

‘Contextualisation as a (Feminist) Method for Transnational Legal Practice’

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Abstract

Transitional justice and peacebuilding are expanding fields of global governance, which have attracted increasing interest from transnational legal practice and scholarship. Focusing on women’s rights promotion in post-conflict states, the chapter examines the United Nations ‘Women, Peace and Security’ agenda and its challenging implementation in Afghanistan. By identifying the hegemony of Western liberal thought within both peace and conflict studies and international human rights law as an obstacle to this implementation, the chapter explains how transnational legal practice could benefit from a greater engagement with feminist methodology and the significance it places on understanding ‘contexts.’ As such, the chapter sets out ‘contextualisation’ as a method that could lead to more relevant and inclusive transnational legal practice and scholarship in such disciplines.

I. Introduction

Post-conflict processes represent a meeting point of the international, national and local.¹ While each post-conflict period is different, the increase of transnational legal practice carried out by international actors on the basis of international norms in these processes stands out. Although both practice and scholarship on transitional justice and peacebuilding have recognised the need to move away from a ‘one-size fits all’ approach and instead to acknowledge the individual localities through ‘contextualisation’ of peace and justice processes, this has not materialised in practice. Rather, it appears that transitional justice and peacebuilding have moved towards a trend of internationalisation and institutionalisation.² This is particularly reflected in the international framework for the advancement of women’s rights in post-conflict states. With reference to the United Nations ‘Women, Peace and Security’ agenda and its implementation in Afghanistan, the chapter aims to illustrate how the theoretical recognition of the importance of contextualisation has not only failed to materialise, but instead, the fields have moved in the opposite direction towards internationalisation and institutionalisation of such processes. Problematising particularly the hegemony of Western liberal thought amongst international actors and at the core of international norms, the chapter sets out how fields such as transitional justice and peacebuilding could benefit from the contextualisation of transnational legal practice within individual localities of operation. Borrowing from feminist theory and methodology, contextualisation, as a proposed methodological tool for transnational legal practice, goes beyond mere ideas of ‘making the international fit’ to the individual local setting and instead allows for the consideration of a broader set of epistemologies and discourses, particularly those non-hegemonic, alternative knowledge bases that find their origins outside of the West. The chapter aims to demonstrate why contextualisation serves as a useful tool for transnational law, and

¹ While the ‘local’/‘global’ dichotomy has been considered contentious and inadequate to capture the intricacies and overlaps of each level of operation, particularly by international law scholarship, this chapter reverts to this terminology, as such reference to these different spheres has been common in peace and conflict as well as transitional justice scholarship. See for example Roger MacGinty, ‘Where Is the Local? Critical Localism and Peacebuilding’ (2015) 36 *Third World Quarterly* 840; Annika Björkdahl and Kristine Höglund, ‘Precarious Peacebuilding: Friction in Global–Local Encounters’ (2013) 1 *Peacebuilding* 289; Patricia Lundy and Mark McGovern, ‘Whose Justice? Rethinking Transitional Justice from the Bottom Up’ (2008) 35 *Journal of Law and Society* 265.

² See for example Chandra Lekha Sriram, ‘Resolving Conflicts and Pursuing Accountability: Beyond ‘justice versus Peace’ in Oliver P Richmond (ed), *Advances in Peacebuilding - Critical Developments and Approaches* (Palgrave Macmillan 2010); Alex Bellamy, ‘The Institutionalization of Peacebuilding: What Role for the UN Peacebuilding Commission?’ in Oliver P Richmond (ed), *Advances in Peacebuilding - Critical Developments and Approaches* (Palgrave Macmillan 2010).

by reverting back to the case study of Afghanistan, how contextualised transnational legal practice could look like in the example of implementation of the Women, Peace and Security agenda.

I. Transitional Justice and Peacebuilding

Transitional justice and peacebuilding are post-conflict processes that ensue in the aftermath of war or other conflicts. While transitional justice has traditionally been associated with addressing egregious human right violations of the past, peacebuilding has commonly been thought of in terms of statebuilding and institutional reconstruction. Ultimately, however, both processes embody the purpose of assisting post-conflict societies in leaving behind their violent pasts and moving towards sustainable peace. Post-conflict periods are stricken by an array of diverse actors with differing interests, needs and expectations as to how the future of the country ought to unfold. Particularly, the involvement of international actors and international norms has led to transitional justice and peacebuilding becoming more transnational in character and expanding as fields of both scholarship and practice.³ As a result of this growth, the gap between the two disciplines has been closing and has led even to some overlaps. Particularly the expansion of transitional justice, through its transformation from a ‘handmaiden to liberal political transitions’ to a tool of ‘postconflict peacebuilding more generally,’⁴ has resulted in the extension of its range of activities and processes that are much more closely connected to the objectives and practices found in peacebuilding. As Sriram explains,

[w]here once transitional justice, human rights, and responses to mass atrocities might have been viewed as being in competition with peacekeeping, peacemaking, and peacebuilding, they are now often an integral part of peacebuilding activities conducted by bilateral donors, regional organisations, and international institutions such as the United Nations and the World Bank.⁵

Thus, although separate analyses of these two areas of scholarship and practice have been conducted to great lengths and depth in both international legal and international relations scholarship,⁶ for the purposes of this chapter, the amalgamation of the two fields is of importance. Besides gaining in complexity, this development of transitional justice and peacebuilding further demonstrates the increase in the number

³ Ruti G Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Journal* 69, 89.

⁴ Dustin Sharp, ‘Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition’ (2015) 9 *International Journal of Transitional Justice* 150, 150.

⁵ Sriram (n 2) 283.

⁶ See for example Teitel (n 3); Oliver P Richmond, ‘A Genealogy of Peace and Conflict Theory’ in Oliver P Richmond (ed), *Palgrave Advances in Peacebuilding: Critical Developments and Approaches* (Palgrave Macmillan 2010).

of different actors involved. As illustrated by Sriram's quote as well as the focus of this chapter on the United Nations, this is particularly due to the growing role of international actors; the involvement of which, unsurprisingly, has also led to an increased relevance of international norms in these periods. The most obvious example is the United Nations, who have assumed a variety of different roles in such contexts including as mediator in peace negotiations, observer of government elections, organisers of statebuilding exercises in issues such as the 'rule of law' or 'gender mainstreaming', or just as donors for different programmes relating to peace and justice. Their presence in such periods is further illustrated by the UN bodies founded to further expand on their efforts in peace processes, such as the UN Peacebuilding Commission, the Peacebuilding Fund, the UN Department of Peace Operations (which currently has 13 active operations⁷), or the UN Department of Political Affairs which is in charge of political missions and good offices engagements, such as the United Nations Assistance Mission in Afghanistan. Moreover, the United Nations add to the normative formulation of post-conflict processes by the adoption of United Nations Security Council and General Assembly resolutions on transitional justice and peacebuilding as well as on individual country-specific contexts. One such example is the different Security Council resolutions that fall under the United Nations 'Women, Peace and Security' agenda and which have formed the normative framework for the advancement of women's rights and women's participation in conflict and post-conflict settings.

The growing role and importance of such transnational movements of both actors and norms have led to the internationalisation and institutionalisation of the fields of transitional justice and peacebuilding.⁸ This development becomes further problematic when considering the normative core of international actors and international law's approach to peacebuilding and transitional justice. At the heart of the dominant international approach to post-conflict peace and justice processes is the idea of 'liberal peace.'⁹ The liberal peace paradigm advocates for a top-down approach that focuses on statebuilding, the promotion of the rule of law and universal human rights, as enshrined in United Nations treaties, as well as the creation of a free market economy in the post-conflict country.¹⁰ By assisting countries to restore their political and economic systems according to liberal and neoliberal national governance structures, the international community further facilitates the integration of such states in the current international governance regime.¹¹ Thus, the liberal peace

⁷ 'Where We Operate' (*United Nations Peacekeeping*)

<<https://peacekeeping.un.org/en/where-we-operate>> accessed 23 February 2020.

⁸ Sriram (n 2) 289–290; Bellamy (n 2).

⁹ See for example Richmond (n 6); Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' (2007) 21 *Global Society* 579.

¹⁰ Richmond (n 6) 18.

¹¹ Laura J Shepherd, *Gender, UN Peacebuilding, and the Politics of Space: Locating Legitimacy* (Oxford University Press 2017) 30.

paradigm assumes that ‘all states inevitably follow the same ‘developmental’ route,’¹² and imposes an approach to peace and justice on post-conflict societies which does not necessarily reconcile with the context in question.

All this occurs against the backdrop that contextualisation and local ownership of peace and justice processes have long been recognised as imperative to the success of both transitional justice and peacebuilding periods, and as such, the pursuit of sustainable peace.¹³ Each context will require different responses depending on the socio-cultural, historical and political features of the post-conflict state in question. The centrality of local ownership of peace and justice processes has also been emphasised in scholarship and practice. Former United Nations Secretary General Kofi Annan explained in 2004, in light of the international community’s role in peace and justice processes that ‘we must learn better how to respect and support local ownership, local leadership and a local constituency for reform.’¹⁴ This recognition, however, is clearly in contradiction to the trends of internationalisation and institutionalisation within transitional justice and peacebuilding and their increasing affinity to the liberal peace paradigm. Indeed, the dominance of both external actors and the imposition of peace-as-liberalism have instead led to comparisons to colonial and imperial forms of governance.¹⁵

As will be illustrated throughout this chapter, this premise of a liberal peace framework can lead to substantial difficulties in the execution of transitional justice and peacebuilding processes in settings where Western liberal thought might be contested or simply seen as alien, including as in this chapter’s example of Islamic contexts.¹⁶ This hegemony of Western epistemologies within transitional justice and

¹² Moses Okello, ‘Elevating Transitional Local Justice or Crystallizing Global Governance?’ in Rosalind Shaw, Lars Waldorf and Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010) 279.

¹³ See for example Rosalind Shaw, Lars Waldorf and Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010); Lundy and McGovern (n 1); Sara Hellmüller and Martina Santschi (eds), *Is Local Beautiful?: Peacebuilding between International Interventions and Locally Led Initiatives* (Springer Science & Business Media 2013).

¹⁴ ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (United Nations Security Council 2004) Report of the Secretary General S/2004/616 14.

¹⁵ See for example Richmond, who describes the UN’s involvement in peace operations as ‘*mission civilisatrice*,’ or Ignatieff’s description of ‘Empire Lite’ with regards to particularly the U.S. involvement in nation-building processes in different post-conflict settings. Oliver P Richmond, ‘UN Peace Operations and the Dilemmas of the Peacebuilding Consensus’ (2004) 11 *International Peacekeeping* 83, 95; Michael Ignatieff, *Empire Lite - Nation-Building in Bosnia, Kosovo and Afghanistan* (Vintage 2003).

¹⁶ Richmond (n 6) 29.

peacebuilding forms a central component of this chapter and is considered in the realm of the United Nations Women, Peace and Security framework. By considering the possibility of broadening epistemologies and discourses used in transnational legal practice of such processes, the chapter proposes a return to the idea of contextualisation and local ownership that has already been accepted as fundamental to the securing of sustainable peace in post-conflict countries. Transitional justice and peacebuilding not only represent transnational fields of practice, but they also serve as important examples of how the effects of an amalgamation of international actors, norms and processes with diverse local settings can lead to a disregard of contextually significant factors, and as a result, lead to difficulties in the implementation of international norms and frameworks. The next section sets out the United Nations WPS agenda as a manifestation of this internationalisation and institutionalisation of transitional justice and peacebuilding processes on the basis of the liberal peace paradigm.

III. The Women, Peace and Security Agenda

The WPS framework originated with the adoption of Resolution 1325 by the United Nations Security Council in October 2000.¹⁷ Resolution 1325 is rooted in a profound body of feminist scholarship that exposes the disregard of women's experiences during and after conflict and highlights the importance of advancing the role of women in peacebuilding processes.¹⁸ Its substantive core is based on the four pillars of prevention, participation, protection as well as relief and recovery, which embody the aims of preventing conflict and violence against women; protecting women and girls from gender-based and sexual violence as well as protecting their human rights; ensuring their representation and participation at all stages of decision-making in conflict resolution and peace processes; and meeting women's needs and increasing their participation in recovery and peacebuilding missions.¹⁹ This is to be achieved primarily by mainstreaming gender throughout all conflict and post-conflict related processes. Gender mainstreaming is a policy concept that highlights the integration of

¹⁷ Security Council Resolution 1325 [on women and peace and security] 2000 [S/RES/1325]. Hereinafter Resolution 1325.

¹⁸ Nicola Pratt and Sophie Richter-Devroe, 'Critically Examining UNSCR 1325 on Women, Peace and Security' (2011) 13 *International Feminist Journal of Politics* 489, 489.

¹⁹ 'Preventing Conflict, Transforming Justice, Securing the Peace – A Global Study on the Implementation of UNSCR 1325' (UN Women) 20 <<http://wps.unwomen.org/~media/files/un%20women/wps/highlights/unw-global-study-1325-2015.pdf>> accessed 18 November 2016.

gender as a key consideration throughout all sectors and at all levels of processes, including policy development, implementation, and evaluation.²⁰

Resolution 1325 was followed by a number of related United Nations Security Council resolutions, which further elaborated on individual issues at the heart of the WPS agenda, such as sexual violence,²¹ women's participation in peace processes,²² and the role of women in counter terrorism.²³ Most recently, there were attempts to adopt resolutions as part of the framework that secured sexual and reproductive rights during conflict and post-conflict phases. However, the rejection of the Trump administration of any references to reproductive rights (and the threat of their veto) led to the removal of those aspects from the resolutions.²⁴ In their entirety these resolutions form the 'United Nations Women, Peace and Security Agenda.' As the UN explained in their 15-year review of Resolution 1325, essentially the 'simple, yet revolutionary idea [of Resolution 1325] was the recognition that peace is only sustainable if women are fully included, and that peace is inextricably linked with equality between women and men.'²⁵

In the last 20 years since its creation, excellent critical feminist analyses have been undertaken on the WPS agenda, its successes, and failures.²⁶ This chapter is not intended to evaluate the overall achievements of the WPS. Instead, it diverts attention to the WPS framework as a manifestation of a field of transnational legal practice within the broader disciplines of transitional justice and peacebuilding through which the movement of international norms by virtue of international actors in specific contexts can be observed. The WPS and its implementation in Afghanistan serve as an example of what happens when international norms and processes, clearly rooted

²⁰ Amy Barrow, "'[It's] like a Rubber Band.'" Assessing UNSCR 1325 as a Gender Mainstreaming Process' (2009) 5 *International Journal of Law in Context* 51, 51.

²¹ Security Council Resolution 1820 2008 [S/RES/1820]; Security Council Resolution 1888 2009 [S/RES/1888]; Security Council Resolution 1960 2010 [S/RES/1960]; Security Council Resolution 2106 2013 [S/RES/2106].

²² Security Council Resolution 1889 2009 [S/RES/1889]; Security Council Resolution 2242 2015 [S/RES/2242].

²³ Security Council Resolution 2122 2013 [S/RES/2122].

²⁴ Liz Ford, 'UN Waters down Rape Resolution to Appease US's Hardline Abortion Stance' (*The Guardian*, 23 April 2019) <<https://www.theguardian.com/global-development/2019/apr/23/un-resolution-passes-trump-us-veto-threat-abortion-language-removed>> accessed 22 February 2020.

²⁵ 'Preventing Conflict, Transforming Justice, Securing the Peace – A Global Study on the Implementation of UNSCR 1325' (n 19) 20.

²⁶ See for example Pratt and Richter-Devroe (n 18); Gina Heathcote, 'Feminist Politics and the Use of Force: Theorising Feminist Action and Security Council Resolution 1325' (2011) 7 *Socio-Legal Review* 23; Christina Binder, Karin Lukas and Romana Schweiger, 'Empty Words or Real Achievement? The Impact of Security Council Resolution 1325 on Women in Armed Conflicts' (2008) 2008 *Radical History Review* 22; Barrow (n 20).

in Western liberal theory, are transferred to contexts outside the hegemony of Western thought, and how such fields could benefit from the contextualisation of transnational legal practice within individual localities of operation.

IV. Case Study: Afghanistan

1. The Afghan Context

Afghanistan serves as a suitable case study for the consideration of the implementation of the WPS framework, as a result of the United Nations' dominant presence in the country since the beginning of the U.S.-led invasion in 2001. Represented through different agencies, the United Nations have been working with partners to improve women's rights in the country. This assistance has particularly come in the form of close links with the Afghan government and technical assistance for legal reforms.²⁷ This is further illustrated by the main partners of the United Nations in Afghanistan. Taking the example of UN Women, out of their 18 partners in Afghanistan 16 are government ministries, offices or commissions and only two form part of larger civil society (and even those are more internationally oriented than locally).²⁸ The close connection to state actors is necessary for the top-down approach of liberal peace project and for the integration of Afghanistan in the international governance regime. Post-conflict Afghanistan,²⁹ therefore, does not only reflect the trend towards internationalisation and institutionalisation of peace and justice processes, but further affirms the centrality of the liberal peace paradigm in current international transitional justice and peacebuilding practice.

While it is understandable that as an intergovernmental organisation the United Nations will have close ties with the government of the country, the focus on the national government and lack of closer ties to local civil society actors demonstrates the detachment of such processes from the context in question. Although local civil society actors certainly do not serve as substitute representation of local communities, they have a crucial role in connecting peace and justice processes to local levels and

²⁷ See for example UN Women, 'Programmes' <<http://asiapacific.unwomen.org/en/countries/afghanistan/programme>> accessed 20 July 2018.

²⁸ UN Women, 'Afghanistan Partners' <<http://asiapacific.unwomen.org/en/countries/afghanistan/partners>> accessed 20 July 2019.

²⁹ The term post-conflict as used here does not suggest that the conflict in Afghanistan has been overcome. The term is rather used to describe countries that have initiated post-conflict processes, including transitional justice and peacebuilding.

enabling local ownership in post-conflict states.³⁰ Indeed, the WPS framework itself emphasises the role of local civil society in realising the objectives of the agenda, as repeated references within the resolutions make clear.³¹ Despite Afghanistan having a very strong women's civil society, including grassroots activism, the United Nations' focus has been on working with the Government and its different ministries, particularly in the area of legal reform.³² With the cooperation of the United Nations, Afghan women's rights have been statutorily strengthened over the years since the fall of the Taliban. Starting with the Afghan Constitution of 2004,³³ the basis for a gender equal legislative framework was put in place. Article 22 of the Constitution enshrines gender equality by stating that '[a]ny kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law.'³⁴ Additionally, the Afghan Government adopted a number of international agreements in relation to human rights, including the Convention on the Elimination of Discrimination Against Women without reservations,³⁵ which was significant for the adoption of the national Law on Elimination of Violence Against Women.³⁶ In adherence with the WPS framework, the Afghan Government further launched their first National Action Plan in June 2015.³⁷ Resolution 1325 calls all Member States to draw up National Actions

³⁰ Carol Cohn, 'Mainstreaming Gender in UN Security Policy: A Path to Political Transformation?' in Shirin M Rai and Georgina Waylen (eds), *Global Governance* (Palgrave Macmillan 2008) 189–190.

³¹ See for example Security Council Resolution 1325 [on women and peace and security] 2000 [S/RES/1325] which requires 'consultation with local and international women's groups', as well as Security Council Resolution 2122 (n 14) which

'6. Recognises the importance of interactions of civil society, [...] and commits to ensuring that its periodic field visits to conflict areas include interactive meetings with local women and women's organizations in the field. 7.(a) Requests [...] to regularly consult with women's organizations and women leaders, including socially and/or economically excluded groups of women; 11. Urges all parties concerned [...] to support the development and strengthening of the capacities [...] of local civil society networks in order to provide sustainable assistance to women and girls affected by armed conflict and post-conflict situations.'

³² UN Women, 'Programmes' (n 27).

³³ Constitution of Afghanistan [agreed upon on 04 January 2004 and ratified on 26 January 2004].

³⁴ *ibid.* Article 22.

³⁵ Convention on the Elimination of All Forms of Discrimination against Women 1979 [GAR/34/180]. Ratified by the Afghan Government on 05 March 2003.

³⁶ Law on the Elimination of Violence Against Women 2009 [enacted by Presidential Decree No. 91]; Wazhma Frogh, 'Afghanistan's National Action Plan: "A Wish List of Many Dreams"' (*LSE Centre for WPS Working Paper*, October 2017) <<http://blogs.lse.ac.uk/wps/2017/11/28/afghanistans-national-action-plan-a-wish-list-of-many-dreams-wazhma-frogh-102017>> accessed 14 December 2017.

³⁷ Ministry of Foreign Affairs of the Islamic Republic of Afghanistan, 'Afghanistan's National Action Plan on UNSCR 1325, Peace and Security'

Plans in which they set out their strategies for the implementation of the WPS agenda. The Ministry of Foreign Affairs of Afghanistan prepared the National Action Plan on Resolution 1325 with the ‘technical support’ of UN Women.³⁸

As such, in line with their top-down approach to liberal peace, the United Nations’ central area of activity on women’s rights in Afghanistan has been that of legal reform in cooperation with the Government of Afghanistan. While the success of this partnership is reflected in the normative changes in Afghan law and policy,³⁹ their effects have not triggered through to the ground. Lack of implementation of legal reform has meant that the reality of Afghan women’s lives remains insufficiently improved in the majority of the country.⁴⁰ This is particularly the case in rural areas, removed from the urban hubs where such reforms take place. With current estimates indicating that ‘around 70 – 80 per cent of Afghans live in rural areas with minimal or no contact to state institutions or basic services,’⁴¹ the importance for a strategy of women’s rights advocacy that also reaches rural women becomes even more important. Much of rural Afghanistan consists of communities that have been self-governing for decades, as a result of the lengthy wars, and are mostly governed by jirgas or shuras consisting of tribal leaders, village elders and/or religious leaders.⁴² Many have never even heard of the National Action Plan or the commitments that the Afghan Government has made to women under the WPS framework.⁴³ In these areas, the UN international women’s rights framework and WPS agenda, even if affecting national legislative reform, have not been sufficient to improve Afghan women’s lives.

Governed by custom and religion, references to National Action Plans or international human rights treaties have not really led to the necessary engagement of community leaders in the struggle to improve the situation of Afghan women.⁴⁴ A different approach to women’s rights advocacy, as adopted by local grassroots and community activists in rural areas, has been more successful in engaging community and religious

<<http://mfa.gov.af/Content/files/English%20NAP%206.pdf>> accessed 22 October 2017.

³⁸ *ibid.*

³⁹ For a list of such reforms see Frogh (n 36) 4.

⁴⁰ Afghan Women’s Network, ‘Position Paper: Reiterating Voices from Afghan Women – from BCA to GCA’ <<http://awn-af.net/index.php/cms/resource>> accessed 25 November 2018.

⁴¹ Frogh (n 36) 8.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ See for example the most recent report by the Afghan Women’s Network which explains that ‘[a]lthough Afghanistan has important laws, policies and action plans on women’s legal and social protection, there is limited and weak implementation and monitoring’ and that ‘[v]iolence against women remains a serious concern.’ Afghan Women’s Network (n 40).

leaders, and as a result, has shown more promising results for Afghan women in rural areas. Afghan grassroots activists have reverted to strategies of rooting women's rights in Islam and thereby allowing for a culturally more accepted approach to promoting women's rights. This approach, however, has seen little support from international actors present in the country, particularly the United Nations. As set out in the next sections, the disconnect of the United Nations to local actors and their alternative strategies, is indicative of the lack of contextualisation of the WPS agenda as well as transnational legal practice in this field.

2. Islamic feminism

The WPS agenda forms the basis of the United Nations' engagement in post-conflict states on gender equality issues and is based on the UN's international human rights framework. While the roots of human rights philosophy can be traced beyond Europe, the current form of international human rights law and its ideas of universality, as operating at the United Nations, are based on European liberal thought.⁴⁵ Indeed, the nexus of human rights with liberalism and democracy has already been set out to great lengths in critical legal scholarship on international law⁴⁶ and will be discussed in more detail in the section on contextualisation in this chapter. With reference to the case study of Afghanistan, this hegemony of Western liberal thought becomes significant in the realm of international women's rights advocacy and the WPS agenda. Contesting considerable components of liberalism, some Islamic contexts, such as certain rural areas in Afghanistan, have regarded international women's rights advocacy as foreign, and in the worst case, as just another tool of Western imperialism.⁴⁷ In Afghanistan, where the U.S.-led invasion of the country was seen by many 'as a direct assault on their religion' that gave 'new legitimacy to radical Islamist groups and undermined the position and discourse of progressive forces,' these factors have led to suspicions towards Western actors, including the United Nations.⁴⁸ While the United Nations would argue that they do not constitute a manifestation of the West, the long history of its domination by countries of the Global North coupled with their role in interventions in developing countries (whether military or not), not least its support of the U.S.-led intervention in Afghanistan itself, further cement the perception of the United Nations' embeddedness in Western

⁴⁵ Makau Mutua, 'The Ideology of Human Rights' (1996) 36 *Virginia Journal of International Law* 589, 592–593.

⁴⁶ See for example Mutua (n 45); Ratna Kapur, *Gender, Alterity and Human Rights - Freedom in a Fishbowl* (Elgar Publishing 2018).

⁴⁷ Susanne Schröter, 'Islamic Feminism: National and Transnational Dimensions' in Jocelyne Cesari and José Casanova (eds), *Islam, Gender and Democracy in Comparative Perspectives* (Oxford University Press 2017) 114.

⁴⁸ Ziba Mir-Hosseini, 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism' (2006) 32 *Critical Inquiry* 629, 631.

powers' political agendas.⁴⁹ These reminders of asymmetrical geopolitical powers and past imperialist experiences in the region have been used as a means by extremist groups to portray the universal human rights discourse as not only neo-imperialist but further as a direct attack against Afghan culture and Islam that ought to be resisted through a nationalism rooted in fundamentalist Islam.⁵⁰

By having been entangled in these clashes between religious nationalism on the one hand and Western neo-imperial 'progressiveness' on the other, women's rights and feminist movements in Afghanistan and other Muslim states, have been caught in a net of opposing voices which each have used them as a symbol for the oppression of the other, whether that is as the cultural imperialist or the religious fundamentalist.⁵¹ Afghan women's rights advocates are no exception and are caught in this dichotomy of the pro-Western women's rights proponent vs. the loyal nationalist/pious Muslim; leaving them, as Leila Ahmed put it, 'to choose between betrayal and betrayal.'⁵² However, when looking at the grassroots strategies by Afghan women's rights advocates, it appears they may have found a way to advance women's rights that is capable of circumventing the fall into this binary trap. By reverting to Islamic feminist strategies in their advocacy, Afghan women's rights advocate have found an approach suitable for the specific context of their country.

As is the case with feminism, there are a number of different interpretations of what Islamic feminism constitutes. Broadly, it represents the interpretation of the main sources of Islam in a manner that allows for the grounding of women's rights in Islamic discourse and within Sharia. Sharia, or Islamic Law, represents the rules and laws governing the lives of Muslims and is primarily based on the two revelatory sources of Quran and Sunnah (the teachings of Prophet Mohammed). However, these form the 'raw material of the Sharia and are not yet ready for use.'⁵³ Instead, what is necessary is their interpretation and reasoning that enables the formulation of rules through jurists.⁵⁴ This jurisprudence is known as fiqh. While Sharia is regarded as the 'revealed or divine law', fiqh is explicitly set out as the 'jurists' law,' derived from

⁴⁹ Inderpal Grewal, "'Women's Rights as Human Rights': Feminist Practices, Global Feminism, and Human Rights Regimes in Transnationality' (1999) 3 *Citizenship Studies* 337, 342.

⁵⁰ Nayereh Toohidi, 'Women's Rights in the Muslim World: The Universal-Particular Interplay' (2003) 1 *Hawwa* 152, 163–164.

⁵¹ *ibid* 162–163.

⁵² Leila Ahmed, 'Early Feminist Movements in Turkey and Egypt' in Freda Hussain (ed), *Muslim Women* (Croom Helm 1984) 122.

⁵³ Rudolph Peters and Peri Bearman, 'Introduction: The Nature of the Sharia' in Rudolph Peters and Peri Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Ashgate 2014) 1.

⁵⁴ *ibid*.

jurists' interpretation of Shari.⁵⁵ This distinction between Sharia and fiqh is of importance particularly to those attempting to adopt more contemporary interpretations of Sharia, including Islamic feminists. Although Islamic feminism has developed diverse approaches to reconcile Islam with gender equality, the most noteworthy has been this reinterpretation at the level of fiqh. Arguing that patriarchal interpretations of Sharia are the product of unfounded readings of Islamic sources, Islamic feminists support an interpretation, which enables to root women's rights within Islam.⁵⁶ In order to facilitate such interpretation, Islamic feminists have reverted to feminist hermeneutics to draw attention to those parts of the Sharia that have either been wrongly interpreted or disregarded in the context of women's rights and gender equality.⁵⁷ Through these analytical strategies, Islamic feminists have revisited the Quran and other sources of the Sharia in order to offer an interpretation that is line with gender equality and the rights of women.

Islamic feminism is not only a growing scholarship, but its increasing significance is further reflected when considering its use in women's rights advocacy within Muslim societies. While many may not identify with the term 'Islamic feminists,' the strategies deployed in contexts such as Afghanistan demonstrate the use of analytical tools set out in Islamic feminist scholarship.

To return to the case study, in Afghanistan, Islam is at the very heart of the socio-cultural, legal and political life.⁵⁸ With Afghanistan suffering from deep tribal divisions, the role of religion as the binding factor surpassing ethnic/tribal differences in the country becomes immensely important.⁵⁹ Besides its social and cultural significance, Islam is also central to the legal system in Afghanistan. The Afghan Constitution clarifies in Article 2 that '[t]he sacred religion of Islam is the religion of the Islamic Republic of Afghanistan' and continues in Article 3 that '[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.'⁶⁰

⁵⁵ Khalid Muhammad, 'Muslim Jurist's Quests for the Normative Basis of Shariah' (Inaugural Lecture 2001 at Leiden ISIM), 2, <<http://www.en.islamic-sources.com/download/E-Books/Jurisprudence/Muslim-Jurists-Quest-for-the-Normative-Basis-of-the-Sharia.pdf>> accessed 20 January 2018.

⁵⁶ Ziba Mir-Hosseini, 'Stretching the Limits: A Feminist Reading of the Sharia in Post-Khomeini Iran', in May Yamani (ed.), *Feminism and Islam: Legal and Literary Perspectives* (Ithaca Press 1996).

⁵⁷ Margot Badran, 'Islamic Feminism: What's in a Name?' (*Al-Ahram Weekly Online, Issue No. 569*) <<http://weekly.ahram.org.eg/Archive/2002/569/cu1.htm>> accessed 9 January 2018.

⁵⁸ 'The World's Muslims: Religion, Politics and Society' (*Pew Research Center*, 30 April 2013) 15 <<https://muslimstatistics.files.wordpress.com/2015/03/worlds-muslims-religion-politics-society-full-report.pdf>> accessed 10 June 2018.

⁵⁹ Leela Jacinto, 'Abandoning the Wardrobe and Reclaiming Religion in the Discourse on Afghan Women's Islamic Rights' (2006) 32 *Signs: Journal of Women in Culture and Society* 9, 10.

⁶⁰ Constitution of Afghanistan (n 33).

In light of the significance of Islam in Afghanistan, local women's rights activists realised early on that progress would only be possible within the framework of Islam.⁶¹ As such, they have attempted to ground women's rights within Islam itself through reverting to Islamic feminist strategies. Thus, for example, the organisation Women's Activities and Social Services Association (WASSA) 'works directly with communities in order to bring change in social attitude of the community' and to promote women's rights at the grassroots level.⁶² One of WASSA's strategies has been to work with religious leaders (mullahs) to reinterpret conservative readings of the Quran in relation to women in order to enhance women and girls' interests and participation in local communities.⁶³ By cooperating with mullahs to initiate conversations with community leaders, organising religious lectures at mosques and forming multistakeholder coalitions, WASSA set up effective women's rights campaigns grounded within Islam itself.⁶⁴ Highlighting the 'vital role' of mullahs and their influence on family life in Afghanistan, WASSA explains how this collaboration has made significant changes for women and girls in rural communities in the form of increased social, political and economic activities.⁶⁵ Thus, the tools and techniques of Islamic feminism have enabled Afghan women's rights activists to work together with religious leaders and community leaders in order to improve the situation of women and girls in rural Afghanistan. Examples of such efforts are manifold⁶⁶ and demonstrate how a greater consideration of the individual locality and wider set of epistemological foundations can lead to more contextualised approaches to women's rights promotion.

Afghanistan is not the only place where activists have reverted to Islamic sources and discourse for the advancement of women's rights. In Tunisia, the elections following the Arab Spring brought 'a new category of women activists into public life', namely the Islamic feminists of the Ennahdha party.⁶⁷ Although Tunisian women's

⁶¹ Isobel Coleman, *Paradise Beneath Her Feet - How Women Are Transforming the Middle East* (Random House 2010) 397.

⁶² 'About WASSA' (*Women's Activities and Social Services Association*) <<http://wassa.org.af/about-us/>> accessed 10 November 2018.

⁶³ 'WASSA Annual Report 2017' (Women Activities & Social Services Association 2017) 12–13 <<http://wassa.org.af/wp-content/uploads/2018/06/ANNUAL-REPORT-2017.pdf>> accessed 10 November 2018.

⁶⁴ *ibid* 13–14.

⁶⁵ *ibid* 13.

⁶⁶ For a more extensive discussion of different Afghan civil society actors' advocacy strategies under the umbrella of Islamic Feminism, see Farnush Ghadery, 'Sticking to Their Guns: The United Nations' Failure to See the Potential of Islamic Feminism in the Promotion of Women's Rights in Afghanistan' in Javaid Rehman, Ayesha Shahid and Steve Foster (eds), *The Asian Yearbook of Human Rights and Humanitarian Law* (Brill Nijhoff 2019).

⁶⁷ Jan Feldman, 'Models of Feminism: Tunisia's Opportunity to Overcome the Secular/Islamist Binary' (2015) 13 *Journal of Women of the Middle East and the Islamic World* 51, 55.

movements have suffered from a secular/Islamic feminist division, it was the cooperation between Islamic feminists with the Essebsi Government that made reforms such as the gender-based violence law of 2017 possible.⁶⁸ Thus, in Tunisia, Islamic feminists' role in reconciling gender equality with Sharia has been incremental to the success of women's rights reforms. In Aceh, Indonesia, Islamic legal thought and religious authorities significantly influence daily life.⁶⁹ Therefore, Muslim women have been pushing for greater roles in religious circles, especially as *ulama*. Spearheaded by the organisation 'Rahima', which trains female *ulama* and advocates, Indonesia has seen an increase of women participating in the country's religious sphere.⁷⁰ These efforts culminated in the first women *ulama* congress in 2017 where three historical *fatwas* were issued against sexual violence, child marriage, and environmental degradation exacerbating gender inequality.⁷¹

While the effects of these developments require further consideration, the increasing relevance of Islamic feminist approaches to women's rights activism illustrates its significance in different contexts. The social and legal change in Muslim countries achieved by such women's groups warrants a critical discussion of their approaches to advancing women's rights and their place within the larger international women's rights agenda. The next part sets out how through a more contextualised approach grounded in both feminist and transnational legal methodology, the potential of such non-hegemonic and alternative strategies could be explored more within international legal scholarship and practice.

IV. Contextualisation

1. Learning from Feminist Theory

Transnational legal scholarship has been arguing for 'an inquiry into the role of law in context' through the consideration of the diverse actors, norms and processes that

⁶⁸ Carla Abdo-Katsipis, 'Islamists in Power and Women's Rights: The Case of Tunisia' (Brandeis University, Middle East Brief No. 112, August 2017), <<https://www.brandeis.edu/crown/publications/meb/MEB112.pdf>> accessed 12 November 2019.

⁶⁹ Nor Ismah, 'Destabilising Male Domination: Building Community-Based Authority among Indonesian Female *Ulama*' (2016) 40(4) *Asian Studies Review* 491, 493.

⁷⁰ *ibid* 494.

⁷¹ Mirjam Künkler and Eva Nisa, 'A fatwa against sexual violence: the story of a historic congress of female Islamic scholars' (*Open Democracy*, 26 June 2017), <<https://www.opendemocracy.net/5050/mirjam-k-nkler-eva-nisa/fatwa-sexual-violence-women-Islamic-scholars>> accessed 10 December 2019.

legal scholarship and practice are faced with since the era of globalisation.⁷² As demonstrated by transitional justice and peacebuilding, a variety of disciplines have seen increased movements of such actor, norms and processes between the international and local levels. As Zumbansen explains transnational law sees itself as ‘present[ing] an important opportunity to reflect on law and its connections with ongoing investigations into local and global forms, institutions and processes of governance.’⁷³ As explained in this section, in its attempt to perform such a function, transnational law could benefit from greater engagement with context-related methodological tools. While the approach to contextualisation presented here finds its roots within feminist theory, it has also been recognised in transnational legal scholarship itself. Thus, examining the idea of contexts within sociolegal scholarship, Zumbansen points out that ‘the question of what is and how to adequately capture the materiality and meaning of “context” has been both the elephant in the room and the elephant being felt by blind men.’⁷⁴ It is precisely in this endeavour to flesh out the meaning of ‘context’ that transnational law could benefit from a greater engagement with feminist theory. As set out below, context has been at the very heart of feminist theory and methodology, including its encounters with law, and could assist transnational legal scholarship in its attempts to ‘critically engage law’s forms and functions in a global context.’⁷⁵

The potential for a methodological alliance between transnational law and feminist theory is further reflected in the inward turn of transnational legal scholarship, which is indicative of self-reflection. Asking ‘bigger picture’ questions, transnational legal scholarship is interrogating its own epistemological bases, particularly with reference to post-colonial theory.⁷⁶ Through a process of self-reflection as well as critique, feminist theory has also been invested in the consideration of ‘a broader set of questions about the production of knowledge.’⁷⁷ Thus, engaging with Foucault’s understanding of critique, Judith Butler asked ‘[w]hat is the relation of knowledge to power such that our epistemological certainties turn out to support a way of structuring the world that forecloses alternative possibilities of ordering?’⁷⁸ This question ought to be at the heart of any discipline that is seriously concerned with a

⁷² Peer Zumbansen, ‘Transnational Law, Evolving’ in Jan Smits (ed), *Encyclopedia of Comparative Law* (2nd edn, Elgar Publishing 2012).

⁷³ *ibid.*

⁷⁴ Peer Zumbansen, ‘Transnational Law as Socio-Legal Theory and Critique: Prospects for “Law and Society” in a Divided World’ (2019) 67 *Buffalo Law Review* 909, 911.

⁷⁵ *ibid* 919.

⁷⁶ *ibid* 932.

⁷⁷ Brenda Cossman, ‘Feminism in Hard Times’ in Ashleigh Barnes (ed), *Feminisms of Discontent* (Oxford University Press 2015) 7.

⁷⁸ Judith Butler, ‘What Is Critique? An Essay on Foucault’s Virtue’ in David Ingram (ed), *The political: Blackwell readings in continental philosophy* (Blackwell Publishers 2002) 214.

critique of itself. Both feminist theory and transnational law have been attempting to engage in such an epistemological inquiry into the relationship between knowledge and power.⁷⁹ Considering this call for critique, and consequently a greater engagement with alternative epistemic communities, this section sets out the approach to contextualisation as a methodological tool that could facilitate these objectives.

Contextualisation, itself, is not a novel method. ‘Contexts’ have always played a crucial role in feminist theories and methodologies, including the consideration of context in understanding law and its effects on different groups. Recognising that the alleged neutrality of law can be disproved by examining its diverging effects on different contexts, feminist legal theorists have long pointed out the significance of contexts for uncovering the biases of law.⁸⁰ Additionally, as Bartlett describes in her widely cited article on feminist legal methods, the consideration of contexts is imperative to feminist practical reasoning.⁸¹ Establishing that legal reasoning ought to be situated within contexts in order to derive its full meanings, Bartlett goes on to explain that feminist reasoning of the law would further include an acknowledgement that there are multiple communities that form different contexts.⁸² This diversity in communities and contexts, in turn, hints to the multiplicity of ‘reason’ as well as the conclusion ‘that no one community is legitimately privileged to speak for all others.’ As such, Bartlett, much in line with other feminist legal theorists,⁸³ emphasises the potential of contextualisation for the uncovering of the injustices that the law might lead to:

Feminists turn to contextualized methods of reasoning to allow greater understanding and exposure of that injustice. Reasoning from context can change perceptions about the world, which may then further expand the contexts within with such reasoning seems appropriate.⁸⁴

In the realm of the international women’s rights movement, the idea of contexts began to gain momentum with the increase of diversity feminisms in order to demonstrate the differences that contexts (and identities) make to the experiences, needs and interests of women. The focus on contexts became particularly relevant with the emergence of global feminism in the 1980s and its universalising language of global feminism and the ‘global sisterhood.’⁸⁵ Particularly transnational and post-colonial feminists emphasised the need to demonstrate the misleading notion of a unitary

⁷⁹ See for example Cossman (n 77); Zumbansen (n 74).

⁸⁰ See for example Carol Smart, *Feminism and the Power of Law* (Routledge 1989).

⁸¹ Katherine Bartlett, ‘Feminist Legal Methods’ (1990) 103 *Harvard Law Review* 829, 863.

⁸² *ibid* 855.

⁸³ See for example Smart (n 80); Nicola Lacey, ‘Feminist Legal Theory and the Rights of Women’ in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press 2004).

⁸⁴ Bartlett (n 81) 863.

⁸⁵ See Robin Morgan (ed), *Sisterhood Is Global* (Anchor Press 1984).

category of ‘woman’ or the existence of a ‘sisterhood’ that is clearly based on a white Western understanding of womanhood.⁸⁶ Thus, in her seminal article ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses,’ Chandra Mohanty not only set out the dangers of a hegemonic feminism with origins in the West for women in the Global South, but further went on to explain the need for ‘context-specific differentiated analysis’ if feminist theory was to acquire wider acceptance and significance.⁸⁷ The consideration of context for a more accurate and precise approach to research is, therefore, not a novel concept and has been long argued for by feminists.

2. Contextualisation in Transnational Law

Transnational law is characterised by a concern with the movement of norms. As has been demonstrated by the discussion of the implementation of the WPS agenda, both transitional justice and peacebuilding periods are accompanied with the transfer of international norms to different localities. The case study of Afghanistan reflects that this export of international norms through international actors does not occur without complications. This section attempts to set out an approach for transnational legal practice that goes beyond the mere attempt to implement international norms within specific localities. Instead, it argues for the contextualisation of praxis within the setting in question. Contextualisation goes beyond the idea of ‘making international norms fit’ by taking into consideration the local setting, including local actors, norms and particularly alternative and non-hegemonic epistemologies. By broadening the knowledge bases of transnational legal practice, contextualisation could facilitate to overcome the hegemony of Western liberal thought deeply rooted within international law and practice.

While others have worked extensively on the gap between the ‘global’ and the ‘local’, particularly in the field of international human rights law, the idea of contextualisation goes beyond this. Specifically, contextualisation is not to be limited to a mere translation of international norms in order to ‘make them fit’ different places in the world. Rather, it argues for a more nuanced connection between the ‘international/global’ and ‘local’, and most importantly, one that requires an awareness of the great power imbalances inherent in the current constellation of ideas of the ‘international’ and its claims to universality.

⁸⁶ Floya Anthias and Nira Yuval-Davis, ‘Contextualizing Feminism: Gender, Ethnic and Class Divisions’ (1983) 15 *Feminist Review* 62, 71.

⁸⁷ Chandra Talpade Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ (1984) 12 *boundary 2* 333, 347; Chandra Talpade Mohanty, ‘Introduction: Cartographies of Struggle: Third World Women and the Politics of Feminism’ in Chandra Talpade Mohanty, Ann Russo and Lourdes Torres (eds), *Third World women and the politics of feminism* (Indiana University Press 1991) 39.

In the realm of international human rights law, Sally Engle Merry most famously developed the idea of the *vernacularisation* of international human rights norms to local contexts. Vernacularisation represents the process of ‘appropriation and local adoption’⁸⁸ of international human rights norms to individual local contexts and through intermediaries, referred to by Merry as so-called ‘translators’, ‘intermediaries,’⁸⁹ or ‘vernacularizers.’⁹⁰ In this process of making the ‘global’ ‘local’, translators play an incremental role in reframing international human rights norms in order to make them fit to the local context as well as in adjusting local issues in a way that makes them conform with the international legal framework on human rights.⁹¹ In contrast to vernacularisation, contextualisation does not merely constitute the adaptation of international norms to individual localities but further the contextualisation of transnational praxis through the understanding of the socio-cultural, historical and political realities of the localities. As Merry herself describes, ‘[t]he process of vernacularization is one in which the global becomes localized, no longer simply a global imposition but something which is infused with the meanings, signs, and practices of local places.’⁹² This, however, means that it is still the international norm that is taken in essence and merely adapted to fit the individual local context. As such, vernacularisation represents a top-down approach of translating international norms into individual localities, thereby implying the superiority of the international norm. Contextualisation, however, puts forward the proposal for a bottom-up approach that includes alternative epistemologies, as found in ‘local’ spheres, and their consideration within international spheres. Thus, while the knowledge basis of what is conveyed through vernacularisation in essence remains ‘the international’ (just transposed to local languages/understandings), and as such, mostly retains its liberal Western epistemic core, the idea of contextualisation offers the opportunity for alternative epistemologies to find their way ‘up’ to the international, thereby contributing to a more inclusive and diverse formation of international law and global governance.

The concept of vernacularisation becomes further complicated in light of Merry’s argument that ‘[r]ather than viewing the emerging regime of global human rights as the imposition of Western cultural forms and legalities, we need to see it as an open text, susceptible to appropriation and redefinition by groups who are also players in

⁸⁸ Peggy Levitt and Sally Merry, ‘Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States’ (2009) 9 *Global Networks* 441, 446.

⁸⁹ Sally Engle Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’ (2006) 108 *American Anthropologist* 38.

⁹⁰ Levitt and Merry (n 88).

⁹¹ Engle Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’ (n 89) 39.

⁹² Sally Engle Merry, ‘Legal Vernacularization and Ka Ho’okolokolonui Kanaka Maoli, The People’s International Tribunal, Hawai’i 1993’ (1996) 19 *PoLAR: Political and Legal Anthropology Review* 67, 80.

the global legal arena.⁹³ While it is undeniable that international human rights norms have become immensely important as tools of advocacy for international and local civil society actors, it would be problematic to see them as empty shells. This would disregard their Eurocentric roots in Western liberal theory⁹⁴ as well as their contemporary complicity in both neo-imperial⁹⁵ and neoliberal endeavours.⁹⁶ This is not to say that vernacularisation is not a valuable process of human rights advancement. The ‘translation’ and ‘adaptation’ of international norms to local contexts have demonstrated successful advances in the implementation of human rights norms, particularly with regards to women’s rights, as Merry demonstrates in her research.⁹⁷ However, the argument is that the process should represent a two-way stream of exchange between the ‘global/international’ and the ‘local.’ In addition to international norms being translated to the ground, alternative knowledge forms and epistemologies (as used in different localities) should also find their way to international legal discourse. This could be facilitated through contextualising transnational legal practice in the individual locality of operation, thereby allowing for a more comprehensive and inclusive approach to cross-border legal praxis.

However, while human rights defenders in different localities are set with the task of translating international norms to their individual contexts, those working in the international sphere have been reluctant to accept alternative non-hegemonic epistemologies and discourses as part of their practice. By widening international law and policy to take into account non-hegemonic epistemologies, in the case of this chapter particularly in the realm of transitional justice and peacebuilding, contextualisation could lead to a more balanced representation of different epistemic communities. The inclusion and consideration of alternative epistemologies and discourses on the international level could open the doors to more widely accepted and relevant transnational legal practice. Moving the focus from the hegemony of liberal thought could enable a deeper engagement with localities of practice and analysis. This need to go beyond liberal epistemologies has long been argued for by critical legal scholars. Considering the embeddedness of human rights in the liberal conception of freedom, Ratna Kapur, for example, criticises the ‘assumption within human rights discourse that liberal understandings of freedom are the only available

⁹³ *ibid* 68.

⁹⁴ Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85 *The American Journal of International Law* 613, 644.

⁹⁵ See for example on Afghanistan, Charles Hirschkind and Saba Mahmood, ‘Feminism, the Taliban, and Politics of Counter-Insurgency’ (2002) 75 *Anthropological Quarterly* 339.

⁹⁶ See for example Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).

⁹⁷ See for example Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006).

and valid ones'⁹⁸ and goes on to explore how 'non-liberal philosophical possibilities may be the key to transforming the ways in which we imagine the world.'⁹⁹

Both peace and conflict studies and international law scholarship have deep-rooted origins within Western liberal thought that have prevented them from broadening their epistemological bases to become more inclusive and representative of other contexts.¹⁰⁰ Additionally, both disciplines have recognised that culture has been the 'big blind spot.'¹⁰¹ Unsurprisingly, this has led scholars to conclude that 'our currently available theoretical frameworks tend to be insufficient for addressing the challenges of cultural differences.'¹⁰² The methodological tool of contextualisation could assist in making scholarship and transnational legal practice more attentive to cultural as well as socio-historical differences between localities of analysis and practice.

3. Contextualising the WPS Agenda in Afghanistan

Increasingly more evidence is presented that in post-conflict states, the local sphere, their needs and interests, are more presumed than adequately researched.¹⁰³ Serious engagement with local actors has further become substituted by certain shallow relationships with governmental actors or civil society closely linked to the international actors in question.¹⁰⁴ The case study of Afghanistan demonstrates how detachment from the local sphere and a lack of contextualisation can lead to blind spots in transnational legal practice.

As explained, the United Nations' efforts as part of the WPS agenda in Afghanistan has primarily been of a top-down nature with a stark focus on legal reform and collaboration with governmental actors. However, this approach demonstrates a

⁹⁸ Kapur (n 46) 2.

⁹⁹ *ibid* 14.

¹⁰⁰ See for example Morgan Brigg, 'Culture: Challenges and Possibilities' in Oliver P Richmond (ed), *Palgrave Advances in Peacebuilding: Critical Developments and Approaches* (Palgrave Macmillan 2012); Abdullahi An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1992).

¹⁰¹ Andrew Williams, 'Reconstruction: The Missing Historical Link' in Oliver P Richmond (ed), *Advances in Peacebuilding - Critical Developments and Approaches* (Palgrave Macmillan 2010) 67.

¹⁰² Brigg (n 100) 339.

¹⁰³ Jevgenia Viktorova Milne, 'Method: Theory and Ethnography in Peace and Conflict Studies' in Oliver P Richmond (ed), *Palgrave Advances in Peacebuilding: Critical Developments and Approaches* (Palgrave Macmillan 2010) 75.

¹⁰⁴ *ibid*.

disconnect to the realities of the lives of many Afghans. As Quhramaana Kakar, director of the organisation Women Peace & Participation, explains:

[t]he solutions provided by the international community do not work for women outside of the capital and other major cities, because their context is different – they are not as educated and open-minded. Many people believe that mechanisms for mainstreaming gender are a Western imposition; it is often understood as empowering women against their male counterparts. So there is a need for a contextualized implementation of UN Security Council Resolution 1325 [...] so that it supports women from all backgrounds and areas.¹⁰⁵

A contextualisation of their practice in the realm of the WPS agenda would have enabled greater engagement with grassroots strategies and with alternative epistemological bases used for the improvement of women's lives. The failure to see the potential of Islamic feminism in the promotion of women's rights in Afghanistan demonstrates the perils of the explained trend of internationalisation and institutionalisation of post-conflict processes and reflects the limitations of the liberal peace paradigm in certain contexts. Realising, that at this point of the analysis, some might question how the United Nations could support, let alone adopt, an approach to women's rights promotion rooted in Islamic discourse, it should be made clear that there have been instances where the UN have, in fact, reverted to Islamic discourse in their work under the WPS agenda in Afghanistan. For example, UN Women organised a 'Gender in Islam' workshop in 2014 for a selected group of Afghan women's rights activist that included training by the Islamic feminist organisation Musawa on the interpretation of Islamic jurisprudence (fiqh) in accordance with gender equality.¹⁰⁶ Thus, conceptually there must be room within the WPS framework as well as the United Nations' understanding of human rights for an Islamic feminist rights discourse. Reverting to Islamic feminism as part of the United Nations' WPS work in Afghanistan must therefore be seen as a viable possibility. Support for this interpretation is also found in the resolutions comprising the WPS agenda, which call for cooperation with local civil society actors as well as 'context-specific' approaches to the implementation of the WPS framework.¹⁰⁷

¹⁰⁵ Wadia Samadi, 'A Seat at the Table: The Evolving Role of Afghan Women Peacebuilders' (*News Deeply – Women & Peace*, 17 August 2017) <<https://www.newsdeeply.com/womenandgirls/articles/2017/08/17/a-seat-at-the-table-the-evolving-role-of-afghan-women-peace-builders>> accessed 19 August 2017.

¹⁰⁶ UN Women, 'Promoting Gender Equality and Women's Rights in Islam' (*Together with Afghan Women Newsletter, Issue 5*, June 2014) <http://www2.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2014/10/unwomen_afghanistan_newsletter_april-june2014_issue5_english.ashx?la=en> accessed 12 June 2017.

¹⁰⁷ See for example Security Council Resolution 2493 2019 [S/RES/2493].

The stark focus on top-down measures and the reliance on the liberal peace paradigm with its emphasis on State building, the rule of law and the international human rights regime, have prevented the United Nations from seeing the potential of successful local bottom-up approaches, especially those with alternative epistemological bases, despite their potential for the Afghan context. The contextualisation of transnational legal practice in these fields could lead to a more inclusive, relevant and effective implementation of the WPS agenda in Afghanistan.

VI. Conclusion

With regards to the example of transitional justice and peacebuilding, the chapter demonstrated how the movement of international norms and actors to individual localities can lead to challenging obstacles in transnational legal practice. The growth of transnational legal practice has resulted in the need to scrutinise the very epistemic foundations of international law and praxis. The consideration of the Women, Peace and Security agenda and its implementation in Afghanistan demonstrated the limitations of transnational legal practice rooted in Western liberal thought. The implications that arise from a failure to engage with non-hegemonic epistemologies prevalent in specific contexts were illustrated by the potential of Islamic feminist tactics, as used by Afghan grassroots activists. With reference to feminist theory and methodology's approach to understanding contexts, the chapter introduced contextualisation as a method that enables transnational legal practice to broaden its knowledge bases in accordance with the localities of operation. Similarly to feminist scholarship, transnational law scholarship has been inquiring its own epistemic foundations in an attempt to confront exclusionary effects of law and legal practice.¹⁰⁸ Continuing on this path of critique, transnational law can play a significant role in pushing epistemic boundaries that have been constructed by the Western hegemony in international law.

¹⁰⁸ Zumbansen (n 74) 948.