because we] are opposed to large-scale mining by multinationals – they don't say 'you oppose AngloGold Ashanti's mining' but if the multinational that is interested in La Toma is them, we can deduce that they are threatening us for this company's interests. So when we asked that company about it, they said 'hey, but did it explicitly say AngloGold Ashanti?', I said no, but you are the multinational which is interested in our area . . . but it's

74 Interview with Marquez (n 3).

> complicated because they don't accept that directly or indirectly they are benefiting from the human rights violations.[75]

Again, the salient point for present purposes is the distance between the two discourses, in particular the contrast between the deceitful, false image proposed by the community representative; and the friendly, amenable, dialogue-seeking image put forward by the mining company. Marquez acknowledges that dialogue has taken place with the company, but clearly feels that the company did not engage in a meaningful way.

Invoking international standards

The discourses of both the company and the community repeatedly invoke international standards, including voluntary standard-setting initiatives and also US legislation, in talking about its activities.

From Herz, there were the following instances: 'Please, I ask organisations that they make known to us any human rights accusations, we are signatories of the UN Voluntary Principles [on Security and Human Rights] and we act on this basis.';[76] and 'The army has agreement with lots of companies, especially in the extractive industries, and our agreement is signed under the Voluntary Principles.'[77] When asked about allegations of corrupt payments by the company to local government officials in the areas where AngloGold Ashanti is operating, Herz replied:

> Our shareholders demand a high standard . . . not because of altruism, but because the share price falls if the company isn't meeting those standards. We are also under the Foreign Corrupt Practices Act – if any of these allegations that you mention occur . . . we take this very seriously.[78]

Here, Herz invokes the possibility of the company's share price falling, as well as the possibility of prosecution in the United States, as reasons why the company would not indulge in corruption in Colombia.

Marquez, like Herz, invoked international standards several times, arguing that the Colombian state is in breach of its international obligations and that the company is a knowing beneficiary:

> They [AngloGold Ashanti] are benefiting from the State's violation of international treaties . . . even the Colombian constitution recognises that Colombia is a pluri-ethnic and multicultural country and that the state must protect the human rights which it has ratified in international treaties . . . for example, [ILO] Convention 169 says that previous consultation should be done with communities before [approving a mining project], and Colombia ratified it and approved it, but when they brought out the Mining Code it says they can do it afterwards, but afterwards is useless because if they already signed my territory over to someone what's the point in consulting me?[79]

Role of the state

As well as the invocation of international standards, the discourses display a lack of confidence on both sides with regards to the Colombian justice system. As already mentioned, Herz referred several times to the fact that the company has its own internal

75 Interview with Marquez (n 3).

76 Herz and CSC (n 52).

77 Ibid.

78 Ibid.

79 Interview with Marquez (n 3).

mechanisms for reporting and investigating human rights violations. While this is part of the company's CSR strategy in terms of creating an extended social and moral role for itself, it is also an implicit recognition of the lack of credibility of the Colombian justice system both nationally and internationally with regard to its ability to ensure that justice is done, particularly in relation to human rights violations.

Despite this shared acknowledgment of the inefficiency of the Colombian justice system, the positions of both interviewees in this regard are markedly different. Marquez's discourse clearly shows her perception that the inefficiency of the system is an important element in allowing the company to benefit from human rights violations and not having to worry about legal repercussions at national level due to the impunity that surrounds so many cases of human rights violations in Colombia:

> We asked them, 'ok, if you're not violating human rights, why don't you speak out when the Black Eagles paramilitary group threaten us?' and the AngloGold Ashanti community liaison representative said, 'We didn't even know you had been threatened'. He went on to say that if we were being threatened or having our human rights violated then there are national mechanisms that we could use to report it, and they recommended that we went to the authorities to report it, when we know that that guarantees nothing here . . . somebody goes to report a human rights violation and days later either they get killed too or they have to leave, because the state doesn't guarantee security. The company knows that, everybody knows that. It wouldn't be difficult for them to make a public statement [condemning the human rights violations], but they don't, because it suits them that our human rights are violated.[80]

The Colombian legal system's lack of credibility leads both the community and the company to seek legitimacy for their discourses by invoking international standards. However, Marquez's discourse clearly shows that the community feels that the Colombian state is on the side of the multinational company, leading to a sense of helplessness on the part of the community.

Central to the debate around AngloGold Ashanti's conduct in Colombia are the persistent accusations that army forces, acting under contracts between the company and the Colombian state to protect the company, and paramilitary forces, acting on behalf of the company, have committed human rights violations on behalf of the company, including murdering social leaders who have opposed the company's activities.[81] Herz:

> We have two security schemes. One is the Colombian army, which is constitutionally the armed forces, whether you like it or not. It has agreements with companies in many sectors [for the protection of the companies], and especially in extractive industries. These agreements are signed under the [UN] Voluntary Principles scheme . . . and the company gives human rights inductions to soldiers and officials, the company does these seminars. There is no soldier who works under the agreement who hasn't been through this induction scheme. I also want to clarify that it doesn't mean payment for arms or munitions, it's simply for the soldiers' logistics, for food etc. It isn't for attack, it's only for the protection of the company, and it's also for the protection of the community.[82] . . . Our second security scheme is with a private, unarmed company, they are simply watchmen who let people come and go from the Project . . . that company is also a signatory to the Voluntary Principles . . . Look, in the case of Mr Uribe,

80 Interview with Marquez (n 3).

81 War on Want report (n 53) 2.

82 Herz and CSC (n 52).

> these accusations of links with paramilitary groups in Sur de Bolivar date from before I arrived at the company. From the moment we arrived, an exhaustive investigation has been carried out, and no evidence of these links exists.[83]

Marquez rejected the premise that the company's agreements with the army are also aimed at protecting local communities:

> If we look at the example of [Spanish multinational energy company] Union Fenosa in La Salvajina area of Suarez, the army always protected the company but never the community, and members of the community were always subject to abuses – the soldiers would grab people as they passed the dam and throw their things away, break their work tools, assault them . . . so no, I don't believe that the company's agreement seeks to protect the community. Before the company came here we didn't need protection because we didn't have these problems in our community.[84]

> The company is clever . . . It may be that it isn't directly responsible, but they have benefited from what the paramilitaries do . . . [this company has] violated the human rights of people in South Africa, financed armed actors, and done the same in Sur de Bolivar [region of Colombia].[85]

Marquez makes repeated, serious criminal allegations against the company, which Herz flatly denies.

Balance of power

There is also a strong sense within Marquez's discourse of a mismatch between the company and the community in terms of power and influence: the company is seen as having the ability to influence national and international public opinion, as well as state policy:

> Unfortunately we are located in a territory that is rich in a mineral which interests the multinationals, and especially AngloGold Ashanti, and we don't have the economic and political power that this company has . . . I think that a community could never be a 'partner' in equal terms with a company that is the third biggest mining multinational in the world, how can a community like La Toma compete and say I'm going to go into partnership with the biggest company in the world, when there is such a gigantic inequality between us[?] . . . state policies guarantee what the company wants, and violate community rights . . . We don't have the possibility to go to the US or England to the international community to tell them about the situation we are living, but they can because they have all of the money in the world and all the contacts to travel at any moment . . . so they have more possibility to be heard, and they also have the media on their side.[86]

Discussion

The above excerpts lay bare the huge differences in how local communities and AngloGold Ashanti construe the corporation's presence. The gap between the discourses is so wide that it almost seems as if they could be talking about two different corporations. This raises serious questions not only for academic study of CSR, but also about the viability and legitimacy of the increasing role of voluntary CSR initiatives as a means of regulating business. As noted above, CSR is based on the idea of business having a responsibility which goes beyond its shareholders to the society in which it is operating; and from a

83 Herz and CSC (n 52).

84 Interview with Marquez (n 3).

85 Ibid.

86 Ibid.

corporate point of view, the key aim of CSR is for business to construct legitimacy. The above analysis of discourses raises two possibilities. The first is that AngloGold Ashanti's CSR efforts have overwhelmingly failed to construct legitimacy with a key stakeholder. The second possibility is that CSR initiatives which purport to be undertaken out of concern for the local communities were intended to construct legitimacy not in the eyes of local communities but in the eyes of other actors, such as shareholders, national and international policy makers, and the mass media.

The community leader interviewed for this research regarded the company as not only manipulative and untrustworthy, but also as (at least partly) responsible for crimes including human rights violations and corruption. The obvious place for such allegations between private individuals to be addressed is in a domestic court of law, however, there was a feeling from the community leader that the company is able to act with impunity, because the Colombian state is also implicated in many of the alleged crimes and is perceived as biased towards the corporation. Both sides' discourses revealed reservations about the effectiveness of the Colombian legal system. For Marquez, the company's CSR discourse is very much a 'discourse of appropriation', employed with an unstated objective: to secure access to the precious natural treasure underground in the community's territory: gold.

More importantly for this paper, the case study raises a deeper issue around power relations and the appropriation of the discourse of justice in an economically globalised world society. As mentioned in section one, Fairclough has shown how, within a social order, some discourses will be 'dominant or mainstream', while 'others are marginal, oppositional, or alternative', that is, some discourses will inevitably be more prominent than others, depending on the underlying social power relations and the position of the social actors which are deploying them.[87] My case study shows a clear clash of discourses, with both sides laying claim to the concept of justice and claiming it for their own discourse. AngloGold Ashanti's CSR discourse lies firmly within what Teubner describes as a 'new economic and law paradigm', claiming 'to be the new victorious paradigm which eliminates older moral–political orientations of law', and is 'justified by almost world-wide institutionalisation of economic rationality'.[88] This new economic and law paradigm is based on the expansion of the global market and holds a particular model of economic development as the Holy Grail for developing countries. The new paradigm can be seen clearly when the president of AngloGold Ashanti says that the company could not indulge in corrupt practices because 'the share price will drop if we don't meet standards',[89] as opposed to offering a moral reason for not indulging in such practices.

The success of this paradigm is reflected in the growing reliance upon voluntary CSR initiatives for the regulation of business: in the competition between discourses which characterises Teubner's plurality of discourses, the economic and law paradigm has thus far emerged as the victor, so much so that it is making a strong case to replace the state in many of its justice-related functions.

The discourse of community leaders such as Francia Marquez, as well as making a strong claim of its own to the concept of justice, contains a strong rejection of the company's justice claims. In standing outside of and in opposition to the dominant paradigm, the community's discourse falls clearly into the 'marginal, oppositional or

87 N Fairclough, *Media Discourse* (OUP 1995) 77.

88 Teubner (n 6) 150.

89 Herz and CSC (n 52).

alternative' category defined by Fairclough.[90] By opposing the company's discourse, the dominant paradigm, the community is deemed to be standing in the way of economic development, a model with which it may not necessarily agree but which has achieved such global currency that opposition to it comes to be defined as radical and old-fashioned. This immediately puts the community at a huge disadvantage, and more so when we consider how much easier it is to access the company's discourse: with huge financial resources, consultants, lawyers, a website, and better access to decision makers and influential circles, the community cannot compete, as Marquez made clear in her interview. With their scant resources, distance from centres of power and influence, and oppositional stance, the community's disadvantage is compounded.

Conclusion

This pilot case study highlights the pressing need for the policy makers and academics to make much more effort to bring communities into their debates on CSR. Further studies should be carried out on a larger scale looking at similar issues in different contexts. It is not enough to recognise the new-found dominance of CSR discourse, nor to recognise how business defines and shapes the debate. It is up to academics and policy makers to ensure that the discourses of those directly affected by the presence of corporations (and the main target beneficiaries of CSR initiatives) are represented within the CSR debate.

This need is particularly pressing given the emphasis of Professor Ruggie's 'Protect, Respect and Remedy' framework upon voluntary, soft-law standards on business and human rights. The fact that a company, which, according to its own discourse, prioritises its CSR activities and seeks to adhere to an array of voluntary mechanisms, could at the same time face serious criminal allegations and have such a lack of legitimacy in the communities in which it is operating should be a cause for concern for proponents of corporate self-regulation. Analysis of Marquez's discourse suggests that, under the new economic and law paradigm, voluntary regulation for corporations is inadequate because it allows corporations to use CSR to appropriate the discourse of justice for themselves at the expense of other oppositional, marginalised actors, such as the inhabitants of La Toma community in the hills of rural Colombia.

90 N Fairclough, 'A Dialectical-Relational Approach to Critical Discourse Analysis in Social Research' in R Wodak and M Meyer (eds), *Methods of Critical Discourse Analysis* (Sage Publications 2009) 16.

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Bringing the outside(r) in: law's appropriation of subversive identities

SARAH KEENAN[1]

SOAS, University of London

Abstract

This article explores some of the ways in which law appropriates subversive identities. Drawing on work from geographical, feminist and critical race approaches to property, I put forward an understanding of property as a relation of belonging 'held up' by space. Building on this understanding, I argue that identity can operate as property in the same way that land and material objects can, and that law appropriates subversive identities by bringing them into its hegemonic space of recognition and regulation. Law's appropriations have a range of effects on both the individual subjects directly involved in legal proceedings and the broader spaces in and through which those subjects forge their identities. Specifically this article explores the appropriation of gay and lesbian identities in the context of immigration law, and of aboriginal identities in the context of Australia's Northern Territory National Emergency Response Act 2007 (Cth) (NTNERA).

This article proposes that law appropriates subversive identities by bringing 'outsiders' into hegemonic spaces of belonging. It focuses on the appropriation of lesbian identities in the contexts of British refugee law and on aboriginal identities in the context of Australia's NTNERA respectively. The process of appropriation involves subversive identities, which are defined in part through their positioning outside or on the margins of law, being brought into spaces of legal recognition and regulation, with a wide range of effects. This article draws on geographical, feminist and critical race approaches to property to focus on the *spatial* effects of such appropriations. The first part of the article explores the conceptual links between property, identity and spatiality to put forward an understanding of property as a spatially contingent relation of belonging, and of appropriation as a spatial process. The latter part of the article builds on this understanding of property and appropriation through empirical studies. Through these explorations of the conceptual and the empirical, the article argues that law's appropriations of subversive identities reshape conceptual, social and physical spaces of belonging. Because space is dynamic, this reshaping is not necessarily fixed or permanent; outsiders continue to build and maintain their own spaces outside the law.

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Property, identity and belonging in space

To appropriate is to take someone else's property and make it your own. Despite an extensive body of philosophical and legal literature on its meaning, property is still difficult to define. The adjectival meaning of appropriate – 'suitable or proper' – is not an etymological coincidence. As I have discussed elsewhere,[2] the understanding of property as a suitable or proper part or extension of the subject has a long history in Western philosophy, most prominently through the work of John Locke and Georg Hegel. For Locke, property is an inherent, essential part of the subject (the body's labour) and a constructed extension of it (the land upon which the body labours).[3] For Hegel, subjectivity can only be achieved through the process of appropriation; the subject must acquire property in the process of becoming fully human. Whereas Locke's subject enters the world already possessing property in his own labour, Hegel's subject must achieve property through his relations with the external world.[4] Locke and Hegel have in common their definition of property as something that is an essential part or extension of the proper subject (as well as an assumption that neither women nor non-white races can be proper subjects).

Debates over what counts as property continue to be prominent across a range of political contexts because property is still widely understood and enforced as a particularly formidable right. Although many legal theorists have pointed out the social constructedness of property[5] – persuasively arguing that it comprises 'no more than socially constituted fact'[6] – most nonetheless still understand property as operating to give the subject something fixed, permanent and incapable of being legally interfered with by others. Although Gray's argument that property is 'an illusion' is an insightful and persuasive one, property is nonetheless an illusion with very material effects. Most significantly, property gives the subject the power to exclude.[7] Such exclusion has material effects ranging from urban homelessness to indigenous dispossession. Citing these effects and discussing the ultimate power of forced eviction that private property rights entail, Nicholas Blomley argues that property produces geographies of violence.[8] While Locke theorised property in terms of a person's relationship with a thing (land), modern property theorists have made a point of highlighting that 'dominium [private power] over things is also imperium [political power] over our fellow human beings'.[9] Property entails significant social power – it is not just an extension of the subject, but also a relationship between subjects.

Building on and taking further these understandings of property as a socially powerful right of exclusion, Cheryl Harris, in her influential 1993 piece, argues that whiteness is property. Writing in the Unites States context but drawing on histories and arguments applicable to other Anglo-European states, Harris outlines how property rights are rooted in racial domination to the extent that whiteness is a form of property.[10] Slavery and

2 S Keenan, 'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19 Social and Legal Studies 423.

3 M Cohen and C B Macpherson, 'Property and Sovereignty' in C B Macpherson (ed), *Property: Mainstream and Critical Perspectives* (University of Toronto Press 1978).

4 G W F Hegel, *Elements of the Philosophy of Right* (CUP 1991).

5 K Gray, 'Property in Thin Air' (1991) 50 Cambridge Law Journal 252.

6 K Gray, 'The Legal Order of the Queue' (paper presented at Techniques of Ownership: Artifacts, Inscriptions, Practices, London School of Economics, 20 July 2007).

7 J E Penner, *The Idea of Property in Law* (Clarendon Press 1997); Cohen and Macpherson (n 3).

8 N Blomley, 'Law, Property, and the Geography of Violence: The Frontier, the Survey and the Grid' (2003) 93 Annals of the Association of American Geographers 121.

9 Cohen and Macpherson (n 3).

10 C I Harris, 'Whiteness as Property' (1993) 106 Harvard Law Review 1707.

colonial conquest – practices implemented by force and enshrined in law – established whiteness as a prerequisite to the exercise of enforceable property rights.[11] (This is not to say that all white people owned property, but that whiteness was one prerequisite to being able to own property.) From the mid-1600s onwards, whiteness was established in the US as a protected legal category which gave white subjects a wide range of social benefits, and from which non-white subjects were excluded. And, while slavery and conquest are no longer legal practices,[12] by essentially maintaining the status quo of a socio-economic system entrenched in racial inequality, law continues to recognise the settled expectations of white people that have been built on the benefits and privileges of white supremacy.[13] Harris sees whiteness as a property right which is exercised whenever a white person takes advantage of the privileges accorded to white people simply by virtue of their whiteness.[14] These privileges are vast and complex.[15] Harris suggests affirmative action as a means to undermine the property interest in whiteness because this would aim to effectively diminish the exclusiveness of white privilege.[16] According to this argument, property is both an essential part of the subject (one's race) and an important relationship between subjects (whiteness gives tangible privileges over non-whites).

Other feminist legal theorists have also explored the idea that particular identity characteristics can function as property. Drawing on Harris's work and on feminist understandings of the relational nature of identity, Margaret Davies troubles the distinction between 'having' and 'being' in regards to masculinity.[17] Because having and being are so culturally interwoven, Davies argues, 'any question of "being" must bring with it – at some level – a question of "having"'.[18] Failure to notice the interdependence of these ideas, she argues, may 'lead to the re-stereotyping or re-freezing of the identities which are otherwise subject to transgression'.[19] Making the case for a queer theory of property, Davies is arguing for a conceptual linkage between identity (often understood as fixed and essential) and ownership (often understood as transferable and impermanent). Such linkage might allow for a de-essentialised understanding of both property and identity, and thus for a subversion of the rigid 'sameness and otherness' which essentialised understandings engender. As will be discussed further below, Davina Cooper has questioned the distinction between ownership and membership in her work on property.

What these feminist and critical race scholars have in common is their argument that, as well as offering increased *access to* property, belonging to particular social groups can also *itself constitute* property. This argument is in many ways consistent with the Lockean and Hegelian understanding of property as *an essential part* of the proper subject. But whereas these classical philosophical formulations begin with an assumed separation between the subject and that outside it and understand property as a relation between them, the critical theorists discussed above challenge (either implicitly or explicitly) that assumed separation.

11 Harris (n 10) 1718–24.

12 That is, slavery and conquest are no longer legal in their traditional forms. Many would argue that conquest continues in other forms today, particularly in 'postcolonial' settler states, and that certain contemporary racialised labour practices amount to slavery.

13 Harris (n 10) 1731.

14 Ibid 1734.

15 P McIntosh, *White Privilege: Unpacking the Invisible Knapsack* (Wellesly College Working Paper No 189 1989).

16 Harris (n 10) 1785.

17 M Davies, 'Queer Property, Queer Persons: Self-Ownership and Beyond' (1998) 8 Social and Legal Studies 327.

18 Ibid 343.

19 Ibid.

If having is inextricably linked to being, if whiteness and other identity characteristics are property, then the subject is always already connected to that which is outside it. These understandings of property thus require a shift in focus away from the subject and onto the broader spaces, relations and networks that constitute property. This shift in focus does not imply that the subject becomes irrelevant or disappears from view, but rather that it becomes part of a fuller picture of factors to be considered.

One such factor is belonging, which is in many ways the inverse of exclusion – the subject can exclude the world from her object because that object belongs to her. As well as property ownership, belonging can signify membership of a community, a relationship to place, and/or a behaviour or identity that 'fits', or is 'at home'.[20] Nira Yuval-Davis describes belonging as being about emotional attachment, about feeling safe and/or 'at home'.[21] Emily Grabham writes that belonging 'refers to the location of an object or person in its "proper place" ("the book belongs on the shelf over there" or "you belong in the UK")'.[22] Belonging thus connotes a sense of propriety, of the proper. To belong is to fit smoothly, or without trouble, into either a conceptual category or a material position. It is necessarily a relational term; an object/subject/practice/part that belongs cannot exist in a vacuum, it must belong to or with something else.

Cooper used belonging as a way to understand the overlap between property as ownership and property as membership in her study of property practices at Summerhill School, an alternative school where children choose whether or not to attend class and where rule-making and dispute resolution involve the school body as a whole (both teachers and children).[23] Cooper found that property practices at Summerhill were constituted by a legally pluralist regime of institutional recognition,[24] with understandings and performances of property being shaped by official state practices, a range of formal and informal school acts. Cooper describes property practices at Summerhill as involving a number of intersecting dimensions, of which belonging is the most important.[25] Cooper considers belonging in two ways: firstly, the relationship whereby an object, space, or rights over it belong to a subject ('subject–object'); and, secondly, the constitutive relationship of part to whole whereby attributes, qualities or characteristics belong to a thing or a subject ('part–whole').[26] Both types of belonging implicate social relations and networks that extend beyond the immediate subject and object of property; property is instead understood as 'a set of networked relations in which the subject is embedded'.[27]

'Holding-up' and different kinds of property

Cooper's analysis of property is spatial in that it focuses on the networks in which the subject is embedded rather than primarily on the subject herself. Networks are necessarily spatial; as particular arrangements of intersecting forces or things that necessarily extend beyond the subject, different networks (whether they be social, conceptual or physical)

20 D Cooper, *Governing Out of Order: Space, Law and the Politics of Belonging* (Rivers Oram Press 1998).

21 N Yuval-Davis, K Kannabiran and U M Vieten 'Introduction' in N Yuval-Davis, K Kannabiran and U M Vieten (eds), *The Situated Politics of Belonging* (Sage Publications 2006).

22 E Grabham, '"Flagging" the Skin: Corporeal Nationalism and the Properties of Belonging' (2009) 15 Body and Society 63.

23 D Cooper, 'Opening up Ownership: Community Belonging, Belongings, and the Productive Life of Property' (2007) 32 Law and Social Inquiry 625.

24 Ibid.

25 Ibid 628.

26 Ibid 629.

27 Ibid 636.

constitute the reference systems through which we locate ourselves in the world. Geographer Doreen Massey argues that instead of thinking of places as areas with boundaries around, it is more useful and accurate to imagine them as articulated moments in *networks* of social relations and understandings[28] (my emphasis). In order to constitute property, I have argued elsewhere that the set of networked relations to which Cooper refers must not only include one of belonging between either subject and object or part and whole, but also be structured in such a way that that relation of belonging is conceptually, socially and physically supported or 'held up'.[29] That is, the set of networked relations that Cooper describes must form a space that holds up the relation of belonging.

As has been argued by Massey and other geographers, all spaces are produced by a multiplicity of different, dynamic forces – space is physical, social, conceptual and, importantly, active. Put simply, relations of belonging are held up when the wider social processes, structures and networks that constitute space give force to those relations. By this I mean that they are recognised, accepted and supported in ways that have a range of effects and consequences. For example, heterosexual relations tend to be held up by space in a multitude of ways that homosexual relations are not (through institutional means such as marriage and parenting rights, through social validation such as accepting, supporting and celebrating couples who hold hands or kiss in public, through positive media representation, through the availability of appropriate sex education and safe sex materials, etc.). This holding up by space of a relation of belonging is more than the act of state recognition, which is associated with liberal identity politics, and which has been specifically critiqued for its predetermination of the bounds of the propertied subject, particularly in colonial contexts.[30] While recognition, as Brenna Bhandar argues, 'fails to escape the violence inherent in colonial spatial and temporal orders',[31] the concept of holding-up is directly concerned with these orders.

The understanding of belonging as between part and whole (the second in which Cooper considers belonging) is something of a departure from traditional and legal understandings of property, but resonates strongly with Harris's analysis of whiteness as property. Using the analysis of part–whole belonging, whiteness can be understood as property because the property holder is embedded in certain social relations and networks of belonging. A white person can enjoy the privileges of whiteness because he or she belongs to the various social relations and networks that constitute whiteness. As sociologists such as Ruth Frankenberg have shown, those relations and networks are complex and far-reaching. Whiteness, like all identity categories, is socially constructed through historically specific fusions of political, economic and other forces.[32] Whiteness in turn 'constructs daily practices and worldviews in complex relations with material life'.[33] That is, whiteness is productive of subjectivities. So while whiteness can be understood as belonging to the white subject as Harris argues (whiteness as property in the sense of subject–object belonging), the white subject also belongs to the complex relations and networks that form whiteness (whiteness as property in the sense of part–whole belonging). This analysis suggests that, in order to understand the varied social powers of property,

28 D Massey 'Power-geometry and a Progressive Sense of Place' in B Curtis, T Putnam, G Robertson, L Tickner and J Bird (eds), *Mapping the Futures: Local Cultures, Global Change* (Routledge 1993).

29 Keenan (n 2).

30 B Bhandar, 'Plasticity and Post-Colonial Recognition: "Owning, Knowing and Being"' (2011) 22 Law and Critique 227.

31 Ibid 228.

32 R Frankenberg, *The Social Construction of Whiteness: White Women, Race Matters* (Routledge 1993).

33 Ibid.

both subject–object and part–whole belonging must be considered. In policy terms, this analysis means that, if the normative goal is to challenge the way whiteness (or another identity category) operates as a structure of exploitation and oppression, then it is the relations and networks that form whiteness which must be changed rather than the individual subjects who belong to those relations and networks.

Law's appropriations of subversive identities

What does this understanding of property mean for law? On one level, understanding property as a relationship of belonging held up by space demonstrates that property is not defined by law alone. Cooper's study showed that property at Summerhill was constituted through a range of social norms, rules and relations rather than through law alone. On another level, understanding property as a relationship of belonging held up by space also reveals the spatiality of the state co-optation of identity politics, which I will argue below can be usefully understood as law's appropriations of subversive identities. Both insights offer a way of understanding the political effects of law that is different from the insights of socio-legal work that takes individual legal subjects – or the similarly grouped subjects of liberal identity politics – as the focus of its analysis. Widening the lens of analysis out from the subject and onto the spaces of belonging in which the subject exists (and, as will be argued below, through which the subject is constituted) brings into view physical, social and conceptual effects of law that tend to be overlooked in socio-legal approaches and in other analyses that focus on the subject (or on groups of subjects). Bringing this understanding of property to law shows how politics of co-optation are not just about the co-optation of individual subjects or groups, but also about shifting the space in which those subjects or groups were able to emerge as a potentially subversive force.

There is now an expansive critical literature on the ways in which the state and other institutions have co-opted different kinds of identity politics. Identity politics is a broad term that encompasses a range of causes based on the shared experiences of injustice of members of particular social groups.[34] Identity politics were essential to the civil rights movement in the United States, to the attainment of equal legal rights for women, and to many other hugely significant social changes over the past century. In recent decades, however, there has been increasing criticism of identity politics and a decided theoretical shift away from them.[35] One of the main critiques is that identity categories, such as 'woman', 'black' and 'gay', are social constructs that do not have natural or universal meanings. To take the first example, Simone de Beauvoir's now classic assertion that 'one is not born, but rather becomes, a woman'[36] has been definitively confirmed by successive generations of feminist writers who have debunked ideas that women can be defined through their genitalia, appearance or sexual preference, and explored the multiple ways in which women (and men) learn to perform their genders.[37] It is thus unclear who is inside and outside any particular category, and those who do fall inside the categories will not necessarily have a strong base of shared experience.[38] There has also been critique of the scale of change that identity politics is capable of producing. The elements of identity politics that have gained most traction in mainstream political praxis are liberal campaigns

34 C Heyes 'Identity Politics' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Plato 2009).

35 M Lloyd, *Beyond Identity Politics: Feminism, Power and Politics* (Sage Publications 2005); J Anner, *Beyond Identity Politics: Emerging Social Justice Movements in Communities of Color* (South End Press 1996).

36 S de Beauvoir, *The Second Sex* (Alfred A Knopf 2010) 267.

37 See, for example, J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990); B Hooks, *Ain't I a Woman? Black Women and Feminism* (Pluto Press 1990).

38 E Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 1990); Butler (n 37); Hooks (n 37).

that have as their goal the improvement of conditions and the extension of rights for that particular identity category, rather than the broader goal of shifting the very systems that produce identity categories and their differential conditions. As Wendy Brown argues:

> politicised identities generated out of liberal, disciplinary societies, insofar as they are premised on exclusion from a universal ideal, require that ideal as well as their exclusion from it, for their own perpetuity as identities.[39]

That is, liberal identity politics aims at inclusion within a system rather than at systemic change.

Related to, and in some cases as part of this critique of identity politics, is a specific critique of law's co-optation of such politics. There have, for example, been critiques of race politics in the US in the post-civil-rights era, pointing to the de-radicalisation of the Black movement and arguing that the achievement of formal legal equality gives the illusion of substantive equality. The reality of substantive inequality along the lines of race persists and is covered up and thus to an extent protected by law.[40] The recognition of indigenous land rights in the courts of settler colonial states such as Australia and Canada has also been critiqued for its ultimate re-inscription of colonial power over indigenous difference and resistance.[41] The passage of hate crime laws to 'protect' women, sexual and racial minorities has come under considerable critique for its reliance on and bolstering of the deeply racist and sexist prison industrial complex.[42] And even relatively conservative feminist voices have pointed out that 'gender mainstreaming' in international law has allowed claims to equality to be tamed and de-radicalised.[43] By including and ostensibly protecting particular articulated interests of a range of marginalised identity groups, law improves the situations of only the most privileged of such groups while ignoring the most oppressed and preserving the overarching systems that produce such oppression and marginalisation.

Thinking spatially: co-optation as appropriation

From a spatial perspective, law's co-optation of identity politics can be understood as occurring in part due to an implicit construction of space as static, closed and singular. This implicit understanding is prevalent in Western philosophy[44] and is shared by law and by the elements of identity politics that come to be co-opted. Legal geographers have consistently critiqued law for its assumption that space is the static, neutral backdrop to legal action.[45] Similarly, liberal identity politics (which tend to be the elements of identity politics that are co-opted by law) have been critiqued for being 'single axis',[46] disconnected from grassroots struggles and lacking in genuine intersectionality (that is, lacking in an understanding of the

39 W Brown, 'Wounded Attachments' (1993) 21 Political Theory 390.

40 R C Smith, *We Have No Leaders: African Americans in the Post-civil Rights Era* (State University of New York Press 1996).

41 I Watson, 'Buried Alive' (2002) 13 Law and Critique 253; S Motha, 'Mabo: Encountering the Epistemic Limit of the Recognition of Difference' (1998) 7 Griffith Law Review 79; F L Korsmo, 'Claiming Memory in British Columbia: Aboriginal Rights and the State' (1996) 20 American Indian Culture and Research Journal 71.

42 D Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (South End Press 2011); A Smith, 'Unmasking the State: Racial/Gender Terror and Hate Crimes' (2007) 26 Australian Feminist Law Journal 47–57.

43 H Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 Harvard Human Rights Journal 1.

44 D Massey, *For Space* (Sage Publications 2006).

45 N K Blomley and J C Bakan, 'Spacing Out: Towards a Critical Geography of Law' (1992) 30 Osgoode Hall Law Journal 661.

46 K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139.

complex ways in which different systems of oppression, such as class, race and gender, intersect to form the conditions of people's lives).[47]

One effect of this construction of space as static, closed and singular is that time is envisaged as an interconnected, homogeneous configuration of movement from one moment to the next – time as a singular universal trajectory of becoming, which operates over smooth, static, ideologically closed space.[48] These understandings of time and space in turn support a view of history and 'development' as an inevitable march towards a common goal. As Massey puts it, 'coexisting heterogeneity is rendered as (reduced to) place in the historical queue', and difference is neatly packed into bounded spaces and dismissed to the past, which is implicitly understood as singular – as *our* past.[49] Thus migrants from 'developing' countries are seen as arriving not only from the peripheries, but also from the past.[50] This understanding of space and time similarly supports an understanding of development and globalisation as an inevitable temporal sequence – poor nation states and those in early stages of capitalism are understood as 'catching up' rather than as being involved in current practices and relations of increasing inequality and oppression.[51] Single-axis identity politics also tend to construct identity groups as needing to catch up with the majority, that is, to be included in a political and legal space that is 'advanced' and 'modern'.[52]

Relegating spatial difference to temporal sequence means constructing as inevitable both the present and the future for those who are 'behind' in the queue, because the singular, linear temporal trajectory is already determined. Similarly, relegating identity difference to a need for inclusion into a pre-existing political space means constructing as inevitable the dominance of that pre-existing space. Understanding space as active and multiplicitous rather than static and singular enables an analysis of law's co-optation of subversive identities that escapes the inevitability of the dominance of law's space. Such co-optations are not just about bringing individual subjects or groups inside a dominant space, but also about shifting the space in which such individuals and groups are embedded. These co-optations are thus not just a matter of bringing *outsiders* in, but about reshaping and reducing *the outside*. Such reshaping and reduction affects what relations of belonging will be held up in the future. These processes are not simply co-optations of groups and individuals but appropriations of subversive identities and corresponding reshapings of the spaces that once held them up. Yet, because space is active and multiplicitous, such appropriations are never fixed or complete; reshaping is an ongoing process, as is resistance to law's appropriations. I will now discuss two instances of law's appropriation of subversive identities through the shaping of spaces of belonging.

47 U Erel, J Haritaworn, E Gutierrez Rodriguez and Christian Klesse, 'On the Depoliticisation of Intersectionality Talk: Conceptualising Multiple Oppressions in Critical Sexuality Studies' in A Kuntsman and E Miyake (eds), *Out of Place: Interrogating Silences in Queerness/Raciality* (Raw Nerve Books 2008).

48 Massey (n 44).

49 Ibid 69.

50 E Darian-Smith, 'Rabies Rides the Fast Train: Transnational Interactions in Post-colonial Times' in D Delaney, R T Ford and N Blomley (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell Publishing 2001).

51 Massey (n 44) 82.

52 See I Grewal, *Transnational America: Feminisms, Diasporas, Neoliberalisms* (Duke University Press 2005); S Long, 'Unbearable Witness: How Western Activists (Mis)recognize Sexuality in Iran' (2009) 15 Contemporary Politics 119.

Refugee law's appropriation of 'the subversive queer woman'

The picture that Western governments, media and liberal non-governmental organisations generally paint of refugee law – particularly in relation to claims made on the basis of sexuality persecution – is one of racialised gays and lesbians fleeing vaguely defined but implicitly demonised 'repressive regimes' to find sanctuary in tolerant, liberal Western states that open their borders as a charitable act of 'human rights protection'.[53] Such representations exist in part because of the very structure of refugee law, which demands a unitary, discrete subject who can travel outside her home country, file a claim for asylum and prove that it would be highly dangerous to go back. The Convention Relating to the Status of Refugees 1951[54] was drawn up in the post-Second World War era as part of a suite of new international legal instruments based on liberal notions of human rights and equality.[55] State signatories to the Convention are obliged to provide protection for individual subjects who have successfully fled their home state and are unable or unwilling to return due to a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' (Article 1 as amended by the 1967 Protocol). It is now an accepted tenet of refugee law in particular states including Australia, Britain and Canada that sexual orientation and gender identity can constitute a 'particular social group' within the meaning of the Convention[56] and that, accordingly, individuals who leave their home countries because they have a well-founded fear of sexuality-based persecution should not be forced to return there.[57]

While there has been research published on the legal position of queer asylum seekers and the particular difficulties they face in the refugee determination process,[58] and on the

53 B Keenan, 'Milestone Victory for Gay Refugees' *The Guardian* (London, 7 July 2010) <www.guardian.co.uk/commentisfree/libertycentral/2010/jul/07/supreme-court-gay-refugees-right-to-asylum> accessed 5 December 2011; N Miles, *No Going Back: Lesbian and Gay People and the Asylum System* (Stonewall 2010).

54 189 UNTS 150 (entered into force 22 April 1954).

55 J Fitzpatrick, 'Revitalizing the Refugee Convention' (1996) 9 Harvard Human Rights Journal 229, 231.

56 Article 1A (2) of the Convention defines a refugee as any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it'; Article 33(1) states: 'No contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

57 In the Australian context this was first judicially confirmed in *Applicant A v MIEA* (1997) 190 CLR 225; in the Canadian context in *Ward v Attorney-General (Canada)* (1993) 2 SCR 689; in the United Kingdom in *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal, ex p Shah, R v Immigration Appeal Tribunal, ex p Shah* [1999] UKHL 20, [1999] 2 AC 629; and the United Nations High Commissioner for Refugees has had the policy that 'persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognised as refugees' since 1996: see K L Walker, 'Sexuality and Refugee Status in Australia' (2000) 12(2) International Journal of Refugee Law 175.

58 For example, Walker (n 57); C F Stychin, '"A Stranger to its Laws": Sovereign Bodies, Global Sexualities, and Transnational Citizens' (2000) 27(4) Journal of Law and Society 601; D McGhee, 'Accessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status – The Case of Ioan Vraciu' (2000) 6(1) Body and Society 29; J Millbank, 'Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation' (2002–2003) 1(3) Seattle Journal of Social Justice 725; J Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989–2003' (2005) 14(1) Social and Legal Studies 115.

problems facing women claiming refugee status,[59] this research has remained largely within the framework of single-axis identity and recognition rather than positing a broader critique of the system itself. Despite the abolition of the discretion requirement, refugee law continues to require the performance of a very particular sexuality for asylum to be granted. As will be discussed in this section, that sexuality is overwhelmingly based on Western commercial understandings of gay men. Building on the conceptual discussion above, this section shows how refugee law can be understood as appropriating the potentially subversive property of the queer woman asylum seeker. The asylum seeker's property in this context is her identity, her part–whole belonging. She is persecuted in her home state because of her queer sexuality and non-normative gender performance. In travelling to the receiving state, she has the potential to produce subversive property there – by asserting that her queer sexuality and non-normative gender performance should be held up in the receiving state. However, the asylum seeker must perform her identity in a very particular way. The same properties that made her subversive, disruptive, even inflammatory in her home state must be shown to be properties that make her a worthy citizen in the receiving state. In demanding proof of a particular lesbian identity legible to a Western court, the receiving state requires the asylum seeker to shift the way she performs her identity, while positioning itself as a haven of salvation and generosity. Many refugee lobby groups also adopt these saviour discourses, bolstering neocolonial ideas about sending and receiving states.[60] Through this legal process the receiving state appropriates the asylum seeker's potentially subversive property and uses it as means by which to further develop its own space of belonging.

For an applicant to prove her sexuality, she must give details such as when she first thought she was a lesbian, all of the intimate relationships and feelings she has had with and for other women, how she managed to hide those feelings and relationships and what happened to her as a consequence if she did not manage to do so, along with anything else that the decision maker hearing the case thinks is relevant to authenticating her lesbian identity. Although queer asylum seekers still assert agency in the courtroom, acting tactically in the face of overwhelming legal formulism,[61] refugee law ultimately requires 'real lesbians' to either be participants in the pink economy and publicly perform their sexuality like gay men, or alternatively to be caring maternal women whose sexuality is an almost invisible part of their identity.[62] For example, a Mongolian woman seeking asylum in Australia on the basis of sexuality persecution was asked by the Refugee Review Tribunal to gives names and addresses of 'gay locations' in both Mongolia and Australia, and to disclose whether she had yet acquired a local woman lover in Sydney.[63] The tribunal then asserted that conditions for gays and lesbians in Mongolia had been improving in recent years, citing as authority the Spartacus Guide, a commercial travel guide aimed at Western gay men

59 For example, J Greatbatch, 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1(4) International Journal of Refugee Law 518; A B Johnsson, 'The International Protection of Women Refugees: A Summary of Principal Problems and Issues' (1989) 1(2) International Journal of Refugee Law 221.

60 P Tatchell, 'Gay Asylum Reform Proposals' (Gays Without Borders 2008) <http://gayswithoutborders.wordpress.com/peter-tatchell-gay-asylum-reform-proposals/> accessed 20 September 2011; 'Prossy Kakooza Must Stay!' (Facebook) <www.facebook.com/group.php?gid=15442634010> accessed 10 September 2011.

61 T A M Johnson, 'On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings' (2011) 20 Social and Legal Studies 57.

62 S Keenan, 'Safe Spaces for Dykes in Danger? Refugee Law's Production of the Vulnerable Lesbian Subject' in Sharron Fitzgerald (ed), *Regulating the International Movement of Women: From Protection to Control* (Routledge 2011).

63 *N04/48953* [2005] RRTA 363.

planning holidays abroad. In a Canadian case, a Russian woman seeking asylum tried to use receipts from the Toronto gay village to prove her lesbian sexuality.[64] The Immigration and Refugee Board took issue with the fact that only some of the receipts were for transactions paid by debit and or credit card, and that only some 'had an air-miles card number on them'. The board found that her inability to show with certainty that the payments were made directly by her meant that she did not make any of the payments herself, and that, 'on a balance of probabilities', she was not really a lesbian.

These cases demonstrate that women claiming asylum on the basis of sexuality persecution must prove that they fit into a particular Western lesbian identity category that is constructed as universal. In terms of part–whole belonging, refugee law produces a lesbianism 'whole' of which applicants must prove they are a part. In so doing it also (re)produces a space of belonging that holds up one particular way of being a queer woman. Apart from the obvious problems with assuming that asylum seekers will be financially able to make 'gay purchases', practically able to name 'gay locations', and culturally able to make social connections as soon as they arrive, the requirement that these women perform their sexuality in this commercial, public way also ignores the reality that the asylum-seeking subject has by definition come from a space where her queer sexuality was not held up, indeed, where it was unsafe for her to publicly show her sexuality. Refugee law's requirement of the performance of this particular lesbian sexuality not only accounts, to some extent, for the relative invisibility of women (compared to men) making claims for asylum on the basis of sexuality,[65] but also dictates and thereby reproduces a mode of being lesbian that fits with state interests in consumerist economics and easily definable and visible minority communities. Overt queer sexuality, the very aspect of identity that made the subject subversive and put her at risk in her home state, is made into a normative property defined by courts using commercial, masculine standards. Such cases also demonstrate the overlap between property as part–whole and subject–object belonging, for, to have her (part–whole) lesbian identity held up, the applicant must own particular objects and move in or 'master' social and physical space in a particular way (subject–object belonging). In requiring the asylum seeker to behave and consume in particular ways, refugee law shifts the asylum seeker's queer sexuality from being a property that unsettled and was potentially subversive of the (sending) state to one that bolsters the broad agenda of the (receiving) state.

By requiring queer women asylum seekers to perform this particular version of lesbian identity, refugee law takes what was the subversive property of the asylum seeker and reorients it such that it becomes part of the property of the receiving state. While the asylum seeker's sexuality unsettled the space from which she came – unsettled that space to the point where she could not safely remain there – refugee law requires her to perform her sexuality in a way that reinforces the hegemonic space of belonging of the receiving state. While this performance fits with and strengthens the growing space of 'homonationalist' belonging,[66] the asylum seeker can be left isolated within refugee communities.[67] The space of belonging produced by court decisions on asylum claims made by women on the basis of sexuality persecution is one in which the nation state is solidly shaped with clearly delineated physical boundaries. Refugee law proceeds on the basis that a subject either belongs or does not, and that belonging is determined by law alone. Indeed, the lesbian

64 *X(Re)* (25 March 2008).

65 This has been noted elsewhere: J Millbank, 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (2003) 18 Georgetown Immigration Law Journal

66 J K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007).

67 A de Jong, *Lesbian, Gay, Bisexual and Transgender (LGBT) Refugees and Asylum Seekers* (The Information Centre about Asylum and Refugees in the UK September 2003).

subject produced by refugee law functions in a similar way to the figure of the woman in some human rights discourses, as has been critiqued by Inderpal Grewal and others[68] – as objects of charity capable of being saved from their own state's repressive regimes and converted to sexual citizenship, which can be done through consumerism. Refugee law appropriates the subversive property of the lesbian asylum seeker and produces a space that holds up particular racialised, gendered and sexualised identities.

One circumstance that is never taken into consideration by receiving courts and tribunals is the effect that their decision about the particular applicant before them will have on the space she leaves behind. Of course, the very structure of refugee law prevents this type of consideration from being taken into account – the Refugee Convention is concerned with individual 'human beings' enjoying 'fundamental rights and freedoms', and with 'the problem of refugees' not becoming 'a cause of tension between states'.[69] It is not concerned with the complex forces and power structures that have caused the sending state to be a dangerous place for queer women, or with the future of those 'outside' spaces. Yet, the operation of refugee law has broad spatial effects – by enabling the permanent departure of dissident queer subjects on the condition that those subjects present their home states as uniformly and impossibly homophobic, refugee law leaves undisturbed and even bolstered, the gendered and heteronormative networks of belonging that make that space unlivable for queer women. The important work of local groups' resistance to homophobia and sexism must necessarily be deemed inadequate by the courts of the receiving state in order to construct the sending state as a uniformly and impossibly unlivable space for queer women. Yet, in reality, such groups continue to work to produce spaces that do hold up queer relations of belonging, with such spaces often being strategically out of the view and reach of law, and outside the understanding of Western 'experts'.[70] Although a positive refugee decision makes a significant and welcome difference in the lives of the individual applicant, it leaves unquestioned the spaces of belonging that cause queer women to move in the first place. Refugee law appropriates the subversive property of the lesbian asylum seeker and produces spaces that hold up particular racialised, gendered and sexualised identities.

Property law's appropriation of 'the subversive aboriginal person'

Moving now from a socio-legal area generally framed in terms of international migration and mobility to one generally framed in terms of domestic relations and stasis, this section examines law's appropriation of subversive identities in the context of indigenous land rights. It is already fairly well established that the law of settler colonial states facilitates legitimises and relies upon the appropriation of indigenous land and mineral resources.[71] Patrick Wolfe and others argue that settler colonialism has as its goal the elimination of the native, and this argument certainly holds weight when considered in light of the ongoing policies of punishment, control and removal of indigenous people that are prevalent in settler colonial states.[72] With the advent of the non-profit industrial complex and its focus

68 Grewal (n 52).

69 Preamble.

70 See, for example, the diverse work in S Ekine and H Abbas, *Queer African Reader* (Fahamu Books and Pambazuka Press 2012).

71 I Watson, 'Illusionists and Hunters: Being Aboriginal in this Occupied Space' (2005) 22 Australian Feminist Law Journal 15; A Moreton-Robinson, 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the Yorta Yorta Decision' (2004) 3 borderlands ejournal; C Notzke, *Aboriginal Peoples and Natural Resources in Canada* (Captus University Publications 1994).

72 P Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 Journal of Genocide Research 387.

4n human rights,[73] along with UN concern for the treatment of indigenous peoples,[74] state laws aimed at the actual physical or cultural genocide of indigenous peoples are untenable. However, focusing on the Australian government's recent legislation enabling the compulsory acquisition of leases of aboriginal land in the Northern Territory, I argue in this section that law instead functions to appropriate subversive aboriginal identities. This process includes the appropriation of aboriginal culture, but extends further. Aboriginal identities are appropriated through the reshaping of aboriginal spaces of belonging. What is at stake in these leases is more than the land over which the leases are sought – it is also the social and cultural characteristics of the communities that live on the land. The resistance to the leases and the insistent claim of aboriginal communities that 'we are not moving' goes beyond an insistence on staying in the same physical place and extends to an insistence that that place remains a space of aboriginal belonging.

The Northern Territory 'intervention' is the name used to describe the set of policies introduced by the Australian Commonwealth government in August 2007. The intervention was primarily enabled by the NTNERA. The Act followed a report by the Northern Territory government entitled *Little Children are Sacred*, which contained allegations of widespread child sex abuse in remote aboriginal communities in the territory.[75] The Northern Territory is commonly regarded as the 'most aboriginal' area of Australia because it has the highest aboriginal proportion of its population of any Australian jurisdiction (over 30 per cent compared to the next highest 3.8 per cent),[76] the highest number of native title land claims,[77] and is the site of the first and most significant aboriginal land rights legislation in Australia (around 45 per cent of the area of the Northern Territory is now aboriginal – owned under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (Land Rights Act), which is higher than in any other jurisdiction).[78] Unlike the rest of Australia, the remote aboriginal communities of the Northern Territory are areas where white Australians may feel out of place.

The Northern Territory is one of two mainland Australian territories, the other being the small area around the federal capital of Canberra, and, although the territories are now self-governing, they are still subject to having their laws overridden by the Commonwealth government – a level of intrusion from which the Australian states are immune. This Commonwealth power to override territory laws is enabled by s 122 of the Australian Constitution. Drawing on this power, the Commonwealth government announced on 21 June 2007 that the levels of child sex abuse in the Northern Territory's aboriginal communities had become a national emergency to which the Northern Territory government had failed to adequately respond. As such, the Commonwealth government was to immediately pass emergency response legislation.

73 A Smith, 'Introduction: The Revolution Will not be Funded' in *Incite! Women of Colour Against Violence* (ed), *The Revolution Will not be Funded: Beyond the Non-Profit Industrial Complex* (South End Press 2007).

74 J Anaya, *Observations on the Northern Territory Emergency Response in Australia* (United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People 2010).

75 P Anderson and R Wild, *Little Children are Sacred: Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (Northern Territory Government 2007).

76 *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (Australian Human Rights Commission 2008) <www.hreoc.gov.au/social_justice/statistics/index.html#Heading34> accessed 15 February 2010.

77 'Northern Territory' (National Native Title Tribunal 2010) <www.nntt.gov.au/Native-Title-In-Australia/Pages/Northern-Territory.aspx> accessed 15 February 2010.

78 B A West and F T Murphy, *A Brief History of Australia* (Infobase Publishing 2010) 85.

The NTNERA introduced a range of highly paternalistic measures to large areas of the Northern Territory. These measures apply to 'prescribed areas' of the Northern Territory, which are defined in the Act as all aboriginal land,[79] as well as any other area declared by the relevant minister, with the exact co-ordinates for the prescribed areas listed in a schedule to the Act.[80] All prescribed areas are those of aboriginal communities.[81] The NTNERA measures applicable in the prescribed areas include: a total ban on the possession and consumption of alcohol;[82] compulsory income management for all welfare recipients;[83] compulsory installation of anti-pornography filters on all public computers as well as obligatory record-keeping of all computer users;[84] cutting back of the permit system for entry onto aboriginal land;[85] federal government takeover of local services and community stores as well as a ministerial power to suspend all elected councillors;[86] a ban on Northern Territory courts from taking customary law into account when dealing with bail applications and sentencing;[87] and compulsory rent-free five-year leases of aboriginal land to the federal government.[88] The NTNERA made itself exempt from Australia's Racial Discrimination Act 1975 (Cth).[89]

In terms of aboriginal resistance to the intervention, the compulsory leases were the focus of anti-intervention campaigns, at least in the legal arena. Notably, traditional owner Reggie Wurridjal brought a High Court challenge against the Commonwealth government, claiming that the lease of the Maningrida land on which he lived amounted to an unjust compulsory acquisition of property, contrary to s 51(xxxi) of the Constitution. Along with other aboriginal elders, Wurridjal was recognised under the Land Rights Act as a traditional owner of the land in question. Like all land under the Act, the fee simple title is held by an Aboriginal Land Trust for the benefit of the relevant aboriginal people. The township of Maningrida was established as an instrument of government policy in 1957.[90] While many aboriginal people have moved to the township of Maningrida itself, many also continue to live in outstations on the region, of which there are over 30.[91] The Bawinanga Aboriginal Corporation operates a large and successful aboriginal employment scheme whereby those living on the Maningrida outstations are paid to maintain them.[92] Due to the relatively short history of white settlement and the relatively well-resourced support of outstation living, aboriginal residents' relationship with land in the Maningrida region is stronger than in other parts of Australia and is also robustly defended in the face of encroaching white governance. In a long and complex decision, the High Court found that the compulsory lease of the Maningrida area did *not* effect any acquisition of property from Wurridjal

79 That is, land held on trust under the Land Rights Act.

80 NTNERA, s 4.

81 Based on a search of all legislative instruments passed under NTNERA as at 15 February 2011.

82 NTNERA, s 12.

83 Ibid s 126.

84 Ibid pt 3.

85 Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory Emergency Response and Other Measures) Act 2007, (Cth) sch 4.

86 NTNERA, pt 5, division 4; pt 7.

87 Ibid ss 90, 91.

88 Ibid pt 4, division 1.

89 Ibid s 132.

90 J C Altman, *Fresh Water in the Maningrida Region's Hybrid Economy: Intercultural Contestation over Values and Property Rights* (CAEPR Australian National University Working Paper No 46 2008) 1.

91 Ibid.

92 'History' (Bawinanga Aboriginal Corporation, Darwin 2007) <www.bawinanga.com.au/meetbac/history.htm> accessed 1 March 2011.

himself, and that, although the leases did acquire property from the Land Trust, that acquisition was on just terms.[93]

From a property law perspective, the leases were unusual in many respects but notably in that, although they granted the Commonwealth 'exclusive possession and quiet enjoyment of the land while the lease is in force',[94] the Commonwealth never sought to enforce this right. Government officials made a point of publicly insisting that the leases did not amount to a land grab.[95] Indeed, then Prime Minister John Howard said, in reaction to land grab allegations, that 'we're offering a guarantee that we're not taking anything from anybody. We're trying to give things back.'[96] The question then is what *was* the government taking, or at least trying to take, through these compulsory leases. The government asserted that the leases 'help to expand opportunities for business investment such as farming, tourism and retail businesses and home ownership' and 'offer opportunity for economic development and better housing and infrastructure' for the benefit of the existing aboriginal communities.[97] In terms of better housing and infrastructure, part of the government's argument for why it needed leases of the land was that having long leases meant that it would not have to go through bureaucratic approval processes in order to make repairs on houses and impose maintenance conditions on individual renters.[98] The minister stated that the leases would also allow the government to promote private home-ownership in aboriginal communities rather than the communal title under which almost all aboriginal land is currently held.[99]

Anti-intervention campaigners pointed out that, contrary to the Commonwealth's stated objectives, housing for aboriginal people in the prescribed areas did not improve under the intervention leases, and any economic development has been negligible.[100] However, while activists were understandably sceptical that the government control of housing enabled by the leases would come to mean 'higher rents, more restrictive tenancy conditions and easier eviction',[101] there was no clear evidence that the Commonwealth used its leases to directly push residents out of their homes.[102] The Commonwealth government's rationale for the five-year leases shifted over time and was generally ambiguous.[103] Paddy Gibson argues that the leases were an attack on the gains won in the aboriginal land rights struggle, namely

93 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2.

94 NTNERA, s 35(1).

95 'QC Rejects NT Land Grab Fears' (*ABC News*, Sydney 17 July 2007) <www.abc.net.au/news/2007–07–11/qc-rejects-nt-land-grab-fears/96634> accessed 3 December 2011.

96 P Karvelas and S Parnell, 'Communal Land up for Grabs', *The Australian* (Sydney 30 June 2007) <www.theaustralian.com.au/news/nation/communal-land-up-for-grabs/story-e6frg6nf-1111113856963> accessed 24 August 2011.

97 J Macklin, 'Stronger Futures in the Northern Territory' (Australian Government Discussion Paper June 2011) 13 and 22.

98 Karvelas and Parnell (n 96).

99 Ibid. The Commonwealth government continues to have a policy of encouraging private home-ownership in aboriginal communities, although how that ownership is linked to government leases is less clear in more recent reports: Macklin (n 97).

100 'Rollback the Intervention' (Intervention Rollback Action Group, Alice Springs 2009) http://rollbacktheintervention.wordpress.com/ accessed 18 August 2012; 'Intervention Delivering "Empty Shipping Containers, No Houses"' (*ABC News*, Sydney 7 September 2008) <www.abc.net.au/news/2008–07–09/intervention-delivering-empty-shipping-containers/2498780> accessed 23 August 2011.

101 P Gibson, *Return to the Ration Days* (Jumbunna Discussion Paper 2009).

102 Existing rights and interests in the land are preserved by s 34 of the NTNERA, but s 37 allows the minister to terminate preserved rights.

103 S Brennan, '*Wurridjal v The Commonwealth*: The Northern Territory Intervention and Just Terms for the Acquisition of Property' (2009) 33 Melbourne University Law Review 957, 963.

'aboriginal control over their own lives'.[104] However, that control had already been taken on a far more direct and dramatic level with other provisions in the intervention such as the total ban on alcohol and compulsory income management. The fact that the leases seemed from the start to be mainly symbolic (because the government made clear its lack of intention to take up its right to exclusive possession) and yet have been the most contested aspect of the intervention suggests that the government was still 'taking' something; that there was a materiality to the 'symbolic' property being acquired.

The property being acquired or 'taken' through the compulsory leases was aboriginal, not just in terms of the type of legal title the land was held under, the identity of the claimants or the majority racial group living on the land, but also in terms of the broader, contested space of belonging of post-contact Australia. What was being appropriated through the intervention leases was not so much the right to exclusive possession of the land in the prescribed areas, as it was the holding up of aboriginal identities in those spaces.

A group of aboriginal activists called the Prescribed Area Peoples' Alliance released a statement following a meeting in June 2009 stating, that the intervention measures 'are pushing us into a corner. That will mean they will take away everything we belong to . . . If people are forced to leave off homelands they will lose everything, their identity.'[105] This reference to aboriginal identity, and to 'everything we belong *to*' (emphasis added) demonstrates the part–whole belonging that is at stake here – although the lease in question in *Wurridjal v The Commonwealth* clearly involved a change in which subject the object belonged to, what was more important to the aboriginal people affected by the leases was the threatened change in the whole (culture) of which they were a part. The space of belonging produced by property in the leases affects both the control of the land and the subjectivities of those who live on it. The appropriation of aboriginal identity through the reshaping of spaces of aboriginal belonging was at stake.

The term 'homelands' is instructive, as is the spatial reference to being 'pushed into a corner'. Although various definitions exist, the key characteristics of homelands are that they are aboriginal-initiated, permanent communities that are distant from non-aboriginal settlements both cartographically and culturally.[106] Beyond its geographical meaning, the idea of homelands captures something of the spatial understanding of property, the subject–object and part–whole belonging, the importance of land and the importance of home and the connection between them. Homelands are spaces of aboriginal belonging where being aboriginal is held up. Because they are not just a set of physical places but rather a space of aboriginal belonging, the homelands can be depleted both physically and culturally – by being forced to move from one location to another and also by having their distinctive characteristics maligned or dissolved. At the same time though, the homelands are a space that cannot be annihilated by compulsory leases or bulldozers alone. Like all spaces, the homelands are not frozen in time, but will shift and adapt from moment to moment, and across physical locations.

The homelands are a kind of subversive property in that the relation of belonging between aboriginal people and their land and culture – a relation that is out of place according to dominant Australian understandings of what and who belong where – is held up in the homelands. In response to the intervention, one remote Northern Territory aboriginal community held on to its subversive property by physically moving and taking its

104 Gibson (n 101).

105 'Prescribed Area Peoples Alliance Statement' (One Voice Gathering, Darwin 18–19 June 2009) <http://rollbacktheintervention.wordpress.com/statements/> accessed 22 March 2010.

106 C A Blanchard, *Return to Country: The Aboriginal Homelands Movement in Australia* (Australian Government Publishing Service 1987) 7.

space with it. This is the community of Ampilatwatja, located some 300km north-east of Alice Springs. Ampilatwatja is a community of the Alyawarr people and land.[107] In June 2009 the people of the Ampilatwatja community, supported by several Australian trade unions, walked off their town site in protest against the intervention, and started building new accommodation and infrastructure on a site 3km away, just outside the boundaries of the intervention's 'prescribed areas'.[108] Despite its physical move, the Ampilatwatja community retained its space of belonging, which is no doubt altered from what it was at the last site but is still a space where aboriginal bodies and cultural practices belong. Spokespeople from the walk-off site have emphasised their rejection of the government's regime, their spiritual connection to the land and intention to live under their own customs and laws forever.[109] Walk-off spokespeople have, for example, stated to the government that 'we're never ever going to go back to that community to live under your controls and measures';[110] and that their action of walking outside the borders of the prescribed areas:

> leads us not to Canberra but to Country, not to further assimilation through dependency but to a continuing way of life, not to western law but to our own, not to hand fed scraps and the confines and indignities of the ration mentality and manufactured 'real economies' but to self reliance, learning by doing and direct responsibility for self, Family and the coming generations.[111]

The Ampilatwatja people's location and declaration that they will not be moving unsettled the Commonwealth government[112] and created ripples of media attention.[113] Theirs is a claim to property, not just in the sense that the land which they have moved to belongs to them, but also in the sense that as a community they are part of an aboriginal culture distinct from the dominant non-aboriginal cultures of wider Australia. It is a claim that their space of belonging should prevail, that their relation of belonging to their land and culture should be held up. Whereas the *Wurridjal v The Commonwealth* case challenged the government's power to take property in aboriginal land, the walk-off literally moved away from the law and took the community's aboriginal space of belonging with it.

Conclusion: law's appropriations and the spatiality of identity

The socio-legal issues of sexuality-based asylum claims and of compulsory leases of aboriginal land in Australia have in common a contestation over property – both involved attempts to assert that particular relations of belonging should be held up in particular

107 'Ampilatwatja' (Barkly Shire Council) <www.barkly.nt.gov.au/our-communities/ampilatwatja/> accessed 12 December 2011.

108 'About' (Intervention Walkoff's Blog, Alice Springs 23 July 2009) <http://interventionwalkoff.wordpress.com/about> accessed 23 March 2010; J Dheerasekara, 'Back to Country: Alyawarr Resistance' (Alice Springs 2009) <http://vimeo.com/12577970> accessed 12 December 2011.

109 'Ampilatwatja Walkoff – Aboriginal Australia Today' (The Juice Media 25 October 2009) <www.youtube.com/watch?v=8nJKEl9asqQ&feature=related> accessed 12 December 2011.

110 R Downs, 'NT Aboriginal Leaders Condemn Intervention, Housing Program Failure' (Sydney 7 October 2009) <http://interventionwalkoff.wordpress.com/media-releases/> accessed 12 December 2011.

111 J Hartley, 'Message from John Hartley' (Northern Territory 2010) <http://interventionwalkoff.wordpress.com/statements/> accessed 12 December 2011.

112 The minister has not released an official statement on the walk-off but is clearly aware of its presence. This video shows public servants from the Commonwealth government driving out to the walk-off site in order to inspect it, looking somewhat shocked at what was taking place and being asked to leave by the residents. 'Intervention Agents Evicted' (ForNowVision, Alice Springs 17 February 2010) <www.youtube.com/watch?v=AB27NSgJEpY&feature=player_embedded> accessed 31 August 2011.

113 L Murdoch, 'A Community with its Own Intervention' *Sydney Morning Herald* (Sydney 13 February 2010) <www.smh.com.au/national/a-community-with-its-own-intervention-20100212-nxmp.html?skin=text-only> accessed 19 December 2012.

spaces. In regards to the leases, that contestation was over whether aboriginal or Anglo-Australian spaces of belonging would be dominant in the remote communities of the Northern Territory. In regards to the cases of women claiming asylum on the basis of sexuality persecution, that contestation was over what kinds of sexualities will be *held up* and afforded a space within the receiving state. Whereas the Australian cases involved assertions of subversive (aboriginal) property and the refugee cases involved the reorientation of what was a subversive (queer) property, both sets of cases demonstrate the significant, pervasive social power of property – its production as well as requirement of particular spaces of belonging. These studies show the complexity of the relationship between property, identity, belonging and space. Law appropriates subversive identities by reshaping the spaces that hold up those identities. The spatial understanding of property as belonging put forward in this article can be used to illuminate the ways in which law appropriates subversive identities, which operate as property on both subject–object and part–whole levels. However, while law appropriates, resistance continues on the outside, through the building and maintenance of spaces that hold up subversive relations of belonging.

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The laws of social reproduction: a lesson in appropriation

Prabha Kotiswaran[1]

Dickson Poon School of Law, King's College London

Abstract

This article offers insights into the law's appropriation of women's reproductive labour, namely, the intimate labours that they typically carry out in the context of marriage to biologically, socially, emotionally and culturally reproduce members of the household by offering a range of goods and services. Feminist legal scholars have long demonstrated the law's failure to recognise, much less value, such reproductive labour. Where the law does recognise such labour, feminists argue that it is largely within the parameters of the institution of heterosexual marriage to the exclusion of other organisational forms. The article extends this line of feminist legal critique to reveal feminists' own reluctance within the debates on social reproduction to recognise the reproductive labour performed by women outside the family and explicitly for *the market. Through a cross-sectoral comparison of the law's regulation of three such sectors of women's abject labour, namely, sex work, bar-dancing and commercial surrogacy, the article demonstrates how, despite their regulation through criminal law, licensing law and contract law, there are several structural similarities in the political economies of these sectors. Consequently, any change in the rule network pertaining to any one sector of women's reproductive labour affects women in that sector but also in other sectors. The article argues that it is only through an examination of the deep interconnectedness between sectors of women's reproductive labour that feminists can assess whether an alternative regulatory matrix would further women's claims to economic justice.*

Introduction

The 2011 film *Made in India* documents the story of Lisa and Brian, a couple from Austin, Texas, who, in their desperation to complete their family, arrive in Mumbai and avail themselves of the services of a surrogate, Aasia. Aasia, a Muslim woman living in the slums of Mumbai with her three young children, is recruited by her sister-in-law to carry a baby for Lisa. Interestingly, Lisa is a nurse who has to sell her house in Texas to be able to afford surrogacy in India. Meanwhile, Aasia's husband, a car mechanic, has seen his earnings dwindle along with the informal car-repair economy. The documentary follows the arc of emotions from the initial euphoria and gratitude of the commissioning parents and the surrogate to the eventual souring of their relations and haggling over the price for the surrogate's services for delivering twins. Even as Aasia returns to the fertility clinic not long after Lisa and Brian have left, to try her hand at surrogacy again, I realised that Aasia's background as a poorly educated domestic maid was not altogether different from the many women I had encountered while

1 prabha.kotiswaran@kcl.ac.uk. Many thanks to Amanda Perry-Kessaris for her excellent feedback.

conducting an ethnographic study of sex work in Sonagachi, the largest red-light area in Kolkata. Almost two-thirds of the women there had been married before, many with small children, when they started selling sex. They often came into sex work from other sectors of the informal economy such as domestic work and construction work. Meanwhile, in the very same red-light areas where Mumbai's sex workers worked from, lived the city's bar dancers who shared in the stigma of the labour they performed by night. Yet surrogates, sex workers and bar dancers generally have one thing in common – an income that far exceeds what women with their education and skills could command in the informal economy. In this article, I ask how feminists might theorise the intimate labours of social reproduction typically carried out within the home that these various women perform for the market? Further, how does the law shape their choices to enter these abject labour markets, their prospects for work in these markets and exit from them?

In so doing, I revisit law's appropriation of women's labour, in particular, reproductive labour. By reproductive labour, I mean the labour involved in social reproduction, namely, 'biological reproduction; unpaid production in the home (both goods and services); social provisioning (. . . voluntary work directed at meeting needs in the community); the reproduction of culture and ideology; and the provision of sexual, emotional and affective services (such as are required to maintain family and intimate relationships)',[2] all of which are performed predominantly by women, typically within the institutional context of marriage. Successive waves of feminist scholarship have highlighted the reproductive labour that women perform. Demands for the recognition of this labour have ranged from radical proposals, such as wages for housework in the 1970s, to more recent attempts at the equitable distribution of marital property upon the termination of a marriage to a rearrangement of responsibilities for care between men and women when both participate in the paid labour market.[3]

Social reproduction under neoliberal conditions of globalisation has, however, dramatically shifted the parameters of these debates. Decisive trends, according to scholars, include women's increased employment in the West, a larger aging population and declining social welfare, which have resulted in the homemaker/breadwinner 'family wage' model being replaced by a 'dual earner model' that seeks to accommodate global competitive pressures for flexible labour.[4] Confronted with the crises that the global economy and welfare states are thrown into, feminists point to how women are not only increasingly called upon to perform paid work in and for transnational markets, but that they also face increased burdens of social reproduction. This may be ameliorated to some extent by the vast inflow of female migrant workers from the developing world, particularly for domestic work and child-care.[5] Yet, as states are driven by neoliberal thinking to address the 'care deficit',[6] feminist scholars point out that 'the gap between the outflows – domestic, affective and reproductive labour – and the inflows – medical care, income earned and leisure time

2 C Hoskyns and S Rai, 'Recasting the Global Political Economy: Counting Women's Unpaid Work' (2007) 12(3) New Political Economy 297–317, 300.

3 For a debate amongst legal feminists on whether the law should support women's increased paid work in the labour market or compensate them for the unpaid work they perform at home, see the 2000–2001 special issue of the Chicago-Kent Law Review.

4 J Conaghan, 'Introduction' (2007) 58(4) Northern Ireland Legal Quarterly 248–49 Special Issue: Legal Constructions of Unpaid Caregiving.

5 H Shamir, 'Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care' (2009) 30 Berkeley Journal of Employment and Labor Law 404, 439–40.

6 Conaghan (n 4) 247.

– falls below a threshold of biological, financial and affective sustainability'[7] which has resulted in the depletion of social reproduction.[8]

The challenges facing the provision of social reproduction are significantly different in the developing world. For one, the institutions constituting what Razavi calls the 'care diamond', which meet the needs of social reproduction, namely, the market, family, state and community,[9] are configured in fundamentally varied ways when compared with the West. In a country like India, for instance, the welfare state is at best minimalist, constituting a 'residual welfare regime'.[10] Urban women's participation in the workforce is abysmally low at 16 per cent resulting in the family being the privileged site of care work. Where women's work has been commodified; it is in sectors like teaching or paid domestic work, which accommodate unpaid reproductive labour more easily.[11] The institutional parameters within which the political economy of reproductive labour is nestled and the regulatory impulses that govern it are thus driven by what Palriwala and Neetha term 'gendered familialism'.[12] In other words, care is a familial and female responsibility and work in the market devalues and diminishes the dimensions of care.[13] Paradoxically, however, feminists also delineate the patriarchal reorganisation of reproduction[14] whereby sex selection has increasingly become a technique used to facilitate female foeticide in the post-conception, prenatal moment rather than killing women through dowry harassment or prematurely later in their life cycles. The resultant lop-sided sex ratio of 914:1000[15] as reported by the 2011 Indian census has fuelled the trafficking of women for social reproduction.[16]

Like their feminist counterparts in other disciplines, feminist legal scholars have on many occasions engaged with the law's regulation of women's reproductive labour. They have, in particular, demonstrated the central role of the law in producing and entrenching the invisibility of women's reproductive labour. As I will show, the feminist legal theorising of social reproduction reveals the sheer contingency of the regulatory matrix governing the family and unpaid housework. One can discern two strains of theorising here. Much of the early, path-breaking work on the law's regulation, and, indeed, appropriation of women's reproductive labour, dealt with the lack of legal *recognition* of women's reproductive labour as valuable. In this vein was Katherine Silbaugh's writing on the significance of legal rules ranging from family law through to tort law, welfare law, bankruptcy law, tax law and labour law that consistently failed to value women's housework. In the process of revealing that these rules did not recognise women's housework, but could have, Silbaugh's work also showed that no default legal regime

7 S Rai, C Hoskyns and D Thomas, 'Depletion: The Costs of Unpaid Domestic Work' <www.e-ir.info/2012/03/19/depletion-the-costs-of-unpaid-domestic-work/>.

8 Ibid.

9 S Razavi, 'The Political and Social Economy of Care in a Development Context: Conceptual Issues, Research Questions and Policy Options' (Gender and Development Programme, Paper No 3, United Nations Research Institute for Social Development, Geneva 2007) 20.

10 R Palriwala and N Neetha, 'Stratified Familialism: The Care Regime in India through the Lens of Childcare' (2011) 42(4) Development and Change 1049–78, 1050.

11 Ibid 1054.

12 Ibid 1049.

13 Ibid.

14 K Sangari, 'Settled Alibis and Emerging Contradictions: Sex Selection, Dowry and Domestic Violence' (2012) 47(34) Economic and Political Weekly 39–48.

15 'India's Skewed Sex Ratios: Gendercide Stings' (Banyan Asia 18 December 2012) <www.economist.com/blogs/banyan/2012/12/indias-skewed-sex-ratios>.

16 N Antelava, 'The Girls Stolen from the Streets of India' (*BBC News Magazine* 9 January 2013) <www.bbc.co.uk/news/magazine-20938125>.

governing a certain sector of women's work at any given point in time is necessary in any way. In other words, legal categories are contingent. Thus, we may currently default to using family law for recognising women's reproductive labour, although labour law might just as well have mandated wages for housewives. Indeed, feminist lawyers continue to delineate how unpaid care-giving is regulated by laws as disparate as property law, family law, labour law, tort law, European Union and international law.[17] It is this contingent legal categorisation of women's labour that both itself amounts to and further enables the patriarchal *appropriation* of women's labour. Meanwhile, some legal feminists reached into the depths of Carol Gilligan's work on difference to articulate a normative view of unpaid reproductive labour or care work,[18] which was reflected in a range of legal proposals,[19] thus bolstering feminist claims to the recognition of social reproduction.

Other legal feminists have increasingly focused on theorising care in terms of *redistribution*,[20] especially intra-gender redistribution or the effects of recognising the reproductive labour of wives for other women.[21] Thus, Mary Ann Case asks if increased employer responsibility for children does not in fact prejudice the interests of working women like herself who do not have children and does not, indeed, ultimately promote the interests of married working men who have stay-at-home wives to perform reproductive labour for the family.[22] Feminist legal realists like Halley, Rittich and Shamir continue in this vein. Their starting point is to highlight the significance of background legal rules, which influence the bargaining power of a social actor in any given situation. Thus, Halley and Rittich have argued against the exceptionalist legal treatment of the family through family law (FL), back-grounding legal rules in the process into several categories ranging from FL1, the subject matter of family law textbooks, to FL2 (tax, immigration, bankruptcy laws), FL3 (tenancy law, employment rules, labour laws) and FL4 (incorporating norms around the household).[23] The exceptional status of the family as a legal category thus performs concrete distributional work. Similarly, Shamir assesses the distributive consequences of accommodations structured within employment law for working families, which were meant to recognise care responsibilities but can in fact have unpredictable effects that consolidate and entrench class and gender disparities. Thus, Shamir's analysis shows that the ability of a worker to take unpaid leave to care for oneself, a child or a

17 Conaghan (n 4) 245.

18 See the discussion of care feminists in P Tsoukala, 'Gary Becker, Legal Feminism, and the Costs of Moralizing Care' (2007) 16 Columbia Journal of Gender and Law 387–8.

19 M Ertman, 'Commercializing Marriage: A Proposal for Valuing Women's Work through Premarital Security Agreements' (1998) 77 Texas Law Review 17–112.

20 I draw on Nancy Fraser's use of these terms in her influential book *Justice Interruptus: Critical Reflections on the Postsocialist Condition* (Routledge 1997). I do not make sharp distinctions here between recognition and redistribution, much less, their attenuated mapping onto a culture/economy distinction. Demands for recognition might well also incorporate demands for redistribution, as in the case of sex workers. Conversely, what might appear to be demands for redistribution (such as, say, labour rights for domestic workers) could well translate into demands for recognition and dignity and, indeed, disassociation from domestic work. See S Chigateri, 'Articulations of Injustice and the Recognition – Redistribution Debate: Locating Caste, Class and Gender in Paid Domestic Work in India' (2007) (1) Law, Social Justice and Global Development Journal <http://go.warwick.ac.uk/lgd/2007_1/chigateri>.

21 J Halley and K Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism – Introduction to the Special Issue on Comparative Family Law' (2010) 58(4) American Journal of Comparative Law 753; M A Case, 'How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should be Shifted' (2001) 76 Chicago-Kent Law Review 1753–86; K Franke, 'Theorizing Yes: An Essay on Feminism, Law, and Desire' (2001) 101 Columbia Law Review 181.

22 Case (n 21) 1756.

23 Halley and Rittich (n 21).

specified family member who is seriously sick under the US Family and Medical Leave Act 1993 might be ultimately used only by working women rather than their husbands due to the gender wage gap.[24] Alternatively, the fact that such leave is unpaid means that, in the absence of any other leave entitlement, only middle-class workers can avail themselves of this optional benefit.[25] The legal analysis here is attentive to the broader institutional framework, such as the orientation of a particular welfare state, as well as the interaction between conventional employment law applicable to the formal economy and the lack of such protections for the secondary labour market of migrant care workers who support working parents.

A further line of feminist legal critique relates to the narrow parameters of the law's recognition of female reproductive labour, normalising in effect the institution of heterosexual marriage to the exclusion of other organisational forms for the provision of social reproduction.[26] Barlow goes so far as to suggest the existence of a sliding scale of value,[27] wherein a high value is placed on non-financial contributions to a marriage, which is not available within cohabitation law.[28] Even less value is accorded in the context of non-couple care-giving relationships or state-dependent single parenthood where paid work is considered to be the carer's primary goal and reproductive labour becomes non-existent at best. Similarly, recognition of the reproductive labour of families formed by lesbians, gays, bisexuals and transsexuals is premised on their approximation of the heterosexual marriage model requiring: 'two parents (no more), cohabiting in a monogamous, long-standing relationship, acting as one economic unit with the associated assumptions around financial dependency, and involved in a romantically defined sexual relationship'.[29]

Feminist endeavours to convince states and increasingly international institutions to recognise women's reproductive labour have met with little success. As feminist economists and development theorists look to successful campaigns elsewhere in trying to get the UN to redraw the 'production boundary',[30] feminist lawyers have had to be content with family law doctrine where the labours of married mothers in long-term marriages are recognised but only at the point of exit, namely, divorce. What is perplexing, however, is that, despite feminist critiques of mainstream economic theory and state policy, feminists' own conceptualisation of the production boundary is somewhat limited when it comes to reproductive labour. In the literature on social reproduction, the 'reproduction boundary', if we may call it that, is fairly consistently and strictly drawn around unpaid reproductive labour performed in a relational context or the reproductive labour of working mothers

24 Shamir (n 5) 431.

25 Ibid 435.

26 See, in particular, K Quinn, 'Mommy Dearest: The Focus on the Family in Legal Feminism' (2002) 37 Harvard Civil Rights–Civil Liberties Law Review 447.

27 A Barlow, 'Configuration(s) of Unpaid Caregiving within Current Legal Discourse in and around the Family' (2007) 58 Northern Ireland Legal Quarterly 251

28 See also S Wong, 'Would You "Care" to Share your Home?' (2007) 58 Northern Ireland Legal Quarterly 268 for how courts have adjudicated property claims when cohabitation arrangements end.

29 J Conaghan and E Grabham, 'Sexuality and the Citizen Carer' (2007) 58 Northern Ireland Legal Quarterly 325, 340.

30 See Hoskyns and Rai (n 2) and their description of the successful campaign in the 1980s to get trade in services included under the regulatory system of the General Agreement on Tariffs and Trade. Reference to the production boundary is in relation to the SNA, or System of National Accounts, used by the UN to map national economies in order to establish gross domestic product, to identify national and global trends and to make cross-national comparisons.

who struggle to balance work and care responsibilities.[31] Glaringly absent is an understanding of reproductive labour performed by women for the market in terms of social reproduction. Admittedly, feminists have expressed concerns about the exploitation that the commodification of women's reproductive labour might bring. Yet the widespread nature of such labour necessitates at the very least some feminist critique of whether the market values and compensates women's labour appropriately.

I attempt to build on existing feminist scholarship to expand the reproduction boundary and understand women's reproductive labour, whether performed for the family or the market, in terms of a continuum. This is because the lived experiences of women like the surrogate protagonist Aasia in *Made in India* suggest that connections between various sectors of reproductive labour have more in common than feminists are willing to concede. I hope eventually to offer a cross-sectoral comparison of the law's treatment of women's labour markets spanning the market–family continuum with market-based, paid-for sexual labour at one end (sex work, bar-dancing) and family-based, unpaid-for care work at the other, with paid domestic work and surrogacy in between. In this article, however, I will focus only on sectors at the market end of the spectrum. To the extent that terms in the social reproduction debates like 'care work', 'care-giving', 'familial care'[32] and 'unpaid care-giving'[33] assume underlying affective arrangements, I use the term reproductive labour instead to de-exceptionalise social reproduction performed in the market for a price. The term 'reproductive labour' leaves open the possibility that feminists recognise the labour that women perform in these sectors, even if they vehemently disagree with their characterisation as work. Finally, although the study is specifically of Indian law, I hope that it will bear resonance in other contexts.

Before I elaborate on the sectors themselves, I will briefly highlight the regulatory continuum of social reproduction, which ranges from international law to domestic law. This regulatory matrix influences the discursive fields of debate and the regulatory disposition of the state towards female labour markets, which in turn has implications for the mobilisational repertoires of reproductive labourers themselves and the venues in which they seek to intervene. Here, the resolutely international regulatory field in which legal feminists today operate is significant. Related to this salience of international law for feminist legal interventions is the emergence of governance feminism,[34] which has been the most visible in the violence-against-women campaigns targeting sex work, trafficking and

31 Conaghan and Grabham (n 29) 326. There are exceptions. Conaghan and Grabham refer to the considerable economic and affective consequences for sexual minorities of the dominant construction of unpaid care-giving where the 'reality' of lesbian and gay relationships 'evidences a variety of configurations of intimacy, which include friends, lovers, former partners, "fuck buddies"'. However, this is rare and does not speak to market-based forms of reproductive labour. Ann Stewart is one of the few scholars who deploy development economics and specifically the notion of global care chains to discuss such market-based reproductive labour: see A Stewart, 'Who Do We Care About? Reflections on Gender Justice in a Global Market' (2007) 58 Northern Ireland Legal Quarterly 359; see also A Stewart, *Gender, Law and Justice in a Global Market* (CUP 2011).

32 Shamir (n 5).

33 This is the term that the special issue of the Northern Ireland Legal Quarterly 58(4) uses.

34 Halley defines governance feminism as: 'an under recognized but important fact of governance more generally in the early twenty-first century. I mean the term to refer to the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power. It takes many forms, and some parts of feminism participate more effectively than others; some are not players at all. Feminists by no means have won everything they want – far from it – but neither are they helpless outsiders. Rather, as feminist legal activism comes of age, it accedes to a newly mature engagement with power.' J Halley, P Kotiswaran, H Shamir and C Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 Harvard Journal of Law and Gender 335–423, 340.

rape. Importantly, governance feminism is heavily invested in the use of criminal law to prohibit such 'violence', especially with respect to sex work. Governance feminists have also consistently opposed the characterisation of sex work, erotic dancing and commercial surrogacy as labour, preferring to view them as forms of unbridled violence against women. Hence, any effort to redraw the feminist reproduction boundary must acknowledge their growing influence. In relatively newer sectors of female reproductive labour such as transnational commercial surrogacy, meanwhile, conventional private international law rules are only beginning to assume significance as the domestic legal validity of foreign contracts for commercial surrogacy or the citizenship status of babies born out of such arrangements are litigated. Sectors such as bar-dancing and unpaid housework meanwhile tend to be regulated in more domestic, national legal terms.

Sex work, bar-dancing and commercial surrogacy

In the following section, I will elaborate on the law's appropriation of female reproductive labour across sectors involving sex work, bar-dancing and surrogacy. I will outline the default legal architecture in these sectors, the feminist discourse surrounding them, and how reproductive labourers themselves have responded. Further, the Indian state's differential treatment of these sectors despite their structural similarities highlights once again the contingency of the law's treatment of female reproductive labour. Feminists then need to grapple with whether an alternative regulatory matrix would further women's claims to economic justice and, if so, at what moments in time and under what conditions are shifts in the default legal categorisation possible? Before I set out to do so, I will refer to the scale of these sectors and the distinct time periods over which they developed. The Indian sex worker population is estimated to be between 1 and 2 million. The number of bar dancers, predominantly in the state of Maharashtra in 2006 before the sector was banned, stood at 75,000. Despite the bullish persona that advocates of the surrogacy sector consistently portray in India and internationally, its exact scope is far from clear. Even the clinics with the largest surrogacy practice have only recently passed the 500 mark for a baby born out of a surrogacy arrangement. As such, the number of surrogates is likely to be only a few thousand. The scale of these sectors also reflects patterns of their growth. Sex work in its contemporary form has been in existence in India for at least two centuries if not longer, although shifts in its organisation and its quite distinct regional configuration are palpable. Bar-dancing emerged in the Western Indian state of Maharashtra in the 1980s, possibly in the wake of the deindustrialisation of Mumbai. Although the sector has been significantly scaled back in the state following a 2006 ban and pending its litigation in the Supreme Court of India, dance bars have sprung up elsewhere in the country. The surrogacy industry on the other hand is relatively new, having taken off only in the past 10 years, largely due to the increase in foreign commissioning parents. I now turn to each of these sectors in more depth.

Sex work

Of the three forms of reproductive labour that I consider, sex work is arguably the most stigmatised. Indeed, it is so stigmatised that feminists have disagreed for long over its very characterisation as a form of labour. Sex workers the world over, including in India, have, however, persisted in campaigning for an alternative characterisation of sex work as legitimate work. The Indian anti-sex work criminal law, the Immoral Traffic Prevention Act 1956 (ITPA), not unlike laws relating to sex work elsewhere in the world, does not criminalise the sale of sex per se but criminalises all activities that are required in order to perform sex work. The inherent ambiguity in the legislative framework, which tolerates individually negotiated, discrete sex work transactions but not commercialised sex work

businesses that are publicly visible, results in the highly corrupt enforcement of the ITPA. Duncan Kennedy's concept of the tolerated residuum of abuse helps clarify the role of criminal laws such as the ITPA. Writing in the context of rape laws, Kennedy has proposed that the legal system will always tolerate a certain level of sexual abuse, which he termed the tolerated residuum of abuse. This tolerated residuum of abuse depends on contestable social decisions about what abuse is and how important it is to prevent it. This in turn affects practices of abuse and social practices of both men and women, irrespective of whether they themselves are abusers or victims.[35] At times, the law may even generate violence against women as in the case of anti-sex work laws[36] like the ITPA. The ITPA is used excessively to prosecute sex workers rather than other stakeholders in the sex industry. The Indian state also uses a range of other general criminal laws such as the Indian Penal Code 1860, local government laws and specialist anti-narcotics laws to harass sex workers. Since the crime statistics data do not record the extent of the use of these laws against sex workers, much less, the countless threats to invoke them against sex workers, the tolerated residuum of abuse against sex workers is in fact likely to be quite large. The state here directly appropriates the labour of sex workers through the rent-seeking behaviour of the police who collect bribes for withholding prosecution against them or by imposing fines upon conviction, which only translate into sex workers' need to perform additional sex work. The state also indirectly appropriates women's labour by deriving ideological benefits. Anti-sex-work laws not only successfully terrorise and sexualise sex workers,[37] but also, women and men who are only remotely connected to the sex industry, thus reiterating hegemonic gender identities.

Layered over these state practices, however, has been the consistent rise of feminist discourse within state expert bodies such as the National Commission for Women, which, in line with the predominant radical feminist take on sex work as nothing but violence against women, views Indian sex workers essentially as prostituted victims of patriarchy and poverty. Feminist abolitionist non-governmental organisations have popularised this stance while sex work remains largely ignored by the autonomous Indian women's movement. Meanwhile, the public health discourse, animating the state's large-scale HIV prevention efforts, views female sex workers as 'agents' who are necessary for HIV prevention efforts. Both these discourses have to some extent influenced the senior ranks of the police bureaucracy which may direct the lower ranks to desist from harassing sex workers thereby altering the tolerated residuum of abuse, although insignificantly. Moreover, since 2000, international trends on prostitution policy have undergone a significant change with the negotiation of the UN Protocol on Trafficking[38] and the passage of the US law, the Victims of Trafficking and Violence Protection Act 2000 (VTVPA), which ranks countries according to their efforts to prevent, prosecute and punish trafficking. States have also resorted to the Swedish model of criminalising customers of sex workers while decriminalising sex workers themselves. Indeed, this trend found expression in an amendment to the ITPA in 2006, which lapsed in Parliament in March 2009 due to a schism within the Indian Union Cabinet produced by the competing prerogatives of anti-trafficking discourse on the one hand and HIV prevention on the other. Following this defeat of the abolitionists, but anticipating legislative action in light of India's ratification of the UN Trafficking Protocol in June 2011,

35 D Kennedy, *Sexy Dressing: Essays on the Power and Politics of Cultural Identity* (Harvard University Press 1993), 137

36 Ibid.

37 M Frug, 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)' (1991–1992) 105 Harvard Law Review 1049–50.

38 A Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime GA Res 25, Annex II, UN GAOR, 55th Session, Supp No 49, at 60, UN Doc A/45/49 (vol I) (2001).

sex workers' groups, which had since the early 1990s mobilised sex worker communities and shied away from formal legal venues for contesting, are now shifting their tactics. They recently launched a constitutional challenge to several sections of the ITPA almost five decades after it initially passed constitutional muster.

Bar-dancing

As is evident in the case of sex work, the default legal categorisation of women's reproductive labour raises the bar for its recategorisation through the efforts of feminists and sex workers alike. This is why the case of bar-dancing is instructive because feminists were able to reorient the state's disposition towards the regulation of bar-dancing. What made this legal recategorisation possible despite the structural similarities of bar-dancing and sex work and women's experience of them? Bar dancing as a sector grew in the Indian state of Maharashtra starting in the mid-1980s and by 2006, when it was banned, easily employed about 75,000 dancers and 800,000 men and women in related employment. The sector was regulated by an elaborate labyrinth of licensing regimes relating to food, liquor and public entertainment, as well as by the public nuisance provisions of the Bombay Police Act 1951 and s 294 of the Indian Penal Code 1860 relating to obscenity. A conservative provincial government took over and banned bar-dancing in bars other than those located in hotels with three stars or above. The justification was the negative externalities that such behaviour produced as well as the offence to the dignity of women. Bar owners challenged the ban and the Mumbai High Court overturned the ban, upholding the right to livelihood of bar dancers.[39] The Indian Supreme Court recently upheld the Mumbai High Court's decision. I focus on the High Court's decision as it pertains more directly to my argument in this article.

The Mumbai High Court decision was clearly a cause for feminist celebration. The court, after all, demonstrated a keen awareness of the gender bias operative in the state's ban, was not convinced that bar-dancing was against the public interest, and held that women could not be effectively penalised for men's insatiable sexual needs[40] or the public consequences of liquor consumption.[41] It reminded the state that many of the bar dancers were widowed, deserted or divorced and trying to earn a decent living for themselves and their families. Even if some were exploited, the state could not prevent others from pursuing a livelihood of their choice, even if involuntary at times. The court also challenged the state's notion that bar dancers stay poor rather than engage in unpalatable work. Thus, judges asked why an illiterate but otherwise beautiful girl should be prohibited from earning well through dancing rather than be condemned to a life of menial jobs?[42]

At the same time, the court drew a bright line between bar-dancing and sex work. It held that dancing was not inherently pernicious and was therefore *res commercium*, unlike sex work which, being immoral, was *res extra commercium*, that is outside commerce. Dancing, the court noted, had an illustrious past since ancient Indian times, including in Maharashtra,[43] so that, if bar-dancing was harmful, then, Bollywood dancing would have to be banned. Thus, we find the court reluctant to challenge more fundamentally the sharp distinctions drawn between sex work and bar-dancing. Interestingly, there are many structural similarities between sex work and bar-dancing in terms of the social origins of the dancers, their previous employment, such as domestic work, their self-understanding of their work as

39 *Indian Hotel and Restaurants Association (IHRA) v State of Maharashtra* (2006) 3 Bombay Cases Reporter 705.

40 *IHRA* 219.

41 *IHRA* 223.

42 *IHRA* 222–3.

43 *IHRA* 191.

dignified, the support systems they relied on, the spatial concentration of bar dancers' residences in red-light areas, the levels of social stigma they endured, the internalisation of this stigma, and the unlikeliness of marriage as an exit option. Significantly, the state's enforcement of laws governing bar-dancing was not unlike its enforcement of anti-sex-work criminal laws. Both sectors faced the threat of enforcement and the attendant harassment, which resulted in the payment of bribes or the public arrest and humiliation of sex workers and bar dancers. This in turn undermined women's bargaining power vis-à-vis other stakeholders in the industries.

Interestingly though, anti-ban feminists repeatedly insisted that dancing was anything but sex work, instead of challenging the more fundamental divide between moral and immoral women. Admittedly, they did so for strategic reasons as they had to urgently deal with the closure of dance bars and fight for bar dancers' rights. This strategic mode of legal arguments, however, invited legitimation in judicial discourse. The distancing of bar-dancing from sex work was achieved only through the normalisation of bar-dancing itself. Dancing by women has generally become more respectable given the popularity of Bollywood dancing amongst middle-class women in fitness clubs.[44] Bar dancing was also thought to satisfy the legitimate male need for entertainment met previously by indigenous traditions of female dancing. Indeed, poor male migrants' rights to sexual entertainment were offered as resistance to globalisation.

Bar dancing was also justified in terms of women's livelihoods. The commodification anxiety of feminists from barely a decade ago, when they opposed women's beauty contests, was missing. Consequently, instead of abolition, feminists called for the increased regularisation of the working conditions of bar dancers. This is true even of radical feminist organisations like the Bangalore-based Vimochana, which has been vocally opposed to sex work but supports better working conditions for bar dancers. So, we have here an instance of legal mobilisation that forced feminists to draw lines between sectors in female reproductive labour, which in turn became consolidated in judicial discourse. Success in campaign terms can perhaps only be achieved by sacrificing discursive complexity.[45] Yet, once we acknowledge the interconnectedness of the rule network governing women's reproductive labour, it follows that some reproductive labourers will likely bear the costs of the strategic successes of other reproductive labourers.

Commercial surrogacy

Commercial surrogacy offers yet another interesting case study for the Indian state's regulation of reproductive labour. Unlike with sex work and bar-dancing, where feminist abolitionists forcefully demand to be convinced of women's reproductive labour, no one, let alone a feminist, will deny the labour involved in reproducing babies. The question then is whether women should perform such labour for others and, if so, under what circumstances and whether it can legitimately be called work. Here, there are several discursive similarities between sex work, bar-dancing and commercial surrogacy. Thus, feminist objections to surrogacy on the grounds of objectification, exploitation, subordination, the domino effects of unrestricted commodification and the social and cultural hierarchies that it entrenches, and its bolstering of heteronormativity and the

44 A Morcom, *Illicit Worlds of Indian Dance Cultures of Exclusion* (C Hurst & Co Publishers Ltd 2013).

45 See Frug's observations on feminist legal strategising around pornography where she notes how the feminist impulse to abolish pornography rather than deconstruct it limited the liberatory potential of the original feminist insight into female sexual subordination: Frug (n 37) 1073–4.

patriarchal family form, all seem familiar.[46] Indeed, the very same Western radical feminists who demanded the abolition of sex work also opposed commercial surrogacy early on, equating surrogacy hostels with brothels.[47] It comes as no surprise then that an Indian male Marxist academic recently termed gestational surrogacy as 'reproductive trafficking' or 'consensual slavery'.[48]

Interestingly, Indian feminists have been reluctant to call for a ban on commercial surrogacy.[49] Many feminists acknowledge that it is too late to ban gestational surrogacy; it is inevitable and here to stay. They instead express concern about the exploitation of surrogates. Others have clearly articulated their concern as to the domino effects of a market in commercial surrogacy driven by neoliberal capitalism.[50] Their anxieties are exemplified by the 21-year-old surrogate featured in a TV show who does it to educate her daughter to become like the English-speaking Indian elite and has no reservations doing it again if 'she likes it'. When asked about whether poor women might not be exploited into becoming surrogates, she insists that she is not coerced; it is this expression of neoliberal subjectivity that worries many feminists. For the time being, however, the regulatory preoccupation for feminists pertains to surrogates' rights – the need for informed consent, the ambit of health insurance during surrogacy, how often they can be surrogates and so on.[51]

The substantial involvement of a professional group like the medical community in surrogacy sets it apart from sex work and bar-dancing, which are associated with so-called 'lumpen' elements in society. Not unsurprisingly, many doctors call for commercial surrogacy to be kept legal, with some catering quite consciously to foreign commissioning parents in riding the wave of increased medical tourism, which the Indian state has keenly promoted. Others estimate that 80 per cent of their patients are Indian couples and, in a country of India's size and social context, which stigmatises infertility, permitting surrogacy is the only rational thing to do.[52] Online advertisements promoting commercial surrogacy meanwhile invoke the human right to reproduce and marry and promote India as a family-friendly country where children born from surrogacy will be loved and not trafficked. Remarkably, the Indian surrogacy market is estimated to generate $2.3 billion annually.[53]

The Indian state supports commercial surrogacy through the fairly permissive non-binding guidelines of the Indian Council of Medical Research (ICMR) on Assisted Reproductive Technologies (ART).[54] Under these guidelines, commercial surrogacy in India takes the form of gestational surrogacy whereby surrogates for a fee bear babies that are

46 R West, *Caring for Justice* (New York University Press 1997) 50–61; M Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (Harvard University Press 2001), 131–53, 154–63; V Marwah and N Sarojini, 'Reinventing Reproduction, Re-conceiving Challenges: An Examination of Assisted Reproductive Technologies in India' (2011) 46(43) Economic and Political Weekly 104–11.

47 J Raymond, *Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom* (Spinifex Press 1993).

48 M Rao, 'Why All Non-Altruistic Surrogacy should be Banned' (2011) 47(21) Economic and Political Weekly 15–17.

49 Ibid 15.

50 I Qadeer, *New Reproductive Technologies and Health Care in Neo-Liberal India: Essays* (New Delhi Centre for Women's Development Studies 2010).

51 Sama Team, 'Assisted Reproductive Technologies: For Whose Benefit' (2009) 44(18) Economic and Political Weekly 25–31.

52 *India Decides*, NDTV interview with Dr Kamini Rao, Assisted Conception Centre, Bangalore and Dr Rishikesh Pai, Mumbai Leelavati Hospital (December 2011).

53 S Lee, 'Commercial Surrogacy Grows in India' (SFGate 20 October 2012) <www.sfgate.com/health/article/Commercial-surrogacy-grows-in-India-3968312.php>.

54 National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, Ministry of Health and Family Welfare, Government of India, Indian Council of Medical Research, 2005.

genetically unrelated to them. In the shadow of these guidelines, the sector has developed internal social norms driven by the medical requirements for ensuring a successful 'outcome', namely, a live birth. Norm generation has also spilled over to aspects such as the issue of travel documents by Western embassies to enable foreign commissioning couples to take their babies home. As the sector expands and the stakes of the major fertility clinics grow, in order to alleviate the existing legal uncertainty around commercial surrogacy, they have called for the passage of a statutory law. Thus, the ICMR guidelines form the basis for the Assisted Reproductive Technologies (Regulation) Bill 2010 (ART Bill).[55] This Bill is highly atypical when compared to laws in most other countries, which prohibit commercial surrogacy and allow altruistic surrogacy only under certain circumstances, if at all.

The proposed ART Bill when passed by the Indian Parliament will be one of the most liberal surrogacy laws in the world. Although the ART Bill is yet to be passed, its regulatory logic in relation to this sector of women's reproductive labour is revealing. The ART Bill envisages a vastly permissive zone within which parties to the surrogacy transaction contract subject to certain limits. These limits include, inter alia, restrictions on the age of the gamete donor and surrogate, the number of embryos that can be implanted in a treatment cycle, and the prohibition of a negotiating role for the ART clinic in arranging the surrogacy transaction. Many of these restrictions are already to be found under the ICMR guidelines but are rarely enforced by the state itself, with the police intervening only when a surrogate or egg donor dies. Contract is thus the overarching framework within which female reproductive labour is recognised and valued.

For a state that has sought to abolish market-based sectors in reproductive labour, such as sex work and bar-dancing, and embodies an ideology of gendered familialism in relation to child-care, its stance on commercial surrogacy is perplexing. Incomprehensibly, nationalist conservatives have not asked to date why Indian wives and mothers should carry babies for 'foreigners'. Those on the left have queried India's permissive stance given India's high maternal mortality rate and the poor state of medical care for women who reproduce for their own families. Some have pointed to how medical tourism amounts to a reverse subsidy to the elite.[56] The only plausible explanation for the ART Bill is surrogacy's ultimate goal of procreation and its enhancement of the hetero-patriarchal family model. The sub-text appears to be the promotion of a very specific form of market dealing in ART. Surprisingly, therefore, the Bill does not permit altruistic arrangements, such as the donation of sperm or oocyte by a relative or known friend of the parties seeking ART treatment.[57] The ART Bill also does not permit the surrogate to contribute oocyte material to the baby,[58] even when the commissioning mother cannot use her own egg, leaving the parents to source it independently. This in turn necessitates the intense fragmentation of reproductive raw materials enhancing the possibility of their commodification in the market. The property rights of marital parties to each other's reproductive materials are, however, protected as spousal consent to the ART procedure and to one's wife becoming a surrogate

55 Available at <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>.

56 A Sengupta, 'Medical Tourism: Reverse Subsidy for the Elite' (2011) 36 Signs: Journal of Women in Culture and Society 312–19; S Reddy and I Qadeer, 'Medical Tourism in India: Progress or Predicament?' (2010) 45(20) Economic and Political Weekly 69–75.

57 S 20(12); this is particularly odd in light of reports that 50 per cent of Indian egg donors and 25 per cent of surrogates are family members: R Sharma, 'Gene factor: Surrogacy stays within the great Indian family' (Bavishi Fertility Institute 9 January 2009) <http://www.ivfclinic.com/surrogacy_its_all_in_the_family_for_indians.html>. Doctors whom I interviewed view this provision as essential to avoid intra-family disputes over property.

58 S 34(13).

is required.[59] Thus, the marital family's rights over the wife's reproductive labour are always protected. In recognition of the surrogate's reproductive labour, the Bill states that the surrogacy contract is to be legally enforceable.[60] In addition to medical and insurance expenses relating to the pregnancy,[61] the surrogate may receive monetary compensation for her services.[62] Upon the birth of the baby, however, she has to give up all parental rights[63] and cannot keep the baby even if she changes her mind or if the commissioning parents change their mind. The commissioning parents meanwhile are required to accept the baby irrespective of abnormalities. Where unclaimed, the baby is to be put up for adoption. Thus, the rights of the commissioning parents over the product of the surrogate's labour are well protected while ensuring that the state has no responsibility towards the baby should the surrogacy arrangement fail.

In the Indian surrogacy market, the most successful fertility clinics recruit surrogates and gamete donors, perform the in-vitro fertilisation (IVF) procedures, operate a surrogacy hostel for surrogates, and finally deliver the babies, apart from informally facilitating travel, accommodation, and birth registration and visa formalities for foreign couples. In an attempt to diffuse the clinic's power, the ART Bill requires a functional separation between the ART clinic and ART bank such that, the ART Bank recruits gamete donors and surrogates while the ART clinic only performs the IVF procedures. Interestingly, the Bill prohibits the use of individual brokers and paid intermediaries, who might include the village midwife[64] (or even the local electrician), to obtain gamete donors and surrogates, making it punishable by imprisonment for three years and a fine. Thus, even in calling upon women to perform for the market, the state has a particular view of who its economic agents should be.

The ART Bill visualises multiple sets of contracts between the various parties based on the assumption that they are equally placed, free, rational agents acting with informed consent. In reality, surrogates and commissioning parents, especially foreign commissioning parents, are divided by huge disparities in power and social status. Informed consent largely appears to be a farce;[65] what drives the market is surrogates' need for money to meet the needs of their own families and children. Surrogates are likely to belong to disadvantaged sections in urban and semi-urban areas.[66] In media appearances, many spoke Hindi and aspired to upper-class education and mobility. Surrogates' reproductive labour is not free of shame or stigma. Amrita Pande characterises commercial surrogacy in India as sexualised care work incorporating aspects of both sex work and care work.[67] Confirming this is the common veiling of surrogates in the media. Stigma, according to Pande, undermines the formation of worker identity while the surrogate–sex worker comparison is constantly

59 S 34(16).

60 S 34(1).

61 S 34(24).

62 S 34(3).

63 S 34(4).

64 A Pande, '"At least I am not sleeping with anyone": Resisting the Stigma of Commercial Surrogacy in India' (2010) 36 Feminist Studies, Special Issue: Reproduction and Mothering 292–312; A Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect "Mother-Worker"' (2010) 35 Signs: Journal of Women in Culture and Society 969–92; A Pande, 'Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India' (2009) 16 Indian Journal of Gender Studies 141–73.

65 S Saravanan, 'Transnational Surrogacy and Objectification of Gestational Mothers' (2010) 45(16) Economic and Political Weekly 26–9, 27.

66 S Banerjee, 'The Curious Case of Commercial Surrogacy' (Countercurrents.org 9 March 2011) <www.countercurrents.org/banerjee090311.htm>.

67 Pande, 'Commercial Surrogacy' , 'Not an "Angel", Not a "Whore"' (n 64).

deployed at different stages of the labour process to both legitimise surrogacy but also to discipline the surrogate. Surrogacy's similarity with care work meanwhile demands the surrogate be a good biological mother, but within limits lest she gets too attached to the baby and refuses to hand it over to the commissioning parents. So far, the prospects for the mobilisation of surrogates have been limited. Yet, the fact that most large infertility clinics require that their surrogates spend a large part of their pregnancy in clinic-run surrogate hostels offers some possibility for collective action, even if limited by the clinic's surveillance of these women.

Modes of the law's appropriation of women's reproductive labour

I have so far examined three market-based sectors of female reproductive labour. Formally speaking, they are governed by three different areas of the law: sex work through criminal law; bar-dancing through licensing law; and surrogacy through contract law. Substantively, the default position in the sex-work and bar-dancing sectors has been to allow for a highly circumscribed zone of permission overlaid with a prohibitionist regime enforced through criminal law. By contrast, the ART Bill facilitates contracts between the various parties to a surrogacy transaction within specified limits. There are, however, several structural similarities in the political economies of these sectors, and a deep interconnectedness in the way that women experience these labour forms.

Revealing the law's contingency helps us ask if and how an alternate legal treatment of women's labour may enhance their bargaining power. In other words, what if surrogacy was to be regulated by labour law instead of contract law or if housewives were paid wages or the state ran brothels. More significantly, it reminds us that, in feminist attempts to redraw the reproduction boundary, rule changes in any given sector of reproductive labour invariably have repercussions for women in related sectors. Thus, it should not be surprising that the legal status of bar-dancing turned on what the Mumbai High Court thought of sex work in normative and legal terms. Similarly, it should not be surprising that the surrogacy industry touts the homely and docile nature of Indian surrogates in an international marketplace while comparing surrogates to sex workers to discipline them. Reminders of this interconnectedness at least with the marital economy are evident in the ICMR guidelines, which are replete with references to the legitimacy of the baby born of a surrogacy agreement, the non-adulterous nature of ART when performed with the husband's consent, and conception through ART not precluding marital dissolution on the basis of impotency and so on.[68] After all, Mary Joe Frug reminded us several years ago that different sets of legal rules and the meaning of the female body are intertwined as they set about permitting and mandating the terrorisation, maternalisation and sexualisation of the female body.[69] Thus, just as anti-prostitution rules terrorise and sexualise sex workers, but also maternalise them, so also, the ART Bill both maternalises and sexualises the female body. The legal rule networks regulating the varied sectors of women's reproductive labour are thus profoundly interrelated and affect not only women's bodies in that sector but in other sectors as well.

The push to assess the distributive impact of rules across sectors is not a purely theoretical exercise either. Based on my empirical research on sex work in India, I have offered three ways of conceptualising the relationship between sex work and marriage. The two institutions *overlap*, as evidenced by the housewife–sex worker; they occupy a *continuum*; which explains the high percentage of ex-wives amongst sex workers and the *bargains* that

68 ICMR guidelines (n 55) 3.16 of ch 3.

69 Frug (n 37) 1049–50.

wives and whores strike with each other, images of which popular culture is replete with.[70] A similar analysis could be extended to the bar-dancing and surrogacy sectors such that housewives, sex workers, bar dancers and surrogates are viewed at times as participating in more than one sector of social reproduction at once (as in commercial surrogacy), at times moving between these sectors, while also often developing conflicting interests towards each other. Given this complex relationship between sectors of reproductive labour, changes in rules affect the choice (relatively speaking) of women like Aasia – should she remain a housewife, do domestic work in others' homes, become a surrogate, join a dance bar or perform sex work on an ad hoc basis?[71]

An initial provocation for my article was to query why certain forms of reproductive labour were prohibited while others were permitted. At the outset, it appears that the laws regulating social reproduction even within a certain sector can be rife with contradictions.[72] If, however, one were to persist in explaining the paradoxical regulation of social reproduction across sectors, another line of critique is plausible, one which attributes the law's dual regulation of women's bodies to the forces of capital, both in the post-industrial West and in the global South. Linda Singer, for instance, convincingly argues that late capitalism disciplines as well as mobilises sexuality. Hence, its oppositional logic maintains sex for money as a distinct segment while uncompensated sexual exchanges are hegemonised and naturalised to sustain dominant class and gender interests.[73] The postcolonial variant of this argument is that, in a representative democracy, development discourse and welfarist governmentality[74] mediate the relationship between the formal (corporate) and informal (non-corporate) sectors to ensure hegemony.[75] Capital flows from the capitalist space to the developmental state to accommodate the castaways of capital's agenda in pre-capitalist sectors. Even as these scholars view the household as performing for capital, an empirical view of any of the markets I have considered would convincingly show how they they can hardly be said to contribute to the logic of capital. As such, they only incidentally benefit from favourable govermentsal categorization.

The market demands rights

The theories of capital above are somewhat inadequate to account for the regulatory paradoxes of social reproduction. Yet, they do offer a backdrop against which to think through the transformation of markets in female reproductive labour without rehearsing irrational fears of the market, overstating causal arguments as to the role of capital or abstract concepts such as exploitation, coercion and subordination. An aspect of this

70 P Kotiswaran, 'Wives and Whores: Prospects for a Feminist Theory of Redistribution' in C Stychin and V Munro (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish 2007) 283–302.

71 I acknowledge here that this might be particularly relevant in the Indian context where the rate of marriage is near universal: Palriwala and Neetha (n 10) 1068.

72 Note Shamir's assessment of the US Family Leave and Medical Act 1993 as 'ideologically Janus-faced' with the liberal face striving to achieve gender equality, through women's market participation and relaxed familial dependency, and the conservative face working towards women's familialisation and gender and class stratification: Shamir (n 5) 439. In the context of sex work, Western post-industrial cities increasingly criminalise sex work performed outdoors to create shiny, new redeveloped city centres while normalising sex work performed indoors where it can be safely consumed by the middle-classes: E Bernstein, *Temporarily Yours: Intimacy, Authenticity, and the Commerce of Sex* (Chicago University Press 2007).

73 L Singer, 'Sex and the Logic of Late Capitalism' in J Butler and M MacGrogan (eds), *Erotic Welfare: Sexual Theory and Politics in the Age of Epidemic* (Routledge 1993) 49.

74 K Sanyal, *Rethinking Capitalist Development: Primitive Accumulation, Governmentality and Post-Colonial Capitalism* (Routledge 2007) 60.

75 P Chatterjee, 'Democracy and Economic Transformation in India' (2008) 43(16) Economic and Political Weekly 53–62, 58.

neoliberal backdrop is the emergence of rights discourse. Acknowledging the rights of reproductive labourers to perform highly stigmatised work for the market may itself be viewed as symptomatic of these neoliberal shifts. However, I focus here on the rights of consumers. This was particularly salient in the bar-dancing case. The right to livelihood of bar dancers triumphed in part because it catered to the right to entertainment of male migrant workers in the city. The ART Bill similarly offers extraordinary protection of the right to reproduce.[76] Facilitating the right of commissioning couples to reproduce aligns with the Indian state's ideology of gendered familialism. The ART Bill meanwhile maintains the hetero-patriarchal deal at the surrogate's end of the transaction as well. This is consistent with the state's own involvement through decades of population control planning with the management of women's reproductive abilities. Indeed, the Indian state developed ART as a way to reverse its population control strategies.[77] Given the economic rewards of reproductive tourism, the state has not hesitated to front a liberal surrogacy law to incentivise the development of a market for which its reproductive labourers perform. This also allows the families of surrogates the kind of class mobility that the state's own weak redistributive efforts can hardly ensure. This is appropriation *par excellence*.

The rights of consumers are not unrestrained, however, as is evident in the context of sex work. There, channelling the international policy trend towards criminalising the demand for sex work, India proposed an amendment to the ITPA in 2006, which sought to punish customers of sex workers. The very same minister who proposed this amendment, however, offered a very different view of the demand for surrogacy. In a TV show on surrogacy, she supported legalising commercial surrogacy. Her argument was part-pragmatic (that a ban against commercial surrogacy would be ineffective), part-ideological (that infertility is a cruel joke). Yet it was the pull of consumerism dressed up as scientific fortitude that seemed most convincing when she asked on behalf of commissioning mothers: 'If women can use frozen peas, why not frozen gametes?'

Conclusion

Social reproduction has been an issue of considerable significance for feminist scholars and lawyers alike for several decades now. Even as feminists need to continue to lobby states and international organisations to redraw the production boundary so as to acknowledge and value the unpaid reproductive labour of women, I argue that feminists also need to question our own reproduction boundary. The collective feminist psyche on social reproduction has so far been tethered to the unpaid reproductive labour that wives and mothers perform, either along with or without paid work in the market, extending at best to paid domestic workers who assist in delivering the reproductive labour commitments of the household. I suggest instead that we query feminist reluctance to consider as work the reproductive labour of women performed outside the confines of affective relational networks and for the market in locations such as the brothel, surrogacy hostel, dance bar or the nursing home. Viewing reproductive labour along a continuum facilitates a cross-sectoral comparison of the regulation of these sectors, which is on the verge of being a zero-sum game.

Feminist lawyers have rendered visible the contingency of legal categories in the regulation of social reproduction. While this offers alluring possibilities for legal reform, feminists cannot feel over-invested in shifting legal categories, as these are likely to produce

76 There are parallels here to the argument that Conaghan and Grabham make about gays and lesbians being reconfigured as 'citizen-carers' as a response to the care deficit and welfare state retrenchment rather than due to the success of liberal egalitarian strategies: Conaghan and Grabham (n 29) 333.

77 ICMR guidelines (n 55) 5.

costs for other sectors of reproductive labour. The bar-dancing case is an example of such an illusory opportunity for transformation. Yet, as is evident in the struggles of sex workers, default legal categorisations remain significant; they 'stick' and determine the venues for mobilisation. Although a retreat from the criminal law seems necessary for criminalised sectors of women's labour, where the state harbours a large tolerated residuum of abuse, the realm of contract hardly suffices for ensuring that women perform reproductive labour for the market on their own terms. Drawing on the insights of feminist legal realism thus helps us assess more carefully the 'laws of social reproduction'.

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Oral history as a tool of legal analysis: women in the margins of Israeli society

Shimrit Lee

SOAS, University of London

Abstract

Researchers in the field of legal consciousness have traditionally relied on surveys, ethnographies, or in-depth interviews to gauge the ways in which individuals engage, avoid, or resist the law. This paper explores how oral history is able to enrich the study of legal consciousness in ways inaccessible to other methodologies. Oral history offers an intertemporal perspective, allowing researchers to trace the development and evolution of legal attitudes and interactions over time. To illustrate the unique function of oral history, I examine the oral history narratives of three Palestinian-Israeli women as they relate their experience with the law over the course of their lifetime. I suggest that combining the oral history technique with the more targeted approach of in-depth interviewing can most aptly capture individual legal consciousness. Research through oral history can further be used in the field of critical legal theory by drawing attention to collective historical grievances of marginalised groups.

Introduction

In the 1997 case of *Delgamuukw v British Columbia*,[1] the Canadian Supreme Court ruled that oral history could serve as evidence in cases involving aboriginal land claims. The First Nations of Gitksan and Wet'suwet'en used oral history – their primary form of historical documentation – to claim territorial jurisdiction.[2] The court acknowledged the difficulties in reliability posed by oral history, yet oral sources were ultimately found to be on equal footing with other forms of historical written documentation.[3] This expansion of evidentiary laws allowed indigenous historical knowledge to emerge from the confines of traditional legal discourse.

This paper seeks to reassert the power of oral history by examining how it can be used as an effective tool for qualitative socio-legal analysis. Specifically, I demonstrate how oral history can trace the development of individual legal consciousness over time, which can aptly complement other qualitative methods. The study draws from oral narratives of Palestinian women in Israel to demonstrate how oral history can contribute an intertemporal perspective to the study of legal consciousness and can be used as a tool for

1 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

2 M Sparke, 'A Map that Roared' (1998) 88(3) Annals of the Association of American Geographers 2.

3 *Delgamuukw* (n 1), para 87.

critical legal theory. While legal consciousness has a variety of definitions,[4] in this paper it will refer to the ways in which individuals 'engage, avoid and resist'[5] the law and legal meanings in everyday life.

Oral history is the process of recording oral testimonies with individuals in order to document their life history stories. Oral histories can be used as a means to recover neglected or silenced accounts of past experiences and guard against the appropriation of marginalised perspectives by dominant historical narratives. Oral sources are not found, but are rather generated through a dialogic, self-conscious exchange in which one person – the interviewer – asks questions to another person – generally referred to as the interviewee or narrator. These interviews allow the narrator sufficient time to tell their story in a way that focuses more on meanings than on facts. The content is grounded in reflections on the past and produces a verbal document that is available to the general public and researchers across disciplines. The method provides rich information about everyday life and insights into the mentalities of those whose perspectives are generally unavailable in the database of public social history. How is oral history able to enhance our understanding of legal consciousness? What makes this method different from other qualitative methods and what are its limitations?

This paper is organised as follows. The first section briefly reviews a number of methods traditionally used in sociological approaches to law, including surveys, ethnographies and in-depth interviews. I make the theoretical case for why oral history is an effective methodology for qualitative legal analysis, which in the second section is tested through an analysis of the oral histories of three Palestinian-Israeli women. I conclude with a brief discussion of the implications of using oral history as a methodology for critical legal studies.

1 Situating the study of legal consciousness

In order to explore the utility of oral history, we first need to trace the evolution of other methodological approaches towards the study of law and society. In particular, we will need to differentiate it from the in-depth interview, which is likely the closest alternative to oral history.[6]

The law and society movement attempts to explain legal phenomena within a complex social totality. Lawrence Friedman writes about the challenge of applying an empirical method to such a 'loose, wriggling, changing subject matter, shot through and through with normative ideas'.[7] Indeed, the attempt to use purely quantitative methods to study law has been challenged from the very inception of the movement. Marx, Weber and Durkheim were fundamentally theoretical, attempting to locate law within the discourse of ideology and power.

4 Early studies of legal consciousness focused on levels of understanding of, knowledge of, and opinions about the law: A Sarat, 'Studying American Legal Culture: An Assessment of Survey Evidence' (1977) 10(3) Law and Society Review 427–88. Other studies of legal consciousness have used a constitutive approach in locating law *in* society. Merry, for example, defined legal consciousness as 'the ways people understand and use law', and K Bumiller approaches the subject through the lens of ideology: S E Merry, 'Concepts of Law and Justice among Working Class Americans' (1985) 9 Legal Studies Forum 59; K Bumiller, *The Civil Rights Society* (Johns Hopkins University Press 1988). This paper will focus primarily on Silbey and Ewick's approach to legal consciousness, in which they examine how ordinary people's understandings, awareness and conceptions of what constitutes 'law' or 'legality' essentially *creates* 'legality'. See P Ewick and S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998).

5 Ewick and Silbey (n 4).

6 S N Hesse-Biber and P Leavy, *The Practice of Qualitative Research* (Sage Publications 2011) 133.

7 L Friedman, 'The Law and Society Movement' (1986) 38 Stanford Law Review 763–80.

While the usage of quantitative methods was popular throughout much of the twentieth century, the 1980s and 1990s witnessed a return to the movement's theoretical roots, in which a flood of critical and cultural legal theory emerged. The so-called interactionists followed this approach and based their sociological research on subjective accounts generated through ethnographical observation and unstructured, intensive interviews.[8] They challenged the scientific value of remaining neutral or disinterested, arguing that dominant perspectives are not grounded in objective, observable reality, but rather in the interests of the dominant societal group. Foucault has contributed to this viewpoint in explaining the ways in which knowledge and power are linked.[9]

This qualitative turn in the law and society movement moved away from the sole examination of 'lawyer's law' towards a democratic framework in which law is experienced and understood by ordinary citizens.[10] Researchers abandoned purely quantitative methods in favour of more qualitative analyses of social interactions.[11]

Since the 1960s, surveys have been conducted to assess why and when citizens turn to law. Early surveys generally found that individuals who are more educated and wealthy tend to resort to law as a means of dispute resolution.[12] Although these studies described the differential use of law based on social position, the data nevertheless depicted a 'generally active and assertive citizenry' whose willingness to turn to the law reflected a widespread perception of the law as legitimate and sustainable.[13] Susan Silbey critiques the survey method itself, revealing that often these studies measure popular agreement or disagreement, rather than conceptions of fairness, such as 'loyalty, compensatory treatment, or substantive equality'.[14] These surveys, Silbey contends, are replete with leading questions that encourage conforming answers, discouraging responses that appear deviant or disloyal.

In ethnographical studies, data-gathering occurs within a setting referred to as a 'field' or a 'site', in which the researcher observes naturally occurring social interaction.[15] Often, observation is accompanied by interviewing and/or participation in the activities of the subject that one is studying. Ethnographic studies of legal consciousness capture, in ways inaccessible to large surveys, the context and complexities of group behaviour and interaction using a variety of sources. Like oral history, it also has the potential to follow individuals over time. Studies such as that conducted by Donald Black[16] confirm that all social groups experience grievances. However, whether or not people are able to name, blame and claim a grievance as a legal dispute[17] is dependent on the 'social geometry' of everyone involved – such as whether the individuals are rich or poor and whether they are

8 Hesse-Biber and Leavy (n 6) 237.

9 M Foucault, *The History of Sexuality*, vol 1 (Vintage 1980).

10 See Merry (n 4). See also S Silbey, 'After Legal Consciousness' (2005) 1 Annual Review of Law and Social Sciences 323–68, 327.

11 See J Habermas, T*he Theory of Communicative Action, vol 2: Lifeworld and System* (Beacon 1987).

12 See J Carlin et al, 'Civil Justice and the Poor: Issues for Sociological Research' (1966) 1(1) Law and Society Review 9–91; L Mayhew and A Reiss, 'The Social Organization of Legal Contracts' (1969) 34 American Sociological Review 309–18; and L H Goodman and S Sanborne, 'The Legal Needs of the Poor in New Jersey: A Preliminary Report' (National Social Science Law Center 1986).

13 Silbey (n 10).

14 Ibid 337.

15 Hesse-Biber and Leavy (n 6) 136.

16 D Black, *The Behavior of Law* (Academic Press 1976).

17 W Felstiner, R Abel and A Sarat identify three major steps – naming, blaming, claiming – that occur before a personal injury is able to turn into a dispute: W Felstiner et al, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980) 15(3/4) Law and Society Review 631–54.

intimates or strangers.[18] Ethnographic studies tend to emphasise the cultural variability of disputing.[19] Unlike traditional survey results, these studies generally depict ambivalent relationships to law and legal institutions, and populations that are rather reluctant to go to court unless their grievance seems intolerable or unavoidable.

Not only do ethnographic studies and surveys frequently generate contradictory outcomes, but they also contain different empirical values. The survey method seeks similarity through generalised statistical procedures that do not adequately depict cultural variability and often exclude phenomena that differentiate race, ethnicity and social class. Ethnographies, on the other hand, depict variability that cannot be generalised beyond the locale in which each study is conducted.[20] The way in which research is conducted *matters*, as it often determines the outcome of the study.

1.1 In-depth interviews

An in-depth interview is a structured conversation in which an interviewer asks detailed, pointed questions to a respondent. The method provides more qualitative information than data collected through surveys and, unlike ethnographies, it can be applied to assess more specific information about ideas, programmes or situations.

In order to examine how diverse and repetitive interactions of everyday life come together to form legal consciousness, Ewick and Silbey set out to conduct in-depth interviews with over 430 residents from four counties in New Jersey.[21] They attempted to discover legality as it is recognised, resisted and reconstituted by a wide variety of ordinary people in everyday routine transactions.

Their interview involved 99 different probes that aimed to determine whether subjects had experienced specific events that could be described as 'legal', including instances that generated 'disputes, complaints and cases' or those legal events that did not necessarily culminate into an actual case.[22] These probes included topics such as parking problems, noise complaints, vandalism, property disputes and work-related accidents. If the subject answered in the affirmative, the researchers would ask more direct questions on formal legal actions that were taken.

Silbey and Ewick recorded more than 5900 events, which could be grouped into three schemas. In one account, subjects located themselves 'before the law', viewing the legal system as something sacred and separate from the routines of daily life. In this account, people only invoked the law if it would benefit the needs of the general public. In another story, subjects were 'with the law', playing it like a game to further their own interests and values. In the third narrative, law was presented as 'arbitrary and capricious', in which certain interests were privileged over others. People revealed a sense of 'being up against the law', unable to 'either maintain the law's distance from their everyday lives or unable to play by its rules'.[23]

18 Black (n 16).

19 See S Macaulay, 'Non-contractual Relations in Business: A Preliminary Study' (1963) 28 American Sociological Review 1–23; D Engel, 'The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community'(1984) 18(4) Law and Society Review 551–82; C J Greenhouse, *Praying for Justice: Faith, Order, and Community in an American Town* (Cornell University Press 1986); B Cox and G Drever 'Some Recent Trends in Ethnographic Studies of Law' (1971) 5(3) Law and Society Review 407–16).

20 Silbey (n 10) 340.

21 Silbey and Ewick (n 4).

22 S Silbey, 'Everyday Life and the Constitution of Legality' in *The Blackwell Companion to Sociology of Culture* (1st edn, Blackwell 2005) 336.

23 Ibid 341.

Legal consciousness emerges through this reciprocal process in which the meanings given by individuals to their world become 'patterned, stabilized and objectified' and then institutionalised to inform and constrain future meaning-making.[24] Silbey and Ewick follow the Foucaultian idea of the pervasiveness of power and locate legality as 'all over'[25] constituting power that is both institutional and embedded in everyday social practice. The following section will discuss whether oral history is able to capture legal consciousness in ways inaccessible to in-depth interviews.

1.2 Oral history

How does oral history differ from other methodologies? Oral history interviews involve lengthy open conversations that are semi-structured or hardly structured at all. Open-ended questions and extended pauses within the interview allow the narrator time and space to be reflective and verbose.

Oral history interviews are far less structured than Silbey and Ewick's method of in-depth interviewing. There are no probes or leading questions in an oral history interview. Rather, oral history demands a shift in methodology from 'information gathering, where the focus is on the right questions, to interaction, where the focus is on process, on the dynamic unfolding of the subject's viewpoint'.[26] Oral history interviews generate information that is more qualitative and subjective than survey data. Unlike ethnographies, in which entire communities are narrated through the observations of the researcher, oral histories allow the subjects to speak for themselves.

Moreover, there is a life history component in oral history. Although some oral histories may focus on a specific event in an individual's life, the interview nevertheless contains a contextual element that allows the narrator to speak about his or her background and life story. I argue that the life history component of the oral history interview adds an intertemporal perspective to the study of legal consciousness. This approach allows the researcher to pay particular attention to structural constraints and enabling circumstances that determine the course of individual actions and decisions over time.

Through in-depth interviewing, Ewick and Silbey demonstrate an approach in which numerous instances of everyday legal interactions culminate to form a collective understanding of the law. However, they fail to account for *how* cultural practice works. They emphasise that the primary means of social action and cultural practice are stories, 'individual narratives that circulate and become the basis of collective action'.[27] But, as Mezey asks: 'How and when does the circulation of narrative come to form a pattern that is more broadly recognizable as cultural practice?'[28] How do individual narratives become the basis of collective action and understanding? What are the mechanisms of transmission and inscription?

As Jean Piaget argues: 'By considering only adults we perceive only mechanisms which are already formed, whereas by following childhood development, we reach to the formation of those mechanisms, and formation alone is explicative.'[29] Through the life

24 Silbey (n 22) 336.

25 A Sarat, '"The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor' (1990) 2 Yale Journal of Law and Humanities 343–79.

26 K Anderson and D Jack, 'Learning to Listen: Interview Techniques and Analyses' in S Gluck and P Daphne (eds), *Women's Words: The Feminist Practice of Oral History* (1st edn, Routledge 1991)) 23.

27 N Mezey, 'Out of the Ordinary: Law, Power, Culture and the Commonplace' (2001) 26 Law and Society Inquiry , 145–67, 161.

28 Ibid 161.

29 J Piaget, *Epistémologie des sciences de l'homme*, Chantal Kourilsky Augeven (trans) (Gallimard 1972) 139.

history component, oral history adds an intertemporal analysis to how narratives circulate, what motivates people to engage in social or legal action, and the formation of mental attitudes that give meaning to such actions. As a biographical documentation of 'a long period of a person's life or even their entire life',[30] oral history portrays the forces that influence the formation of social consciousness, including the narratives that one hears and internalises from parents and grandparents; the transmission of social values through the family and local community; the observation of adult interaction; initial contacts with the outside world, particularly in the school context; and through specific sites of mass initiation and inscription, what Mezey terms the 'common places of law': 'the news, television shows, movies, novels, comics, high school civics courses'.[31] Personal experiences, historical circumstances and cultural frameworks further shape these sites of consciousness formation. Oral history is a unique methodology in that it allows us to view the construction of culture in terms of processes rather than structures, and social institutions as the product of human interaction over time.[32]

In order to assess the functionality of oral history as a tool of qualitative legal analysis, I will use a collection of oral history interviews I conducted as part of an independent project in Israel and the West Bank in 2011. I interviewed 13 Jewish-Israeli and 14 Palestinian-Israeli women across Israel, and four non-Israeli-Palestinian women in the West Bank. The initial purpose of my study was to understand how women's political and feminist consciousness emerges within the context of the Israeli–Palestinian conflict and develops over time.

The format of my interviews was very flexible and conversational, allowing me to ask for clarification, to gauge the subjective meaning behind the narrator's experiences, and to go beyond 'conventional, expected answers to the woman's personal construction of her own experience'.[33] I loosely structured each session chronologically, beginning by asking the narrator about her childhood and moving towards more emotionally or politically charged themes. *Fabula*, chronological order, and *sujet*, the way the facts were arranged by the narrator, were both important factors in the telling of the life history.[34]

2 Case study: Palestinian-Israeli women

Israel defines itself as both a Jewish and a democratic state. Although Israel's legal system is based on Western legal culture, promoting values that aim to be 'secular, liberal and rational',[35] the legal system also contains aspects of religious law inherited from the Ottoman tradition. Jewish, Muslim, Christian and Druze courts deal primarily with questions of personal status, including marriage and divorce. The Basic Laws substitute a formal constitution and aim to protect human dignity and liberty.

The democratic aspect of the state guarantees free elections, majority rule, an independent judiciary, separation of powers and human rights.[36] Yet the precedent on which the current system is based reflects an inherently unequal foundation. Upon gaining its independence in 1948, Israel enacted the Law of Return, guaranteeing Jews the right to

30 Mezey (n 27) 152.

31 Ibid 162.

32 S N Hesse-Biber and P Leavy, *The Practice of Qualitative Research* (Sage Publications 2006) 238.

33 Anderson and Jack (n 26) 23.

34 S Snider, 'Oral History: Stories and their Variations' (lecture at New York University 2010).

35 A Barak, 'Some Reflections on the Israeli Legal System and its Judiciary' (2002) 6(1) Electronic Journal of Comparative Law <www.ejcl.org/61/art61–1.html>.

36 Ibid.

settle in Israel and gain citizenship. The Zionist movement,[37] viewing Judaism as a combination of 'nationality, ethnicity and religion' demanded exclusive right to the land of Israel as the sole homeland of the ethnic Jewish nation.[38] Oren Yiftachel argues that Israel is an 'ethnocracy', suggesting that it is neither democratic nor authoritarian, with rights depending on one's ethnic origin and geographic location.[39]

For most Palestinians, the establishment of the state of Israel in 1948 is known in Arabic as the Nakba ('disaster' or 'catastrophe'), as approximately 720,000 Palestinian Arabs left, fled, or were expelled from their homes.[40] Roughly 65 to 85 per cent of Palestinians living within the borders of Israel were forced into permanent exile with no right of return, while another 25 per cent became internal refugees in Israel. The Palestinians that remained within Israel's borders became de facto citizens of the new state and now comprise 20.4 per cent of the population.

This minority occupies an ambivalent position in the Jewish state as its members are perceived as internal enemies, a population that needs to be controlled and contained. Although the state guarantees basic human rights to the Arab citizens of Israel, structural discrimination towards Arabs seriously prohibits the full realisation of civil rights. Institutionalised discrimination is practised against Palestinian citizens in all areas, including land dispossession and allocation, education, economics, language, housing, culture and political participation.

Cultural and traditional practices that inhibit the realisation of human rights occur *within* groups as well, creating an additional discriminatory system that contributes to 'layers of inequality'[41] experienced by Palestinian women in Israel. Within the Arab communities of Israel, patriarchal clans known as *hamula* have retained much of their power and political significance.[42] The state has consistently supported these clans as a means to relinquish 'all matters of personal status to the different religious courts' and to support 'the normative authority of local notables over young men, and more particularly over women'.[43] Palestinian women are thus located in what Robert W Connell has described as 'gender regimes', meaning power relations and hierarchies within all major social institutions, particularly within families, workplaces, state bureaucracies and other collectivities.[44] These gendered regimes complement and reinforce one another to produce multiple layers of law and legality.

Badi Hasisi finds a legal culture of mistrust and cynicism amongst the Palestinian-Israelis.[45] He uses quantitative survey methods to find an extremely low level of reported crimes in the Arab communities in the northern district of Israel and a high level of

37 The aim of the Zionist movement was to create for the Jewish people a nationalist home in Palestine secured by public law. See J L Gelvin, *The Israel-Palestine Conflict: One Hundred Years of War* (CUP 2007) 52.

38 A Ghanem and S Ozacky-Lazar, 'The Status of the Palestinians in Israel in an Era of Peace' (2002) 9(102) Israel Affairs 268.

39 O Yiftachel, '"Ethnocracy" and its Discontents: Minorities, Protests, and the Israeli Polity' (2000) 26(4) Critical Inquiry 725–56.

40 Gelvin (n 37) 135.

41 T Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore*' (Institute for Human Rights 2002) 17.

42 A Sa'ar, 'Contradictory Location: Assessing the Position of Palestinian Women Citizens of Israel' (2007) 3(3) Journal of Middle East Women's Studies 49.

43 Ibid 50.

44 R W Connell, 'New Directions in Gender Theory, Masculinity Research, and Gender Politics' (1996) 61(3–4) Ethnos 157–76.

45 B. Hasisi, 'Criminology: Police, Politics, and Culture in a Deeply Divided Society' (2008) 98(3) Journal of Criminal Law and Criminology 1119–45.

distrust in the police force. These findings can be attributed to 'political marginalization, feelings of discrimination [and] regime delegitimation among the Arab minority in Israel'.[46] Feelings of exclusion and autonomy in the Arab community are furthered by the neglect of the Israeli police force, which views the Arab minority as relatively unthreatening to the majority community.

2.1 The development of legal consciousness

What can oral history tell us about the ways in which Palestinian citizens resist, manipulate, or acquiesce to law's power? This section will explore the utility of oral history as a tool of intertemporal legal analysis by presenting the stories of three Palestinian-Israeli women as they relate their own processes of identity-formation.

2.1.1 Samia

Consider the story told by Samia,[47] a 40-year old Palestinian citizen of Israel who grew up in the city of Nazareth, the largest city in the northern district of Israel. A researcher and advocate, her doctoral research explores the importance of memory as a political and historical tool in nation-building, focusing specifically on the diverse experiences of displaced Palestinian women in the so-called 'Nakba generation'.[48] During the interview, Samia spoke extensively about her own family history upon the establishment of the state of Israel in 1948:

> The Zionist forces came to Nazareth on 16 July 1948, and my father was two days old. My grandfather, he used to tell me that the Zionist forces put the citizens of Nazareth from our neighborhood close to the mosque, in trucks, in order to move them to the Lebanese border. And my grandfather and grandmum, they used to lie in front of the truck's wheels. They did not want the Nazareth population to become refugees in Lebanon. There are a lot of stories . . .[49]

During the interview, she described Amendment No 40 to the Budgets Foundation Law,[50] also known as the 'Nakba Law', as 'fascist' and 'racist'. The law authorises the Finance Minister to reduce state-funding or support to any institution if it holds an activity that commemorates 'Israel's Independence Day or the day on which the state was established as a day of mourning'.[51] Samia views the law as an infringement on free speech, representing a legal system that does not allow Arab citizens to preserve their history and culture.

She asks: 'How can I bring my child to grow up in this sick unhealthy society? I can't understand how a state which claims itself as a democratic state can have this law just to remove memories.'[52]

The oral history interview represented a space for Samia to trace the development of her social, political and legal consciousness and re-appropriate her historical narrative. Raised in a communist family, she remembers policemen coming to her home to arrest her father and uncle for their politically subversive activities. Her earliest memory of political

46 B Hasisi, 'Policing Minorities in a Deeply Divided Society' in D Avnon and Y Benziman (eds), *Plurality and Citizenship in Israel: Moving beyond the Jewish/Palestinian Divide* (1st edn, Routledge 2010) 155.

47 The names of these women have been changed to protect their identity; the names of locations are real.

48 The Nakba Generation refers to those who were dispossessed or displaced following the creation of the state of Israel.

49 Samia, Personal Interview, 18 May 2011.

50 Budget Foundations Law (Amendment No 40) (5771–2011), passed by Knesset on 23 March 2011.

51 Ibid.

52 Samia, Personal Interview.

activism involved a demonstration against the Sabra and Shatila massacres[53] during the Lebanon War in 1982: 'I was afraid. I remember that my grandmother was holding my hand all the time. We were running and escaping and trying to avoid the tear gas. It was fear. It was really fear.'[54]

Samia grew up in a family that was up 'against the law'. Her earliest interactions with legal authorities involved fear, arrests and tear gas. Samia goes on to describe how her family values further shaped her perceptions:

> Growing up in Nazareth, we didn't learn anything about the Revolutions, we didn't know about the Arab Revolutions in 1936.[55] We didn't read Mahmoud Darwish[56] in our curriculum, we didn't know Tawfiq Ziad.[57] So you know, we didn't know about *our* history . . . I learned from my family and other political activities.[58]

Samia was nurtured by a political consciousness that made her feel different from her classmates and neighbours. Values within her family ceased to be taken for granted and instead became defining characteristics because they were perceived by the outside world as factors of differentiation. Through the course of the oral history interview, Samia explored the development of her awareness as a marginal minority within Israeli society. She emphasises moments of conflict as determining the emergence of a legal consciousness that is 'up against the law'.

The intertemporal perspective revealed by this oral history interview echoes sociologist June Tapp's notion of socialisation, in which individuals come to abide by legal norms through successive phases of learning – first by conformity and later through moral internalisation.[59] I argue that Tapp's concept of socialisation privileges the notion of obedience or compliance with law, thus reducing legal discipline to written, known laws. Conformity to written law does not emerge as a salient element within the narrative told by Samia. Contrarily, she defines herself by acts of refusal and consistently refers to structural forces such as gender, ethnicity and political affiliation as playing a direct role in shaping her experiences and everyday interactions.

Samia's political and social consciousness is closely tied to her understanding of law. The Israeli legal system, like most legal systems, reflects certain ethnic and religious interests. Legal norms are an extension of social norms, provided that social norms enjoy 'authoritative validity'.[60] The line between social and legal consciousness is barely distinguishable. Therefore, when examining the development of legal consciousness through the use of oral histories, legality should be defined broadly to encompass political and cultural forms of authority that define and pattern social life.[61]

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53 On 17 September 1982, Israeli-backed Lebanese Phalangist militiamen slaughtered at least 800 civilians in the Sabra and Shatila Palestinian refugee camps in West Beirut. 'Flashback: Sabra and Shatila Massacres' (*BBC News* 24 January 2002) <http://news.bbc.co.uk/2/hi/middle_east/1779713.stm> accessed 6 February 2013.

54 Samia, Personal Interview.

55 The Arab Revolt was a Palestinian rebellion against the British Mandate and Jewish immigration (1936–1939).

56 Mahmoud Darwish was a nationalistic Palestinian poet who wrote about dispossession and exile (1941–2008): B Ze-ev, *Remembering Palestine in 1948: Beyond National Narratives* (Cambridge University Press 2011) 25.

57 Tawfiq Ziad was a Palestinian politician and poet (7 May 1929–5 July 1994). Ibid 218.

58 Samia, Personal Interview.

59 J L Tapp, 'Socialization, the Law, and Society: Reflections' (1971) 27(2) Journal of Social Issues 1–16.

60 Ibid 4–5.

61 See W H Sewell, 'A Theory of Structure' (1992) 98 American Journal of Sociology 1–29.

2.1.2 Fatma

Fatma is a practising lawyer from Lod, a so-called 'mixed city' of both Jewish and Arab inhabitants. Unlike Samia, Fatma grew up with many silences in her historical narrative:

> My grandmother never talked about [the Nakba], never ever. And neither did my grandfather. The historical story that we learned in school talks about the Jewish narrative only, it doesn't bring in the Palestinian narrative. We never had two sides of the story.[62]

She attributes her family's reluctance 'to touch politics' to the military laws[63] that governed the life of Palestinian-Israelis from 1949–1966:

> The laws and system in Israel were very much military, and people didn't have much freedom, of speech, of movement, of . . . you know, I hear stories of Palestinians who didn't even want to talk about politics over the phone because they were afraid that someone was following them, [or] they couldn't talk about it without getting hurt, or taken to jail or something like that.[64]

Fatma was never involved with system-challenging behaviour, seeing it as an activity that could harm her chances to develop a legal career in the state or the ministry. She occupies an ambivalent position in wanting to work within a system that regards her as an unequal citizen: 'I think it's a psychology of being a minority, on the one hand [we are] very much oppressed, but on the other hand, [we want] *to be*, [we want] to live the life . . . '[65]

Fatma engages with the law as it relates to women's rights. She explains: 'I was never actually very involved with politics, even today. I'm in feminism, first and foremost.'[66] She worked at the Ministry of Law's Legal Aid Department in Jerusalem before becoming a women's rights lawyer at Kayan, advocating on behalf of Palestinian women in cases that involve sexual harassment in the workplace, domestic violence and discrimination.

She describes the development of her feminist consciousness and her feelings of inferiority within her family:

> The different limits and standards that my parents set for us, for [my brother] as a boy and me as a girl, were very clear and very different. I did not live with it in peace, I did not just accept it as my reality . . . I believe that feminism really did help me in that sense. It did give me a lot of power to abandon barriers that society had imposed upon me as a woman. For a long time I didn't think about it in terms of feminism, but rather in terms of equality and personal need.[67]

Fatma chose to study law as something that would empower her as a woman: 'I'm good at talking and fighting, fighting for rights. It was always clear to me that I would study law.'[68]

Her attitude towards the law and her legal profession is filled with both hope and frustration:

> I think my work is changing the system as a whole. I mean, I think I *have* to believe in order for me to keep up the work. I believe it does bring changes, but in very small tiny steps. As a minority, my main challenge is the issue of

62 Fatma, Personal Interview, 11 April 2011.

63 Upon the establishment of the state of Israel, Arabs remaining within the border were subject to harsh military laws, including curfews, administrative detentions and expulsions.

64 Fatma, Personal Interview.

65 Ibid.

66 Ibid.

67 Ibid.

68 Ibid.

> legitimacy, being a lawyer that is reliable, that people can come to and not think, 'Well, she's an Arab lawyer so she's probably not good enough . . . '[69]

Fatma locates her story within the ambivalent legal culture of Palestinian citizens of Israel. In some ways she is 'before the law', invoking a conception of how law *should* be. Her feminist identity has allowed her to internalise liberal notions of equality, human rights and citizenship. She is also 'with the law', using the rules of law to advance women's rights. Yet in other ways Fatma is 'against the law', highlighting the lack of equality within the current legal system and the difficulties that she faces as a minority woman.

2.1.3 Lana

Many narrators in this oral history collection made no explicit references to official state institutions, and law was seemingly absent in their accounts. Indeed, to know the uses of law, 'we need to know not only how and by whom the law is used, but also when and by whom it is *not* used'.[70] Lana, a 26-year old Bedouin woman from a village outside Nazareth, defines her personal struggle as existing within the power relations of her family and community.

She was 21 when she made her first posting on an online forum for Palestinian lesbian women. It wasn't until she was 19 that she even knew the Arabic word for lesbian, '*mithlya*'. Finding the online forum allowed Lana to feel that she was not alone. Yet when her father found out she was using the internet, he mistakenly assumed she was talking to boys – and he beat her.

Lana realised that the only way to leave the Bedouin village was to get married. She reflects on the irony:

> Ok, and this is one of my problems! [*laughs*] I don't want to get married. I looked for a gay guy that was in the same situation, you know, like his family wants him to get married. I found a guy . . . he's living in the US. He's living alone, he's gay, and he doesn't want his family to know about it. His family is also trying to push him to get married. He's Arab and he's Palestinian. So we made a deal, we can get married, and I'll [leave the village]. This is what happened.[71]

Lana thus chose the institution of marriage as a means to escape the authority of her family. Silbey and Ewick would perhaps define this act of resistance as a 'masquerade', in which an individual plays with expected roles.[72] Lana manipulates traditional expectations, marrying a suitable Palestinian man in order to live independently of her family. Yet her life is still filled with challenges as she attempts to maintain the masquerade: 'I'm in a dilemma. I was in a relationship for two years. My wedding was the same day as the anniversary with my girlfriend! I want to stay with her, but at the same time I want my freedom.'[73]

She continues to visit her girlfriend in Haifa without her family's knowledge:

> *Aswat*[74] is my home when I come here. But I can't go out. I can only go to the few places where no one knows me. My family doesn't know I'm here. When I'm

69 Fatma, Personal Interview.

70 S Silbey and P Ewick, 'Conformity, Contestation, and Resistance' (1992) New England Law Review 737 (my emphasis).

71 Lana, Personal Interview, 24 March 2011.

72 S Silbey and P Ewick 'Narrating Social Structures: Stories of Resistance to Legal Authority' (2003) 108(6) American Journal of Sociology 1350–1.

73 Lana, Personal Interview.

74 Aswat is the Forum for Palestinian Lesbians based in Haifa, Israel <www.aswatgroup.org/>.

> walking on the street, I don't take buses. I always have glasses on, I dye my hair, I cover my face with my scarf.[75]

Lana does not use law to bring a case against the discrimination, violence and the threat of violence prevalent in her home. Rather, she relies on her own ability to contest cultural authority that governs her life. In order to make a claim about Lana's legal consciousness, we would need to examine the legal culture existing within Bedouin society.[76] Like most Palestinian lesbians, Lana balances her desire to live freely and to demand acceptance from her community, with the need for protection and safety. Perhaps she views the legal system as an option that does not provide the safety and confidentiality she desires; or perhaps as a member of the Palestinian minority she perceives the official state legal system with distrust. She chooses instead to use the forum of *Aswat* to fight for the collective rights of Palestinian lesbians, rather than bring forth a legal case of her own. Lana continues to use the online forum to share her story with others, strengthening the voices of other Palestinian lesbians and nudging society towards equality

3 Overcoming limitations: a combined method

An oral history analysis can greatly contribute to the study of legal consciousness as *process*, paralleling the development of social and political consciousness. Its strength lies in its richness and depth and in its methodological approach that allows participants to structure the world as they see it, rather than as the analyst sees it.[77]

However, oral history is limited in that it documents rather subjective accounts, informed by an individual's fallible memory and psychological state. The use of grounded theory to generate theories of legal consciousness can further lead to interpretive conflict, in which tensions arise between the researcher's authority over interpretation and the subject's own interpretation. An oral history methodology does not preclude the danger of appropriation or exploitation of people's stories by researchers and practitioners.

Despite these shaky grounds, oral history allows us to glimpse into the inner world of the individual, as we attend to the logic of narrative, the processes of attitude formation, and moments of cognitive dissonance in which the narrator attempts to reconcile contradictions into a salient belief system. Oral historians value contradictions because these inaccuracies 'provide an important avenue of insight into a respondent's state of mind [and memory]'.[78] There are no lies in oral history, as all statements are meaningful and relevant to the speaker.[79]

Psychologist Dana Jack advises oral historians to listen to the narrator's 'moral language' and 'mega-statements', and the ways in which major anecdotes are strung together in order to understand the assumptions and beliefs that guide a subject's logical interpretation of her experience.[80] The process of storytelling itself includes moments of 'realization, awareness, and, ideally, education and empowerment'[81] that cannot be found in any other method of

75 Lana, Personal Interview.

76 See A R Queder, 'Permission to Rebel: Arab Bedouin Women's Changing Negotiation of Social Roles' (2007) 33(2) Feminist Studies 164; and C Bailey, *Bedouin Law from Sinai and the Negev* (Yale University Press 2009).

77 M Rank, 'The Blending of Qualitative and Quantitative Methods in Understanding Childbearing among Welfare Recipients' in S N Hesse-Biber and P Leavy (eds.), *Approaches to Qualitative Research* (Oxford University Press 2003) 81–96.

78 D Patai, 'Whose Truth? Iconicity and Accuracy in the World of Testimonial Literature' in A Arturo (ed), *The Rigoberta Menchu Controversy* (1st edn, University of Minnesota Press 2001) 270–86.

79 G Lovell and C Lutz, 'The Primacy of Larger Truths' (2001) in Arturo (n 78) 175.

80 Anderson and Jack (n 26).

81 Hesse-Biber and Leavy (n 6) 150.

sociological analyses. The oral history narratives of Samia, Fatma and Lana reveal rich data on the meta-narratives of identity formation.

Yet, these narratives are nevertheless lacking in their ability to trace direct causation and isolate variables that are specifically *legal*. In order to pinpoint the law more directly, I suggest a combined methodology of in-depth interviewing and oral history. In-depth interviewing reveals minute incidents of legal interaction that may not emerge in the course of an oral history interview. Silbey's study relates numerous incidents related to the law, conjuring images of 'parking tickets, age restrictions for drinking, criminal enterprise, voting regulations, and taxes'.[82] Many of those interviewed appeared in minor criminal courts, others in civil courts for major cases, 'divorce proceedings, small claims, or as jurors'.[83] Conversely, oral history narrators emphasise legal matters that are particularly personal or political, omitting everyday legal incidents unless they play a defining role in the way the narrator has come to perceive the world. In-depth interviewing sheds light on micro-level legal interactions that constitute legal consciousness in ways inaccessible to oral history alone.

I conceive of a combined method as follows. The researcher would begin each interview with an oral history component, allowing the narrator an open space to trace his or her childhood, adolescence and adulthood. The interview would then move into an in-depth interview, in which the researcher would pose a set of questions related to individual interaction with the law, much in line with the method of Silbey and Ewick.

Sociologists studying legal consciousness could benefit by emulating the comprehensive research methodologies used by oral historians. In turn, the practice of legal oral historians could be enhanced by utilising in-depth interviews to obtain more specifically legal information.

3.1 Reasserting the power of narrative

The legal system uses 'filtering concepts'[84] such as relevant evidence to limit what facts a court considers. The legal concept of 'relevance' empowers a court to approve or disapprove certain narrative elements of a party's story. By considering oral history as relevant evidence in the case of *Delgamuukw v British Columbia*,[85] the Canadian Supreme Court legitimised aboriginal knowledge. Oral history allows for a totality of collective truth to emerge through the court proceedings. Unlike interviews, which are often replete with leading questions, oral history allows subjects to claim ownership and take control of their own stories. An oral history methodology can expose the gap between law as it is imagined, and law as it is experienced by individuals or groups. As such, the discipline can contribute to critical legal theory as a means to expose the realities of marginalisation under the promise of formal equality.

When analysed as a collection of narratives from a broad array of individuals, narrative studies can reveal something systematic about citizens' structural relationship to legality. The reflections that emerge during the oral histories of the Palestinian-Israeli women, for example, echo Hasisi's finding of a legal culture of cynicism and doubt amongst the Palestinian-Israeli community.[86] The oral histories presented in this paper suggest that, while there are elements of both 'before' and 'with the law', Palestinian-Israeli women most

82 Silbey and Ewick (n 70) 736.

83 Ibid.

84 M Barnes, 'Black Women's Stories and the Criminal Law' (2006) 39(941) University of California, Davis 941–90, 944 n 5.

85 *Delgamuukw* (n 1).

86 Hasisi (n 45).

often display a unique form of 'avoiding and/or resisting the law' legal consciousness. In many cases, this attitude is coupled with deep ambivalence. For example, Fatma works within an inherently unequal system in an attempt to improve the lives of minority women. These narratives provide new vocabulary, images and metaphors for conceptualising inequality in Israel and present opportunities for political mobilisation and legal re-appropriation.

Silbey and Ewick's study on legal consciousness is purely descriptive, drawing attention to the social construction of law from an individualist perspective. There is a lack of engagement with the effects of structural constraints based on social characteristics, which could impact individual legal consciousness.[87] The researchers attempt to address this issue by presenting the story of Millie Simpson – a young black woman who was stigmatised under the law. However, the example is nevertheless insufficient in describing the development and the source of Millie's legal consciousness. According to Ewick and Silbey, consciousness is 'the participation in the production of structures'.[88] Yet Simpson, constrained by intersectional forms of marginalisation, does not have the same ability to participate in the construction of social structures and is rendered largely invisible within the court. It wasn't until a private attorney retold her story at a third proceeding that the court found Millie innocent. Even then, she was seemingly absent from the transaction. Her experiences 'paint a picture of her mostly being "acted upon" without her input or participation'.[89] An oral history analysis could greatly contribute to the study of critical legal theory, exposing hierarchies of dominance and essentialism that negate the presence of minority women such as Millie under the law. As Angela Harris and Leslie Espinoza explain:

> Arguably, the most significant impact of critical theory has been the reformation of legal analytical practices through the use of stories. Outsider tales provide an opportunity to breach the limits of language in describing oppression.[90]

The oral histories of Palestinian-Israeli women extend our understanding of individual legal consciousness into a critique of law and legal processes as a whole, drawing attention to relationships of power and resistance in everyday life.

Silbey and Ewick's concept of legal consciousness is rather individualistic, implying a process that occurs within a single *mind*. Oral history is able to offer an analysis of legal consciousness that does end with the individual. As a feminist-informed research method, oral history alerts us to the silences and absences in familiar institutions, such as the legal system, and focuses on marginalised and excluded peoples' collective experiences. The discipline offers 'a unique and provocative means of gathering information central to understanding women's lives and viewpoints',[91] which have more often than not been excluded in traditional legal discourse. An analysis of women's subordination, and, in particular, the experiences of minority women, is tied to a normative goal of fostering effective reform and guarding against appropriation.[92]

Oral history could thus be used to develop effective anti-discrimination laws. The legal system of Israel is based on a liberal individualist theory, which defines the task of anti-

87 See S F Hirsch, 'Subjects in Spite of Themselves: Legal Consciousness among Working-class New Englanders (1993) 17(4) Law and Social Inquiry 839–57.

88 Silbey and Ewick (n 4) 24.

89 Barnes (n 84) 979.

90 L Espinoza and A Harris, 'Embracing the Tar-Baby' (1997) 85(5) California Law Review 544.

91 G Etter-Lewis, 'Black Women's Life Stories: Reclaiming Self in Narrative Texts' in Gluck and Daphne (n 26) 43.

92 L Gordon, 'The Struggle for Reproductive Freedom' in Z R Eisenstein (ed), *Capitalist Patriarchy and the Case for Socialist Feminism* (Monthly Review Press 1979).

discrimination law as passive and non-substantive. Such a blind approach to ethnic, religious, or gender differences seeks equality, yet 'does not embrace a purposeful classification on the basis of proscribed group affiliation'.[93] Anti-discrimination cases in Israel are dealt with on a case-by-case basis, precluding the potential for transformative and substantive equality. For example, the Supreme Court case of *Kadaan v Israel's Land Administration*[94] in 2000 was the first case to maintain the principle of equality for Palestinian citizens of Israel. However, while upholding an Arab family's right to buy a house in a predominately Jewish neighbourhood, the court ultimately failed to address any historical formal and material ethnic discrimination against Palestinian citizens in land and housing.[95]

Further legal research through oral histories could also be used to explore a feminist critique of rights, deepening a gendered analysis of topics such as competing rights, direct and indirect discrimination, intersectional forms of discrimination, and conceptions of national identity and citizenship. For example, many of the women interviewed spoke about marriage, divorce, and child custody – legal matters that occurred within the so-called 'private' sphere yet are legislated by official 'public' institutions. By appropriating the private concerns of women into the pool of public social knowledge and history, oral histories could challenge the traditional legal divide between the public and the private spheres.

As a tool of critical legal theory and practice, oral history invokes an approach to equality that takes into account collective legal needs based on historical disadvantage. Oral history can be used to 'link micro- and macro phenomena and personal life experiences to broader historical circumstances'.[96] The narrative collection of Palestinian-Israeli women is a normative assertion of outsider identities, and, if taken seriously, can effectively challenge a legal system fraught with systematic exclusion.

Conclusion

Scholarly literature on Palestinian women in Israel is generally focused on either oppression or empowerment.[97] Accounts of oral history complicate this polarity by drawing attention to the structural tensions between the various legal regimes that preside over the lives of Palestinian women citizens of Israel, which are pertinent to both the oppressive *and* the resistive aspects of the women's lives. For example, Lana's process of decision-making and personal transformation is located within a web of oppression and opportunity, of finding a crack in the system and using resources at hand to expose power. The act of storytelling itself transforms each momentary transaction into a historic event.[98]

Furthermore, a combined methodology of oral history and in-depth interviewing would greatly enrich our understanding of legal consciousness and could inform anti-discrimination laws. As an intertemporal tool of analysis, oral history can be used as a study of *process* in the formation of legal understandings and actions. The biographical element of an oral history interview points to moments of attitudinal shifts caused by particular life experiences and changing historical circumstances. If one is exploring how individuals engage with, avoid and/or resist the law and legal structures, oral history allows one to not

93 Y Jabareen, 'Critical Reflection on Law, Equal Citizenship and Transformation' in D Avnon and Y Benziman (eds), *Plurality and Citizenship in Israel: Moving beyond the Jewish/Palestinian Civil Divide* (1st edn Routledge 2010) 70.

94 HC 6698/95 *Kadaan v Israel Land Administration*, 54(1) PD 258 (5760/61–2000).

95 Jabareen (n 93) 76.

96 Hesse-Biber and Leavy (n 6) 153.

97 Sa'ar (n 42).

98 Silbey and Ewick (n 72).

only understand what the subject is currently experiencing and her perspective on that, but the process that led her there.

Through the oral histories of three Palestinian-Israeli women, I have demonstrated the ways in which oral history offers a contextualised approach to multiple grounds of discrimination, while drawing attention to moments of resistance and agency. As an intertemporal technique, the life history component of the oral history interview traces the development of legal consciousness over time. Oral history allows us to understand the cultural, social and historical environments of Samia, Fatma and Lana. As demonstrated through the case of *Delgamuukw v British Columbia*, the discipline gives weight to larger narratives of collective historical experiences. As an assertion of outsider identities and narratives, oral histories can be used as a powerful advocacy tool in effective legal reform.

NILQ 64(3): 351–64

The protection of cultural heritage: common heritage of humankind, national cultural 'patrimony' or private property?

FIONA MACMILLAN

Professor of Law, Birkbeck, University of London

Abstract

Starting from an argument about the relationship between cultural heritage and national and/or community identity, this article considers the different ways in which both the international law regime for the protection of cultural heritage and the international intellectual property regime tend to appropriate cultural heritage. The article argues that, in the postcolonial context, both these forms of appropriation continue to interfere with the demands for justice and for the recognition of historical wrongs made both by indigenous peoples and by many developing countries. At the same time, the article suggests that these claims are undermined by the misappropriation of the postcolonial discourse with respect to restitution of cultural heritage, particularly in the intra-European context. The article advocates the need for a regime for the protection of cultural heritage that is strong enough to resist its private appropriation through the use of intellectual property rights and nuanced enough to recognise significant differences in the political context of local and national claims to cultural heritage.

1 Introduction

This article is located in the context of persistent assertions in international legal instruments characterising cultural patrimony as being the heritage of humankind. The significance of this assertion is contested: it is unclear whether it amounts to a claim of 'ownership', a justification for legal protection, or a(nother) piece of convenient legal verbiage lacking precise significance or meaning. Taking account of these mutations in meaning, the article traces the emergence of the legal concept of cultural heritage with a view to demonstrating that it has always been a critical factor in the development of national identity and the securing of national sovereignty. It argues that, in substance, international law has failed to address the significance of national cultural patrimony in the development process. This failure is not only manifested by the vague language of international instruments, which do not adequately address the connection between concepts of community, nation, state and that of cultural heritage. It is also a consequence of the promotion of an aggressive system of intellectual property protection that frequently has the effect of privatising cultural property[1] in the hands of individuals,

1 In general this article uses the expression 'cultural property' interchangeably with that of 'cultural heritage'. For an account of the movement in international law from the use of the former expression to the use of the latter, see J Blake, 'On Defining the Cultural Heritage' (2000) 49 International and Comparative Law Quarterly 61–85, 65–67 . While Blake's account explains the advantages of the use of 'heritage' rather than 'property'

corporate or human, when it might be more properly managed as a community resource or right. In the end, one way or another, law (mis)appropriates the cultural heritage of communities, nations or states. This (mis)appropriation arguably amounts to yet another instance of the denial of any meaningful concept of development in international law.

2 Heritage, identity, sovereignty

The connection between heritage, identity and sovereignty is well known to those who have followed the debate in relation to the rights of indigenous people over their cultural heritage. The United Nations Declaration on the Rights of Indigenous People[2] contains numerous manifestations of the importance attached to this concept,[3] which traverse rights in both tangible and intangible heritage. These concepts are found in Articles 11.1, 12.1 and 13.1, which provide respectively:

> [Article 11.1:] Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
>
> [Article 12.1:] Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
>
> [Article 13.1:] Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

Articles 11.2, 12.2 and 13.2, meanwhile, impose obligations on states with respect to the protection of these rights, as well as redress and restitution in cases where the rights have been infringed. The Declaration's main assertion with respect to cultural heritage, however, is in Article 31.1, which also has the effect of linking cultural heritage and intellectual property rights:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

[*note 1 continued*] in terms of the width of its application, I suspect that this change in language also obscures the dimensions of the systemic conflict between cultural property/heritage and intellectual property, which is one of the themes of this article. It is notable that other writers who are concerned with this conflict, tend to use the expression cultural property, rather than cultural heritage: see, e.g., J R Slaughter, 'Form and Informality: An Unliterary Look at World Literature' in R Warhol, *The Work of Genre: Selected Essays from the English Institute* (English Institute in Collaboration with the American Council of Learned Societies 2011) <http://quod.lib.umich.edu/cgi/t/text/text-idx?c=acls;idno=heb90055> 177–240.

2 GA Res 61/295 (UN Doc A/61/L67 and Add 1), adopted on 13 September 2007.

3 While at the same time making reference to the ubiquitous concept of the common heritage of humankind in a preambular statement that affirms that 'all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind'.

The long campaign of indigenous peoples which resulted in this Declaration is linked to a wider agenda of self-determination,[4] which is ethically and politically connected to the treatment of indigenous peoples during the colonial and postcolonial periods. This historical context provides a clear basis for distinguishing the claims of indigenous peoples from some other examples where the assertion of rights over cultural heritage has become the centrepiece of national identity and/or claims to sovereignty.

In the European context, the assertion of national rights over cultural heritage has become part of the policy platform of right-wing and, in some cases, extreme right-wing parties, the effective claim of which is that national identity is so closely tied up with this 'heritage' that its relocation is a matter of cultural 'right'. This, for example, is part of the platform of the Danish People's Party. The Program of which contains numerous references to the importance of Danish national cultural heritage.[5] The third of four paragraphs that serve to introduce the Program states: 'In the Danish People's Party we are proud of Denmark; we love our country and we feel a historic obligation to protect our country, its people and the Danish cultural heritage.' And there is further section concerned specifically with the importance of cultural heritage:

> **The country is founded on the Danish cultural heritage and therefore, Danish culture must be preserved and strengthened.**
>
> This culture consists of the sum of the Danish people's history, experience, beliefs, language and customs. Preservation and further development of this culture is crucial to the country's survival as a free and enlightened society.
>
> Therefore we wish to see action on a broad front to strengthen the Danish national heritage everywhere. Outside Denmark's borders we would like to give financial, political and moral support to Danish minorities.[6]

In furthering claims based on this platform, this political party has not hesitated to misappropriate the discourse on postcolonialism that has sustained the claims of indigenous peoples.[7] As Porsdam has shown, this misappropriation is well illustrated in relation to the controversy over the return to Denmark of the surviving versions of the Jyske Lov (Jutlandic Law) of 1241, which was in the possession of the Swedish Royal Library, having either been purchased by it or bequeathed to it in the early eighteenth century.[8] Despite the claims of the Danish People's Party that the case was comparable to the dispute in the 1970s over the return to Iceland by Denmark of the Icelandic Sagas,[9] the two can probably be distinguished, politically at least, on the basis of the former imperial relationship between Denmark and Iceland. During the nineteenth and twentieth centuries,

4 Despite Art 46.1 of the Declaration, which apparently represents the type of political and diplomatic compromise common in international legal instruments. It provides: 'Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.'

5 <www.danskfolkeparti.dk/The_Party_Program_of_the_Danish_Peoples_Party.asp> accessed 29 January 2013. My thanks to Professor Helle Porsdam of the University of Copenhagen for drawing my attention to this material.

6 Ibid (bold as in the original).

7 H Porsdam, 'Cultural Heritage and Law: The Case of Cultural Looting' in H Porsdam and T Elholm (eds), *Dialogues on Justice: European Perspectives on Law and Humanities* (De Gruyter 2012) 219–34, 221 and 228–32.

8 Ibid 228–32.

9 As to which, see M Rendix, 'Copyright as Moral Strategy of Reclaiming the Past: The Return of the Icelandic Sagas' in Porsdam and Elholm (n 7) 177–92.

the Icelandic Sagas had been at the centre of a long campaign by Iceland based on the assertion that these manuscripts were central to their national identity. Greenfield observes:

> The significance of these saga manuscripts to the people of Iceland would be impossible to exaggerate. They have been the root and stock of Icelandic culture, the lifeblood of the nation, the oldest living literature in Europe, enshrining the origins of Icelandic society . . . Indeed, when the Icelanders took up the struggle for freedom and independence from Denmark in the nineteenth century, the saga literature was both their inspiration and their justification.[10]

With respect to questions about the relationship between ownership as a legal matter and claims for the return of cultural heritage on the basis of some form of national right, there is less to distinguish the cases. Allowing for the fact that the passage of time tends to obscure some relevant details, it is arguably the case that both the Icelandic Sagas and the Jutlandic Law were legitimately acquired by Denmark[11] and Sweden,[12] respectively. This same tension between the question of whether the item of cultural heritage was legitimately acquired by the holder and the right (in any case) to claim return of such items is a feature of many current controversies. Other salient examples of this are, of course the long-running dispute over the Elgin Marbles[13] and the current claim by Turkey for the return of sculptures from the Mausoleum of Halicarnassus, which are currently part of the British Museum collection.[14]

Given the alleged relationship between national cultural heritage and identity, it is not surprising that 'ownership' of cultural heritage is also a part of the contested territory of sovereignty and challenges to sovereignty, in a world that is not perhaps quite as globalised (for better or worse) as one might sometimes be tempted to think. Arguably, the current campaign by Turkey for the return of artefacts that it considers its national property,[15] of which the claim for the return of the sculptures from the Mausoleum of Halicarnassus is one, represents an assertion of sovereignty in the face of Western hostility.[16] This campaign, however, is one that should be easily recognisable to former imperial states, since it appears to have been mounted with the intention of stocking an 'encyclopaedic museum like the Metropolitan or British Museum'.[17] As this comment makes clear, the concept of preserving and exhibiting cultural heritage in this way is a familiar and comfortable way of expressing a claim to identity and sovereignty. Preservation and conservation of cultural heritage, in particular, is a value to which Western society tends to subscribe.[18] One consequence of this is that claims to proprietary rights over cultural heritage as assertions

10 J Greenfield, *The Return of Cultural Treasures* (CUP 1996) 4, quoted in Rendix (n 9) 180.

11 Rendix (n 9) 181.

12 Porsdam (n 7) 229.

13 See e.g. <www.elginism.com> accessed 29 January 2013.

14 See e.g. 'Turkish Campaigners May Go to European Court of Human Rights over Mausoleum of Halicarnassus in British Museum' <www.elginism.com/similar-cases/turkish-compaigners-may-go-to-european-court-of-human-rights-over-mausoleum-of-halicarnassus-in-british-museum/20121217/6770/> accessed 29 January 2013.

15 See e.g. 'Of Marbles and Men: Turkey Gets Tough with Foreign Museums and Launches a New Culture War' The Economist (19 May 2012) <www.economist.com/node/21555531> accessed 3 February 2013.

16 An example of which is the negative reaction on the part of some states in the European Union to the idea of admitting Turkey to the Union. See also ibid, in which it is observed that '[g]rowing economic power and stalled talks over EU membership make many Turks feel that it is time to turn their backs on the West. Amid the turmoil of the Arab spring Turkey believes it can become the leader of the region.'

17 A quote attributed to an aide to Turkey's Minister for Culture and Tourism, Ertugrul Gunay: ibid.

18 See P Yu, 'Cultural Relics, Intellectual Property and Intangible Heritage' (2008) 81 Temple Law Review 433, 471–73.

of sovereignty that involve practices that do not amount to conservation of that cultural heritage can be regarded as extremely problematic.

We can all sit around and nod our heads sagely when we are told that the destruction by the Zuni of their war gods forms part of a cultural practice that should be respected and that the attempt to preserve these gods would be culturally disrespectful;[19] or likewise, when the Igbo people destroy their *mbaris* as part of a cultural practice, after having painstakingly erected them.[20] Yet no such indulgence was evident when the Taliban regime in Afghanistan dynamited the World Heritage-listed, sixth-century Buddhas of Bamiyan, having described them as being 'idols' and thus religiously offensive. The cases clearly have significant differences, one of the more important in cultural terms being that the Taliban were destroying something that belonged not to their own culture, but arguably to someone else's, although they claimed a cultural imperative for the act of destruction. However, the Bamiyan Buddhas case is probably most interesting because of its significance in geopolitical terms. A reasonable argument might be made that this was much more than a mere act of cultural destruction. It was, rather, an aggressive assertion of sovereignty, not to mention a clear rejection of any meaningful concept of the common heritage of humanity, in favour of a claim that the Buddhas were part of their national cultural patrimony to do with as they wished.

3 The common heritage of humanity?

Of course, most controversies involving some sort of national, local or community assertion of rights over cultural heritage do not, as a matter of logical necessity, involve the rejection of the concept of the common heritage of humankind. Instead, they tend to involve some contingent claim that, for one reason or another, is said to trump or displace other claims. For example, it is not necessarily clear that claims made by the British Museum to retain their extensive collection of heritage objects from all around the world involve a rejection of the concept of the common heritage of humanity in favour of some claim to national rights over the contents of the museum. Rather the Director of the Museum, Ewan McGregor, claims that they are in the best position to conserve the artefacts and to present this 'encyclopaedic collection'[21] – a position that Sharon Waxman scathingly describes as 'this new philosophy for a multicultural age'.[22] There is also a *faux* naivety in this idea of the 'encyclopaedic collection' as though it was somehow free of the circumstances in which it was formed, and as though all the components of the collection will look exactly the same from wherever they are viewed.[23] Observations made by Slaughter when addressing the concept of 'the centre' in the intangible cultural heritage of world literature seem apposite here:

19 S Harding, 'Value, Obligation and Cultural Heritage' (1999) 31 Arizona State Law Journal 291, 312; R W Mastalir, 'A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property under International Law' (1993) 16 Fordham International Law Journal 1033, 1038; Yu (n 18) 476–78.

20 See Harding (n 19) 309–12; Yu (n 18) 476–78.

21 N MacGregor, 'Preface' in K Sloan (ed), *Enlightenment: Discovering the World in the Eighteenth Century* (British Museum Press 2004) 6. See also, N MacGregor, 'To Shape the Citizens of "That Great City, the World"' in J Cuno (ed), *Whose Culture? The Promise of Museums and the Debate over Antiquities* (Princeton University Press 2009) 39–54.

22 S Waxman, *Loot: The Battle over the Stolen Treasures of the Ancient World* (Times Books, Henry Holt & Co 2008) 212.

23 See further G Rose, *Visual Methodologies: An Introduction to Researching with Visual Materials* (3rd edn, Sage 2012). My thanks to Professor Amanda Perry-Kessaris for this reference.

> [T]he core defines the norms and forms that make it the core; it defines itself as center . . . We should remember, here at the center, that the core is the core not because it is the *source* of things, but because it is a collection of things . . . [T]he center absorbs everything; it . . . treats everywhere else and everything else as raw materials to be extracted, exploited, accumulated, and privatized . . . [T]he center is never simply a given or merely an object; it is the effect of a certain way of seeing and speaking, of gathering and analyzing data.[24]

What McGregor does not say, because he is obviously alive to the dangers of it, is that the great metropolitan museums, like the British Museum, are, of course, a sort of physical embodiment of the history of imperialism. This is a description that the British Museum may not be willing to embrace, but in some senses it could be taken as the basis for an argument that the British Museum has some particular interest, beyond the presentation of an encyclopaedic collection, in keeping all this looted stuff because it is part of British history and, thus, perhaps of British cultural heritage – although maybe this confuses history with heritage. However, if the British Museum could make such a claim then how would it relate to claims for return of artefacts to former colonies, and to communities within former colonies, on the basis of their significance to history and identity? Whose claim trumps whose?

All these types of controversies, and their intensely political nature, clearly have the capacity to complicate how we talk about ownership of, or rights over, cultural heritage at any level more specific than common heritage of humanity. However, the concept of the common heritage of humanity does not necessarily preclude us from talking at the same time about national, local or community rights or responsibilities in relation to heritage. This is to say that the battle over the ownership of cultural heritage has always been an ongoing battle over history and how it relates to or is translated into present-day identity.

4 Cultural heritage in international law

The trajectory of international law in this area is clearly marked by precisely this battle. And like the controversies over the collections in the great metropolitan museums, it also tends to reveal the rather contingent historical and political nature of at least some 'national' and local claims to cultural heritage.

Although disputes about ownership of cultural artefacts go back to antiquity,[25] cultural heritage first became a recognised concept in international law at the time of the Vienna Treaty of 1815,[26] which was imposed by the British victors after the conclusion of the Napoleonic Wars. One of the things that the British insisted upon was the return of moveable artefacts of 'cultural heritage' looted by Napoleon during his campaigns. This was very much a punitive clause, but it carried with it the rise of a discourse that linked people, territory and cultural objects.[27] Naturally, the discourse was essentially European in perspective, but even more it was guided by British imperial claims. A stroll through the Italian galleries in the Louvre makes it clear that a substantial collection of Venetian artworks, looted by Napoleon, remain in French possession. The British, it seems, may have been less than diligent in enforcing the terms of the Vienna Treaty when they did not relate directly to British interests. The Venetians, however, did get back the famous horses of San Marco, one of the symbols of their city. The extent to which this might be considered a victory of cultural heritage rights perhaps needs to be considered in light of the fact that

24 Slaughter (n 1) 196.

25 See M M Miles, *Art as Plunder: The Ancient Origins of Debate about Cultural Property* (CUP 2010).

26 A F Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (CUP 2008) 23–29.

27 Ibid 13, citing W G Grewe, *The Epochs of International Law*, M Byers (trans and rev) (De Gruyter 2000) xviii.

the Venetians had looted the horses from Corinth several centuries earlier. In fact, this example is illustrative of a perennial issue with respect to national or local rights in cultural heritage, which is that the passage of time, along with the mutations of nationality and national borders, tends to introduce a certain fragility into some current assertions of national ownership. For example, the fact that the sculptures from the Mausoleum of Halicarnassus, the subject of Turkey's claim against the British Museum, were made by Greek sculptors[28] is not without some resonance in this context.[29]

The period prior to the conclusive end of British dominance, which was definitely dead by the end of the Second World War,[30] was, amongst other significant events in the present context,[31] characterised by the systematic removal of cultural objects, without any sense of moral culpability, from the 'outposts' of the Empire.[32] The subsequent treatment of this process of removal, under both international law and under the administrative practice of former metropolitan states, in the period of decolonisation after the end of the Second World War has laid the groundwork for the issues with which this article is most closely concerned. There are three inter-related aspects of the terrain of international law that need to be taken into account in order to reflect on the trajectory of international law and its impact on the relationship between development and cultural heritage rights.

First of all, there is the very process of decolonisation itself and the political aspirations that accompanied it. At the international law level, this process was managed in a rather *ex post facto* fashion by something that eventually became yet another in the extensive collection of 'Vienna' treaties and conventions. This was the Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts of 1983. In the current context there are two key (low) points of this treaty. The first of these is its failure to recognise the distinctive position of indigenous peoples within former colonial subject states. This, of course, is a serious problem with which the international law system continues to struggle. In part, it was a consequence of the strongly state-based thinking that characterised the development of international law in the post-war period. This explanation (the inadequacy and injustice of which needs no elaboration), however, cannot serve to explain the second important aspect of the Vienna Convention, which is the absence of any rules on restitution of works of art or artefacts to the former colonial states. Instead, the question of the return of works of art and artefacts was to be governed by bilateral negotiations under the auspices of a UNESCO Committee, the operation of which has continued up until the present period.[33] What makes this particularly pernicious is the stark contrast between the arrangements that the colonial powers, comprising a number of European states, made with respect to the return of artefacts to their former colonies and the

28 'Of Marbles and Men' (n 15).

29 Another example of this type of problem relates to the murals of Bruno Schulz: see M Bruncevic, 'The Lost Mural of Bruno Schulz: A Critical Legal Perspective on Control, Access to and Ownership of Art' (2011) 22 Law and Critique 79–96.

30 G Arrighi, *The Long Twentieth Century: Money, Power and the Origins of Our Times* (Verso 1994) 47–74 and ch 3.

31 Including: the conclusion of the first specific international law instrument designed to protect cultural heritage (1907 Hague Regulations on Law and Customs of War: Protection of Historic Buildings); and the rise of ideology in European fascist states that postulated the destruction or removal of cultural objects as essential to eradicating the identity and existence of certain groups.

32 Special Rapporteur, Mohammed Bedjaoui, who was responsible for the preparation of the work that eventually led to the conclusion of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983) found that the removal of cultural objects during the colonial period was generally not 'in accordance with the canons of justice, morality and law': UN Doc A/CN4/292, quoted in Vrdoljak (n 26) 202.

33 For a critical assessment of the work of this committee, see Vrdoljak (n 26) 211–17.

arrangements that they made for the return of what they considered to be their own artefacts under the Allied Restitution programmes that followed the conclusion of the Second World War.[34]

The second of the three important developments in international law in the postcolonial period was the re-institutionalisation of the concept of free trade. This occurred as a result of the Bretton Woods negotiations at the conclusion of the Second World War, and specifically the conclusion of the General Agreement on Tariffs and Trade, which constituted part of Roosevelt's envisaged remaking of the world systems. The concept of international free trade had been floating around since the Treaty of Westphalia of 1649, which had abolished trade barriers and sought to protect the rights of private enterprise to trade across state borders, even during times of war or other political turmoil.[35] While the economic freedoms of Westphalia were not observed during the Napoleonic Wars, they were restored in the Settlement of Vienna of 1815 and the Congress of Aix-la-Chapelle of 1818.[36] And then these freedoms were restored again, after the cataclysms of the First and Second World Wars, at Bretton Woods, starting the international legal system(s) on a process that has lead eventually to the World Trade Organization (WTO).

Thirdly, the postcolonial period has also witnessed the development of the UNESCO regime for the protection of 'culture', within the international law context of the Dumbarton Oaks system. The Dumbarton Oaks system, arising from the Dumbarton Oaks negotiations also at the end of the Second World War, set up the UN system and set the scene for much of what we now call public international law. The UNESCO Conventions started off with a concern for the protection of cultural property during armed conflict (UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention, 1954)), moved on a concern for restitution to states of moveable cultural property (UNESCO Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export and Transfer of Ownership of Cultural Property 1970), and then the preservation of immoveable cultural property (UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 1972). In this century, while the rate of international law-making with respect to the protection of culture and cultural heritage has increased, the focus of protection has moved to a concern for underwater cultural heritage (UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001), intangible cultural heritage (UNESCO Convention for the Safeguarding of Intangible Cultural Heritage 2003) and the concept of 'cultural diversity' (UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions 2005).

What is particularly important and interesting about this UNESCO regime is that it is marked by its reactions to both the process of decolonisation and the growth and development of free-trade theory. Despite using the language of the cultural heritage of mankind/humanity, the regime is intensely statist, which is also (obviously) a consequence of its location in the system of international law. This, of course, reflects the strongly statist ideology that characterised the period of decolonisation. There are now some small breaches in this discourse as witnessed at the general level on public international law, for example, in the UN Declaration on the Rights of Indigenous Peoples of 2007 and reflected in the

34 Vrdoljak (n 26) 202. And for an account of the Allied Restitution programmes in this context, see ibid 140–48.

35 Arrighi (n 30) 43–44.

36 Ibid 52.

UNESCO Convention for the Safeguarding of Intangible Cultural Heritage[37] and the Convention for the Protection and Promotion of the Diversity of Cultural Expressions.[38] At the same time, and arguably running counter to this strongly statist approach, the ambit of the UNESCO regime is circumscribed by the dominance of free trade ideology and the associated importance of private ownership rights. One classic example of this is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export and Transfer of Ownership of Cultural Property of 1970, which makes its provisions on the return of moveable cultural property subject to ensuring compensation for 'innocent' purchasers and persons 'who have valid titles' to the relevant artefacts.[39] The Convention for the Protection and Promotion of the Diversity of Cultural Expressions is also marked by the dominance of free-trade ideology. In one way, its very existence can be considered a reaction to the international legal implementation of that ideology in the WTO agreements. This is because one of primary motivations of the Convention's promoters was to compensate for the absence of a general cultural exception in the WTO agreements.[40] However, it might also be regarded as accommodating aspects of the ideology underpinning the WTO through its uncritical acceptance of the role of private property rights, in the form of intellectual property rights, in sustaining the type of cultural creativity that it regards as essential to the flourishing of cultural diversity.[41] A similar uncritical acceptance characterises the Convention for the Safeguarding of Intangible Cultural Heritage.[42] Given the historical intertwining of the trade regime and the UNESCO regime, it is probably not surprising that UNESCO's increasing concern with the protection of intangibles has been matched by an enormous growth in the scope and application of intellectual property rights – classically private proprietary rights over intangibles – which are now part of the WTO package in the form of its Agreement on Trade Related Aspects of Intellectual Property (TRIPs Agreement). The minor inconvenience flowing from the fact that this Agreement does not fit within the neoclassical account of free trade upon which the WTO claims to find its theoretical basis and justification has been conveniently forgotten.

5 Cultural heritage and decolonisation

In light of the foregoing, this current period of decolonisation can be regarded as generating three outstanding issues in relation to the question of who owns cultural heritage. These are: first, the question of how we mediate claims that cultural 'stuff' is the common heritage of humanity with the particular claims of developing countries and indigenous peoples; secondly, the question of tangibility and intangibility and its relationship to the privatisation of cultural heritage; and, thirdly, the question of whether it

37 Which recognises in its recitals 'that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and recreation of the intangible cultural heritage . . . '; and also recognises the role of communities and groups in Art 2.1.

38 Which makes repeated references to 'traditional cultural expressions' and notes in its Recitals 'the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development'.

39 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export and Transfer of Ownership of Cultural Property 1970, Art 7(b)(ii).

40 See further C B Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?' (2006) 9 Journal of International Economic Law 553–74.

41 According to its Recitals, the Convention recognises 'the importance of intellectual property rights in sustaining those involved in cultural creativity'; and see Art 20. For a further analysis, see F Macmillan, 'The UNESCO Convention as a New Incentive to Protect Cultural Diversity' in H Schneider and P van den Bossche (eds), *Protection of Cultural Diversity from a European and International Perspective* (Intersentia 2008) 163–92.

42 See Art 3(b).

is possible to find a meaningful accommodation of co-existing claims to private and some form of public or communal ownership of cultural heritage.

5.1 Claims of developing countries and indigenous peoples

There are some common issues that arise when considering the question of the mediation of general claims to the common heritage of humanity with particular claims of developing countries and indigenous peoples. Nevertheless, such claims by developing countries and indigenous peoples are distinct and should not, therefore be elided. For developing countries, attempting to build a national identity, sometimes from scratch, and to forge it around often invented/artificially constructed national symbolism, the failure to return significant forms of cultural heritage has been in some cases viewed as a denial of the right to exist.[43] Despite the statist focus of the UNESCO Conventions, they have been of little assistance to developing countries with respect to tangible cultural heritage because of their resolutely non-retroactive effect. The irony of this is particularly marked in relation to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Article 2 of which provides:

> The States Parties to this Convention recognize that the illicit import, export and transfer of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.

The fact that the Convention and its more recent partner the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995[44] apply to moveable tangible property and that both Conventions clearly envisage that such property is national in nature would seem to make them well adapted to the task of recognising the cultural interests at play here. However, the Conventions only apply to activities undertaken from the time they came into force,[45] which means they are more or less irrelevant, in a strictly legal sense, to the claims of developing countries for restitution of objects removed during the colonial period. On the other hand, symbolically they might be regarded as stating an ethical position that should be recognised by the international community.[46] In this respect, it is interesting to note that the UNIDROIT Convention notes that, despite its lack of retrospectivity, it:

> does not in any way legitimise any illegal transaction . . . which has taken place before the entry into force of this Convention . . . nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.

43 For a discussion of the importance of the restitution of cultural artefacts to former colonial states, see Vrdoljak (n 26) 200–06.

44 Which introduces a more complex legal architecture in order to support the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

45 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Art 7; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995, Art 10.

46 Although the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Art 4, makes cultural property that has been removed with the consent of the competent authorities (paras (c) and (e)) or 'been the subject of a freely agreed exchange' part of the patrimony of the state in which it is located. The application of this provision to artefacts taken during the colonial period would be the source of endless conflicts about what was 'looted' and what was not. As argued above, in the postcolonial context this is not only difficult to substantiate, but more importantly beside the point.

For indigenous groups, the question of the right to control of cultural heritage is linked to questions of identity, survival and the political project of self-determination, in a world that is dominated by the Westphalian state-based system of sovereignty and law-making. Representing some changes in political awareness, the 1995 UNIDROIT Convention recognises the existence of 'national, tribal, indigenous or other communities' and introduces some procedural rules about claims in the light of this. Its applicability is, of course, limited by the problem of retrospectivity. However, given that indigenous peoples lack the protection of statehood and are still at the whim of the nation states in which they live, the Convention might be regarded as having slightly more utility in a temporal sense. Running counter to this suggestion are the facts that: first, the Convention envisages the need for a co-operative relationship between these groups and the state or states in which they live in relation to the international claims for return with which it is concerned; and, secondly, the fact that it only deals with international claims means that it says nothing about claims by indigenous peoples against the states in which they live. It is interesting, perhaps to note that, in any case, of the most important states for these purposes,[47] only New Zealand is a member of the UNIDROIT Convention.

5.2 Tangibility, intangibility and the privatisation of cultural heritage

In cultural terms, the significance of the distinction between tangible and intangible heritage can be easily exaggerated. This is because what makes a tangible item heritage is precisely its symbolic value. In other words even tangible items are only heritage because of an intangible connection.[48] This putative distinction, which is derived from occidental legal ordering, is, however, reflected in the UNESCO approach to the protection of cultural heritage. While UNESCO's twentieth-century Conventions focused largely on the question of the protection of tangibles, this century has seen a turn towards the protection of the intangible with the conclusion of the eponymous Convention for the Safeguarding of Intangible Cultural Heritage and of the Convention on the Protection and the Promotion of the Diversity of Cultural Expressions. In fact, both Conventions disrupt to some extent the previous practice of attempting to separate the tangible and the intangible. The Convention on Intangible Cultural Heritage includes within its definition of intangible cultural heritage 'instruments, objects, artefacts and cultural spaces' associated with 'practices, representations, expressions, knowledge, skills . . . that communities, groups and, in some cases, individuals recognize as part of their cultural heritage'.[49] The Cultural Diversity Convention recognises that both the tangible and intangible are part of the diversity of cultures.[50] Neither Convention, however, has much to offer to either indigenous peoples or developing countries when it comes to the protection of their intangible cultural heritage, despite their objections to the Western appropriation of a wide range of things such as traditional medical or environmental knowledge, know-how, stories, artistic styles, music, dance, festivals, carnivals and other ceremonies. This appropriation, apart from being problematic in itself, has raised problems with respect to inappropriate use.[51] There are also circumstances in which this appropriation can interfere with the ability of indigenous peoples or communities in the developing world to access, use and reflect

47 Meaning states within which there are substantial groups of indigenous peoples, such as Australia, Canada, New Zealand and the United States.

48 See Blake (n 1) 67–69.

49 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Art 2.1.

50 E.g. through its recognition of the role of 'cultural goods': UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Art 4.4.

51 For a full discussion of this problem, see Yu (n 18).

upon their own intangible cultural heritage. This happens as a consequence of appropriation of this heritage by making it subject to intellectual property rights, which is considered below.

However, it should be noted that the problems of access to intangible heritage are not limited to the issue of private appropriation through intellectual property rights. As Stoler has shown, developing countries have also suffered from another problem with respect to access to their intangible cultural heritage.[52] This relates to access to information on state administration during the colonial period. While the 1983 Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts required the return of some types of state papers and archives, it does not address the 'know-how' of state administration (including the legal system) with the result that many developing counties claim that effective state-building has been almost impossible.[53]

5.3 Public versus private claims to cultural heritage

The problem of mediating co-existing claims to private and some form of public or communal ownership of cultural property is a problem that exists with respect to both tangibles and intangibles. As already noted, the importance of respecting private property rights in relation to moveable heritage was regarded as so paramount by the metropolitan powers that the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property makes special provision to ensure that it is respected and that proper compensation is paid to a property holder. If anything, the situation with respect to the protection of private property rights over intangible forms of cultural heritage is even more biased in favour of the private right holder, with this century's UNESCO Conventions simply ceding the ground.[54] Certainly, this accommodating approach does nothing to contradict claims that appropriation through intellectual property is the new form of imperialism.[55] For developing countries and indigenous peoples, not only is there the problem of the appropriation of cultural heritage through a discourse that claims their heritage as the patrimony of humankind – some sort of global patrimony – but also, the problem of the appropriation by private corporate interests, usually in the global north, of intangible heritage. The types of intangible cultural heritage that might be appropriated through intellectual property rights have already been mentioned. So far as, for example, traditional medical knowledge is concerned, there is a plethora of examples of the way in which this type of intangible heritage can be appropriated by pharmaceutical corporations through the use of patents. Similarly, for example, with respect to stories, songs and music there are serious issues about the appropriation of intangible heritage by, for example, the entertainment industry represented by the Hollywood machine. (Of course, the recent development of national film industries in countries like Nigeria and South Korea, as well as the continuing power of Bollywood, constitutes a welcome counter-movement to the Hollywood machine.)

Not only does all this add another possible layer onto the question of 'Who owns cultural heritage?', but it also means that somehow the relationship between the private rights and the more public or communal rights inherent in identifying something as cultural heritage must be negotiated. A negotiation of this type must depend upon some choice as

52 L A Stoler, 'Colonial Archives and the Arts of Governance' (2002) 2 Archival Science 87–109.

53 See Vrdoljak (n 26) 205.

54 See text accompanying nn 41 and 42.

55 See e.g. Rendix (n 9) 191–92. See also Slaughter (n 1) especially 198–99, who argues that the distinction between the developed and developing world is reflected in the idea that the former has intellectual property whilst the latter has cultural property, which is always under threat of appropriation.

to which rights should prevail. In the postcolonial context, there is a strong argument in favour of giving precedence to cultural heritage rights over intellectual property rights and other private property rights. Three arguments might be cited in support of this proposition. The first is simply that the importance of cultural heritage to processes like nation-building and self-determination, as well as its importance for the identity of indigenous peoples, should be regarded as giving it precedence over private rights on the grounds of ethics, justice and the right to development. Secondly, it could be argued that, in relation to tangible heritage, the international community has already made a political choice to favour cultural heritage rights over private property rights. This choice is expressed in both the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995, in which private property rights are recognised by a right to compensation in certain circumstances, but cannot be relied upon to prevent the return of stolen or illegally exported cultural artefacts. This approach dovetails with the third argument in favour of preferring cultural heritage claims over private property claims, which is that this approach gives scope to both types of claims whereas giving precedence to private property claims effectively extinguishes cultural heritage claims. Whether property said to constitute cultural heritage is tangible or intangible, its essential features seem to be: first, that it is 'owned' publicly or, at least, in common; and, secondly, that the ownership rights focus on preservation (loosely conceived), access and the sharing of benefits associated with it. These rights cannot be exercised if private property rights are given precedence. Certainly, it is also true that one of the most significant roles of cultural heritage rights is to prevent or limit the privatisation of that cultural heritage. Sometimes this might mean preventing the possibility of private ownership rights altogether, but this is not necessarily the case. There may be circumstances, particularly with respect to intellectual property rights, where the range of rights holders might be circumscribed without preventing more general access.[56] In any case, it should be possible to find mechanisms either in property law, including intellectual property law, or external to it that carve a public or communal space out of the privatised space of property law.[57] The fact that the law, to date, has a poor track record in this respect only invests the project with more urgency.

6 Conclusion?

What does it mean, in the end, to say, as UNESCO instruments do with such predictable regularity, that cultural heritage is the common heritage of humanity? Is it a claim to ownership or is it a justification for special status and protection? Is it a ground upon which to argue, for example, that diversity is what makes us human? Or a ground upon which to argue that wanton acts of destruction harm the humanity of us all? As Blake notes, there is an 'inherent contradiction' in characterising something as the common heritage of humanity 'while at the same time noting its power in asserting the cultural identity of the community which produced it'.[58] Yet the assertion of a general claim on the basis of common humanity is not without value.

History shows us that it is not possible to decouple cultural heritage from particular identities, national, communal or otherwise. But it is not clear that this always implies the

56 This is the gist of the UN Declaration on the Rights of Indigenous Peoples, Art 31.1, quoted in full in section 2 above.

57 For an argument to this effect with respect to intellectual property rights, see F Macmillan, 'Many Analogies, Some Metaphors, Little Imagination: The Public Domain in Intellectual Space' (2010) 2 Pòlemos 25–44.

58 Blake (n 1) 64.

right to make a claim for 'ownership', which might in any case be better understood as a form of stewardship.[59] Political context is clearly significant here. The postcolonial context, with its urgent demands for justice, makes claims for return of artefacts by indigenous peoples in Australia, for example, different to claims by right-wing governments or political parties in Europe. The pressing need to recognise that cultural heritage is critical to identity, nation-building and sovereignty, and that any notion of a right to development is meaningless without these things, does not just mean that the claims by developing countries to the return of their artefacts taken during the colonial period must be taken seriously by the international community. It also requires a recognition that they have rights over their intangible heritage which impact on, for example, its wholesale appropriation as part of the Hollywood machine.

'Too much', Lowenthal writes, 'is asked of heritage. In the same breath we commend national patrimony, regional and ethnic legacies and a global heritage shared and sheltered in common. We forget that these aims are usually incompatible.'[60] If the cultural heritage claims arising from the oppressive legacy of the colonial period were accepted on the basis that in the name of a right to development they are politically distinguishable from other types of claims, we might find this problem easier to resolve. Attention could then be turned to asking even more of heritage – or at least of rights in relation to it. Now we need heritage rights to fend off the new imperialism of private appropriation of culture, especially as it operates through the global system of intellectual property rights ushered in through the WTO TRIPs Agreement.

59 See K A Carpenter, S Katyal and A Riley, 'In Defense of Property' (2009) Yale Journal of Law 100–204.

60 D Lowenthal, *The Heritage Crusade and the Spoils of History* (Viking 1997) 227, cited in Blake (n 1) 64.

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Matters of ownership: a 'People's Port' for Dover?

ANNE BOTTOMLEY

Kent Law School

and

NATHAN MOORE

Birkbeck, University of London[1]

Abstract

Focusing upon the recent (and possibly on-going) process of privatisation of the port of Dover, this paper seeks to move away from the idea that appropriation involves the annexation of some pre-existing 'thing', by some pre-existing entity that can subsequently act as 'owner', in order to begin to ask how it is that processes of appropriating assemble different agents and agendas, so as to constitute the possibility of both the 'owner' and the 'property' as such. What we see in relation to Dover is a shortfall in the current available mechanisms for owning property, where those who are to be constituted as the owners are identified as the local community – or, as the scheme is referred to in Dover, where the asset is to become the 'People's Port'. What this shortfall makes visible is a confluence of various interests, as they endeavour to promote and, where necessary, seek to create, a way to crystallise the asset as a particular (and potentially novel) property form, for the benefit of the locality.

Privatisation, appropriation and the Port of Dover

This article examines the events which followed from the Labour government's announcement, in 2009, that the port of Dover, the largest and probably most culturally significant English port, was to be privatised.

Privatisation, of course, raises the question of appropriation; but in a manner which is far from straightforward. On the face of it, the transfer of an asset from public to private control involves 'an' appropriation. However, once we begin to look closely at what is actually involved in such a transfer, things become less obvious than we might have expected. Most noticeably, it is patently wrong, at least in the story concerning the proposed privatisation of the port of Dover, to understand the situation as the movement of some unified thing or asset from one owner to another. Rather than 'an' appropriation, we have found that the port has been subject to a complex of appropriations, which seldom fit together smoothly and tightly and are not always pursuing the same agenda. Instead, a number of different interests have come together which have, with varying degrees of success, created the asset, the 'port of Dover', on various different levels, and in ad hoc and

1 The authors thank the British Academy for funding which enabled the employment of a research assistant, Caroline Archer, whom we also thank. This paper is derived from presentations given at R-CoMuse seminars (Research Network into Co-operatives, Mutuals and Social Enterprises), and the School of Oriental and African Studies 'Appropriation Seminar' – we thank all of the participants for the discussions which informed our work. We also wish to thank the reviewers for their very helpful comments.

partial ways. Consequently, it is less the case that some thing is being moved from one owner to another, than it is that a whole set of strategies, narratives and interests combine in order to produce an affect, of what might, at best, be thought of as a 'potential asset' (or even an 'asset in potential').

Therefore, it is not inappropriate to consider 'appropriation' as a leitmotif going beyond the materiality of the port itself, and into the very idea of what the port, as asset, might or could be. In an important sense, it is less a thing than a process (a series of 'asseting' procedures) that are yet to resolve what the port might come to be. This is especially clear, as our discussion below will show, in the variety of aspiring ideas about community, community benefit (and responsibility) and community ownership that have been mobilised in relation to the port. Consequently, we might also consider there to be an appropriation of ideas involved, inasmuch as certain parties, quite unfamiliar with the history, values and terminology of mutuals and the co-operative movement, have nevertheless wished to present such ideas as not only having some (yet to be defined) value, but also (and perhaps more surprisingly) relevance to the possible futures of the port. It is not, then, simply a question of who will benefit from future ownership of the port (although this is certainly relevant), but of a more profound inquiry as to what ownership and being an owner, might actually mean: In this case when applied to, or thought through, the port as a contested asset.

Privatisation of ports

The Labour government's announcement concerning Dover was one of the latest in a well-established policy of privatising those ports remaining in public ownership,[2] and thus should not have been either particularly surprising, or even controversial. The pattern adopted for these privatisation processes is for the existent Harbour Board to construct, in effect, a 'management buy-out', known as a 'voluntary transfer'; and then for the port to be 'sold on' through the accumulation of shares by already established private entrepreneurs or investment groups.

There has been little significant political or public opposition to the policy of privatisation of the ports and, generally, little local opposition when the privatisation process has been carried through. It might well have been the case that the Labour government recognised that a certain political sensitivity would be required when making the announcement that the time had now come for Dover to undergo the process, but they certainly did not foresee that it would provoke not merely vehement opposition, but, more significantly, the development of a proposal that the port of Dover should be moved into a different form of public ownership – that it should become a 'People's Port' 'owned' by the 'people of Dover'.

Historically, opposition to privatisation schemes has been spearheaded by trades unions representing port workers, supported by a network of local activists motivated by a concern to defend the principle of 'public ownership' of assets, as well as by fear of the impact privatisation might have on the local economy. This form of opposition is quite simple – it is an attempt to defend the status quo. Such a strategy is strengthened when worked into a

2 The privatisation programme is carried in the Ports Act 1991. Other than the small number of ports held by local authorities, and an even smaller number by local trusts, the majority of ports had become placed under central government control through the establishment of local Harbour Boards accountable to the relevant secretary of state. For further detail on the history of port privatisation and the Dover bidding process, see C Archer and A Bottomley, 'Local Assets and Local Interests: The Significance of Dover's "People's Port"' (forthcoming).

vision or scheme for regeneration of the port and its surrounding economy, but it is often difficult to provide, let alone to promote, an 'alternative' to 'privatisation'.

The ports selected were, all too often, in a state of decline. Little money had been available for investment into infrastructure regeneration for a long time, and the management culture in most ports could be characterised as one trapped into ever-smaller circles of 'managing' long-term decline, often through a prism of short-term crises. Technological developments impacting on how shipping could now be used more effectively and changes in patterns of economic investment into transport and infrastructure were, indeed, leaving the 'unreformed' ports behind, rendering them obsolete and potentially redundant. Thus, the evidence presented for supporting privatisation has seemed stark – not only can inward investment and motivated management be delivered through privatisation, but the failure of public ownership to deliver either is manifest. And so, framed as a simple choice between public decline or private potential, and with the traditional stance of union activists focused on a defence of the status quo – we should not have expected more than the usual, muted and short-lived, complaints against privatisation when Dover was added to the list.

Three local factors, however, created a very different scenario in Dover. First, local knowledge of what had happened in local ports which had been privatised[3] was building a compelling dossier of evidence against the 'promise' of privatisation as an economic boost to both port and local community. Instead of regeneration, further economic decline was the norm as jobs were lost and the ports became little more than isolated outposts in a vast global infrastructure of transport conglomerations and investment potentials. Complex ownership structures of shares held in and through international companies and management structures designed as accountable to head offices often located in other jurisdictions removed any focus of concern with, or accountability to, the locality, away to 'another place', or chain of places difficult to track either in material or virtual dimensions.[4] The threads which had woven ports into the texture of their socio-economic environment, their localised materiality, were cut. Communities whose built environment was focused on the central site of the port, found themselves both strangely adrift, cast off and, at the same time, beached in a setting which only made sense as the environs of an active port-focused community. Port sites became enclosed no-go areas, surrounded by the residuum of a socio-economic infrastructure for which they had once been the central focus.

Locals began to compute what privatisation cost – and they now saw it as a form of asset stripping: the port as an asset appropriated from the community, as well as the material and economic assets appropriated from the business which was once the port. This cumulative record alerted those concerned about the future of Dover to a simple truth; that the pursuit of profit could certainly deliver, initially, inward investment and a regenerated management, but that it could also, and quickly, transform a local asset into little more than a cog in a global business. Further, they saw evidence of the extent to which profit had been made from initial undervaluation of port assets[5] and how those involved in managing the

3 The Medway Ports and Sheerness on the Isle of Sheppey.

4 There is a paradoxical virtualisation involved in the operation of multinational companies, which locates them in specific places, whilst simultaneously despatialising them, in terms of their responsibility and commitment to the places where they happen to be. This point has been well made by Z Bauman, *Globalization: The Human Consequences* (Polity 1998) ch 1. See also A Bottomley and N Moore, 'Blind Stuttering: Diagrammatic City' (2008) 17(2) Griffith Law Review 559–76.

5 In Medway Ports, the management buyout purchased the port for £120 million, which was then sold on, three years later, for £400 million. See P J Arnold and C Cooper, 'A Tale of Two Classes: The Privatization of Medway Ports' (1999) 10(2) Critical Perspectives on Accounting 127–52.

process of the move from public to private ownership had reaped economic benefit for themselves, rather than it being 'invested' in a future for the port as a local concern.

Thus 'local knowledge' of what had happened to other ports added impetus to the trade-union campaign against privatisation, as well as to a general sense of unease amongst the local community – but this, of itself, was not enough to counter what most local people saw as the inevitable move towards privatisation. However, a second, very localised, factor now fed into the growing response of concern.

A People's Port?

A local resident, Neil Wiggins,[6] with a background in shipping and a long-standing concern with the management of the port, decided to look closely, with a professional eye, at the initial business plan produced by the Harbour Board. He thought that, as he had anticipated, the business model they were pursuing did not utilise the potential of the port and that, even more worryingly, it was more than likely that the future of Dover would mirror that evidenced elsewhere: an economically undervalued asset would be ripe for an external take-over, leaching economic potential away from both the port and the local economic infrastructure which was so dependent on it. As a long-standing local resident, he began to focus on the latter. By his account, he began to think about whether there might be any possibility in building an alternative plan which would tie in the future of the port with a commitment to the economy of the local community. Without any knowledge of how it might be possible, he began to envision some form of community ownership for the port in order to secure it as a local asset.

The idea of securing the port as a local asset was strengthened when it was reported, both locally and nationally, that the Pays de Calais authority and 'Arab countries' had expressed an interest in buying it.[7] The possibility of the port being purchased by French or Arab interests was covered in the local media as a species of invasion – one televised newsreel featured a compelling historical montage of White Cliffs, spitfire planes and the voice of Vera Lynn singing, as it posed the question of whether, having fought off invaders, the port of Dover was now to fall to foreign interests. It was not so much privatisation which was now the issue, as the 'wrong people' (and certainly not Dover) being able to profit from it. At that point, the local businessman came together with the young barrister (Charlie Elphinke) who had been selected as the prospective Tory candidate for the Dover and Deal parliamentary seat – and a general election was in the offing.

A third factor now added a dimension which the Labour government had either not foreseen, or given little credence to. David Cameron, seeking a new profile for a Tory political agenda, had begun to invest in the doubled narrative of 'responsible capitalism' and the 'Big Society'.[8] Elphinke was quick to see how the vision of securing the port as a locally owned asset could fit into this agenda, offering not only a platform for his own election, but a 'case-study' of how the new Tory approach could play out in practice. After the

6 Drawn from interviews undertaken by Caroline Archer in 2011/2012. We thank him for his co-operation.

7 The significance of purchase of large ports by foreign investors is underscored by the purchase, in 2010, of half of Piraeus by Cosco, a company owned by the Chinese government.

8 See the most intelligent attempt to give form to this in J Norman, *The Big Society: The Anatomy of the New Politics* (University of Buckingham Press 2010). For the Coalition government this agenda includes the promotion of other forms of ownership and benefit other than that of the classical company form for the benefit of shareholders. Hence, recent and current legislative changes in rules relating to co-operatives and community benefit organisations – e.g. Co-operative and Community Benefit Societies and Credit Unions Act 2010 (not yet in force) and the Co-operatives and Community Benefit Societies Consolidation Bill (announced 2012, consultation process commenced July 2013).

initiative taken by Wiggins in raising the possibility of local ownership, Elphinke's role was crucial in translating that idea into a potential.

What arose from this confluence of events was something very different to the conventional defence against privatisation couched as a defence of public ownership in the form of state-held assets (whether national or local), and in its place was conjured a new form of public ownership – that of 'ownership' by the 'community'.

Ownership matters

For any lawyer, or legal scholar, couching a bid for an asset under the rubric of community ownership is fraught with problems. It is easy to understand the political purchase in employing the idea of community ownership, but being able to translate that into a suitable legal form (carrying a viable business model) is far from obvious. However, to move too quickly into asking how it might be achieved is to miss the crucial first questions. What is it that one is trying to achieve? What is carried in the notion of ownership? What does the strategic appeal to ownership attempt to secure? To probe these questions, we need to keep ourselves firmly grounded in the materiality of what is at stake.

In Dover the question was how the most significant local economic asset could be secured as a continuing (and improved) element of and for the local economy. What needed to be factored in was a means by which the management responsible for the deployment of that asset could be held accountable in terms of securing its economic value (and potential) for the local economy.

Here we encounter a particularly interesting 'threshold' or 'hinge'; one which marks a move from thinking purely in terms of business models towards thinking in terms of property models. A business model is focused on the enterprise in terms of the profits which can be generated by it – the assets held are simply the material infrastructure through which profit is made. How profit is then distributed will depend on the particular form the business model takes and that, in turn, is dependent upon the combination of regulatory constraints with the interests of those who have most control over the business. In recent years, even for those committed to the model of a market economy, a concern with the impact of forms of investment which value only profit, and often only short-term profit, on the materiality of businesses has given rise to a call for 'responsible' or 'sustainable' forms of enterprise. Sustainable pertains to a concern with long-term growth, a concern which only those investors committed to an ongoing relationship with the enterprise are likely to recognise. Responsible focuses on how to link together investment and management into a focus on sustainability. The suggestion seems to be that, in building individual enterprises which address these issues, a new culture of and for[9] the capitalist market economy can emerge.

Finding patterns through which this agenda can be built, let alone delivered, has become a concern for all the major political parties. One means through which they have (all) sought to develop a new economic culture is by an appeal to the idea and practices of ownership. It is as if, by using the term, they seek to reconnect the 'virtual' of 'investment' and 'profit' back into a 'materiality' of 'asset' and 'people'.

However, to suggest that an underlying pattern can be extrapolated from this appeal to ownership is not to imply that it is a coherent or stable narrative. Utilising the idea of

9 By the formulation 'of and for', we wish to signify differences pertaining to the market system which are *of* it, at the same time as their being something different to it: differences which, in their potential, can be considered, even now, to be partially incorporated, or similarly formatted, to market operations, and thus 'for' it. We appreciate that this might seem a little overloaded, not to mention unnecessarily tortuous, but we are trying to avoid any sense of a market 'dialectic', or teleology, in the processes at work.

ownership arises within specific sets of circumstances, making its significance dependent upon the terms of the particular response being mounted to meet the immediate conditions. In other words, each circumstance frames the way in which ownership is being deployed as an idea or image. You will note that we are not using the term 'concept': to do so would be to invoke an underlying rationality of form, of and for each event or circumstance. We have chosen to use the more amorphous term 'idea', to denote not so much an invoking, as an evocation of patterns which are associated with the term ownership. As Gray and Gray remind us, property is a concept 'so fragile, so elusive and so often misused'.[10] As with property, the significance of the use of the term ownership is that, mirage-like, it seems to most people, on most occasions, to carry a great power – one might even say an imperative. An appeal to ownership, and rights associated with it, within ours and many other cultures, is one of the strongest ways to assert a claim to or over an asset.[11] However, remembering Gray and Gray, when we focus on what is actually meant by ownership, it begins to shift and change – no centre seems certain and boundaries become blurred. Two narratives are frequently employed to try and stabilise it. The first is simply common sense, but that narrative implodes quickly. The second is what Gordon refers to as 'the compulsive power of the absolute dominion trope', and he argues that:

> . . . the price that has been paid for the compulsive power of the absolute dominion trope has been a heavy one, a maddeningly persistent tendency to suppress and deny the collective and collaborative elements, the necessity of mutual dependence, inherent in social endeavour, and a consequently enormous distortion in our common capacities to understand and regulate our social life.[12]

Gray and Gray remind us that 'property talk is value laden';[13] and never more so than when ownership is framed not merely through private property, but through absolute dominion. Gordon's argument is twofold. First, that this image of property is not sustainable when set within a legal framing, which is, necessarily, more pragmatic in having to recognise and deal with a greater complexity and mess than political philosophy, or common sense, generally recognises. And, second, that the image has a negative impact in suppressing other accounts of property and ownership, the traces of them and the potential in them.

Following from this, it is important to track how the idea/image[14] of property is appealed to in specific events and circumstances. From this we can extrapolate sets of 'themes', or logics,[15] associated with, or carried through, appeals to ownership.

Investing in ownership

In 2010, the Labour government instigated the Ownership Commission, which as a headline to its 2012 report, makes this statement:

10 K Gray and S Gray 'The Idea of Property in Land' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) 15.

11 For an outstanding study of the fabrication of property, and one which makes its cultural specificity clear, see M Strathern, *Property, Substance and Effect: Anthropological Essays on Persons and Things* (The Athlone Press 1999)

12 R W Gordon, 'Paradoxical Property' in J Brewer and S Staves (eds), *Early Modern Conceptions of Property* (Routledge 1996) 108.

13 Gray and Gray (n 10).

14 In other circumstances we would have used 'image', rather than 'idea'. However, without further explanation, here it would seem too like suggesting a 'false representation', which is not how we use the term in our scholarship. See e.g. A Bottomley 'Lines of Vision, Lines of Flight: Belly of an Architect' (2010) 31(4) Cardozo Law Review 1055–85; and N Moore, 'Get Stupid: Film and Law via Wim Wenders and Others' (2010) 31(4) Cardozo Law Review 1195–17.

15 For the usefulness of thinking in terms of competing 'logics', see A Mol, *The Logic of Care* (Routledge 2006).

> Ownership matters. Yet Britain does not take ownership sufficiently seriously. The Ownership Commission's task is to open up a debate about good ownership in the UK.[16]

Ownership, here, is being appealed to as means by which to meet a deficit – that of the growing disjuncture between enterprise and investment. And, into this evocation of ownership, slips the moral value of 'good'. Ownership becomes a means through which to model 'accountability'. As discussed previously, a major contemporary theme, mirrored in the report, is that of appealing to shareholders to become more active in thinking of themselves as owners of an enterprise, rather than as investors. Thinking in ownership terms reminds them that it is they who can and should hold management to account and not merely in terms of profit and how it is distributed, but more broadly for how that enterprise as an asset is being developed and deployed.[17] They are, in other words, to become 'responsible owners'. It is not enough to take one aspect of ownership, that of benefit, without undertaking the responsibilities associated with another aspect of ownership – that of taking control, in this case, in holding to account.

The language of ownership, and the evocation of property carried with it, is being used here to provide a (re)grounding – not simply into the business enterprise, but for the business enterprise itself. Thus, the Commission not only argued for a more active ownership model for shareholders, it also advocated different forms of ownership for enterprises, as alternatives to the classical company form. Mutual, co-operative and co-partnership business/property models had already been rediscovered before the Commission began its work. Dubbed as the 'new mutualism', they had become attractive to a Labour government trying to develop a 'third way'. Indeed, it was this rediscovery by the Labour government of what had once been a significant part of the Labour movement that had been a major incentive in setting up the Commission, evidenced in The Co-operative's role as sponsor. The Commission, unsurprisingly, recognised that other forms of ownership for/of enterprises were not only economically viable, but also socially valuable.

The promise, or perhaps rather, hope, of a more responsible capitalism arising from a rethinking of business models through a frame of ownership is evident in both the title given to the Commission and the headline that 'ownership matters'. But it is interesting that the subtitle evidences the outcomes sought through an appeal to (and activation of) ownership: 'Plurality, Stewardship and Engagement'. A 'plural' market economy, encouraging the values and practices of 'stewardship' and 'engagement':[18] conjuring an image of responsible ownership delivering sustainable capitalism. Within this framing, ownership takes a form rather different to that which many would associate with the use of the term – this is not selfish individualism, but rather social, as well as economic, responsibility.

16 See <http://ownershipcomm.org/>. The Commission was headed by Will Hutton and, although instigated by the Labour government, was sponsored by The Co-operative. Its report was delivered under the Tory–LibDem Coalition government, on whose behalf Vince Cable welcomed its findings. On the webpage introducing the report is the statement: 'The Commission's starting point is that we believe that companies should be more than networks of contracts, and at their best they can be living, breathing human institutions held together by trust and a sense of common purpose.'

17 See e.g. Vince Cable giving evidence to the Business, Innovation and Skills Committee in July 2012, in relation to bonuses paid by banks to senior executives: 'we start from the premise that share holders are the owners . . .' <www.publications.parliament.uk/pa/cm201213/cmselect/cmbis/uc460-i/uc46001.htm>. On the difficulties of building and sustaining an account of shareholders as owners, see R McQueen, *A Social History of Company Law 1854–1920* (Ashgate 2009).

18 Significantly, the reviving of such values returns us to those of the early stages of modern governance. See M Foucault 'Governmentality' in R Hurley et al (trans), M Foucault, *Power: Essential Works of Foucault 1954–1984* (Penguin 1994).

There are, however, difficulties with this narrative of responsible ownership as the vector for carrying a more sustainable market economy. The first relates to finding models which carry a sufficient sense of ownership. The problems associated with a company shareholder model based on investment are well known. (Although it is crucial to those concerned with building responsible capitalism that it is addressed.) What, then, are the alternatives? This is the point at which the attraction of mutual, co-operative and co-partnership models becomes evident. All three are dependent on forms of membership – it is necessary to become a member to hold any rights in relation to the enterprise. The link into rights in the enterprise through membership is generally carried through the holding of a share; however, the share denotes membership rather than investment. Depending on the actual form the enterprise takes, the share may carry little more than a right to vote and to benefit from a very controlled distribution of profits or use of assets. Unlike investment models, this is generally not a pathway to profit-making, but to benefiting from a service, or from the use of an asset. Arguably, it is membership per se which is designed to carry participation in the enterprise (and thereby facilitating a holding to account, as well as promoting the value of stewardship): a sense of belonging, perhaps, rather than a sense of ownership. However, in the history and contemporary profiles of these organisations, an appeal to thinking of them as 'owned by the members' is frequently alluded to, often in contrast to 'ownership by outside investors'. Here, two images of ownership are being employed. First, that the members have control and, second, that profit (benefit) returns to them rather than leaching out to external investors.

Matters of property: sharing assets

There is, also, a third element which is implicit in this account – that of where (or in whom or what) the ownership of the assets is vested. What makes the alternative models different from an orthodox business or property model is that the material assets, and capital value represented in them, are locked away, or at least suspended, and held in the enterprise for the benefit of the membership. It is analogous to a trusts model, in which the purpose of the trust is the pursuit of the enterprise for mutual benefit.[19] Thus, rather than thinking in terms of an equity carried in an enterprise which can become available to shareholders once that enterprise is brought to an end, this property model thinks in terms of holding assets and capital in order for the enterprise to continue. Of course, some of these enterprises do come to an end – and the question then is: what happens to the assets held in the enterprise? Is it, for instance, distributed between the members?

In most of the enterprises based on co-operative and co-partnership models[20] the traditional answer is 'No'. The assets are held by the enterprise and when (if) it comes to an end, depending on the form and rules adopted by the enterprise, the assets are transferred 'out', to, for instance, another co-operative, or 'back' to the body which initially established the enterprise. However, the term 'mutual' has become associated with a rather different history, that of the role of mutual building societies – here members of the enterprise may

19 However, in current (non-charitable) trusts law in this jurisdiction, finding a means through which to either 'hold for a purpose', rather than for beneficiaries, or to stop what is held 'in common' from being disaggregated is still difficult.

20 The term 'co-operative', in this country, has become associated, primarily, with a membership model based on the consumer or user of services provided by the organisation. The term co-partnership generally refers to a membership model based on those who produce – hence John Lewis is a co-partner ship, not a co-operative. However, these terms are not defined in law but rather derive, more organically, from the way in which the practices developed and the focus taken in the British co-operative movement on a consumer, rather than production, model. Mutuals are generally used as just another term for co-operatives, but the use of the term became particularly associated, in this country, with building societies.

have access to the capital value of the enterprise through a process of demutualisation, bringing that enterprise to an end, and then distributing the assets between the members. Hence, we can think of one form as locking away property as asset, and the other as suspending property as asset. In the first, ownership will never be more than sharing benefit, whereas in the latter ownership can mean access to distribution of capital.

However, the terms co-operative, co-partnership and mutual are not, in this country, framed through definitions in law.[21] There are no legal forms which, to date, define them, and consequently the terms have been 'mobile' – some enterprises call themselves co-operative or mutual, and yet do not conform to the patterns, or the distinction between them, which we drew above. It is as if, often, the terms are used to suggest a particular set of values, rather than a particular form (rather as the term 'trust' is often employed in the title of an organisation without it actually being incorporated as a trust in law). Further, in as far as legislation has addressed what these things might be, it has added to the confusion by introducing something called 'fully mutuals'[22] which do not allow for demutualisation (thereby being more of, in our terms, a traditional co-operative model).

The Coalition government has committed itself to promoting alternative forms of business practice and thereby alternative forms of ownership of/for enterprises. In a series of legislative reforms, they have begun to draw a distinction between member-based enterprises (for the benefit of members) and community benefit (BenCom) enterprises. Their basic model is that most membership enterprises will not be fully mutual, unless it is clear that they have made themselves so, whereas community benefit enterprises are, by definition, fully mutual – their assets are locked away from any member group. This renders the traditional co-operative model as now bifocated – between (usually) small-scale enterprises, in which the membership will be able to bring the enterprise to an end through a sharing out of the assets between them, and (usually) larger and longer-term enterprises which deem themselves to be (in the rules they adopt) fully mutual. Meanwhile, as an important item on the agenda of building a new spirit of socially orientated business enterprises, the Coalition foregrounds community benefit enterprises, carried either under the regime of BenComs (IPSs) or community interest companies.[23]

Ownership: models, modes and practices

We have now moved through a series of very different forms for enterprise, in which the model of ownership deployed mutates. We began with the concern to link shareholders into a responsibility towards the functioning of an enterprise through the vector of ownership. Then we moved to a model of shared ownership of assets in order to mutually benefit from

21 That is, as yet. To date the incorporation of them can be carried through a number of legal models, the preferred being that of the Industrial and Provident Society (IPS), which has to be registered and, as part of that process, the registrar considers whether the form and rules conform to the principles of co-operation and mutuality. For detail, see I Snaith, *The Law of Co-operatives* (Waterloo Publishers 1984), and, for up-to-date news and analysis of development in this area, see Ian Snaith on <http://snaithsco-oplawnews.blogspot.co.uk/>. However, under current legislative proposals (see n 8 above), the IPS legislation is redesigned and a distinction drawn between 'co-operatives' (member-based), and 'community benefit societies' (designed to deliver local benefit, and with potential charitable status). In this sense, we can now collect together mutuals, co-operatives and co-partnerships as member-based, that is for the benefit of members, as opposed to BenComs which are designed for community benefit. As more legislation develops, we are moving closer to a legal form for co-operatives, under which 'ownership' of assets will be held within the organisation, but can be accessed by members by bringing the enterprise to an end (a process of demutualisation) Conversely, in BenComs 'benefit' in terms of use is the focus and, as there is no membership, there is no process through which assets can be demutualised.

22 Co-operative and Community Benefit Societies Act 2003.

23 Introduced by the Companies (Audit, Investigations and Community Enterprise) Act 2004.

the use of them, including the profit thereby generated. Within this framing, we then had to distinguish between those forms which share ownership of capital and assets, in the sense that both can be distributed between the membership, and those which lock away the assets and only allow for the sharing of benefit. Finally, we move to a model which focuses on benefit to a community.

All of these models deploy ownership over two different registers. The first register is concerned with economic value. By this, we mean the aspect of the enterprise which is given a particular economic value: but is this in the material assets, or the capital value which they represent, or is it in the profit made by the enterprise and how it is distributed? What particular aspect of economic value in the enterprise is being claimed under the rubric of ownership? This, of course, shifts. In one sense, in regard to shareholding, it is used to try and reconnect an interest in profit back into a concern in how the company is run. In another sense, it can be used to encourage people to be proactive in coming together to share assets in order to produce shared benefit through profit. Finally, it can be used to encourage enterprise where assets are only valued for their potential productivity in order to benefit a wider grouping. In the final scenario, ownership is stretched to a limit if it remains predicated, as it usually is, on a traditional private property model.

At this point, we have to bring into account a second register – that of social value. If the traditional company form operates, clearly, within a register of economic value, then the Commission wants to activate responsibility as not merely an economic benefit, but also as a social benefit (responsible capitalism). Membership-based organisations promote the social, as well as economic, values of co-operation (another form of responsible capitalism) and community-orientated enterprises, by definition, promote a social value of shared responsibility. Ownership within the social value register moves away from a private property model and becomes much more attuned to the responsibilities of 'stewardship'.[24] Ownership, in this sense, becomes, on the one hand, the way in which assets are held in and for an enterprise, in order, on the other hand, to benefit a group (which is rather analogous to one use of the trust model). Whether it is necessary for the group to think of themselves as owners is moot and will depend upon whether they feel that the enterprise is being run in a way which does benefit them and whether, in the way it is run, it is sufficiently accountable to them. What we have reached is another limit – the extent to which, legally or socially, the idea of ownership matters. What can it deliver? What does it need to deliver?

The term ownership can be deployed in very different ways, not least with reference to what, as much as how, or why, something is being held 'in ownership', or constructed as property relations through a vector of ownership. What is evident is that the grouping of mutuals, co-operatives and co-partnerships shares a set of values, co-operation, which ground a business model within a property model that privileges shared benefit and mutuality over individual rights. How far can an ownership model also be deployed, usefully, to meet a shared benefit for a community?

We suggested earlier that the major imperative in using it within the context of responsible capitalism was to try to reground the relationship between investment and enterprise by making investors think of themselves as owners, thereby becoming proactive in an involvement with the enterprise. We also suggested that deploying this narrative of ownership was a means through which to build a more material relation, between those who think of themselves as owners and that which they (should) think of as owning. In relation to the second focus (on co-operatives etc.), it is membership which carries a relation of ownership and, more specifically, carries it into the enterprise rather than into the capital

24 Gray and Gray (n 10).

value (unless suspended rather than locked away). Thus, the values of responsibility and stewardship, as much as that of shared benefit, which are evident in these forms, do not require the same conjuring of ownership as the carrier of those values – and this differs significantly from the appeal to ownership addressed to shareholders. Ownership comes in many shapes and forms.

Property lawyers and scholars recognise that it is wrong to try and locate property as being (in) a thing; rather it is traced through sets of relations concerned with the control and use of rights in relation to things, which are given value in use or exchange. And it has long been of significance that things given value have a number of value trajectories (logics) clustered through and around them. The simple process of distinguishing a material asset from what it represents in terms of capital value is something we are all familiar with – whether it is in domestic property, a business enterprise, or a trust fund etc. However, we must also contend with the fact that different forms of material assets carry a range of values, each of which may hold a very different significance to different parties concerned with the deployment of that asset. The term ownership to a property lawyer or scholar is, therefore, a very problematic term to deploy when trying to think – image – these sets of competing interests, either as clusters of rights and obligations, or as couched in legal forms. There are many reasons for this; not least of which is the heritage of thinking property relations through not merely ownership, but through a private ownership model. And, of course, it has long been trite economics to argue that there is clear proof that the only economically successful societies are those which are predicated in a regime of private property and thereafter able to develop a market economy driven by selfish individualism and the imperatives of capital. In a sense, the tragedy of the Ownership Commission was that it had to work within not merely the real politic of the consequences of this heritage, but to do so with the very tools which had constructed it.[25] The question is how, and to what extent, if we are to work with the idea of ownership, we can make something of it which does not simply repeat the old errors: does not simply lead us back into the trope of private property, or leave us with business models which continue to do little more than address the profit imperative.

We are left, then, with two issues. First, let us assume that there is a useful potential in thinking of business enterprises in terms of ownership, or, rather in addressing them through the frame of property relations. However, second, what we need to do is to more closely consider what forms of property relations, indeed what forms of ownership, could be developed to open us to the potential 'in our common capacities to understand and regulate our social life'.[26] To consider this, we return to Dover.

Ownership by 'the people of Dover' (?)

What might it mean to 'the people of Dover' if they were to 'own' the port? The question, of course, arose originally from a negative perspective – what would it mean if they didn't? Their concern was with the very real possibility that, through the process of privatisation, ownership of the port would lead to it being regarded as no more than one asset within an organisation of investors more concerned with the profits they could accrue from the business, rather than having any commitment to developing the port as part of the local economy. This then led to an audacious potential – what if the asset, and the business associated with it, could be owned in such a way as to not only address the concern of it

25 By this we mean using ownership as the vector. The use of 'tragedy' is a reference to the well-known phrase 'the tragedy of the commons'. See G Hardin, 'The Tragedy of the Commons' (1968) 162)(13) Science 1243–48.

26 Gordon (n 12) 108.

being central to the local economy, but also to ensure its running for the benefit of the local economy? Could a form be found which not only linked asset and business potential into the locale, but locked it in? Ownership, in this sense, was being used as a token of not merely control now, but as a projection into a future secured by a business which was firmly rooted in the material asset of the port. But who then should be the owners of the asset? It would have to be those whose futures most relied upon this security – the people of Dover. A guarantee for them; protected by them. It seems, in its audaciousness, to be a very simple proposition.

When, in 2011, Vera Lynn launched the People's Port, flanked by Neil Wiggins and Charlie Elphinke, in wind and rain on Dover seafront, and sang a few lines of 'There'll be Bluebirds over the White Cliffs of Dover', she said something very interesting: ' . . . if the people of England cannot own the port of Dover, then the people of Dover should'.[27] How had the 'people of England' owned the port? Through it being a publically owned asset; that is it was held under the authority of the nation state. However, the government had given itself the powers to privatise that asset and was now moving to do so. The problem in our jurisdiction is that we have very few models for owning public assets;[28] and, as we have frequently found, those vested in local or national public authority are vulnerable to a decision to sell (privatise) them. In some cases, and this is in part true of Dover, this can give rise to a sense that a national body is not only asset-stripping the nation, but doing so against local interests. In fact, in Dover, a narrative developed which in part figured the inhabitants of Dover as the guardians of the nation's gateway – arguing not only a local interest, but a localised responsibility to defend the port against the potential of foreign invasion, through the taking over and running of the port – let alone taking profits offshore.[29] But the stronger argument which developed was one which focused on local needs – and it seemed that a national body could not be trusted to protect them. However, even a regional public body is open to the same criticism of not, necessarily, securing local interests by keeping material assets (and, in this case, future profits) firmly in public ownership.[30] So the slippage in Lynn's statement is interesting – what the People's Port sought to do was to root ownership into local community, rather than into a public body. Only the people of Dover could be, in this sense, trusted with the asset (and future) of the port, as it was they who had most invested in benefiting from it.

This move away from public ownership in the form in which we are most used to it, chimes, of course, with a major concern of the Big Society agenda: that of responsible citizens doing it for themselves, rather than being dependent upon the state. Moving public assets into new forms of ownership which still have a public value inscribed into and on them, rather than into what has now become dubbed 'full privatisation', has been framed as an alternative to national or local state ownership. The question is how to legally frame (or 'carry' or 'translate') this in practice.

For Wiggins, not then conversant with the legal options open to him, his initial attraction was to use 'some form of mutual'. He willingly admits that he did not know

27 Video available on www.peoplesport.org.uk/.

28 See C Rose, *Property and Persuasion* www.law.arizona.edu/faculty/FacultyPubs/Documents/Rose/PropertyPersuasion.pdf.

29 See the home page of the People's Port, with a picture of white cliffs and the banner slogan of 'Keeping the nations gateway forever England' <www.peoplesport.org.uk/home/>.

30 Hence, the increasingly used tactic of trying to secure open spaces owned by public bodies and designated for privatisation by moving to have them registered as commons or village greens, see e.g. *R v Sunderland City Council ex p Beresford* [2003] UKHL 60.

anything about mutuals when this was suggested to him. And he was not alone. As new and aspiring Tory candidates came to grips with the Big Society agenda, they, like their more established colleagues, began to use terms they were very unfamiliar with, and they would prove to be very cavalier in their use of them. Mutuals, co-operatives and co-partnerships were frequently rolled together as if all are the same – a kind of glorious ménage of 'another way'. Suddenly the 'John Lewis' model was being not only frequently evoked as evidence of how successful 'they' could be, but could be transmuted into a mutual or a co-operative (whereas it is actually a co-partnership). But it served a purpose – here was evidence of a solid middle-class high-street shop which we all know, use and love, and: '. . . did you know? Isn't it extraordinary? And such a success!' Not the radicalism of any kind of counter-culture to capitalism, but solid respectability was just what these new advocates needed. And, in an important sense, they were also right to locate the alternatives, not through an appeal to their radicalism, but through a focus on feel-good factors: co-operation – working together for mutual benefit, being responsible not just to ourselves but to others. This was the message – and the alternatives forms were not only open to being deployed in such a way but, as with the Labour new mutualism of the third way, in great part their traditional supporters welcomed being (again) rediscovered, even if in a different political framing.

When Elphinke was duly elected to Parliament, he drew Cameron's attention to the potential of the People's Port bid as exemplifying what the Big Society agenda could deliver. He was given support from the government, and government offices, in helping to construct the idea as a viable alternative to that brought forward by the Dover Harbour Board. (It must have seemed a very strange turn for Dover Harbour Board, to find that the establishment was not going to simply follow a full privatisation option!) What was now required for the alternative approach to progress was obvious – they needed a sound business plan and a financial package which would require inward, community-centric, investment. To attract investors, they would need to have their governance structure in place. How were they to negotiate a balance between what investors would expect (not merely profit, but security and a level of control over decision making) with the promise of ownership by the people of Dover?

It quickly became evident that 'some form of mutual' was not an option. It would not serve to raise the capital needed and did not deliver a solution as to how to tie in people with port through a frame of ownership. Even the word 'mutual' turned out not to be attractive as a campaigning tool. Locals did not respond to it positively, they were not familiar with it as a term representing a particular form or principle, nor did they find it clear enough to be a compelling idea. Worse, they proved to be somewhat negative about the very suggestion that they could, through mutuality, own the port. And we are returned to the issue of the benefit of using the idea of ownership in particular circumstances.

There is no doubt in our minds that employing the idea of ownership was initially important in actually raising the potential of a third way in the privatisation process. It focused Neil Wiggin's mind and began a conversation between himself and others anxious about the process Dover was about to go through. It also, at least initially, could be deployed to carry, focus, a local conversation about how the future of the port could be secured for local interests. What Wiggins, and Dover, wanted was a sense of being heard about their concerns and, even more importantly, a sense of some input into a decision which was so to affect their destiny. But, when it came down to it, their concerns were rather more specific than could be, or needed to be, met by a generalised appeal to ownership. They wanted the port to thrive and to remain as the central focus of their economy. They wanted monies made available for building and revitalising their local socio-economic

infrastructure, which had been in decline for too long, and they saw the port as a major potential benefactor in a much-needed regeneration programme.

However, this aspiration was becoming de-linked from an appeal to community ownership, largely because of that community's ambivalence over such a notion. Indeed, in many interviews, what was expressed was both a kind of resignation (Why not a Dover Harbour Board management buy-out? It will happen anyway.) blended with a fatalism that the answer did not lie 'with them'. Neil Wiggins found himself in a difficult position – becoming increasingly convinced that his alternative plan was not only viable but 'good for Dover', he was faced with having to try and 'drum up' local support.[31]

In this, we can see a difference between ownership as a vector for first initiating an alternative business model and ownership as an actual form for carrying it through. Thus, it is important to consider the lifecycle of an enterprise, and not merely what survives into an end product. The point here is that an appeal to ownership can be useful in one place or time, or to a particular audience, only to become either unnecessary or insufficient in other circumstances. Of course, we should be sensitive to a style of politics which knowingly deploys such a narrative to simply garner initial support, for instance, when having no intention of following through with it. However, we do not think that happened here, in the sense that, when it was first deployed, it made sufficient and necessary sense in order to raise an issue, focus a concern and begin an initiative. But this was, primarily, operating at a level of rhetoric rather than reality – in that, when thought through, it became clear that actually activating ownership was much more problematic both in what form it could take, as well as in achieving a dialogue between Wiggins and the local community which elicited from them a commitment to the project. In the end, it was not just that finding a suitable form would be difficult, but that the local community had not bought into it. Ownership, here, had reached a limit. But the concerns and the aspirations continued.

Not just at local level, but also at government level, how to put into operation the Big Society agenda of alternatives to full privatisation now had to be faced. By the autumn of 2011, the People's Port plan had begun to change shape. Two particular signals reflected this: first, the terms 'mutual' and 'community' were dropped from their publicity material and replaced with 'trust' and 'communitisation'; second, the proposal was now framed as the Dover People's Port Trust Ltd.[32] Led by a board of local businesspeople (and Charlie Elphinke), the introduction of trust, as a term and a form, makes very clear that the local community is now placed in a position in which its interests were to be protected by local worthies with economic expertise. The ugly term 'communitisation', replacing 'community', suggests a process by which community, of a kind, is to be built *through the bid*, rather than its being already in existence as a ground *for* the bid. Thus, it is a business model which is being 'communitised', rather than a 'community' being invoked as the basis of the business.

The People's Port webpage now describes the form they have adopted in these terms:

> We have set up a community trust – the Dover People's Port Trust Limited . . . established and registered with the FSA [Financial Services Authority] as a charitable industrial and provident society – similar to the co-op.

There are some very interesting conflations and slippages in this statement. The term 'community trust' can only really mean for 'the benefit of the community' – this is established through the melding of the trust form, with registration as both a BenCom (under what is still, to date, referred to as one form of an IPS) and as a charity. It is not similar to a co-op, except in as far as co-ops are also registered under the IPS rules. For the

31 Not helped, of course, by the initial stance taken by the trade unions, which was to defend the status quo.

32 <www.peoplesport.org.uk/our-bid/details-of-our-proposal>.

People's Port, the trust form has a dual benefit. First, they are signalling an asset lock over the material and capital value of the port and, second, they are emphasising that profit, as benefit, will be kept within the locality. The reference to co-op, is probably a muddle, but a useful one. It keeps open the idea of not only the social value of co-operation, but also signals a role for an active membership, which, although carried also in a BenCom, is lost when emphasis is given to the trust form. It is rather as if, to return to points we made earlier, the terms co-operation and trust are used to signal values, rather than specific forms of enterprise. And, a point well recognised by the Coalition, it is difficult to convey to people the different forms which enterprises can take; what is important is to signal the values they are intended to carry.

The new formulation makes clear that its rational (purpose) lies in a commitment to the recognition of the centrality of the port to the viability of the locale. However, the benefit to the community is now expressed in a manner closely adjacent to a beneficial interest behind a trust, albeit in a manner which muddles the proprietary element with the purpose and/or charitable trust forms. The new objective proposes an economically viable business model, structured on a property form which holds both port and business within a framing which locates it, and its future, firmly into the local environment. Further, it provides that a proportion of profits would be made available to the community through the establishment of a local charitable trust, giving a direct link between profit and local benefit. What has changed from the original concept is the suggestion of a more direct connection between community and enterprise through a framing of 'them' as owning it – now it is held and managed by a board which, akin to trustees, knows what is best (economically) for the port and thereby for the community. In effect, it provides for another form of local establishment running things, rather than the establishment represented in and through its immediate competitor, Dover Harbour Board. It provides a safe option which is recognisable to the businesspeople and local (and national) Tories in their vision of building responsible capitalism, as much as a Big Society.

However, even as it now takes form as a much muted account of ownership, it leaves residual traces which can be activated, not least the issue of holding to account. Even if the local community did not meet the challenge of 'us' owning, it could well be that a narrative has now been laid for activists to recover, and profile, in 'thinking' and 'claiming' rights, or challenging expectations, in future negotiations over port activities. There is, also, a more direct heritage left in the trace of being able to become a member of the People's Port. Although this is somewhat blurred, in that it is designed as much as anything else to evidence support, it remains, in its potential, an important link back into the idea of local ownership.

The outcome achieved a purpose: it built a viable alternative, founded on local interests, which countered the full privatisation bid of the Dover Harbour Board. It also offered a template for putting together a legal and financial package which could carry a third way. However, it has to be recognised that the final structure adopted begins to look far more like not only a conventional business model, but also a conventional social model for dealing with local interests. Evoking trust and using charity recognises the interests and claims of the local community, but very much under a rubric of the protection or stewardship vested in local businesspeople and worthies. Indeed, as the bidding process extended into 2012, the date for decision-making being put back a number of times, the Dover Harbour Board bid also mutated as it committed itself to setting aside a proportion of its profits for local charitable use (and it later increased that proportion), and undertook activities designed to show a commitment to the locality. Often, the issue became which of them offered a better business plan, rather than the merits of one form of privatisation over the other.

The radical image which had initiated the People's Port had become a much safer, more muted account of an alternative. Local businesspeople and Tory party members alike required the development of something they could feel comfortable with. And they could be pleased with themselves in that they had not only found a way, but had also provoked the opposition into a mirroring exercise. Local conditions, political culture and the very real difficulty of thinking differently leave us with, necessarily, a sense that what might have been a radical potential has been tempered away from anything we might think of as transformative.

But this would be to ignore just what has been achieved, and what might still flow from such examples.

Alternative property practices

Not so long ago, thinking property differently seemed either lost in history, or endlessly deferred in a future utopia which we might dream of, but would never see. But history has returned to allow us to recover alternatives and see the potential in them for us, now. 'Commons' has been reactivated for its potential – not merely in protecting access to, and use of, land and resources, but in reminding us that 'use' rights are important and do not need to be hinged on ownership: they can overlay private property, becoming a defence against the excesses of private ownership. The orthodoxy of the 'tragedy of the commons'[33] is now met with a counter-economic model of the viability of commons.[34] On the internet, strategies have been found in the name of commons to keep open access to knowledge and to privilege and defend the sharing of it. Hardt and Negri,[35] seeking new ways for thinking a political–economic alternative to and in late capitalism, have turned to commons as a model. All of these strategies are couched, in some form, on an image of keeping open, of not enclosing, property in terms of a protection of its use-value. In an important way, they refuse the logic of property relations predicated in private ownership and the rights of individualistic absolute dominion.

Co-operatives, co-partnerships and mutuals carry a radical history of thinking differently about property relations – of people pooling resources, and of acting for mutual benefit, in which, again, use of assets is key to the sets of relations built between people in relation to a resource. More than simply business models, they suggest different ways of holding property, expressing different values. Profit is to be made, but it is to be shared between the group of members. And, again, the importance of use, and thereby the importance of locking away assets and capital, trumps the logic of individualistic ownership which seeks to activate and disaggregate a portion of the assets.

However, the question of how far the vector of ownership can remain central in protecting community interests remains moot. We can think of this question in three ways. First, in social terms, how far do we need, or can we deploy, the strategy of thinking in terms of ownership? At government level, and in many community campaigns, using the language of ownership remains a key component for building the Big Society agenda. For the Coalition it is, clearly, a means through which it seeks to activate communities (communitisation) through giving them responsibilities for managing and delivering local services and assets as an alternative to the role of public authorities.[36] For some activists,

33 Hardin (n 25).

34 E Ostrom, *Governing the Commons* (CUP 1990).

35 M Hardt and A Negri, *Commonwealth* (Harvard University Press 2009).

36 See e.g. *Proposals to Introduce a Community Right to Buy: Assets of Community Value* (ISBN 978–1-4098–2802–0 Department for Communities and Local Government Consultation Paper February 2011). This has become 'the community right to bid' under the Localism Act 2012, but does not introduce any new legal forms for community ownership.

the idea of community ownership is a strong trope with which to counter the claims of either private property or state provision, and, often, they particularly appeal to ownership as not just a means through which to build and protect community benefit, but also as a means through which to lock away material assets, protecting them from future privatisation.[37] In these contexts, the appeal of ownership is based on an account of ownership as one of the responsibilities of stewardship. Communities, when the point is pressed, are beneficiaries as well as, often, stewards. How far thinking of the community as owner is useful, depends, we think, on whether the rhetoric of ownership serves a purpose in activating community thinking and practices in terms of taking ownership of (responsibility for) local assets.

Second, in legal terms, the question remains the form, or melding of forms, which can carry the purpose of a community-holding of assets. To date, in England, no new legal forms have been suggested – there is a remodelling of membership and community benefit structures, and charitable trusts have taken on a more active role in meeting new conditions, but, unlike Scotland, we have not engaged with the possibilities of a special, or specific, legal form for community ownership. And so we shift, perhaps usefully, between a blend of co-operatives, BenComs and trusts. As ownership as an idea is mobile, perhaps a mobile, mutating, legal form properly reflects this. Thirdly, and finally, the question is whether we need a notion of ownership to deliver the benefits and protection which communities need. Commons focuses us on use-value, trusts on benefit, and trusts (as well as BenComs and the traditions of co-operatives) can alert us to thinking property ownership as not the only means through which to deliver use-value. And can we, in the end, activate ownership as something more than conveying private property rights? Or do we need to recognise the limits of the use of the term, let alone the legal means by which to deliver it?

In Dover a direct account of ownership by a community proved to be not only a chimera, but also evidence of the limits of thinking in ownership terms. Certainly, a better model for recognising community interests, protecting the asset and distributing the benefit could have emerged, given a different political context and culture. But the narrative of the People's Port bid serves a more modest purpose than that of seeking utopias: it reminds us that, with a vision that we can think differently, and in addressing the pragmatic immediacy of the concerns and models available to us now, we can develop others. We can think the possibility of alternative property practices, but only through an engagement with those events which might, very easily, be dismissed as no more than evidence of failure to deliver, rather than as evidence of potential.

The outcome, for Dover, for now

In November 2012, rumours began to circulate in Dover that an 'important announcement was about to be made'. The rumours seemed to come from the port, and the suspicion was that Dover Harbour Board had been given an indication that its bid had been successful. Everyone waited and watched. Then, in early December, an announcement was made that Dover Harbour Board had donated money to the National Trust for the purchase of a stretch of the White Cliffs – which could now be protected as a local asset, in perpetuity. This was not, however, the announcement which was being waited for! Some locals suggested that a decision about the future of the port was being postponed until just before the next general election – but could it really wait that long? Then, just days before Christmas, a decision was announced: which was to withdraw the port of Dover from the

37 For instance, the campaign promoting 'community land trusts', see <www.cltfund.org.uk/about/about-clts>.

privatisation process.[38] For the time being the status quo obtains and it is to remain in public ownership. The reason given in the government statement was that:

> . . . the transfer scheme proposed would not ensure a sufficient level of enduring community participation in the port.[39]

In a very important way, Neil Wiggins can claim a victory. The issues he raised, the campaign he mounted and the plans he devised have produced a result. Not only have they, for now, blocked the Harbour Board privatization bid; they have left very interesting traces – a recognition of the value of enduring community participation and benefit, and of the question of how far ownership matters in accomplishing this.

Appropriate thinking

Consequently, it may be that we need to shift our thinking, as academics and scholars, away from the loaded idea of appropriation, and think more of 'processes of appropriating'. Not only does this raise questions about the dynamism inherent in the transfer and creation of property forms, it also allows us to broaden our thinking inasmuch as we must look beyond the thing appropriated, to consider the networks and assemblages which that thing is not only caught up in, but effectively materialised through. In this approach, it becomes clear that a whole spectrum of participations and involvements are required, very often from actors and interests that one would not, initially at least, presume to be relevant.

We do not wish to downplay the fact that, of course, it has often been the case that the processes of privatisation can be thought of, properly, as processes of appropriation, in that they have carried a corresponding deprivation for the affected locality. Also, we do not wish to simply join in, uncritically, nor be appropriated by, the agenda and language of the Big Society. We have to track and think clearly about how the competing logics of community activism and community responsibilisation impact upon, or carry, each other. What becomes clear, once we consider processes of appropriating that construct both the owned and the owner in action, is that a certain level of community responsibilisation is inevitable, and that participation, whether as a supporter or a critic, has an impact that must be assessed well beyond the terms or aims of the particular faction in question.

Finally, we cannot consider property to exist as some integrated and uniform thing, which can be transferred cleanly from owner to owner. The situation in Dover reminds us that the thing, as a resource and asset, is formed and takes form not only through transfers, but also through processes of contestation about just what the thing is and overlapping (and not necessarily resolved) perspectives concerning just what it is for. This complicates matters as far as the rather more obvious counters to privatisation are concerned: especially the appeal to commons. Dover is evidence that the idea of a virgin, 'un-owned' thing simply doesn't exist – rather, there are resources which, as soon as they are recognised as such, are caught up in processes which are, already, forming them as property and potential property. Therefore, we would argue that, in fact, to refer at this point to 'property' and 'potential property' is actually to refer to the same practices and processes of appropriating – the potential *is* the property.

38 <www.gov.uk/government/speeches/the-port-of-dover>.

39 In 2011/2012, the government amended the Ports Act 1991 to expand upon the criterion of 'serving the interests of the community' (one of the criteria used in determining whether to accept a voluntary transfer scheme), to thereafter include a reference to an 'enduring and significant level of community participation'. See Amendments to Government Criteria for Consideration of Sales under the Port's Act 1991, Hansard, 16 May 2011 col 4WS.

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Appropriating rhetoric: a beginner's guide

Clare L Fisher Williams

SOAS, University of London[1]

Abstract

This paper examines the importance of the speaker – the agent – in the construction of dialogue. Within the rhetoric used by each agent are power constructs which display the speaker's position in society (role). The rhetoric used by that agent in the process of fulfilling that social role is particular to that setting in space-time. However, what happens when another agent in a different social position appropriates that rhetoric? The framing of the dialogue changes and the hidden power structures revealed and altered. To what extent does the new agent appropriate the first speaker's normative authority? What impact does this have on the rhetoric itself?

In this discussion I take a real-life example of the appropriation of rhetoric from the ongoing Eurozone downgrade debates. I use McCloskey's theory of rhetoric, or 'sweet talk', to uncover the normative bias of the discourse, and set the dialogue within Giddens' structuration framework to highlight the importance of language, locale and the agent. The analysis highlights power differentials that are indicative of conflicts of interest in the regulation of credit-rating agencies and the debate asks what this means for future action.

The story so far

You may remember what happened on 11 November 2011. At around 3 o'clock in the afternoon (it was a Friday), a technical 'glitch' occurred at Standard & Poor's (S&P's). A message was sent out to some subscribers that France's sovereign credit-rating had been downgraded. This was news to France. In fact, it was news to the rest of the markets as well and precipitated a jump in bond yields that refused to resolve, even after strenuous denials by the credit-rating agency (CRA): 'The ratings on the Republic of France remain "AAA/A-1+" with a stable outlook, and this incident is not related to any ratings surveillance activity' it said.[2] 'We are investigating the cause of the error,' it said. But bond yields remained stubbornly high.

One month later, though, the issue resurfaced in more concrete form. At the beginning of December, S&P's announced that it was indeed reviewing Eurozone credit ratings and that there was a 50 per cent chance that countries – including France – might be downgraded. The announcement came a couple of days before a European summit and

1 Doctoral candidate, School of Law c_williams@soas.ac.uk.

2 See <http://ftalphaville.ft.com/2011/11/10/741751/about-that-france-downgrade/?> accessed 1 January 2013.

was undeniably embarrassing for French President Nicolas Sarkozy who had staked his reputation on maintaining France's coveted triple-A rating. It also spelled bad news for the main Eurozone bailout fund which was being propped up on – amongst other things – France's triple-A rating.[3] It's safe to say the rating was important not only to France but to the Eurozone.

The summit passed fairly uneventfully and, one month later, in January 2012, France finally saw its credit rating downgraded to AA+. Among the (mainly fiscal and economic) reasons cited for the review, S&P's highlighted political indecision as one of the factors in the downgrade. Having staked so much political capital on maintaining the AAA rating, the French government was at pains to point out that the downgrade was 'bad news' but 'not a catastrophe' after all.[4]

But downgrades happen regularly. What was different here? The difference in this dialogue, played out for the most part in the European media, was the political response to the January announcement. Instead of accepting the rules of the game as set by CRAs and altering their economic policy, France fought back. The French Finance Minister, François Baroin, openly questioned the political motives of the threatened downgrade. Speaking on the French radio station, Europe 1, he remarked that the French economy was in better shape than that of the UK and that 'you'd rather be French than British in economic terms'.[5] Baroin, in turn, was responding to comments made by the French Prime Minister, François Fillon, and the French Central Bank Chief, Christian Noyer, who had both pointed to the comparative weakness of the UK economy. In an interview with the French paper *Le Telegramme*, Mr Noyer stated '[a] downgrade doesn't seem justified to me when you look at the economic fundamentals'. He went on: '[o]r else a downgrade should come first for the UK, which has a greater deficit, as much debt, more inflation, and less growth than us, and collapsing credit'.[6] He finished by stating '[o]ur British friends have a higher deficit and more debt, and I would say that the ratings agencies have not yet noted that'. Friends indeed.

More followed. A member of German Chancellor Angela Merkel's Christian Democratic Union party echoed Noyer's sentiments, stating that it simply wasn't 'fair' to leave the UK's AAA rating intact with a stable outlook while downgrading France and Austria. Appeals to 'fairness' and the level of public questioning of the ratings marked an interesting pinch point in the ongoing saga that is the Eurozone crisis. Ultimately, a phone call between Fillon and UK Deputy Prime Minister Nick Clegg, in which the British politician requested that France 'calm the rhetoric', marked a ceasefire.[7]

CRA ratings methodology for sovereign bonds has always included an appraisal of the political stability and the strength of institutions in a country. In a post-crisis transparency drive, CRAs published 'plain English' guides to their ratings methodology following accusations of being impenetrable and obscure. These reveal the extent to which analysts' individual 'appraisals' of political conditions are included in the rating. In Moody's rating methodology this is included as 'other factors' in the final stage of the process. S&P's states that 'rather than providing a strictly formulaic assessment, Standard & Poor's factors into its ratings the perceptions and insights of its analysts based on their consideration of all the

3 The European Financial Stability Facility's own rating was an agglomeration of those of the states supporting it.

4 See <www.channel4.com/news/france-downgrade-rumours-hit-euro-rescue-hopes> accessed 1 January 2013.

5 See <www.bbc.co.uk/news/uk-politics-16222988> accessed 2 January 2013.

6 See <www.telegraph.co.uk/finance/financialcrisis/8958251/UK-should-be-downgraded-before-France-says-ECBs-Christian-Noyer.html> accessed 1 January 2013.

7 See <www.bbc.co.uk/news/uk-politics-16222988>; see also <www.channel4.com/news/france-downgrade-rumours-hit-euro-rescue-hopes> accessed 1 January 2013.

information they have obtained'.[8] This allows the agencies to provide subjective assessments, or 'opinions', protected as such in the United States under the First Amendment to the Constitution as free speech.[9] Political assessments are clearly factored into the methodologies of all agencies and the stability and credibility of the government, along with the strength of rule of law institutions, comprises a notable aspect of the rating. This was probably most evident in the Italian downgrades that forced the disgraced Berlusconi out of office.[10] However, the ratings are independent of state involvement, comparative, and all rely on published methodologies.

Inherent in the assessments of economic stability and resilience is a discourse of power. The rhetoric employed by the CRAs to 'persuade' markets of the likelihood of default contains the social and market position of the agency, the trust other actors place in them and, consequently, their respective power within the markets. Arguably, the Italian example would also suggest a demonstration of their power in the political sphere too. Sarkozy's request to have his political abilities judged on the retention of the French AAA rating also suggests that political participants are happy to invite CRA power into their field of operation. Until things go wrong, that is.

This story highlights myriad interactions between CRAs, politicians and the markets. In this article, I will focus on only one aspect of this, namely the appropriation of frames of discourse, the effects of this on both the communicative interactions and on other actors, and what this can tell us about power differentials and conflicts of interest in the regulation of CRAs. The interactions will be analysed through Giddens' theory of structuration, which takes as its starting point the individual actor-agent whose 'knowledgeability' of the world in which they operate comprises 'discursive consciousness', 'practical consciousness' and the 'unconscious'. The second of these, 'practical consciousness', in turn, comprises their tacit knowledge about how to 'go on' in everyday life; how to interact with others and how to recognise, process and react to ordinary and extraordinary situations. This in turn is constructed through the use of language – discourse, dialogue, rhetoric and 'sweet talk'.[11] Inherent in, and central to, this ability to successfully interact is communication, or talk. Deirdre McCloskey's theory of rhetoric will be used here to unpack the normative content of much of the dialogue used in the story. The content and purpose of the discourse is just as important as the speaker, however, a change in the latter may also precipitate a change in the meaning of the dialogue.

8 S&P's, 'How We Rate Sovereigns' (Global Credit Portal, RatingsDirect 13 March 2012) 7 <www.standardandpoors.com/spf/ratings/How_We_Rate_Sovereigns_3_13_12.pdf> accessed 1 January 2013.

9 See inter alia the cases brought by Jefferson County against Moody's and by Orange County against S&P's in 1999. Actual malice on the part of the CRA had to be proved to overcome the First Amendment protection. However, an ongoing case in the California Court of Appeal, which recently upheld the First Amendment protection, did call into question whether certain ratings for special investment vehicles that are not publicly distributed may have a case to answer on negligence charges. For further information, see <http://newsandinsight.thomsonreuters.com/Legal/News/2012/01_-_January/No_free-speech_protection_for_rating_agencies_____again__CA_judge/> accessed 3 January 2013. However, the recent civil action brought against S&P's by the United States Department of Justice and the Securities and Exchange Commission is set to challenge the lack of accountability of CRAs.

10 Repeated downgrades saw 10-year bond yields remain at unsustainable levels for a significant period of time, forcing Italy to concede that its principal problem was its leader. Following his conviction for tax fraud, Berlusconi faces a Senate vote on whether to strip him of his seat in the Chamber. This could finally bring an end to his attempts to overthrow the government, potentially meaning the outlook for Italian politics is stable, and by extension, the political aspect of Italy's sovereign rating.

11 D McCloskey, 'How to Buy, Sell, Make, Manage, Produce, Transact, Consume with Words', in E M Clift, *How Language is Used to Do Business: Essays on the Rhetoric of Economics* (Mellen Press 2008).

Framing the 'structuration' scene; lights, camera, (inter)action

Structuration, 'an unlovely term at best', is a comprehensive theory of social interaction that takes the individual actor-agent as its starting point. It sets out the 'structuring of social relations across time and space, in virtue of the duality of structure',[12] or the mutual reinforcement and reconstitution of the agent and the structure through repeated interactions. Structure(s), therefore, both informs and is reproduced through repeated interactions, however, it can only be identified in interactions and memory traces.

The 'practical' consciousness of language: why say it like that?

Central to the theory of structuration is what actors know or believe about the circumstances of their actions and the actions of others (their knowledgeability). This knowledge is drawn on in the production and reproduction of action and includes both tacit and discursively available knowledge. Tacit knowledge, in turn, falls into two categories; the unconscious and practical consciousness. This latter describes what actors know or believe about the circumstances of their actions but cannot express discursively. Information is not repressed (as in the unconscious), but rather represents tacit knowledge about how to go on in everyday life, including how to interpret and respond to various situations and interact in a 'normal', day-to-day manner. The boundary between the discursive and practical consciousness is shifting and permeable, but included in the latter are the reflexivity of the agent, her self-consciousness and ability to monitor her actions as the 'monitored character of the ongoing flow of social life'.[13] To be human is to be a social being and to act purposively, or to be able to explain the reasons for acts through the discursive consciousness. However, our continuous monitoring of actions and interactions, dependent on our rationalisation of the world in which we operate, takes place in practical consciousness. This is where we understand the actions of others and process the norms that act as factual boundaries of social life.[14] The mutual knowledge shared by members of a society about how to co-exist with one another is not directly accessible to the discursive consciousness of most actors, but is inherent in their ability to go on in social settings successfully.[15] While much sociology focuses on the discursive consciousness of the actor by going into the field and asking people what they are doing and why, the practical consciousness rarely forms the subject of inquiry. However, for Giddens, this is 'fundamental to structuration theory' as the site at which the rules and resources implicated in the reproduction of social interaction are rationalised.[16]

The practical consciousness of the agent develops throughout childhood, and goes hand in hand with the development and use of language. As humans, language is essential for defining the boundaries of our sphere of perception. We are unable to perceive or conceive (clearly at any rate) that which cannot be verbalised and, by the same token, are only able to perceive that which we know *how* to perceive. Language continues throughout adult life to be the principal means of communication in social situations both of co-presence (face to face) and mediated co-presence (via the telephone, or by an email).

12 A Giddens, *The Constitution of Society* (Polity Press 1984) 376.

13 Ibid 3.

14 Ibid 4.

15 Ibid.

16 Ibid 6. Giddens' terminology is drawn on here except for the term 'embed', which I borrow from Granovetter. See inter alia M S Granovetter, 'Economic Action and Social Structure; The Problem of Embeddedness' (1985) 19(3) American Journal of Sociology 481-510: and M S Granovetter and M Swedberg, *The Sociology of Economic Life* (Westview Press 2001).

Information is conveyed and received in the form of language, which is reinterpreted by the receiver. The use of language, its importance for conveying messages, its grammatical structures, the hidden implications of certain words, are all reinforced by the constant production and reproduction of linguistic exchanges, causing language usage to embed deeper. Language therefore gives us the tools to conceptualise ourselves as agents, and the world in which we live, while also allowing us to rationalise the structures of action that are acceptable and those that are not. These are recursively implicated and further confirmed in turn through repeated interactions.

The hidden meanings behind the use of certain aspects of language are also produced and reproduced through interaction and more deeply embedded as structural properties informing those very interactions. Natural scientists use precise, objective language which implies their authority and expertise. Economists take a similar approach. So, too, do CRAs, as the following quote demonstrates:

> The negative outlook considers that economic performance is likely to remain weak; that it will be progressively more difficult for the government to consolidate its finances given an increasingly rigid budget structure; and that debt metrics will continue to rise and financial flexibility to decline as a result.[17]

Note the phrases such as 'consolidate its finances', 'rigid budget structure', 'debt metrics', 'financial flexibility to decline'. These typically economic phrases convey economic certainty. The agency has closely examined the financial situation of the country – in this case Barbados – and is not happy with the result. By using terminology associated with the 'science' of economics, notions of authority, independence, impartiality and the mathematical application of formulae to determine a result, the reader is left with the impression that this is the work of highly skilled professionals who ought not be questioned. Certainly, analysts may be highly skilled, but remember from above – these are opinions only.

The use of terminology that itself conveys the authority of the speaker constructs rules of interaction which, through recursive reproduction throughout time and space, form structure(s) discernible in instantiations, which are continually reproduced through repeated interactions. The rules and resources, or 'structural properties', are rationalised and reproduced by the practical consciousness of agents operating in the same field; in our story, sovereign bond market participants, governments, financial media and other stakeholders. The normative implications of the language used, implicated in the practical consciousness of agents, mean that it is rare for the rating or its justification to be challenged, save in the normal channels provided for by the CRA itself.[18] Agencies were relied on, for the most part, as 'experts' whose opinions were largely unquestioned by the markets. This is, of course, until the crash of 2008 when it became apparent to most that the ratings were not always accurate or up to date. Actors were forced to reappraise their conduct within the market and the assumptions that their actions and interactions were founded on. They were forced to address the structural properties of the systems in which they functioned.

17 See <www.moodys.com/research/Moodys-downgrades-Barbados-to-Ba1-outlook-negative--PR_262599> downgrade of Barbados, accessed 1 January 2013.

18 There is an appeals process provided for by all CRAs whereby an assigned rating can be challenged and reviewed prior to publication. There is also the option of not publishing the rating at all if it is not necessary, in which case only minimal fees are payable to the agency.

Normative rule-setting and resource allocation: 'Why? Because the CRA said so!'

Sovereign bonds make up approximately 40 per cent of the entire stock of bonds issued globally.[19] As international gatekeepers to the financial markets, CRAs have the power to determine which countries can access the markets and at what price. Governments cannot issue bonds to the international markets without a rating, and must approach the 'big three' agencies (S&P's, Moody's and Fitch Inc.) to rate their issues. Because of their ability therefore to open, or close, the gates to the international finance markets, Partnoy has referred to the CRAs as 'gateopeners', and these actors have become increasingly important as a means of accessing finance.[20] As states chose to turn increasingly to international markets to raise funds rather than the banks, the role of the CRA was elevated from nicety to essential, and the level of rating assigned became crucial for determining the interest a state could expect to pay on its borrowing.

When a state requests a rating, the CRA will use the information provided by the state and will carry out some of its own research into the various categories that are appraised and which go into forming the final rating. In the case of S&P's, the two overarching calculations that inform the rating are, firstly, the political and economic profile and, secondly, the flexibility and performance profile.[21] Within the first of these, the political score will include an examination of institutional effectiveness and political risks while the economic structure and growth prospects comprise the economic score. In order to establish the institutional effectiveness, the country's institutions are analysed against an international scale. Moody's claims to rely on World Bank figures and analyses here.[22] This in turn has been the subject of unflattering analysis on grounds of reliability and normative relativism.[23]

Countries are aware that their institutional structure will be compared to the 'ideal standard' set out by international financial institutions like the World Bank. They are also aware that the closer they conform to those standards, the higher their rating is likely to be, and the lower the costs of their borrowing will be. By implementing the ideal standard of governance as a precursor to market access, the CRAs engage in international standard-setting. They are, in other words, establishing the rules of the game, or structure, by which countries have to play. Indeed, structural properties are made up of rules and resources recursively implicated in social reproduction. Institutionalised features of systems have structural properties in the sense that relations are stabilised across time and space. At the same time, resources can be both allocative and authoritative. By assigning a rating which determines the cost of accessing the markets, CRAs are exercising allocative resources, while their co-ordination of markets and state organisation embodies their exercise of authoritative resources. As such, CRAs, through recursive actions and interactions with states and other market participants, actively set, monitor and adjust the structure in which interaction takes place. Combined with the normative bias of language used resulting in their embedded authoritative status within the markets, actors conform of their own choosing to 'fit' within a structure that they both tendentiously create and are created by.

19 S&P's (n 8).

20 F Partnoy, 'How and Why Rating Agencies are not like Other Gatekeepers' <http://finance.eller.arizona.edu/lam/fixi/creditmod/Portnoy.pdf> accessed 2 January 2013.

21 S&P's (n 8).

22 Moody's, 'Rating Methodology; Sovereign Bond Ratings' (September 2008) <www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_109490> accessed 1 January 2013.

23 A Perry-Kessaris, 'Prepare your Indicators: Economics Imperialism on the Shores of Law and Development' (2011) 7(4) International Journal of Law in Context 401–21.

However, this analysis raises the further point of regulation. Sovereign states, as we have seen, are reliant on CRAs for a rating of their bonds. The financial crisis has meant that European states in particular are increasingly relying on international markets to remain solvent. It is therefore even more important to states currently to receive the best possible rating, meaning that borrowing costs will be kept down. CRAs may establish the rules of the market, but it is these same nation states who are held accountable for the regulation of CRAs. The agencies' dismal performance throughout the crisis has shifted the regulatory spotlight back on to nation states and international organisations who have spent years deliberating the best way to regulate bodies on which they disproportionately rely. This conflict of interest is further exacerbated by imbalances of power within the markets, as the following discussion illustrates.

The power of persuasion in markets

While many have settled on institutions and structures as the key to understanding the functioning of society, for McCloskey, the simple answer to this is language, talk, communication.[24] Admittedly, the definition of institutions given by the New Institutional Economics movement is a blunt tool for describing what is ultimately an exceptionally complex intangible. Within structuration, rules and resources, as structural properties, comprise structure, yet these are again found in memory traces and as instantiated in actions and interactions. Again, then, in language. After all, information exchange, discussion, debates, dialogue, persuasion, *communication* all take the form of talk (or writing). But we all use language to shape the world, and to shape our interaction with the world, and to shape our interaction with others around us. The same can be said for our reflexive self-monitoring and manifestation of interpretation through recursive action and interaction. If the key to understanding social interaction is to be found anywhere, it might be worth a look at language.

Rhetoric never used to be a dirty word. The *Oxford Dictionary of Current English* gives the definition as 'the art of persuasive or impressive speaking or writing; language designed to persuade or impress'.[25] The opposite is logic, or dialectic speech, which is reasoning conducted according to strict principles of inductive validity. As McCloskey puts it,

> Rhetoric . . . is not merely the ornament one adds into speech at the end, and it is not necessarily dishonest. It is the whole argument – its logic, its arrangement, its appeals to authority, its passion, its pointed lack of passion, its audience, its purpose, its statistics, its poetry. Of course economics, and therefore law and economics, will be 'rhetorical'.[26]

So rhetoric is nothing more than the art of persuasion. Law is rhetoric. Sociology is rhetoric. Economics is . . . and here is the problem. Once upon a time, economics – the social science of economics – was deductive. But the logical, inductive and unchallengeable reasoning of the natural sciences drifted into or was appropriated by economics, gradually, throughout the twentieth century. Sure, *homo economicus* wanted to maximise his utility, but we forgot the fact that he had to be home by tea to put the kids to bed and so didn't really care about the finer points of maximisation right there and then.

For McCloskey, economists claim to practise dialectic while in fact engaging in rhetoric. Indeed, the very act of claiming scientific certainty is a persuasion. She gives the example

24 See, inter alia, D McCloskey, 'The Rhetoric of Law and Economics' (1988) 86(4) Michigan Law Review 752–67; McCloskey (n 11); D McCloskey, 'The Rhetoric of the Economy and the Polity' (2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1839109> accessed 2 January 2013.

25 *Concise Oxford Dictionary of Current English* (OUP 1964).

26 D McCloskey, 'The Rhetoric of Law and Economics' (1988) 86(4) Michigan Law Review 752–67, 760.

of a price exchange to illustrate the importance of conversation in economic exchanges, or, as she terms it, 'sweet talk'.[27] 'The market' establishes the 'given price' of an item by talking about it. Sellers and potential buyers communicate, they exchange information about how much they value the item. What does it mean to the buyer? How much do they really want the item? They want it a lot? Well, then it will cost more. Have you ever noticed the price increase of items in your Amazon 'wish list'?

But a conversation cannot take place without actors. Actors matter, not only as the participants who engage in rhetoric, but as framers of a dialogue. The conversation is important, but so are both the social positions of the actors and the locale in which the dialogue takes place. Social position, or role, corresponds to the significance attached to the rhetoric – to what extent do you trust the speaker? If your nosey neighbour mentions that a company is going to 'go bust', you are less likely to sell your shares than if that neighbour happened to be the managing director of said company. Social position can be attributed by other agents through their actions and interactions, forming structural properties that are implicated in the actions of others. Or, as we have seen, it can be implied by the agent through the normative implications of her rhetoric. But the locale in which the exchange takes place is also important. The physical region in which the communication is set gives the actors definite boundaries in which to communicate with each other and so frames the dialogue. The locale shapes the interaction by shaping the actors' behaviour, thereby influencing the meaning both implied and imputed.

When states request a rating for a new issue of sovereign bonds, they attempt to persuade the agency that their bonds are deserving of the highest possible rating. In the countless meetings between the agency and government ministers, central bank officials, and even heads of industry, the CRA gains knowledge through dialogue, debate and persuasion.[28] But part of the independence and impartiality of the CRA is an undertaking to 'see through the rhetoric' and assign an accurate rating, unbounded by the wishes of the issuer. The rating that results informs, or *persuades* the markets of the true value (the risk) of the bonds. Each review and downgrade (or upgrade – it is possible in the reverse) marks a shift in rhetoric by the agency as to the risk involved in such an investment. This analysis allows us to look past the dialectic of most ratings and their explanations. In fact, taking the ratings to be mere rhetoric, the art of persuasion, suddenly becomes very apt against the backdrop of the First Amendment to the US Constitution.

But what happened to the story?

What have we learned so far? Language, in all its glorious forms, constitutes the basic blocks of self-monitoring, self-perception, action and interaction. It also constitutes the practical consciousness through the internal processing and rationalisation of interaction, crystallising into the rules and resources that make up structural properties that are in turn implicated in recursive, routinised conduct. We've seen that CRAs engage in rhetoric disguised behind a veneer of dialectic. We've seen how, through repeated actions and interactions with market participants and stakeholders, this rhetoric has been implicated in the structural properties, observable as instantiations and memory traces and has resulted in high levels of power being imputed to the CRAs by other market actors.

But we are then left with the story set out above, which doesn't follow the rules. The initial technical glitch suffered by S&P's and the jump in bond yields that followed may be

27 McCloskey (n 11).

28 S&P's includes discussions with business leaders operating within the state in question when conducting research prior to assigning a rating.

proof of the authority still attributed to ratings and the agencies that assign them by the markets. It is fair to say that the numerous errors and failures by CRAs unmasked during the financial crisis – notably AAA ratings attached to subprime collateral – did erode the level of trust and authority accorded to CRAs by forcing stakeholders to reappraise the role of the agencies in the market. This reappraisal may in turn have extended to their ability to set international norms in political, institutional and fiscal fields, their ability to set the rules of market interaction and allocate the resources potentially gained thereby, and their role in establishing the structural properties of market-oriented interaction. But that reappraisal clearly had not served to alter the function of the underlying structure, within which it was a normative requirement to have at least two ratings for any bond issue. This 'rule' of the markets had been established for decades and recursively confirmed through repeated bond issues with assigned ratings. This norm in turn was fundamental to the social position of CRAs as gatekeepers of the markets, and the fact that this position has endured the questioning that followed the crash implies that the structural properties questioned were either less fundamental to the market or questioned in such a way as to leave their intrinsic effectiveness intact. The power of the CRAs – relative to other market actors – was shaken, but ultimately remained intact.

The January 2012 announcement by S&P's of downgrades for France should have been another episode of such interaction. Agencies set the rules – political, institutional, economic – that have to be met in order for a certain rating to be assigned. But when the 'wrong' answer came back, French politicians openly challenged the rationale and motivations of S&P's. There are several possible reasons why. As we have seen, CRAs hold authority, attributed by market actors and maintained through 'normative dialectic'. It is suggested that, in appropriating the language of the CRAs, the French ministers were keen to deflect the embarrassment of a downgrade by appropriating the authority associated with such dialogue. Noyer's statement that the UK has a 'greater deficit, as much debt, more inflation, and less growth . . . and collapsing credit' than France was a plea to the markets, as well as to the agency itself, that was undeniably framed in CRA dialectic. McCloskey notes that actors engaged in competitive rhetoric need to employ tools that are equal or superior to those of their opponents. If your adversary has just invested in a new piece of technology that gives him an advantage, chances are you're going to try and get the same (or better) if you want to succeed. Of course, political rhetoric is more susceptible to challenge than economic dialectic. To compete, then, why not borrow the dialectic frames of reference that deflect challenge so well?

Yet the market failed to respond. Indeed, the lack of further action by the CRA indicates that the frames appropriated by Noyer, Baroin and others were only partially successful. It is true that some commentators agreed with France, noting that they may have had a point. But the lack of reaction by the markets indicates that, while the language was borrowed, the authority and trust implicated in the linguistic turn did not follow. Rhetoric may be essential to the formulation of trust, but it is clearly not sufficient.[29] In structuration, the equivalent of sweet talk comprises the linguistic turn of the agent's knowledgeability. But there is a problem. Humans, along with other great apes, have learned to be suspicious of rhetoric.[30] As politicians endlessly engage in rhetoric, we have learned to be suspicious of them, too. However, the main problem facing Noyer in his attempt to appropriate attributed authority was time, or the fact that his assertions came *after* those of the CRA. For episodes to be implicated in structure, interactions must be produced and reproduced through time and space, and this in turn results in system integration. But the dislocation of the actor (the

29 McCloskey (n 11) 32.

30 Ibid 13.

rhetorician) and the field of dialogue (the locale) resulted in mistrust. The result was what sounded little more than a political spat between a bruised Eurozone and a smug UK.

What does this story tell us?

The story of Fillon and French rhetoric is an interesting example of the appropriation of frames of discourse. Without doubt, this phenomenon occurs frequently in all walks of life, for many reasons. The implied normativity of one actor's talk, be this authority or inferiority, expertise or ignorance, impartiality or bias, may mean that dialogue is borrowed first and foremost for its authority, or bias, for example. What is more important here, though, is what this spat reveals about power imbalances within the international markets, and how conflicts of interest have become so central to the regulation of CRAs. We have seen that rating agencies set the rules of the game – international norms of sovereign bond markets that have to be met by anyone wanting to access the markets. We have seen how much nations rely on international finance, given the dire situation of the banks, and the fall-out of the financial crisis. In short, therefore, the CRAs have greater power in the markets through their position and use of dialectic, and they set the rules of engagement. Nation states wanting to raise funds must play along and meet the conditions of rule of law, governance, political credibility, and so on, if they want to survive – financially, of course, but everything else rests on this. Following the crash and the realisation of the extent to which CRAs got the numbers so vastly wrong, calls have been directed at states and governments to do something to regulate the agencies. As the discussion has shown, this is akin to asking governments to bite the hand that feeds.

The story set out above illustrates the recognition by politicians that CRAs hold greater power within the markets than they themselves do. The appropriation of rhetoric was, as suggested, an (albeit thwarted) attempt to harness some of this authority for political purposes. While unsuccessful, it served to illustrate the power imbalance between the parties, as explained above with reference to rhetoric and dialectic.

On the practical front, there are two broad approaches to regulation open to states. The first is to rely entirely on the markets themselves to regulate activity, by firstly improving transparency and then increasing competition, the idea being that agencies compete on their reputations for best practice and reliability. The problem here is that reputation can only be gained in the ratings market over years of engaging in the practice and, without a reputation of quality and reliability to begin with, it is difficult to gain popularity and recognition. We have hit a vicious circle. Moreover, the speed and complexity of the new collateralised products that were being rated were so great that the products were virtually unintelligible. Each of the 'Big Three' agencies was assigning its top ratings to the products which later turned out to be toxic. Clearly, competition failed in this instance, and there is no guarantee that this could ever constitute a fail-safe method.

The second option available to states is to increase oversight of CRA operations. How agencies enter the market, how they operate and how they are reimbursed, along with increased disclosure and transparency rules, all constitute viable, and attractive, regulatory options, especially when backed up with high penalties for non-compliance. Regulators in Europe have proposed a combination of the two approaches, although arguably the focus falls heavily on oversight. Regulation (EC) 1060/2009, as amended by Regulation (EC) 513/2011, not only encourages more firms to enter the ratings market, but increases requirements on transparency, disclosure, oversight and compliance. CRAs operating in European member states must now be registered and certified and must submit to oversight

by – and pay operational fees to – the European Securities and Markets Authority.[31] This is the body tasked with ensuring that the higher standards set are adhered to and with imposing fines or revoking certificates to operate on evidence of infringement.[32]

Potential conflicts of interest are set out in the regulations and are to be avoided by the CRA or managed appropriately, however, there remains a black cloud over the continuing presence of astonishing conflicts of interest.[33] Moreover, proposals have recently been tabled to completely phase out ratings-based regulation by 2020 and impose even stricter rules on the publication of unsolicited sovereign ratings.[34] The proposals also emphasise the ability of private investors who have relied on a rating to their detriment to bring a civil action against the CRA, whether or not a contractual relationship exists between the two parties, potentially massively increasing the liability of agencies.[35] We await a test case to see the real impact of this provision, however.

The European Commission has recognised that, while EU regulation of CRAs is equivalent to that currently in operation in the US, Canada and Australia, current measures only mark the first step in the regulatory journey to address all the problems and conflicts of interest in the credit-ratings market.[36] However, the steps taken so far represent an important shift in the international balance of powers. In effect, CRAs still set the rules of the game *within the markets*. But by regulating the agencies, states are devising a new set of rules *in which* CRAs will have to function. In other words, by drawing up tighter regulatory standards and increasing oversight and penalties for non-compliance, states are taking back some of the power lost to CRAs within the markets. This necessarily has to be done at the international level due to the nature of both the markets and the operations of the larger CRAs.

One aspect of this worth noting is the legislative requirement that agencies remain free from any political or economic influences or constraints, which is now stated explicitly in the regulations.[37] While CRAs may objectively take into account the political situation or credibility within a country, it may not downgrade a country (or group of countries) simply due to harsher regulation, oversight, or unpleasant political rhetoric.

To place this once again in the language of structuration, states are reaffirming their power through their agency – or their ability to act – and, by enacting legislation, will be using language more reminiscent of dialectic to alter the rules and resources of interactions. States may then set allocative resources by regulating how agencies are allowed to charge for their services (although at present there is no blueprint for how to resolve this major conflict of interest: in fact there is also a lack of constructive suggestions and debate in this area). States may also set authoritative resources by correcting information asymmetries and diluting the power of CRAs through increased transparency, which enables other market

31 See, respectively, <www.esma.europa.eu/page/List-registered-and-certified-CRAs> and <http://europa.eu/rapid/midday-express-02–04–2012.htm> accessed 4 February 2013.

32 Art 20(1), Regulation (EC) 1060/2009, L302/16. See also <http://europa.eu/rapid/midday-express-16–10–2012.htm> accessed 4 Febraury 2013.

33 Title II, Art 6(1), Regulation (EC) 1060/2009, L302/16, although detail is notable in its absence here. Many European regulators have called for future action to completely overhaul the CRA market, in so doing wiping out any possibility for conflicts of interest to exist. There are currently no firm plans – or indeed any viable suggestions – to eliminate all conflicts of interest in this area, notably surrounding how ratings are paid for.

34 See <www.europarl.europa.eu/news/en/pressroom/content/20130114IPR05310/html/Tougher-credit-rating-rules-confirmed-by-Parliament%27s-vote> accessed 4 February 2013.

35 Ibid.

36 See <http://ec.europa.eu/internal_market/securities/agencies/index_en.htm> accessed 4 February 2013. However the 2006 Dodd-Frank Wall Street Reform and Consumer Protection Act in the US required all Federal Agencies to remove references to credit ratings in their regulations. See below.

37 Annex I, s A,1(a), Regulation (EC) 1060/2009, L302/16.

actors to undertake their own analysis based on the available information. In this setting, information is power, and increased information flows may negatively affect the authority of the CRAs within the international financial markets.

Even more importantly, ratings-based regulation will be abolished, both in the US and the EU. This had meant that the specific regulations applicable to any debt issued would be determined on the basis of the assigned rating. This requirement, in effect, was a state endorsement of the general reliability of ratings and, by removing this requirement, one structural property that had maintained the authority imputed to ratings was demolished, challenging at the same time the position of ratings at the heart of all debt transactions. This in turn leaves space for other actors to reappraise the structure(s) informing market norms and function should any further revelations come to light about the practices of CRAs.

In addition to questioning the validity of regulatory responses to rating agency failures, the story also highlights the importance of settings of interaction, in particular when aspects of the interaction – rhetoric, for example – are appropriated. In borrowing the discourse of rating agencies, the political speaker may hope to emulate their authority and exercise some of their influence over the markets. But what happens when rhetoric simultaneously shifts both between both *agents* and *locales*? This question is compounded by another: what happens when the appropriator and appropriatee are seen commonly to rely on different types of discourse in everyday communication? No one would question that politicians are renowned for their reliance on rhetoric and their desire to persuade people, markets and the laws of the universe if they were able. Rating agencies, by contrast, employ 'dialectic' and the language of science to convey their authority, expertise and social position resulting in their unchallengeability. The shift in agent and locale, therefore, takes place across a linguistic boundary – moving from the apparently logical to the rhetorical, or as we might say, from rhetoric-dressed-up-as-logic to plain old rhetoric.

Following the outburst, UK bond yields did not show any interest in the French protestations. French bond yields gradually returned to their normal level. The markets failed to respond to the French politicians, indicating that any authoritative bias imputed to the discourse of the CRA by nature of the language used was 'lost in translation' when it was later employed by the French political classes.

The veneer of dialectic that agencies attach to their market rhetoric, it is suggested then, is where the normative bias of authority lies. Once this is lost, the power and trust attached to rating agencies owing to their authority is also lost. Fillon, a master rhetorician, appropriated only the rhetoric, which was devoid of authority, power and trust. This leaves us to conclude that the authority imputed to ratings by the market (as witnessed in the first jump in bond yields) derives from the agency itself (or the analysts working for the agency), manifested in agency rhetoric. The same can be said of any agent. Further, any normative authority imputed *to the agent* by other actors is then reproduced in that agent's discourse, confirming earlier imputed authority in a feedback loop. This manifests in the language used which in turn is received into the practical consciousness of other agents. Their repeated actions and interactions reproduce as structural properties the normative implications of her discourse, which becomes embedded as the structure which both organises and is reproduced in actions and interactions across time and space. So, the appropriation of language by an agent who also engages in a similar type of communication – say logic – may have a different outcome for the normative authority bound up in the discourse. Scientific rhetoric appropriated within the community of genetic biologists, for example, will retain its authority. The same discourse, spoken by a bus driver, would not only sound odd, but would lack the authority of the biologist. The same is true between rating agencies and politicians.

In a telephone call made to Nick Clegg following the French statements, François Fillon appeared at pains to make clear that his intentions had not been to call into question the UK's rating, but instead to 'highlight that rating agencies appeared more focused on economic governance than deficit levels'.[38] In fact, in this observation he may have been right. The competence of those dictating economic policy – in the eyes of the rating agencies – may have played a role equal or greater in determining the rating to the level of the deficit or the debt. Conversely, domestic political rhetoric by the Coalition government in the UK has focused on maintaining the AAA rating by reducing the deficit, a trick (one suspects) used widely by policy-makers to deflect analysis of their personal performance. But in the weeks that followed, the political spat proved that any challenge to rating agency authority, or market orthodoxy, was not what the French government had in mind after all. In a statement in late January, François Fillon admitted to the world's media that in an apparent U-turn France would, after more consultation, consider making budgetary 'alterations' if necessary.[39] While still claiming that France was a 'safe country for investment', he confirmed that the government would be paying heed to the opinions of S&P's, and would be taking remedial action. Having so publicly questioned the rules of the markets as set by CRAs, the final note to the story ends on one of a return to the status quo, with France backing down and ultimately conforming. There was a return to political rhetoric by the politicians who, once striving to meet the rules set by rating agencies, were rewarded with lower bond yields. The position of CRAs within the structures of the sovereign bond markets was confirmed. However, this position may be challenged by future regulatory reforms that seek to realign the rules and resources of market interactions.

38 See n 7.

39 See <www.telegraph.co.uk/finance/financialcrisis/9014832/Francois-Fillon-France-downgrade-should-not-be-dramatised.html> accessed 4 February 2013.

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The informal justice paradigm and the appropriation of 'local reality'

Torunn Wimpelmann
CHR Michelsen Institute, Bergen, Norway

Abstract

This article traces the emergence of a new paradigm within rule of law assistance and the forms of appropriation that operate through it. An informal justice paradigm promotes external support to non-state justice as more sensitive to local aspirations and as a more efficient form of intervention. I problematise this paradigm by unpacking both its discursive premises and the actual mechanisms through which aid to informal justice can take place. I argue that the celebrated sensitivity to local context, contrary to assertions, in the last instance empower outside experts, whose mandate it becomes to validate 'local reality' and render it amendable for intervention. In sum, the informal justice paradigm enables a parallel form of governance where national institutions are deemed optional at best and irrelevant at worst, where ultimate authority is exercised by international expertise and where accountability to the local population is, on the whole, eroded.

Introduction

This article explores forms of appropriation at work in international aid projects that are aimed at strengthening informal and customary justice processes. It traces the global proliferation of such projects, accompanied by assertions that working with and supporting non-state and ostensibly organic or traditional forms of governance, as opposed to formal and national institutions, is often more culturally appropriate, more effective and enabling less imposing forms of outside engagement. By detailing the processes and mechanisms through which informal justice programmes are promoted and implemented, the article unsettles the democratic and empowering claims of this informal justice paradigm. I find that the celebrated sensitivity to local context within the informal justice paradigm in the last instance serves to empower outside experts. These are mandated to validate local reality and render it amendable for intervention and improvement. In sum, the informal justice agenda constitutes a parallel form of governing where national institutions are deemed optional at best and irrelevant at worst, where ultimate authority is exercised by international expertise and where accountability to the local population is, on the whole, eroded. Moreover, despite its language of authenticity and disinterest, support for informal justice never occurs in a vacuum. It is as susceptible to capture by larger projects of rule as is any legal regime. In Afghanistan, as I show, the surging interest in informal justice was closely linked to military agendas, framing the rapid strengthening of local conflict resolution mechanisms as a military imperative. These dynamics, once unpacked, serve as a reminder of the importance of placing 'the need' to engage with the informal justice sector into its specific historical and political context.

Towards a new orthodoxy? The 'need' to engage with informal justice

The 1990s saw the rise of a remarkable consensus in the field of development practice around the rule of law as a necessary condition for economic development and progress as a whole.[1] This 'widespread agreement, traversing all fault lines . . . that the rule of law is good for everyone'[2] led to a surge in funding for development assistance attempting in various ways to reform legal frameworks, to strengthen courts and the skills of legal professionals and to improve other aspects of the justice sector. However, desired change often proved elusive. This lack of tangible results formed one backdrop to a discernible emphasis over the last five to ten years in the *rule of law* field on support to informal justice mechanisms and actors. Institutions like the World Bank, the UK's Department of International Development (DFID), the United States Institute of Peace (USIP), the International Development Law Organization (IDLO) and the United Nations Development Programme (UNDP) have been at the forefront of the canonisation of a new orthodoxy that calls for going beyond a 'state-centric' view and incorporate customary or non-state actors and processes in justice sector reform. A report from DFID in 2004 was an early articulation of this view. It made the case for working with non-state justice and security actors based on their prevalence and their ability to reach poor people.[3] The Organization for Economic Co-operation and Development (OECD) followed up in 2006, arguing that, in fragile states (referring to a now established donor categorisation of countries with limited government reach, violent conflict or deviating economic and political policies), conditions might necessitate unusual solutions and a 'multi-layered methodology' targeting both state and non-state service providers simultaneously.[4] By 2009, an OECD discussion paper pronounced a consensus to have emerged within the development community 'that non-state/local justice security are, often, more effective, accountable, efficient, legitimate and accessible service providers [than the postcolonial state]' and therefore 'indispensable for the short-term and intermediate-term distribution and delivery of justice and security'.[5] The World Bank's 2011 World Development Report, focusing on countries transitioning from conflict, made some cautious propositions along similar lines. It suggested supplementing formal justice with traditional community systems, since the former could not deliver in the short term. It advocated that, in early stages of transitions from violent conflict, bridges between formal and informal justice systems should be built.[6] An article published a year later by three authors associated with the World Bank's justice programme was somewhat more forceful, urging donors to shift away from 'state institutions as the answer'; instead of privileging state-centrism, operations should be decentralised (including engagement with legal pluralism).[7] Finally, a joint report commissioned by UNDP, UN Women and UNICEF illustrated a widespread sense that support to informal justice was set to become mainstream policy. Noting a growing interest in informal justice, 'until recently relatively invisible in development partner assisted justice

1 M J Trebilcock and R J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing 2008); T Carothers, 'The Rule of Law Revival' (1988) 77(2) Foreign Affairs 95–106.

2 B Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 1.

3 DFID, 'Non-state Justice and Security Systems: A Guidance Note' (DFID 2004).

4 E Scheye and A McLean, 'Enhancing the Delivery of Justice and Security in Fragile States' (OECD 2006) 11.

5 E Scheye, 'State-provided Service, Contracting Out and Non-state Networks: Justice and Security as Public and Private Goods and Services' (INCAF/Partnership for Democratic Governance, OECD 2009) 7.

6 World Bank, *World Development Report 2011: Conflict, Security, and Development* (World Bank 2011).

7 D Desai, D Isser and M Woolcock, 'Rethinking Justice Reform in Fragile and Conflict-Affected States: Lessons for Enhancing the Capacity of Development Agencies' (2012) 4(1) Hague Journal on the Rule of Law 64.

interventions', the report sought to identify how engagement with informal justice could build respect for and protection of human rights.[8]

There are many dimensions to the increasing traction of the idea that aid donors must make 'informal justice' an integral component of their strategies, and it is beyond the scope of this article to examine them all to exhaustion. However, a few central elements are as follows.

The very first assumption serving as a premise for the whole paradigm is that the justice sectors in certain countries are in need of externally driven improvement. This is, of course, the underlying principle of the entire rule of law field, of which the call for support to informal justice constitutes but the latest revision. Within the general parameter that the justice sector is in need of 'improvement', one central trope underpinning the informal turn is centred on the shift to a more *user-orientated* strategy. The case for the user-orientated approach is built on both normative and efficiency grounds. Firstly, to take the 'users' as the starting point is presented as a moral question. As the World Bank states:

> Justice for the Poor reflects an understanding of the need for demand oriented, community driven approaches to justice and governance reform, which values the perspectives of the users, particularly the poor and marginalized as women, youth, and ethnic minorities.[9]

However, more practical reasons for the user-oriented perspective are also articulated, justified on grounds of efficiency: A percentage ranging from 80 to 95 is often cited as reflective of the amount of total legal cases that informal justice actors 'solve' or adjudicate. From this figure, it is inferred that, in order to be more effective, in particular to expand *access* to justice to the poor or to users more generally, it is more sensible to engage informal mechanisms since they have a broader reach. But, as Balchin points out, there is a paradox here. Most research – and often donor statements as well – acknowledges that informal justice mechanisms tend to either exclude or disadvantage marginalised groups such as impoverished people and women. Yet the same informal justice mechanisms are held to be a solution to the increased access of marginalised people to justice.[10]

At a closer look, this seeming paradox is made possible through a formalistic definition of justice to the exclusion of a substantive one. In turn, this formalistic definition of justice is achieved through a marketised language in which justice is presented as a 'service' to be delivered, a commodity or a product.[11] The framing of justice as a matter of supply and demand, of delivering a service to a customer or user, is at the heart of a move that forecloses discussion of the *content* of justice or at least makes the content of secondary importance. In other words – justice is no longer about a certain outcome being ensured – but about a service having been delivered. Whether disputes are being solved – not *how* they are being solved – is the paramount issue.

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8 Danish Institute of Human Rights, *Informal Justice Systems. Charting a Course for Human Rights-based Engagement* (Report commissioned by UNWomen, UNDP and UNICEF 2012).

9 World Bank, 'Justice for the Poor Program Presentation' (World Bank 2006).

10 Cassandra Balchin, 'Strengthening International Programming on Access to Justice for the Poor and for Women: Lessons Learnt from Pakistan's Musalihat Anjumans and other Programs' in Peter Albrecht et al (eds), *Perspectives on Involving Non-state and Customary Actors in Justice and Security Reform* (IDLO in conjunction with Danish Institute for International Studies 2011). There might be a calculation of a trade-off here, Balchin hypothesises, that involves an assessment that, on balance, informal justice is the lesser of two evils in the context of an inadequate formal system, but as she points out, if such an assessment is being made, it is rarely made transparent or explicit: ibid 88.

11 Jonathan Padwe, 'Customary Law, Traditional Authority and the Ethnicization of Rights in Highland Cambodia' in Frederic Bourdier (ed), *Development and Dominion: Indigenous Peoples of Cambodia, Vietnam and Laos* (White Lotus Books 2010).

This privileging of formalistic over substantive justice is also bolstered by another normative theme within the informal justice paradigm: earlier approaches to justice sector reform that focused on the state justice sector only are denounced as *Western-centric*.[12] By way of contrast, policy makers are called upon to be more open-minded and less prescriptive: They should recognise empirical reality and avoid ethnocentric prescriptions. Extending support to informal justice is thus described as the hallmark of a more tolerant and less imposing attitude, whereas insisting that only the state justice system should prevail is tantamount to imposing a Western model and refusing to recognise the non-Western world. On this point the informal justice discourse takes its cue from a burgeoning broader academic debate on postcolonial or non-Western statehood and political authority which points to the multiplicity of governance in such settings,[13] but somewhat misrepresents or misunderstands much of this work. For instance, while authors like Christian Lund have made the analytical point that postcolonial societies typically have more dispersed political power and public authority, with various 'institutions' vying for influence, they have also cautioned that 'the state' is everywhere socially constructed and its self-presentation as a unitary, autonomous body is misleading, also in the West.[14] However, in the informal justice discourse, this 'hybrid order' literature often becomes the basis of an 'inverted essentialism',[15] a radical difference between Western and non-Western polities; the former is where Westphalian or Weberian statehood properly belongs, whereas in the latter, aspirations to Western categories of governance are at odds with 'reality' or contrary to local culture.[16]

I have argued that the informal justice paradigm makes its case on the twin notions of efficiency and local legitimacy, both anchored in a user-orientated approach. To this it should be added that even if the legitimising trope of the informal justice paradigm is its purport to proceed from user needs and local values, the paradigm also shares premises with neoliberal agendas of austerity and withdrawal of state services. As has often been pointed out, making self-reliance a virtue has served to discipline populations, and particularly the poor, into making fewer demands on the state and into accepting the dismantling of welfare provision.[17] Similar dynamics are observable in the international development industry, but here an additional twist has been the use of cultural difference or local reality as a platform on which differentiated rights to state services and access to material goods are asserted. As Sorensen argues: 'in the global periphery, liberalism has re-discovered multiethnic-post conflict societies as tribal, communal and sectarian'.[18] This rediscovery of local reality is clad in a progressive language of recognition. But in actuality the privileging of local reality or culture over local aspirations might serve to produce the exclusion of large amounts of people from 'our' standards of legality, asking them instead to find virtue in their customary

12 Albrecht et al (n 10).

13 B E Bertelsen, 'Multiple Sovereignties and Summary Justice in Mozambique: A Critique of Some Legal Anthropological Terms' (2009) 53(3) Social Analysis 123–47; V Boege et al, *On Hybrid Politic Orders and Fragile States: State Formation in the Context of 'Fragility'* (Berghof Research Center for Constructive Conflict Management 2008); V Boege et al, 'Building Peace and Political Community in Hybrid Political Orders' (2009) 16(5) International Peacekeeping 599–615; C Lund, 'Twilight Institutions: Public Authority and Local Politics in Africa' (2006) 37(4) Development and Change 685–705; C Lund, 'Twilight Institutions: An Introduction' (2006) 37(4) Development and Change 673–74; K Meagher, 'The Strength of Weak States? Non-state Security Forces and Hybrid Governance in Africa' (2012) 43(5) Development and Change 1073–101.

14 Lund, 'Twilight Institutions: An Introduction' (n 13).

15 Padwe (n 11).

16 Ibid.

17 M Duffield, Development, *Security and Unending War: Governing the World of Peoples* (Polity Press 2008); J Reid, 'The Disastrous and Politically Debased Subject of Resilience' (April 2012) Development Dialogue 67–80.

18 J S Sorensen, 'The Failure of State-building: Changing Biopolitics and the Splintering of Societies' (April 2012) Development Dialogue 49–65, 56.

legal systems, a solution heralded as both more efficient and legitimate. This is not to say that all demands for support to informal justice are parts of a neoliberal agenda, but to point to how easily the former can be co-opted by the latter.

Support to informal justice in practice

If the informal justice paradigm might assign segments of the population to other legal zones, it does not simply leave them there to their own devices. The informal justice paradigm constitutes non-state justice processes as a *policy field*, to be delineated, mapped and subject to interventions intended to improve their functioning, fill any missing gaps and remove aspects deemed problematic. It is when we examine the details of the actual practices through which such interventions are to take place that the notion of support to informal justice as somehow more bottom-up or user-driven becomes unsustainable. Before turning to the story of informal justice support in Afghanistan, this article looks at some common themes that are emerging in the informal justice policy literature.

While, as many within the paradigm themselves point out, the development of concrete strategies is still in its infancy,[19] there are some widely agreed upon points. First of all, there is general agreement across the board that support must be context-driven and flexible:

> A key finding . . . is the messy, nuanced and context-specific nature of engaging with customary justice systems. There are few guiding principles that can be applied across the board and no model solutions that are guaranteed to advance empowerment in every environment. What works in a given country context is situation-specific and contingent on a variety of factors, including social norms, the presence and strength of a rule of law culture, socio-economic realities, and national and geo-politics, among others.[20]

Moreover, in order to devise the support appropriate for the context at hand, it is emphasised that donors must acquire an extremely detailed knowledge prior to intervening. The need for 'deep contextual knowledge'[21] is often linked to the importance of avoiding support to 'the wrong' actors, those who are human rights violators, criminals or just without local legitimacy. As one paper states:

> Donors need to develop a knowledge management strategy that will help them acquire a detailed level of knowledge (including the identification of reliable local informants) in order to minimize the chance of supporting actors who prove unreliable or unaccountable.[22]

What this research-driven form of intervention effectively represents is a kind of *ethnographic governmentality*,[23] in the sense that knowledge about the population, framed in anthropological terms such as culture, custom or community, is a paramount tool to develop policy. Moreover, while the community or customs are the formal reference point from which policy is designed, in the particular intervening practices that the informal justice paradigm enables, the authority to validate exactly what these are lies with the external intervener. Whatever the knowledge produced by interveners affirms as 'empirical facts' or the 'reality on the ground' is to be the basis of policy.

19 M Derks, *Improving Security and Justice through Local/Non-state Actors* (Netherlands Institute of International Relations 'Clingendael' 2012).

20 E Harper, E Wojkowska and J Cunningham, 'Conclusion: Enhancing Legal Empowerment through Engagement with Customary Justice Systems,' in *Working with Customary Justice Systems: Post-Conflict and Fragile States* (IDLO 2012) 173.

21 Desai et al (n 7) 62.

22 Derks (n 19).

23 Padwe (n 11).

At the same time, according to the logic of improvement (without which external intervention would, of course, be superfluous), informal justice mechanisms are nonetheless found to be in possession of deficits in need of improvement. These deficits are similarly defined by interveners who are held to retain the ultimate standard against which such shortcomings are identified. A constant theme is the need for informal justice mechanisms to be subject to outside monitoring to 'maximize the system's benefits and address its weaknesses' as one report formulates it.[24] Customary justice mechanisms are presented as working imperfectly if simply left to their own devices or the victim of ill-informed interventions; outside expertise is constantly needed in order to ensure their optimal operation and to curb their excesses. Various programmatic prescriptions to set up monitoring mechanisms that can ensure compliance to human rights principles or otherwise warrant that informal justice processes do not lead to 'harmful' outcomes are a key feature of most practical guidance. Some have observed that this resembles the so-called *repugnancy clauses* of colonial times whereby customary law and practices were allowed in so far that they were not '*repugnant to natural justice equity and good conscience*'.[25] As in colonial times, customary justice processes are measured against standards of civilisation that are ultimately defined by interveners.

It is clear then that in this interplay between proceeding from the 'facts on the ground' and, at the same time, subjecting them to the necessary improvements, it is the authority and judgment of the interveners that are paramount. The opinions of national officials, on the other hand, are regarded as less important or even an obstacle to be overcome. For instance, Derks warns that 'host governments' might perceive non-state or local actors as competitors or threats to stability and peace and oppose outside support to these actors as interference into domestic affairs.[26] Donors are therefore advised to apply their diplomatic skills to persuade host governments to permit international intervention support to non-state actors, or to avoid a discussion with host governments altogether by providing support indirectly to non-governmental organisations (NGOs) or trade unions.[27] Scheye goes even further in questioning the importance of national government opinion, suggesting that, while the political elite (i.e. the government) might cast the question of support to non-state actors as a matter of legitimacy, the real reason for their scepticism is to do with power struggles and with national government's desire to consolidate its own power.[28] Said differently, in opposing international support to non-state governance, national governments are often acting out of mere self-interest and their opposition is therefore not to be taken too seriously.

In sum, the relations of governance that the informal justice paradigm seems to draw up, is one in which local reality and community are to be deciphered and modified by careful calibration of donor expertise, with national institutions in a more marginal position. Its claim to be a form of locally driven, less intrusive approach is therefore problematic, at least from the point of view of national governments. Moreover, as with all forms of interventions, attempts to 'improve' informal justice do not operate in a vacuum. As a tool of governing, it tends to become entangled in other projects of rule. As I show below, this was certainly the case in Afghanistan, where external interest in informal justice attained new dynamics as local justice mechanisms were framed as a crucial part of the US-led counter-insurgency.

24 Harper et al (n 20) 171.

25 Merry cited in Padwe (n 11) 332 (emphasis added).

26 Derks (n 19) 2.

27 Ibid.

28 Scheye (n 5).

The promotion of informal justice mechanisms in Afghanistan

Afghanistan has a formal legal system built on a combination of secular jurisprudence and Sharia law, dating back to the 1880s. In addition, informal justice processes often referred to as *shuras* or *jirgas* are commonplace, although these do not have any official legal status in the country. They are typically presided over by male elders, often nominated by parties to a conflict or dispute. It was these latter mechanisms that increasingly become an object of international focus post-2001, in particular, since international aid to the formal justice system seemed to yield disappointing results.[29] The USIP, a research and policy institute funded by US Congress, was something of a pioneer. USIP, which had a large office in Kabul, started working on informal justice as early as 2002, commissioning several research publications on the informal justice system and organising a series of workshops and conferences. In 2007, the UNDP entered the field with its biyearly Human Development Report for Afghanistan focusing on justice reform. The report suggested that 80 per cent of all cases were solved by the informal justice system and called for the establishment of 'a hybrid model of Afghan justice that articulates, in detail, a collaborative relationship between formal and informal institutions of justice'.[30] In early 2009, USIP proceeded to set up what it termed *pilot projects* in 13 districts across eight provinces of the country.[31] These projects were to 'test ways of designing or strengthening links between the state and informal systems to increase access to justice'[32] and were implemented either by USIP itself or by partner NGOs.[33]

At the same time, other experiments were taking place in Helmand province, where the UK government had also been working with informal justice processes for some time. In 2008, justice committees consisting of 'representative groups of senior tribal elders representing all the major tribes and sub-districts of a district'[34] were established through UK initiatives in two districts in the province. A year later, they were followed by additional committees in other districts and incorporated into the Afghanistan Social Outreach Programme (ASOP) to increase the visibility and presence of the Afghan government at the local level.

Partly due to the lobbying of international donors, the idea of a formalised relationship between formal and informal justice was repeatedly reiterated in various benchmark documents formulated as part of the donor-led reconstruction process. Most importantly, in 2009, USIP successfully lobbied for the inclusion of a reference to the informal system in the Afghan National Justice Sector Strategy. According to USIP, this reference then *obligated* 'the State to develop an official policy toward its relations with customary dispute resolution systems and to conduct activities that will strengthen these systems so that fair and effective access to justice for all Afghans is achieved'.[35] Other donors threw their

29 The material in this section draws upon on the author's interviews and observations in Kabul between 2010 and 2011 in connection with her PhD fieldwork in the country.

30 UNDP, *Afghanistan Development Report 2007: Bridging Modernity and Tradition: Rule of Law and the Search for Justice* (UNDP 2007) 20.

31 N Coburn, 'The International Community and the "Shura Strategy" in Afghanistan' in Albrecht et al (n 10).

32 USIP, 'Informal Dispute Resolution in Afghanistan' in *USIP Special Report* (USIP 2010) 1.

33 For a more detailed account of attempts to promote informal justice in Afghanistan, see T Wimpelmann, 'Nexuses of Knowledge and Power in Afghanistan: The Rise and Fall of the Informal Justice Assemblage' Central Asian Survey (forthcoming).

34 DFID, 'Support to the Informal Justice Sector in Helmand' (Internal DFID note on file with author April 2009).

35 USIP <www.usip.org/programs/projects/relations-between-state-and-non-state-justice-systems-afghanistan> accessed 29 March 2011.

support behind such a policy, which would allow them to anchor their work in the provinces to some kind of national framework, or at least secure the formal sanctioning of the Afghan government for their activities.

This was the backdrop to the April 2009 establishment of a joint national–international 13-member working group in the Afghan Ministry of Justice, tasked with developing an Afghan government policy that would bestow official recognition on informal justice processes and create a system of co-ordination and referral between them and the formal system. The working group was established largely through the efforts of USIP and the UK government, which subsequently became prominent actors in steering the process. However, many of the Afghan representatives in the group – justice officials, women activists and human rights workers – strongly opposed the very idea of a national policy which recognised informal justice mechanisms. They protested that the *shuras* and *jirgas* were conservative, unaccountable mechanisms which effectively reinforced the power of local elites and sanctioned abuses against the poor and women. They insisted that women in particular were better off in formal courts than in *jirgas* and *shuras* where they could even find themselves given away in marriage as a compensation for a crime or offence, so-called *baad*. The Afghan Supreme Court had also long objected to what it regarded as a potential negation of the formal system's universal jurisdiction. It had voiced its opposition repeatedly, in particular, in 2007 when it had gone to the drastic step of banning the UNDP report and deemed any quoting from it illegal.[36]

Eventually, after a year of protracted and often heated negotiations, a short policy document was agreed upon, consisting of four pages and providing recognition to traditional justice mechanisms. The policy argued that the positive functions of the informal system should be strengthened and, at the same time, practices and decisions that violated the human rights of women, men and children, including *baad*, should be eliminated. Disputes resolved through informal justice processes 'not in contravention of Sharia, the Constitution, other Afghan laws and international human rights standards' would be recognised as valid decisions by the formal justice system, after registration with relevant government institutions. But what the internationals considered something of a victory proved short-lived. When a new Minister of Justice was sworn in, he decided to change the policy for a law which he considered to be more appropriate. Despite intense lobbying efforts from Western embassies to keep the painfully crafted policy, the entire process restarted. Furthermore, the law that eventually was drafted under the supervision of the Ministry essentially ended up criminalising the very system that the internationals had attempted to promote.[37] In effect, the overall impression in Kabul was one of failed appropriation by the international actors.

But while the internationals might have been outmanoeuvred in the capital, international engagement with informal justice had in fact gained pace dramatically. The chief reason for this was that support to informal justice had meanwhile come to be framed as a military imperative. It followed that there was simply no choice to await the approval of national authorities – strengthening the *shuras* and *jirgas* had to go ahead regardless, lest the war against the Taliban be lost. In what follows, I take a closer look at the assumptions and infrastructure through which these efforts could take place.

36 A Suhrke, *When More is Less: The International Project in Afghanistan* (Hurst/Columbia 2011).

37 The draft law stated that *jirga* members should have 'complete knowledge of Afghan laws' and be local residents, effectively disqualifying a large number, if not the majority, of current *jirga* participants. Moreover, the draft law declared that those members of *jirgas* and parties to disputes who did not observe its provisions should be prosecuted.

Expert authority and Afghan reality

As in other settings, the case for recognising and supporting informal justice mechanisms was grounded in a local reality discovered through scientific enquiry. The '80 per cent' claim published in the 2007 UNDP report came to be widely circulated and formed part of a broader literature in which it was asserted that the formal justice system was not only ineffective in most of the country, but that it was indeed alien to Afghan culture. Most Afghans, it was argued, preferred the restorative justice of their customary ways, and often resented the retributive justice practised by the formal courts.[38] In turn, such statements drew upon a long-established template in Western scholarly and government discourse in which Afghanistan (and the region) is presented as possessing enduring features of tribalism and non-stateness that makes it particularly unsuited to 'Western' forms of governance. As more historically grounded scholarship points out, this template of non-stateness has in fact developed in close relationship with Western conquests and expeditions into the country. There were strategic reasons for why Western scholarship has tended to privilege a tribal, stateless, independent and Pashtun imagery of the region, such as attempts during the nineteenth century to wrest certain areas away from the Afghan monarch[39] or discredit the Soviet-backed communist government in Kabul during the last phase of the Cold War. As we shall see, the latest resurrection of these images was also closely entwined in geopolitical dynamics and far from representing a neutral statement of 'facts'. Nevertheless, the disinterested air of academic expertise was fundamental both to establishing the *need* for engagement with informal justice and in the actual organisation of such engagements.

For instance, a publication from USIP illustrates how such scholarly authority was at play in discourses about informal justice.[40] The USIP report presents findings from its aforementioned pilot projects, which are to form the basis of future policy. Noting that the formal justice system remains in a 'severely dilapidated state', something that could 'take generations' to redress,[41] the two authors state that most Afghans anyhow resort to informal mechanisms: 'Many experts believe that as many as 80 per cent of all disputes in the country are resolved in the informal system.'[42] They conclude that 'given the many problems with the state justice sector', 'informal mechanisms provide the best prospect of providing sound dispute resolution services to most Afghans today and in the future'.[43]

But expert knowledge was not only important in establishing the need to support informal justice, it was also integral to the actual practice of such support. Having laid out the case for the *need* to engage with the informal system, the report also offers practical recommendations for how such engagement can take place. Many of the points centre around the importance of context, political sensitivity and research. The document states that organisations working with the informal system need to have an 'intimate knowledge of the local political landscape'. Project implementers should thus be familiar with the history of the area, the key power-holders, ethnic and tribal divisions, the reputation and loyalties of the formal justice system and local government officials, major sources of income, and who controls them, and the influence of the insurgency. Ignorance of the local context and failure to appreciate the 'inherently political nature of dispute resolution' might

38 S Haroon, *Frontier of Faith: Islam in the Indo-Afghan Borderland* (Columbia University Press 2007); M Marsden and B D Hopkins, *Fragments of the Afghan Frontier* (Columbia University Press 2011).

39 Haroon (n 38).

40 USIP (n 32).

41 Ibid 2.

42 Ibid 3.

43 Ibid.

undermine efforts altogether: attempts to engage might be rejected by the local community as illegitimate, or might fuel tension and, indeed, political destabilisation, for instance, by favouring one group over another.

In fact, infrastructure was already in place to provide such intimate knowledge called for by the USIP report. In the wake of the 2001 invasion, a handful of Afghan NGOs and institutes had emerged which specialised in catering to Western information needs – often known as 'mapping' exercises. Perhaps at one point the most successful and prominent of these, was The Liaison Office (TLO, formerly the Tribal Liaison Office), which was founded as an Afghan NGO in 2003. In 2011, TLO had 150 staff, and 10 field offices, concentrated in the war-ridden southern and eastern provinces of Afghanistan. The language that TLO used to advertise its services clearly illustrates how institutionalised knowledge production about Afghan local reality for Western donors had become. The organisation's website describes its activities as:

> thorough research of the ground context in given areas in order to understand community structures, decision-making and conflict resolution mechanisms, stakeholders and their sources of power (actor mapping), conflict-generating factors between individuals and groups (conflict mapping), local capacities for peace, existing service provision, economic realities, and the impact of Afghan government and international development and stability initiatives.[44]

TLO was one of the implementers of the USIP pilot projects on informal justice and one of a handful of organisations which had established themselves through a portfolio of various mapping and project activities. Often, these organisations were carrying out activities that involved a combination of both. In this vein, what research identified as local reality fed into programme activity, to be immediately acted upon. The researchers performed a vital role as necessary intermediaries, whose authority was constantly at work in deciding action.

One example of a programme with a built-in mapping component was the ASOP. It was conceived as a programme to extend governance to the countryside of Afghanistan. Set up first in co-operation with the British in Helmand, it was subsequently to be replicated – although in a slightly modified form – in co-operation with the US, which funded its anticipated establishment in more than 100 districts. The main activity of ASOP was to set up councils at the district level.[45] The rationale for the councils was a concern amongst Western governments that a distant, overly centralised and unresponsive Afghan administration caused the population to support the insurgency. The councils were tasked with bringing the concerns of local residents to the attention of government officials, especially regarding the quality and conduct of reconstruction activities, and with providing a forum for solving conflicts. They also proved useful for intelligence purposes. The mechanisms for selecting members for the councils varied somewhat, but the first step was based on a 'mapping exercise', carried out by one of the research organisations mentioned above, which produced a short list of power-holders in the area.

TLO and similar organisations typically hired a few expat researchers and interns based in the capital. Afghan staff mainly collected data in the field, although the organisation would normally be formally led by a well-connected national who could ensure that the organisation stayed on good footing with the government. The Afghan data-collectors, usually respectfully referred to as researchers, were the providers of raw data. Their ability

44 TLO, 'Research and Analysis' <www.tlo-afghanistan.org/research-and-analysis> accessed 27 March 2011.

45 Matt Waldman, 'Community Peacebuilding in Afghanistan: A Case for a National Strategy' in *Oxfam Research Reports* (Oxfam International 2008).

to move around undetected in insurgent-ridden areas, speak in local languages and access local networks made them crucial to the overall enterprise. But the notes and transcripts they produced were subsequently to be validated, refined and put into useful form by senior, mostly Western, staff in the capital.

Institutionally, the 'mapping industry' formed part of an emerging governance constellation that rendered national debate about the content of justice superfluous. Instead, bureaucratic power was channelled through NGOs, whose authority to decide was founded on special knowledge of Afghan culture and local context. While this knowledge gave the appearance of being *Afghan-led*, the fact that the entire endeavour was structured by larger fields of power was largely rendered invisible. The local reality (that the mapping exercises claim to be able to access) was, of course, fundamentally shaped by the war between coalition forces and insurgents, but not recorded as such. For instance, widespread use of local conflict resolutions over formal courts could, rather than reflecting an enduring cultural preference, be linked to safety and security, since government justice officials were explicitly targeted as government collaborators by insurgents and often remained holed up in fortified compounds in fear for their lives. As such, they were not particularly accessible to the local population and many districts were completely out of reach for any government official in any case. Moreover, the organisations carrying out such research, as long as they stood to prosper from continuing funding flows, had a vested interest in the reality that they set out to map. For instance, claims of local demand for informal justice might ensure a continuation of funding to these types of activities. One project evaluation even found that one of the organisations involved in the USIP pilot projects paid formal justice staff substantial amounts to refer cases to the *jirgas* set up by the organisation, doubtless inflating the number of cases that the latter 'solved' and thereby the appearance of a successful project.[46] More generally, the proliferation of interest in the informal and the traditional had taken place in the context of the growing difficulties facing Western attempts to stabilise Afghanistan. The procurers of mapping services were, after all, members of the NATO coalition and, despite claims of being Afghan-led, the direction of accountability in these activities went from the NGOs to Western capitals, via foreign embassies and military bases. As I show below, the very premise was to consolidate a certain political order.

Working locally by necessity

The tendency to circumvent national institutions became even more pronounced once the military expressed a direct interest in informal justice. This happened as US military forces began to articulate their strategy as counter-insurgency (COIN for short), as part of a reinvigorated effort to 'win the war' following the start of the Obama presidency. Explicitly modelled on colonial counter-insurgency wars, COIN framed the local population as rational actors whose support could be won over through the provision of desirable services such as protection and good governance. But, in Afghanistan, the COINistas, as they were sometimes called, soon determined that the national government was simply not up to the job. The Karzai administration was dismissed as too corrupt and incapacitated to deliver services on a scale anywhere close to what was needed. This led many military strategists to conclude that alternatives had to be found. Like many in the informal justice paradigm, COINistas came to view the national government and its institutions as having a dubious right to exercise monopoly over violence or adjudication. With a military victory at stake, support to informal justice was even a security imperative:

46 Arne Strand, personal communication June 2012.

> For the purposes of COIN there is not a 'longer term' in which to work. The longer it takes, the better for Taliban war aims. They are keen to portray the government as ineffectual and chronically corrupt. They are of course right. COIN operators, working locally by necessity, are not going to be able to correct the faults of a disastrously compromised elite, and a largely unco-ordinated international effort that might take decades to bring positive effect. The solution lies, as with so much in the world of COIN, in local solutions. Local solutions, however, often collide with national aspirations. The awakenings movement in Iraq, which extracted much of the sting from the Sunni resistance cells, was hardly compatible with aspirations for state monopoly on force. Similarly, local justice initiatives may not strictly be compatible with traditional ideas of the judiciary holding the monopoly on final adjudicative authority.[47]

By 2010, despite the vocal opposition in the Ministry of Justice working group, support to informal justice was becoming a mainstream policy amongst larger donors. The US Agency for International Development (USAID) was sufficiently convinced to change its justice strategy. No longer solely focused on the formal system, it divided its support into two components, one of which was support to informal justice conceptualised as a pilot programme to be implemented as a support function to military operations. According to the 'clear hold and build' doctrine of COIN, once an area was 'cleared' of insurgents through military operations, the next step was to establish a military 'hold' of the area, followed by the rapid provisions of the services it was assumed that the population wanted, hereunder justice ('build'). Thus, the tender document for USAID support to informal justice instructed:

> Upon arrival in a cleared district, the Contractor's Field Team will assess the status of the informal and state justice systems, as well as the specific needs of the community, through close consultations with tribal/informal justice actors (tribal elders, religious leaders, local government officials, and other community leaders). Within one week, the team will develop an action plan based upon the specific circumstances found.[48]

In fact, the NATO military saw themselves as being in direct competition with the Taliban, which was reported to have set up Sharia-based courts that by virtue of their 'speedy' nature held a 'comparative advantage' which 'is significant enough to persuade or coerce some members of the community that the Taliban can provide at least one service to the community more effectively than the Afghan government or their tribe'. The analogy of competition in a justice market resonated with the overall approach to justice as a service which has characterised much of the informal justice paradigm. But in Afghanistan around 2010 – at the apex of the NATO military campaign in the country – delivering this service became associated with higher stakes than ever since it was made into a matter of life and death. It removed even further the possibility of prioritising the content of justice over its mere delivery in any form.

Conclusions

In the end, the COIN doctrine that framed much of the Western military operations in Afghanistan eventually lost steam. Some of its key strategists exited the battlefield through a whirlwind of scandals, culminating in the resignation of Central Intelligence Agency Chief David Petraeus in late 2012. More seriously, the NATO coalition, whose commanders

47 F Ledwidge, 'Justice and Counterinsurgency in Afghanistan: A Missing link' (2009) 154(1) Rusi Journal 27.

48 USAID Statement of Work, Rule of Law Stabilization Program (RLS) Informal Component, United States Mission to Afghanistan, Attachment I (2010), USAID tender document on file with author, 6.

argued that they neither had the troop levels nor the political support to conduct COIN properly, gradually adopted a somewhat different strategy. They shifted to a combination of targeted assassinations and raids and the offloading of much of the fighting to local forces. Meanwhile, the interventions into informal justice themselves had changed rather noticeably, from the fine-tuned, subtle actions advocated by USIP into the much more standardised, rapid forms of intervention developed by USAID. With the gradual withdrawal of troops and funds from Afghanistan, it is difficult to predict the future shape of external involvement with the country's informal justice. At the moment, there appears to be a momentum, with USAID renewing its informal justice project until at least 2014[49] and others like the World Bank reportedly considering to enter the field as well.[50] There was, however, no apparent success in getting Kabul's sanction of the project's efforts 'to create accessible, efficient, holistic, equitable, and sustainable systems that can not only bring or improve justice and dispute resolution in these particular districts, but that can serve as tested models for adaptation and replication throughout Afghanistan'.[51] Even if the final version had been more to their liking, women activists had decided to lobby the President to take the law proposal on *jirgas* and *shuras* off the government's agenda, an objective they reported to have succeeded with in the spring of 2011.

The formulation of a new consensus pronouncing that external support to justice sector reform must include engagement with non-state justice 'providers' hinges on the claim that such forms of intervention are typically more in tune with local realities and demands. In other words, they are more legitimate. In this article, I have sought to problematise such assertions by exploring the actual practices through which these interventions might take place. I have pointed to how the discretion afforded to foreign experts in defining local reality leaves national actors with few avenues of reviewing or questioning decisions, let alone possibilities to realise a more transformative agenda. The events unfolding in Afghanistan also hint at other forms of intervention for which the focus on non-state actors might pave the way. In their quest for pushing through a policy that would bestow formal recognition to customary justice processes, external actors even took little notice of the protestations of the country's Supreme Court. As the question of national sanction was rendered increasingly irrelevant, external actors took to circumventing Kabul completely. Instead, they sought legitimacy in the 'need' to restore the *shuras* and *jirgas*, which they maintained, had solved the majority of disputes in Afghanistan for centuries.[52] What this amounted to was an institutionalised erosion of Afghanistan as a sovereign nation state, a reverting back to an imperial cartography of permeable borders. It was a form of appropriation where Western powers were free to choose what forms of political authority to validate, and under whose jurisdiction people in other countries should live.

49 USAID, *Afghanistan Rule of Law Stabilization Program: Informal Component (Phase 3)* (USAID 2012–2014).

50 Desai et al (n 7).

51 USAID (n 49).

52 John Dempsey and Noah Coburn, *Traditional Dispute Resolution and Stability in Afghanistan* (Peacebrief, United States Institute of Peace, 16 February 2010).

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Taking as giving, appropriation as access: transfers of land development rights and China's recent experiments

TING XU*

Queen's University Belfast

WEI GONG**

London School of Economics

Abstract

Economic development at both the domestic and global levels is associated with increasing tensions which are inextricably linked to the meaning and allocation of property rights, which has a great impact on appropriation of resources and may lead to different paths of development. 'Taking' – the appropriation of private land for public needs – is a typical example that exhibits those tensions, posing a challenge to the conventional conception of property as individualistic and exclusive rights of possession, use and disposition and to the associated neoliberal model of development. Should the individual landowner be left to bear the cost of a regulatory intervention which endures to the wider benefit of the whole community? How can the tensions between private ownership and public regulation be mitigated? If we take the liberal concept of property, then private property seems to be in constant conflict with public interests and wider social concerns. Meanwhile, community, situating between the state and the individuals, and community's relationship to development rights have not provoked enough discussion. The paper explores the different ways land development rights might be seen both in Western, essentially common law, systems and in China, especially now and in view of two case studies. An empirical example in Wugang, China, reveals the importance of integrating the 'community lens' proposed by Roger Cotterrell into studies of the transfer of land development rights. Reading through the community lens, taking could be giving and appropriation could also be access. This approach provides a new perspective to re-evaluate the relationship between legal appropriation and development.

Introduction

Economic development at both the domestic and global levels is associated with increasing tensions including those between the urban and the rural, efficiency and equity, private ownership and public regulation, the rights of individuals and of communities, and the North and the South. Those tensions are inextricably linked to the meaning and allocation of property rights, which has a great impact on appropriation of resources and may lead to different paths of development. 'Taking' – the appropriation of private land for public needs – is a typical example that exhibits those tensions, posing a

* Lecturer in Law t.xu@qub.ac.uk. The authors would like to thank Jean Allain, Gordon Anthony, Alison Clarke, Roger Cotterrell, Amanda Perry-Kessaris, John Morison, and Tim Murphy for deep and insightful comments.

** Research Officer w.gong2@lse.ac.uk.

challenge to the conventional conception of property as individualistic and exclusive rights of possession, use and disposition and to the associated neoliberal model of development.[1]

This article seeks to answer two closely related questions: should the individual landowner be left to bear the cost of a regulatory intervention which endures to the wider benefit of the whole community? How can the tensions between private ownership and public regulation be mitigated?

The article starts with a discussion of the challenges posed by economic development to the liberal/neoliberal conception of property. It then reviews the evolution of land development rights in Western, essentially common law systems, and in China, especially now and in view of two case studies.

Land development rights can be defined as 'the right to change the use of a parcel of land from one yielding a lower return [agricultural use] to a use yielding a higher return [urban residential, commercial, or industrial use], with consequent increase in its value'.[2] While recognising the importance of development rights in takings of land, practices in the US and UK have been largely confined to the liberal framework. By contrast, two case studies of China's recent developments in the transfer of land development rights[3] provide an alternative way of re-evaluating the two questions raised above. Empirical examples focus on the practices in Wugang and Chongqing in China, two pilot cities chosen by the Chinese government to experiment with the transfer of land development rights. Albeit with many limits, transfers of development rights in the these two cities have opened up possibilities of integrating local people, who are often excluded and sometimes exploited in land development, into the process of appropriation and allocation of land resources. Compared to US practice, Wugang's experiments highlight the importance of integrating the community lens proposed by Roger Cotterrell[4] into studies of the transfer of land development rights.

As an old social science concept, there are many interpretations of what community is or should be. Roger Cotterrell sees 'community' as networks of social relations held together by a variety of bonds (e.g. a convergence of economic interests, shared custom, common values) and based on mutual interpersonal trust.[5] Drawing on Weber's four types of social action (traditional, affectual, instrumentally rational and value-rational),[6] Cotterrell's 'networks of relations of community' encompass four ideal types of community: instrumental community, traditional community, community of belief and affective community. Cotterrell stresses the relations between law and community (rather

1 This model of development is often characterised by outright privatisation.

2 D Monson and A Monson, 'Development and Practice of British Planning Law' (1949–1950) 44 Illinois Law Review 779, 785.

3 The transfer of development rights is not limited to transfers of land rights, but is widely discussed in the context of climate change, the greenhouse effect and air pollution. The Kyoto Protocol in 1997, for example, has established a framework of trading in quotas or emission credits for carbon emission. Similar examples include tradable fishing quotas and transferable air-pollution permits. See e.g. C M Rose, 'Expanding the Choices for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to Old-Fashioned Common Property Regimes' (1999) 10 Duke Environmental Law and Policy Forum 45.

4 See e.g. R Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate 2006) 65–78; 'Community as a Legal Concept? Some Uses of a Law-and-Community Approach in Legal Theory', in R Cotterrell, *Living Law: Studies in Legal and Society Theory* (Ashgate 2008) 17–28.

5 Cotterrell, *Law, Culture and Society* (n 4).

6 M Weber, *Economy and Society: An Outline of Interpretive Sociology*, E Fischoff (trans) (University of California Press 1978) 23–26.

than an abstract 'society')[7] and the roles of law in expressing and strengthening the trust that binds different actors in relations of community. Different relations of community pose different regulatory problems.[8] Therefore successful regulation often depends on whether law could act as a communal resource, strengthening trust and co-operation within networks of relations of community.[9] This method contrasts the liberal/neoliberal approach to disembed law from wider social life and provides 'a sociological analysis of the role of law in economic life'.[10] Furthermore, such a communal approach to appropriation and development goes beyond many 'boundaries' entrenched in property law[11] including the public–private divide. This approach may help to resolve C B Macpherson's famous tensions between property as a right to exclude and property as a right of access.[12] Reading through the community lens, taking could be giving and appropriation could also be access.

Liberal property regime: a recipe for economic development?

The most-cited classical liberal concept of private property is William Blackstone's definition of property as 'the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'.[13] Such a perception of property as 'exclusive rights of possession, use, and disposition' has been strengthened by the economic analysis of law, which argues that property rights must be 'strong and clear' in order to preserve a well-functioning market and thereby promote economic growth.[14] This proposition remains influential in theoretical analysis[15] and has profound appeal to many development projects promoted by the World Bank and International Monetary Fund.[16] This conception of property points to a single development path, which is expected to be followed by all developing countries. However, many development paths have challenged the neoliberal assertion that property rights must be strong and clear. China's economic growth, for

7 In this approach, 'society is disintegrating into many different networks of social relations in and beyond nation states'. Cotterell, *Law, Culture and Society* (n 4) 65.

8 For discussion of the strengths and weaknesses of each type of community and its relation to law, see e.g. Cotterrell, *Law, Culture and Society* (n 4) 73–5, 154–58; Cotterrell, 'Community as a Legal Concept?' (n 4) 22–25.

9 See A Perry-Kessaris, *Global Business, Local Law: The Indian Legal System as a Communal Resource in Foreign Investment Relations* (Ashgate 2008); A Perry-Kessaris, 'Reading the Story of Law and Embeddedness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law?' (2011) 62(3) Northern Ireland Legal Quarterly 401. See also T Xu, 'Global Legal Transplants through the Lens of Community: Lessons for and from Chinese Property Law' in A Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context and Subtext* (Routledge, 2012) 167–80.

10 See R Swedberg, 'The Case for an Economic Sociology of Law' (2003) 32 Theory and Society 1, 1. See also R Cotterrell, 'Rethinking "Embeddedness": Law, Economy, Community' (2013) 40(1) Journal of Law and Society 49, 49.

11 For more discussion, see e.g. M Heller, 'The Boundaries of Private Property' (1999) 108 Yale Law Journal 1163.

12 C B Macpherson, 'Capitalism and the Changing Concept of Property' in E Kamenka and R S Neale (eds), *Feudalism, Capitalism and Beyond* (Edward Arnold 1975) 105–24.

13 W Blackstone, *Commentaries on the Laws of England, vol I: Of the Rights of Persons* (Clarendon Press 1766) 2.

14 Ronald Coase is most cited for this proposition: see e.g. 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1.

15 See e.g. R Epstein, *Takings: Private Property and the Power of Eminent Domain.* (Harvard University Press 1985); H De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Black Swan 2001); T Bethell, *The Noblest Triumph: Property and Prosperity through the Ages* (St Martin's Press 1998).

16 For criticism on this approach, see e.g. D Kennedy, 'Some Caution about Property Rights as a Recipe for Economic Development' (2011) 1(1) Accounting, Economics, and Law 1 <www.bepress.com/ael/vol11/iss1/3>; R Dyal-Chand, 'Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights' (2007) 39 Rutgers Law Journal 59; M Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (Basic Books 2010).

example, provides a counter-example that China's growth rate is high, while private property rights remain weak and vague. Furthermore, the liberal conception of property enshrines 'efficiency' but largely ignores 'equity' in the use and allocation of property rights. In doing so, it overlooks the question of who wins and loses in the process of appropriation and development and the necessity of looking for alternative property regimes and paths of development. Seen from the liberal perspective, any legislative restriction on one of the 'exclusive rights' is, prima facie, a taking,[17] including most forms of land acquisition for public needs such as zoning restrictions and eminent domain (also known as condemnation).[18] Indeed, taking often involves 'the conflict between private and public interests in the use of a piece of land'.[19] From the liberal point of view, such conflicts are irresolvable because appropriation of land for public needs, usually accompanied by government regulation, restricts appropriation of land resources by the individuals. A boundary between the public and the private is entrenched and is hard to cross.

Nevertheless, taking seems unavoidable in economic development in which land needs to be assembled for development projects. As the result of takings often involves economic loss of private parties,[20] compensation is one of the core issues in taking. For example, in the US, the private parties' entitlement to compensation depends on whether the taking is eminent domain, which is the process through which a government condemns a resource for a public use and compensation to private parties is required. Indeed, the idea that eminent domain should be coupled with compensation at 'fair market value' has been entrenched in the US Constitution.[21] If a taking is for 'public use' and if the owner is paid fair market value, the taking is justified. Yet, 'by implicitly understanding all property to be fungible' and 'fully interchangeable with money', the liberal conception of property acquiesces in the broad power of eminent domain.[22] So, the liberal concept of property leads itself to a paradox that it ironically justifies takings and leaves the eminent domain power uncontrolled.[23] Furthermore, eminent domain is embedded in a particular constitutional framework with which the US saddled itself in a pre-development era and may not be an effective mechanism to deal with new taking issues in recent economic development.

Indeed, it is often neglected that 'the ownership of property, in and of itself, is of little value to an individual. Instead, it is the owner's ability to put that property to a particular use that creates value in property'.[24] So, how should profits generated from the increase in land value due to development and change in use be distributed? Should ownership of land include a right to the development value (usually in the form of capital gain) that results from urban growth? Should the grant of compensation consider the fact that the owner may have developed a personal connection to the land[25] (this may also involve communal interest to that land)?

17 M J Radin, *Reinterpreting Property* (Chicago University Press 1993) 122.

18 Eminent domain refers to 'the power of any government body to compel a private owner to sell at a price fixed by a court. When government pays for property it is free of the constraint of the taking issue': see R H Platt, *Land Use and Society: Geography, Law, and Public Policy* (Island Press 2004) 278.

19 D Krueckeberg, 'The Difficult Character of Property: To Whom do Things Belong?' (1995) 61 Journal of the American Planning Association 301, 304.

20 J L Sax, 'Takings, Private Property and Public Rights' (1971) 81(2) Yale Law Journal 149, pp.150–151.

21 US Constitution: 'Nor shall private property be taken for public use, without just compensation' (the last clause of the Fifth amendment).

22 Radin (n 17) 136, 156.

23 Ibid 135–37.

24 J Stinson, 'Transferring Development Rights: Purpose, Problems, and Prospects in New York' (1996) 17(1) Pace Law Review 319, 322.

25 Radin (n 17) 142.

Taking as giving: the evolution and transfer of land development rights

Neoliberalists assume that the market does the whole job of allocation of resources. However, in contemporary society the state is 'doing more and more of the work of allocation'[26] in the form of regulation through which public rights are being increasingly inserted into private property. This has paved the way for the evolution and recognition of land development rights. For example, in the UK,[27] takings of private land for public use (in particular, the acquisition of land for development) are in the form of 'compulsory purchase',[28] which refers to 'the compulsory purchase of any land under powers conferred by or under any statute'.[29] Like the US, 'right to compensation' is one of the core issues in compulsory purchase and the compensation should be fair and include market value.[30] The question is whether the market value should include 'any betterment' which refers to 'any increase in the market value of the retained land attributable to the nature of, or the carrying out of, the relevant project'.[31]

International treatises and documents also stress the importance of regulation on land development and reasonable constraints on private property. For example, the pivotal property provision of the European Convention on Human Rights 1950 proclaims, in Protocol 1, Article 1, that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

The land policy of the United Nations (UN), first officially articulated at the UN Conference on Human Settlements (Habitat I) in 1976,[32] is along the same lines. The Preamble of Agenda Item 10(d) of the Conference Report says:

> Land . . . cannot be treated as an ordinary asset, controlled by individuals and subject to the pressures and inefficiencies of the market. Private land ownership is also a principal instrument of accumulation and concentration of wealth and therefore contributes to social injustice; if unchecked, it may become a major obstacle in the planning and implementation of development schemes. The provision of decent dwellings and healthy conditions for the people can only be

26 Macpherson (n 12) 117.

27 This article concentrates on the law of England. However, some aspects of the law on compulsory purchase apply throughout United Kingdom.

28 See e.g. T Allen, 'Controls over the Use and Abuse of Eminent Domain in England: A Comparative View' in R P Malloy (ed), *Private Property, Community Development, and Eminent Domain* (Ashgate 2008) 75–100. The origin of compulsory purchase lies in the Town and Country Planning Act 1947. Other pieces of major legislation include the Land Compensation Act 1961, the Compulsory Purchase Act (1965), the Town and Country Planning Act 1990, Planning and Compulsory Purchase Act (2004).

29 Law Commission, 'Towards a Compulsory Purchase Code: (1) Compensation, An Overview' (Law Com Consultation Paper No165, 2004) 4.

30 Ibid 6. However, in some cases, market value does not necessarily mean fairness. For example, individuals bought at the top of the property market a few years ago, but the market value fell and the individuals are being compensated for the market value of the property at today's prices. These situations are being condemned to negative equity. Thanks to Professor Gordon Anthony for raising this point.

31 Law Commission (n 29) 8.

32 Held in Vancouver, Canada, 31 May–11 June 1976.

> achieved if land is used in the interests of society as a whole. Public control of land use is therefore indispensable . . .[33]

Diverse measures[34] of public control of land (in particular of agricultural land on the periphery of urban areas) use are listed in Recommendation D2 of the report. Measures (ii) and (v) recognise land development rights. Measure (ii) specifies 'acquisition of development rights' along with 'the creation of land reserves and land banks'. Measure (v) emphasises 'co-ordination between orderly urban development and the promotion and location of new developments, preserving agricultural land'.[35] Furthermore, 'Recommendation D.3 recapturing plus value' provides that 'the rise in land values resulting from change in use of land . . . must be subject to appropriate recapture by public body (the community)'. Yet it is still difficult to answer the question: should the individual landowner be left to bear the cost of a regulatory intervention which endures to the wider benefit of the whole community? If we take the liberal concept of property, then private property seems to be in constant conflict with public interests and wider social concerns. Community, situating between the state and the individuals, and community's relationship to development rights, have not provoked enough discussion.

The evolution of the transfer of land development rights, a process emerging from zoning and city planning in the US since the 1960s, provides a vehicle not only for compensating betterment in the taking of private land for development but also an alternative for traditional ways of taking, such as eminent domain. The transfer of development rights is 'trading a development restriction on one property for the right to develop on another'.[36] The nature of the transfer of development rights is 'regulatory tools designed to facilitate land use planning',[37] setting a 'regulatory cap'[38] of land resources, usually for purposes of nature conservation and environmental protection. What are being transferred in the process are quotas or credits of land for future development.[39] Furthermore, the transfer of land development rights in the US could be interpreted as requiring that the state recognises ownership of land development rights by private owners, and the state must purchase the development rights from private owners or allow development rights to be traded freely in market as commodities. In this way, the transfer of land development rights could mitigate the harsh consequences associated with eminent domain and constitute a form of just compensation.

The most frequently cited of the many examples of the transfer of land development rights are the New York plan and the Chicago plan.[40] New York city began to experiment with the transfer of land development rights in 1961. The city restricted the use of the property on which historic landmarks are located and the owner may transfer his or her development rights to another property he or she owns in the receiving area.[41] In the New York plan, the land development right is vested in the same owner but can be transferred

33 <http://habitat.igc.org/vancouver/vp-d.htm>.

34 Such measures include zoning and land-use planning, purchase, compensated expropriation and fiscal controls such as taxation.

35 <http://habitat.igc.org/vancouver/vp-d.htm>.

36 Stinson (n 24) 330.

37 Ibid 324.

38 C Rose, 'The Several Futures of Property' (1998) 83 Minnesota Law Review 129, 164.

39 See e.g. V Renard, 'Property Rights and the 'Transfer of Development Rights': Questions of Efficiency and Equity' (2007) 78 (1) TPR 41; A D Ellerman, 'A Note on Tradeable Permits' (2005) 31 Environmental and Resources Economics 123.

40 M D Strugar, 'Transferable Development Rights: Robbing Peter to Pay Paul?' (1985) 62(4) University of Detroit Law Review 633, 634.

41 Ibid.

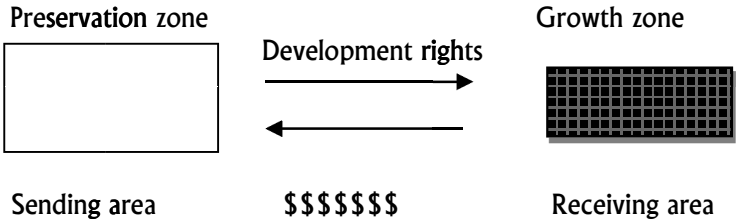

Figure 1. Transfers of development rights[42]

to different locations. The Chicago plan resembles the New York plan, but also departs from it: while restricting the use of the development of the plot of the land where historic landmarks are located, the city of Chicago allowed the unused development rights of that land to be transferred elsewhere as compensation to the owner.[43] Chicago city also set up a city-run 'development rights bank' through which land development rights were bought and sold. In cases where an owner did not wish to participate directly in the transfer of land development rights, the city had to purchase or condemn that preserved site and compensated the owner with land development rights in the form of cash from the profits generated from the bank.[44]

However, the transfer of land development rights is more than a form of compensation but, in fact, constitutes another form of taking, that is, the taking of development rights rather than ownership. At the same time, the transfer of land development rights can also be a form of giving. For instance, in the US examples, the development rights were taken away from the landowner in order to preserve the historic sites, but in the meantime value was given to both the local community (the continued pleasure/amenity of having a beautiful building preserved as part of their neighbourhood) and to wider communities (a building of artistic, architectural and historic importance is preserved as part of the national or world heritage). Furthermore, two other kinds of giving also happened in the transfers of development rights. First, land owners whose development rights had been taken were given in exchange the right to develop other land elsewhere (or money in lieu, supplied by landowners elsewhere who chose to buy the development rights from him/her). Secondly, the local community in the 'receiving area' was given local benefits provided by the enabled development in the receiving area and the wider community was given the benefits of a planned environment.[45]

In order for the giving to happen, the practice of transfers needs to integrate the 'communal dimension', that is, reconciling individualistic and exclusive ownership with communal interests and participation. This communal dimension is crucial for a successful transfer programme. Voluntary participation and public confidence in the value of transferred land development rights are particularly important.[46] For example, in order to avoid the situation that a biased regulation burdens one participant (whether the property owners or property developers) in a transfer programme, a comprehensive zoning plan needs to be drafted so that 'reciprocity of advantage' and 'consensus' can be achieved in order to 'benefit the entire community' and to 'maximise the efficient use of community resource and to minimise the deleterious consequence of development'.[47] This calls for

42 Platt (n 18) 272.

43 Ibid 635.

44 Ibid.

45 Thanks to Professor Alison Clarke for raising this point.

46 Stinson (n 24) 346.

47 Stinson (n 24) 349–51.

various participation and support from both the sending and receiving areas in order to strike the balance between overprotection of individual rights and state coercion.[48] The next section explores this issue further through two case studies of the transfer of land development rights in China.

The transfer of land development rights in China

Legal framework for land acquisition and the urban–rural divide

It may be useful to contextualise our central concerns by looking briefly at the Chinese legal system. Law-making in China is guided by a so-called principle that 'broad legislation is always better than detailed'. National law only provides general principles and needs to be complemented by various kinds of regulations for implementation. As a result, there exists a complex hierarchy of law-making power and legislative organs. Specifically, according to the Legislation Law of the People's Republic of China 2000, the National People's Congress and Standing Committee exercise state legislative power (Article 7). And only national laws may be enacted in respect of matters relating to 'acquisition of non-state assets' (Article 8(6)). The State Council enacts administrative regulations in accordance with the Constitution and national law in order to implement national law (Article 56). Various ministries and commissions under the State Council also exercise regulatory power and make administrative rules in accordance with national law, administrative regulations, and decisions and orders of the State Council in order to implement administrative regulations (Article 71). Local People's Congresses and Standing Committees make local decrees and local governments make local rules within their authorities (Articles 68, 71). In theory, the Constitution has the highest authority, followed by administrative regulations, which have higher authority than local decrees and administrative or local rules (Article 79). In reality, appropriation of land resources is often decided by different forms of regulation. Moreover, land acquisition is often empowered by local rules, which often contradict national law, leading to disputes and conflicts between local government and the people.

China's land system is underpinned by the urban–rural divide, an entrenched feature of the Maoist era (1949–1976). This divide generated and continues to generate inequality between rural and urban development in many respects, including social security, infrastructure investment, education and health care. Post-Mao, and especially in the post-Deng period (1992–present), legal and administrative distinctions between urban and rural become blurred.[49] Yet the land system remains an obstacle for bridging the urban–rural gap. Although equal protection of state, collective and private property is one of the important principles of Property Law 2007(Article 4), two kinds of unequal ownership exist in the contemporary Chinese land system.[50] Urban land is owned by the state, which can grant and allocate land-use rights, and local governments therefore can transfer these land-use rights. By contrast, while in law rural land is collectively owned, what constitutes 'the collectives' is ill-defined. The de facto owners are often local governmental authorities such

48 It is quite likely that a receiving area is too distant from the sending (preserving) area, and what is being protected in the sending area is hardly to be realised: see ibid 349.

49 Decollectivisation in 1978 loosened the control over the rural population on leaving the countryside, and urbanisation and rural industrialisation make the urban–rural boundaries blurred. The blurred boundaries are demonstrated in e.g. rural–urban migration and the rapid urban expansion.

50 A tri-ownership system, including state ownership, collective ownership and private ownership, has evolved and persisted. Property Law 2007 provides equal protection for public property and private property for the first time since 1949, but there is much debate over whether private property should be given the same status as public property. Furthermore, in contrast to the official, and indeed legal, support for *unitary* and *exclusive* property rights, the reality of the property regime has seen *fragmentation* of property rights in which de facto owners are multiple.

as administrative villages and the township-level government. Farmers may not in law dispose of their land freely and are vulnerable to compulsory land acquisition by the state.[51] In the process of urbanisation and industrialisation, rural land is generating significant profits; however, local governments, officials and property developers are enjoying these profits, while farmers are often excluded and sometimes exploited. Land acquisition is a typical example.

Land acquisition is the only way for farmers' land-use rights to enter into the market. Both the Chinese Constitution[52] and the Land Administration Law[53] specify that the state, in the *public interest*,[54] may lawfully acquire land owned by collectives. This sets the mechanism for compulsory land acquisition. The Land Administration Law states that compensation shall be given in accordance with the original use of the acquired land,[55] and the compensation is through a package that includes compensation for the land, resettlement subsidies and compensation for fixtures to, and young or green crops on, the acquired land. Article 42 of Property Law 2007 expands the scope of compensation to 'the premiums for social security of the farmers' in order to guarantee their normal lives and safeguard their lawful rights and interests. However, the compensation is still not specified to be paid at full market prices, not to mention the recognition of development rights. Indeed, without taking account of either the market value of the land and the land development rights, local governments can acquire rural land from farmers at a low price (e.g. RMB30,000–50,000 RMB/*mu*,[56] equivalent to US$321–535/hectare) and sell it to property developers at a high price (e.g. millions of RMB/*mu*). A great profit thus could be made because of the huge gap between these two different prices.

China's land policy

China needs to feed 1.3 billion people but arable land only constituted 13 per cent of the total land in 1996 and this figure decreased to 11.8 per cent in 2009.[57] Preserving 1.8 billion *mu* of arable land in order to ensure the country's food supply is a national policy. Guided by this policy, the Land Administration Law was revised in 1998 in order to exert strict control over the use of arable land. The central government has also formulated a master plan for land utilisation, which classifies the purposes of land use into agricultural use, construction use and unused. Land development must be in accord with the master plan,[58] and property developers need to apply for 'agricultural use land conversion quotas' (that is, the quotas that land for agricultural use can be converted to construction uses) set out in the master and annual plans.[59]

51 For more discussion, see T Xu, 'The End of the Urban–Rural Divide? Emerging Quasi Commons in Rural China' (2010) 96(4) Archiv für Rechts und Sozialphilosophie (the Archives for Philosophy of Law and Social Philosophy) 557.

52 Constitution 2004, Article 10(3).

53 Land Administration Law 2004, Article 2(4)

54 In China, the definition of public interest is at the discretion of the government in particular local governments. Many lavish commercial and industrial projects have been built in the name of public interest. For a recent review of the notion of public interest in a global context, see J Morison and G Anthony, 'The Place of Public Interest' in G Anthony et al (eds), *Values in Global Administrative Law* (Hart Publishing 2011) 215–38.

55 Land Administration Law 2004, Article 47

56 1 hectare=15 *mu*.

57 <http://data.worldbank.org/indicator/AG.LND.ARBL.ZS/countries> accessed 15 January 2013.

58 Article 23 of the Regulations on the Implementation of the Land Administration Law 1998, promulgated by the State Council on 27 December 1998; implemented on 1 January 1999.

59 See Article 19 of the Regulations on the Implementation of the Land Administration Law 1998, promulgated by the State Council on 27 December 1998; implemented on 1 January 1999.

Yet 'agricultural use land conversion quotas' set out in the land-use plans cannot always meet the need of land for development projects in the context of rapid economic growth and urbanisation. Furthermore, by the end of 2004, rural-to-urban migration left 4 million mu of land idle, populated only by low-density and abandoned farmers' residential plots. The State Council responded with a policy on 'consolidation of rural construction land' in 2004, encouraging farmers to consolidate their abandoned residential plots or to move into high-density residential blocks.[60] Then the land of their old residential plots could be converted to arable land, which means that construction land in rural areas may decrease subsequently, creating quotas for construction land in urban areas. A balance between the increase in urban construction land and the decrease in rural construction land could be achieved.

The transfer of land development rights in Wugang[61]

Wugang city (county level) is located in Henan province, central China. The city has 190 administrative villages (*xingzheng cun*) and 834 natural villages (*ziran cun*)[62] with a population of approximately 320,000. The city houses one of China's biggest iron and steel companies. A lake that runs through the city with beautiful mountains surrounding it has made Wugang a popular tourist destination in recent years.

The experiment with the transfer of land development rights in Wugang is made possible by a larger rural reform project – 'merging villages into planned neighbourhoods', colloquially referred to the measure of 'linking up the increase in urban construction land and the decrease in rural construction land' discussed above. In 2005, the Ministry of Land and Resources issued a proposal to standardise this measure and began the experiment with 'merging villages into planned neighbourhoods' in five provinces including Shandong, Jiangsu, Hubei, Sichuan and Tianjin in 2006.[63] The experiment has expanded on a nationwide scale since 2009. As a pilot city for this experiment in Henan province, Wugang has begun to relocate farmers to condensed residential places such as newly built flats in residential blocks in the rural area. New planned neighbourhoods have been formed. Farmers have also been offered houses and flats cheaper than the market price and subsidies and loans without interest for house purchase. Land previously used for rural residence, unused land, and land abandoned by villagers who have moved to the cities as rural migrant workers has been converted into farmland. The conversion created extra quotas (land development rights) for construction land, which could be transferred to and used in developing cities and towns. Overall, the amount of construction land has not increased and the amount of arable land has not decreased.

The city government aims to merge 834 villages into four towns and 17 planned neighbourhoods. There are nine planned neighbourhoods under construction to be finished by 2015. So far 27,000 *mu* (1800 hectare) of land has been made available for urban construction.[64] New neighbourhoods have been constructed according to their local advantages in industry, trade or service. In those neighbourhoods close to industrial areas, farmers could get new jobs in the factories. For example, Shangcao community at Tieshan

60 'Decision on Land Administration Reform', No 28 (2004), State Council.

61 The empirical material is gathered from both authors' fieldwork in Wugang, China in August 2011. We interviewed local officials and farmers who participated in the transfer of land development rights.

62 'Natural villages' emphasises villages 'in the sense of what is local and long-standing', while 'administrative villages' refers to 'the collective' or 'sub-government institutions'. See S Feuchtwang, 'What is Village?' in E B Vermeer et al (eds), *Cooperative and Collective in China's Rural Development: Between State and Private Interests* (M E Sharpe 1998) 47.

63 'The measure of linking up the increase in urban construction land and the decrease in rural construction land' (Ministry of Land and Resources 2005)

64 Data collected from interviews with local officials.

town is close to a shoe factory which employs more than 6000 workers. These neighbourhoods also provide many opportunities for farmers to engage in trade or service. For example, Zhangzhuang community of Yinji town is a tourist destination located in a beautiful area of reservoir basin. Farmers often live in newly built two-level houses. They live on the ground floor and the first floor is used as bed and breakfast accommodation. Yinji town is also a production centre for traditional Chinese medicine, providing many job opportunities for local farmers. Farmers have formed new networks of social relations based on common commercial interests and professional specialisations, that is, 'instrumental (economic) community'.

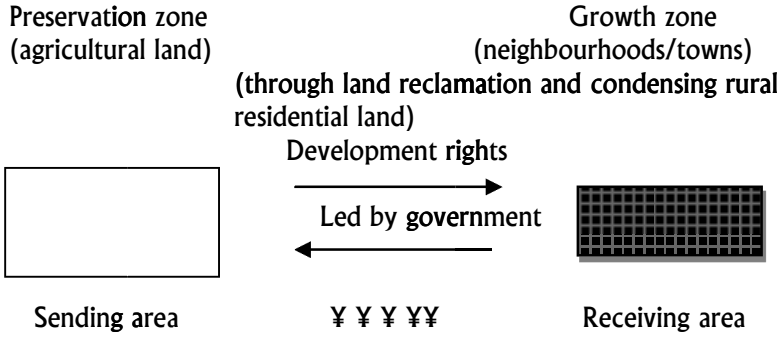

Figure 2: The transfer of land development rights in Wugang, China[65]

The transfer of land development rights in Chongqing: land tickets transfer[66]

Chongqing is a major city in southwest China and one of the four directly controlled municipalities by the central government. It is the largest municipality located in inland China, comprising 19 districts and 21 counties.[67] As one of the fastest urbanising cities in China, by the end of 2010, Chongqing's urban resident population had reached 15.29 million which constituted 53 per cent of the total 33.03 million population.[68]

Chongqing was chosen by the National Development and Reform Commission as an 'experimental zone for comprehensive integration of urban and rural development' in June 2007. As part of the experiment, in 2008, Chongqing set up a Rural Land Exchange Centre, a division of Chongqing Bureau of Land and Resources, in which land tickets (*dipiao*, land quotas or credits), equivalent to land development rights, can be traded. The processes usually include: rural land in remote areas (usually abandoned land by farmers who have migrated to cities or new land made available through 'merging villages into planned neighbourhoods') is reclaimed and converted into new farmland; the increase of farmland and the subsequent decrease of rural construction land generate new quotas for urban land that could be used for construction purposes; the Rural Land Exchange Centre combines separate quotas generated by consolidation of small pieces of land (e.g. 0.3 *mu* of construction land generated from one small piece of land) into a large bundle (e.g. hundreds of *mu* of construction land), which constitutes a land ticket; land tickets are then sold to various kinds of property investors and developers including the Urban Development

65 This model is based on Platt's (n 18) Figure 1.

66 Empirical material is gathered from the second-named author's fieldwork in Chongqing, China in March 2012. The author interviewed local officials especially those in the Rural Land Exchange Centre and farmers.

67 Chongqing Survey Yearbook 2011 (China Statistics Press 2011) 4.

68 Ibid 3.

Investment Companies,[69] state-owned enterprises, private enterprises or property developers through auctions at the Rural Land Exchange Centre; finally, the Rural Land Exchange Centre distributes the income from selling the land tickets to farmers whose residential plots have been converted into farmland for making new quotas for construction land. As farmers (strictly speaking, the households) only hold land-use rights and village committees 'own' rural land ownership, farmers are entitled to around 85 per cent of the income and the village committee is entitled to around 15 per cent of the income. Distribution of income among farmers is according to each household's contribution to generating one land ticket. However, acquiring land quotas does not mean gaining real land. Companies which have successfully acquired land quotas only have entitlements to using land for urban development. They still need to go through the processes of bid and auction held by another division of the Bureau of Land and Resources in order to buy land use rights for construction purposes. Developers must also ensure that redevelopment of the land is in accordance with city land planning. Furthermore, there is no second-level market for trading land development rights.

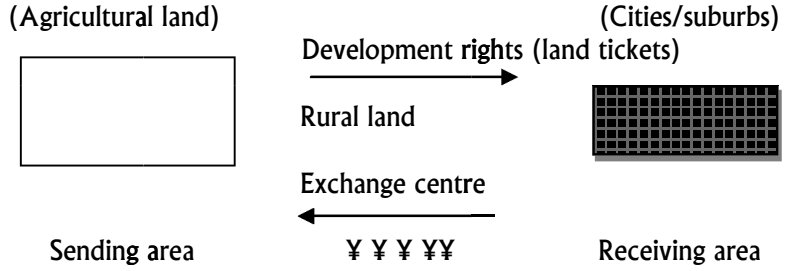

Figure 3: The transfer of land development rights in Chongqing[70]

Eleven auctions held by May 2010 at the Exchange Centre have raised land quotas amounting to 1200 hectares (18,000 *mu*) of land, equivalent to 1.9 billion yuan. Official policy makes it clear that profits generated in the trade of land tickets shall be reinvested in agricultural and rural development as well as spent as compensation to villages and farmers for housing demolition and as subsidies for building new houses. The exchange of land tickets has enabled profits generated from the process of urbanisation and the expansion of the urban land market to trickle down into the hands of farmers. It also created possibilities for a unified urban and rural land market.

Wugang and Chongqing experiments compared

In Wugang, the measure of linking up the increase in urban construction land and the decrease in rural construction land can only be applied within the administrative jurisdiction at the country level. To put it another way, land development rights (quotas) generated for construction use can only be used in the same area where rural land has been consolidated. So, the sending area and receiving area are within the same locality or at least close enough. The disadvantage of this restriction may be that the compensation standard is often set very low, because the land development rights are usually transferred to newly built neighbourhoods or towns close to the sending area. Although subsidies and loans are provided for farmers, the compensation does not amount to market values of the acquired land. Yet, since the receiving area is close to the sending area, the rural area has gained

69 The Urban Development Investment Companies act as land development agents for local government.

70 This model is based on Platt's (n 18) Figure 1

opportunities for development, while arable land could still be preserved, both constitute important kinds of giving. The Wugang experiment also stresses the importance of community in the process of development. Although the construction of planned neighbourhoods is mainly led by the government and driven by economic motivation, it has considered 'non-economic' components of economic networks[71] that farmers could keep emotional or sentimental attachment to the rural land, while enjoying developmental opportunities as members of the newly formed community.

In Chongqing, administrative boundaries may be crossed through the exchange of land tickets. Land tickets raised in the remote rural areas are traded together with land tickets raised in the suburban areas of Chongqing with the same price through auctions and bids. Therefore one of the advantages of this experiment is that farmers in the remote area could get a relatively high level of compensation. However, as the receiving area is too distant from the sending area, real development is concentrated on cities and their peripheries, which may enlarge the gap between the rural and the urban areas. Furthermore, most successful bidders of land tickets are the Urban Development Investment Companies, commercial property developers and manufacturing enterprises. Before acquiring land tickets, they usually have a considerable amount of land already reserved in hand but not yet within city planning and thus not ready for development. Getting land tickets 'legitimises' the use of their already reserved land but may create monopolies of land. Moreover, these bidders have often cultivated 'under-the-table' relationships with the local government and among themselves, which help them to lower the prices in the bidding processes. Unlike the transfer of land development rights in the US, which may mitigate the harsh consequences of takings of land ownership, the transfer of land development rights in Chongqing actually creates more quotas for 'takings' of rural land ownership. Problems are also centred on: how to allocate land transfer income; how to avoid excessive involvement of local governments; and how to make sure that farmers participate in the transfer of development rights voluntarily?

Conclusion: taking as giving, appropriation as access through the community lens

What constitutes community? Is it only limited to the sense of geographical entities? What is the relationship between community and law? We have briefly outlined Cotterrell's 'law-in-community' approach in the introduction, and this approach is not without criticism. Simon Roberts, for example, argues that:

> [Cotterrell] proposes that state law should reach out to co-ordinate and facilitate the operation of plural legal orders at the level of 'community'. Some of these accounts tell a story of the covert expansion of state power, and of increased opportunities for coercion and manipulation.[72]

However, Cotterrell does not intend to prescribe, but offers a method to observe and explain the penetration of state power into the private sphere in the form of regulation, which now seems an irreversible trend. Furthermore, it is often easy to label Cotterrell's approach as an 'ideal-type' Western theory. However, the approach is in nature a methodology, and is not characteristically Western.[73] In fact, the community lens proposed by Cotterrell is a useful method that could be applied to the Chinese context. Take the Wugang experiment, for example: community is never a static entity. Farmers keep moving out of the villages and forming new kinds of community, transforming old networks of social relations and creating new ones. In the transfer of land development rights in

71 Cotterrell (n 10), 56.

72 S Roberts, 'Domesticating the Sociology of Law' (2008) 71(1) Modern Law Review 132, 142.

73 See Cotterrell, 'Community as a Legal Concept?' (n 4) 17–18.

Wugang, the sending and receiving areas are dynamic networks of social relations rather than static geographical entities. Some effective aspects of the regulation strengthen and facilitate trust, co-operation, and reciprocity of benefits among different actors of community (for example, farmers, local governments and private developers). Furthermore, although there are always clashes and overlaps between different networks of social relations, one network of community is often dominated by one type of social relations. For example, the newly formed community in Wugang is dominated by instrumental social relations that engage with market activities and share the benefits of urban development. Nevertheless, this does not mean that the old social relations have disappeared or regulation should not take the old social relations into account. In Wugang, while being located to new neighbourhoods, farmers still keep emotional attachment to the farmland and tradition and custom are not entirely abandoned, due in part to the arrangement that the receiving area is close to the sending area.

The community lens also sheds light on rethinking the relationship of legal appropriation and development. As Radin argues, a system of property holding needs to be justified by community participation.[74] Krueckeberg also points out that 'rights to personal use of property are fundamental to individual and social well-being; rights to profit from property, in contrast, have always been subject to reasonable constraints for the benefit of the entire community and the society'.[75] Property is social relations, encompassing entitlements and obligations. Property law governs 'the contours of social relations'.[76] The community lens helps to look at diverse communal relations existing between individual autonomy and state control, offering opportunities to explore plural property regimes. Stressing the community lens is important to avoid the limits of public/private dualism and to reconcile the tensions between private property and public regulation.

Taking, appropriation of private land for public use, often points to a right of exclusion. However, in our evaluation of Wugang's experiment with the transfer of land development rights, the community lens helps to show the possibility of appropriation as right of access. Although farmers' land development rights were taken for purposes of preserving arable land, new networks of social relations were formed based on farmers' common economic interests and professional specialisations through which they were able to access alterative development opportunities ('participatory development') in newly formed neighbourhoods. In this context, appropriation, being read through the community lens, is not just about the right to exclude but also the right to access, and taking could also be giving. Stressing the community lens provides a useful vehicle to rethink not only the practice of the transfer of land development rights but also the relationship between legal appropriation and development. Law will often face the dilemma that law steals or is stolen by development, unless law recognises the importance of networks of social relations. This is not simply recognising that the capital gain by urban development should return – at least the large part of it – to the community. More importantly, law needs to engage with different networks of social relations, strengthen trust and co-operation among different actors in relation of community. Finally, as the networks of social relations transcends the boundaries of the nation state, cutting across the local and the globe, the community lens would also be useful for analysing law and development issues on a global scale. And this will be the subject of another paper.

74 Radin (n 17) 164.

75 Krueckeberg (n 19) 307.

76 J W Singer, *Entitlement: The Paradoxes of Property* (Yale University Press) 61.