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Regina Jefferies

Feminist Curiosity about International Constitutional Law and Global Constitutionalism

Jenna Sapiano¹ & Beverley Baines²

I. Introduction: A Space of Feminist Resistance

The constitution is gendered and has been for centuries. Male voices and masculine notions of rationality that date from the Enlightenment set the intellectual origins of modern Western constitutions. A discursive narrative of the rationality of ‘the people’, mainly understood to be male and white, was the basis for the philosophies that gave rise to the current understanding of constitutionalism. Power, at that moment in time, was also vested in men, and constitutional law, in its domestic variety, being gendered, gives priority to the place of men. Likewise, the international is also often a site of the masculine that often denies women (but also many others) access to avenues of political agency.³ The language of international politics, be it about security or diplomacy, is often masculine, where strength and superiority are valued over cooperation and equality. Empirically, women are often not present at the international level, where men continue to dominate politically and professionally in law and governance.

Dianne Otto, in conversation with Anna Grear on the realities of feminist analysis and future spaces of feminist resistance, argued that ‘[w]e are desperately in need of new ways of creating, framing, understanding and applying international law, which enhance rather than diminish the importance and power of local, national and

¹ Jenna Sapiano, Postdoctoral Fellow, Centre for Gender, Peace and Security, Monash University. We wish to thank several people for reading earlier versions of this article, including Professor Anthony Lang. We also wish to extend our thanks to the two reviewers whose comments proved invaluable. All errors remain our own.

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³ As an example of where women’s agency is denied and women are delegated to the role of ‘beautiful souls’ (Jean Bethke Elshtain, *Women and War* (University of Chicago Press 1987)), Ratna Kapur argues that the international women’s right movement has developed the understanding of violence against women in such a way as to reinforce the women as the victim subject. This image is transnational, although Kapur argues that the ‘Third World victim subject has come to represent the more victimized subject’, and that this focus ‘reinforces gender and cultural essentialism’. Ratna Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 15 *Harv. Hum. Rts. J.* 1, 2. We acknowledge this line of reasoning and suggest that it has a necessary role in the fictional exchanges set out in this article. However, Kapur goes farther in her argument than we do here in taking an intersectional post-colonial feminist approach.

transnational movements for social justice and liberatory change.⁴ This article makes a modest attempt to add to this space of feminist resistance by composing fictional exchanges between feminist scholars of constitutional law, international law and International Relations on the presence of constitutionalism at the international/global level.⁵

Constitutionalism constitutes, preserves, and sometimes limits the exercise of power, but does not have the capacity to accord agency where none previously existed or where the intention to create it is absent.⁶ Agency is capacity and activity that may be prevented or assisted by power as entrenched authority. If the intention is there, constitutionalism can accord agency through language, institutional structures, or aspirational objectives. Constitutionalism, historically conceived of and applied to the domestic space, is finding its way into the lexicon of international law and politics, in practice and scholarship. Constitutional language and values from the national level to the international level point to an emerging international constitutional method, while the increased constitutionalisation of the international system is grounds on which international law is taking on constitutional features.

In the scholarship on this topic we see two distinct strands of research. These strands reflect two distinct points of view on the process of constitutionalism/constitutionalisation – as a horizontal process, where a constitutional order is understood to be emerging at the global level, or a vertical process, where there is increased porousness between the national and international.⁷ Adopting the terminology already used in the literature, we label these fields ‘**International Constitutional Law**’ and ‘**Global Constitutionalism**’. In this article, we explore the importance of constructive exchanges between and among these two fields of scholarship to promote women’s constitutional agency. In what follows, we fashion conversations between International Constitutional Law and Global Constitutionalism scholars on three core concepts of feminist constitutionalism: equality, inclusion, and agency. Within these three conversations, we imagine the beginnings of an exchange between pairs of scholars. Such exchanges should yield insights about substantive norms, as well as about processes, that promote the role of

⁴ Dianne Otto and Anna Grear, ‘International Law, Social Change and Resistance: A Conversation between Professor Anna Grear (Cardiff) and Professorial Fellow Dianne Otto (Melbourne)’ (2018) 26 *Fem. Leg. Stud.* 351, 352.

⁵ It may be that international/global constitutional structures and frameworks exist only in the imagination of scholars and that claims of an emerging global or international constitutional order are greatly exaggerated. Even so, the international level already evinces notions of constitutions, constitutional law, and constitutionalism. That there are fields of scholarship exploring constitutional frameworks and language at the international/global level may be the first stage to the real emergence of such an order. Whether it does now exist is not the subject of this article.

⁶ ‘Agency’ according to Irving ‘entails inclusion, access to, and effective participation in, decision making, both in the political-legal sphere and with respect to one’s person.’ Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (CUP 2008), 3.

⁷ We posit that the divide between these fields also reflects a disciplinary one between law and politics; however, this distinction is not obvious from the small selection of scholars with whom we engage in this article.

feminist analysis and critical thinking and the position of women at all levels of power and the everyday.

The small size and limited scope of our inquiry does not yield a conclusion but rather a hypothesis for future research. We hypothesise that research by women who are Global Constitutionalism scholars relies on *gender inclusivity* to subvert patriarchal scholarship whereas that of their International Constitutional Law counterparts invokes *gender specificity* to confront patriarchy. Gender inclusivity and gender specificity both conceptualise valid feminist approaches. A gender inclusive approach challenges power relations from a gender-blind perspective, whereas a gender specific approach recognises and challenges male/female power relations. We argue that inclusivity and specificity are precisely the gender regimes that Global Constitutionalism and International Constitutional Law scholars would respectively justify had we given them the opportunity. We suggest that these concepts open a space for gender-blind/gendered exchanges between the two sets of scholars using a discourse that is familiar to both.

II. Defining International Constitutional Law and Global Constitutionalism

International Constitutional Law and Global Constitutionalism have no settled definitions. The consequence of this is a ‘cacophony in ... discourse’⁸ where definitions are contextual to the intention of the author or the project. Our intention is not to add further noise to this cacophony but to understand both concepts to exist on a continuum in which International Constitutional Law focuses more on internationalising domestic constitutional law and constitutionalising international law, and Global Constitutionalism on whether the supra-state context might have or need a constitution or constitutional order.

The scholars who speak of or engage in International Constitutional Law tend to be looking to legal frameworks. On the other hand, Global Constitutionalism is mainly about process and norms. International Constitutional Law assumes that international legal frameworks exist around constitutional mechanisms and that international legal rules have a constitutional function.⁹ In a sense, International Constitutional Law is most concerned with rules – rules that transcend international and constitutional law. International Constitutional Law in our taxonomy is vertical – it is the ‘bringing up’ of human rights law from the domestic into the international, and the transportation of international law ‘back down’ into the domestic constitution, whereas Global Constitutionalism is concerned with political and legal global

⁸ Cormac Mac Amhlaigh, ‘Harmonizing Global Constitutionalism’ (2016) 5 *GC* 173, 179.

⁹ Jean d’Aspermont, ‘International Legal Constitutionalism, Legal Forms, and the Need for Villains’ in Anthony F. Lang Jr. and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017), 155-169, 159.

structures, institutions, and processes. In other words, the horizontal interactions at the global level are the primary concern of Global Constitutionalism scholarship.¹⁰

Perhaps what most distinguishes International Constitutional Law from Global Constitutionalism is the significance given to the state and state borders. International Constitutional Law maintains the relevance of national boundaries,¹¹ while Global Constitutionalism begins to identify and anticipate greater links between the individual and the global that transcend the state. International Constitutional Law captures the interactions that are happening between the international and the state, that is, the vertical relationship between international law and constitutional law. This interaction moves in both directions so that international law may influence domestic constitutional law, just as domestic constitutional law may guide international law. Global Constitutionalism is, put simply, replication at the global level of the constitutional structures and processes of constitutionalisation that have a long history within the state. International (and regional) institutions are central to the process of constitutionalisation. Those who see evidence of, or advocate for, the emergence of a global constitutional order point to the European Union as the quintessential example; however, some will also point to the World Trade Organization and the United Nations as demonstrating ‘constitutional qualities.’

We explore the possibility that International Constitutional Law and Global Constitutionalism rely on distinctive assumptions about gender in the internationalisation/globalisation of constitutional norms. Moreover, these assumptions are opaque. For decades scholars have sought transparency by applying a feminist lens first to national constitutions,¹² then to International Constitutional Law,¹³ and most recently to Global Constitutionalism.¹⁴ This article also pursues transparency albeit from a novel approach. We focus on International Constitutional Law and Global Constitutionalism scholars whom we identify as feminist to analyse how they include gender in their work. Our exploration suggests they conceptualise gender differently depending on whether their work falls within International Constitutional Law or Global Constitutionalism.

We do not advocate for one concept over the other but suggest that discursive exchanges between exemplaries of each field of study are necessary to open a space of resistance for the promotion of gender equality, inclusion, and agency. We select these three concepts as ideals to open space to feminists for exchange, which sets the theme for this article. They are also part of the discourse that all the scholars use and shape, and which are concepts applicable to feminism, but also constitutionalism and

¹⁰ See Anthony F. Lang Jr. and Antje Wiener, ‘Introduction’ in Anthony F. Lang Jr. and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017), 1-20.

¹¹ E.g. Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (OUP 2009).

¹² E.g. Donna Greschner, ‘Can Constitutions Be for Women Too?’ in Dawn Currie and Brian MacLean (eds), *The Administration of Justice* (Social Research Unit 1986), 20.

¹³ E.g. Dianne Otto, ‘Introduction’ in Dianne Otto (ed), *Gender Issues and Human Rights* (Edward Elgar 2013).

¹⁴ Ruth Houghton and Aoife O’Donoghue, ‘Can Global Constitutionalism be Feminist?’ in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019).

constitutional law. If such an exchange were to transpire, it could move feminist inquiry beyond transparency to transformation of the scholarly assumptions about including gender in the re-internationalisation/globalisation of constitutional norms. We cannot, however, predict reconciliation or compatibility, rather we advocate for a space of engagement, in line with Otto's invitation to build a space of feminist resistance.

III. Feminist Curiosity

The theory of feminist curiosity frames our approach. Cynthia Enloe developed this theory to inform her international research about women in contexts of war, conflict, and militarization.¹⁵ According to Enloe, 'the idea of feminist curiosity is empowering because it suggests that what makes you a feminist are the questions you might ask, not just the answers you offer.'¹⁶ Feminist curiosity led her to pose two questions: 'Where are the women?'¹⁷ and 'What do these people do there, wherever this "there" is?'¹⁸ She asked these questions of a wide range of elites and non-elites in many research contexts although she did not advert to women scholars. However, we invoke her first question to identify women as International Constitutional Law and Global Constitutionalism scholars. We maintain that this approach is consistent with her contention that researchers should 'pay attention to all sorts of women in all sorts of circumstances because they are *analytically interesting*.'¹⁹

Moreover, our research suggests that the constitutional imaginaries²⁰ that distinguish Global Constitutionalism and International Constitutional Law scholarship also differentiate *where* the Global Constitutionalism and International Constitutional Law women are. This distinction contributes to the centrality of the few women who are Global Constitutionalism scholars relative to the many women International Constitutional Law scholars who are siloed. We suggest that questioning who centred and siloed them, and 'who benefits from them being there but not somewhere else'²¹ could form the basis for women who are Global Constitutionalism and International Constitutional Law scholars to initiate a conversation irrespective of whether it leads to a reconciliation, compatibility or even an alliance.²²

¹⁵ Cynthia Enloe, Anita Lacey, and Thomas Gregory, 'Twenty-five Years of *Bananas, Beaches and Bases*: A Conversation with Cynthia Enloe' (2016) 52 *JSoc* 537, 540.

¹⁶ *Ibid*, 541 continuing: 'It also allows us to be more candid about what we don't know.'

¹⁷ *Ibid*, 542.

¹⁸ *Ibid*.

¹⁹ Cynthia Enloe, 'Resisting Lazy Political Analysis: Crafting a Feminist Curiosity to Make Sense of International Politics' (2017) 9 *Alternatif Politika* 317, 319 (emphasis in original).

²⁰ Oliviero Angeli, 'Global Constitutionalism and Constitutional Imagination' (2017) 6 *GC* 359, 375.

²¹ Enloe, 'Twenty-five Years' (n 15), 542.

²² Her findings led Enloe ('Twenty-five Years' (n 15), 549) to encourage women to take seriously the strategy of creating alliances because 'patriarchy is constantly being updated in order to perpetuate the privilege of certain forms of masculinity.' Enloe would encourage us to seek more than transparency. Given her warning that 'patriarchy really is sustainable,' we worry that distinctive feminist approaches to gender, especially if they are mutually exclusive, could preclude impactful feminist resistance. Thus, Enloe's call for women's alliances merits serious consideration

Enloe's second major question, 'What do these people do there, wherever this "there" is?',²³ invites us to consider three criteria – 'people,' 'do,' and 'there'. In our research, the 'people' are women scholars because they palliate Enloe's concern that: 'Rarely are women seen as the explainers or the reshapers of the world.'²⁴ What they 'do,' whether implicitly or explicitly, is gender analysis; and 'there' is wherever patriarchy is in International Constitutional Law and Global Constitutionalism scholarship.²⁵ Elaborating these criteria makes it apposite to re-frame Enloe's question to ask: What is the work that gender does in International Constitutional Law and Global Constitutionalism scholarship? We address this question by exploring how gender inclusivity and gender specificity inform the writings of four women whom we identify as International Constitutional Law scholars – Hilary Charlesworth and Christine Chinkin on women's equality and security,²⁶ Catharine A. MacKinnon on freedom from sexual violence,²⁷ Ruth Rubio-Marín on gender parity²⁸ – and three writings by their Global Constitutionalism counterparts – Antje Wiener on contestation,²⁹ Anne Peters on proportionality,³⁰ and Seyla Benhabib on democratic iterations.³¹ We chose these writings for their subject matter – equality, inclusion, and agency – rather than their authors.

We maintain that the subject matter of each paper is central to the illumination of gender in the internationalisation/globalisation of constitutional norms. Moreover, despite the differences in their conceptualisations of gender, the authors share the same perspective about which norms – namely, equality, inclusion and agency – are fundamental to any form of constitution-making, whether domestic, international, or global. What they share provides a platform for opening an exchange about their differences. We make no claim, however, that they are the only papers by these authors that we could have selected.

by the feminist scholars whose work we approach in this article. We do not advocate for alliances here (although likewise, would not reject them). Rather, we seek to open spaces of engagement, not to suggest what these scholars (or any others working in these fields) should think. To do so would detract from their agency, which they hold as respected scholars.

²³ Enloe, 'Twenty-five Years' (n 15), 542.

²⁴ Cynthia Enloe, *Bananas, Beaches and Bases: Making Feminist Sense of International Politics* (2nd ed., University of California Press 2014), 34.

²⁵ *Ibid*, xvi expressing her long held 'hunch ... [that] patriarchy is ingeniously adaptable.'

²⁶ Hilary Charlesworth and Christine Chinkin, 'An Alien's Review of Women and Armed Conflict' in Dale Stephens and Paul Babie (eds), *Imagining Law: Essays in Conversation with Judith Gardam* (University of Adelaide Press 2016), 171-194.

²⁷ Catharine A MacKinnon, 'Creating International Law: Gender as Leading Edge' (2013) 36 *HJL&G* 105.

²⁸ Ruth Rubio-Marín, 'Women in Europe and in the World: The State of the Union' (2016) 14 *IJCL* 545.

²⁹ Antje Wiener, *A Theory of Contestation* (Springer 2014).

³⁰ Anne Peters, 'Proportionality as a Global Constitutional Principle' (2016) MPIL Research Paper No. 2016-10, available at SSRN: <https://ssrn.com/abstract=2773733>, last accessed 16 July 2019.

³¹ Seyla Benhabib, 'The New Sovereignism and Transnational Law: Legal Utopianism, Democratic Scepticism and Statist Realism' (2016) 5 *GC* 109.

The authors of the papers we chose are European, Australian or American experienced senior scholars. There were many other women International Constitutional Law scholars we could have chosen, although the pool of women Global Constitutionalism scholars is significantly smaller. Self-identification as feminist was not a criterion for selection. Nevertheless, none would question that feminism permeates the work of Charlesworth, Chinkin, MacKinnon, Rubio-Marín, and Benhabib, as well as being transparent in the early scholarship by Wiener³² and Peters.³³ In other words, we attribute to all of them a past or present engagement with feminism, which we define broadly. We do not make any claim as to the strength of their scholarship or feminist approach over other feminist scholarly approaches. We selected these seven scholars to indulge our ‘feminist curiosity,’ not to assume that they share a uniform feminist approach or even shared experience and definition of gender other than that it can refer to women.

Our exploration is limited to a singular piece of work by each scholar (or in one case pair of scholars). We explain how it leads us to suggest that gender specificity informs the scholarship of International Constitutional Law feminists and gender inclusivity, that of their Global Constitutionalism counterparts. Effectively, their scholarship makes transparent different concepts of gender. Feminist analysis in International Constitutional Law is sexualised in that it siloes the women who challenge its gendered nature. The International Constitutional Law women we identify in this article are powerful and vocal feminist critics; all have well-deserved reputations as eminent scholars doing outstanding work. However, what is siloed is the feminist perspective that they adopt, the consequence of their gender specificity. Even as they are taken seriously, the position they work from is still very much pushed to the sidelines of the discipline. The feminists working on Global Constitutionalism whose scholarship we engage within this article, similarly acclaimed scholars, write within gendered and patriarchal structures, albeit, from the centre of the academic discipline. That their analysis is also sexualised is not transparent because they take a gender inclusive approach. Further, we note that International Constitutional Law scholars give greater attention to rights, while Global Constitutionalism scholars focus more on processes, which, as we have already suggested, may be a consequence of their training in law or politics, or a reflection of their assumptions on the globalisation of the international space. In sum, the six papers we explore represent a small-scale qualitative research project that yields the hypothesis that International Constitutional Law and Global Constitutionalism feminist scholars adopt different concepts of gender – gender specificity and gender inclusivity respectively – on which they rely to confront patriarchal scholarship.

³² Antje Wiener, ‘Identity-Power-Politics or Social Movements Inside Out: A Critical Feminist Perspective on Social Movements’ (2004) Latin American Studies Association, Pittsburgh, March 10-12, 1994, available at SSRN: <https://ssrn.com/abstract=2097699>, last accessed 16 July 2019.

³³ Anne Peters, *Women, Quotas and Constitutions: A Comparative Study of Affirmative Action for Women under American, German, EC and International Law* (Kluwer Law International 1999).

The following table illuminates our categorisation, even as we acknowledge that in practice there can be no such conceptual rigidity.

	INTERNATIONAL CONSTITUTIONAL LAW	GLOBAL CONSTITUTIONALISM
	<i>specificity / rights</i>	<i>inclusivity / process</i>
EQUALITY	equality and security (Charlesworth and Chinkin)	contestation (Wiener)
INCLUSION	freedom from violence (MacKinnon)	proportionality (Peters)
AGENCY	parity (Rubio-Marín)	democratic iterations (Benhabib)

In general, the benefits of dialogues are significant and recognised by other scholars. Thomas Müller maintained that dialogue could refine ‘conceptual and analytical tools’³⁴ which, applied to our project, might reduce any instability introduced by different concepts of gender. Enloe contended that avoiding dialogue could be ‘one of the reasons why patriarchy persists.’³⁵ Cogently, Barbara Havelkova argued that any approach that is not one-sided could be transformational,³⁶ portending the ‘gender-progressive’ empowerment of women.³⁷ In sum, these discursive exchanges have the (as yet unrealised) potential to transform how feminist scholars conceptualise gender in the internationalisation/globalisation of constitutional norms.

Any exchanges between these feminist scholars must benefit both sides if they are to be productive. For example, a dialogue might lead International Constitutional Law scholars to question whether being siloed in a fragmented constitutional imaginary is more likely to re-inscribe patriarchy than the experience of Global Constitutionalism scholars whose work has centrality to a holistic constitutional imaginary. On the other hand, a conversation might encourage Global Constitutionalism scholars to question whether gender inclusivity is more likely to instantiate patriarchy than to overcome it as the gender specific regime International

³⁴ Thomas Müller, ‘Global Constitutionalism in Historical Perspective: Towards Refined Tools for International Constitutional Histories’ (2014) 3 *GC* 71, 73.

³⁵ Enloe, ‘Twenty-five Years’ (n 15), 548.

³⁶ Barbara Havelková, *Gender Equality in Law: Uncovering the Legacies of Czech State Socialism* (Hart 2017), 2.

³⁷ *Ibid*, 15-16 relying on the Beijing Platform for Action which ‘strives to empower women through “removing all the obstacles to women’s active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making ... and the eradication of all forms of discrimination on the grounds of sex”.’

Constitutional Law scholars intend. Of course, dialogues may move beyond either/or choices to yield both/and configurations. But they must happen before we can know the outcomes.

IV. Feminists Do Gender

This section re-frames Enloe's second question to ask of feminist scholars: What is the work that gender does in your scholarship on International Constitutional Law and Global Constitutionalism? Gender is a contested concept. In 1995 the Beijing World Conference on Women adopted the goal of gender equality.³⁸ Scholars construe gender as a social category that connotes the possibilities of change, unlike sex, which if construed as a biological category, is a barrier to change. However, gender remains synonymous with women in much international discourse and as such is subject to criticism.³⁹ One response to this criticism is to treat gender as performative, viewing women's international participation as different from men's not for inherent biological reasons but rather because it is socially constructed.⁴⁰ Another response, and the one we adopt, is to understand gender as an interdependent or relational concept 'which means that changing ideas about women necessarily involves changing ideas about men.'⁴¹ Expressed relationally, the concept prods International Constitutional Law and Global Constitutionalism scholars to justify the gender regimes they influence and structure.

Typically, gender works to promote relations of specificity or inclusivity. In constitutional law, gender specificity seeks to remediate legally constructed barriers that perpetuate women's vulnerabilities and hence inequalities. Examples of employment legislation that could be subject to gender specific constitutional challenge are laws that require women to retire at a younger age than men or that do not provide for pregnancy leave and benefits. On the other hand, gender inclusivity creates legal arrangements that enable women's agency through processes that are advertently and genuinely equal. Examples of family dissolution laws that might not be subject to gender inclusive constitutional challenge are custody laws that give primacy to the best interests of children and division of matrimonial property laws that assess non-monetary contributions. Our research findings suggest vulnerability and agency are precisely the assumptions that underlie the concepts of gender specificity and gender inclusivity that feminist International Constitutional Law and Global Constitutionalism scholars would respectively justify given the opportunity for dialogue. We base this hypothesis on the following exploration of International Constitutional Law and Global Constitutionalism scholarship.

³⁸ Fourth World Conference on Women, 'Beijing Declaration and Platform for Action' A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

³⁹ Brenda Cossman, 'Gender Performance, Sexual Subjects, and International Law' (2002) 15 *CJLJ* 281, 282.

⁴⁰ Catherine Powell, 'How Women Could Save the World, If Only We Would Let Them: From Gender Essentialism to Inclusive Security' (2017) 28 *YJLF* 271, 276.

⁴¹ Otto (n 13).

A. On Equality

This section re-narrates Hilary Charlesworth and Christine Chinkin's analysis of how two international instruments address women's insecurities and inequalities. Next, we describe Antje Wiener's theory of contestation as exemplified in the context of international security governance. The section concludes with some questions relevant to equality that these scholars might raise in a fictional conversation.

i. Equality and Security

Hilary Charlesworth and Christine Chinkin contrasted the 'flurry of international activity' expressed through normative development and rhetoric over two decades with its 'little effect' on violence against women in and after armed conflict situations.⁴² First, they reported how all-encompassing this violence is. It includes sexual violence, rape, abductions, forced domestic work, forced marriage, forced nudity designed to sexually humiliate, forced pregnancy, abuse in refugee camps, unequal access to training and economic opportunities, little or poor reproductive health care, difficulty dealing with menstruation when living in tents and lacking adequate sanitary facilities, diminished access to housing, land and property, aggravated poverty, harsh burdens of caring for children, family and others, and so on.⁴³ Then they explained how two recent international instruments adopted on the same day in October 2013 – UN Security Resolution 2122⁴⁴ and UN Convention on the Elimination of Discrimination against Women ('CEDAW') Committee General Recommendation No. 30⁴⁵ – manifest different approaches to addressing women's insecurity and inequality in and after armed conflict.⁴⁶

Security Council Resolution 2122 reiterated earlier resolutions calling for women's participation and perspectives in international peace and security efforts. It also made a modest effort to consolidate 'more fleeting references to women's equality in earlier resolutions.'⁴⁷ However, Charlesworth and Chinkin criticised it for failing to challenge the 'priority given to coercive action through military power' and the 'deeply gendered nature of security discourse and practice.'⁴⁸ Their critique highlights the priority the Security Council gives to state interests. In effect, non-intervention trumps humanitarian relief.

⁴² Charlesworth and Chinkin (n 26), 176.

⁴³ *Ibid.*, 172-176.

⁴⁴ UN Security Resolution 2122, S/RES/2122 (2013), 18 October 2013, available at <http://unscr.com/en/resolutions/doc/2122>, last accessed 16 July 2019.

⁴⁵ UN Committee on the Elimination of Discrimination against Women, General recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations, 18 October 2013, available at <https://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf> last accessed 16 July 2019.

⁴⁶ Charlesworth and Chinkin (n 26), 176.

⁴⁷ *Ibid.*, 182.

⁴⁸ *Ibid.*, 184.

Unlike Resolution 2122 wherein the Security Council focused primarily on security, General Recommendation No. 30 originated from a non-governmental body, the expert committee set up under CEDAW. The Committee deployed it to require that State and non-State actors address ‘the root causes of armed conflict’ and recognise that ‘reparation measures must seek to rectify structural inequalities.’⁴⁹ In other words, Recommendation No. 30 focused on violence as a form of discrimination. The emphasis on inequality is not surprising given its CEDAW antecedents. Indeed, Charlesworth and Chinkin credited the Recommendation with not only seeking changes for women but also attempting to influence the Security Council to ‘broaden, strengthen and operationalize gender equality.’⁵⁰ Nevertheless, its subscription to gender equality also posed several potential problems.

For instance, it illuminated a fragmentation between the two instruments, the one subsumed under the norm of international security and the other gender equality. This fragmentation led Charlesworth and Chinkin to ask: ‘How has the generation of principles and norms on women and gender in different parts of the UN affected the possibilities for feminist transformations at the international level?’⁵¹ Another criticism they voiced was that Recommendation No. 30 fails women because it assumes structural disadvantage and economic hardship render them vulnerable, imaging them as victims, not agents. Thus Recommendation No. 30 was also problematic, albeit differently so from Resolution 2122.

However, Charlesworth and Chinkin did not use their failures to condemn either instrument. They understood that despite their limitations these instruments represented the affirmation of women’s rights to security and equality, rights that might be invoked to assist women trapped in the dangerous consequences of armed conflict. Regrettably, their research also underlined how little difference Resolution 2122 and Recommendation No. 30 make to the security and equality of women in these conflict situations. As Charlesworth and Chinkin realistically concluded, a puzzling dissonance remains ‘between the[ir] bold aims and prescriptions ... and their impact on States.’⁵²

ii. Contestation

Antje Wiener’s monograph on the theory of contestation addressed the dissonance between international norms and their impact. She exemplified her theory in the context of security governance, its norms and implementation at the global level. Wiener explored contestation not as a norm but rather as a social activity or practice that is usually expressed through discourse and never through violent acts.⁵³ Discursively, it typically involves expressing disapproval of fundamental norms. The norm-constituting stage precedes and gives rise to it, while the rule implementing stage follows it. In other words, the innovative thrust of Wiener’s theory of contestation was

⁴⁹ *Ibid*, 187, 188.

⁵⁰ General Recommendation No. 30 (n 45) quoted in Charlesworth and Chinkin (n 26), 193.

⁵¹ Charlesworth and Chinkin (n 26), 193.

⁵² *Ibid*, 191.

⁵³ Wiener (n 29), 1.

the espousal of an ‘imagined intermediary level’⁵⁴ that she characterised as the ‘referring’ stage.⁵⁵ It is at this level or stage that she called for establishing ‘organizing principles,’ especially ‘the principle of contestedness as a meta-organizing principle of governance in the global realm.’⁵⁶ This principle reflects democratic constitutionalism’s assumption of the citizen’s right to contestation vis-à-vis the state, then shifts it from the domestic realm to that of global governance.⁵⁷ Wiener theorised contestation as putting organising principles, including the principle of contestedness, on the agenda of global governance.⁵⁸ Organising principles are important; they might be ‘a potential stabilising force of global governance.’⁵⁹

The objective of Wiener’s theory of contestation is to fill the ‘gap between generally agreed and well-justified norms on the one hand, and relatively specific and often highly disputed rules and regulations.’⁶⁰ Traditionally, this agreement takes place at the norm constituting stage and the disputation at the rule implementation stage. However, Wiener moved the disputation to an intermediary or referral stage and repurposed it as contestation. In effect, she created a space for ‘stakeholders’ who practice contestation.⁶¹ The category of stakeholders is broader than the individual norm-users or designated norm-followers who might have disputed the norms at the implementation stage. Rather the concept of stakeholders has a social connotation, extending as it does to ‘those who claim a legitimate interest in a policy.’⁶²

Moreover, Wiener conceptualised these stakeholders ‘as proactive rather than reactive’, maintaining they should have ‘access to regular contestation.’⁶³ Thus, she pre-empted conflict at the implementation stage by designing a space for routine contestation earlier.⁶⁴ If contestation were not routine, that is if it were *ad hoc*, it would not suffice to fill the gap between fundamental principles and standardised procedures because the gap is not about legality, it is a legitimacy gap.⁶⁵

To illuminate this legitimacy gap between generally accepted fundamental norms and contested compliance at the implementation stage, Wiener explored three sectors, one of which was security governance. In this sector, the meta-norms are non-intervention, sovereignty, and civilian inviolability.⁶⁶ The contested micro-norms found at the implementation stage consist of UN Charter articles and regulations, *etc.*⁶⁷ Despite the broad appreciation of the macro-norms, the contestation of the micro-

⁵⁴ *Ibid*, 3.

⁵⁵ *Ibid*, 34.

⁵⁶ *Ibid*, 3.

⁵⁷ *Ibid*, 4.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *Ibid*, 3.

⁶² *Ibid*.

⁶³ *Ibid*.

⁶⁴ *Ibid*, 53.

⁶⁵ *Ibid*, 3.

⁶⁶ *Ibid*, 65.

⁶⁷ *Ibid*.

norms – involving, for example, the decision about military intervention in Iraq – ‘has become the rule rather than the exception.’⁶⁸ Wiener argued against considering that this outcome means that the meta-norms are weak.⁶⁹ She proposed instead negotiated normativity at the intermediary or referring stage. Accordingly, her theory of contestation would fill this gap by adopting, as an organising principle, the Responsibility to Protect. While the Responsibility to Protect doctrine had not yet emerged as a legal norm, it nevertheless appears to lend legitimacy to international actors that engage its standards. As Wiener put it, ‘even the most powerful United Nations member states – go to quite some length in order to legitimate their action, whether in accordance with international law or not.’⁷⁰

iii. Fictional Exchange on Equality between Charlesworth and Chinkin and Wiener

Between Charlesworth and Chinkin and Wiener, we imagine two meta-level conversations about substantive norms and global processes. Effectively questions might arise from Wiener about Charlesworth and Chinkin’s ascription of normativity to women’s rights. On the other hand, Charlesworth and Chinkin might wonder about Wiener’s query about who has access to contestation. Wiener might be puzzled about Charlesworth and Chinkin’s treatment of women’s security and equality rights as fundamental norms rather than implementation rules. Although these rights derive from instruments created by international bodies, Charlesworth and Chinkin attribute them to women, not to states.

In contrast, the fundamental norms addressed by Wiener (i.e., sovereignty and non-intervention) are states’ rights. There is a disjunction between whether these norms protect women or states. Charlesworth and Chinkin might ask Wiener if she attributes agency to women and, if so, how women might avail themselves of contestation given their victimhood. When Charlesworth and Chinkin expose the failures of Resolution 2122 and General Recommendation No. 30 and Wiener finds it necessary to theorise contestation, are these feminist scholars seeking to improve the rule of law or to identify rule by law at the international and global levels respectively?

B. On Inclusion

This section sets out an abbreviated version of Catharine A. MacKinnon’s analysis of gender crime jurisprudence at the international level, followed by a synopsis of Anne Peters’ theory of proportionality as a principle of international law. It concludes with a fictional exchange of questions about inclusion that MacKinnon and Peters might ask of each other.

⁶⁸ *Ibid*, 66.

⁶⁹ *Ibid*, 67.

⁷⁰ *Ibid*, 68.

i. Freedom from Violence

Catharine A. MacKinnon analysed the evolution of gender crime from its genesis in domestic law to its current state in international law.⁷¹ Essentially gender crimes ‘happen because of gendered and sexualized roles, meanings, stereotypes, and scripts socially assigned to groups on the basis of their sex.’⁷² MacKinnon conceptualised sex crimes as ‘gender-based.’⁷³ She contended they must be understood as ‘criminal forms of sex discrimination: crimes of sex inequality.’⁷⁴

Moving specifically to the international level, MacKinnon reported a series of cases demonstrating that regional systems in Europe, Latin America, and Africa had begun to develop the insight that gender inequality is central to crimes of sexual violence.⁷⁵ Her review of decisions by *ad hoc* tribunals set up under the international criminal justice system revealed an implicit or tacit acceptance of the concept of gender crime.⁷⁶ The real breakthrough came, however, with the provisions articulated in the Rome Statute of the International Criminal Court.⁷⁷ The Rome Statute defined crimes against humanity as including: ‘rape, slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’ and ‘persecution against any identifiable group or collectively on ... gender ... grounds.’⁷⁸ It also listed forms of sexual violence as war crimes.⁷⁹ These provisions changed gender crime ‘from tears in the eyes of women’ to ‘an international crime.’⁸⁰

In the first few years from its inauguration, the Office of the Prosecutor gave effect to the Rome Statute’s gender crime provisions when he convicted three men: Thomas Lubanga Dyilo (DRC), Germain Katanga (DRC), and Jean-Pierre Bemba (Central African Republic).⁸¹ He also issued arrest warrants for gender crimes against two men who are fugitives: Omar al Bashir (Sudan) and Joseph Kony (Uganda).⁸² MacKinnon characterised the International Criminal Court prosecutions for gender crimes as ‘remarkable,’⁸³ given ‘laws against gender crime are largely not obeyed, domestically *or* internationally.’⁸⁴ Moreover, convictions become even more extraordinary.

⁷¹ MacKinnon (n 27), 105.

⁷² *Ibid*, 105-106.

⁷³ *Ibid*, 105.

⁷⁴ *Ibid*, 106.

⁷⁵ *Ibid*, 106-107.

⁷⁶ *Ibid*, 108.

⁷⁷ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

⁷⁸ MacKinnon (n 27), 108, fn 16 citing Rome Statute arts. 7(1)(g), 7(1)(h).

⁷⁹ *Ibid*, citing Rome Statute art. 8(2)(e)(vi).

⁸⁰ *Ibid*, 109.

⁸¹ *Ibid*, 111.

⁸² *Ibid*.

⁸³ *Ibid*, 113.

⁸⁴ *Ibid*, 114 (emphasis in original).

Asking why the International Criminal Court took ‘such an exceptional path,’⁸⁵ MacKinnon contended that distance attenuates the male bond.⁸⁶ By male bond, she meant what all men know about gender crimes: men with power can commit them and will allow certain other men to commit them; gender crimes are not the real rules.⁸⁷ Distance matters because: ‘When the men observing do not identify so closely with the doers of the acts, they are more likely to see what they are actually doing to women.’⁸⁸ More specifically, distance is what the International Criminal Court represents; it opens the ‘opportunity ... to act on what women know.’⁸⁹

MacKinnon’s analysis about the impact of distance applied both to the design of the Rome Statute wherein international political actors included very detailed enumerations of what constitutes gender crime, and to the prosecutions and convictions by the International Criminal Court. Her affirmation of the value of the Rome Statute and the International Criminal Court prosecutions elides political and judicial actors, theorising them as working in tandem. The political actors created the international statute; the International Criminal Court acted as its guardian. There was no contest. Or if there was a contest, it was not between the various United Nations member states who requested the men be charged with the gender crimes and the women who were the victims. They were to all intents and purposes on the same side.

ii. Proportionality

In contrast, proportionality is all about constituting sides. Or as Anne Peters put it, proportionality is about forging relationships between different things.⁹⁰ The size, number, and types of things may differ, but proportionality requires their relationship be ‘appropriate.’⁹¹ ‘Disproportionality,’ she explained, ‘is thus a “wrong” relationship.’⁹² Like MacKinnon, Peters identified the historical origins of the legal concept of proportionality. In 1794, almost two centuries before the creation of the concept of gender crime, a Prussian jurist ‘invented’ proportionality.⁹³ Currently, it is found in the language or jurisprudence of many national and some regional constitutions.⁹⁴ Peters also reported its appearance in various areas of international law, including armed conflict, human rights and trade.⁹⁵

Peters characterised proportionality as a principle of international law that is without ‘a substantive standard of conduct.’⁹⁶ Instead, it is ‘a technique or method to

⁸⁵ *Ibid*, 115.

⁸⁶ *Ibid*, 120.

⁸⁷ *Ibid*, 116.

⁸⁸ *Ibid*, 120.

⁸⁹ *Ibid*, 121.

⁹⁰ Peters (n 30), 1.

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ *Ibid*.

⁹⁴ *Ibid*, 2.

⁹⁵ *Ibid*, 3.

⁹⁶ *Ibid*, 6.

determine such a measure of conduct in the light of the specific circumstances.’⁹⁷ Moreover, as an international principle, proportionality comes in three versions distinguishable by the relationships implicated by the circumstances. The horizontal version refers to the relationship between states, typified by the law of countermeasures; the diagonal version, to the relationship between a national public interest and the interest of individuals in, for example, human rights protection or international humanitarian law; and the vertical version, to the relationship between a global public interest in, for example, free trade and particular interests of states.⁹⁸

The rationale for the principle of proportionality in the horizontal version is ‘to prevent escalations.’⁹⁹ It could weigh in on the side of either state. However, the rationale for proportionality in the diagonal version is one-sided because it invokes ‘international law ... and an international legal regime ... to guarantee that the interests of the individuals ... are safeguarded.’¹⁰⁰ When international human rights law is invoked to guarantee individual interests, it is ‘seen as being in the global public interest.’¹⁰¹ In other words, the rationale for proportionality in the diagonal version is very significant. It changes the nature of the contest from being one between a national public interest and individual interests to one between a national public interest and the ‘global public interest.’¹⁰² Finally, the rationale for proportionality in the vertical version promotes the global public interest in free trade, for example, by applying international law to limit exceptions to World Trade Organization obligations.¹⁰³ In all three versions, therefore, the proportionality principle is a technique for intervening in the reconciliation of disputes specifically by requiring ‘verification and criticism’ at the international level.¹⁰⁴

To support her main argument, which was for classifying proportionality as a global constitutional norm, Peters offered four reasons the most important of which was that it ‘reduces fragmentation and thus plays the constitutional role of creating unity.’¹⁰⁵ As an example, she referred to the law of armed conflict which allows ‘collateral damage’ to civilians only if it is not ‘disproportionate’ to anticipated concrete and direct military advantage.¹⁰⁶ In theory, the balance is tilted slightly to the protection of civilians if the principle of proportionality is performing its functions of coordinating and harmonising the differences between international humanitarian law and human rights.¹⁰⁷ However, the reality is that the balancing ‘is often to the

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, 7.

¹⁰⁰ *Ibid.*, 9.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, 10.

¹⁰⁴ *Ibid.*, 12.

¹⁰⁵ *Ibid.*, 14.

¹⁰⁶ *Ibid.*, 16, fn 61 citing International Criminal Court for the former Yugoslavia, Appeals Chamber, *Prosecutor v Galić*, Judgement, IT-98-29-A, 30 November 2006, para. 190.

¹⁰⁷ *Ibid.*

disadvantage of the civilian population.’¹⁰⁸ For instance, courts may rely on the assessment of a ‘reasonable military commander’ who expects a massive military advantage and only an isolated loss of civilian life.¹⁰⁹ Nevertheless, Peters is convinced proportionality has the potential to work against the fragmentation of international law.¹¹⁰

Moreover, Peters cited studies that showed proportionality substantially contributed ‘to a strengthening of the judicial role’ both domestically and internationally.¹¹¹ From the perspective of the alternative of self-help, proportionality-infused judicialisation is an improvement. Balancing has its deficiencies, not least of which is the ‘considerable leeway’ it gives judges to evaluate and ‘weigh’ competing interests.¹¹² A lack of predictability and the potential for judicial authoritarianism should not be denied. These problems led Peters to suggest judicial restraint when reviewing domestic balancing decisions whilst leaving open the ‘prospect of possibility of being subjected to such review.’¹¹³ Her reference to restraint and review supported the suggestion that she limited her argument for proportionality to the importation of the protections contained in non-criminal international law.

iii. Fictional Exchange on Inclusion between MacKinnon and Peters

Since MacKinnon and Peters examined very different contexts – gender crimes and proportionality respectively – can they have a feminist conversation and if so to what end? What they share are reflections on international courts, criminal and non-criminal, and the values they ascribe to international law. That may be enough to start a conversation. MacKinnon might ask Peters whether the proportionality principle should play any role in the International Criminal Court gender crime prosecutions and, if so, what role? Might the gender crime provisions in the Rome Statute make proportionality redundant or, worse, dangerous for victims of sexual atrocities? For her part, Peters might ask MacKinnon whether the Rome Statute’s failure to advert to protecting gays and lesbians as such might become a context in which the victims of gender crimes could resort to non-criminal rules of litigation and avail themselves of proportionality’s protection. Finally, given that MacKinnon praised the International Criminal Court for applying the gender crimes provisions of the Rome Statute and Peters believes that the judiciary could be persuaded to apply proportionality to protect civilians from collateral damage in armed conflict, we should ask each scholar to explain how her approach is consistent with judicial independence and the separation of powers.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, 17 citing works by Alec Stone Sweet & Jud Mathews (fn 65), Armin von Bogdandy & Ingo Venzke (fn 66), and Judith L. Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter (fn 67).

¹¹² *Ibid.*, 18.

¹¹³ *Ibid.*, 19.

C. On Agency

This section briefly reviews Ruth Rubio-Marín's assessment of the state of parity in Europe and Seyla Benhabib's development of the concept of democratic iterations. It concludes with questions that aspire to understand the concepts of agency that infuse both analyses.

i. Parity

When Ruth Rubio-Marín delivered the 2016 keynote address at the annual European University Institute State of the Union conference themed 'Women in Europe and the World', to those who might question the decision to devote the State of the Union to women, she responded: 'is it ever the right time to ask the Woman question?'¹¹⁴ Her answer was an emphatical yes, because 'in spite of formal legal status, women in Europe, who make up more than half the population, remain an oppressed group.'¹¹⁵

Citing Iris Young's five faces of oppression – violence, exploitation, marginalisation, powerlessness, and cultural imperialism¹¹⁶ – Rubio-Marín offered evidence that women in Europe experience violence from sex trafficking, rape, sexual harassment, cyberstalking, abuse including sexual abuse of migrant women, asylum seekers, refugees, and differently abled women, and intimate partner abuse.¹¹⁷ Exploitation and marginalisation exist from low employment rates, the gender pay gap, lower or no pensions, occupational segregation in less lucrative sectors, part-time work, and the burden of most of the housework.¹¹⁸ The low numbers of women on corporate boards, lack of parity in political representation, and the failure of many women to break through the glass ceiling evidence powerlessness.¹¹⁹ The absolute failure of society to acknowledge the social value of care work illustrated cultural imperialism, that is, the 'androcentrism, which political theorist Nancy Fraser defines as an institutionalized pattern of cultural value that privileges traits associated with masculinity, while devaluing everything coded as feminine.'¹²⁰ Cultural imperialism also surfaces in the heteronormativity and religious and ethnic imperialism that lesbians and transgender women, adult Muslim women who wear headscarves, and Roma women all face.¹²¹

Rubio-Marín advocated a European response that would diverge from the neo-liberal model of capitalism and adopt a more inclusive model of development that integrates a gender perspective.¹²² More specifically, she recommended adoption of the substantive norm of parity democracy, that is, the 'equal representation of women in

¹¹⁴ Rubio-Marín (n 28), 546.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, 547 citing Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 2011), 40.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, 548-549.

¹¹⁹ *Ibid.*, 549.

¹²⁰ *Ibid.*, 549-550 citing Nancy Fraser, 'Feminist Politics in the Age of Recognition' in Nancy Fraser (ed) *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis* (Verso 2013), 162.

¹²¹ *Ibid.*, 550.

¹²² *Ibid.*, 553.

every site of decision-making.¹²³ Parity challenges ‘male dominance, as men perceive gender-based hierarchy to be their last bastion of comfort and sense of self in a context of emasculation.’¹²⁴ Moreover, parity has relevance beyond Europe to all forms of international and global governance, as well as to scholarly endeavours such as national, international, and global publications, conferences, and classrooms.

ii. Democratic iterations

Seyla Benhabib argues against contemporary legislators, jurists, and scholars who would resist the force of transnational law including conceptions of global governance, labelling them the ‘new sovereigntists.’¹²⁵ They argue that transnational law and court decisions pose threats to democratic self-determination.¹²⁶ For Benhabib the contrary is true: ‘transnational human rights and constitutional rights do not stand in contradiction to one another’ even when they diverge.¹²⁷ Instead, transnational law can enhance popular sovereignty and strengthen democratic sovereignty.¹²⁸ However, political theorists will continue to be anxious about the loss of democratic control and self-determination if they continue to confuse popular with state sovereignty.¹²⁹

Benhabib next addresses the question of how human rights norms or principles enshrined in transnational agreements relate to constitutional rights.¹³⁰ Her response is that transnational documents contain ‘core concepts of human rights which ought to form an aspect of any conception of valid constitutional rights.’¹³¹ In other words, the norms ‘permit a variety of instantiations’ of the rights.¹³² To illustrate, the norm of gender equality allows France and Germany to adopt versions of parity whereas the United States rejects parity in favour of non-discrimination legislation that does not apply to political parties.¹³³

Over the past decade, Benhabib has developed the concept of ‘democratic iterations’ to address the contentious interaction political and legal scholars face between law and politics.¹³⁴ Like contestation and proportionality, democratic iterations are processes that encompass ‘argument, deliberation and exchange.’¹³⁵ They enable universal human rights claims to be ‘contested and contextualized,

¹²³ *Ibid.*

¹²⁴ *Ibid.*, 554.

¹²⁵ Benhabib (n 31), 111.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, 112.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, 113.

¹³⁰ *Ibid.*, 118.

¹³¹ *Ibid.*, 119.

¹³² *Ibid.*

¹³³ *Ibid.*, fn 10 citing two anti-discrimination statutes that do not apply to political parties: Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) and Title IX, Education Amendments of 1972, 20 U.S.C.

¹³⁴ *Ibid.*, 122.

¹³⁵ *Ibid.*

invoked and revoked, posited and positioned.¹³⁶ These iterations may take place in 'legal and political institutions as well as in the associations of civil society.'¹³⁷

Democratic iterations are important because they facilitate the reinterpretation of transnational norms to give them shape as constitutional rights.¹³⁸ In other words, they transform meaning, causing original meanings to lose their authority. While courts are primary sites of norm iteration, democratic iterations occur in legislative sites.¹³⁹ Ultimately, democratic iterations serve as a basis for deciding about the 'legitimacy of a range of variation in the interpretation of a rights claim.'¹⁴⁰ The dilemma is to figure out when 'democratic iterations have taken place rather than demagogic processes of manipulation or authoritarian indoctrination.'¹⁴¹ The fact that democratic iterations can be national or international complicates this dilemma.¹⁴²

Benhabib uses the example of the gender equality in the Tunisian constitution to warn this does not mean 'acceptance of dominant Western moral values.'¹⁴³ For instance, some Moroccan women's groups reject strict equality and seek 'complementarity,' claiming it is compatible with a provision for gender equality in their constitution.¹⁴⁴ They offer complementarity as a 'critique of Western feminism as acceding to the commodification of women's bodies through their lack of opposition to nudity and pornography.'¹⁴⁵ This contentious conversation illuminates 'value divergences about the meaning of female autonomy and the public manifestation of the female body.'¹⁴⁶ Similarly, feminists in Western countries debate issues such as pornography, surrogate motherhood, *etc.*¹⁴⁷ These controversies are not territorially limited and could lead to conversations in which women 'can agree to disagree through democratic iterations.'¹⁴⁸ Moreover, these and other examples illuminate the importance Benhabib attaches to the potential that transnational human rights hold to widen 'the circle of popular sovereignty by granting voice to the voiceless and rights to the rightless'.¹⁴⁹

iii. Fictional Exchange on Agency between Rubio-Marín and Benhabib

Rubio-Marín and Benhabib share the conviction that their work could make democracy better for women, the former through the adoption of the substantive norm of parity and the latter through valuing the process of democratic iterations. If they had a feminist conversation, Rubio-Marín might question Benhabib about the limits of her flexibility about constitutional rights. Benhabib subscribes to the transnational norm

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*, 123.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, 126.

¹⁴³ *Ibid.*, 128.

¹⁴⁴ *Ibid.*, citing Nouzha Guessous 'Women's Rights in Muslim Societies: Lessons from the Moroccan Experience' (2012) 38 *Philos. Soc. Crit.* 525-533.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, 129.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, 137.

of gender equality, but would she draw the line at one or more instantiations of it in a constitution? Would her answer depend on whether the constitutional instantiation was the result of democratic iterations? On the other hand, Benhabib might question Rubio-Marín's inflexibility about the value of the substantive norm of parity. For example, should feminists continue to value parity if they find that women who succeed to political office in a parity regime are anti-feminist? Could Rubio-Marín and Benhabib envision a coming together of their respective proposals to embrace both parity and democratic iterations? Would they together change women's constituent power and hence democracy nationally? Internationally? In global governance?

V. Conclusion: A Way Forward

The language of international politics and law, be it in the area of security or diplomacy, is often consistent with the conventional stereotype of masculinity where strength and superiority are valued over cooperation and equality. Likewise, women are often not present internationally where men continue to dominate politically and professionally in law, governance, and scholarship. Women are not taken seriously as agents. Enloe implores feminist (and other) scholars to take women seriously. We argue that the opening of space between International Constitutional Law and Global Constitutionalism scholars could further their existing and distinctive projects to make women central to any discussion of constitutions, constitutional law, and constitutionalism.

As two scholars coming from two disciplines, constitutional law (Baines) and International Relations (Sapiano), and from opposite ends of our academic careers, we come to this project with differences in training, ways of thinking, and discourse. However, we are both inspired by the call for a more profound gender curiosity and have written this article aware that the danger of women's voices and agency being lost or silenced in this 'constitutional battle'¹⁵⁰ is a real possibility. The international/global constitutionalism project is fragmented, and the constitutionalisation of the separate global regimes adds to this fragmentation. The fragmented nature of the international sphere could limit, or it could open, the space for the substantive development of women's rights and the discussion of the political and legal agency of women. What may matter is to seize the moment.

The constitutionalisation of women's agency may, as Jan Klabbers warns, cause deeper fragmentation as competing constitutional regimes and organisations become 'locked firmly in constitutional place'.¹⁵¹ On the other hand, the fragmented and incomplete nature of the global system may allow space for women to exist with voice and agency in a way that is absent in (many) domestic spaces. In other words, women may find more space in the realm of international/global constitutionalism/constitutional law, if their concerns find a platform or platforms. It is for the promotion of this second way that we suggest these spaces of resistance for exchanges between scholars of International Constitutional Law and Global Constitutionalism. Sharing dialogues about their differences could show us the way forward.

¹⁵⁰ Jan Klabbers, 'Constitutionalism Lite' (2004) 1 *Int. Org. L. R.* 31, 53.

¹⁵¹ *Ibid.*

Valuing Labour: The Interaction of Law and Informal Norms in UK Agriculture

Polly Lord¹

I. Introduction

Working relationships are regulated by the interaction of legal and non-legal norms and yet the two have often been treated as distinct in the scholarship of different disciplines.² While socio-legal, pluralist and regulatory studies of law have begun to investigate the links between law and informal norms, often they focus on the effectiveness of law; its acceptability, contingency and legitimacy in the world it seeks to regulate.³ Particular institutionalist accounts⁴ have sought to reconceptualise the relationship between law and norms, recognising that law is affected by embedded organisational norms. However, it is the law in these studies which often provides the dominant frame of analysis: how norms affect legal compliance or are invoked in law's absence. Far less is known about how law and informal norms interact within working relationships⁵ and the subsequent impact on workers when norms are either successfully displaced by law or not. This paper thus addresses these research questions through empirical examination of the interplay between informal norms and three statutory, wage-related laws in one UK-based sector: agriculture. It finds that the interplay is nuanced, with law's displacement of norms not necessarily leading to better worker protection.

Described as 'an interesting enigma',⁶ agriculture is a traditionalist industry guided by its own internal principles and rules. Externally, 'a number of factors differentiate farming employment relations from the remainder of the economy',⁷ not

¹ Associate Lecturer, University of Exeter. This research was funded by the ESRC. The author thanks the participants of the Law and Society Association 2018, the editors and anonymous reviewers for their invaluable comments.

² Andrew Frazer, 'Labour law, institutionalist regulation and the employing organization' (2014) 201(1) *International Employment Relations Review* 4, 9.

³ *Ibid.*, 10.

⁴ E.g. Richard W Scott, 'Crafting an Analytic Framework I: *Three Pillars of Institutions*' in *Institutions and Organizations* (Sage Publishing, 2013); Frazer (n 2), 16.

⁵ Petra Mahy, Richard Mitchell, Sean Cooney and John Howe, 'The Plural Regulation of Work: A pilot study of restaurant workers in Yogyakarta, Indonesia' (Centre for Employment and Labour Relations Law, 2017) 15

<https://law.unimelb.edu.au/__data/assets/pdf_file/0007/2475259/Plural-Regulation-of-Work-Pilot-Study-of-Restaurant-Workers-Yogyakarta-ISBN-9780734053916-online.pdf> accessed 9 April 2019.

⁶ Jane L. Glover and Trish Reay, 'Sustaining the Family Business with Minimal Financial Rewards: How do family farms continue?' (2015) 28(2) *Family Business Review* 163, 163.

⁷ Rupert Tipples, 'The further re-regulation of farming employment relations in New Zealand' (2007) 47(1) *Sociologia Ruralis* 63, 67.

least the seasonality and perishability of the produce and a tight supply chain which controls farm operations. Indeed, until 2013, the UK had a separate regime of enhanced employment law rights for agricultural workers in recognition of the uniqueness of the sector.⁸ This was abolished in England in 2013,⁹ leaving those employed after 31 October 2013 within the generic legislative framework. Internally, the involvement of family members and emotional attachment to the farm complicate rationality within the decision-making process, not least as farming is often ‘viewed as a lifestyle, or a way of life.’¹⁰ As a result, I anticipated that working relationships within the sector would be regulated by several informal norms which would likely resist law’s formalised system.

I focus on three wage-related statutory provisions, namely pensions, accommodation and apprentice pay, to allow deeper consideration of law’s connection to informal norms. As they are prescriptive provisions, the legal rules contain little discretion regarding their application. As such, compliance with the law is binary, leaving scope for considering whether deviant behaviour is actually compliance with an informal norm. In addition, these laws govern areas of norm behaviour which have recently changed, allowing reflection on the impact for workers when law displaces norms. In doing so, my approach builds on the recent empirical turn in labour law,¹¹ which explores ‘how the law is used: not simply whether it achieves its objectives (however defined) but how people come to accommodate and live with it’.¹²

This article is set out in four parts. I begin by reviewing the literature on the relationship between law and informal norms drawn from the law-and-economics movement, socio-legal literature on compliance and empirical studies on the operation of informal norms in UK working relationships. I then introduce the research background and design before presenting my empirical findings in three sections which focus on norm construction; norms as additional benefits; norms as aligned to other industry norms; and norms as being more protective than law. Each section discusses the interplay between informal norms and law before concluding that the norm appears to be preferred by relevant actors to the law because of its increased protection and the value it affords to labour.

⁸ Agricultural Wages Act 1948; Agricultural Wages (England and Wales) Order 2012.

⁹ By the Enterprise and Regulatory Reform Act 2013 s.73 and Schedule 20. Wales has retained the regime: Agricultural Wages (Wales) Order 2019.

¹⁰ Linda Price and Nick Evans, ‘From ‘As Good as Gold to ‘Gold Diggers’: Farming Women and the Survival of British Family Farming’ (2006) 46(4) *Sociologia Ruralis* 280, 283; Mieke Calus and Guido Van Huylenbroeck, ‘The Persistence of Family Farming: A Review of Explanatory Socio-economic and Historical Factors’ (2010) 41(5) *Journal of Comparative Family Studies* 639.

¹¹ Amy Ludlow and Alysia Blackham (eds.) *New frontiers in empirical labour law research* (Hart Publishing, 2015); Jeremias Prassl, *The Concept of the Employer* (Oxford University Press, 2015); Lizzie Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford University Press, 2015); Lydia Hayes, *Stories of Care: A Labour of Law* (Palgrave MacMillan Publishing, 2017).

¹² Linda Dickens and Mark Hall, ‘Review into research into the impact of employment relations legislation’ (Employment Relations Research Series No 45, DTI, 2005) 32.

II. The Relationship Between Law and Norms

Workplaces are ‘a hotbed for norm-bedded action’.¹³ Ranging from understanding the impact of gender norms, recognising a workers’ code of honour or assessing a disinclination to discuss wages,¹⁴ research has established a multiplicity of norms which operate alongside formal structures and rules within organisations. Interest in the interplay between law and norms boomed in the mid-1990s when scholars of the law-and-economics movement embraced a new wave of norm scholarship.¹⁵ The movement recognised that ‘a law is an obligation backed by a state sanction... a norm can be defined as an obligation backed by a nonlegal sanction.’¹⁶ Those non-legal sanctions can include a variety of social punishments, from ostracism to gossip.¹⁷ As a result, where law cannot provide enough sanctions or incentives to encourage behaviour towards a perceived public good, norms may provide the constructive role in encouraging behaviour.¹⁸

Rational choice theory is often utilised by law-and-economics scholars, who view behaviour as motivated rationally and by self-interest,¹⁹ such that decisions are taken on an implicit cost-benefit analysis. Thus, one of the movement’s most well-known proponents, Eric Posner, considers the horizontal interplay between law and behaviour to be ‘signalling equilibria’,²⁰ in which individuals comply with laws to seek reputational gain or protection. In his case of tax compliance, most people would not voluntarily pay tax under the traditional rational wealth maximiser position because it does not serve their financial interests;²¹ consequently tax is supported by penalties for evasion. However, Posner argued that when penalties are too high, compliance can be undermined as it removes the ability to voluntarily honour tax obligations and thus reduces the chance to ‘signal’ a willingness to establish cooperative relationships.²² A social norm is therefore a label and, Posner claims, ‘has no independent explanatory power.’²³ Norms may therefore be managed by lawmakers to encourage preferential

¹³ Jon Elster, ‘Social Norm and Economic Theory’ (1989) 3 *Journal of Economic Perspectives* 99, 101.

¹⁴ Leonard Bierman and Rafael Gely, ‘Love, Sex and Politics - Sure - Salary - No Way: Workplace Social Norms and the Law’ (2004) 25(1) *Berkeley Journal of Employment & Labour Law* 167, 175.

¹⁵ Robert C. Ellickson, ‘The Evolution of Social Norms: A perspective from the legal Academy’ in Michael Hechter, Karl-Dieter Opp (ed.) *Social Norms* (Russell Sage Foundation, 2001) 35.

¹⁶ Robert Cooter, ‘Do Good Laws Make Good Citizens: An Economic Analysis of Internalized Norms’ (2000) 86 *Virginia Law Review* 1577, 1579-80.

¹⁷ Ellickson (n 15), 35-6.

¹⁸ Dan M. Kahan, ‘Signaling or Reciprocating - A Response to Eric Posner’s Law and Social Norms’ (2002) 36 *University of Richmond Law Review* 367, 367-8.

¹⁹ Sally S. Simpson and Melissa Rorie, ‘Motivating Compliance: Economic and Material Motives for Compliance’ in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Publishing [online] 2011) 60.

²⁰ Eric A. Posner, ‘Law and Social Norms: The Case of Tax Compliance’ (2000) 86 *Virginia Law Review* 1781, 1819.

²¹ Kahan (n 18), 376-377.

²² *Ibid*, 378.

²³ Posner (n 20), 1819.

behaviour, with social meaning created and sustained by law.²⁴ While Posner's theory is a sophisticated analysis which explains repeated behaviour beyond the profit maximisation model, his conceptualisation fails to adequately explain empirical behaviour, or as Kahan argues, it is behaviourally unrealistic.²⁵ One of Posner's core problems, as for other rational choice theorists, is his attempt to model such a broad spectrum of behaviour that nearly any phenomenon can be negated or accounted for.²⁶ In addition, Posner's theory fails to recognise the complexity within the interplay between law and norms, not least through his denial of norms' causative effects. As a result, the relationship between norms and law can be understood as being more unpredictable than Posner suggests.

A. The preference of norms over law

Much of the early work on the relationship between law and norms focused on the role of norms at the expense of law.²⁷ For instance, Stewart Macaulay's classic study into US businessmen and lawyers found that contract law was routinely ignored in business transactions.²⁸ Instead, informal norms exerted more of an influence on behaviour than legal regulation. Likewise, in Lisa Bernstein's research into the American merchant trade, two types of informal norms were preferred to laws to manage relationships: relationship-preserving ('RPNs') and 'end of game' norms ('EGNs'). RPNs included dispute-resolution and performance-based norms and focused on upholding the relationship between actors, whilst EGNs were chosen at the end of the relationship and were included in the legal contract.²⁹ Preference for RPNs centred on the need for flexibility. Thus, RPNs were 'deliberately allocated to the extralegal realm'³⁰ because they relied on observable but not verifiable information, or the cost of formalising the obligation was too high. RPNs also reflected adjustments to which parties did not want to be bound or which were made solely to preserve a profitable relationship. Social sanctions were also often more effective than legal sanctions.³¹ Transactors thus implicitly distinguished between these norms, choosing the one most appropriate for their contracting stage and relationship;³² the law was not the *a priori* guiding force.

Other, more recent empirical research, has noted the continuing role that norms play within working relationships, particularly in smaller, or family-run firms,

²⁴ Emanuela Carbonara, 'Law and Social Norms' in Francesco Parisi (ed.) *The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts* (Oxford University Press, 2017) 473.

²⁵ Kahan (n 18), 375, 385.

²⁶ *Ibid*, 371-372.

²⁷ Bierman and Gely (n 14), 173-174.

²⁸ Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55, 63.

²⁹ Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 *University of Pennsylvania Law Review* 1765, 1796-7.

³⁰ *Ibid*, 1797.

³¹ *Ibid*, 1798.

³² *Ibid*, 1797-8.

where rules are often unwritten and principles tacitly understood.³³ Jordan *et al*'s study into employers' perceptions of labour legislation noted that amongst small firms, 'the norm was to operate "like a family," which was at odds with developing formal practices.'³⁴ Instead, practices were characterised by the daily routines between employees and managers,³⁵ with formal rights flexibly interpreted to meet the business context.³⁶ As a result, informal norms retain a crucial importance in working relationships, often at the expense of law.

B. The role of norms when law is weak

The relationship between informal norms and law has also been considered by socio-legal scholars when analysing compliance. While the formal construct of compliance compares the formal definition of legal obligations to the actual behaviour of the regulated,³⁷ socio-legal literature has suggested that, alternatively, compliance should be considered as 'the negotiated outcome of the regulatory encounter',³⁸ or as 'a process of extended and endless negotiation'.³⁹ Consequently, failure to comply with law may actually signal compliance with a sub-culture's norms.⁴⁰ As a result, the relationship between norms and law is dynamic, and 'informal norms and institutions often play complementary or even substitutive roles when formal regulation is absent or ignored'.⁴¹

One of the leading theorists on this topic, Lauren B. Edelman, examines the role of employment law when law is ambiguous, procedural in its emphasis or has weak enforcement mechanisms.⁴² In her view, the issue is weakness within the legal regime, which allows law to be constructed 'in a manner that is minimally disruptive

³³ Monder Ram, Paul Edwards, Mark Gilman and James Arrowsmith, 'The Dynamics of Informality: Employment Relations in Small Firms and the Effects of Regulatory Change' (2001) 15(4) *Work, Employment & Society* 845, 846; James Arrowsmith, Mark W. Gilman, Paul Edwards and Monder Ram, 'The Impact of the National Minimum Wage in Small Firms' (2003) 41(3) *British Journal of Industrial Relations* 435, 438-9, 451-2.

³⁴ Elizabeth Jordan, Andrew Thomas, John Kitching, Robert A. Blackburn, *Employment Regulation. Part A: Employer Perceptions and the Impact of Employment Regulation* (Business, Innovation & Skills, Employment Relations Research Series No. 123, March 2013) 34; Brigitte Kroon and Jaap Paauwe, 'Structuration of precarious employment in economically constrained firms: the case of Dutch agriculture' (2014) (1) *Human Resources Management Journal* 19, 32.

³⁵ Kroon and Paauwe (n 34), 32.

³⁶ Dickens and Hall (n 12), 350.

³⁷ Bettina Lange, 'Compliance Construction in the Context of Environmental Regulation' (1999) 8(4) *Social & Legal Studies* 549, 552.

³⁸ Robyn Fairman and Charlotte Yapp, 'Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement' (2005) 27(4) *Law & Policy* 491, 491, 495.

³⁹ Peter K. Manning, 'Reviewed Work(s): To Punish or Persuade: Enforcement of Coal Mine Safety by John Braithwaite' (1988) 28(4) *The British Journal of Criminology* 559, 561.

⁴⁰ Lange (n 37), 564.

⁴¹ Petra Mahy, 'The functional approach in comparative socio-legal research: reflections based on a study of plural work regulation in Australia and Indonesia' (2016) *International Journal of Law in Context* 420, 421.

⁴² Lauren B. Edelman, 'Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law' (1992) 97(6) *American Journal of Sociology* 1531, 1532.

to the status quo.⁴³ Her theory of legal endogeneity highlights that the creation of formal structures can appear as visible mechanisms for implementing legal rules, which can often serve as merely a symbolic commitment to legislative compliance.⁴⁴ Indeed, she finds that the symbolic value of commitment to law motivated organisations ‘even in the absence of any rational motivation for doing so.’⁴⁵ Crucially, those conceptualisations – imbued with meaning from organisational norms and institutionalised by courts’ interpretations – become entrenched within the law’s legitimacy.⁴⁶ Conflict between norms and laws are thus balanced, with external legitimacy provided by these gestures of compliance, mediated by individual managerial discretion.⁴⁷

Fundamental to Edelman’s discussion is the role of the ambiguity of law and legal processes, providing the space within which norms can be prioritised over law within the operation of the law itself. Employment law does ‘tend to set forth broad and ambiguous principles that give organizations wide latitude to construct the meaning of compliance’.⁴⁸ However other rules, such as the statutory wage-related benefits under discussion here are far more prescriptive. There is thus scope for further inquiry into the interplay between norms and these statutory rules.

C. The role of norms when new law is introduced

Law can sometimes displace informal norms; however legal rules which are substantially different to a prevailing norm require gradual introduction to allow adaptation.⁴⁹ If not, or when the legal rules pursue different objectives to the norm, often the relationship breaks down, with the informal norm emerging the victor.⁵⁰ For example, when the UK’s National Minimum Wage (‘NMW’) Act was introduced in 1998, it created a generally applicable statutory wage law.⁵¹ Its introduction thus brought a challenge to embedded informal norms regarding pay. Ram *et al* noted an initial regulatory ‘shock’ amongst employers when the law was first enacted, both as to costs and increased administrative requirements.⁵² However, this shock was not seen as significant enough ‘to jolt employers or workers out of their customary practices and habits’.⁵³ This was because the shock was ‘absorbed by informal understandings’,⁵⁴ with wages influenced by product market pressures, labour force

⁴³ *Ibid*, 1535.

⁴⁴ *Ibid*, 1544.

⁴⁵ *Ibid*, 1545.

⁴⁶ *Ibid*, 1546-1547.

⁴⁷ *Ibid*, 1567.

⁴⁸ *Ibid*, 1532.

⁴⁹ Carbonara (n 24), 479.

⁵⁰ *Ibid*.

⁵¹ Agriculture had its own statutory minimum wage: Agricultural Wages Act 1948 and associated Orders.

⁵² Ram *et al*. (n 32), 847.

⁵³ *Ibid*, 847; Arrowsmith *et al*. (n 33), 451.

⁵⁴ *Ibid*, 852; *Ibid*, 452.

characteristics and labour market institutions, as well as internal customary norms.⁵⁵ According to Arrowsmith *et al*'s inquiry into the clothing, hotel and catering industries, the most common response to the NMW was to simply absorb the increase in costs.⁵⁶ Employers also claimed that workers had requested lower wages to ensure they still received social security benefits.⁵⁷ Interestingly, the workers interviewed by Arrowsmith *et al* varied on whether they viewed this as acceptable, depending on the fairness of pay, how they were treated and the relative pressure of the job. Other employers responded to NMW as a 'critical event', where implementation triggered changes to working practices which had been under consideration. As such, the law's introduction, whilst resulting in organisational change, was moulded by the informal norms of the workplace. The researchers concluded that 'legal obligations will be ignored if they do not relate to the established set of informal norms.'⁵⁸ Thus, it is not only the quality of the law that may affect the relationship; the entrenchment of the norm itself is likely to be relevant.

This brief review of the literature highlights that authors such as Bernstein have determined that norms are often preferred to law within working relationships, whilst theorists such as Posner and Edelman have sought to explain this interaction by reference to the law's perceived inadequacy. In the next section, I build on this literature by demonstrating that the picture is more complicated when one examines the impact of the interaction between law and norms on working relationships in an agricultural setting. In doing so, I challenge the implicit assumption within existing scholarship that following norms over law tends to be detrimental to workers, by suggesting that labour is valued more highly under prevailing normative standards than the current legislative framework.

III. Background and Methodology

A. UK Agriculture

Data was collected as part of a wider project on how UK-based small-sized livestock farmers responded to employment law. The project was set against a backdrop of significant uncertainty for the agricultural industry driven by a declining labour availability and increasing financial pressures, issues which frame this research.

⁵⁵ *Ibid*, 858-9; *Ibid*, 452; Monder Ram, Paul Edwards and Trevor Jones, 'Staying Underground Informal Work, Small Firms, and Employment Regulation in the United Kingdom' (2007) 34(3) *Work and Occupations* 318, 336; Damien Grimshaw and Marilyn Carroll, 'Adjusting to the national minimum wage: constraints and incentives to change in six low-paying sectors' (2006) 37(1) *Industrial Relations Journal* 22; Janet Druker, Geoffrey White and Celia Stanworth, 'Coping with Wage Regulation: Implementing the National Minimum Wage in Hairdressing Businesses' (2005) 23(1) *International Small Business Journal* 5.

⁵⁶ Arrowsmith *et al* (n 33), 451; Ram *et al* (n 33), 847.

⁵⁷ *Ibid*, 443.

⁵⁸ Ram *et al* (n 33), 367.

Since 2000 there has been a notable decline in regular, full-time hired labour in UK small farms, with a comparative increase in seasonal labour.⁵⁹ However, the demand for workers is anticipated to rise over the next few years.⁶⁰ Farmers are thus increasingly concerned about a sectoral labour shortage, a shortage which is exacerbated due to the declining availability of migrant workers following the Brexit referendum in 2016.⁶¹ Of all the agricultural workforce, migrant workers have received the most attention by researchers.⁶² This is unsurprising; agriculture has ‘high levels of seasonal, informal and migrant labour’,⁶³ as the seasonal nature of the work positively lends itself to such a workforce.⁶⁴ Taking account of this literature, this project does not analyse migrant workers as a distinct group, because its aim is to bridge a gap in understanding working relationships more broadly. There is also not the same differentiation of status between migrant and domestic workers on livestock farms; workers are treated similarly because animals need the same daily care year-round.

In addition, financial pressures and declining margins have resulted in mass intensification in agricultural production, where priority is given to quality, volume and price.⁶⁵ The UK Government’s cheap food policy has encouraged growth of the industry, promoting large-scale farm practices.⁶⁶ Retailers have sought further intensified practices which demand more work for less pay,⁶⁷ making it difficult for suppliers to pay living wages,⁶⁸ whilst last-minute changes to orders and ever-shorter lead times increase pressures.⁶⁹ These practices impact upon the entrepreneurial control of employers, and pose significant challenges to smaller farmers who may lack

⁵⁹ Michael Winter and Matt Lobley, *Is there a future for the small family farm in the UK? Report to The Prince’s Countryside Fund* (Prince’s Countryside Fund 2016) 47; Michel Blanc, Eric Cahuzac, Bernard Elyakime and Gabriel Tahar, ‘Demand for on-farm permanent hired labour on family holdings’ (2008) 35(4) *European Review of Agricultural Economics* 493, 494.

⁶⁰ Caroline Nye, ‘The ‘blind spot’ of agricultural research: Labour flexibility, composition and worker availability in the South West of England’ (2018) 27(3) *Cahiers Agricultures* 35002.

⁶¹ Environment, Food & Rural Affairs Committee, *Feeding the nation: labour constraints (Seventh Report)* (HC 2016-17, HC1009, April 2017) 3.

⁶² See, for example: Precision Prospecting, ‘Temporary Workers in UK agriculture and horticulture: A Study of Employment Practices in the Agriculture and Horticulture Industry and Co-Located Packhouse and Primary Food Processing Sectors’ (Precision Prospecting Ltd and University of Cambridge 2005); Ben Rogaly, ‘Intensification of Workplace Regimes in British Horticulture: The Role of Migrant Workers’ (2008) 14 *Population, Space and Place* 497.

⁶³ Sonia McKay, Steve Jefferys, Anna Paraksevopoulou and Janoj Keles, *Study on precarious work and social rights* (Working Lives Research Institute, European Commission, April 2012) Appendix A:3; Bridget Anderson and Ben Rogaly, ‘Forced Labour and Migration to the UK’ (Centre for Migration, Policy and Society in collaboration with the Trades Union Congress 2005) 26.

⁶⁴ Precision Prospecting (n 62), 31-2; David McCollum and Allan Findlay, *Trends in A8 migration to the UK during the recession* (2011) (Population Trends 145, Office for National Statistics, Autumn 2011); Andrew Geddes and Sam Scott, ‘UK Food Businesses’ Reliance on Low-Wage Migrant Labour: A Case of Choice or Constraint’ in Martin Ruhs and Bridget Anderson (eds), *Who needs migrant workers? Labour shortages, immigration and public policy* (Oxford Scholarship Online, 2012).

⁶⁵ Rogaly (n 62), 500; Precision Prospecting (n 62), 42.

⁶⁶ Winter and Lobley (n 59), 4.

⁶⁷ Rogaly (n 62), 497.

⁶⁸ Ethical Trading Initiative, ‘Company purchasing practices’ (Ethical Trading Initiative) <<http://www.ethicaltrade.org/issues/company-purchasing-practices>> accessed 20 November 2018.

⁶⁹ Precision Prospecting (n 62), 33.

the resources to meet the demands. Indeed, Lobley *et al* spoke of an ‘agricultural treadmill’, where farmers have ‘to ‘run’ constantly to survive and ‘stand still’.⁷⁰ Consequently, this research focused on smaller farms to explore the impact of these pressures, particularly as in smaller businesses, relationships are usually more heavily embedded with informal norms.⁷¹ Classifying a farm as small, however, is not without its practical difficulties.⁷² As a result, farms were considered ‘small’ when they self-identified as such; which meant owner-occupied or tenanted farms, not agribusinesses or large land owners.

B. Research Design

I conducted semi-structured face-to-face interviews with 29 farmers/farm managers and 2 workers at 26 farms/farm estates, to generate rich data in a flexible format.⁷³ The qualitative approach enabled a conversational style, which encouraged reflections on how participants viewed their world. Employers were the primary focus of this study to examine how they responded to employment law, in light of the industry’s pressures. Participants were predominantly recruited from the South West of England, through utilising personal contacts in the farming community and adopting a snowballing sampling method. Participants were primarily male, with five female, reflecting the wider trend that most farmers are male, albeit this sample had more women farmers than the 11% national average.⁷⁴ Seven were aged between 30-39; five between 40-49; twelve between 50-59 and the remaining seven were over 60, again reflecting the wider demographic of the sector, where 25% of farms are staffed by over 55-year olds.⁷⁵ All interviews were recorded and transcribed, with some selectively transcribed due to their length (3 hours+). Ethics approval was granted for this research prior to data collection and pseudonyms are used throughout to protect participants’ identities.

Finally, identifying norms was a complicated task.⁷⁶ While norms’ external aspects can be revealed empirically through tangible, observable behaviour,⁷⁷ they may clash with internal norms as to what actors think ought to be done.⁷⁸ Following the pattern-seeking approach adopted by Mahy *et al*,⁷⁹ practices were considered an informal norm when they were expected or considered standard enough to be

⁷⁰ Matt Lobley, Michael Winter and Rebecca Wheeler, *The Changing World of Farming in Brexit UK* (Routledge Publishing 2018) 57.

⁷¹ Monder Ram, Paul Edwards, Trevor Jones, Maria Villares-Varela, ‘From the informal economy to the meaning of informality: Developing theory on firms and their workers’ (2017) 37(7/8) *International Journal of Sociology and Social Policy* 361, 367; Ram et. al. (n 32), 846; Ram et al. (n 54), 322.

⁷² Winter and Lobley (n 58), 10.

⁷³ Mats Alvesson, *Interpreting Interviews* (Sage Publications, 2011) 2.

⁷⁴ Calculated from: Richard Clegg, ‘EMP04: Employment by Occupation’ (Office of National Statistics, 11 September 2018).

⁷⁵ Tom Blenkinsop, HC Deb 24 April 2013, vol 561 col 926.

⁷⁶ Mahy *et al* (n 5), 32.

⁷⁷ Reza Banakar, *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity* (Springer, 2015) 216; Mahy (n 41), 428.

⁷⁸ Mahy *et al* (n 5), 32.

⁷⁹ *Ibid.*

sufficiently replicated over interviews. Moreover, norms could be identified reflexively by the participants through a comparison between their own behaviour and the wider industry. The extracts presented here thus reflect the wider opinion inherent in the sample.

IV. The Norms

In this section, I use extracts from interviews with farm owners and estate managers, to extend the literature in two important ways. First, I highlight the continuing role norms play in managing agricultural working relationships, which often appears more protective of workers than the legal provisions which seek to displace them. Secondly, I suggest that the reason for this difference lies in the respective constructions of ‘value’ entailed in legal and normative frameworks.

A. Norm as an additional benefit

In agriculture many workers, including seasonal staff, live in accommodation tied to their jobs.⁸⁰ The law allows employers to deduct up to £7.55/day from pay as an offset against the national minimum/living wage (‘NM/LW’).⁸¹ This statutory maximum was intended to protect employees from excessive charges levied by employers.⁸² However, not one employer in this sample deducted an offset. Instead, where accommodation was provided as part of the job, the norm was to provide it, and bills and council tax, free of charge, as shown by Paul:

The lowest paid is Paula, she’s 20, she’s on 20 grand, um, and then you’ve got Phil on 22, Paddy on 23 and Peter on 28. Included in that is a free house, so they pay nothing for their house, council tax, electricity.

(Paul, dairy farm owner, aged 30-39)

Paul provided housing to each of his workers including his migrant worker (Peter) and recently hired worker (Phil). The norm was constructed as an additional benefit to staff, irrespective of legal regulation or the worker’s position. As a result, the market rate was regarded by these farmers as forming part of the reward package for employment, with Sam highlighting the practical costs:

When we gave him a house, I effectively gave him nearly a £7,000 pay rise, y’know – I could get £7,000 of rent on that property.

(Sam, livestock farm owner, aged 50-59)

⁸⁰ Department for Environment, Food & Rural Affairs, ‘Consultation on the Future of the Agricultural Wages Board for England and Wales, and Agricultural Wages Committees and Agricultural Dwelling House Advisory Committees in England: Summary of Responses (Department for Environment, Food & Rural Affairs, December 2012, revised February 2013) 7.

⁸¹ National Minimum Wage Regulations 2015 regs 9 and 16.

⁸² Department for Business Innovation & Skills, ‘Low Pay Commission consultation on the accommodation offset’ (Low Pay Commission and Department for Business, Innovation & Skills, 25 July 2012) <<https://www.gov.uk/government/news/low-pay-commission-consultation-on-the-accommodation-offset>> accessed 9 April 2019.

By providing accommodation as part of the financial package, its value was constructed differently to the legal rule providing for deduction of an off-set. Consequently, some workers appeared in a better financial position under this norm than had the law been followed. Other farmers did not provide accommodation, but increased the wages to reflect the costs of living in their area:

A house 'round here to rent out is worth anywhere from 750 to 1,200 pound a month, if you took that much money plus the council tax off an employee's wages, they basically wouldn't work for you., if you paid them 30 odd grand a year, they'd go find their own house to live in.

(Rob, dairy farm owner, aged 50-59)

As in Ram *et al.*,⁸³ the law was ignored in preference of an established set of informal norms which viewed accommodation as part of workers' financial package. Whilst not a legal obligation - the statutory offset only sets a maximum deduction – the norm is also not displaced. This is despite declining financial margins where, using a rational choice approach, it might be considered that providing accommodation leaves little benefit to employing farmers.

One reason for this seems to be the declining availability of staff, as Rob said: '*so many farmers think the only way they'll get an employee is to offer a house.*' In many ways, this reflects Posner's signalling theory, where in the context of a sectoral labour shortage, employers are signalling willingness to contract through providing housing. Furthermore, as the norm provides a more protective dispensation to workers in valuing accommodation as a non-deductible benefit, the law is not necessarily needed to encourage social welfare.⁸⁴ However, the norm of providing a house for free not only signals but has created an entrenched expectation amongst future workers. As Rob continued, '*farming's dug its own hole on this one by offering accommodation*'. Thus, contrary to Posner, the norm is a causative factor which continues to substantiate itself within the industry. It seems that in current structural conditions, the norm is too entrenched to be displaced by law and yet that appears positive for the workers concerned.

The norm to provide accommodation also extended into providing it to long-term workers past their retirement, with additional financial support coming from the State pension:

The presumption was that you get a house for life, which is a completely bizarre, concept in.... So, Terry's father was in a house for life and I would imagine that there would be an expectation from Terry [Tom's worker] that he would have one as well.

(Tom, farm estate manager, aged 50-59)

⁸³ Ram *et al.* (n 33), 367.

⁸⁴ Carbonara (n 24), 473.

This norm operated to reflect the longevity of the relationship, with workers and their families remaining in the property, which had been attached to their job, until their death. However, there were outstanding issues to address, such as responsibility for repairs, as the following extract with Zak shows:

Interviewer: When he retires, will he lose the house?

Zak: No, that is his house. ... he'll have to pay market rent when he retires, but he can live there all the time and I think his wife can as well. So, we had this, we had another house in the village down the road and ... they lived in the house for 30 years and the real problem was, we got to the point where we, the tenant left and no work had been done in the house, because there's no, well, there's no reason why you would look after that house! [laughs] but then we got to the end of it and we had to spend, 40 grand on repairs. So it was a bit of an eye-opener thinking well actually we should look after these estate staff, houses a bit better really. So yeah Zeke [Zak's worker] will, he's grown up and had all his children in that house, he'll live there for, forever I think.

(Zak, farm estate manager, aged 30-39)

This extract raises several points, not least that Zeke will be required to pay rent at a market rate and thus the relationship will transfer from an employment relationship to one of landlord and tenant on retirement. However, the rationale for this appeared to stem from Zak's previous experience with a long-term tenant, who outlived expectations and consequently the property fell into disrepair. Importantly, however, there is recognition of Zeke's emotional connection to the house which Zak prioritises as his intention to keep him *in situ* and continue the relationship, presumably for the benefit of the worker. As such, the norm developed into incorporating mutual responsibilities, for the worker to pay rent and the house to be kept in good condition. Crucially, the phrase deployed was '*looking after*'; reflecting a sense of value in the relationship which echoes Bernstein's relationship-preserving norms.⁸⁵ This research, however, extends Bernstein's analysis by applying it to a relationship that changed. While the relationship was preserved, it was reframed, suggesting that RPNs relate to the individuals as well as the contractual context. Thus, Zak appeared to deliberately allocate a RPN to flexibly manage the new relationship, altering the terms in line with his perceptions of future profitability. In return, Zeke appears protected by retaining his home. The norm thus provided an additional benefit for both parties, valued beyond the legal contractual construction.

B. Norms' displacement by new law

Since 2017, pensions must be offered as a matter of law, and this legislative change has begun displacing the house for life norm. All jobholders over 22 who earn over £10,000 per year are to be automatically enrolled into an employer's pension scheme, although

⁸⁵ Bernstein (n 29), 1796-7.

opt-outs (and -ins) are available.⁸⁶ Employers' duties have been staggered since 1 October 2012,⁸⁷ and the 2017 review into its implementation concluded that 'automatic enrolment was working', as it 'harnesses inertia' by ensuring individuals are defaulted into the scheme.⁸⁸ Opt-out rates were generally 9%, although this was higher at 10% and 12% for micro- and small businesses respectively.⁸⁹ Exploratory research suggested that opt-outs may increase due to a lack of information on the scheme and a perceived lack of affordability, particularly for women.⁹⁰ Targeted self-employment interventions were due to be tested, and potentially legislated for, in 2018 however this has not yet happened.⁹¹

This new legal requirement interacts with the traditional norm of providing a house for life. As Tom pointed out, this may be a '*bizarre*' concept, but it may also explain why 65% of agricultural workers had not enrolled in a pension by the end of 2017;⁹² the underlying embedded formal norm continued to affect compliance with the pension law. Yet there has been some alteration to expected practices, for instance:

I sort of said to them "Look you can take it but we're not going to pay it to you if you don't take it, it's something we're being legally obliged to do, I wouldn't do it if we, I didn't have to." But y'know it's only fair that they obviously have a pension...

(Paul)

The law's challenge to the norm has been accepted by some farmers, which seems more deliberate than the absorption of the rules reported when the NMW was introduced.⁹³ As the rules were staggered, it may be that farmers could adapt to the pension provisions rendering displacement of the norm more likely.⁹⁴ However, more pertinent is Paul's use of the word '*fair*'. Several of the research participants recognised that the introduction of pensions meant alignment of agricultural employment with other industries. As such, agriculture's informal norms were both displaced by the law and aligned with other industries. That shift enabled farmers to more readily accept

⁸⁶ Pensions Act 2008 ss.3, 7, 8.

⁸⁷ Employers' Duties (Implementation) Regulations 2010 reg. 4.

⁸⁸ Department for Work & Pensions, *Automatic Enrolment Review 2017: Maintaining the Momentum* (Cm 9546, December 2017) 13.

⁸⁹ *Ibid* 29.

⁹⁰ Rajiv Prabhakar, 'Why do people opt-out or not opt-out of automatic enrolment? A focus group study of automatic enrolment into a workplace pension in the United Kingdom' (2017) 27(5) *Journal of European Social Policy* 447.

⁹¹ Department for Work & Pensions (n 88), 16.

⁹² Trade Union Congress, 'Six in ten workers in hospitality and agriculture not paying into a pension' (9 October 2017) < <https://www.tuc.org.uk/news/tuc-reveals-pension-blackspots> > accessed 4th April 2019.

⁹³ Ram *et al*, (n 33) 858-9; Arrowsmith *et al* (n 33) 452; Ram *et al* (n 55) 336; Damien Grimshaw and Marilyn Carroll, 'Adjusting to the national minimum wage: constraints and incentives to change in six low-paying sectors' (2006) 37(1) *Industrial Relations Journal* 22; Janet Druker, Geoffrey White and Celia Stanworth, 'Coping with Wage Regulation: Implementing the National Minimum Wage in Hairdressing Businesses' (2005) 23(1) *International Small Business Journal* 5.

⁹⁴ Carbonara (n 24), 479.

the legal change as opposed to reduce it to a question of sanctioned legal compliance, again invoking farmers' internal value of staff:

I'm quite happy with it [pension enrolment] ... I'm hopefully quite conscious that people do need to be looked after.

(John, dairy farm owner, aged 30-39)

Thus, in a related extension to Ram *et al.*,⁹⁵ as there was greater alignment of the law to the employer's embedded practices and view of fairness, legal obligations were more readily accepted. However not all farmers valued pensions as an acceptable norm with some, such as David, encouraging workers to opt-out:

I'm just going to get her to sign herself out of it.

(David, dairy farm owner, aged 40-49)

The reasons for this were two-fold. First, was '*the extra cost basically...they still want their top whack [wage] per hour and they want that on top.*' Pensions add around 8% to the wage bill, however it was the staff's expectation of a higher salary that David appeared concerned with. The second reason concerned how he constructed his social identity as an employer, and his perceived relationship with the law and Government: '*Why should we be... doing the State's job of looking after folk?*' Accordingly, for David, the law will not displace his informal norm as the valuation of labour does not align.

While there is clearly potential for workers to be disadvantaged in this situation, David's worker had requested a reduction in hours because '*she only wants to earn £8,000 a year and doesn't want to pay tax!*' Likewise, as employees also contributed, some farmers reported their staff had requested the opt-out, particularly younger employees:

*To them, it just looks like you're robbing money off them, going in their pension:
"Well actually I wanted it that weekend coz I'm going out!!"*

(Yohan, dairy farm owner, aged 30-39)

The supposed variation from the law in this manner does not render displacement of the norm ineffective. Importantly the regulations allow for variation within legal behaviour, where deviance is legitimised through the inclusion of the opt-out. Thus, extending Edelman, there was a weakness in the law which allows compliant behaviour, even though the law was still successful in changing behaviour. Therefore, as agriculture moves away from giving farmworkers 'a house for life', if opt-outs increase, many workers – particularly older workers – will be in a more precarious position than they were prior to these changes. Of course, with the decline in both permanent staff and potential housing stock, this practice may well have declined naturally in the future. However, the embedded norm, compared to the statutory provision, seems to leave many workers more protected.

⁹⁵ Ram *et al.* (n 33), 367.

C. The norm as more protective than the law

The final legal provision to be discussed concerns apprenticeship pay. Apprenticeships are paid employment in a skilled occupation, which incorporates an element of substantial training for a minimum of 12 months. In 2015, the programme underwent a package of reforms to be more employer-led, to make apprenticeships more attractive and ‘a credible alternative to both higher education and jobs without training’. As part of this reform, the UK Government increased the rate by 21%, considerably more than the Low Pay Commission’s recommendation of a 2.6% increase. While the Government recognised concerns over non-compliance with rates, and the potential increases deterring employers’ from engaging with the scheme, it felt that this ‘largest ever increase’ would improve the quality of the programme and applicants. The 2019 rate is £3.90 and applies to those under 19 years of age, or in their first year; those over 19 and in their second year are entitled to their age-graded national minimum wage.

In the research sample, however, the interplay between law and the informal norm led to unintended consequences due to differing valuations of labour. Farmers reported an intention to pay more than this statutory rate:

His figure for college is £3.50 an hour, ok, on that apprenticeship. So, we found that a bit, bit – seemed a bit mean really, y’know, £3.50? I mean, there’s not a lot of people that aren’t worth 5 quid... We were going to give him £5, but then one of the lecturers said to us at the college “we’d rather you stuck at 3.50.”

(Mark, estate farm manager, aged 40-49)

Mark explained that the college wanted parity across their students to deter comparisons, and arguments, at college. He was subsequently investing in his apprentice by sending him on training courses. Similarly, Xander’s young worker was hoping to attend an apprentice course, so the intended wage was reduced to the statutory level:

I don’t want to pay him more then cut when he goes as an apprentice [laughs] so I’m paying him his apprentice rate now, and if he gets taken on the course then that will be all well and good.

(Xander, dairy farm owner, aged 50-59)

Consequently, the legal standard is lower than the informal norm and has led to the worker being financially worse off. The apprentice rate is also not considered in isolation; it is intended to be, and appears considered by these employers, as the stepping stone to an ongoing working relationship:

We don’t view it as cheap labour – we view it as training somebody for the industry.

(Neil, dairy farm manager, aged 50-59)

However, due to the increases in other minimum wage rates, there is a large gap between apprentice rates and other minimum wages. As Mark commented:

He's on 3.50, and he needs to be on 8.10... I'm thinking yeah, he's suddenly 130% more, so is he worth that?

Mark thus questions his construction of labour's value compared to the legislative standard. To reconcile the division, Mark intended to offer a 12-month contract after the apprenticeship to enable flexibility on both sides, although he admitted '*it's more safeguarding us than him, really.*' The informal norm to pay more than the statutory rate – for example, the £5 per hour that Mark, and others, suggested – would bridge the gap between rates but also seemingly provide more secure employment after the apprenticeship ends.

The apprenticeship pay system is prescriptive, requiring a set pay rate with little ambiguity, and yet Edelman's theorising also holds true as compliance was undertaken symbolically.⁹⁶ While formally the pay rules were met, farmers presented different opportunities in line with their sense of fairness. The informal norms thus continued to regulate the relationship. In addition, the concerns articulated by Mark undermine the standard of worker protection provided by the law, as farmers begin questioning their investments against the higher rates of NM/LW after the apprenticeship ends. As a result, the conflict between law and norms are reconciled⁹⁷ by compliance with formal pay rates but balanced by insecure contracts. It thus appears that the law, while legitimised, places workers in a more precarious financial position.

V. Discussion and Conclusion

Discussions of informal norms and law tend to assume that the informal norm is a negative gloss to the law's positive intention. As previous studies have shown, informal norms can fill the space that law leaves behind – either in its absence or because it is ignored – or shape law, particularly upon its introduction. In these instances, the implicit assumption is that compliance with norms over law is a negative occurrence. However in this research, the informal norm provided potential benefits for workers, over the legislative standard.

Examining the statutory provisions on accommodation, pensions and apprenticeship pay revealed subtle interactions between the web of law and informal norms in working relationships. In this sample, norms were considered as an additional benefit, acceptable when aligned to other norms and more protective than the law. In each example, workers were seemingly financially more secure under the farmers' informal valuation of their labour than the statutory level. In some instances, such as providing accommodation free of charge, this simply reflects the rules as statutory minima, where employers can offer better terms. In others, even when the law was effective in displacing the norm as with apprentice pay, subsequent considerations undermined the law's protective capabilities. This impact of informal

⁹⁶ Edelman (n 42), 1544.

⁹⁷ *Ibid*, 1567.

norms on the employment relationship thus requires further critical reflection, which focusing on the law as an analytical lens often fails to yield. Furthermore, this research queries the economic rational choice model as a basis for analysis as the actors it studied did not select options based solely on their own self-interest. While reduced staff availability may demand competitive wage-related benefits, decisions were still taken within the context of declining profits.

In the light of these findings, the interplay of informal norms and law within the employment relationship appears messy, or as Posner put it: ‘the effect of most laws on social behavior is so complex that a boundedly rational legislator could not predict it.’⁹⁸ The task for this qualitative research has consequently not been one of prediction, but to question the often uni-directional gaze of scholarship that takes law as a positive analytic framework. Whilst the research discussed in this article is limited in its small-scale nature, and focused on employers, it does indicate that employers’ preference for norms can produce a beneficial outcome for workers. Consequently, while prediction is difficult, greater empirical understanding into the potential beneficial operation of informal norms prior to legislation’s enactment (even when legislating has been ‘successful’) could be a valuable policy endeavour.

⁹⁸ Eric A. Posner, ‘Standards, Rules and Social Norms’ (1997) 21 *Harvard Journal of Law and Public Policy* 101, 112.

The Missteps of the FIRST STEP Act: Algorithmic Bias in Criminal Justice Reform

Raghav Kohli¹

I. Introduction

Contrary to his tough-on-crime rhetoric, Donald Trump in December 2018 signed the FIRST STEP Act² (the 'Act') into law, a criminal justice reform legislation aimed at reducing recidivism and reforming prison and sentencing laws.³ With a 87-12 vote in the Senate and a 358-36 vote in the House, a bitterly divided Congress approved the Act in a rare display of bipartisanship earlier that month.⁴ Apart from triggering an awakening within Congress about the dire need to decarcerate, the Act unified an unusual coterie of proponents, including tycoons such as the Koch Brothers, and celebrities such as Kim Kardashian.⁵

Whilst hailed as historic and sweeping in some quarters,⁶ the Act only affects the federal system, which houses a small fraction of the United States prison population. Out of approximately 2.1 million people imprisoned,⁷ only 180,413 are federal inmates.⁸

Nonetheless, the Act aims to introduce several reforms. It mandates the Department of Justice to establish a 'risk and needs assessment system' to classify the recidivism risk of prisoners, and to incentivise participation in productive activities.

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² The Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act 2018 (US.)

³ 'President Donald J. Trump Secures Landmark Legislation to Make Our Federal Justice System Fairer and Our Communities Safer' (*White House*, 21 December 2018) <<https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-secures-landmark-legislation-to-make-our-federal-justice-system-fairer-and-our-communities-safer/>> accessed 6 February 2019.

⁴ Van Jones and Jessica Jackson, '10 reasons to celebrate the First Step Act' *CNN* (21 December 2018) <<https://edition.cnn.com/2018/12/21/opinions/ten-reasons-to-celebrate-first-step-act-jones-and-jackson/index.html>> accessed 6 February 2019.

⁵ Ryan Bort, 'Kim Kardashian, Alyssa Milano, Van Jones Among 50+ Celebrities Lobbying for Prison Reform Legislation' *Rolling Stone* (New York, 14 November 2018) <<https://www.rollingstone.com/politics/politics-news/kardashian-prison-reform-755934/>> accessed 6 February 2019.

⁶ Nikki Schwab, 'House passes criminal justice reform bill' *New York Post* (New York, 20 December 2018) <<https://nypost.com/2018/12/20/house-passes-criminal-justice-reform-bill/>> accessed 6 February 2019.

⁷ 'USA Data' (*World Prison Brief*) <<http://www.prisonstudies.org/country/united-states-america>> accessed 6 February 2019.

⁸ 'Inmate Statistics' (*Federal Bureau of Prisons*, 7 February 2019) <https://www.bop.gov/about/statistics/population_statistics.jsp#pop_report_cont> accessed 6 February 2019.

For instance, it allows prisoners to earn ‘time credits’ through their participation and apply them towards early release to pre-release custody. Other proposed changes include retrospective modification of ‘good time credit’ computation, reduced sentences for drug-related offences, and a ban on shackling of pregnant women.

However, inmates do not benefit equally from these reforms. The risk and needs assessment system employs algorithms to classify each prisoner as having a minimum, low, medium, or high risk for recidivism. The Act only permits prisoners falling within the minimum and low risk brackets to apply for time credits towards pre-release custody.

This article seeks to critically examine the impact of such algorithmic decision-making in the criminal justice system. Analysing different instances of algorithmic bias and the recent Wisconsin Supreme Court decision of *State v. Loomis*,⁹ it argues that opaque algorithmic decisions violate due process safeguards. In conclusion, the increasing use of such algorithms in the criminal justice system, including the FIRST STEP Act, is found to be undesirable, unless tempered with solutions which meaningfully improve their accuracy and transparency.

II. Algorithmic Bias in Decision-Making

Algorithmic decision-making has been demonstrated to perpetuate, at times even accentuate, gender and racial stereotypes within the criminal justice system.¹⁰ In a study conducted in 2016, ProPublica examined the COMPAS algorithm, one of the most popular scores used in pre-trial and sentencing to assess a criminal defendant’s likelihood of recidivism.¹¹ The analysis found that black defendants were twice as likely to be misclassified as higher risk compared to their white counterparts.¹² Furthermore, white defendants were mistakenly labelled low risk almost twice as often as black re-offenders.¹³ Similarly, a recent report in 2019 by Liberty, a civil rights NGO, discovered that several UK police forces have used discriminatory algorithms to predict where crime will be committed, and by whom, based on factors such as racial profiling.¹⁴

⁹ *State v Loomis* 881 NW 2d 749 (Wis 2016).

¹⁰ Danielle Kehl, Priscilla Guo, and Samuel Kessler, ‘Algorithms in the Criminal Justice System’ (*Berkman Klein Center for Internet & Society, HLS*, 2017)

<https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf> accessed 6 February 2019.

¹¹ Jeff Larson, Surya Mattu, Lauren Kirchner, and Julia Angwin, ‘How We Analyzed the COMPAS Recidivism Algorithm’ (*ProPublica*, 23 May 2016)

<<https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>> accessed 6 February 2019.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ ‘Liberty Report Exposes Police Forces’ Use Of Discriminatory Data To Predict Crime’ (*Liberty*, 4 February 2019) <<https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/liberty-report-exposes-police-forces%E2%80%99-use-discriminatory-data-0>> accessed 6 February 2019.

However, this cannot be conceived of as an entirely unanticipated phenomenon. Since machine learning depends on the data it processes, biases or inaccuracies in the sample size can easily be amplified.¹⁵ Even where the data used to train machine learning algorithms is neutral, prejudices have been shown to creep in at multiple other stages of the deep-learning process.¹⁶ The problem of bias is further compounded as algorithms are often protected intellectual property or are kept secret due to their proprietary nature. This prevents affected parties from challenging its decisions by permitting opaqueness in its decision-making process.¹⁷

The evidence strongly suggests that algorithmic bias may further entrench the already glaring structural inequalities in the US criminal justice system.¹⁸ Given this risk, the US justice system seems to be at a constitutional, ethical, and technological crossroads.

III. The Threat to Due Process Rights and Accountability in Criminal Justice: Analysing the Pitfalls of *State v. Loomis*

Specifically, the use of such algorithms in risk assessments and sentencing raises grave concerns about due process safeguards and accountability in criminal justice. Recently, in *Loomis*, an individual facing a six-year imprisonment term challenged the sentencing judge's use of the COMPAS algorithm before the Supreme Court of Wisconsin, arguing that it violated his due process rights on three grounds. First, it violated the defendant's right to be sentenced based upon accurate information, as the proprietary nature of COMPAS prevented him from assessing its accuracy. Secondly, it violated a defendant's right to an individualised sentence. Finally, it improperly used gendered assessments in sentencing.

The Court rejected these arguments and held that the use of the COMPAS algorithm at sentencing, within narrow constraints, did not violate the defendant's due process rights.¹⁹ It observed that while it could not be a determinative factor, a COMPAS risk assessment helps in deciding an individualised sentence alongside other supporting factors.²⁰ The Court also mandated that any Presentence Investigation Reports ('PSI's) containing a COMPAS assessment must give an advisement cautioning the sentencing court about its limitations.²¹ In spite of explicitly recognising

¹⁵ David Danks and Alex John London, 'Algorithmic Bias in Autonomous Systems' (2017) Proceedings of the 26th IJC on AI, 2 <<https://www.cmu.edu/dietrich/philosophy/docs/london/IJCAI17-AlgorithmicBias-Distrib.pdf>> accessed 6 February 2019.

¹⁶ Karen Hao, 'This is how AI bias really happens—and why it's so hard to fix' (*MIT Technology Review*, 4 February 2019) <<https://www.technologyreview.com/s/612876/this-is-how-ai-bias-really-happensand-why-its-so-hard-to-fix/>> accessed 15 March 2019.

¹⁷ Anupam Chander, 'The Racist Algorithm?' (2017) 11 Michigan Law Review 1023.

¹⁸ 'Report to the UN on Racial Disparities in the US Criminal Justice System' (*The Sentencing Project*, 19 April 2018) <<https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>> accessed 6 February 2019.

¹⁹ *Loomis* (n 7).

²⁰ *Ibid.*

²¹ *Ibid.*

the problems that plague algorithmic decision-making, the Court's reasoning leaves much to be desired.

A. The Court misunderstood how algorithmic decision-making works

While addressing the defendant's inability to assess the accuracy of the algorithm due to its proprietary nature, the Court made fatally erroneous observations about the nature of algorithms. It held that even though the COMPAS report did not disclose how risk scores are determined or how the factors are weighted, the defendant could challenge the resulting risk scores set forth in the report attached to the PSI. This could be done based on the 2015 Practitioner's Guide to COMPAS prepared by Northpointe, the developer of the algorithm, which explains some of the variables considered in calculating the risk scores.

However, this approach misunderstands the different ways in which bias creeps into the algorithmic process. As discussed earlier,²² even if the algorithm is facially neutral in the factors it considers, it may amplify biases and inaccuracies in the input data. Thus, in limiting a defendant's right to verify the results only to the extent of his answers to questions and publicly available data about his criminal history, the Court failed to account for the different stages of algorithmic decision-making that impact its final assessment. Further, by referring to the 2015 Guide prepared by the developer of the algorithm itself as an instrument for the defendant's benefit, the Court ignored the manifest conflict of interest involving Northpointe, a for-profit company with a \$1,765,334 contract at stake in Wisconsin.²³

B. The Court's proposed advisement is ineffective and inadequate

In an attempt to mitigate the defendant's concerns regarding racial bias and erosion of individualised sentencing, the Court mandated that a PSI using a COMPAS risk assessment must contain a four-part advisement that cautions sentencing courts about its limitations. This would include, *inter alia*, a warning stating that the proprietary nature of COMPAS has been invoked to prevent the disclosure of information relating to its functioning, and how some studies have raised questions about whether it discriminates against minority offenders.²⁴

However, the efficacy of such a warning mechanism remains doubtful for two reasons. First, while the advisements recognise some limitations of such risk assessments, they do not provide any guidance to judges on how much they should discount such assessments.²⁵ This is significant as judges still have no means of verifying the accuracy of such tools, but are expected to factor them into their decisions. Secondly, the advisement is likely to merely pay lip service due to

²² *Supra* (n14).

²³ Katherine Freeman, 'Algorithmic Injustice: How the Wisconsin Supreme Court Failed to Protect Due Process Rights in *State v. Loomis*' (2016) 18 *NCJOLT* 75, 92.

²⁴ *Loomis* (n 7).

²⁵ 'Wisconsin Supreme Court Requires Warning Before Use Of Algorithmic Risk Assessments In Sentencing' (2017) 130 *HLR* 1530, 1534.

widespread recognition of what is today known as ‘automation bias’,²⁶ or the ‘technology effect’,²⁷ or the ‘anchoring effect’²⁸ – the phenomenon whereby judges tend to be submissive to scientifically generated results due to a cognitive bias supporting data reliance.

C. The Court’s decision upholding the use of COMPAS as a non-determinative factor to arrive at an individualised sentence is flawed

Rejecting the defendant’s argument that a COMPAS risk assessment amounts to sentencing based on group data, the Court held that considering such a risk assessment as non-determinative along with other supporting factors is helpful in arriving at an individualised sentence.²⁹ However, this observation does not consider the fact that in the absence of any means to ascertain the accuracy of the risk assessment, the Court cannot determine the appropriate degree of reliance to be placed on this factor. Given the grave concerns regarding the high possibility of bias, the Court failed to offer a satisfactory justification for its continued use even as a mere ‘non-determinative factor’ in risk assessment and sentencing.

IV. The Way Forward

The decision in *Loomis* aptly demonstrates the challenges of algorithmic decision-making in the criminal justice system. While the FIRST STEP Act does not concern itself with the use of risk assessment tools in sentencing, reservations about due process continue to plague other determinations for which the Act employs algorithms, such as deciding which prisoners are entitled to pre-release custody. Since these determinations have a significant impact on the lives of prisoners, the continuing use of algorithms, however minor, is both disconcerting and arguably illegitimate.

It is therefore imperative to prevent the perpetuation of discrimination as a consequence of criminal justice reform. Even if the use of algorithms is considered indispensable, the Attorney General, along with the Bureau of Prisons, must actively take steps to avoid algorithmic bias under the Act.

For instance, promoting greater transparency regarding, *inter alia*, how an algorithm was developed, what assumptions were considered in its design, how its factors are weighted, what data was used to train it, and how frequently it is updated, will improve its credibility in two significant ways.³⁰ First, such information will enable affected individuals to meaningfully challenge algorithmic decisions. For instance, Europe’s new General Data Protection Regulation provides rights to ‘meaningful

²⁶ Liberty (n 12).

²⁷ Freeman (n 21) at 97.

²⁸ HLR (n 23) at 1536; Han-Wei Liu, Ching-Fu Lin, and Yu-Jie Chen, ‘Beyond State v. Loomis: Artificial Intelligence, Government Algorithmization, and Accountability’ (2019) 27 *International Journal of Law and Information Technology* 122, 133.

²⁹ *Loomis* (n 7).

³⁰ Kehl *et al* (n 8) at 32.

information about the logic involved' in automated decisions, commonly known as the 'right to explanation'.³¹ While it is a welcome development, the debate on the scope and applicability of this right remains contentious.³² Second, it will facilitate audits by external reviewers. Regular audits by independent researchers to check the design and real-world impact of algorithms are expected to go a long way in improving accountability.³³

Further, algorithmic bias may be actively countered by a combination of manual and automated steps. For instance, human oversight of algorithmic decisions, and manual reviews of algorithmic correlations for identification of stereotypes can temper algorithmic decisions with optimal human intervention.³⁴ This may be coupled with 'algorithmic affirmative action', which seeks to train algorithms against biases and incorporate safeguards in its design to reflect equal opportunity.³⁵ Such an approach would require designers to foresee how algorithms function in the real-world and rectify problematic results accordingly.³⁶ In fact, such algorithms are increasingly being used by giants such as Facebook and Google.³⁷

As we continue to redefine our relationship with technology, we must ensure that new pervasive technologies in our lives are informed by ethical considerations. Perhaps, adopting the aforementioned measures could prevent the FIRST STEP Act from becoming a misstep in criminal justice reform.

³¹ Selbst and Powles, 'Meaningful information and the right to explanation' (2017) 7(4) International Data Protection Law 233-242.

³² *Ibid.*

³³ 'Algorithmic Impact Assessments' (*AI Now Institute*, April 2018) <<https://ainowinstitute.org/aiareport2018.pdf>> accessed 10 June 2019.

³⁴ Gideon Mann and Cathy O'Neil, 'Hiring Algorithms Are Not Neutral' (*Harvard Business Review*, December 2016) <<https://hbr.org/2016/12/hiring-algorithms-are-not-neutral>> accessed 6 February 2019.

³⁵ 'Big Data' (*The White House*, May 2016) <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf> accessed 10 June 2019.

³⁶ Chander (n 15) at 1043-1044.

³⁷ *Ibid.*

Mats and Restorative Justice in Vanuatu

Kim D. Weinert¹

Mats are often unconsciously walked on, tripped over and habitually searched out to wipe our wet and muddy shoes on. Beyond a mat's functional and decorative characteristics, it is an object that does not attract much legal attention in law. However, in Vanuatu, fine mats are different. A 'fine mat' is a significant custom object. Fine mats within ni-Vanuatu² homes and culture are symbols of status and wealth, which are proudly displayed and exchanged in various custom ceremonies.³ They also embody juristic importance in Vanuatu's pluralist legal system.

This article argues that a ni-Vanuatu fine mat is more than a benign object. A feminist critique would suggest that, in their use as compensation for sexual harm victims, mats can memorialise violence and tie a victim of sexual crime to a narrative of patriarchal justice. By using the mat as a point of reference, this article will suggest how Vanuatu's sentencing practices can better facilitate a sexual assault victim's agency to redress gender inequality where custom reconciliation practices fall significantly short.

Vanuatu's criminal justice system has various statutory provisions which promote custom reconciliation ceremonies between the perpetrator and victim.⁴ The most commonly used provision is section 119 of the Criminal Procedure Code, which provides that:

[U]pon the conviction of any person for a criminal offence, the court shall, in assessing the quantum of penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if he is satisfied that undue delay is unlikely to be thereby occasioned, postpone sentence for such purpose.⁵

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² ni-Vanuatu is the term used for a citizen of Vanuatu.

³ *Public Prosecutor v Bule* [1994] VUSC 18. See also, Jean Tarisesei, 'Today is not the Same as Yesterday, and Tomorrow it will be Different Again: Kastom in Ambae, Vanuatu' in Bronwen Douglas (ed), *State, Society and Governance in Melanesia* (Australian National University, 2000) <https://openresearch-repository.anu.edu.au/bitstream/1885/140991/1/women%26governance3_0.pdf> accessed 23 July 2019.

⁴ Judicial Services and Courts Act 2000 s 65(2)-(3), Penal Code (Amendment) Act 2006 and Criminal Procedure Code [Cap 136], Island Courts Act 1983 [Cap 167] s 10. See also Constitution of the Republic of Vanuatu arts 95(2), 47(1).

⁵ Criminal Procedure Code [Cap 136] s 119.

Newton Cain, a scholar in South Pacific politics, policy and development observes that the courts have adopted different approaches to customary settlements across the South Pacific region.⁶ In Vanuatu, the purpose of custom is to quickly put everyone back onto a straight 'road' again.⁷ In other words, custom can resolve disputes, mend relations and restore peace between families and villages.⁸ The function and structure of a custom settlement is three-fold. First, to appease the victim; second, to redeem the perpetrator; and, third, to restore a sense of order and peace in the community.⁹ Generally, a customary settlement requires a perpetrator to give custom objects such as island food, kava, pigs (either alive or dead) and fine mats to the victim.¹⁰ But, in many cases, women often lack the status and ability to affect custom settlement proceedings as older male family members tend to speak on behalf of the victim.¹¹

The achieving and restoring of peace by custom lies at the core of Vanuatu's custom system of justice - however, it is challenging not to think that justice here may be distributed more towards the perpetrator than the victim. Victims have reported experiencing ongoing and overwhelming feelings of shame and embarrassment associated with sexual violence and crime even after a custom reconciliation ceremony has occurred.¹² The United Nations has expressed concerns at the use of customary law within the South Pacific region and custom may insufficiently focus on the needs of the victim in an attempt to provide redress.¹³

The current regime assumes that receiving custom objects and financial compensation will adequately deliver justice for the victim, but, unlike some custom objects like food and kava, which can be consumed, a fine mat has a degree of permanency and, if displayed, becomes a powerful presence within a victim's or a family member's home. Generally, mats can be found in homes displayed or stored in a basket above a fire to keep the mat free of insects and mildew.¹⁴ Parkinson Wirrick

⁶ Tess Newton Cain, 'The Incorporation of Customary Law and Principle into Sentencing Decisions in the South Pacific Region' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change – Law, Society and Governance in the Pacific* (Australian National University Press, Canberra 2010) 174. Compare *Public Prosecutor v Vuti* [2011] VUSC 75; *Public Prosecutor v Malau* [2017] VUSC 25.

⁷ See case study of M and W in Tony Crook, Susan Farran and Emilie Roëll, 'Understanding Gender Inequality Actions in the Pacific: Ethnographic Case-Studies & Policy Options' (European Union, Publications Office of the European Union 2016) Report 184–85 <<https://research-repository.st-andrews.ac.uk/handle/10023/10119>> accessed 23 July 2019.

⁸ *Public Prosecutor v Joshua Tovor* [2011] VUSC 230, [6]

⁹ Jean Zorn, 'Issues in Contemporary Customary Law: women and the Law' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change – Law, Society and Governance in the Pacific* (Australian National University Press 2010) 130.

¹⁰ *Ibid*, 106. For example, *Public Prosecutor v Boronie* [2016] VUSC 178, [8]; *Public Prosecutor v John* [2013] VUSC 175.

¹¹ Sofia Shah, 'Sexual Offences in Vanuatu under the Light of Custom and Law: 'An Avenue for Restorative Justice' (2013) 8 *Asian J Criminol* 257, 269.

¹² Vanuatu Women's Centre, 'Vanuatu National Survey on Women's Lives and Family Relationships' (May 2011) 92.

¹³ United Nations Women, 'Handbook for Legislation on Violence Against Women' (2008) 16.

¹⁴ Carlene Winch-Dummet and Silas Chief Viratameria Buli, *The Production, Symbolism, Exchange and Value of Red Mats and Pigs in Traditional Economy of South West Pentecost Vanuatu* (2011) 7

in his study of Vanuatu custom, observes a great emphasis on a duty and obligation to respect customary norms, laws and chiefly authority.¹⁵ It is arguable, therefore, that a victim and their family should display the mat so not to be seen as subversive, and to demonstrate their upholding of custom and respect for community norms and Melanesian values in keeping the peace and maintaining social order and harmony.

The 2001 case of *Public Prosecution v Gideon*¹⁶ illustrates the concerning extent to which custom can influence a judge's discretion in sentencing. In this case, the victim was a 13-year-old girl who sustained injury following unlawful intercourse. The accused pleaded guilty to rape and the court found the victim's age to be an aggravating factor. Despite the court describing the offence as an 'act of senseless sexual intercourse', the sitting judge relied upon sentencing remarks in the case of *Peter Wayne* by finding that customary settlements 'benefit[ted] sentence'.¹⁷ The maximum sentence for rape is life imprisonment (14 years) but on the basis of Gideon's guilty plea and customary settlement of VT 30,000, a pig and a fine mat, the court under section 119 of the Criminal Procedure Code reduced his sentence to only 13 months and ordered that the sentence be wholly suspended.

Gideon is one of many cases where custom allows for a sentence to be either suspended or significantly reduced.¹⁸ The outcome of *Gideon* and other cases may encourage defendants to make use of custom to avoid harsher penalties. However, the use of custom as a sentencing tactic can diminish women's identity and further undermine their already subordinate status in Vanuatu.¹⁹

The high cultural value of fine mats explains their use in legal settlement of sexual violence against women.²⁰ In spite of this, a mat can also emanate a legal narrative about the lives and experiences of sexual abuse victims that serves as a reminder of their violence and pain. A fine mat for a victim may act as an implicit link between the realities of a victim's sexual abuse and their unrecognised feelings of helplessness and shame as a victim. If a victim did not have the opportunity in custom to reject a mat, the fine mat could become an ongoing trigger of the traumatic event, thereby causing the victim to live through a 'private death'.

Accordingly, it is important for Vanuatu's legal system to attempt to account for the vulnerability and disempowerment that a custom object can represent for

<http://seaspirit.weebly.com/uploads/1/2/2/7/12279747/the_production_symbolism_exchange_and_value_of_red_mats_and_pigs_in_the_traditional_economy_of_south_west_pentecost_vanuatu.pdf> accessed 12 May 2019.

¹⁵ Parkinson Wirrick, 'Restricting the Freedom of Movement in Vanuatu: Custom in Conflict with Human Rights' 12(1) (2008) *JSPL* 76, 81.

¹⁶ [2001] VUSC 118.

¹⁷ *Public Prosecutor v Peter Wayne & Others* CR 08 of 2000.

¹⁸ See *Public Prosecutor v Tabigerian* [2015] VUSC 181; *Public Prosecutor v Kalgai* [2005] VUSC 58; *Public Prosecutor v Georges* [2004] VUSC 68 (with aggravating factors).

¹⁹ Lissant Bolton, 'Women, Place and Practice in Vanuatu: a view from Ambae' (1999) 70 (1) *Oceania* 43.

²⁰ See a small sample of cases: *Public Prosecutor v Boesel* [2018] VUSC 16; *Public Prosecutor v Amos* [2016] VUSC 199; *Public Prosecutor v Yonna* [2007] VUSC 108; *Public Prosecutor v Robin* [2005] VUSC 69; *Public Prosecutor v Wayne* [2000] VUSC 57.

victims of sexual violence. Although there is a plethora of stand-alone legislative reform ideas addressing violence against women in Vanuatu, there appears to be very little political will to operationalise these recommendations and other suggestions to overcome the inadequacies of Vanuatu's criminal law sentencing provisions for victims of sexual violence. In particular, it has been strongly advocated by Law Reform Commissions to remove custom in sentencing.²¹

A common principle behind the recommendations is the promotion of a victim's agency and autonomy.²² It has been suggested that judges must start to create and encourage clear opportunities for a victim to have a voice and agency in sentencing. Currently, Vanuatu's pre-sentencing procedure allows a victim to write a victim impact statement ('VIS'), but VIS forms should include a section for a victim to comment on the suitability of custom in sentencing. Without this opportunity, a victim is unable to openly inform the court of the unsuitability of custom as redress, the trauma suffered from a sexual crime, and how they feel about a possible reduced sentence.

While custom is an important part of Vanuatu society, its use in sentencing must be carefully administered to ensure adequate victim redress. As outlined in this article, even benign objects such as a mat can have long-lasting negative impacts on sexual crime victims and their recovery.

²¹ Vanuatu Law Commission, *Penal Code: Sexual Offences & Customary Reconciliation – Legislative Review* No05/14 (2014) 9; New Zealand Law Reform Commission, *Converging Currents: Custom and Human Rights in the Pacific* Study Paper 17 (2006) 96.

²² *Supra* (n11, n12).

Research Access and Adaptation in the Securitised Field of Australian Refugee and Asylum Law

Regina Jefferies¹

Each day, a vast network of low- and mid-level government officials at a variety of different agencies go about the business of implementing the international legal obligation of non-refoulement in Australia – one of the central tenets of international refugee law, which prevents states from returning an individual to a place where they fear persecution.² Whether in a formal refugee status determination or in deciding whether to provide legal services information to asylum seekers in detention, officials routinely make decisions based upon organisational, legal, practical and other considerations that factor into how legal obligations are implemented. These determinations are not limited to formal legal processes or reviewable administrative decisions, nor are they limited to the decisions of public-facing officials. Yet, as refugee and asylum policy become increasingly subordinated to (and deemed incompatible with) state sovereignty and national security,³ gaining access to government officials and legal processes for the purpose of academic research faces serious challenges.

I begin with a brief overview of the intersection between international legal compliance scholarship and socio-legal studies, in order to situate a methodological discussion within a broader theoretical frame. I then turn to the challenges I faced in researching Australia's compliance with the norm of non-refoulement, which required an exploration of how front-line state actors internalise, implement and influence the norm. I describe my attempts to gain access to agencies and actors to test one international legal compliance theory using multi-sited ethnography, doctrinal analysis and participant interviews in a grounded theory approach. I then recount my shift towards identifying and mapping the pathways and actors of internalisation using doctrinal and qualitative network analysis, resulting from geographical limitations and legal barriers that, among other things, prescribe imprisonment for officials who disclose broadly defined 'Immigration and Border Protection information.'⁴

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² 1951 Convention Relating to the Status of Refugees (1951 Convention), 189 U.N.T.S. 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954).

³ Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-"Refoulement" and the Externalization of Asylum by Australia and Europe' (2008) 43 *Government and Opposition* 249.

⁴ Australian Border Force Act 2015, s 42.

I. International Legal Compliance and Socio-Legal Studies

In 2017, I moved to Australia to undertake a research programme exploring how international human rights standards flow ‘through layers of national and sub-national institutions’⁵ in their eventual application to individuals through formal and informal discretionary determinations. International legal compliance scholarship emerged in the 1990s as a subfield of international law grappling with the debate between theorists who argued that international law constrains and shapes state behaviour and those who argued that international law is epiphenomenal.⁶ Though many studies have since sought to explain whether states obey international law, scholars generally conclude that states’ rule acceptance equals ‘faithful rule observance.’⁷ While some empirical work has challenged this view, few international law scholars have tested theoretical frameworks beyond traditional legal case studies.⁸

My project ventures to fill that gap by employing social-science research methods to examine, critique, and lay the groundwork for continued empirical testing of one such theory—transnational legal process (‘TLP’). Harold Koh introduced TLP in 1996, arguing that states obey international law through a process of internalisation borne of ‘repeated interaction with other governmental and non-governmental actors in the international system.’⁹ Though the theory acknowledges the multiplicity of actors involved in the domestic internalisation of international legal norms, it describes an iterative process that takes little notice of the role of low-level state officials, or street-level bureaucrats, in questions of internalisation or law production.

Socio-legal scholarship, however, has devoted significant time and attention to these types of ‘bottom-up’ actors and questions. In their theory of ‘legality,’ Patricia Ewick and Susan Silbey present a view of law as fundamental to social interaction and thus representative of ‘the diversity of the situations out of which it emerges and that it helps structure.’¹⁰ They argue that the pervasiveness of law shapes, and is shaped by, social life.¹¹ While legal scholarship often characterises ‘discretionary’ decisions of street-level bureaucrats such as prosecutors and police officers as ‘other-than-law’, requiring legal structure and confinement, legality theory suggests a more nuanced understanding of law that emerges just as readily from routine, discretionary encounters as from ‘groups of powerful law “makers.”’¹²

⁵ Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Hart Publishing, 2004) 4.

⁶ William C. Bradford, ‘International Legal Compliance: An Annotated Bibliography’ (2004) 30 *North Carolina J Intl L Commercial Regulation* 379.

⁷ Roda Mushkat, ‘Dissecting International Legal Compliance: An Unfinished Odyssey’ (2009) 38 *Denver J Intl L Policy* 161, 162.

⁸ Gregory Schaffer and Tom Ginsburg, ‘The Empirical Turn in International Legal Scholarship’ (2012) 106 *AJIL* 1.

⁹ Harold Hongju Koh, ‘Transnational Legal Process’ (1996) 75 *Nebraska L Rev* 181.

¹⁰ Patricia Ewick and Susan S. Silbey, *The Common Place of Law* (University of Chicago 1998) 17.

¹¹ *Ibid.*

¹² *Ibid.*, 18. See Anna C. Pratt, ‘Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act’ (1999) 8 *Social & Legal Studies* 199.

II. Negotiating Access in the Australian Context

I embarked on this research programme with the aim of observing and interviewing front-line government officials working at the border, processing refugee status determination and visa cancellation cases and overseeing the detention of refugees and asylum seekers. These are the types of spaces where the actual practices of individuals implementing Australia's *non-refoulement* obligation are carried out – a variety of agencies, geographic locations, and professional settings. Yet, because Australia's geography dictates that people arrive by water, or by air, the government exercises an extraordinary degree of control over the physical spaces where officials process asylum-seekers. This left one practical option for multi-sited ethnography – formally requesting access to observational sites accommodating low- and mid-level officials.

Gaining access for ethnographic observation would not be unprecedented, as scholars had observed and interviewed border officials in two Australian airports¹³ before 2014 and the Department of Home Affairs ('DHA') continued to broadcast front-line border operations through television shows such as 'Border Security: Australia's Front Line'.¹⁴ I therefore began by reaching out to scholars who had conducted research in the field. However, this tactic proved minimally successful due to guarded and non-responses, as well as the fact that in 2017 the federal government transitioned most migration-related agencies into DHA, rendering even recent past experience less useful.

No clear procedure exists for requesting permission to engage with DHA or similar agencies for the purposes of academic study, which raised questions regarding the methods by which agency participation in research is evaluated. Though DHA maintains a 'Irregular Migration and Border Research Programme' and has partnered with research organisations, their website contains no contacts or reference to the process of obtaining permission to conduct a study.¹⁵ This lack of formal procedure is apparently not uncommon, as I found while searching for similar procedures in the United States. A subsequent meeting with an academic and employee of DHA suggested I contact the main switchboard where, after several redirections, I was eventually routed to the media inquiry department. A request to that department resulted in no response. A separate enquiry to a mid-level contact at the Australian Border Force also resulted in no final response.

As I attempted to untangle these leads, I met another academic who had previously worked in several roles within and outside of government and who had maintained strong connections to mid- and high-level officials in the field. By reaching

¹³ Sharon Pickering and Julie Ham, 'Hot Pants at the Border: Sorting Sex Work from Trafficking' (2014) 54 *BJ Criminology* 2.

¹⁴ Paul Farrell, 'Border force and immigration officials have final say on reality TV show' *The Guardian* (Sydney, 22 September 2015) <www.theguardian.com/australia-news/2015/sep/22/border-force-and-immigration-officials-have-final-say-on-reality-tv-show> accessed 5 January 2019.

¹⁵ Australian Department of Home Affairs, *Irregular migration and border research* <<https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/research/irregular-migration>> accessed 20 November 2018.

out to old colleagues and friends in various departments, I received invaluable introductions and an implicit endorsement that facilitated access to officials with the power to consider and grant approval for participation. I thus corresponded with officials at the Assistant Secretary level within DHA, the Attorney-General's Department, and the Department of Foreign Affairs and Trade ('DFAT').

I presented my research as an attempt to gain an understanding of the perspectives of front-line officials in the implementation and internalisation of the norm of *non-refoulement*. I explained that interviews would be confidential, appended a participant information sheet, and indicated flexibility regarding observational sites. Each official initially responded with interest and an openness to allowing low-level officials to participate. However, the Attorney-General's Department and DHA ultimately declined to participate on the basis of 'the confidentiality of the advice [they] provide and the trusted relationships [they] have with [...] clients when participating in government decision-making...'¹⁶ DFAT also declined participation, concluding that officials 'would not be well placed to contribute' on the topic of research.¹⁷

The initial interest and subsequent rejection of my request caused me to question whether my status as a 'foreigner' and thus, legal subject of the system I sought to study might have hindered my ability to gain access to sensitive locations. I arrived in Australia amidst a dual citizenship parliamentary eligibility crisis, as well as an unfolding scandal over foreign influence in domestic politics. Against this background, Parliament passed the Foreign Influence Transparency Scheme Bill 2018, instituting new rules aimed at regulating and criminalising 'foreign influence' in Australia. Though I will likely never know whether this contributed to the denial of access, my original research objective and methodology clearly required rethinking.

I therefore revised my research question to focus on the pathways and actors of internalisation of the norm of *non-refoulement*. By shifting focus to the process, I could look to former officials and actors who had participated in that process, including employees of civil society organisations, international organisations, and legal practitioners, while laying groundwork for future research. I recruited study participants through legal and community listservs and snowball sampling to conduct qualitative network analysis using semi-structured interviews. This resulted in thirteen interviewees – more than two-thirds of whom had previously worked as front-line officials in the field. Combining doctrinal review with invaluable insights from interviews allowed me to triangulate methods and sources, producing a more robust account.

In the interviews, former officials also indicated that fear of prosecution and loss of current or future employment weighed heavily on participation considerations. The Australian legal and political framework includes restrictive laws and employment contracts that prevent current and former DHA officials from discussing their

¹⁶ E-mail on file with author.

¹⁷ *Ibid.*

employment without fear of a two year prison sentence¹⁸ and lacks effective whistleblower protections.¹⁹ Government officials have suffered the consequences of even anonymous disclosure.²⁰ The pressure on officials not to speak about government practice thus strongly militated against participation.

III. Conclusion

Several factors encumber deep engagement with the implementation apparatus in the securitised field of refugee and asylum law in Australia. There is general recognition amongst researchers, expressed privately and publicly, that the current political and legal climate present significant roadblocks. Moreover, while it seems plausible that a formal collaboration between my university and the DHA might have facilitated my research methods and aims, framing my research question differently may have had a greater impact. For example, the framing of the ethnographic airport study cited above corresponded to a 'human trafficking' discourse favoured by Australian officials.

Yet, these practical issues reflect more than challenges of framing or institutional relationships. Shielding from view the routine, discretionary actions of officials charged with implementing legal obligations frustrates the participatory, dialogical dimensions of legality. By limiting access to research that furthers agency goals, whether by exercising control over messaging, or by aligning research with perceived agency needs,²¹ agencies enact an undemocratic version of legality. As the daily practices of government officials are core to law internalisation, production and a democratic legal process, additional work is needed to identify and clear pathways to access.

¹⁸ Australian Border Force Act 2015, s 42.

¹⁹ Nicola Bevitt, 'The Australian Border Force Act 2015 (Cth) Secrecy Provisions - Borderline Unconstitutional' (2017) 39 *Sydney L Rev* 257.

²⁰ Doug Dingwall, 'Attorney-General argues limits to public servant free speech justified', *Sydney Morning Herald* (Sydney, 9 November 2018) <www.smh.com.au/politics/federal/attorney-general-argues-limits-to-public-servant-free-speech-justified-20181108-p50esk.html> accessed 5 January 2019.

²¹ Farrell, (n 14).