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MPhil in International Law

The Danger of the Single Legal Story: The Effects of International Human Rights Legalization on Land Issues in Africa

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Research dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the MPhil in International Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of MPhil in International Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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# The Danger of the Single Legal Story: The Effects of International Human Rights Legalization on Land Issues in Africa

**Abstract**

The order of ideas herein presented constitutes a decolonial critique of the constraints inherent in international human rights law, upheld as the gold standard for safeguarding the rights of rural communities in the context of resource extraction within the African landscape. The objective is to render visible the constraints imposed by international human rights law on the capacity of international human rights organizations to advocate for the interests of African communities facing the adverse human rights implications of reckless corporate extractive operations.

The exercise is based on an analysis of reports on resource extraction and human rights in Africa issued by prominent international human rights organizations, specifically Amnesty International and Human Rights Watch. This analysis locates these limitations within the coloniality of international human rights law, pursuant to the process of human rights legalization. For in practice, the legalization process has gradually and progressively reduced human rights into a monodisciplinary legal domain in which the multidisciplinary ode to human rights has been silenced. Whether intended or unintended, the multidimensional human rights story gave way to the prevailing single human rights story, within which human rights are knowable and visible in ways that matter only through the eyes of the law.

As an instrument of coloniality, the legalization process has dismantled the intricate, decentralized, and all-encompassing global human rights rhizome, relegating it to historical obsolescence, and in its place, constructed the prevailing hierarchical, unitary, centralized, and exclusionary arboreal edifice of

international legal human rights. This reduction of human rights to a one-dimensional legal framework has effectively silenced numerous indigenous voices globally, notably those originating from the global south. The prevailing arboreal paradigm must yield ground, allowing for the resurgence of a rhizomatic framework as the more equitable, tenable, decolonial approach.

# 1. INTRODUCTION

> *'A society with no other scale but the legal one is less than worthy of man.'*[1]

On 7 October 2009, the Nigeran novelist Chimamanda Adichie delivered a memorable presentation on TED Talks entitled 'The danger of the single story,' which provided an incisive critique of Western reductionist storytelling about Africa.[2] Adichie argues that Western storytelling reduces Africa's complex totality of humanity to one-sided exaggerations of the negative: stereotypes. The compression of the other to a single variable (of tragedy) negates Africa's full humanity. Her critique is a moment in the broader genealogy of postcolonial studies that have taken issue with Western misrepresentation of the other.[3] This dissertation draws inspiration from Adichie's critique of Western reductionism and decolonial theory made visible in international law through Third World Approaches to International Law (TWAIL).[4] In this dissertation, reductionism refers to the contraction of the human condition and experience through the legalisation of human rights, the legal expropriation and occupation of human rights. This colonial condition renders international human rights instruments ineffective in defending and protecting human rights.

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[1] A Solzhenitzen, quoted in AB Rubin 'Does law matter? A judge's response to the critical legal studies movement' (1987) 37 *JLE* 307.

[2] CN Adichie 'The danger of a single story' *TED Talks,* 07 October 2009.

[3] This genealogy is exemplified by Edward Said's *Orientalism,* in which he critiques the invention of the Oriental through Western discourse, and V. Y. Mudimbe's *The Invention of Africa,* in which he critiques the colonial library of Africa (European philosophies of Africa) constructed by European explorers, policymakers, legislators, administrators, missionaries, anthropologists and philosophers.

[4] TWAIL is an international school of thought, predominantly led by international legal and policy scholars and practitioners of the global south who seek to decolonise international law and the international legal system.

The international human rights framework is the gold standard of research, policy development, campaigns and advocacy among international human rights organisations. This study takes issue with the colonial moorings of this framework, which limits the ability of these international human rights organisations to meaningfully address the human rights violations and abuses in the context of land dispossession and resource extraction in Africa. To build this argument, the dissertation examines how this international gold standard has constrained international human rights organisations in meaningfully defending the rights of land dispossessed communities in the context of resource extraction in the region. The purpose of this exercise is not to lay the blame at the feet of these organisations but to demonstrate how the coloniality of the international human rights framework has undermined the work of these organisations on questions related to land dispossession and resource extraction in the region. The exercise also draws on the author's own experience as a human rights activist at Amnesty International.

The study will locate the coloniality of the international human rights framework within the development of the international human rights framework, most notably the legalisation process of human rights at the international level and the concomitant limits in addressing land rights in Africa in the context of land expropriation for profit by international corporations. The study's arguments are centred around the effects of the legalisation process, notably the impoverishment of human rights. International human rights organisations have exclusively relied on international human rights law, despite its weakness, in defending and protecting the rights of rural communities. In so doing, these organizations have not been able to defend rural lands and natural ecosystems expropriated for business purposes by multinational corporations working hand in glove with African governments. As the Russian writer Aleksander Solzhenitzen said, 'A society with no other scale but the legal one is

less than worthy of man'. This is to say, the dominant human rights' single story – the legal story – is 'less than worthy of man'.

Methodologically, the study will focus on five studies by two international human rights organisations: Amnesty International and Human Rights Watch. Amnesty International published three of these studies, while Human Rights Watch published two. All the studies deal with the question of human rights that arise due to land expropriation and exploitation by extractive corporations. While the initial plan was to focus on Southern Africa, the limited number of studies focused exclusively on Southern Africa led to the expansion of the focus to Africa at large. Thus, the studies cover two states in Southern Africa (Angola and Eswatini), two states in East Africa (Tanzania and Uganda), and one state in West Africa (Nigeria). Theoretically, the study is situated within Critical Legal Studies (CLS) more broadly, and specifically within Third World Approaches to International Law (TWAIL) and decolonial literature.

# 2. METHODOLOGY

In order to build the arguments, the dissertation examines five human rights reports written and published by two major international human rights organisations. The central question of this study is how the coloniality of the international human rights framework limits the ability of international human rights organisations to defend and protect human rights in the context of land expropriation and resource extraction in Africa.

The analysis attempts to highlight the evidence of the failure of the international human rights framework to effectively handle the human rights violations identified in, and human rights violations omitted from, the reports. The criteria for the selection of the reports include the following:

a) The reports were written and published by the most recognisable international human rights organisations.

b) The reports address human rights violations in rural communities within the borders of African states.

c) The research was conducted in rural communities within the borders of African states.

d) The human rights violations under consideration are related to land and natural ecosystems that provide life-sustaining ecological services such as food, water, health, housing, and a healthy environment.

e) The human rights violations under consideration are related to land expropriation for some form of extraction of natural resources for profit.

For the sake of manageability, the study focuses on five reports written and published by the two most recognisable international human rights organisations: Amnesty International and Human Rights Watch. Amnesty International reports include (1) 'The End of Cattle's Paradise: How Ranchers Eroded Pastoralism and Food Security in the Gambos, Angola' (2019); (2) '"They Don't See Us as People": Security of Tenure and Forced Evictions in Eswatini' (2018); and (3) 'No Clean-Up, No Justice: An Evaluation of the Implementation of UNEP's Environmental Assessment of Ogoniland, Nine Years On' (2020). Reports by Human Rights Watch include (4) '"What is a House Without Food?": Mozambique's Coal Mining Boom and Resettlements' (2013); and (5) '"Our Trust is Broken": Loss of Land and Livelihoods for Oil Development in Uganda' (2023).

This dissertation provides a review of CLS, privileging Third World Approaches to International Law (TWAIL) and decolonial scholarship. This study uses TWAIL and decolonial scholarship as methodological frames to render the subject matter under investigation orderable. Thus, the methodological approach taken in this study parts ways from the positivistic quest for neutrality, impartiality and purity of law. One of the enduring legacies of the Critical Legal Studies movement is the banal, commonsensical and taken-for-granted understanding that the law is produced and applied in contested sites rather than in neutral, impartial and pure spaces. Instead, the study approaches international law as an unfinished product of asymmetric economic, social, cultural and political relations between states with shifting power (im)balances.

# 3. REVIEW OF LITERATURE

**Introduction**

The subject matter of this dissertation is situated within the landscape of Critical Legal Studies (CLS), notably its decolonial evolutionary branch of Third World Approaches to International Law (TWAIL). CLS is part of the broader social sciences and humanities tradition of critical theory emerging in Germany in the 1930s, associated with the Institute for Social Research, widely known as the Frankfurt School of Critical Theory.[5] The vision of critical theory is a world in which human beings are emancipated from the oppression of falsehoods.[6] CLS itself is viewed, even by CLS scholars, as an American social movement emerging from the emancipation zeitgeist of the 1960s and 1970s characterised by the movements for civil rights, women's rights, opposition to the Vietnam war, and black power.[7] The CLS movement was constituted through the works of legal scholars associated with Yale Law School, Harvard Law School, and the University of Wisconsin Law School. Globally, the emergence of CLS coincides with the apogee of anti-colonization movements worldwide, especially in Africa, where newly independent states such as Ghana burst into the world stage.

[5] The Frankfurt School of Critical Theory brought together prominent left-leaning social scientists and philosophers, including Max Horkheimer, Herbert Marcuse, Theodore Adorno, and Jürgen Habermas.

[6] JA Standen 'Critical Legal Studies as an anti-positivist phenomenon' (1986) 72 *VLR* 983 at 992.

[7] In addition to the social movements in the United States, the global movement for independence from colonialism was at its highest point as states such as Ghana, Zambia, Tanzania, Kenya, etc., in Africa became independent and part of the United Nations. The conditions for the emergence of CLS were globally widespread.

The current chapter provides a review of the literature associated with the CLS movement. Gleaning from James Stewart's 'CLS family tree', the CLS literature can be divided into several branches, including Feminist Legal Theory, Critical Race Theory, Psychoanalytical Legal Theory, Postmodern Legal Theory, Law and Literature, Queer Legal Theory, Law and Popular Culture, Cultural Legal Studies, and Comics and Law.[8] For the current study, it is worth adding Third World Approaches to International Law (TWAIL) to this list, which is interwoven with decolonial theory. This review covers only Feminist Legal Theory, Critical Race Theory, Universal/Cultural Relativism, and TWAIL. The review is limited to the following themes because, together, they form a logical scholarly mosaic within which the subject matter of this dissertation appropriately fits. While the CLS movement is generally considered dead,[9] David Trubek argues it lives in international development and international relations, finding its living expression in TWAIL.[10]

**CLS, The Central Branch**

The central project of Critical Legal Theory (CLT)[11] consists of altering the provision and administration of legal education and propagating the deconstruction and decentering of unqualified deference to traditional liberal legal scholarship.[12] This project is driven by the assumption that legal theory and practice are constituted through politics, ideology, socioeconomic interests,

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[8] JG Stewart 'Demystifying CLS: A critical legal studies family tree' (2020) 41 *ALR* 121.
[9] RM Fischl 'The Question that Killed Critical Legal Studies' (1992) 17 *LSI* 779.
[10] DM Trubek 'David Trubek on the birth of the Critical Legal Studies Movement: Part Two,' *Critical Legal Theory Podcast, Episode 3*, 2022, available at https://systemicjustice.org/2022/07/episode-3-david-trubek-on-the-birth-of-the-critical-legal-studies-movement-part-two, accessed on 23 March 2023. Trubek himself is an active member of the TWAIL legal and policy practice.
[11] Critical Legal Studies (CLS) and Critical Legal Theory (CLT) are used interchangeably in this dissertation.
[12] JD Hanson 'Introduction,' *Critical Legal Theory Podcast, Episode 1*, 2022, available at https://systemicjustice.org/2022/04/episode-1-introduction-to-the-critical-legal-theory-podcast accessed on 23 March 2023.

and power.[13] Thus, the central tenets of CLT include, though not necessarily limited to, the following:

First, CLT stresses that legal outcomes are underdetermined by so-called legal reasoning. This premise is often referred to as the indeterminacy of the outcomes of legal deliberations by judges. The principle of indeterminacy critiques the traditional, liberal view that rigorous, impartial application of legal principles in court cases inevitably produces pure, unbiased results.[14] Further, CLS holds that 'legal reasoning is not a decision procedure, but a set of cultural practices within a discursive matrix that legal actors use to enact performances designed to convince readers and listeners that the outcomes they favour are legally required.'[15] Furthermore, according to CLS, 'legal constraint is a culturally contextualised experience, not a demonstrable fact.'[16] In other words, the legal constraint is a spatiotemporal set of factors that are historically contingent upon time and space.[17] Moreover, CLS asserts that 'legal norms and discourses are underdetermined by social structure and political ideology.'[18] Law is a language produced and reproduced within networks of unequal social relations with shifting asymmetric power (im)balances.[19] Finally, CLS views 'legal rules and practices [playing] a significant role in constructing social, economic and political life.'[20] Legal language profoundly shapes and is shaped by social, economic and political interests and stratification.[21] All in all, Jon Hanson explains, CLS is an instrument in the fight for justice for the marginalised:

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[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.

> …the legal medium [is] a terrain on which democrat egalitarians, anti-racist socialists, feminists, queers and historically intersectionally marginalized identities can fight to renegotiate the background rules that structure social, economic, and political life and in so doing, enlarge the space of freedom in the world.[22]

At the core of CLS scholarship, one may place David Trubek, Mark Tushnet, Duncan Kennedy, and Roberto Unger. Trubek, the most senior among them, draws deeply from the classical sociologists to demonstrate the indeterminacy, cultural specificity, spacio-temporality, and political nature of lawmaking and legal reasoning. In his 'Max Weber's Tragic Moderning and the Study of Law in Society', Trubek argues that Weber's understanding of sociology in law differs from the standard, positivist approach in that he established a sharp line between the realms of fact and value. Knowledge of empirical reality on the one hand and ethical or purposive knowledge on the other exist in separate, unbridgeable spheres.[23] While Weber presented a standardised, positivist legal sociology with enduring influence on modern legal scholarship, he also critiqued this habit of thought. Ultimately, he agonized over the possibility that social sciences might not live up to the promise of delivering human freedom.[24] Therefore, Weber's sociology highlights the need for a critical approach to the study of law in a society that considers the limitations of social science and the complexities of modernity. Elsewhere, Trubek argues that CLS is a scholarly project that challenges current legal scholarship and the organisation of American society.[25] The underlying ideas of CLS concern the relationship between law and society, social structures and human behaviour. CLS derives its ideas from various legal and social theory sources, many of them barely understood. Unlike traditional legal studies, which focus on legal doctrine or

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[22] JD Hanson 'Introduction,' Critical Legal Theory Podcast, Episode 1, 2022, available at https://systemicjustice.org/2022/04/episode-1-introduction-to-the-critical-legal-theory-podcast accessed on 23 March 2023.

[23] DM Trubek, 'Max Weber's tragic modernism and the study of law in society' (1986) 20 LSR 573 at 583.

[24] Ibid., 573.

[25] DM Trubek 'Where the action is: Critical legal studies and empiricism' (1984) 36 SLR 575.

legal scholarship, CLS critiques legal thought and the unexamined assumptions of legal theories themselves.[26] In addition, Trubek notes that legal scholars typically spend their professional lives in ivory towers studying legal documents insulated from the day-to-day practice of law and other disciplines. This, he argues, can create a 'tilt' towards legal dogmatism that does not reflect the realities of legal practice or the needs of society. A critical perspective to legal scholarship could address this imbalance by analysing the banal assumptions buried within the prevailing legal mindset and revealing the social, economic, and political forces that shape legal doctrine. This could bring about realistic knowledge of the role of law in society and the potential for legal reform.[27] Likewise, elsewhere Trubek called for studies of courts that take into account the broader social, economic, and political factors that shape disputes before the courts. In his analysis, existing theories of dispute processing suffer from disciplinary Balkanisation, failing to take a multidisciplinary approach and draw on insights from anthropology, sociology, psychology, and economics to develop a more comprehensive understanding of how disputes are resolved in the legal system.[28]

Trubek takes a historical look at changes in law and development studies wherein early efforts in the 1960s focused on modernising legal systems in developing countries, whereas, in contrast, the new 'law and development' movement emerged after the Cold War with a greater emphasis on promoting the rule of law and human rights. He points out that the collapse of the Soviet Union and the rise of democratic market models of state, economy, and society have also shaped the new law and development projects significantly. The legal scholarship on development has become more refined, using more sophisticated theoretical models and empirical methods. Trubek observes that the emerging

[26] Ibid., 588.
[27] Ibid., 618.
[28] DM Trubek 'Studying courts in context' (1980-1981) 15 LSR 485 at 494.

research recognizes the need for interdisciplinarity in law and development and the importance of factoring in local contexts and cultures in designing legal reforms.[29] In one of his earliest interventions, he proposed that examining the basic theory from which they derive becomes necessary when legal solutions fail to address social problems.[30] When the public asks casually, 'Is law dead?', it is an indication that the role of law in society has become problematic. The crisis of law is due to underlying assumptions that undermine fruitful legal inquiry and development. The crisis calls for a social theory of law with better concepts that will correct errors and clear the space for further inquiry.[31]

Another major proponent of CLS is Duncan Kennedy[32] who has tirelessly argued that law schools perpetuate social hierarchies in several ways including through the admissions process, which favours students from privileged backgrounds, through the training of students to accept and participate in the unequal hierarchical structure, through the hierarchy among students, reinforced by the current law review selection and grading systems, and through the placement process after graduation which reinforces the professional hierarchy within the legal field.[33] To correct the status quo, Kennedy proposes overhauling the admissions process in law schools by establishing basic legal competencies and a lottery system for admission, with race, class and gender quotas. To end the inequality in access to legal education, Kennedy proposes curriculum redesign and investment in students in the lower ranks of the academic ladder. In addition, Kennedy proposed democratising faculty hiring and addressing research and instruction competencies among

[29] DM Trubek 'Law and development: Then and now: Are international institutions doing their job?' (1996) 90 *ASIL* 223.
[30] DM Trubek 'Toward a social theory of law: An essay on the study of law and development' (1972) 82 *TYLJ* 1.
[31] Ibid.
[32] D Kennedy 'Legal education and the reproduction of hierarchy' (1982) 32 *JLE* 591.
[33] Ibid., 606.

lecturers. Finally, he recommends developing programs that encourage public legal practice.[34]

Taking a historical perspective, Kennedy revisited this question two decades later in conjunction with the quest for social justice,[35] providing a historical narrative of debates surrounding social justice in legal education from 1900 to the present. According to Kennedy, the debate on legal education and social justice has undergone four phases. The first stage, which lasted until around 1900, was dominated by the positivist conception of legal education, which held that social justice had nothing to do with legal education. The second stage, which lasted until around 1930, saw the emergence of a more expansive conception of legal education that emphasised the importance of social justice. The third stage kickstarted in the 1940s and ran through the post-war era, signalling the move from social to individual concerns and tendencies. The fourth stage, which began around 1970, saw the emergence of a more radical approach to legal education, which rejects the notion of social justice. Kennedy argues that this critical and radical approach is necessary to address contemporary social justice concerns.[36] Overall, legal education must be responsive to the social and political context in which it takes place and must be willing to engage critically with questions of social justice.[37]

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[34] Ibid, 615. According to Kennedy, legal education reproduces inequality in three deleterious ways. First, legal education provides a legitimating ideology that justifies the rules that underlie the legal system and reinforces the existing power relations. Second, legal education attitudes and behaviours so that students reproduce the hierarchy and become cultural clones. Third, legal education mystifies legal reasoning, making it seem as if it is an objective and neutral process when it is shaped by social and political factors. Finally, legal education limits the diversity of perspectives and experiences in the legal profession, which can lead to a narrow and incomplete understanding of legal issues and can limit the ability of lawyers to represent clients from diverse backgrounds effectively, 608.

[35] D Kenney 'The social justice element in legal education in the United States' (2005) 1 UNBOUND 93. Similarly, Mark Tushnet, another central figure in the CLS movement, provides a political evolution of the movement in 'Critical legal studies: A political history' (1991) 100 *TYLJ* 1515.

[36] Ibid., 100.

[37] Ibid., 94.

In another piece, Kennedy argues that legal reasoning is a complex and multifaceted process influenced by various factors, such as the magistrate's personal beliefs and values, the social and political milieu within which the case is deliberated, and the manipulability of the field.[38] Conflicts between the idea that 'the law is the law,' on the one hand, and the idea that the law is intrinsically an affair of justice, on the other hand, are not quickly resolved and that the manipulability of the field is much greater than the lay public realises. Furthermore, Kennedy suggests that most social theorists assume that 'law' can be treated as a block contributing to a larger structure. Overall, he presents a critical phenomenology of legal reasoning and explores the complex conditions that may influence a judge's decision-making process.[39] Kennedy provides a unique perspective on the legal reasoning process that can help legal professionals to be more reflective and critical in their approach to legal decision-making.[40]

In another text, Kennedy applies the tenets of CLS in an analysis of legal reasoning, which, in his view, overly focused on abstract rules and principles at the expense of social context and practical outcomes.[41] Instead, he advocates for a more contextual and pragmatic approach to legal reasoning that considers legal decisions' social and political implications. Kennedy draws on CLS to analyse the rhetorical strategies used in American private law opinions, articles, and treatises, arguing that these rhetorical strategies often obscure the political and ideological dimensions of legal disputes and that a more critical and self-reflective approach is needed to understand the role of law in society fully. He situates his analysis within the broader context of CLS, drawing on other scholars' work to support his arguments and proposes a framework for

[38] D Kennedy 'Freedom and constraint in adjudication: A critical phenomenology' (1986) 36 *JLE* 518.
[39] Ibid., 518, 536, 561.
[40] Ibid., 556, 546, 528.
[41] D Kennedy 'Form and substance in private law adjudication' (1976) 89 *HLR* 1685.

configuring the symbiosis between form and substance in private law adjudication. CLS provides a theoretical and methodological foundation for Kennedy's analysis and is an integral part of the intellectual context in which this analysis is situated.

As Alan Hunt does, one may ask, what is 'critical' about legal theory?[42] According to Hunt, 'critical' refers to deconstructing the legal approach to the law. CLS scholars are deeply dissatisfied with the status quo in legal education and the place of law in the contemporary world. They challenge the assumptions and taken-for-granted attitudes and prejudices of legal professionals and seek to understand the practices of judges and lawyers by subjecting them to scrutiny that maintains critical distance. In other words, critical legal theory is critical because it questions and challenges the prevailing orthodoxies in theory and praxis of law.[43]

Roberto Unger, another towering CLS figure, advances views with the same flavour. His position is that legal thought should be understood as a form of politics rather than a neutral or objective discipline.[44] He views legal reasoning as inherently political and shaped by social context and that power relations and ideological commitments often influence legal decisions. Another key argument is that traditional legal theories, such as objectivism and formalism, are inadequate for understanding the complexities of legal decision-making. For Unger, legal objectivism fails to recognise the role of ideology, politics, and social context in legal decision-making, whereas legal formalism fetishises the method of legal justification. A more critical stance is needed to understand the nature of law and legal practice. Finally, Unger argues that the CLS represents a new approach to legal scholarship and practice that is more attuned to the political and social dimensions of law and more committed to

[42] A Hunt 'The critique of law: What is "critical" about critical legal theory? (1987) 14 *JLS* 5.
[43] Ibid.
[44] RM Unger 'The critical legal studies movement' (1983) 96 *HLR* 561.

social justice and transformative change.[45] The CLS has significantly impacted the legal field by challenging the traditional assumptions and methods of legal reasoning. The movement has criticised the objectivity and neutrality of legal reasoning and has argued that law is inherently political and shaped by social context. The criticism has brought about a heightened understanding of how power and ideology contribute to legal judgments and has inspired new approaches to legal scholarship and practice. The movement has also influenced the development of other critical legal approaches, exemplified by feminist and critical race theories.[46]

In 'Critical legal studies as an anti-positivistic phenomenon', Jeffrey Standen argues that CLS is an anti-positivist movement.[47] It draws on the tradition of German philosophy to critique the positivist constructs of contemporary American jurisprudence, including the inadequacies and inconsistencies in legal procedures understood as separate from politics and values, and the supremacy of 'reason' in law, and the formalist legal philosophy exerting considerable influence over American law.[48] Standen's interpretation of CLS scholarship is that it views the law as inseparable from politics or morality—attempts to separate them are delusional. CLS rejects the formalist legal philosophy that exerts a considerable influence over American law and instead emphasises the importance of context, power, and ideology in legal decision-making. CLS has opened new avenues for critical inquiry and social justice advocacy in the legal field by challenging the dominant legal paradigms of positivism and formalism.[49]

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[45] Ibid, 649.
[46] Ibid., 586.
[47] JA Standen 'Critical legal studies as an anti-positivistic phenomenon' (1986) 72 *VLR* 983.
[48] Ibid., 983, 996.
[49] Since CLR scholars assailed positivism and formalism, it is crucial to define what these terms meant in the eyes of the CLR scholars. The author defines positivism as a legal philosophy that emphasises the importance of formal rules and procedures and the segregation of law from politics and morality. Positivism holds that laws should be based on empirical, factual, and scientific knowledge, not on non-empirical notions or appeals to romantic or religious sources. It

Similarly, in 'CLS wasn't killed by a question', John H. Schlegel challenged traditional legal thinking, questioning the neutrality and objectivity of law and arguing that law is a product of social, economic, and political forces.[50] CLS scholars sought to expose how law reinforces existing power structures and inequalities and to develop alternative approaches to legal analysis that would promote social justice and equality. They also criticised the dominant legal theories of the time, such as legal positivism and natural law, for failing to account for the law's social and political context. According to Schlegel, the opposition against CLS's critique of 'liberal legalism' centred on the question, 'What would you put in its place?' This question reflected a conscious strategy to avoid CLS's critique by treating it as normative rather than structural. In other words, the question implied that CLS offered a negative critique of the existing legal system without providing a positive alternative. However, Schlegel argues that this was a misreading of CLS's project, which was not to provide a blueprint for a new legal system but to expose how the law is shaped by power and ideology. In the final analysis, the demise of CLS was due to multiple intrinsic and extrinsic factors. While inherent factors include elitism, social insularity, and distrust of outsiders, external factors were conservative legal thought and the decline of the welfare state.

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also maintains that any attempt to gain knowledge over the bounds of sensory experience is fruitless. On the other hand, formalism is defined as a legal philosophy that emphasises the importance of formal rules and procedures and the separation of law from politics and morality. Formalism holds that the law is a self-contained system of rules that can be applied mechanically to resolve disputes without regard to the social or economic context in which they arise. It also maintains that judges should not consider their own personal values or policy preferences when interpreting the law (Standen op cit (n45) 995; Unger op cit (n42) 564). Alan Hunt uses the term legal liberalism to describe the entire legal system constituted through positivism and formalism (A Hunt 'The theory of critical legal studies' (1986) 6 *OJLS* 1 at 4).

[50] JH Schlegel 'CLS wasn't killed by a question' (2007) 58 *ALR* 967.

**The Feminist Branch**

One of the main branches of the CLS 'family tree' is feminist jurisprudence. This section highlights a few examples of legal scholarship within the feminist stream of CLS. Hilary Charlesworth, Christine Chinkin and Shelley Wright provide a good overview of the feminist branch of CLS, pointing out that feminist jurisprudence contributed significantly to legal scholarship through the scrutiny of multiple branches of domestic and international law, laying to bare gender biases of alleged neutral bodies of rules.[51] They point out that feminist legal theory is a specific and focused approach, drawing its theoretical strength from the firsthand experience of the legal system's contribution to the unequal treatment of women.[52] Gender bias in international law, they argue, involves the dominance of men in critical institutions of the global legal system, giving them prolonged control of all bodies with political authority at both national and international levels. As a result, topics that were only important to men are viewed as matters of concern to humanity, while issues primarily associated with women are often seen as less important. If the structures of international law and politics were genuinely representative of all people, their conventional appearance would drastically alter: their perspectives would broaden to encompass topics previously considered domestic in both senses of the term. The authors contend that contemporary international law has both an androcentric and Eurocentric bias. Its origins stem from Western beliefs about the role and significance of law in society. Feminist legal theory aims to reshape conventional international legal language and approach to incorporate diverse perspectives. Applying feminist perspectives in international law can provide valuable insights into various branches, including environmental law, human rights, state responsibility, use of force, humanitarian law, refugee law,

[51] H Charlesworth, C Chinkin and S Wright 'Feminist approaches to international law' (1991) 85 *AJIL* 613.
[52] Ibid., 613

and population control. The approach could lead to a more inclusive and just legal system that considers all people's experiences, regardless of gender. Ultimately, feminist jurisprudence, they argue, could lead to a more critical examination of legal systems, legal languages, legal materials, and acceptance and validation of legal abstractions as legal purity.[53]

Thus, for instance, Nicola Lacey's review[54] of feminist jurisprudence books by Tove Dahl,[55] Mary A. Glendon[56] and Catharine A. MacKinnon[57] covers a range of themes and arguments, including the need for a feminist perspective in legal scholarship, the intersection of gender with other forms of oppression, the importance of recognising women's experiences and perspectives in legal decision-making, and how legal frameworks can perpetuate gender inequality.[58]

As Kennedy and Unger reviewed earlier, MacKinnon is a prominent CLS scholar whose scholarship has had an enduring influence on feminist jurisprudence.[59] For her, sexuality is to feminism what labour is to Marxism, and both are fundamental to understanding how society is constructed. In her view, the process of labour is responsible for shaping and altering the material and social aspects of our world, which at the same time moulds individuals into social beings as they contribute to the creation of value.[60] Similarly, sexuality is a fundamental aspect of the human experience that is often taken away from women and is a crucial site of struggle for feminists.[61] Additionally, she argues that consciousness-raising is central to feminist theory and method and that this

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[53] Ibid., 644.
[54] N Lacey 'Feminist legal theory' (1989) 9 *OJLS* 383.
[55] TS Dahl *Women's Law: An Introduction to Feminist Jurisprudence* (1987).
[56] MA Glendon *Abortion and Divorce in Western Law* (1987).
[57] CA MacKinnon *Feminism Unmodified by Catherine* (1987).
[58] N Lacey op cit (n52).
[59] CA MacKinnon 'Feminism, marxism, method, and the state: An agenda for theory' (1982) 7 *Signs* 515; 'Feminism, marxism, method, and the state: Toward feminist jurisprudence' (1983) 8 *Signs* 635.
[60] MacKinnon (1982) op cit (n57).
[61] Ibid.

process involves examining women's experiences and challenging traditional notions of authority and objectivity.[62] Finally, she suggests that feminist theory and activism must be grounded in the analysis of power structures and how they shape gender relations.[63] What is the implication of this analysis in constructing feminist legal theory? In a follow-up article, MacKinnon lays out the implications of her analysis for jurisprudence since the law is a crucial site where gendered power relations are constructed and contested.[64] Accordingly, traditional legal theories assume that the law is neutral and objective and fail to consider how gendered power relations shape the law. Instead, she advocates for a feminist jurisprudence that recognises the gendered dimensions of the law and seeks to challenge and transform these power relations.[65]

Lynne Henderson's essay[66] reviews the works of Carol Smart,[67] Zillah Eisenstein,[68] and Catharine MacKinnon,[69] each of which offers a unique perspective on feminist legal theory and how the law reinforces gender inequality. First, according to Henderson, Eisenstein critiques how the law has historically treated women's bodies as objects to be controlled and regulated, arguing that this has perpetuated women's subordination and contributed to a broader culture of violence against women.[70] In response, she advocates for a more expansive understanding of reproductive rights, including the right to safe and accessible healthcare and the right to make decisions about one's body without interference from the state or other actors.[71] Second, according to Henderson's review, MacKinnon takes the position that the law is a crucial site

[62] Ibid.
[63] Ibid.
[64] MacKinnon (1983) op cit (n57).
[65] Ibid.
[66] L Henderson 'Law's patriarchy' (1991) 25 *LSR* 411.
[67] C Smart *Feminism and the Power of Law* (1989).
[68] ZR Eisenstein *The Female Body and the Law* (1988).
[69] CA MacKinnon, *Toward a Feminist Theory of the State* (1989).
[70] L Henderson op cit (n64).
[71] Ibid.

of gender-based oppression and that feminist legal theory must challenge how the law has historically reinforced women's subordination.[72] The law has been used to legitimise and perpetuate gender-based violence and discrimination, and legal reform alone is not enough to address these issues.[73] Instead, she advocates for a radical rethinking of the law and its role in society and a more expansive understanding of sexual harassment and other forms of gender-based violence as forms of discrimination.[74] Third, Henderson writes that Smart views traditional legal approaches to feminism as limited in their ability to address the complex ways gender intersects with other forms of oppression.[75] The law is a patriarchal institution often resistant to meaningful change by feminists, and legal rights alone are insufficient to achieve gender equality. Instead, an intersectional approach to feminist legal theory is necessary to consider how gender intersects with race, class, and other forms of identity and oppression.[76] Smart also critiques the idea that legal rights are inherently liberatory for women, arguing that those in power can manipulate and co-opt them.[77]

In exploring Anglo-American feminist legal theory, Sharyn Anleu delves into various crucial themes. These include the criticism of traditional legal theories that rely on liberal ideals of individual rights, freedom, and reasonableness, which tend to prioritise men's interests and reinforce male domination.[78] Feminist jurisprudence aims to surpass conventional legal theories by incorporating sociological, feminist, and psychological perspectives. To bring about a necessary transformation in the field of law and legal knowledge, it is imperative to not only provide access to education and

[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] SR Anleu 'Critiquing the law: Themes and dilemmas in Anglo-American feminist legal theory' (1992) 19 *JLS* 423.

professional opportunities for women but also to integrate their unique perspectives, experiences, and value for social relationships and empathy into the existing structure and organisation.[79] According to Anleu, feminist legal theory is not a singular body of knowledge or set of universal concerns and perspectives. Instead, it is influenced by various political interests and organisational arrangements within different societies. Anleu further examines the dilemmas and challenges faced by feminist legal theorists, including the tension between universalism and particularism, the dynamic relationship between legal systems and social progress, and the role of governments in promoting gender equality.[80]

In this analysis, which mirrors Duncan Kennedy's polemic on legal education, Menkel-Meadow shares her perspective and evaluation of the similarities and differences between critical legal studies and feminist criticisms of legal education.[81] Menkel-Meadow identifies similarities between the two schools of thought regarding current legal education. Both schools focus on the hierarchy, passivity, depersonalisation, and decontextualisation of legal education. They both recognise limitations in how rules and roles create a lawyer persona, preventing individuals from seeing the world's complexity. Additionally, both schools seek to explore new, less oppressive forms of consciousness, belief systems, and practices in law, legal education, and society. In both schools, the law is not seen as innocent.[82]

[79] Ibid.
[80] Ibid.
[81] C Menkel-Meadow 'Feminist legal theory, critical legal studies, and legal education or the fem-crits go to law school' (1988) 38 *JLE* 61.
[82] Ibid.

Christina Whitman[83] reviews the works of eight feminist legal scholars, including Susan Estrich,[84] Frances Olsen,[85] Robin West,[86] Martha Minow,[87] Deborah Rhode,[88] Vicki Schultz,[89] Regina Austin,[90] and Patricia Williams.[91] In *Real Rape,* Estrich sees a criminal justice system that historically excluded the perspective of female victims of rape and privileged androcentric definitions of consent and coercion.[92] The system has been overly concerned with due process to avoid unfair punishment of male defendants for false rape allegations.[93] According to Whitman, Estrich's book sought to influence lawmakers to introduce legislation to hold accountable those accused of date rape and bring to an end the androcentrism of the criminal justice system.[94] On the other hand, Rhode's *Justice and Gender* deals with the larger context within which legislation occurs, considering the historical, social, and economic context before delving into the relevant legal opinions and arguments currently being presented.[95] However, Rhode does not offer an overarching method of analysis but focuses on the specific legal issues facing women and how the law has helped and hurt different groups of women. According to Whitman, while the book does not make any suggestions for legal change, it is a valuable resource dealing with the intersection of gender and the law.[96] Schultz's article 'Telling stories about

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[83] CB Whitman 'Feminist jurisprudence' (1991) 17 *FS* 493.
[84] S Estrich *Real Rape* (1987).
[85] F Olsen 'Statutory rape: A feminist critique of rights analysis' (1984) 63 *TLR* 387.
[86] R West 'Jurisprudence and gender' (1988) 55 *UCLR* 1; 'The difference in women's hedonic lives: A phenomenological critique of feminist legal theory' (1987) 3 *WWLJ* 81.
[87] M Minow *Making All the Difference: Inclusion, Exclusion, and American Law* (1990).
[88] DL Rhode *Justice and Gender* (1989).
[89] V Schultz 'Telling stories about women and work: Judicial interpretations of sex segregation in the workplace in Title VII cases raising the lack of interest argument' (1990) 103 *HLR* 1750.
[90] R Austin 'Sapphire bound!' (1989) 1347 *WLR* 539.
[91] P Williams 'On being the object of property' (1988) 14 *Signs* 5.
[92] Estrich op cit (n82).
[93] Ibid.
[94] Whitman op cit (n81) 495.
[95] Rhode op cit (n86).
[96] Whitman op cit (n81) 502.

women and work' uses non-legal methods of analysis to examine the role of employment practices in shaping women's choices and experiences in the workplace.[97] Schultz argues that courts have historically assumed that the gendered division of labour at work is shaped either by women's decisions or by employers' pressure and have overlooked the possibility that structural features of employment influence women's choices.[98] She proposes a fresh narrative that relates employment practices to women's choices, even when employers do not intentionally engage in exclusionary or coercive practices.[99] Overall, the book challenges traditional approaches to legal inquiry and offers innovative methods for analysing the nexus of gender and law.[100]

The growing number of Black female legal scholars and practitioners introduced the intersectional approaches to feminist legal theory. In her 1989 seminal article, 'Demarginalizing the intersection of race and sex,' Kimberle Crenshaw observes that the experiences of Black women are often marginalised in both feminist and antiracist discourses because they are viewed as the intersection of two mutually exclusive categories of analysis: race and gender.[101] Similarly, Angela P. Harris provides a critique of 'essentialism'[102] in feminist jurisprudence, stressing that feminist legal theory needs to move away from essentialism and towards a more intersectional approach that considers the

[97] Schultz op cit (n87).
[98] Ibid.
[99] Ibid.
[100] Whitman op cit (n81) 503.
[101] KW Crenshaw 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine' (1989) 1989 *UCLF* 139.
[102] AP Harris 'Race and essentialism in feminist legal theory' (1990) 42 *SLR* 581. Essentialism is the 'notion that a unitary, "essential" women's experience can be isolated and described independently of race, class orientation, and other realities of experience' (585). In feminist legal theory, essentialism refers to the tendency to view women as a homogeneous group with shared experiences and interests without considering the diversity of women's experiences based on factors such as race, class, and sexual orientation. This approach has been criticised for ignoring the experiences of marginalised groups of women and perpetuating the dominance of privileged groups (Ibid.).

diversity of women's experiences based on factors such as race, class, and sexual orientation.

**The Critical Race Branch**

Critical Race Theory (CRT) is a central branch of Critical Legal Realism (CLR) that focuses on systemic, institutionalised discrimination against racialised social groups. Derrick Bell pioneered this line of scholarship in the 1970s, 1980s and 1990s, with other racialised critical legal scholars building upon his work. Good examples include the articles 'Racism in American Courts' and 'Brown v. Board of Education and the Interest-Convergence Dilemma.' The former delves into the relationship between racism and the American judicial system, examining the historical context and its impact on the African American community to build the argument that racism is deeply ingrained in the legal system and profoundly affects the administration of justice.[103] Bell contends that the courts have failed to provide equal protection under the law for African Americans and that this failure has contributed to a sense of despair and disillusionment within the black community.[104] He also suggests that the legal profession has been complicit in perpetuating racial discrimination and is incumbent upon lawyers and judges to work towards greater racial justice and equality. To build his argument, Bell presents several pieces of evidence, noting that the death penalty disproportionately impacts minorities, mainly African Americans. That Black defendants have been unjustly singled out by law enforcement and subjected to more severe penalties compared to their White counterparts, and that legal doctrine and precedent have been used to justify and perpetuate racial inequality. According to Bell, these examples indicate a

[103] DA Bell 'Racism in American courts: Cause for Black disruption or despair?' (1973) 61 *CLR* 165.
[104] Ibid.

broader pattern of discrimination within the legal system.[105] In 'Brown v. Board of Education,' Bell introduced the concept of the 'interest-convergence dilemma' to refer to the idea that progress towards racial equality in the United States has only occurred when the interests of whites and blacks have converged.[106] According to Bell, in this case, the interests of Black people in receiving a quality education converged with the interests of Whites in maintaining the United States' reputation as a democratic nation. The benefits to white people—specifically those in policymaking positions who recognised the potential economic and political advantages of ending segregation—were the primary motivation for the shift towards desegregation and away from the 'separate but equal' doctrine. This shift was not solely driven by the moral concerns of those opposed to racial inequality.[107] For those reasons, this convergence of interests made the case decision inevitable—that is, the decision was not solely based on 'neutral' principles but on a convergence of interests between Whites and Blacks.[108] The case sparked a revolution in civil rights law and increased Blacks' political power inside and outside the courtroom. The transformation of Blacks went from begging for decent treatment to demanding equal treatment under the law as is their constitutional right as citizens. However, despite the decision, most Black children remained in racially isolated and inferior public schools.[109]

In a review article of Bell's work, Richard Delgado[110] points out that Bell's scholarship[111] shows that American civil rights law is not designed to improve conditions for Black people, except when doing so aligns with the self-interest of white people. According to Delgado, Bell's work shows that the civil

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[105] Ibid.
[106] DA Bell 'Brown v. Board of Education and the interest-convergence dilemma' (1980) 93 *HLR* 518.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] R Delgado 'Derrick Bell and the ideology of racial reform: Will we ever be saved?' (1988) 97 *YLJ* 923.
[111] DA Bell *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987).

rights statutes and case law system serve a homeostatic function, ensuring society maintains the 'right' amount of racism—and Bell uses ten 'chronicles', or imaginative tales, to explore different aspects of society's treatment of race.[112] Delgado underscores Bell's surgical skill in exposing the nerves and ligaments of the American race-remedy law and suggests that his (Bell's) sombre prognosis about the possibility of racial justice in the United States is a necessary corrective to more optimistic views.[113] Also, Delgado notes that Bell's imaginative tales are a powerful way to explore race relations' complexities and challenge readers to think more deeply about these issues.[114] Broadly, by highlighting how racism is embedded in the American judicial system, Bell challenges lawyers, judges, and legal scholars to confront the issue of racial discrimination head-on. Bell's work raises important questions about the role of the legal profession and the courts in promoting social change and the relationship between law and social justice. His work has profoundly impacted the legal field and helped shape the ongoing conversation about race and the law.

The CRT stream of CLS brings back Crenshaw, who, in a 1988 text, provides an analysis of the continuing struggle for racial equality in America by considering the critiques of civil rights reforms presented by the New Right and scholars associated with CLS.[115] According to her argument, the neoconservative focus on formal colour blindness overlooks the fact that civil rights laws are not always explicit and racial inequalities still exist. [116] However, the Critical scholars who focus on the importance of legal ideology and legal rights rhetoric in legitimising specific actions are accurate in their assessment.

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[112] Delgado op cit (n112).
[113] Ibid.
[114] Ibid.
[115] KW Crenshaw 'Race, reform, and retrenchment: Transformation and legitimation in antidiscrimination law' (1988) 101 *HLR* 1331.
[116] Ibid.

Nevertheless, they overlook the options and opportunities that an oppressed group, like the Black community, may have.[117]

In a more recent article, Crenshaw takes to task the so-called post-racial revolution in America as a whitewashing condition in which the idea of a colourblind society is used to obscure ongoing racial inequalities and injustices.[118] Crenshaw's analysis challenges the assumptions that the rule of law is inherently liberating for racialised people, that America has moved beyond race and that Americans live in a post-racial society. Instead, she highlights how legal reasoning and academic professionalism have been used to rationalise the existing racial order in America.[119] In addition, Crenshaw questions the notion of 'meritocracy' as a neutral concept that justifies the lack of minority representation in elite institutions like law schools. She highlights how legal reasoning and academic professionalism have been used to rationalise the existing racial order in America.[120]

In an annotated bibliography on CRT, Richard Delgado and Jean Stefancic highlight the significant impact of this scholarship on legal scholarship and practice in the United States through the critique of traditional legal approaches to race and racism, arguing that the law is not neutral and that it often perpetuates racial inequality.[121] Further, CRT scholars have also critiqued the limitations of antidiscrimination law and called for a more intersectional approach to understanding the experiences of marginalised groups.[122] Furthermore, CRT has influenced legal education by promoting a more diverse and inclusive curriculum and advocating for greater representation of

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[117] Ibid.
[118] KW Crenshaw 'Race to the bottom: How the post-racial revolution became a whitewash' (2017) 35 *The Baffler* 40.
[119] Ibid.
[120] Ibid.
[121] R Delgado & J Stefanic 'Critical race theory: An annotated bibliography' (1993) 79 *VLR* 461.
[122] Ibid.

minorities in the legal profession.[123] Finally, CRT has contributed to the development of alternative dispute resolution methods that consider power imbalances and marginalised groups' experiences.[124]

Elsewhere, Delgado took CRT to the lecture halls where racialised students faced difficulties conveying the relevance of the conventional law school curriculum to the barrio[125] (neighbourhood) problems, particularly for minority students, such as Chicanos and Native Americans.[126] According to Delgado, most law professors did not fully appreciate racialised students' difficulties in perceiving their community interests and lived realities reflected in traditional law teaching. In their lectures, they often focused on legal problems faced by big corporations and wealthy individuals, which had little relevance to the struggles of impoverished communities and neighbourhoods.[127] Professors barely bother to show how cases in textbooks related to the issues faced by farm labourers or residents of the barrio. Students were left to learn on their own how to apply course material to problems in their impoverished community.[128]

In an introductory text, Delgado and Stefancic maintain that CRT aims to analyse how race and racism intersect with other aspects of social identity, such as gender, class, and sexuality, to influence people's experiences and opportunities.[129] It emerged in the United States in the 1970s and 1980s as a response to what its founders saw as the limitations of traditional legal theory, which tended to treat law and legal institutions as neutral and objective.[130] CRT

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[123] Ibid.
[124] Ibid.
[125] Barrio is a Spanish term for neighbourhood. In the US, and in this case, it is used to refer to Spanish-speaking neighbourhoods, often marginalized and ghettoised.
[126] R Delgado 'Minority students and the legal curriculum: An experiment at Berkeley' (1975) 63 *CLR* 751.
[127] Ibid.
[128] Ibid.
[129] R Delgado & J Stefancic *Critical Race Theory: An Introduction* (2011).
[130] Ibid.

emphasises how law and legal institutions are shaped by social and historical context and how they can perpetuate or challenge systems of oppression.[131] While CRT is not a legal doctrine or a set of rules that can be applied directly in legal cases, it has influenced how some legal scholars and practitioners approach issues of race and racism in the law.[132] For example, CRT has been used to analyse how the criminal justice system disproportionately targets and harms people of colour and to argue for reforms to address these disparities.[133] It has also been used to critique how antidiscrimination law has been narrowly interpreted and applied and to argue for a more expansive understanding of what constitutes discrimination.[134] CRT has been influential in several social justice movements in the United States, particularly those focused on issues of race and racism. For example, it has been used to analyse and critique how racism is embedded in institutions such as the criminal justice system, education, and housing. It has also been used to argue for policies and practices addressing systemic racism, such as affirmative action programs and community-based policing. Critical Race Theory has also been influential in developing intersectional approaches to social justice, recognising how different forms of oppression intersect and compound one another.[135]

In 'Looking to the Bottom,' Mari Matsuda argues that people of colour and critical legal scholars share similar perspectives and goals and should work together to achieve social justice.[136] The author suggests that the failure of the two groups to develop an alliance is tied to the weaknesses of the CLS movement. Matsuda discusses the concept of Anji Reparations[137] and how it fits

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[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] MJ Matsuda 'Looking to the bottom: Critical legal studies and reparations' (1987) 22 *HCRLLR* 323.
[137] Anji Reparations is a concept discussed in the article that refers to reparations for past injustices committed against marginalised communities. The author argues that reparations are

into the discussion of critical legal studies and highlights the need for a more inclusive legal system that considers marginalised communities' experiences and perspectives.[138] In 'Voice of America', Matsuda discusses the issue of accent bias and its implications for antidiscrimination law.[139] She poses two questions: one small, which is about the application of antidiscrimination law to accent bias, and one large, which is about the kind of world we want to live in under the constitutionally constituted experiment in pluralism that we call democracy.[140] Also, she takes the position that discrimination based on accents is a form of prejudice and that antidiscrimination laws should protect individuals with accents in the workplace. In addition, Matsuda discusses the influence of the 'turn to the narrative' and how stories can create a doctrinal puzzle in accent discrimination cases and finally suggests that promoting acceptance and appreciation of diverse accents is essential for creating a more just and equitable society.[141]

CRT addresses the question of 'skin colour' in American law.[142] A movement was formed by scholars of racial minorities within critical legal studies and other progressive networks. This movement, called the 'African American movement' in legal studies, aimed to address race issues from the specific perspective of African Americans. [143] According to critical race theorists, those who adhere to traditional legal theory have disregarded the significance and relevance of race awareness in their interpretation of the law.[144] They reject

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not just about compensating for past wrongs but also about acknowledging historical wrongs, recognising continuing injury, and committing to redress. The author suggests that reparations should be made with the guidance of victims and should continue until all vestiges of past injustice are dead and buried.

[138] Ibid.

[139] MJ Matsuda 'Voices of America: Accent, antidiscrimination law, and a jurisprudence for the last reconstruction' (1991) 100 *YLJ* 1329.

[140] Ibid.

[141] Ibid.

[142] G Minda *Postmodern Legal Movements: Law and Jurisprudence et Century's End* (1996).

[143] Ibid.

[144] Ibid.

the belief that the law should be blind to race and instead redefine race through a postmodern lens, acknowledging the significance of the racial landscape in a society composed of multiple racialised groups, where group identity is incomplete, unstable, and constantly changing.[145]

**Universalism and Cultural Relativity**

Another body of literature related to this dissertation's topic is cultural relativism in international human rights law. This branch of scholarship, which takes inspiration from anthropology, challenges the idea of universal human rights and instead proposes that human rights should be viewed within their cultural context. The scholarship on the cultural relativity of human rights argues that human rights are claims to a moral language based on Eurocentric morality now imposed on all through an international human rights system. Guyora Binder writes that the debate between universalism and cultural relativism in international human rights law remains one of the most intriguing and thought-provoking topics of discussion.[146] The debate deals with the difference between universalism, which holds that everyone should have the same rights, regardless of their culture, and cultural relativism, which holds that human rights should be seen in the light of the values and customs of each society. Binder proposes that the debate should shift from whether human rights are universal or culturally relative to how to interpret and apply human rights norms to respect cultural diversity while upholding the core values of human rights.[147]

Thus, according to Kathryn Muyskens, there are two main challenges to human rights. The first is cultural relativism, which questions the idea of universality. The second is the problem of parochialism, which argues that

[145] Ibid.
[146] G Binder 'Cultural relativism and cultural imperialism in human rights law' (1999) 5 *BHHLR* 211
[147] Ibid.

human rights impose values that are not truly universal.[148] These challenges relate to cultural sensitivity because they highlight the tension between universal applicability and cultural specificity. While human rights are meant to be universally applicable, they must also be sensitive to cultural differences and avoid imposing values that are not universal. Uncritical discourse on human rights presents the danger of cultural imperialism, and Muyskens uses the discourse on the right to health as an example.[149] Cultural imperialism can be a moral and practical hazard to the human right to health because it can perpetuate additional injustices and imperialistic harms. In global health, cultural imperialism can manifest in various ways, such as imposing Western medical models on non-Western cultures, ignoring traditional healing practices, or failing to consider the social determinants of health specific to certain cultures. For example, the author mentions the case of the HIV/AIDS epidemic in Africa, where Western models of prevention and treatment were initially imposed without considering the cultural context, leading to ineffective and even harmful outcomes.

Another example is the use of female genital mutilation/cutting (FGM/C) to justify denying health care to women who have undergone the practice, which perpetuates harmful cultural practices and violates their right to health.[150] Muyskens proposes a method of conceptualising the human right to health that mitigates the threat of cultural imperialism and imbues it with ethical and political import. This methodology incorporates cultural sensitivity while leveraging the human rights framework to advance and improve global health.[151] In addition, she argued that the human right to health should be understood as a 'threshold concept,' which sets a minimum standard of health

[148] K Muyskens 'Avoiding cultural imperialism in the human right to health' (2022) 14 *ABR* 87.
[149] Ibid.
[150] Ibid.
[151] Ibid.

that all individuals are entitled to while allowing for cultural variation in how that standard is achieved. This approach emphasises the importance of cultural sensitivity and recognises that different cultures may have other ways of achieving the same standard of health. By framing the human right to health in this way, the author argues that it can be helpful in mobilising action for global health justice while avoiding the hazards of cultural imperialism.[152]

Ann-Belinda S. Preis presents a well-rounded summary of critical arguments for the cultural relativity of human rights.[153] Preis' cultural critique of human rights makes visible cultural and ideological ethnocentrism in the discourse of human rights and human dignity. Preis argues that human rights are not universal and are shaped by cultural practices, highlighting the human rights discourse's unpredictable, incomplete, and partial nature.[154] Additionally, Preis suggests that human rights researchers must address the relationship between the theory and practice of human rights and be willing to do a 'big job' of exploring the various cultural constructions of human rights.[155] Preis' notion of the 'big job' refers to exploring the different cultural constructions of human rights and the relationship between the theory and practice of human rights. The cultural contingency of human rights presents several challenges, including the danger of 'displacing the agency or intentions of those we study by our own "folk" notions or theoretical concepts,' which means the risk of imposing Western cultural values and beliefs on other cultures, potentially leading to a lack of understanding and acceptance of human rights.[156] Another challenge is the ethnocentric view of social behaviour based on the individualism of 'utilitarian man,' which leaves little space for cultural and contextual differentiation. Finally, the author argues that the relationship between the

[152] Ibid.
[153] AS Preis 'Human rights as cultural practice: An anthropological critique' (1996) 18 *HRQ* 286.
[154] Ibid.
[155] Ibid., 315.
[156] Ibid., 314.

theory and practice of human rights must be explored to promote human rights across cultures.[157]

Sally Engle Merry argues that human rights law can demonise culture by viewing it as a problem or obstacle to be overcome rather than celebrating its complexity and diversity.[158] Accordingly, human rights lawyers may see culture as traditional harmful practices or old customs that need to be eliminated, and their commitment to a model of legal rationality can be incompatible with local cultural traditions. This can lead to a narrow and oversimplified understanding of culture and may overlook how cultural practices can be adaptive and meaningful for local communities.[159] According to Merry, demonising cultural practices in the name of human rights can have several potential drawbacks. It can lead to a narrow and oversimplified understanding of culture and may overlook how cultural practices can be adaptive and meaningful for local communities. It can create tension between protecting cultural diversity and implementing universal human rights standards. Misreading culture can hinder the growth and expansion of human rights concepts. And it can perpetuate a colonialist mentality that views non-Western cultures as inferior and needing Western intervention.[160]

Terence Turner discusses whether universal human rights are compatible with cultural relativism, arguing that anthropology is crucial in promoting emancipatory cultural politics that recognises and respects human differences.[161] According to Turner, universal human rights and cultural relativism stand in a complex relationship, calling for careful consideration. Moreover, Turner argues that collective rights have become one of the critical

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[157] Ibid.
[158] SE Merry 'Human rights law and the demonization of culture' (2003) 26 *PLAR* 55.
[159] Ibid.
[160] Ibid.
[161] T Turner 'Human rights, human difference: Anthropology's contribution to an emancipatory cultural politics' (1997) 53 *JAR*, 273.

areas in which shifting social, political-economic, and global south problems have collided with the individualistic liberalism of human rights.[162] The defence of the principle of freedom to differ is integral to promoting rights and the political struggle for emancipation, liberation and tolerance. Consequently, the human rights movement and anthropological disciplines must take on a more political outlook on their role as human rights thinkers and advocates.[163]

Zachary Manfredi discusses various international human rights and humanitarianism critiques in this article.[164] He argues that these concepts are often deployed in limited, dangerous, or potentially colonising ways. For example, he questions whether human rights always open up new political possibilities or sometimes restrict our imagination. He also examines how the history of human rights shapes our understanding of them today and considers the relationship between political theory and practice. Finally, he explores how new surveillance and documentation technologies are changing the rules of human rights organisations and institutions.[165] Therefore, Manfredi defends critical engagement with these ideas to render visible the precarity, limitations, and capabilities related to their application. He suggests that we must be aware of how human rights and humanitarianism are deployed in different contexts and how they intersect with other contemporary notions, such as cosmopolitanism. By examining the history of human rights and considering the relationship between theory and practice, we can better understand these concepts' challenges and work towards more just and equitable futures.[166]

According to Renteln, traditional Western views of rights have flaws in their presumed universality and their sources for human rights.[167] She argues

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[162] Ibid.
[163] Ibid.
[164] Z Manfredi 'Recent histories and uncertain futures: Contemporary critiques of international human rights and humanitarianism' (2013) 22 *Qui Parle* 3.
[165] Ibid.
[166] Ibid.
[167] AD Renteln 'The concept of human rights' (1988) 83 *Anthropos* 343.

that the root cause of their inadequacy can be traced back to the Western assumption of moral universality, which is also reflected in some international human rights documents.[168] A fundamental analysis of non-Western cultures demonstrates that their value systems bear no Western resemblance. This is evident in practices like female genital mutilation and child labour.[169] In addition, Renteln argues that relating rights and duties is crucial as it allows for a more flexible and nuanced approach to formulating international human rights standards. Correlativity of rights and obligations would mean that framing moral claims in terms other than rights is not necessarily problematic.[170] Renteln points out that some theorists are hesitant to recognise the existence of rights that correspond to the duties held by others. This reluctance may stem from the fear of diluting the language of rights by introducing numerous less significant rights. However, Renteln argues that the issue is not with the correlation itself but with the inexistence of a process to legitimate the assertion of corresponding rights and duties.[171]

Taking as the point of departure the definition of cultural relativism as the theory according to which 'morality is relative to culture' or that 'right and wrong vary with cultural norms,' John J. Tilley reviews arguments for or against cultural relativism in human rights.[172] He observes that there are several criticisms of cultural relativism as a theory. One complaint is that it can be used to justify human rights abuses in the name of cultural tradition or custom. Another criticism is that it assumes that cultures are homogeneous and ignores internal diversity and dissent within cultures. Additionally, cultural relativism can be seen as a form of moral relativism, which holds that there are no objective moral truths, which can lead to a lack of moral accountability. Some

[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Ibid.
[172] JJ Tilley 'Cultural relativism' (2000) 22 *HRQ* 501.

critics argue that cultural relativism is self-contradictory, as it asserts that all moral beliefs are relative to culture but then claims that cultural relativism is a universal truth.[173] Tilley writes that whether cultural relativism can be reconciled with the idea of universal human values is an ongoing debate. While some scholars argue that cultural relativism and universal human values are fundamentally incompatible, others argue that cultural relativism can be understood as respecting cultural diversity while upholding universal human values. For example, Martha Nussbaum has defended universal human values while acknowledging the importance of cultural diversity. Ultimately, Tilley argues, the relationship between cultural relativism and universal human values is complex and depends on how one defines and understands these concepts.[174]

According to Jack Donnelly, 'sophisticated defenders of both universality and relativity today recognise the dangers of an extreme relativism that would justify any practices as "cultural" and therefore immune from criticism or change.'[175] Additionally, some critics argue that the concept of human rights is inherently Western and that the imposition of these values on non-Western cultures is a form of imperialism. Finally, some concerns promoting human rights may lead to the homogenisation of cultures and the loss of valued local practices. Donnely takes the position of the universality of human rights: 'The idea of human rights is not a Western invention, but a truly universal one.' He contends that human rights are grounded in the inherent dignity of all human beings and that this dignity is recognised across cultures and societies. Donnelly also acknowledges that there may be cultural differences in how human rights are understood and implemented. Still, he maintains that these differences do not negate the fundamental universality of the concept.

[173] Ibid.
[174] Ibid.
[175] J Donnelly 'The relative universality of human rights' (2007) 29 *HRQ* 281 at 298.

**The TWAIL Branch**

While Third World Approaches to International Law (TWAIL) is rarely associated with CLS, the two have an apparent kinship. The goal of TWAIL is to dismantle the coloniality of the international legal edifice. TWAIL deals precisely with the Western, Eurocentric, colonial biases of political, economic, social and cultural nature through which international law is constituted. TWAIL scholars such as Antony Anghie and Makau Mutua clarify that theirs is a political project that seeks to reveal the relationship between international law and the Third World. Unlike traditional approaches to international law, which focus on established rules and protocols, TWAIL is still being developed as a methodology. It emphasises the importance of understanding the historical and political context in which international law operates. It also seeks to challenge the assumptions and biases that underlie many traditional approaches to the subject.

In 'TWAIL: Past and Future,' Anghie notes that TWAIL is not a fixed and established methodology but a political project that has evolved.[176] TWAIL scholars are concerned with how the relationship between areas of international law and the Third World plays out, revealing the historical and political context in which these areas of law operate.[177] For example, TWAIL scholars might examine how human rights law has been used to further the interests of powerful states or how trade law has been used to perpetuate global economic inequality.[178] By doing so, they can challenge the assumptions and biases that underlie traditional approaches to these areas of law and develop new analytical tools for understanding them. By doing so, they are adding to the analytical resources available to TWAIL scholars and helping to refine the methodology.[179]

[176] A Anghie 'TWAIL: Past and future' (2008) 10 *ICLR* 479.
[177] Ibid.
[178] Ibid.
[179] Ibid.

In a more recent article, 'Rethinking International Law: A TWAIL Retrospective,' Anghie looks back at the evolution of the TWAIL movement from origins to critical themes and concerns and relevance to the globe, arguing that in modern international law and relations, the division between First and Third World remains relevant and influential.[180] He points out that TWAIL scholars have examined various important topics and issues. These include (a) analysing incidents or cases that involve the Third World or have affected Third World peoples and determining their relevance to the field of international law, (b) exploring how international law has contributed to the transfer of wealth and resources from the Third World to the First World, (c) examining how expropriation technologies have adapted and evolved and continue to operate in a supposedly post-imperial world, (d) demonstrating how focusing on the Third World would challenge traditional histories of international law and specific fields and doctrines within international law, and (e) uncovering alternative concepts of justice and governance originating in the non-European world.[181] According to Anghie, the segregated reality of the First and Third Worlds remains relevant in modern international law and relations. It influences and shapes developments in areas such as international economic, environmental, and criminal law, even when those developments seem to challenge or surpass the First World/Third World dichotomy.[182]

Anghie's scholarship highlights the emergence of international law from the womb of imperialism. The author traces the roots of this legal system back to the interactions between European and non-European societies during the colonial period. This thread is evident in his 'The evolution of international law: Colonial and postcolonial realities,' which argues that the concept of sovereignty, which is central to international law, has been shaped by

[180] A Anghie 'Rethinking international law: A TWAIL retrospective' (2023) 34 *EJIL* 7.
[181] Ibid., 52.
[182] Ibid., 62.

colonialism throughout history.[183] The imperialist spinal cord, which distinguished between the civilised and the uncivilised, has profoundly shaped the sovereignty doctrine and has given certain cultures sovereignty and power while denying them to others. This distinction justified the invention of the civilising mission, a historical dynamic that continues to shape international law and relations.[184] The civilising mission has also been a driving force behind the project of controlling and changing non-European societies, which has been a persistent feature of international law. This mission seeks to transform the internal structural organisation of societies, generating resistance and revealing further differences that new doctrines and institutions must address. Thus, the civilising mission continues influencing international law in this globalised, terror-ridden world.[185] The current war on terror is an extension of the enduring effects of imperialism on the contemporary international system. The notion of using pre-emptive force against countries deemed as 'rogue states' and the desire to transform Middle Eastern nations into peaceful democracies bears a striking resemblance to earlier imperial endeavours.[186] The trend suggests that the underlying assumption is that safeguarding Western security can only be achieved through aggression to convert potentially hostile societies into democratic states.[187]

The TWAIL network comprises international law and policy experts and practitioners focusing on Global South-related concerns. The goal of these interventions is to examine and break down the influences of colonialism in international law. They strive to actively work towards decolonising the everyday experiences of those who live in the Global South. TWAIL scholars

[183] A Anghie 'The evolution of international law: Colonial and postcolonial realities' (2006) 27 *TWQ* 739.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid.

aim to bring international law's commitment to justice in line with the increasing prevalence of injustice in the world it claims to regulate. TWAIL scholarship is mission-driven, praxis-based and justice-oriented. Praxis describes the connection between the ideas that scholars express and their actions. It highlights how theory and actual life experiences cannot be separated from each other. Twailers strive to align their actions with their beliefs and principles as international lawyers. To do so, they engage in a variety of struggles, such as increasing their reflexivity, challenging traditional disciplinary norms, and advocating for institutional change and transformation.[188]

Balakrishnan Rajagopal puts forward similar arguments, namely that the TWAIL scholarship has captured the historical peripheries of the Global South. [189] In his view, this has exposed the Eurocentric nature of international law and called for a more universal and legitimate approach. He sees tensions in the Global South due to the overall crisis in the global economic and political system, which could pose both an opportunity and a challenge for international law.[190] Furthermore, Rajagopal stresses the significance of looking beyond the change possibilities of BRICS and focusing on those provided by global civil society. This is crucial in addressing numerous issues in global governance

[188] Like Anghie, Natarajan emphasises that TWAIL scholars engage in various struggles to promote greater self-awareness and social justice. Some of the struggles include the need for greater reflexivity, promoting changes in the discipline, and pushing for broader institutional changes despite institutional resistance. For example, Twailers engage in struggles for greater reflexivity by examining their positionality and how their experiences and perspectives shape their scholarship. They also engage in struggles for disciplinary upheaval by challenging the dominant narratives and methodologies of international law and advocating for more inclusive and diverse approaches. Finally, TWAIL scholars engage in struggles for institutional resistance and transformation by advocating for changes in the structures and practices of international law and policy institutions to better reflect the needs and perspectives of the peoples of the Global South (U Natarajan 2016. 'Introduction: TWAIL—On praxis and the intellectual' (2016) 37 *TWQ* 1946).

[189] B Rajagopal 'International law and its discontents: Rethinking the global south' (2012) 106 *ASIL* 176.

[190] Ibid.

today. In addition, he concludes by calling for a rethinking of power dynamics and a more equitable distribution of power within the international legal system to address the concerns of the Global South.[191]

In 'TWAIL: An epistemological inquiry', Pooja Parmar stresses that TWAIL's emphasis on the struggles, histories, and resistance of the Third World presents a significant opportunity for creating alternative theories of international law, particularly those related to human rights.[192] However, to fully realise its potential, TWAIL must integrate the search for alternative epistemologies as they remain unexplored. Therefore, Parmer suggests that TWAIL needs to identify non-European modes of thought and incorporate them into its epistemology to develop alternative theories and methodologies that challenge the dominance of Western-centric perspectives in international law. Parmer effectively calls for a dialogue to construct a TWAIL epistemology, specifically about redefining human rights. Part of this effort could entail identifying how the 'Europe' that is 'deeply embedded' in the 'everyday habits of thought' of the legal scholars shows up in their constructions of theories and methodologies.[193]

James T. Gathii highlights the dialectical coexistence of the dominant conservative/liberal approach and alternative Third World approaches in international legal scholarship and practice.[194] Understanding the coexistence of these different approaches to international law generates creative tensions and allows for a more nuanced understanding of global justice and inequality issues. The interpenetration of these approaches can lead to a more comprehensive and inclusive approach to international law that considers the interests of both Global North and Global South economies.[195]

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[191] Ibid.
[192] P Parmar 'TWAIL: An epistemological inquiry' (2008) 10 *ICLR* 363.
[193] Ibid., 364.
[194] JT Gathii 'Rejoinder: Twailing international law' (2000) 98 *MLR* 2066.
[195] Ibid.

Endalew Enyew takes TWAIL as a theoretical and methodological lens into the law of the sea and critically analyses the historical development of this branch of law from the Third World States' standpoint.[196] This study applies critical jurisprudence and a historical approach to international law, thoroughly examining the capabilities and restrictions of the law of the sea in protecting the rights and interests of Third World States and their people.[197] According to Enyew, developing countries challenged the traditional legal regime on the sea, including the concept of freedom of the seas, arguing that this doctrine should adapt to accommodate their inherent interests.[198] They have also taken initiatives to destabilise the old legal regime of the sea, such as by claiming exclusive economic zones (EEZs) and extending continental shelves beyond the traditional three-mile limit. These challenges to the conventional legal framework of the sea prompted the creation of fresh ideas and principles for maritime law that addressed their rights and interests, such as the concept of the common heritage of humanity and the principle of the duty to cooperate in the management of living resources in the EEZs. However, their challenges also faced resistance from powerful Western states, which sought to maintain their dominance over the seas and their resources.[199] Enyew demonstrates that the law of the sea is not a neutral or objective body of law but reflects the interests and power relations of the states that create and enforce it. Furthermore, Enyew successfully shows that the law of the sea is not static but rather evolves in response to changing circumstances and new challenges.[200] Moreover, Enyew demonstrates that Third World states and peoples have played a significant role

[196] EL Enyew 'Sailing with TWAIL: A historical inquiry into Third World perspectives on the law of the sea' 21 *CJIL* 439.
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] Ibid.

in shaping the evolution of the law of the sea and that their perspectives and experiences must be considered in any analysis of the law of the sea.[201]

Makau Mutua takes aim at international human rights law as a colonial standard setting. In 'Standard setting in human rights,' Mutua discusses the history of the human rights project, pointing out that the human rights regime that emerged after the European war has roots in various historical movements, international legal theories, and organisations.[202] Some of the notable historical events and movements that have shaped international law and human rights include fighting against colonialism, holding states accountable for the harm caused to foreigners, resisting religious persecution, the League of Nations' Mandates and Minorities Systems, protecting minority groups, implementing the humanitarian intervention, upholding international humanitarian law, advocating for women's rights, campaigning against slavery, and battling racism like apartheid.[203] Mutua points out that international law was initially created and developed by a select group of nations. This exclusive society of nations was responsible for constructing the fundamental principles of international law. At the dawn of international law, standard setting and norm creation were exclusively European exercises.[204] Furthermore, Mutua emphasises the importance of politics in establishing human rights standards. He highlights that some states may disagree with certain standards due to concerns about sovereignty, self-determination, developmental needs, and the fight against foreign domination or imperialism. [205] It is not lost to Mutua that these objections are often couched in noble ideals, making it difficult to oppose

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[201] Enyew's revelations can be applied to contemporary issues in international law, such as the ongoing debates over the exploitation of marine genetic resources, the protection of marine biodiversity, and the impacts of climate change on the oceans. Critical and historically informed approaches such as this foster a better understanding of the underlying power dynamics and interests at play and work towards more equitable and sustainable solutions.

[202] M Mutua 'Standard setting in human rights: Critique and prognosis' (2007) 29 *HRQ* 547.

[203] Ibid.

[204] Ibid.

[205] Ibid.

human rights without appearing hostile, turning human rights advocacy into an organised 'political sport' in the halls of the UN. Therefore, in any discussions about the process, it is critical to address the questions of fairness, transparency, ownership, democracy, and participation. Seven years earlier, Mutua had taken a more scathing, almost nihilistic, stance on international law.[206] In this piece, he first defines TWAIL as a political and intellectual movement that seeks to challenge the current international law system, which is seen as unjust and Eurocentric. Thus, TWAIL is both reactive and proactive, seeking insight into how international law has been used to establish and maintain a system of international regulations and organisations that places non-Europeans in a subordinate position to Europeans based on race.

Also, the movement aims to create a new set of rules for global governance and eliminate the factors contributing to poverty in the Third World. He forcefully asserts that international law has historically been used to subjugate non-European societies by legitimising European conquest and domination, violently subjugating indigenous peoples, colonising them, and imposing European norms and institutions. Legal positivists developed a vocabulary that denigrated non-European societies, portraying them as suitable for conquest through extreme violence in the name of the 'civilising mission.' The universalisation of international law through imperialism and violent subjugation of the world to benefit Europe further solidified the dominance of European ideas, traditions, attitudes, habits, and sense-making in the international legal system.[207] Therefore, for Mutua, the decolonisation of the international legal system requires recognising a diversity of legal systems and cultures, promoting self-determination and sovereignty of non-European peoples, and creating a new international economic order that prioritises the needs and interests of the Third World. Mutua's essay has the typical TWAIL

[206] MW Mutua 'What is TWAIL?' (2000) 94 *ASIL* 31.
[207] Ibid.

flavour with its demands for international law to be more inclusive and responsive to the needs of non-European societies rather than being dominated by European norms and institutions. It calls for the recognition of the right to development and the redistribution of resources to address global inequalities and for the creation of alternative legal frameworks, such as regional human rights systems, to supplement or replace the current international legal system.[208]

**Decoloniality: A Theoretical Framework**

Whereas the theme of decoloniality runs through the CLS scholarship, it is more salient in TWAIL as it directly addresses the historical experience of the Third World in the context of the evolution of international law. Beyond the frontiers of international law, the decolonisation scholarship is vast and deep, encompassing the social sciences and humanities, grappling with the experience of the Third World in the context of the emergence of modernity, capitalism, imperialism and colonialism. Since its inception, stitches of decolonisation literature have been characteristic features of TWAIL scholarship. This dissertation draws on both TWAIL and decolonisation scholarship at large. The following pages provide sketches of the structural tenets of decolonisation scholarship, which, together with TWAIL, inform the current study.

Anibal Quijano's 'Coloniality and modernity/coloniality' is a referential landmark in this literature.[209] In this piece, Quijano uses the term 'coloniality' in relation to modernity/rationality to denote the ongoing effects of colonialism in the present day, including how power and resources are still concentrated in the hands of a small European minority and their ruling classes. Quijano emphasises the close relationship between coloniality and modernity/rationality, suggesting that the emergence of modernity and rationality as universal paradigms of knowledge was not accidental but rather

[208] Ibid.

[209] A Quijano 'Coloniality and modernity/coloniality' (2007) 21 *CS* 168.

closely tied to the colonial project.[210] He argues that the dynamics of the coloniality of power profoundly shaped the birth of the paradigm of modernity/rationality, particularly in the emergence of urban and capitalist social relations. Quijano argues that the domination of Latin America and Africa by European powers began with the conquest of these societies and cultures.[211] Thus, Quijano highlights these conquests as the starting point of the process that led to European powers' domination of these regions. This process began with the colonisation of Latin America and culminated in a global power concentration that covered the entire planet. European powers' domination of Latin America and Africa was established through direct political, social, and cultural domination and hegemony.[212] A form of domination called 'Eurocentered colonialism' was implemented by Western European societies, which entailed the creation of structured political control systems over non-European societies. However, it is essential to note that in most cases, this formal system of colonial domination has been defeated, particularly since the Second World War.[213] Quijano argues that Western imperialism is the successor to colonialism. This form of imperialism is marked by an alignment of social interests among dominant groups in countries with unevenly distributed power rather than being solely imposed from outside. Currently, the consolidation of power among Europeans and their descendants is accomplished through a renewed vigour, in an even more violent manner, on a global scale.[214] Quijano argues that the concentration of power is not limited to the subordination of non-European cultures to European culture in international relations. Still, it also involves colonising the imagination of the dominated. In other words, this

[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid.
[214] Ibid.

concentration of power 'acts in the interior of the imagination' of the dominated, and in a sense, it is a part of it.[215]

Quijano's piece implicates the relationship between modernity, rationality, coloniality and international law. TWAIL scholars have recognised the natural and intimate kinship between the Eurocentric knowledge system, colonisation and international law.[216] Quijano's framing makes this natural kinship between modernity, rationality, coloniality, and international law unmistakable.[217] In his view, the emergence of modernity and rationality as universal paradigms of knowledge was closely tied to the colonial project and the force of the coloniality of power in shaping the paradigm of modernity/rationality.[218] This relationship is also reflected in the development of international law, which the same Eurocentric paradigm of knowledge and power has shaped. According to Quijano, international law has been used to legitimise European powers' domination of non-European peoples and cultures and establish a global order favourable to the interests of the European ruling classes.[219] This has been achieved through the imposition of a universalist legal framework based on European concepts of sovereignty, property, and individual rights and that has been used to justify the dispossession and exploitation of non-European peoples and cultures. Quijano argues that this Eurocentric legal framework must be challenged and transformed to create a more just and equitable global order.[220]

Alongside Quijano's work, Walter D. Mignolo's decolonisation thought is worth consideration.[221] Mignolo provides insights into the deconstruction of

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[215] Ibid.
[216] Mutua op cit (n177); Enyew op cit (n167).
[217] Quijano op cit (n180).
[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] WD Mignolo 'DELINKING: The rhetoric of modernity, the logic of coloniality and the grammar of decoloniality (2007) 21 *CS* 449.

modernity from the standpoint of liberation and decolonisation, including the need to fracture the hegemony of knowledge and understanding ruled by the theological and 'ego-logical politics of knowledge and understanding since the 15th Century and through the modern/colonial world.'[222] He also discusses the 'strategy of de-linking to de-naturalize concepts and conceptual fields that totalise reality.' According to Mignolo, the logic of coloniality is about the ways in which 'spatial/temporal and imperial/colonial differences' are organised and 'interwoven through the colonial matrix of power.'[223] As masterfully articulated by Quijano,[224] the 'colonial matrix of power was instituted at the inception of the modern/colonial world.' Building on Quijano, Mignolo argues that the language and ideas surrounding modernity, which include many different categorisations, are closely connected to the colonial mindset. Coloniality is an essential and foundational part of modernity—that is, there is no modernity without coloniality.[225] Mignolo proposes that the desired decolonial condition must be accomplished and sustained through its own grammar, which is the process of 're-writing global history from the perspective and critical consciousness of coloniality and from within geo and body-political knowledge.' This is delinking, the formulation of a liberation theory designed to surpass the achievements of the Frankfurt School.[226]

In Mignolo's view, land expropriation quite clearly originated the Eurocentred international legal system.[227] The combination of massive land expropriations and the international legal system was a powerful strategy used by Imperial Europe, later adopted by the United States. To counter this colonial condition, delinking breathes theoretical life into the ruins and skeletons of

[222] Ibid.
[223] Ibid.
[224] Quijano op cit (n180).
[225] Mignolo op cit (n192).
[226] Ibid.
[227] Ibid.

languages, cultures, categories of ideas and subjectivity that have been consistently denied by modern rhetoric and imperialistic implementations of colonial logic.[228] Mignolo proposes that decoloniality starts to take effect not by interpreting the world differently within the same paradigm but by adopting a different paradigm altogether. Therefore, decoloniality can be applied to international law by shifting the paradigm from which it is viewed and interpreted.[229]

In 'The Coloniality of Being,' Nelson Maldonado-Torres deploys the concept of the 'coloniality of being' to denote the lived experience of colonisation and its impact on language and culture.[230] The idea is distinct from colonialism, which implies a political and economic relationship wherein a people's sovereignty is dependent on the power of another nation, effectively making the domineering nation an empire.[231] The term coloniality does not simply refer to the historical period of colonialism but rather to persistent power structures that have shaped culture, labour, relationships between individuals, and the production of knowledge long after the end of formal colonial rule.[232] The coloniality of Being is closely linked to the creation of the colour line in various forms and aspects. This concept is manifested in the emergence of liminal subjects who represent the boundary of Being. At this point, the distortion of meaning and evidence reaches a level of dehumanisation.[233] Coloniality of Being provides a better understanding of how coloniality continues to shape modern experience, including cultural patterns, academic performance, and self-image. It elucidates how coloniality operates in the present, such as in the naturalisation of the unethical nature of violence through

[228] Ibid.
[229] Ibid.
[230] N Maldonado-Torres 'The coloniality of being: Contributions to the development of a concept' (2007) 21 *CS* 240.
[231] Ibid.
[232] Ibid.
[233] Ibid.

the normalisation of colonialism and slavery.[234] Moreover, the concept of coloniality of Being is useful for criticising and challenging dominant discourses and power structures that perpetuate coloniality and for imagining and working towards alternative futures that prioritise decolonisation and social justice. It is worth noting that Maldonado-Torres engages with Heidegger's work to inform his understanding of coloniality in several ways, drawing on his (Heidegger's) concept of Being to argue that coloniality is not just a matter of politics or economics but also a fundamental ontological issue that shapes the modern understanding of the world and human experience.[235] At the same time, Maldonado-Torres critiques Heidegger's involvement with Nazism and his failure to offer an apology to the Jewish people.[236] He argues that Heidegger's work can be read as an example of how coloniality operates in philosophy by excluding and marginalising non-European perspectives and experiences. By engaging with Heidegger's work this way, Maldonado-Torres seeks to develop a critical approach to philosophy that is attentive to how coloniality shapes our thinking and world.[237]

Sylvia Wynter's 'Unsettling the coloniality of being/power/truth/freedom,' also merits consideration in decoloniality literature.[238] Wynter speaks of the 'coloniality of being/power/truth/freedom' as an interlinked concept based on the premise that underlies the invention of 'man.'[239] According to this premise, the figure of 'man' is a recent invention that appeared due to a change in the fundamental arrangements of knowledge that began a century and a half ago.[240] Wynter argues that if these arrangements were to disappear as they appeared, 'man' would be erased. Therefore, the

[234] Ibid.
[235] Ibid.
[236] Ibid.
[237] Ibid.
[238] S Wynter 2003 'Unsettling the coloniality of being/power/truth/freedom' (2003) 3 *NCR* 257.
[239] Ibid.
[240] Ibid.

'coloniality of being/power/truth/freedom' is linked to the invention of 'man' and the fundamental arrangements of knowledge that have made it possible for his figure to appear. Wynter's argument challenges traditional notions of humanism and the Enlightenment by questioning the dominant narratives that have shaped the modern understanding of humanity.[241] She argues that the figure of man, which emerged during the Renaissance, is a recent invention used to justify the exploitation and domination of other groups of people. Wynter contends that the Enlightenment's emphasis on reason and rationality has been used to exclude certain groups of people from the category of human and that this exclusion has been used to justify their subjugation.[242] Wynter proposes moving beyond the figure of 'man' and towards a more inclusive understanding of humanity that recognises the diversity of human experience. Doing so can challenge the coloniality of being, power, truth, and freedom and create a more just and equitable world. Wynter's text invites questioning the dominant narratives that have shaped the prevailing understanding of humanity and to imagine new possibilities for the future. By challenging the coloniality of being, power, truth, and freedom, Wynter opens new avenues for thinking about social and political issues, including international law.[243] For example, her argument could inspire new ways of thinking about issues related to race, gender, and class. It could lead to more inclusive and equitable social, political and legal systems. Additionally, her argument could inspire new inclusive and diverse education and knowledge production approaches. Overall, Wynter's argument challenges legal scholarship to think critically about the dominant narratives that shape legal systems of thought and practice and to imagine new possibilities for the future.[244]

[241] Ibid.
[242] Ibid.
[243] Ibid.
[244] Ibid.

Tatiana C. Squeff explicitly applies the tenets of decolonial scholarship in international law, pondering the possibility of shaping soft law into a decolonial tool.[245] Squeff uses 'coloniality of doing' to refer to procedures where rule changes are imperative at the universal level, considering the striving for normative evolutions/transformations. Squeff uses the term within the existing international legal landscape saddled with high and heavy burdens of coloniality, resistant to change due to the rigidity of its positivist normative structure, constructed by militarily and economically powerful states in the modern imperialistic epoch, which has sustained their legitimacy for centuries.[246] Therefore, the 'coloniality of doing' limits the development of international rules by perpetuating the existing colonial power structures and preventing the incorporation of alternative perspectives and approaches. Squeff explicitly displays the natural kinship between decoloniality and TWAIL scholarships. She explains that decolonialism as an epistemic approach is related to TWAIL, bringing TWAIL closer to the decolonial turn.[247] Twailers aim to redefine international law to counter its colonialist and imperialist foundations.[248] The construction of international law based on the 'intellectual, historical and cultural experiences' of the West disregards the struggles of Third World peoples within the international society.[249] Therefore, decolonialism as an epistemic approach can help challenge and transform the existing colonial power structures in international law, a key concern of TWAIL. Soft law can be used as a decolonial tool in international law, as it allows for the participation of Third World societies in creating international norms and advancing their

[245] TC Squeff 'Overcoming the "coloniality of doing" in international law: Soft law as a decolonial tool' (2021) 17 *RDGV* 1.
[246] Ibid.
[247] Ibid.
[248] Ibid.
[249] Ibid.

agendas. Also, Squeff argues that soft law can help circumvent imperialism in international human rights law.[250]

**The Unifying Thread**

The spinal cord that unifies all these categories of literature is *the biased nature of the law, its development and application* to the benefit of upper social groups at the expense of the lower ones in social stratification, both at the level of the society of individuals and the society of nations. Thus, CLS takes issue with the positivistic view of the law, which presumes economic, social, political, cultural and moral neutrality and purity. CLS maintains that this view of the law and the legal system betrays a convenient lack of reflexivity, wherein the inability for self-reflection and self-criticism are normalised – more like second nature. In addition, the education system perpetuates a legal system of inequality, legitimising and normalising inequality more generally. Hence, broadly speaking, CLS deals with the question of the role of law and the legal system in society. For this reason, CLS scholar calls for a reflexive and self-critical approach to legal practice and scholarship. The various branches of CLS are rhizomatic lines of flight of this critical view of the law.

Thus, the feminist branch used critical methods to critique the male bias of legislation, jurisprudence, and practice. Feminist legal scholars charged that the whole traditional legal edifice with its theories, principles, doctrines and concepts, such as state, sovereignty and human rights, had been built within a Western patriarchal *weltanschauung*, which promoted men's interest to the detriment of women. While the subject matter of this dissertation does not incorporate the legal feminist perspective, it shares with it the critical standpoint, aiming at the same target: the traditional legal edifice. The

[250] Ibid.

emergence of feminist legal scholarship added a new voice to what hitherto had been a single male story.

Critical race theory added a new dimension to the CLS through the critique of the history and laws of the land to expose their systemic racist biases. Once again, the claims of political, economic, social and moral purity of the legal system are exposed as convenient delusions. Through critical race theory, the now widespread theoretical concept of intersectionality emerged to capture the multiple layers of discrimination to which people of African descent, notably African American women, were subject under the American legal system. While the current dissertation is not an exercise in critical race theory, it shares with it the critical method, framing and viewing the international human rights legal standards from an African vantage point.

The universalism and cultural relativism debate also lays bare the necessity of taking a critical and cautious approach to human rights. Just as CLS questions claims of economic, social, political, cultural and moral purity of the law, cultural relativist scholars rightly argue that, in a culturally diverse world, claims of human rights neutrality and universalism mask Western ethnocentrism and perpetuate Western cultural domination of the world. As a critical approach, cultural relativism takes seriously the spatio-temporal nature of social processes, to the effect of which all human inventions are historically and culturally contingent.

While TWAIL is often not classified under CLS, its emphasis on the deconstruction of international law as a colonial legal library built to justify the plunder and pillage of the global south by the global north appears to internationalise CLS. An argument could be made that, with its sharp focus on international law, TWAIL is a specialised legal project of the larger global south scholarly movement described in this review as the decolonial turn. This global south scholarly movement seeks to dismantle the Eurocentric construction of world systems, including philosophical, economic, social, cultural and political

systems. The decolonial scholarship aims to free the very reality of being human in the world from coloniality. TWAIL's focus on the human experience of the global south is the point of departure in engaging with international law and decolonial scholarship with its aim to decolonialise international systems of thought and practice. Together, they inspire the theoretical and methodological approaches deployed in this dissertation.

# 4. INTERNATIONAL HUMAN RIGHTS LAW AND LAND RIGHTS IN THE CONTEXT OF RESOURCE EXTRACTION IN AFRICA

Amnesty International and Human Rights Watch are globally recognised human rights brands known for their courageous research, campaigns and advocacy. They have exposed numerous human rights violations, abuses and war crimes worldwide involving state and non-state agents. Due to pressure from constituencies in the global South, in the past decade, the two organisations have increasingly extended their investigations--which had until then focused on civic and political rights--to economic, social and cultural rights, including at the intersection of resource extraction and environmental justice. Both organisations have used the international human rights framework as the gold standard for all their research, campaign and advocacy. The five reports introduced and discussed in this chapter problematise corporate conduct in the extractive industry relative to economic, social, cultural and environmental justice in Africa. The organisations apply the international human rights legal framework in all five reports to make their case. This exercise aims to make visible the limits of exclusive reliance on legalised human rights procedures to meaningfully address the plight of African communities who rely on the land and natural ecosystem to realise their economic, social, cultural and environmental rights amid the onslaught of resource extraction.

**Report 1: The End of Cattle's Paradise[251]**

In 2019, Amnesty International released 'The end of cattle's paradise', a highly mediatised report in Portuguese-speaking countries. The report addresses the problem of large-scale land takeovers for commercial livestock farming and its impact on the right to food and other human rights in the Gambos municipality of Angola. The report documents how large parts of Tunda dos Gambos and Vale de Chimbolela, the traditional grazing lands in the southern province of Huila, were granted to unidentified commercial livestock farmers since the end of the civil war in 2002 without adequate consultation with the pastoralist communities who were the historical and customary occupants and users, resulting in the displacement of pastoralist communities and the loss of grazing land for livestock. The report also documents concerns about malnutrition and hunger among the pastoralist communities and the lack of adequate food in the Gambos. The report argues that these land takeovers have violated the rights of the pastoralist communities, including their rights to food, water, health, work, culture, and participation in decision-making. The report suggests that the Angolan government needs to take swift action to address the insufficient food supply in the Gambos, thoroughly investigate malnutrition and hunger in the municipality, and temporarily halt land grants.

Additionally, they should assess and provide appropriate remedies for any human rights violations and losses experienced by the pastoralists. According to the report, the Ministry of Agriculture and Forests must be transparent about how the unknown commercial livestock farmers gained entry to significant portions of Tunda dos Gambos and Vale de Chimbolela. Additionally, they should return the occupied regions to the pastoralists and compensate them fairly for any damages suffered.

[251] Amnesty International 'The end of cattle's paradise' (2019).

The report states that ranching causes land loss and can harm the livelihoods and food security of pastoralist communities. Moreover, Amnesty has highlighted that the land takeovers were done without regard for the rights of the pastoralists and their legal status as the historical and customary occupants and users of these lands. In this report, Amnesty International alerts that land diversion for ranches displaced communities and disrupted their traditional ways of life, negatively impacting their food security. Finally, Amnesty mentions that land diversion led to the depletion of natural resources to the detriment of communities that rely on those resources for food, water and shelter.

Amnesty suggests a need for more sustainable and equitable land use practices that consider the needs and rights of local communities. For instance, Amnesty points out that the land takeovers did not consider the rights and legal status of the pastoralists, who are the historical and customary occupants and users of these lands. This suggests that a more participatory and inclusive approach to land use planning could help balance the needs of the cattle industry with the need for food security. Also, Amnesty highlights cattle's economic and cultural importance to pastoralist communities, suggesting that any efforts to promote sustainable ranching practices should consider these communities' social and cultural context.

The report refers to several international legal instruments and treaties to frame the issues and argue the case, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic and Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). The report also mentions these treaties and the African Charter on the Rights and Welfare of the Child as regional and international standards that require consultation, compensation, and environmental and social impact assessments when land is diverted for commercial purposes.

Amnesty discusses land rights in several places, noting that the land takeovers in the Gambos region lacked consideration for the pastoralists' rights and their legal status as these lands' historical and customary occupants and users. Amnesty also mentions allocating grazing land for commercial livestock farming and the need for human rights due diligence to prevent adverse impacts on pastoralist communities. Furthermore, Amnesty highlights the importance of land tenure security for pastoralist communities and notes that land tenure insecurity can lead to displacement and food insecurity. The report suggests that more sustainable and equitable land use practices are needed to balance the needs of the cattle industry with the need for food security. These practices should consider the rights and needs of local communities.

**Report 2: 'They Don't See Us as People'[252]**

In this report, Amnesty discusses several problems related to land governance in Eswatini in relation to forced evictions, including inadequate housing, lack of consultation with affected communities, unclear land tenure, and the coexistence of Swazi customary rules with the Constitution. The report points out that the current legal system in Eswatini does not offer clear and definite guidelines on land ownership and other forms of tenure. This means that the state of Eswatini is not meeting its regional and international responsibilities to implement measures that ensure the legal security of people's tenure. This creates a situation where Swati people permanently run the risk of being forcibly evicted. The report highlights the root causes of land tenure insecurity, which include unclear land management, tenure systems, and the disparity between policy and its implementation. Amnesty argues in the report that these issues must be addressed to ensure that people have access to adequate housing and are protected from forced evictions.

[252] Amnesty International 'They don't see us as people' (2018)

'They don't see us as people' delves into Eswatini's responsibility to uphold the right to adequate housing as outlined in international and regional human rights laws. The Eswatini state has committed to respecting, protecting, and fulfilling this right by ratifying various treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR). Amnesty cites other international human rights treaties governing the protection of the right to adequate housing and preventing forced evictions, including the African Charter on Human and Peoples' Rights, the UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, and the Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights. According to Amnesty, Eswatini must comply with these international human rights obligations to ensure that residents have access to adequate housing and are protected from forced evictions.

Furthermore, the report examines how the international human rights framework handles land rights, emphasising that these standards protect everyone from forced evictions, even if they do not legally own the property they occupy. Amnesty notes that the UN Committee on Economic, Social and Cultural Rights stresses in its General Comment 7 that any eviction must comply with international human rights laws and be reasonable and proportional, even if it is justified. The report highlights that the current legal system in Eswatini does not offer enough clarity and certainty when it comes to land ownership and other forms of tenure, which means that the state of Eswatini has not fulfilled its obligations at both regional and international levels to guarantee legal security of tenure for its residents.

**Report 3: 'No Clean-Up, No Justice'[253]**

This report, 'No clean-up, no justice' evaluates the implementation of the United Nations Environmental Programme's (UNEP) environmental assessment of Ogoniland, a region in Nigeria, nine years after the assessment was conducted. The report documents the failure of the Nigerian government and Shell oil company in Ogoniland to implement the UNEP report's recommendations to clean up the region's environment, which has severely polluted land, water, air and food sources through oil spills and other forms of contamination. The report highlights the devastating impact of pollution on the health and livelihoods of the Ogoni people, who have been exposed to severe health risks and have lost access to communal property and cultural heritage. Amnesty also identifies institutional weaknesses that have affected the clean-up process, including conflicts of interest, lack of transparency and accountability, and the absence of qualified professionals. In the report, the organisation calls on the Nigerian government to prioritise the interests of the communities of the Niger Delta over those of the oil companies and to hold those responsible for environmental damage, pollution, and human rights violations accountable and liable. Also, Amnesty calls for implementing effective, transparent, responsible and accountable structures, using the best independent external expertise to ensure a successful clean-up of the region's environment.

More specifically, Shell's actions in the Niger Delta have resulted in an alarming amount of pollution, which has contaminated agricultural land, fisheries, and drinking water, putting hundreds of thousands of people at risk of severe health issues. According to the UNEP report, the Ogoni people are exposed to this pollution constantly, every minute of every day, all year round. Even children born in Ogoniland can sense the presence of oil pollution due to the constant odour of hydrocarbons in the air. UNEP's report also revealed that

[253] Amnesty International 'No clean-up, no justice' (2020).

the Nisisioken Ogale community was drinking water from wells that were contaminated with benzene, a substance known to cause cancer. The contamination levels were more than 900 times above the World Health Organization (WHO) guidelines. An example of this occurred in Ogale, a town on the outskirts of Port Harcourt with a population of 40,000. According to the report, this would inevitably result in lasting health issues. Despite being aware of the dangers of pollution, many people had no choice but to use contaminated water for daily activities such as drinking, bathing, washing, and cooking. In 2014, Shell responded by constructing a permanent piped water distribution facility, the Eleme Regional Water Supply Project, in Ogale. This facility had a potential capacity of 450,000 litres and was completed in August 2013. Subsequently, it was handed over to the Rivers State government. However, the Centre for Environment, Human Rights and Development (CEHRD) and Platform research revealed that the facility relied on a borehole water drilling mechanism to purify the heavily contaminated underground water.

As per Amnesty, the UNEP report suggests establishing a thorough and lasting health monitoring system. The report proposes that individuals who have consumed water from hydrocarbon-contaminated sources should be listed in a central database and advised to undergo a complete medical examination conducted by knowledgeable medical professionals knowledgeable about the adverse health effects of contaminated drinking water. Furthermore, their health must be monitored throughout their lifetime since the consequences of hydrocarbon exposure, such as cancer, may take a long time to surface. According to the report, pollution has reached an alarming level in Ogoniland. It has contaminated agricultural land, fisheries, and drinking water, posing serious health risks to hundreds of thousands of people. The UNEP report stated that the Ogoni people are constantly exposed to this pollution every day of the year.

Amnesty has made a legal argument stating that, under international human rights law, all states are legally obligated to prevent violations by all parties, including companies and individuals involved in artisanal refineries. Countries must take appropriate action to prevent such abuses by private entities and respond to them by investigating the situation, holding those responsible accountable, and providing adequate compensation for the harm caused. Companies must also be mindful of their impact on human rights and take steps to avoid contributing to such abuses. Amnesty states that according to the UN Guiding Principles on Business and Human Rights:

> This is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their human rights obligations and does not diminish them. And it exists over and above compliance with national laws and regulations protecting human rights.[254]

Amnesty also found that the pollution violated the Ogoni people's land rights, as the pollution caused the loss of livelihoods and traditional occupations, such as farming and fishing, and the loss of access to communal property and cultural heritage.

According to Amnesty, the efforts made to clean up the pollution in Ogoniland have been too little, too weak and have not resulted in effective cleanup. The organisation also highlights institutional weaknesses that have affected the clean-up process in Ogoniland. For a successful clean-up in Nigeria, the government must establish efficient, transparent, and responsible systems with the help of independent external experts. The Hydrocarbon Pollution Remediation Project (HYPREP) under the Federal Ministry of Environment needs a complete revamp and should eliminate any potential conflicts of interest by employing qualified professionals. The reasons for the continuous failure to clean up should be disclosed to the public, and immediate corrective actions must be taken.

[254] Ibid., 13.

**Report 4: 'What Is a House Without Food?'[255]**

This report by Human Rights Watch (HRW) sheds light on the human rights violations caused by the rapid expansion of the mining industry in Tete, a province in central Mozambique. According to the report, to make room for Vale's and Rio Tinto's coal mining activities, the communities in the area were displaced and relocated, with their access to water and ability to produce or purchase food severely disrupted. As a result, many relocated households have faced food insecurity and have had to rely on food aid provided by the mining companies themselves.

According to HRW's research, the coal mining operations in Tete province have greatly affected the local communities. Many households living on or near the mining sites were forced to relocate, resulting in displacement from their homes, farmland, and way of life. The resettlements offered poor-quality agricultural land and unreliable access to water, leading to declining living standards among community members. Resettled individuals in Cateme and Mwaladzi faced significant challenges in re-establishing their self-sufficiency and livelihoods. These disruptions adversely impacted their access to food, water, and work.

This report discusses land rights from an international human rights law perspective. The report highlights various rights protected under international human rights law, including the right to food, water, and work. Additionally, the report mentions the UN Guiding Principles on Business and Human Rights, which outline the responsibility of businesses to respect human rights, including the right to land and property. The report also references the guidelines provided by the Special Rapporteur on Housing regarding resettlements due to development-related projects. These guidelines state that affected populations have the right to easily accessible opportunities to make

[255] Human Rights Watch, 'What is a house without food?' (2013)

complaints and receive a timely response and the right to assistance before, during, and after relocation until they have achieved the standard of living set out in the resettlement plan.

**Report 5: 'Our Trust is Broken'[256]**

In the report 'Our trust is broken,' HRW discusses Uganda's specific human rights violations due to oil development. The report describes how the oil development in Uganda has led to the violation of several human rights, including the right to property, the right to food, the right to work, and the right to an adequate standard of living. The report also highlights how the affected communities have been subjected to forced evictions, inadequate compensation, and a lack of meaningful consultation and participation in decision-making.

The organisation reports that the oil development has caused forced evictions, insufficient compensation, and a lack of meaningful consultation and participation in decision-making. As a result, a host of human rights have been violated, including the right to property, the right to food, the right to work, and the right to an adequate standard of living. In concrete terms, HRW documents the multifaceted impact of oil development, including land loss, environmental impact, social impact, and human rights impact. First, in relation to the loss of land and livelihoods, the land acquisition process has been marred by delays, poor communication, and inadequate compensation. Many farmers have been deprived of crucial income due to delays in accessing their land to tend perennial crops, impacting their food security. Families have also described their inability to pay school fees and anguish over their children or grandchildren dropping out. The compensation process has left people with less land and with replacement land that is usually smaller, less productive, and farther away, which has endangered household food security.

[256] Human Rights Watch, 'Our trust is broken' (2023).

Regarding the environmental impact, the oil development has had significant environmental impacts, including spills from pipelines and drilling, inadequate handling of drilling muds and other wastes, and impacts on biodiversity from the removal. There was disturbance of wildlife habitat in various protected areas, air pollution from dust and harmful emissions in the oilfields. The pollution affected water from hundreds of stream crossings, particularly within the watershed of Lake Victoria, Africa's largest lake, whose basin supplies water to 40 million people. Third, concerning the social impacts, the influx of thousands of workers from outside of local communities housed in camps during the construction phase has raised concerns about potential social problems that could result. Many residents have expressed concerns about the potential for increased HIV and other diseases, more alcohol and drug use, and more gender-based violence. Residents have also expressed concerns over the early impacts of the Tilenga oil development, including increased dust and noise. Fourth, concerning the impact on human rights, the forced removal of communities from their land without proper compensation or alternative means of livelihood violates the right to property and a decent standard of living. The lack of meaningful consultation and involvement in decision-making violates the right to participate in public affairs and access to information. The oil industry's development has negatively affected the right to food, work, and education. The report also emphasises the responsibility of the Ugandan government and oil corporations in perpetuating these human rights violations and urges prompt action to address these concerns.

In addition, the report describes how the affected communities have responded to the loss of their land and livelihoods in several ways. The report states that many farmers have been deprived of crucial income due to delays in accessing their land to tend perennial crops, impacting their food security. Some residents have resorted to selling household assets, including livestock, or borrowing from predatory lenders at excessive rates to pay their expenses.

Many residents have described receiving food rations as an interim measure to help with the declines in income but also described it as inadequate to support families either because it was not provided consistently or was not of sufficient quantities.

HRW refers to several international human rights standards and guidelines, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the United Nations Guiding Principles on Business and Human Rights. These standards and guidelines provide a framework for assessing the human rights impacts of oil exploitation project development and holding governments and companies accountable for their actions. The organisation also highlights the role of the Ugandan government and oil companies in perpetuating these human rights abuses and calls for urgent action to address these issues. The organisation's legal argument is that the Ugandan government and oil companies have violated international human rights standards and guidelines by failing to respect the rights of the affected communities. According to HRW, it is against international human rights law to force communities out of their land without adequate compensation or alternative means of livelihood. To do so violates their right to property and a decent standard of living. In addition, the lack of meaningful consultation and participation in decision-making processes infringes upon their right to participate in public affairs and obtain information. HRW also points out that the oil development has affected the right to food, work, and education, stating that the Ugandan government and oil companies have a duty to respect human rights and ensure their actions do not lead to human rights violations. HRW calls for urgent action to address these issues, including ensuring that communities are adequately compensated for their losses, have access to alternative livelihoods, are meaningfully consulted, and participate in the decision-making process.

**Application of the International Human Rights Gold Standard**

At this stage, it is important to stress that in their reports, including the ones under consideration in this study, Amnesty International and Human Rights Watch adhere to the widely recognised gold standard for conducting research, developing policies, advocating for change, and launching campaigns within the global human rights movement. As stated earlier in this study, the preferred gold standard is the international human rights framework, which consists of the International Bill of Human Rights and other international human rights instruments. Typically, a report by most international human rights organisations will build a case for human rights violations drawing on evidence and international human rights standards. All the reports summarised in this study draw on international human rights instruments, including the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, UN Guiding Principles on Business and Human Rights, and General Comments of the UN Committee on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the African Charter on Human and Peoples' Rights. This dissertation takes the position that this international gold standard limits the ability of international human rights organisations to advocate and defend the human rights of rural communities facing the onslaught of land expropriations for resource extraction and agribusiness in Africa—the limits emanate from the coloniality of this same international human rights gold standard itself.

As CLS argued, the assumptions and requirements of neutrality in law-making and application have tended to conceal economic, political, social and cultural biases of the powerful groups involved in producing and reproducing the prevailing legal and moral standards. TWAIL scholars have applied this approach to the evolution and application of rules and regulations that govern relations between states. As Twailers have shown, these power dynamics also

play themselves out in the international legislative process involving states locked in unequal international figurations, that is, networks of interdependencies between states with shifting asymmetric power (im)balances.

From the standpoint of this study, the threads of coloniality that are responsible for the limits of the international human rights framework include the legalisation of human rights, the reduction of the complex totality of the human experience to legality, the inherent asymmetric power dynamics between states in the production of and reproduction of the international legal status quo.

**The Legalisation of Human Rights**

The first thread of the coloniality of the international human rights framework is the legalisation of human rights. Saladin Meckled-García and Başak Çali make a compelling argument to the effect that the relationship between human rights and law is not straightforward and needs to be investigated through multidisciplinary approaches.[257] They define the legalisation of human rights as 'the process by which human rights are transformed from moral and political claims into legal rights.'[258] This process involves a shift from a moral and political discourse to a legal discourse and has significant implications for the ways in which scholars, governments, legal systems, activists and the public generally think about and pursue human rights.[259]

This shift has gradually occurred over time as human rights have become more widely recognised and institutionalised, recalling that the concept of human rights has historically been located in natural-law philosophy, which

[257] S Meckled-García & B Çali *The Legalization of Human Rights* (2005).
[258] Ibid., 9.
[259] Ibid.

assumes that human rights are pre-legal.[260] However, they rightly argue that it is now more common to derive the concept of human rights from international legal texts, as do Amnesty International, Human Rights Watch and other human rights organisations.[261] Consequently, as legalisation becomes mainstream and hegemonic, society loses sense of the need to question the assumptions that underlie the relationship between human rights and their legal expression and explore the ethical, political, and practical repercussions of this relationship.[262] Another consequence of this shift is that the field of human rights has become a colony of the legal profession, implying that only law and lawyers can speak meaningfully about human rights. Philosophy, ethics, theology, art, sociology, anthropology, psychology, science, etc., lose their natural right to articulate the human condition and experience as human rights.[263] In other words, legalisation translates into colonial expropriation and occupation of human rights. When disciplines other than law are used in the human rights discourse, they are positioned as handmaidens of law.

As in the case of land, resources, culture, etc., the colonial legal takeover and occupation of human rights without recognising that no single discipline can do justice to the complex totality of the human experience cannot be good for the global human rights ecosystem.

**Tyranny of the Legal Story**

Legalisation is the vehicle through which law becomes a monocultural voice telling a single story of human rights. As Adichie explains, a single story is dangerous because it empties the human experience of its diverse and complex totality, generates the other's social disgrace through stereotyping, undermines

[260] Ibid.
[261] Ibid.
[262] Ibid.
[263] Ibid.

the other's human dignity, and emphasises differences rather than similarities with the other. Therefore, a single story is both untrue and incomplete.[264] Furthermore, a single story is dangerous because human beings are vulnerable to it, as it is often the only story that is heard or seen about a particular place, people, or subject matter. This condition can be due to a variety of factors, such as the media, literature, history, or politics, which may promote a particular narrative and exclude other perspectives.[265]

In postcolonial theory, the single story is the reduction of the colonised subjects and their world into erroneous perceptions of the coloniser. A classic study of this process is eloquently presented in Eduard Said's *Orientalism,* in which the coloniser invents the Oriental through the anthropological, journalistic, literary, sociological and historical writings of Western writers.[266] Another classic that deals with this process is V. Y. Mudimbe's *The Invention of Africa*, in which Africa is merely Western philosophical perceptions of Africa archived in the 'colonial library' constituted through multidisciplinary Western literature of Africa.[267] Of this, Mudimbe writes:

> Exploiting travellers' and explorers' writings, at the end of the nineteenth century a 'colonial library' begins to take shape. It represents a body of knowledge constructed with the explicit purpose of faithfully translating and deciphering the African object. Indeed, it fulfilled a political project in which, supposedly, the object unveils its being, its secrets, and its potential to a master who could, finally, domesticate it. Certainly, the depth as well as the ambition of the colonial library disseminates the concept of deviation as the best symbol of the idea of Africa.[268]

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[264] Adichie op cit (n2). Adichie herself explains that the single story creates stereotypes and flattens one's experience of a place or people. She shares personal stories of how growing up reading only British and American books made her believe everyone from those countries was white, blue-eyed, and ate apples in the snow. This limited her understanding of people from different cultures and made her vulnerable to a single narrative. She argues that engaging with multiple stories from different perspectives is crucial to avoid stereotypes and recognise the complexity and diversity of people and places.

[265] Ibid.

[266] E Said *Orientalism* (1978)

[267] V Y Mudimbe *The Invention of Africa* (1988).

[268] Ibid., xii.

Furthermore, Mudimbe rightly observes that, since the colonial library is so pervasive, having penetrated the minds of Africans through Western education, essentially, when we think and speak of Africa, 'we are dealing with [Western] ideology.' Even the best among African leaders bear the weight of the 'colonial library' in their thought processes. He elaborates:

> Modern African thought seems somehow to be basically a product of the West. What is more, since most African leaders and thinkers have received a Western education, their thought is at the crossroads of Western epistemological filiation and African ethnocentrism. Moreover, many concepts and categories underpinning this ethnocentrism are inventions of the West. When prominent leaders such as Senghor or Nyerere propose to synthesise liberalism and socialism, idealism, and materialism, they know that they are transplanting Western intellectuals.[269]

In *The Idea of Africa,* Mudimbe further pursues this process of production of Africa through the convenient misperceptions of other than Africans (Mudimbe 1994). 'African discourses,' he says, 'have been silenced radically or, in most cases, converted by conquering Western discourses.'[270] The pervasiveness of Western discourses is such that 'categories and conceptual systems that depend on a Western epistemological order' continue to be the epistemological iron cage in which both Western and African scholars are trapped.[271] Such is the process of the invention of the single story of Africa, showing clearly the extent to which even the most illuminated minds are vulnerable.

The single story, in this case, is the legal story of human rights, told through the sole voice of law, itself constituted through Western philosophical assumptions of what counts as knowledge of the human experience at the expense and exclusion of other traditions of storytelling and interpreting the human condition. Treating human rights exclusively as concerns of the law is dangerous because it limits our understanding of human rights to a single perspective. Human rights are complex and multifaceted, constituted not only

[269] Ibid., 186.
[270] Ibid., xiv.
[271] Ibid., xv.

through legal but also social, cultural, ethical, political, and psychological dimensions. By excluding other disciplines, international human rights legislators and interpreters risk oversimplifying human rights and reducing them to a narrow legalistic framework, constructing a single story of human rights that ignores the lived experiences and cultural contexts of people and communities affected by human rights violations and abuses. To avoid this danger, engaging with multiple stories and perspectives on human rights is essential, drawing on a range of disciplines and approaches to understand the full complexity and diversity of human rights issues.

**The Exclusion of the Knowledge of Rightsholders**

Part of the coloniality of the international human rights framework, which undercuts the ability of international human rights organisations to defend human rights, is the exclusion of ontological and epistemological systems of those who are subject to human rights violations and abuses in framing and articulating human rights. The idea of human rights in the international human rights framework conjures an image of humans as completely detached and unrelated to natural ecosystems and nonhuman nature in and around them. It is as if being human is counter to nature. Further, the anthropocentric view of the world posits nonhuman nature as subservient to humans.

Remarkably, international human rights organisations do not draw on African ontological and epistemological views on land, nature, and environment in human rights research, policy and advocacy. Yet, it is these ontological and philosophical (and often religious) understandings of land, nature and environment around which rightsholders organise and make sense of their everyday lives. These are the ideas that constitute their humanity and dignity.[272]

[272] W Kelbessa 'African environmental philosophy, injustice, and policy' (2022) *GJIA.*

African philosophy provides a rich conceptual library on how Africans perceive nonhuman nature and the environment. Writing on this subject, Edwin Etieyibo explains that African philosophy provides a basis for recognising the intrinsic value of nonhuman nature, including animals, by acknowledging the interconnectedness of all beings and the importance of maintaining a harmonious relationship with the environment and by focusing on the community and beings in community, rather than just individual humans. According to African communalistic beliefs, the community and its members are considered the source of intrinsic value.[273] This way, the concept of inherent value is not focused on humans but rather on either the value of individual beings or beings in the community as a whole. The value of individual beings flows from their community membership, and the value of the community emanates from its ability to uphold the value of its members.[274] This characterisation of beings, community, and nature, according to Etieyibo, is not anthropocentric. Furthermore, Etieyibo argues that African philosophy recognises the intrinsic value of nonhuman nature by rejecting the idea that humans are the only beings with intrinsic value.[275] He suggests that African philosophy recognises the interconnectedness of all beings and the importance of maintaining a harmonious relationship with the environment. This means that African philosophy recognises the intrinsic value of nonhuman nature, including animals, and can provide a basis for recognising their rights.[276]

Elsewhere, Etieyibo demonstrates the intrinsic value of non-human nature and the environment via Ubuntu,[277] which Es'kia Mphahlele popularised

[273] E Etieyibo 2018 'African philosophy and the nonhuman nature' in G Hull (ed) *Debating African Philosophy: Perspectives on Identity, Decolonial Ethics and Comparative Philosophy* (2018) 164.
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] E Etieyibo 'Ubuntu and the environment' in A Afolayan and T Falola (eds.) *The Palgrave Handbook of African Philosophy* (2017) 633.

in his collected writings as African humanism.[278] As Etieyibo argues, Ubuntu is intricately interwoven with the environment, and the former can be called upon to address environmental sustainability.[279] This must be so since Ubuntu does not endorse the pursuit of self-interest at the expense of others, including the natural environment. Ubuntu recognises humans as a part of the natural world, and their interests are closely linked with the interests of other natural entities. African humanism promotes an ethical relationship with the environment that frowns upon the desire to exploit the natural ecosystems for unbridled self-interest.[280] In African ontology or metaphysics, reality is a closed system where everything is interconnected, and any alteration in the system affects all of it. This means that both the spiritual and physical worlds can coexist. The community of beings that make up this reality include humans, deities, spirits (including the nameless dead and ancestors), animals and inanimate objects. Humans are part of the interconnected community of beings that make up the natural world. Therefore, African humanism fosters a universal awareness of ecological issues and can be deployed to combat the existential climate crisis that humanity currently faces.[281]

Angela Roothaan takes up the interconnectedness between humans and the nonhuman world in an essay on African hermeneutics of trees.[282] Drawing on the West African context, Roothaan asserts that a rich hermeneutics of trees can contribute to an understanding of the environment that could create more sustainable relations between humans and their environment. She suggests that African traditional relations to trees are of particular interest as they are

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[278] E Mphahlele *Es'Kia: Education, African Humanism and Culture, Social Consciousness, Literary Appreciation* (2002).
[279] Etieyibo op cit (n245).
[280] Ibid.
[281] Ibid.
[282] A Roothaan 'Hermeneutics of trees in an African context: Enriching the understanding of the environment for the "Common Heritage of Humankind"' in J Chimakonam *African Philosophy and Environmental Conservation* (2018) 123.

essential to humans as 'natural symbols' of the central values of communal life, as sources of food and medicine, and as signs of spiritual realities.[283] Roothaan outlines different frameworks that determine the human relationship to the environment, especially in the West African context. She argues that the African worldview is holistic and that the environment is seen as a community of beings, both human and non-human, that are interconnected and interdependent. She also suggests that the African worldview is relational and that humans are seen as part of the environment, not separate from it.[284] Roothaan's main argument is that a rich hermeneutics of trees in an African context can contribute to a more sustainable relationship between humans and their environment. She suggests that by understanding the contested meanings of trees in African traditions, we can better understand the environment and create more sustainable relations between humans and their environment for the future.[285]

Francis Diawuo and Abdul K. Issifu provide a concrete case study of African ontology in relation to environmental conservation.[286] They explain that the indigenous people of the Tongo-Tengzuk community have utilised taboos and totems to aid in natural resource conservation and management. One such example is the ban on hunting and consuming pythons, frogs, and crocodiles in Sankana and Tongo-Tengzuk, respectively. This practice has played a significant role in preserving various forms of wildlife within the community.[287] Certain areas of the communities have designated patches of forest that are protected due to their significance as sacred totems or habitats for animals that hold special spiritual or cultural value. The trees in and around these shrines are not

[283] Ibid.
[284] Ibid.
[285] Ibid.
[286] F Diawuo & Abdul K Issifu 'Exploring the African traditional belief systems (totems and taboos) in natural resources conservation and management in Ghana' in J Chimakonam *African Philosophy and Environmental Conservation* (2018) 209.
[287] Ibid.

harvested for firewood or charcoal, as lesser gods are believed to reside in and around the area. Consequently, they are left in their natural state.[288] The rocks on the hills are protected from quarrying due to the presence of more minor gods within them. The lesser gods in the rocks of the Tongo hills and the trees surrounding the Tengzuk Shrine have aided in preserving the natural environment and preventing mismanagement. In the context of this case study, lesser gods refer to the deities or spirits that are believed to inhabit natural objects such as trees, rocks, hills, and other natural features. It is believed that minor deities inhabit the vicinity and should be treated with reverence and safeguarded. For instance, the rocks on the hills are not to be mined due to the existence of more minor gods within them. The numerous trees near and within the shrines are not harvested for fuel or charcoal but are left to grow naturally, as it is believed that lesser gods reside within the area.[289]

[288] Ibid.
[289] Ibid.

# 5. DISCUSSION AND CONCLUSION

All the activities and human rights violations and abuses protagonised by the extractive companies in the reports of Amnesty International and Human Rights Watch, as reviewed above, are related to land,[290] natural ecosystems and nonhuman nature. However, the significance of the land and natural ecosystems and their environmental media—soil, water, and air—in people's lives finds no expression in these reports. In other words, the relationship between human and nonhuman nature is seldom visible in all five reports presented. The Ubuntu-based ontological and epistemological systems across the continent that govern the relations between human beings and land, natural ecosystems, and nonhuman nature are excluded from the human rights discourse that relies exclusively on international human rights standards. Yet, these Ubuntu-based ontological and epistemological systems, produced and reproduced through centuries of interaction and experimentation with the land and its ecosystems, give meaning and dignity to life in these communities. They are part of the ways and means of human life, relied upon to confer structure and predictability to life and deployed to render the everyday world orderable and meaningful. The actions of extractive companies disrupt these indigenous knowledge systems and the relationships they mediate between human and nonhuman nature. Within these knowledge systems, humans and nonhumans, human nature and nonhuman nature, and human rights and nonhuman rights are two sides of the same coin. Therefore, one cannot speak of human rights violations without

[290] In this study, land refers to natural ecosystems composed of all the environmental media (soil, water and air) and nonhuman nature. Nonhuman nature refers to all living and non-living entities that are not human beings. This includes animals, plants, rocks, rivers, mountains, and other natural phenomena. In the context of the discussion on African philosophy and nonhuman nature, nonhuman nature refers to the natural environment and all the living and non-living entities that make up the environment (Etieyibo op cit (n241)).

nonhuman rights violations and vice versa. One cannot speak of human and nonhuman rights violations without destroying these knowledge systems.

As a framework, the international human rights perspective makes certain things visible and others invisible. Among the things rendered invisible within the international human rights framework, as applied as the gold standard by Amnesty International and Human Rights Watch, are African indigenous knowledge systems through which indigenous laws and rights are constructed. The exclusion of indigenous ways of being in the world and knowing the world and self is the hallmark of coloniality.[291] The exclusion of other disciplinary theories and methods of knowledge production and validation is at the heart of the legalisation of human rights. For all its good and benefit, the legalisation of human rights has the unintended consequence of creating a world in which the human condition and experience are only knowable and governable through legal theories and methodologies—as if the economic, social, cultural, religious, psychological and political dimensions of being human did not matter. The limited ability of international human rights organisations to speak and act holistically and meaningfully in defence of human rights in Africa emanates from the coloniality of the international human rights gold standard on which they rely—the international human rights framework. The coloniality of the international human rights framework is produced, reproduced and sustained through the legalisation process.

Therefore, legalising human rights produces a single story, the legal tale of the human experience. Unintentionally, legalisation strips human rights of their reflection of the complex totality of human experience to the legal bare necessity. In the end, what remains is a one-dimensional notion of human rights that are legally visible and otherwise invisible. Just as Herbert Marcuse argued that contemporary society is dominated by a version of rationality driven solely

[291] DM Matsinhe 'Quest for methodological alternatives' (2007) 55 *CS* 836.

by technological and economic efficiency,[292] one may justifiably argue that international human rights legalisation has unintendedly created a contemporary international system predominantly driven by a hegemonic reductive view of human rights as a legal necessity.

Marcuse's concept of 'repressive desublimation' refers to a process in which the one-dimensional society achieves the 'conquest of transcendence' by reducing and even absorbing alternatives and oppositions.[293] This results in the decline of the human ability to comprehend opposing viewpoints and different options and instead promotes a mindset of contentment. In such a mindset, reality is logical, and the current system is effective. In this process, the means of production take on the responsibility of a moral agent, and the conscience is emptied through objectification and the overall desire for material things. The outcome is the elimination of opposing and surpassing elements in the realm of 'higher culture.'[294] 'Repressive desublimation' produces permissive cultures in which various forms of pleasure enjoy free expression, whereas higher forms of human expression succumb to repression.[295] Similarly, while hoisting various forms of freedoms—e.g., expression, association, assembly, press, etc.—legalisation suppresses alternative, non-Western forms of expression of human freedom, being and doing. Decades of legalisation have produced one-dimensional international human rights thinking in which the law is the way, the truth and the light. A system in which human rights are unknowable except through law impoverishes the human rights universe. Solzhenitzen decries this condition: 'A society with no other scale but the legal one is less than worthy of man.'[296]

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[292] H Marcuse *One Dimensional Man* (1964).
[293] Ibid.
[294] Ibid., 41.
[295] Ibid.
[296] Solzhenitzen op cit (n1).

Marcuse's critical thinking has substantial implications in the quest for alternatives to one-dimensional international human rights system thinking. By critically analysing the prevailing human rights framework, it is possible to differentiate between essential and contingent aspects, as well as true and false modes of existence. This distinction can be achieved through a logical examination of the empirical situation, with a thorough grasp of its potential and historical contingency. Critical thinking makes it clear that power, exploitation and injustice shaped the development of the one-dimensional international human rights system. TWAIL is an excellent example of this.

Marcuse's thinking challenges the one-dimensional thinking that dominates international law, often construed as a neutral and objective system that regulates the relations between states, a view that ignores the fact that international law is shaped by the interests of the powerful states and corporations that dominate the global system. Marcusean critical thought renders visible the unexamined power relations that underlie the international human rights system and deconstructs the dominant Eurocentric ideology that supports it. Critical analysis can lead to the development of alternative approaches to international human rights jurisprudence based on the values of justice, equality, and freedom rather than the interests of the powerful.

Gilles Deleuze and Félix Guattari offer another suitable metaphor that illustrates the repressive tendencies of legalisation—the botanical images of 'rhizome' and 'arborescence.'[297] 'Rhizome' refers to non-hierarchical, decentralised, diverse, interconnected forms of thought and theorisation. In contrast to the conventional hierarchical arrangements with a clearly defined top-down structure, a rhizome is *non-hierarchical,* lacking a central point of origin or a rigid hierarchy; instead, it expands horizontally, featuring numerous entry and exit points, thereby enabling a multitude of connections and

[297] G Deleuze & F Guattari *A Thousand Plateaus: Capitalism and Schizophrenia* (1987).

pathways to emerge. Also, a rhizome is known for its *multiplicity/diversity,* which consists of a variety of interconnected nodes or points, each capable of establishing connections with other nodes in numerous ways, producing abundant connections and pathways that are intricate and capable of adaptation. Furthermore, *connectivity* is part of a rhizome's essence whereby the interconnectedness of nodes within defies any prescribed sequence or arrangement, fostering a myriad of relationships and connections that give rise to a highly adaptable and ever-evolving framework. Moreover, a rhizome is *nomadic,* given its ever-wandering architecture that defies prescribed or predetermined trajectories, with the ability to sprout and extend in unforeseen dimensions, seamlessly adjusting to evolving conditions. In addition, a rhizome is also known for *heterogeneity*, encompassing multiple disparate elements, ideas, or entities without imposing any singular order or categorisation while facilitating the harmonious coexistence of numerous perspectives and approaches. And finally, a rhizome is an *acentred* structure without a fixed centre, and rather than depending on a central point of control or authority, it draws upon its nodes' intricate interplay and interconnections.[298]

In contrast, Deleuze and Guattari note that an arborescence is characterised by a *hierarchical* structure with well-defined and unchanging order centred around the root, from which branches and sub-branches sprout. This hierarchical arrangement enforces a strict top-down organisation, with every element carefully positioned within the hierarchy. Also, the arborescent structure is linear, traditional, rigid and inflexible, forcing each component to follow a prescribed sequence. This sequential approach often leads to a singular outcome, leaving little room for diversity or alternative pathways. Additionally, arborescence simplifies complex totalities, sorting and segregating elements into distinct *branches, classes, and categories*, which can result in oversimplification

[298] Ibid.

and the omission of intermediate and non-conforming elements. In an arborescent system, the entire hierarchy revolves around a central point of control, the origin, that holds the reins of growth and development, dictating the structure's every move. Arboreal systems generally function according to a binary framework, whereby components are arranged in contrasting pairs. This mode of thinking often results in dichotomies and binary oppositions, ultimately limiting the system's adaptability to subtle intricacies and intricate phenomena.[299]

Legalising human rights has given the international human rights system an arborescent structure in which human rights thought, jurisprudence, and activism must seek and obtain Eurocentric legal validation. Eurocentrism stands at the centre and declares, 'I am the truth, the way, and the light; no human right knowledge can obtain the stamp of approval except through me.' The arborescent structure of the international human rights system embodies the coloniality of power, doing, being and knowledge. As TWAIL scholars have argued, the arborescent structuring of international law has facilitated the transfer of resources from the global south to the global north.

Therefore, in these conditions, decolonisation calls for the transformation of the arborescent international human rights framework into a rhizomatic structure with non-hierarchical, multiple, fluid, acentred, heterogeneous, nomadic and interconnected modes of thought, being, knowing and doing. In a rhizomatic international human rights structure, African ways of thinking, being, knowing and doing are acceptable methods of defining human rights and practising activism. A rhizomatic international human rights framework would enable international human rights organisations such as Amnesty International and Human Rights Watch the freedom to draw on local, indigenous, cosmologies, ontologies and epistemologies to construct and defend

[299] Ibid.

context-specific views of human rights. A rhizomatic structure dismantles the colonial condition in which human and nonhuman nature, natural ecosystem and environment—or in which society, economy, business, and environment—are discrete processes locked in conflictual, exploitative relationships. In a rhizomatic architecture, these processes are interconnected and interdependent so that human rights and dignity are inconceivable without nonhuman and environmental rights. After all, in rural Africa, the land, natural ecosystems, and the environment fulfil human rights through the provision of ecological services such as housing (construction material), healthy (medicinal plants) and healthy environment (carbon sequestration, flood and erosion control), food, water, recreation, culture, and religion.

Deleuze and Guattari's rhizomatic model has been applied to various fields, including international law. A non-hierarchical, non-linear, and decentralised system of growth and organisation would characterise a rhizomatic international human rights structure. It would emphasise the importance of connectivity, diversity, and heterogeneity, as opposed to the unity, homogeneity, and separation of traditional international law. The rhizomatic international human rights system challenges the conventional, Eurocentric notion of the state as the primary actor in international law. It would emphasise the importance of non-state actors, such as non-governmental organisations, local communities, and social movements in the global south. It would also challenge the traditional, Eurocentric notion of sovereignty and emphasise the importance of shared responsibility and cooperation among different actors. Rhizomatic international human rights law would be open-ended and capable of connecting with indigenous knowledge and legal systems, creating new assemblages and multiplicities. It would also be responsive to local contexts and diverse cultural practices, ways of being, knowing and doing rather than imposing a Eurocentric set of norms and values camouflaged as universal. Rhizomatic international human rights law would offer a way of

thinking about human rights beyond traditional models of state-centric, hierarchical, and Eurocentric legal systems. It would promote a more inclusive, diverse, and collaborative approach to human rights that is responsive to the complex and dynamic realities of the contemporary world.

Decolonial international human rights build up a rhizomatic, decentred, nomadic, connected and multitudinous story rather than an arborescent, centralised, segregationist, linear and rigid single story. Decolonial human rights call for higher forms of freedom rather than 'repressed desublimation.' Decolonial human rights emit improvised, flexible and situational sounds of jazz rather than an orchestra's linear, rigid sounds. When approaching human rights questions in Africa, international rights organisations must dismount the Eurocentric horse and embrace Ubuntu and indigenous ways of being, knowing, thinking, speaking and doing.

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