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A LEGAL PLURALIST APPROACH TO THE USE OF CULTURAL PERSPECTIVES IN THE IMPLEMENTATION AND ADJUDICATION OF HUMAN RIGHTS NORMS

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INTRODUCTION

The assertion that state law is the law is perhaps one of the greatest and most embedded creeds in Western legal cultures.[1] In practice, however, individuals coexist among multiple communities generating and enforcing norms.[2] Some of these norms are regarded as official law, while others are considered informal or customary law (or not even law at all).[3] While lawyers tend to focus on state-sanctioned law—the self-proclaimed only law—legal pluralist scholars have long studied legal hybridity in a given social field.[4] In this paper, we borrow some of their insights to analyze the operation of international human rights law. The state monopoly on the production and enforcement of law has not only sidelined infra-state normative orders, but also denied public international law (including human rights law) the quality of law.[5] In spite of its state-sanctioned character, human rights law retains its oddity among the law of states and unlike the latter, the

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1. Within scholarship on legal pluralism, there is a long and ongoing debate regarding both the definition of law and legal pluralism itself. It is beyond the scope of this paper to address this debate. *See generally* Brian Z Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375 (2008).

2. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdictions*, 14 CAP. U. L. REV. 179, 182 (1984). He also notes that "the question of what is law and for whom is a question of fact about what certain communities believe and whit what commitments to those beliefs." Robert Cover, *The Supreme Court. Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

3. On official and unofficial law, *see, e.g.*, Masaji Chiba, *Three Dichotomies of Law in Pluralism: An Analytical Scheme of Legal Culture*, TOKAI L. REV. 173 (1987).

4. *See* Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC'Y REV. 719, 720 (1972).

5. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 214-16 (1994).

former can hardly deny the normative power of the multiplicity of actors intervening in its operations. Moreover, and far from being self-contained, the different layers or sub-regimes of a fragmented human rights law are in constant overlap and exchange.[6] As such, we subscribe to the view of international human rights law as a multilayered architecture, whereby states, supranational organs, non-state as well as transnational and local actors, all generate, reconstruct, and contest normative postulates.

We take a legal pluralist approach with the aim of better grasping the challenges and opportunities in the implementation and adjudication of human rights norms, focusing on non-dominant groups raising cultural claims.[7] On a more modest note, legal pluralist lenses may at least provide a more realistic account of how international human rights law functions in practice. In particular, we follow Berman when he says: "while it does not offer substantive norms, a pluralist approach may favor procedural mechanisms, institutions, and practices that provide opportunities for plural voices."[8] And such opportunities are vitally necessary in human rights, given the global cultural diversity existing within the system. Rather than being one-size-fits-all, culture often plays a deterministic role in perspectives on human rights. Legal pluralist lenses are therefore helpful in understanding the link and interaction between human rights and culture as normative orders with overlapping subject matters. Sometimes these orders can be viewed as complementary and, at other times, as apathetic or contradictory. It is for actors, including states, judges, and international bodies - as well as civil society and local communities - to navigate and reconcile them. Often these tasks are done in the context of human rights implementation and adjudication of specific cultural claims.

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6. Carlos Iván Fuentes, René Provost & Samuel G. Walker, *E Pluribus Unum – Bhinneka Tunggal Ika? Universal Human Rights and the Fragmentation of International Law, in* DIALOGUES ON HUM. RTS. & LEGAL PLURALISM 37, 66 (René Provost & Colleen Sheppard eds., 2013); Barbara Oomen, *The application of socio-legal theories of legal pluralism to understanding the implementation and integration of human rights law*, 4 EUROPEAN J. HUM. RTS. 471, 493 (2014).

7. In this paper, non-dominant groups refers to (not monolithic) social groups that have relatively less influence in the prevailing political, economic and cultural structuring of society and who normally do not stand as equal peers in social interaction. This term is preferred over 'minorities.' Although the latter entails similar connotations, it can be misleading when it comes to characterize certain groups, such as women.

8. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1166 (2007).

A wide range of actors - human rights users[9] - seek entitlements, recognition, and resources by or while claiming protection of their cultural specificity or identity in a myriad of ways. Both culture and identity tend to evoke strong moral and normative commitments. According to Waldron, identity claims are put forward as versions of rights. Such claims, like rights claims, are usually presented as non-negotiable: "They represent *who I am*", which cannot be sacrificed for the benefit of others.[10] Thus, assertions of culture can be, at least discursively, as powerful as rights. In this sense, Cowan, Dembour, and Wilson have also noted that "culturalist" claims are likely to carry more weight in adjudication processes and, therefore, they are used strategically to justify a wide range of claims.[11] Furthermore, since the notion of "cultural rights" - and culture more generally - is quite flexible, its use may be especially apt to bring onto the human rights agenda issues that would otherwise not easily fit. Almost all human rights can be linked to culture, however there is still no agreed definition or list of cultural rights.[12] Indeed, it is submitted that the field of cultural rights is one of the least elaborated by international human rights law, which opens up possibilities for claims that contest prevailing understandings of the social, political, cultural, and economic life.[13]

From a political perspective, cultural claims also hold an important emancipatory potential. Third World scholars have observed that 'culture' is being embraced "as a terrain of resistance and struggle."[14] For Rajagopal, the turn to culture in the 'Global South' has translated into new conceptions of human rights for building alternatives to prevailing models of modernity, democracy, development, and market.[15] Yet, at the same time, post-colonialist and other critical approaches to culture and human rights underscore

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9. *See* Ellen Desmet, *Analysing users' trajectories in human rights: a conceptual exploration and research agenda*, 8 HUM. RTS. & INT'L LEGAL DISCOURSE 121, 125-126 (2014).

10. Jeremy Waldron, *Cultural Identity and Civic Responsibility*, *in* CITIZENSHIP IN DIVERSE SOCIETIES 158 (Kymlicka & Norman eds., 2000).

11. Jane K. Cowan, Marie-Béné Dembour & Richard A. Wilson, *Introduction*, *in* CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES 1, 9 (Cowan et al. eds., 2001).

12. Yvonne M. Donders, *Human Rights: Eye for Cultural Diversity*, ORATIEREEKS (29 June 2012) 16, http://www.oratiereeks.nl/upload/pdf/PDF-6449weboratie_Donders.pdf (last visited Mar. 12, 2017).

13. Rosemary J. Coombe, *Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference*, 1 L. CULTURE & THE HUM. 35, 52 (2005).

14. *See* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 165 (2003).

15. *Id.* at 166, 170.

the limitations of international human rights law to live up to its emancipatory promise. This is largely due to the neoliberal imprint of the existing legal frameworks and the individual justice models endowed in human rights courts.[16] This paper explores whether and how legal pluralist approaches to international human rights law can facilitate some of the emancipatory goals of claimants.

This paper analyzes the challenges and opportunities in the implementation and adjudication of human rights norms concerning cultural claims raised by non-dominant groups through the lens of legal pluralism. It addresses both implementation and adjudication in order to thoroughly consider states' interaction with non-state law and the role of supranational supervision. The paper is set out in three parts; the first of which explores how acknowledging the coexistence and interaction of different normative orders may help to more effectively implement international human rights standards. This part looks at ways in which women's rights can be implemented by mobilizing cultural norms relating to dispute resolution and inheritance/property rights, and the supervisory role of the UN human rights treaty bodies. The second part explores the interaction of normative orders in relation to the adjudication of rights claims by the Inter-American and European Courts of Human Rights. It examines how cultural rights claims reflective of non-dominant normative commitments have been brought before human rights courts and how they have been incorporated or accommodated. The paper analyzes not only a range of mechanisms that are apt to deal with normative hybridity, but it also revises some of the challenges posed by both the implementation and adjudication enterprises in the context of non-state cultural claims. The third part of this paper deals with this matter. The analysis draws insights from literature and case law on human rights, cultural diversity, and legal pluralism, as well as ethnographic studies. Without providing an exhaustive analysis, this paper illustrates the opportunities and challenges in the implementation and adjudication of culturally related rights claims.

I. *Legal Pluralism and Human Rights Implementation*

While responsibility for implementing international human rights law formally rests on states' parties to the relevant treaties, in practice, a variety of interacting normative orders intervene. These other normative orders can

16. *See, e.g.*, Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUROPEAN J. INT'L L. 141, 160 (2011); Ben Golder, *Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought*, 2 LONDON REV. INT'L L. 77, 111-112 (2014).

include customary law, and social, cultural, and religious norms. In such pluralistic settings, different actors can and do use different norms to legitimize their claims, actions, and decisions. Numerous scholars have advocated approaches to human rights that take into consideration or endeavor to incorporate these other normative systems.[17] Such scholars argue that by using these approaches, international human rights can be made more concrete, relevant, and effective in local settings by being tailored to the user's perspective. By contrast, the failure to recognize and incorporate other normative orders can be detrimental to the effectiveness of a state's human rights measures and to the enjoyment of rights in practice. As Tamanaha noted, "[l]aw characteristically claims to rule whatever it addresses, but the fact of legal pluralism challenges this claim."[18]

These inclusive approaches to human rights are premised on the fact that while conceptualized universally on the international level, in domestic implementation rights need to be brought down to earth and made meaningful for local communities - vernacularized.[19] This is in line with international law, which accepts that the variety of cultures and contexts in states around the world necessitates some distinction in the manner and form of human rights implementation.[20] Put simply: the universality of rights does not require their uniformity in implementation.[21] A diversity or variety of rights on the ground tailored to ensure their local enjoyment is "not at odds

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17. *See, e.g.*, Abdullahi Ahmed An-Na'im, *Introduction*, *in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 3-4 (Abdullahi Ahmed An-Na'im ed., 1992); Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L. J. 381, 417 (2000); Tom Zwart, *Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach*, 34 HUM. RTS. Q. 156, 157 (2012).

18. Tamanaha, *supra* note 1, at 375.

19. Peggy Levitt & Sally Engle Merry, *Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States*, 9 GLOBAL NETWORKS 441, 441 (2009); *see also* Sally Engle Merry, *Legal Transplants and Cultural Translation: Human Rights in the Vernacular*, *in* HUMAN RIGHTS: AN ANTHROPOLOGICAL READER 265, 287 (Mark Goodale ed., 2009).

20. David Kinley, *Bendable Rules: The Development Implications of Human Rights Pluralism*, *in* LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 50, 51-52 (Brian Tamanaha, Caroline Sage & Michael Woolcock eds., 2012).

21. *See* Cees Flinterman, *The Universal Declaration of Human Rights* 60, 26 NETH. Q. HUM. RTS. 481, 482 (2008); Eva Brems, *Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam*, 5 HUM. RTS. REV. 5, 13 (2004).

with maintaining human rights as a global language."[22] This flexibility is provided for in the international human rights system, which accommodates diversity in different ways. This section of the paper considers one such mechanism for accommodating diversity: the subsidiarity principle and the fact that international law does not prescribe national implementation measures.

States parties to human rights treaties are obliged to ensure that individuals within their territory and subject to their jurisdiction benefit from the guarantees laid down in those treaties. However, the treaties do not give concrete instructions as to how the various rights are to be guaranteed.[23] For example, Article 2(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that "each State Party undertakes to take the necessary steps. . .to give effect to the rights" therein.[24] The UN Human Rights Committee's has held that this Article "generally leaves it to the States Parties concerned to choose their method of implementation in their territories."[25] As such, under international law, states enjoy discretion with regard to the method of domestic implementation of their treaty obligations.[26] Galligan and Sandler note that as human rights standards are often vague and open-ended, each state has discretion to determine what those standards mean and what constitutes adequate compliance.[27] This, they claim, is not an error to be remedied but rather reflects "the compromise between the universalist claims of human rights and the imperatives of local culture."[28]

Implicitly, states are better placed than the international community to select human rights implementation measures based on their effectiveness in their domestic setting. On this basis, and given states' discretion, the international system accepts that there is not one way to effectively imple-

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22. Koen de Feyter, *Treaty Interpretation and the Social Sciences*, *in* METHODS OF HUMAN RIGHTS RESEARCH 225 (Fons Coomans, Fred Grünfeld & Menno T. Kamminga eds., 2009).

23. Ineke Boerefijn, *International Human Rights in National Law*, INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK 577, 579 (Catarina Krause & Martin Scheinin eds., 2009).

24. International Covenant on Civil and Political Rights, art 2(2), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

25. UN Human Rights Committee, *General Comment No. 3*, "Article 2 Implementation at the National Level" ¶ 1, UN Doc. HRI/GEN/1/Rev.1 at 4 (July 19, 1981).

26. Nisuke Ando, *National Implementation and Interpretation*, THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 698, 702 (Dinah Shelton ed., 2013).

27. Denis Galligan & Deborah Sandler, *Implementing Human Rights*, *in* HUMAN RIGHTS BROUGHT HOME: SOCIO-LEGAL PERSPECTIVES ON HUMAN RIGHTS IN THE NATIONAL CONTEXT 23, 27-28 (Simon Halliday & Patrick Schmidt eds., 2004).

28. *Id.* at 28.

ment rights, but potentially many. For example, the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) in Article 3 provides that states "shall take in all fields, in particular the political, social, economic and cultural fields, all appropriate measures, including legislation."[29] This is not just a phenomenon in the UN system but also can be seen in regional human rights treaties, which foresee implementation by legal as well as other measures.[30] In this way, as long as states meet their treaty obligations, they are free to choose the most appropriate way of doing so at the domestic level. As such, states have the possibility to employ multiple normative orders - including but not limited to state law - in the implementation of international human rights standards.

To date, however, much attention has been paid to the legal incorporation of rights into constitutions and national legislation, with the result that the role of other measures has not been as thoroughly considered. This also evidences the bias referred to earlier of state law as the law. Examination of other methods of implementation is crucial given that state law may be unsuccessful - and sometimes even counter-productive – in protecting rights in practice. For example, implementing women's rights can be difficult when they are contrary to well-entrenched local norms. In such circumstances, state legislative measures tend to be ignored by local law enforcers and the public alike, or rejected by particular communities. In both cases, women—the intended beneficiaries—are often left particularly vulnerable and unable to enjoy their rights. As such, this section explores the possibility of states using other systems of normative ordering than legislation to realize women's rights in practice and within their cultures. This section uses two examples relating to dispute resolution and inheritance/property rights. It employs a legal pluralist perspective to consider how to implement human rights standards in various communities to better accommodate cultural groups and the vulnerable among them.

A. *Non-State Dispute Resolution Mechanisms*

An important aspect of legal pluralism is its recognition of multiple systems of dispute resolution. While the state will often have dedicated formal institutions, it does not have a monopoly on dispute resolution

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29. Convention on the Elimination of All Forms of Discrimination Against Women, art. 3, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

30. *See* American Convention on Human Rights, "Pact of San Jose," Costa Rica, art. 2, Nov. 22, 1969, 144 U.N.T.S. 1979; African Charter on Human and Peoples' Rights [Banjul Charter] (Nairobi, Kenya, June 27, 1981), 21 I.L.M. 59, art. 1 (1981) (entered into force Oct. 21, 1986).

processes. In any given setting around the world, multiple competing options are likely to exist for resolving disputes between community members. These may include religious, social, kinship based, or formal state mechanisms. As such, individuals can forum shop and select their dispute resolution mechanism. Sometimes state mechanisms may be preferable if they can better protect the relevant right or individual in question, other times they may not. For example, the state system may be an unattractive option if it is seen as corrupt, inefficient, or hostile by community members, or if it is inaccessible due to its location, cost, slow process, complexity, obscurity and/or lack of cultural sensitivity.[31] In contrast, non-state mechanisms may be familiar, readily available, affordable, efficient, and socially legitimate.[32]

While practical factors such as (in)accessibility may be persuasive, it can also be a deliberate choice of claimants to avoid state institutions. For example, state dispute resolution mechanisms may not be attractive for some communities, such as in Japan, where adversarial approaches and judicial orders are not always welcomed. As Onuma notes, "one is expected to reach the same goal by resorting to less forceful measures such as patient negotiations, mediation, and other conciliatory measures."[33] Similarly in Bali, Indonesia, it is expected that "disputes should be settled in harmony, on the basis of kinship and togetherness."[34] Many African societies also promote reconciliation and more community based solutions to disputes. In Vubo's research in Cameroon, members of a voluntary association proposed a variety of solutions to problems identified with their association (such as corruption and mismanagement); however, none of them proposed submitting to state legal procedures. It was held that resort to such procedures may "compromise the spirit of trust, fraternity, solidarity and sacrifice

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31. Caroline Sage & Michael Woolcock, *Introduction*, *in* LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 1, 1-2 (Brian Tamanaha, Caroline Sage & Michael Woolcock eds., 2012); Elin Henrysson & Sandra F. Joireman, *On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya*, 43 LAW & SOC'Y REV. 39, 49 (2009); *see also* Celestine Nyamu-Musembi, *Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights*, CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 126, 137, 140, 143 (A. A. An-Na'im ed., 2002).

32. Sage & Woolcock, *supra* note 31, at 2.

33. Yasuaki Onuma, *In Quest of Intercivilization of Human Rights: "Universal vs. Relative" Human Rights Viewed from an Asian Perspective, Centre for Asian Pacific Affairs*, Asia Foundation, Occasional Paper No. 2 (1996) p. 4.

34. Ingrid Westendorp, *Personal Status Law and Women's Right to Equality in Law and in Practice: The Case of Land Rights of Balinese Hindu Women*, 7 J. HUM. RTS. PRAC. 430, 440 (2015).

that is at the basis of this type of association."[35] These long-standing informal dispute resolution mechanisms have been adapted in contemporary times to address widespread human rights problems. For example, the *Gacacas* of Rwanda were used to address the genocide in 1994, and more recently, *Nari Adalat* in India are used to address violence against women.

As in many parts of the world, discrimination and violence against women exists on a large scale in India and persists despite state attempts to prevent and punish it via legislation and formal institutions.[36] Discrimination and violence against women is a violation of women's rights under several international human rights treaties. To address this, several initiatives were undertaken by the state and other actors, including creating the *Nari Adalat.* These "women's courts" address issues including domestic violence, rape, polygamy, child custody, divorce, and dowry matters.[37] The petitioners are largely low caste, uneducated women, and the judges are women from the same communities with no formal education or training - but who act as "peer mediators."[38] The *Nari Adalat* have added another mechanism to the pre-existing plural legal system in India, which comprises formal state courts, village *panchayats*, as well as informal family and community mediation services.[39] These other pre-existing avenues are often expensive, time consuming, unfamiliar, ineffective, and even sometimes

35. Emmanuel Yenshu Vubo, *On the Viability of Associational Life in Traditional Society and Home-Based Associations, in* CIVIL SOCIETY AND THE SEARCH FOR DEVELOPMENT ALTERNATIVES IN CAMEROON 95, 119 (Emmanuel Yenshu Vubo ed., 2009).

36. CEDAW Committee, *Concluding observations of the Committee* on the Elimination of Discrimination against Women - India, ¶¶ 10, 20, UN Doc. CEDAW/C/IND/CO/4-5 (July 24, 2014); Ratna Kapur, *Revisioning the Role of Law in Women's Human Rights Struggles, in* THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW 101, 101 (Saladin Meckled-García & Başak Çali eds., 2006); Sesha Kethineni, Murugesan Srinivasan & Suman Kakar, *Combatting Violence against Women in India: Nari Adalats and Gender-Based Justice*, 26 WOMEN & CRIM. JUST. 281, 282-85, 297 (2016).

37. Manadendra Sen & Preethi Krishnan, *The Nari Adalat: A Grassroots Response to Violence and Injustice against Women, in* INNOVATIONS TOWARDS EDUCATION FOR EMPOWERMENT: GRASSROOTS WOMEN'S MOVEMENT 62, 62 (Sangeetha Purushothaman ed., 2010); Kethineni et al., *supra* note 36, at 286.

38. Sylvia Vatuk, *The "women's court" in India: An Alternative Dispute Resolution Body for Women in Distress*, 45 J. LEGAL PLURALISM & UNOFFICIAL L. 76, 77 (2013).

39. Sally Engle Merry, *Legal Pluralism and Legal Culture: Mapping the Terrain,* LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 66, 74 (Brian Tamanaha, et al. eds., 2012).

hostile to women's complaints.[40] Alternative avenues are necessary as the "vast majority" of women suffering from domestic violence or other marital disputes do not consider turning to the state for resolution.[41] The *Nari Adalat* are therefore a vital addition to the plural Indian system, providing women with an affordable, sensitive, and approachable option to resolve disputes and have their rights upheld.[42]

Crucial to the success of the *Nari Adalat* is that they enjoy local legitimacy and broad community support. Because they are embedded in and stem from the community, the *Nari Adalat* have a thorough understanding of their clients and context, including local customs and traditions.[43] Due to this position, the *Nari Adalat* are particularly effective as they are able to craft solutions that meet the needs of their petitioners and yet are also seen as having legitimacy and community ownership.[44] This is important because the *Nari Adalat* rely on their local community to provide evidence in cases, to support the appearance of the accused, and to enforce their decisions after judgment.[45] While they utilize some legal formalities (such as issuing decisions on legal paper), the *Nari Adalat* have no state legal authority and rely exclusively on public pressure and naming and shaming.[46] Without strong community support, they could not function.

In addition to community support, the *Nari Adalat* also receive state support. While outside formal state institutions, the *Nari Adalat* borrow state legitimacy and receive state support, such as funding and police assistance.[47] In this way, the *Nari Adalat* are an example of how the state can intervene to assist with the national implementation of human rights through normative orders other than state laws and institutions. This could be an example of what Zwart terms state "amplification" of grass-roots systems that work to protect and promote human rights.[48] In this case, the *Nari Adalat* are modeled on the well-known informal *panchayats* system, but adapted to be run by women for women with state support but not direction. As Merry has noted, based on the inherent dynamism of culture, established

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40. *Id.* at 78-9; Sen & Krishnan, *supra* note 37, at 52, 64; Kethineni et al., *supra* note 36, at 296.

41. Vatuk, *supra* note 38, at 81-83.

42. Sen & Krishnan, *supra* note 37, at 65.

43. *Id.* at 57-58; Vatuk, *supra* note 38, at 77.

44. Sen & Krishnan, *supra* note 37, at 58.

45. *Id.* at 58, 60, 63.

46. Merry, *supra* note 39, at 77; Sen & Krishnan, *supra* note 37, at 58.

47. For example, the Gujerati state provides "a sitting fee" for *Nari Adalat* members and the police has assisted with collecting information and pressuring perpetrators to comply. *See* Merry, *supra* note 39, at 75; Sen & Krishnan, *supra* note 37, at 57, 70.

48. Zwart, *supra* note 17, at 558-64.

cultural forms (like the *panchayats*) can be deployed in new situations and take on new meanings.[49] Here, the *Nari Adalat* were able to provide for vulnerable women in a way that the formal state law mechanisms had not been able.

These 'women's courts' are necessary in India given the failure of the state mechanisms to effectively address women's rights and combat domestic violence. However, questions remain regarding whether the *Nari Adalat* are effective enough: Do they provide women with real, sustainable solutions - or simply ameliorate the immediate harm? While acknowledging a degree of success, Vatuk criticizes the *Nari Adalat* for not sufficiently challenging patriarchal norms on marriage and women's role in society. However, the *Nari Adalat's* effectiveness is based on the fact that they are accepted as legitimate within the communities where they operate. They would likely lose this legitimacy if they radically rejected local cultural norms in favor of promoting an incompatible version of women's rights. By taking their current approach—a middle route—the *Nari Adalat* can be seen as local, credible change agents, and vital sites of intra-cultural engagement and dialogue on sensitive issues of women' rights. As often reiterated, change initiated from within a cultural community is more likely to be lasting and effective than change coerced by external actors—including the state. While perhaps not an immediate solution,[50] the *Nari Adalat* are an important means of effectively implementing women's rights within their cultural context. Like all dispute resolution mechanisms, there are limits on the ability of the *Nari Adalat* to transform society. However, they have succeeded in providing protection for women's rights where state mechanisms had failed.

B. *Non-State Regulation of Land and Inheritance*

Another well-known manifestation of legal pluralism relates to the various systems in which to recognize and regulate access to and interest in land and inheritance. Particularly in post-colonial settings, multiple normative systems co-exist and overlap for regulating land and inheritance, including customary and state law. Navigating between these systems is important to protect one's right to land (in order to cultivate food and as a

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49. Sally Engle Merry, *Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)*, 26 POL. & LEGAL ANTHROPOLOGY REV. 55, 69 (2003).

50. Sezgin notes the efficacy of such "gradual" measures of "revolution" or "reform" from within that are ultimately "more likely to be readily adopted" - as opposed to top down measures by the state. Yüksel Sezgin, *How to Integrate Universal Human Rights into Customary and Religious Legal Systems*, 60 J. LEGAL PLURALISM & UNOFFICIAL L. 5, 29-30 (2010).

source of wealth), yet can also be difficult given the inconsistencies and conflicts between the systems. For example, while a state may have legislated equality in their national legislation providing for women to inherit and hold land, this may be inconsistent with other local systems regulating land or family relations that limit or prevent women from owning or inheriting land.[51] While in plural systems individuals can forum shop to a certain extent regarding how to secure their interest in land and property, depending on one's location, status, and cultural belonging, there may not be much of a choice.[52] This is particularly the case for women who may be reluctant or unable to petition the state to protect their rights,[53] or if they do, it may be perceived by their community as an attempt to disrupt communal values, "gender relations, and society more generally."[54] Around the world, unequal access to land between women and men is one of the foremost causes of economic inequality, diminishing women as social and political actors.[55]

According to human rights treaties (such as CEDAW), states parties are obliged to guarantee women equal rights, specifically regarding property ownership.[56] This is relevant as numerous customary systems provide for patrilineal inheritance and for men to be the sole property owners. For example, Indonesia has a plural legal system, including formal state law and multiple customary systems based on religion and tradition. Indonesia is a party to CEDAW and has implemented principles of non-discrimination and equality in its Constitution. It also has human rights legislation, which permits women to own land, hold marital property, and receive half upon divorce.[57] Despite these state initiatives, some Indonesian women do not

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51. Rwandan society is a case in point. *See, e.g.*, Katrijn Vanhees, PhD Research Fellow, Conference Paper Presented at the 2016 World Bank Conference on Land and Poverty, Improving Land Rights for Women: Blind Trust in the Magic of Formal Marriage 12 (Mar. 14-18, 2016).

52. From their study of the Kisii in Kenya, Henrysson and Joireman claim that women's only option was to use customary rather than formal dispute resolution for land claims due to the cost. Even then, the cost may be too high for many vulnerable women. Elin Henrysson & Sandra F. Joireman, *On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya*, 43 LAW & SOC'Y REV. 39, 53-54 (2009).

53. Customary systems may be a better venue given women's negative experiences with formal systems. *Id.* at 41.

54. Aili Mari Tripp, *Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda*, 7 AFRICAN STUD. Q. 1, 2, 12 (2004).

55. *Id.* at 6.

56. CEDAW, *supra* note 29, art. 2, 16(1)(h).

57. *See, e.g.*, THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA, art. 28(I)(2); Marriage Act (Act No. 1/ 1974) (Indon.); *see* Basic Agrarian Law (No. 5/ 1960/ art. 9(2)) (Indon.); Westendorp, *supra* note 34, at 437-38; Ratno Lukito, *The*

enjoy these rights in practice, due among other things to decentralization and the predominance of customary law.[58] This reflects the fact that notwithstanding the official place of state law, in practice, it can fail to compete with other normative orders.[59] Other such examples exist, and scholars have noted that ensuring women's right and access to land has long been a problematic aspect of customary systems.[60] Rather than seeking to abolish conflicting customary systems, or prescribing their rules from the national level, states and other actors can work with customary systems to implement women's rights within their cultural context.

For instance, the codified customary law in Bali for the Hindu community (Adat law) provided for inheritance on a patrilineal basis.[61] However, many within the Balinese community disagreed with these laws, were concerned for their daughters, sisters and wives' well-being, and sought to provide for their inheritance.[62] Westendorp details Balinese parents who made arrangements for their daughters to inherit or who gifted property to their daughters before they passed away.[63] This is an example of what Nyamu has described, claiming that while norms are typically articulated in rigid ways, they "will often fail to capture all of social reality."[64] Nyamu argues that notwithstanding stated cultural norms – especially ones like codified customary law – "[l]ocal practices are varied, and people's day-to-day interactions are more revealing of the 'living' cultural norms."[65] To illustrate, Nyamu also uses the example of women's inheritance, however in Kenya. While Kenyan state law permits daughters to inherit, customary practice continues to exclude women, who typically have a right to farm land but cannot own, inherit, or control its dispossession.[66] As in Bali, despite the

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Enigma of National Law in Indonesia: The Supreme Court's Decision on Gender-Neutral Inheritance, 35 J. LEGAL PLURALISM & UNOFFICIAL L. 147, 153 (2006).

58. CEDAW Committee, *Concluding observations of the Committee on the Elimination of Discrimination against Women - Indonesia*, CEDAW/C/IDN/CO/6-7, ¶ 15 (July 27, 2012); and, Westendorp, *supra* note 34, at 439.

59. Tamanaha notes that sometimes state law is simply "impotent." Tamanaha, *supra* note 1, at 385-386.

60. Henrysson & Joireman, *supra* note 31, at 41-42; *see also* Tripp, *supra* note 54, at 3-4, 11.

61. Lukito, *supra* note 57, at 149; Westendorp, *supra* note 34, at 439.

62. Westendorp, *supra* note 34, at 443.

63. *Id.* Lukito details a similar example in the matrilineal system in Minangkabau, where fathers would gift their estates before dying. Lukio, *supra* note 57, at 149.

64. Nyamu-Musembi, *supra* note 31, at 132-33; *see also* Tamanaha, *supra* note 1, at 410.

65. Nyamu-Musembi, *supra* note 31, at 132.

66. Henrysson & Joireman, *supra* note 31, at 43, 45. For a discussion of similar customary inheritance law in Uganda; *see also* Tripp, *supra* note 54, at 6.

prevailing customary law in the Akamba community that daughters cannot inherit, in practice there is both support for and examples of women's inheritance.[67] Nyamu argues that these varied practices offer a starting point to internally challenge custom and advocate interpretations in line with human rights principles.[68]

Nyamu advocates utilizing this inherent dynamism in culture to address problematic customary practices by seeking out community-based alternatives. By working within customary arrangements, women have found different ways to claim land through a variety of mechanisms, including inheritance, gift, purchase, loan, lease, and through their husbands and relatives.[69] For example, there is a customary practice among the Kisii for women to gain heirs and legitimize their presence on the land known as "daughter-in-law marriage." Under an invention of customary law, a Kisii woman may 'marry' her fictional son to another woman with children by paying the bride price, and then that woman becomes her daughter-in-law and the children become her grandchildren.[70] Through these children she can gain access to land. This is an example of culture's dynamism and how creatively custom can be applied, and how culturally aligned variations more compliant with human rights can be developed. In this way, women's rights can be protected by and within cultural systems, and without state intervention.

As a further example of dynamism, Adat law has been reformed. It now provides for women to have half the marital property, which includes a new form of marriage (*pada gelahang*), and that daughters can inherit – albeit only half that received by sons.[71] While such unequal inheritance is clearly not in conformity with CEDAW, it nevertheless represents welcome progress in Adat law.[72] While this change may not fully protect Balinese women's rights, it is a positive opening that can be used to promote community dialogue and push for further reform. Nyamu encourages those seeking human rights compliance to appropriate such positive openings,[73] arguing that the potential to realize "gender equality through local norms

67. Nyamu-Musembi, *supra* note 31, at 133-34.

68. *See id.*

69. Tripp, *supra* note 54, at 14.

70. Henrysson & Joireman, *supra* note 31, at 44-45 n.6; N. Thomas Hakansson, *The Detachability of Women: Gender and Kinship in Processes of Socioeconomic Change among the Gusii of Kenya*, 21 AMERICAN ETHNOLOGIST 516, 530 (1994).

71. Westendorp, *supra* note 34, at 444 (citing Decree No 01/Kep/Psm-3/MDP Bali/X/2010, MUDP Bali, Denpasar, 15 October 2010).

72. *Id.*

73. Celestine Nyamu, *supra* note 17, at 382.

and processes lies in the fact that local custom is in constant motion."[74] The creation of a novel form of marriage in Adat law – *pada gelahang* – also illustrates how dynamic customary law can be in responding to community needs. Such community-based alternatives are important as they enjoy local legitimacy and could be further employed or expanded on the basis of culture's dynamism to become new norms better protecting women's rights within context.

Westendorp stresses the importance of local legitimacy, holding that "cultural change is only possible if the population is convinced of the need for it and is committed to it."[75] Many scholars have reiterated this position, connecting the legitimacy of norms with their efficacy in practice. For example, one of the reasons why the laws changed in Bali was because an academic and authority on Adat law engaged with the local leaders and persuaded them of the acceptability of different forms of marriage and that greater gender equality would not lead to a breakdown of Hindu identity.[76] Westendorp suggests that the local academic was able to do what the state could not. Also, not to be discounted, is the agency of those individuals within the relevant communities. Recalling culture's inherent dynamism, Nyamu notes that people are agents of cultural transformation and can shift norms. She argues that change is more likely if a sufficient number of (relatively) powerful people in the community oppose a particular practice.[77] To create such a consensus for change, Nyamu recommends identifying and organizing allies.[78] As state officials are not best placed to influence local norms, Westendorp submits that the state should instead rely upon - and financially support - NGOs and individuals working to promote women's rights.[79]

Whenever advocating change, considerations of power are always important. Both Nyamu and Westendorp noted that women had less power to

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74. Celestine Nyamu-Musembi, *supra* note 31, at 127.

75. Sezgin, *supra* note 50, at 29 (2010) pp. 29-30; Westendorp, *supra* note 34, at 445.

76. Westendorp, *supra* note 34, at 445-46.

77. Nyamu-Musembi, *supra* note 31, at 135.

78. *Id.* An-Na'im emphasizes the necessity for advocates of alternative cultural positions on human rights to seek broad acceptance of their position by demonstrating "the authenticity and legitimacy of that interpretation within the framework of their own culture." An-Na'im, *supra* note 17, at 4; *see also* Sezgin, *supra* note 50, at 23 (regarding building coalitions).

79. "It is important that they [NGOs] receive financial support from the Indonesian authorities, as accepting money from international sources would disqualify them in the eyes of the locals." Westendorp (2015) at 446. *See also* Sezgin, *supra* note 50, at 30 - 31.

influence change than men, as they are typically not well represented in local decision-making bodies.[80] This is of course not a problem limited to customary systems, but is well-known across communities and state institutions. In such contexts it can be difficult to shift the balance in favor of cultural attitudes benefiting women's rights. As such, it is important to promote inclusivity and the participation of women and other relatively vulnerable groups in all fora discussing and determining both state and local norms.[81] This may appear to be a somewhat aspirational recommendation given that transformation in culture and attitudes is required to ensure such inclusive participation. To facilitate the acceptability of women's participation (and even leadership), Nyamu recommends drawing parallels to other institutions in which women play leading roles, such as in churches and self-help groups.[82] In any case, securing inclusive participation at the various levels of norm creation, interpretation, and application requires dedicated advocacy, consensus building, and time.

C. *UN Treaty Body System, Human Rights Implementation and Legal Pluralism*

As illustrated in this first section, traditional dispute resolution mechanisms and customary law are two examples of non-state ordering systems that can be mobilized to help implement human rights. While some states (such as India) are indeed already engaging with such normative systems, the international human rights treaty system continues to be largely focused on states parties and state law. This is reflected in the UN treaty bodies' recommendations to states as part of their supervisory role. Some treaty bodies, such as the Human Rights Committee (HRCee) and the Committee Against Torture, focus predominately on state law and enforcement, whereas other bodies can be seen to take a more holistic approach. For example, the CEDAW Committee and the Committee on the Rights of the Child (CRC Committee) - while still advocating state law - have also recommended that states parties undertake a variety of other measures to effectively implement human rights standards. Such measures have included education (including non-formal education); microcredit programs; creating public dialogue and debate; and the use of theatre, TV programs, art, and

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80. *Id.* at 443; Nyamu-Musembi, *supra* note 31 at 141. *See also* CEDAW Committee, *Concluding observations of the Committee on the Elimination of Discrimination against Women - Kenya*, 5 April 2011, CEDAW/C/KEN/CO/7, ¶ 41.

81. Nyamu, *supra* note 17, at 403; Sezgin, *supra* note 50, at 32.

82. Nyamu-Musembi, *supra* note 31, at 142-43.

music.[83] Importantly, they have also recommended states cooperate with civil society organizations and engage local community and religious groups and leaders.[84]

However, despite all the UN treaty bodies envisaging implementation measures other than those based solely on state law to varying degrees, they still generally address the state as the primary actor. This is an obvious result of the fact that international law is binding upon the state as the party to the treaty. However, such a state-centric approach has certain limitations regarding effective human rights implementation. As reiterated in this section, the state is not necessarily best placed to change a community's norms that challenge international human rights standards. To be effective, measures implementing human rights need to be initiated by or with the relevant cultural community and to enjoy local legitimacy. On this basis, the focus of the UN treaty system on the state for human rights implementation may appear somewhat misplaced. The state measures recommended by the treaty bodies are top down rather than bottom up, which *prima facie* suggests that they are unlikely to be embraced by cultural communities when contrary to local norms.[85] As such, UN treaty bodies could do more to encourage states parties to engage with local actors and norms in legally plural settings, and more could be done by states to collaborate with and support such actors. While the UN General Assembly, CRC Committee, and the Committee on Economic, Social and Cultural Rights have acknowledged that all members of society have responsibilities regarding the realization of human rights,[86] more could be done to flesh out these

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83. UN Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child, *Joint General Recommendation No 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No 18 on the Committee on the Rights of the Child on Harmful Practices*, ¶¶ 63 –81, CEDAW/C/GC31-CRC/C/GC/18 (Nov. 14, 2014).

84. *See e.g.,* Committee on the Rights of the Child, *General Comment No 5*, ¶¶ 56 – 59, CRC/GC/2003/5 (Nov. 27, 2003); CEDAW Committee, *supra* note 80, ¶¶ 18(a), 20(c); CEDAW Committee, *supra* note 58, ¶¶18(c), 22(b)-(c); CEDAW Committee, *supra* note 36, ¶ 21(c).

85. Sezgin notes that government interference can invoke "fierce resistance." Sezgin, *supra* note 50, at 11-12.

86. Committee on the Rights of the Child, *General Comment No 5,* ¶ 56, CRC/GC/2003/5 (Nov. 23, 2003); Committee on Economic, Social and Cultural Rights, *General Comment No 14 The right to the highest attainable standard of health* (art. 12 ICESCR), ¶ 42, E/C.12/2000/4 (Aug. 11, 2000); G.A. Res. 53/144, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/RES/53/144 (March 8, 1999); G.A. Res. 217 A(III), preamble, (Dec. 10, 1948).

responsibilities and the relationship between the state and other actors in society.

For example, the treaty bodies sometimes pass up opportunities to mobilize plural legal systems in the protection of human rights. As an illustration, in response to Kenya's most recent report, the CEDAW Committee noted their concern "that, while women's access to justice is provided for by legislation, their ability to exercise that right and bring cases of discrimination before courts is limited by such factors as legal costs, the persistence of traditional justice systems, illiteracy, lack of information about their rights, and other practical difficulties in accessing courts."[87] As such, they advised Kenya to educate the public and those working in the justice sector about CEDAW, to adopt national legal aid, and implement legal literacy programs.[88] The CEDAW Committee did not refer further to the role played by traditional justice systems, thereby failing to engage Kenya on potential measures to mitigate their negative effects or capitalize on the advantages, simply requesting them "to take all appropriate measures to remove impediments women may face in gaining access to justice."[89]

In response to domestic violence in India, the CEDAW Committee recently recommended, *inter alia*, legislation (including in relation to victim reparation) to criminalize marital rape and to provide harsher sentences for perpetrators of acid attacks.[90] Similarly, regarding early and forced marriages, the Committee recommended India pass and implement legislation and to "effectively investigate, prosecute and punish cases of forced and early marriage."[91] They only recommended state law solutions, but they did not refer to other normative systems as a means to protect women's rights – such as the *Nari Adalat*. This is despite the fact that the Committee noted "the coexistence of multiple legal systems with regard to marriage and family relations in the State party, applying to the various religious groups."[92] The Committee called upon India to ensure equality between men and women in marriage by "[e]nsuring that all the laws on marriage and family relations governing the various religious groups. . . are in full compliance with" CEDAW.[93] Here, taking only a top down approach, the Committee missed the opportunity to recommend India engage with and mobilize these

87. CEDAW Committee, *supra* note 80, ¶ 13.

88. *Id.* at ¶ 14.

89. *Id.* at ¶ 14(c).

90. They also recommended training for police, crisis shelters and medical assistance for victims. CEDAW Committee, *supra* note 36, ¶ 11.

91. *Id.* at ¶ 39.

92. *Id.* at ¶ 40.

93. *Id.* at ¶ 41(a).

other systems as a means to promote women's rights within their cultural context.

The CEDAW Committee has also frequently commented on discrimination regarding women's ownership and inheritance of land. They have noted their concern that customs and traditional practices in Kenya, Indonesia, and India prevented women from owning or inheriting land and other property.[94] As such, they recommended Kenya establish a legislative framework to increase and strengthen women's participation in designing and implementing local development plans and "[i]ntroduce measures to address negative customs and traditional practices, especially in rural areas, which affect full enjoyment of the right to property by women."[95] They urged Indonesia to eliminate this discrimination, to bring all provisions in line with CEDAW, and to "guarantee equal inheritance rights to women."[96] India was advised to "[a]bolish traditional practices and customs that prevent rural women from inheriting and acquiring land and from fully enjoying their rights and guarantee land ownership rights to women."[97] Here again, the Committee identifies competing normative orders as challenging human rights implementation, but treats the norms as an obstacle to be overcome (or abolished), rather than an alternative system for states to engage in human rights protection.

However, the CEDAW Committee has, as noted above, also encouraged states parties to promote public dialogue and engage with communities and civil society. For example, the Committee urged India to:

> initiate and encourage debate within the relevant communities . . . and . . . work with and support women's groups as members of these communities so as to (a) modify social and cultural patterns of conduct to achieve elimination of prejudices and practices based on stereotyped roles for men and women and (b) review and reform personal laws of different ethnic and religious groups to ensure de jure gender equality and compliance with the Convention.[98]

Similarly, Indonesia was urged to:

> [r]aise awareness of religious groups and leaders about the importance of amending legal provisions; increase support for law reform through partnerships and collaboration with Islamic jurisprudence research organizations, civil society organizations, women's non-gov-

94. *Id.* at ¶ 32; CEDAW Committee, *supra* note 58, ¶¶ 45(a), 47(d); CEDAW Committee, *supra* note 80, ¶ 41.

95. CEDAW Committee, *supra* note 80, ¶ 42(a)-(c).

96. CEDAW Committee, *supra* note 58, ¶¶ 46(a), 48(b).

97. CEDAW Committee, *supra* note 36, ¶ 33(a).

98. *Id.* at ¶ 11.

ernmental organizations and community leaders supportive of the advancement of women's rights[99]

These are very positive recommendations and demonstrate the CEDAW Committee's understanding of culture's role in human rights and the interplay of plural legal systems in implementation.[100]

However, these recommendations still tend to be made only in second place, with the primary focus on state legislation and enforcement. For example, as a result of two *fatwas* by the Council of Ulemas, Indonesia withdrew its ban on FGM/C and permitted circumcision by a medical practitioner. In response, the CEDAW Committee encouraged Indonesia to adopt robust legislation criminalizing FGM/C and providing sanctions for offenders.[101] The Committee then added that Indonesia should also raise awareness among religious groups and leaders, and encourage comparative studies with other groups that do not practice FGM/C.[102] While this is an important addition and indicates an awareness of engaging in this manner, it comes only after the initial focus on state law and criminal sanctions. As this example shows, Islamic law as determined by the Council of Ulemas clearly has significant influence in Indonesia and its opposition to a state law can override those provisions. As such, it is essential (not secondary) to mobilize that plural legal system in order to arrive at a legitimate and sustainable position against FGM/C in Indonesia.

The analysis in this section indicates that all actors in society can and, at times, do play an important role in human rights implementation. This is especially so when overlapping normative orders exist, impacting particular human rights. While more progressive than some of the other UN treaty bodies, the CEDAW Committee could be more consistent in engaging with other normative orders. In this way, and via state mediation, international law and non-state law can be in conversation, mutually influencing and shaping one another.[103] Given international law's focus on the state, it does

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99. CEDAW Committee, *supra* note 58, at ¶ 18(c).

100. Quane argues that the treaty bodies "envisage an inclusive and participatory law reform process" that "effectively attempts to co-opt these traditional and religious leaders." *See, e.g.*, Helen Quane, *Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?* 33 OXFORD J. LEGAL STUD. 699, 699-700 (2013).

101. CEDAW Committee, *supra* note 58, ¶¶ 21, 22(a).

102. *Id.* at ¶¶ 22(b)-(c).

103. Quane notes that we are in "the very early stages in this relationship." Helen Quane, *International Human Rights Law as a Catalyst for the Recognition and Evolution of Non-State Law*, *in* NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM 11, 113, 128, 132 (Michael A. Helfand ed., 2016).

not deal well with non-state actors or law or their incorporation/co-optation into the human rights paradigm. Rather than states being the actors and the rest of society being passive, community members (and not just leaders) have agency and the ability to contribute, shape, and change local cultural norms. As an alternative (or in addition) to state legislative intervention in other normative orders, states should support local actors advocating human rights solutions within their cultural setting. Such support can include the state provision of information, education, facilities, and resources including funding. While such processes may take time, they can contribute to effective human rights implementation by creating the conditions for sustainable and meaningful change in the relevant normative order.[104] Using other systems than state law to protect human rights may not deliver instant results, but that is also frequently the case even when a law is passed.[105] In this way, as Nyamu argued, it is possible to realize rights through local practice and custom rather than relying on the national formal legal system.[106]

Similarly, at the adjudication stage, supranational bodies can protect the rights of cultural communities by recognizing and accommodating non-state norms. Rather than focusing only on state laws or on state-endorsed culture to understand the rights of certain individuals and communities, supranational bodies have increasingly been called upon to recognize other norms in determining cultural claims before them. This is done in a more explicit manner than in implementation, as members of such cultural communities are parties to the adjudication and place their complaints directly before the supranational bodies. In this way, they are able to "translate" their claims across normative systems, in a similar way to which international norms are translated into local system via implementation. The consideration of other norms than state law has been essential in protecting the rights of various non-dominant groups in adjudication by the Inter-Ameri-

104. Quane iterates the central role of the state under international law in this process, and the utility of such processes despite the lack of 'quick fix' solutions. Quane, *supra* note 100, at 702.

105. Brems argues that "it makes no sense to change the laws if these changes are not supported by a change in the minds of the people. Therefore, human rights obligations that require profound societal changes should be realized progressively within a reasonable timeframe." Brems, *supra* note 21, at 18.

106. Nyamu-Musembi, *supra* note 31, at 126. Also on the importance of articulating state and non-state forums as a way to advance human rights, *see* Giselle Corradi, *Can Legal Pluralism Advance Human Rights? How Development Actors Can Contribute* 26 EUR J DEV RES 783 (2014) (discussing how international aid actors can engage with legal pluralism and promote human rights within community structures of dispute processing).

can and European Courts of Human Rights. This is considered in more detail in the section below.

II. LEGAL PLURALISM AND HUMAN RIGHTS ADJUDICATION: POLYPHONY IN THE COURT ROOM BEYOND STATE-SANCTIONED NORMS AND TRADITIONS

Starting from the premise, discussed above, that insights from legal pluralism are helpful in analyzing the operation of a multi-layered regime of international human rights law, this second section focuses on supranational adjudication. Litigation offers a socio-cultural forum for mobilizing different politics, values, and normative orders. As a decision-making process, litigation is a space of dialogue and power struggles.[107] Through adjudication, several normative postulates compete and contest one another. While some of them are disregarded, others are appropriated or accommodated by the adjudicator. In this regard, the Inter-American and the European Courts of Human Rights (IACtHR and ECtHR, respectively) are no exception. Moreover, because these courts occupy an intermediate position between the local and the global, between states and non-state actors, they are well placed to deal with legal pluralities. In this section, the paper draws attention to issues of normative and cultural recognition from the perspective of non-dominant actors in litigation. As such, it departs from a focus on the normative space granted by human rights courts to states and situates non-dominant cultural claims within a legal pluralist perspective. This section discusses the accommodation of those claims by the Inter-American and the European Courts of Human Rights and the main challenges confronted by them in doing so. Particular attention is given to the strategic use and navigation of legal claims, the mechanisms used by human rights courts to accommodate non-dominant normative and cultural claims, and the risks and opportunities arising from the way such courts recognize and accommodate cultural diversity.

Means of incorporation and recognition of legal pluralities are usually studied in the framework of the interactions between state and non-state normative orders, such as when customary or religious laws become part of state laws by way of legislation or judicial practice. However, it has been increasingly acknowledged that international human rights courts also have

107. This argument has been mostly advanced in the constitutional context. *See* CHRISTOPHER F. ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW 242 (2007); Sandra Liebenberg, *Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement*, 12 AFRICAN HUM. RTS. L.J. 1, 10-11 (2012) (relying on theories of deliberative democracy).

to deal with issues of incorporation of normative communities. This is especially so when those organs are called upon to make human rights standards reflective of cultural diversity.[108] In the last decades, scholars paid increasing attention to how constitutional and supranational bodies deal with legal plurality.[109] In this framework, the literature usually elaborates on devices such as subsidiarity (discussed above), federalism, and the margin of appreciation.[110] Kinley adds to this list of devises the limitation clauses in international treaties, which permit differences pertaining to morality, security, etc., and the principle of exhaustion of domestic remedies, which gives priority to the domestic handling of a complaint before it can be heard at the international level.[111]

In order to understand how such legal techniques play out in incorporating or recognizing cultural or normative hybridity, it is useful to consider the margin of appreciation. The European Court's margin of appreciation is a well-known example of 'deference'[112] because the regional order—represented by the European Convention on Human Rights and its monitoring body, the ECtHR—cedes space to 'another' legal system - in this case, that of member states- through the upholding of its normative outputs. It is said that in this way the ECtHR allows local normative and cultural variation.[113] A similar logic -giving space to domestic norms and cultures- underpins the other legal devices listed above.

It should be observed, however, that the aforementioned tools are primarily concerned with making room for or reconciling the normative variation among constituencies that are institutionally relevant in the current constitutional and international order. That is, communities represented by, *inter alia*, nation-states (and their agents), inter-state bodies and transnational polities (such as the EU). Thus, when it is said that such devices allow local normative variation, it is important to understand how this attests to an interesting normative interaction that Santos calls *dislocation*. As

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108. Fuentes et al., *supra* note 6, at 60; *Int'l Council on Human Rights Policy, When legal Worlds Overlap: Human Rights, State and Non-State Law* 89 (2009); *see also* Roderick A. Macdonald, Pluralistic Human Rights? Universal Human Wrongs?, *in* DIALOGUES ON HUMAN RIGHTS AND LEGAL PLURALISM 15 (René Provost & Colleen Sheppard eds., 2013); Oomen, *supra* note 6, at 432.

109. *See* Michael Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT'L J. CONST. L, 415, 418 (2008).

110. *Id.* at 445.

111. Kinley, *supra* note 20, at 52; *see also* Berman, *supra* note 8, at 1209-10.

112. "The State may grant social groups or communities a private legal space, a process sometimes referred to as 'deference.'" *Int'l Council on Human Rights Policy, supra* note 108, at 91.

113. Berman, *supra* note 8, at 1201; Brems, *supra* note 21, at 14.

he explains, with the emergence of supranational laws such as human rights systems, the position of states has *dislocated* and acquired a local or infra-state character. It is in that position that nation-states call upon supranational orders to recognize their local normative community.[114] Yet, we should not lose sight that from the perspective of many groups and individuals, the state and its laws continue to exercise or consent to their oppression. Further, they may have reason to question how the state defines its local culture. As a result, such people also turn to supranational orders to assert their religious, traditional, and other cultural views on human rights, and they expect those orders to reduce or deny their normative deference towards the state and rather to incorporate people's cultural claims. Supranational human rights bodies may therefore face demands of normative/cultural accommodation pulling in opposite directions. Against this backdrop, this section examines how regional human rights courts in Europe and the Americas accommodate normative and cultural plurality advanced by those who are usually under-represented within state institutions.

People belonging to ethnic, cultural and religious communities have brought a number of cases before the ECtHR and the IACtHR. Many of them assert cultural recognition while contesting socio-economic arrangements. We can think of a number of illustrative cases, such as indigenous land-related claims based on customary norms and practices; complaints brought by Roma and Traveler people to accommodate their lifestyle of living in caravans, whether they are nomadic or not; and cases where women assert recognition of non-official customary and religious marriages to access pensions granted to widows. These cases, which are discussed in the sections below, are especially interesting from a legal pluralist perspective. In the first place, these cases raise important issues of accommodation and recognition of the commitments governing the lives of applicants with ethnic, religious, and cultural affiliations.[115] Drawing on Tamanaha's categorization, such commitments reflect customary normative orders as well as community/cultural normative systems.[116] In the words of Malik, they are

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114. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 94 (2d ed. 2002).

115. For instance, many have questioned their subjection to "general laws and policies [which] failed to accommodate their particular needs arising from their tradition of living and travelling in caravans." *See* Beard v. United Kingdom, App. No. 24882/94, Eur. Ct. H.R. ¶ 130 (2001); Chapman v. United Kingdom, App. No. 27238/95, Eur. Ct. H.R. ¶ 127 (2001); Coster v. United Kingdom, App. No. 24876/94, Eur. Ct. H.R. ¶ 139 (2001); Lee v. United Kingdom, App. No. 25289/94, Eur. Ct. H.R. ¶ 127 (2001).

116. Tamanaha, *supra* note 1, at 397-99.

"minority legal orders."[117] Many of these cases relate to claims for recognition of non-conventional lifestyles, accommodation of non-dominant cultural traditions and practices, as well as incorporation of different worldviews and norms in state laws. Moreover, some cultural claims have important material and institutional implications that transcend issues of symbolic and spiritual preservation of cultural communities or legal clashes. As will be seen, at the heart of some complaints are entrenched dynamics of prejudices and discrimination, coupled with tensions between multi-level government authorities, non-state actors, and trends of privatization.[118]

Thus, these cases confront the two major regional human rights courts with a complex legal landscape marked by legal overlaps and competing normative authorities. They disclose the difficult interaction between, for example, central government legislation and ordinances, local development plans and regulations, local authorities, and private actors' practices and interpretations concerning land, social security, family, housing, planning, property, and environmental protection, as well as communal cultural commitments and customary laws, among others. Rather than applying *the law* – the ECHR and the American Convention on Human Rights (ACHR) – in a hierarchical fashion to *the* domestic legal order, judges from the regional courts must deal with all that normativity and more. Indeed, applicants to these courts –through the *translation* done by lawyers and NGOs[119]– rely on their affiliation to religion or to Roma and indigenous cultures in the light of the ECHR and the ACHR. Additionally, they also resort to laws outside the courts' jurisdiction, such as the Framework Convention for the Protection of National Minorities, recommendations by the Parliamentary Assembly of the Council of Europe, the UN Declaration on the Rights of Indigenous Peoples, and the ILO Convention No. 169.

It follows that, as in other social fields discussed in the first section, when it comes to international human rights systems, people not only have

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117. Maleiha Malik, *Religion and Minority Legal Order*, RELIGION, SECULARISM AND CONSTITUTIONAL DEMOCRACY 358, 358-60 (Jean Cohen & Cécile Laborde eds., 2016).

118. *See, e.g.*, Robert Home, *Gypsies and Travellers in the United Kingdom: Planning, Housing and Human Rights in a Changing Legal Regulatory Framework*, 20 STELLENBOSCH L. REV. 533, 534 (2009).

119. Lawyers and NGOs are not just "intermediaries who translate global ideas into local situations" but also "retranslate local ideas into global frameworks." SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 134 (2006).

recourse to more than one human rights body (forum shopping),[120] but also they use more than one law to assert their claims depending on context, strategies, and other factors. Once such claims reach the judicial body, a number of techniques play out in determining whether and how to recognize and accommodate culturally-based rights claims. The variety of normative claims and sources that can be brought to the supranational fora injects dynamism into the system, which facilitates the transfer of legal postulates from one struggle to another, serving the interests of different culturally defined groups. At the same time, this dynamism incentivizes these human rights courts to endorse evolving interpretations that borrow or integrate a variety of norms while accommodating cultural diversity - albeit not without difficulties. These processes are further discussed below. We start this discussion by exploring the navigation and appropriation of cultural claims that depart from state-backed norms on land use and ways of life. Here, we focus on cases concerning indigenous and Roma/Travelers rights claims. Next, we discuss other examples concerning state regulations on marriage and social security *vis-a-vis* the rights of women committed to their ethnic and religious affiliations. Subsequently, we explore the mechanisms that have, or might have, assisted human rights courts in accommodating non-dominant cultural diversity. Finally, we reflect upon some of the challenges involved in these processes of normative interaction and accommodation.

A. *Dealing with Non-State Norms on Land and Ways of Life: Indigenous and Roma/Travelers Cases*

A case in point is to analyze indigenous land rights claims before both the European and Inter-American Courts of Human Rights. So long as such claims assert communal rights based on customary tenure, on the use of land or even on the spiritual connection with it and its resources, they depart from dominant notions of property and modes of living usually endorsed by states to regulate land and natural resources matters.

In the European context, more than two decades ago, the former European Commission of Human Rights addressed indigenous claims over ancestral land and natural resources in relation to the construction of a hydroelectric dam on traditional Sami land in Norway.[121] Although the Commission did not find for the applicants and reframed their property

120. This is possible because, to use McCruden's words, supranational courts are "[s]haring [an] overlapping legal space." *See* Christopher McCrudden, *The Pluralism of Human Rights Adjudication*, REASONING RIGHTS. COMPARATIVE JUDICIAL ENGAGEMENT 3, 6 (Liora Lazarus, Christopher McCrudden & Nigel Bowles eds., 2014).

121. G. and E. v. Norway, App. No. 9278/81 & 9415/81, Eur. Ct. H.R. (1983).

claims as an issue of "private life, family life and home" under Article 8 ECHR, it stated that minorities were, in principle, entitled to claim the right to *respect for a particular way of life* they may lead as private life, family life, or home.[122] The normative recognition of a *traditional way of life* (inclusive of a livelihood deemed culturally relevant) has been linked to the international protection afforded to the cultural life of minorities, not just in the European system, but also in the UN context[123] and the Inter-American system.

It is well known that the IACtHR has been faced with numerous complaints concerning indigenous and tribal customary rights to ancestral lands and natural resources, and that it has recognized their traditional communal rights. In doing so, the Court relied on the right to property in article 21 ACHR, which has been reinterpreted as embracing collective forms of land ownership based on indigenous usage and customs. In the Court's view, "disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which would render protection under article 21 of the Convention illusory for millions of persons."[124] At the heart of this normative construct lies the protection of indigenous and tribal people's way of life and their *cultural identity*. According to the Court, the starting point of such a particular way of life is their close relation with their traditional lands and natural resources, "not only because they are their main means of survival, but also because they form part of [. . .] their cultural identity."[125] Interestingly, the ACHR does not contain a right to cultural identity or integrity, as it is often recognized in the domestic laws of several American states. However, the

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122. *Id.* at 35.

123. UNCHR Gen. Cmt. No. 23, art. 27, *Rights of Minorities*, ¶ 7, CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994); *see also* MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 658-64 (2005).

124. Sawhoyamaxa Indigenous Community v. Paraguay, Merit, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 120 (Mar. 29, 2006) [hereinafter Sawhoyamaxa v. Paraguay]; Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 161 (June 27, 2012) [hereinafter Sarayaku v. Ecuador]; and, Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 111 (Oct. 14, 2014) [hereinafter Kuna and the Emberá v. Panama].

125. Yakye Axa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 135 (June 17, 2005) [hereinafter Yakye Axa v. Paraguay]; Sawhoyamaxa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶118 (Mar. 29, 2006); Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 261 (Aug. 24, 2010) [hereinafter Xákmok Kásek v. Paraguay].

Court has not only relied on the concept of cultural identity to sustain a novel interpretation of the right to property, but has furthermore recognized a right to cultural (and collective) identity of indigenous communities – and found that states violated this right.[126]

While the case law on indigenous rights by the ECtHR remains relatively scarce and provides limited insights on the accommodation of indigenous lifestyles and norms,[127] issues of accommodating a minority way of life have gained resonance in the Court's jurisprudence regarding Roma and Travelers. In a number of such cases, nomadic as well as sedentarized Roma and Travelers turned to the ECtHR to redress evictions or threats of eviction. Their eviction was usually due to the infringement of land-use regulations regarding stationing caravans on sites owned, rented or occupied by Roma or Travelers. In response, they claimed that state authorities failed to accommodate their traditional practice of living in caravans. According to Acton, Caffrey, and Mundy, different normative systems are appropriate for different lifestyles amongst the Roma. The "feud model," which generally relies on the nuclear family that constitutes an independent economic unit, belongs to a more nomadic lifestyle. In turn, the "tribunal model" fits a more settled and structured lifestyle.[128] These norms and practices are nonetheless dynamic and adapted over time, especially as a result of technical and socio-economic changes prompted by neoliberal policies.[129] Of note, some of the factors identified as obstructing the accommodation of Roma's lifestyles are a system of land ownership based on exclusive occupation that rules out traditional usages of the land, alongside planning regulations that control land use as a form of development.[130]

In *Buckley,* the first Roma case decided by the ECtHR, the applicant claimed that regulations impeding the occupation of her caravan on her own land violated her right to respect for her home and her right to private and

126. Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 213, 217, 220 (June 27, 2012).

127. Cases as decided by the Court on their merits. Timo Koivurova, *Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects*, 18 INT'L J. MINORITY & GROUP RTS. 1, 8-10 (2011).

128. Thomas Acton, Susan Caffrey & Gary Mundy, *Theorizing Gypsy Law*, 45 AM. J. COMP. L. 237, 244, 248-249 (1997).

129. On the detrimental impact that the international shift toward neoliberal policies has had on ethnic minorities and indigenous peoples' lives. *See, e.g.*, Nando Sigona & Nidhi Trehan, *Introduction: Romani Politics in Neoliberal Europe*, ROMANI POLITICS IN CONTEMPORARY EUROPE: POVERTY, ETHNIC MOBILIZATION, AND THE NEOLIBERAL ORDER 1, 2-4 (Nando Signona & Nidhi Trehan eds., 2009).

130. Pat Niner, *Accommodating Nomadism? An Examination of Accommodation Options for Gypsies and Travellers in England*, 19 HOUSING STUD. 149, 152 (2004).

family life (Art. 8 ECHR).[131] She contended that this right protected her Gypsy *way of life*, which involved living in caravans and traveling.[132] The former European Commission found for the applicant, supporting the applicability of the concept of a traditional way of life to the Roma.[133] At the time, this legal reasoning was not upheld by the ECtHR.[134] It later did so, establishing the protection of family and private life of a particular cultural identity as one of the tenets of the ECtHR case law on Roma and Travelers. The Roma/Gypsy custom of living in caravans and traveling entered the scope of article 8 ECHR, reshaping the meaning of both "home" and "private and family life."

The cases discussed here also serve to illustrate that the porosity of both law and culture has made it possible for different actors to strategically use legal concepts through appropriation and integration of normative postulates that navigate across different settings. A good example is provided by the legal appeal of a right to protection of a way of life, which has prompted further navigation of the concept within the European human rights system. Aside from its application in the context of indigenous, Roma and Travelers' struggles, the right to a way of life has also been used to challenge state bans on fox and other animal hunting with dogs. This is an old traditional practice that persists despite UK laws prohibiting it and the strong opposition of animal rights defenders.[135] Indeed, in a case declared inadmissible by the ECtHR, individuals and a countryside association from the UK claimed human rights protection of a particular lifestyle encompassing the cultural traditions of rural 'hunting communities' and their economy.[136] Regardless of the Court's reasons for declaring the petition manifestly ill-founded,[137] the case reveals that a wide set of normative

131. ECHR art. 8.

132. Buckley v. United Kingdom, Judgment, App. No. 20348/92, Eur. Ct. H.R. Dec. & Rep. ¶ 53 (1996).

133. "[The Commission] accepts, as submitted by the applicant, that living in a caravan home is an integral and deeply-felt part of her gypsy life-style." *Id.* at ¶ 64.

134. However, the argument did resonate for some judges of the Court who dissented from the majority position. *See* dissenting opinions of Judge Pettiti, Judge Lohmus and Judge Repik. *See id.*

135. For a general overview of the practice and its persistence despite the state ban. *See* Laurence Dodds, *Ten Years on from the Fox Hunting Ban, has Anything Really Changed?*, THE TELEGRAPH, http://www.telegraph.co.uk/news/earth/countryside/11418998/Ten-years-on-from-the-hunting-ban-has-anything-really-changed.html (last visited, April 14, 2016).

136. Friend v. United Kingdom, App. No. 27809/08, Eur. Ct. H.R. ¶¶ 36-38 (2009).

137. The ECtHR basically confined its protection of way of life to that of ethnic or other 'discrete minority groups' and to activities that were not of a public nature barely

claims over tradition, practices, and livelihoods may be grounded in the protection of a particular way of life and cultural identity covered by the right to private and family life under Article 8 ECHR. This also suggests that courts will have an increasingly difficult task in justifying which ways of lives are accommodated or formally recognized – and those that are not.

Likewise, in the Inter-American system, legal postulates on land rights tied to cultural identity resonate beyond indigenous peoples. Indeed, they have also been used in the context of afro-descendant rural people claiming collective rights over land and resources occupied by them, as demonstrated by the *Saramaka* and *Operation Genesis* cases.[138] Both cases concerned afro-descendant communities that the Court considered socially and culturally distinguishable from the rest of the state population and, which had, according to the Court, a special link to the land. In the first case, extractive industry concessions over the community's land were granted to private actors, while in the second case the resident afro-descendant population was displaced. In both cases, the IACtHR regarded them as 'tribal' peoples and granted rights accordingly.[139] In taking this decision, the Court underlined the state obligation to protect an indigenous-like way of life and cultural identity.

The extension of indigenous-like protection to afro-descendant rural people and the Court's definition of Article 21 ACHR as including non-Western forms of property suggest that the aforementioned norms and interpretations might be taken further and applied to other rights struggles, such as that of peasants, pastoralists, and other rural communities.[140] Such groups are also in a position to articulate similar legal claims as they have a strong

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linked to personal autonomy and identity. It also argued that the ban did not take up the applicants' employment nor did it stigmatize them in the eyes of society *Id.* at ¶¶ 43-45.

138. Afro-descendant communities displaced from the Cacarica River Basin. Operation Genesis v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) (Nov. 20, 2013); Saramaka People v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) (Nov. 28, 2007).

139. Operation Genesis, Inter-Am. Ct. H.R. (ser. C) No. 270, ¶¶ 346-47; and, Saramaka People, Inter-Am. Ct. H.R. (ser. C) Np. 172, ¶ 80. The Court's interpretation has been maintained subsequent cases concerning afro-descendant communities. See e.g. Community Garífuna Triunfo de la Cruz & its members v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) (Oct. 8, 2015) and Garífuna Punta Piedra Community and its members v. Honduras, Inter-Am. Ct. H.R. (ser. C) (Oct. 8, 2015).

140. The former UN Special Rapporteur for the right to food, for instance, has addressed this question and called to extend the protection to at least certain traditional communities that entertain a similar relationship with their ancestral lands, centered on the community rather than on the individual. Oliver De Schutter (Special Rapporteur on the Right to Food) The Right to Food, ¶¶ 13, 26, U.N. Doc. A/65/281 (Aug. 11, 2010).

cultural connection to the land and its natural resources, and they too endure dispossession, discrimination, and insecurity in land tenure. Yet, at the same time, the cultural script of the legal protection developed around indigenous' identity and lifestyle cast doubts on its ability to grant protection to other rural people who may not fit the protected cultural identity. This potential exclusionary effect attests to the problem generated when courts essentialize culture and identity in order to protect them. This issue is discussed further in section III below.

B. *Dealing with Non-State Norms on Marriage and Religion: Cases Concerning Women's Rights*

Other relevant cases from the ECtHR are those regarding the granting of legal effects to non-official marriages performed according to the cultural affiliation of the applicants. In *Muñoz Díaz v. Spain*, a widow, who married under Roma rites, claimed recognition of her marriage and the ensuing survivor pension granted by the state following the death of the spouse. She was unsuccessful in her claims for equal recognition of her Roma marriage. The ECtHR found no obligation in that respect for the respondent state. However, the ECtHR also held that the state's refusal to recognize the effects of the Roma marriage for the purposes of the survivor's pension was disproportionate. Remarkably, it provided that "the force of the collective beliefs of a community that is well-defined culturally cannot be ignored."[141] In addition to the applicant's belief in the validity of her marriage celebrated according to the rites and traditions of the Roma minority to which she belonged, the Court stressed that such rites and traditions were not disputed or regarded as being contrary to public order by the state. Key to the Court's reasoning was also Spain's prior acknowledgement of a widow's entitlement to a survivor's pension in cases where the marriage was not valid but there was a good faith belief in the existence of a marriage. Furthermore, the Court relied on Spain's several official acts of recognition of the marital status of the applicant. These state-sanctioned forms of recognition appeared very relevant for the ECtHR to accept the claim that the union celebrated under Roma norms should at least generate a legal entitlement to survivor pension.[142]

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141. Muñoz Díaz v. Spain, App. No. 49151/07, Eur. Ct. H.R. ¶ 59 (2009).

142. There are other cases in which it is possible to appreciate the Court's deference regarding state acts of recognition of legal plurality. For instance, in *Károly Nagy v. Hungary* (which concerned a compensation claim against the Hungarian Calvinist Church following the dismissal of a pastor of the Gödöll"o parish) the ECtHR noted that "excluding claims based on ecclesiastical law from the jurisdiction of State courts

Not very long after, the Grand Chamber of the ECtHR ruled on a very similar complaint in *Şerife Yiğit v. Turkey*. The facts in this case were for the most part analogous to those in *Muñoz Díaz*, with the important difference that the applicant had married according to Islamic rites. At first glance, the case of Mrs. Yiğit might appear as not being so much about the accommodation of non-dominant cultural claims, as it was the case of Mrs. Muñoz in the Spanish context. This is on account of the fact that Islam is the religion of the large majority of Turkey's population. Yet, the *Şerife Yiğit* case is still relevant for the analysis undertaken here. Besides tensions and power struggles between secularists and religious groups in Turkey, it should be recalled that Muslims are certainly a non-dominant minority in the context of Europe. As such, the Court's view on Islam-related rights claims, even in the context of Turkey, are significant for whether and how the ECtHR and other countries will accommodate Muslims' needs and concerns. Moreover, the specific situation of Mrs. Yiğit was one of considerable vulnerability, and her complaint in any case concerned the tension between her cultural and normative commitments and those of the state.

Observing that Turkey, unlike Spain, had not given any official recognition to any form of non-civil law marriage, the Court found that Mrs. Yiğit, had no legitimate expectation of obtaining a survivor's pension and social security benefits on the basis of her "partner's" entitlement. Furthermore, the ECtHR attached considerable weight to the specific socio-cultural context invoked by the state, particularly with regard to Islam. In fact, in addition to the importance Turkey accorded to the principle of secularism, the Court noted that this state "aimed to put an end to a marriage tradition which places women at a clear disadvantage, not to say in a situation of dependence and inferiority, compared to men."[143] The Court assessed the state's refusal to recognize religious marriages in light of the prohibition of polygamy and the respect for gender equality. In other words, the refusal to recognize the applicant's religious marriage for the purposes of a survivor pension ultimately rested on the state's and the Court's views of the merits and value of Islam. Interestingly, the Court's appraisal of Islam does not appear to incorporate the viewpoint of religious women such as Mrs. Yiğit, but rather seems to uphold a stereotypical idea of what Islam entails for Muslim women. Thus, paradoxically, it remains unclear whether the ECtHR considered the impact of the legal position it adopted upon Mrs. Yiğit in particular and Muslim women in general. Lacking access to social security rights, after having taken care of the home, the deceased spouse

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does not violate Article 6 § 1 of the Convention [right to access to court]." Károly Nagy v. Hungary, App. No. 56665/09, Eur. Ct. H.R. ¶ 73 (2015).

143. Şerife Yiğit v. Turkey [GC], App. No. 3976/05 Eur. Ct. H.R. ¶ 81 (2010).

and six children, Muslim women like Mrs. Yiğit, were actually the most burdened by the legal solution.[144]

Finally, it is noteworthy that in *Muñoz Díaz* as well as some other cases regarding land-use permission for Roma and Travelers' caravans, the ECtHR conceded that:

> while the fact of belonging to a minority does not create an exemption from complying with marriage laws [or planning laws in the case of caravans], it may have an effect on the manner in which those laws are applied. [. . .] the vulnerable position of Roma [and here we could also think of other social groups] means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.[145]

But how do human rights courts assess the extent to which states have taken steps to incorporate and give consideration to those views and needs? In cases like the ones discussed above, one may ask the extent to which courts could examine whether other measures less rights-restrictive could have been adopted or explored, such as equalizing the legal effects of long-lasting cohabitation or encouraging civil registration of different forms of marriage. For instance, in cases dealing with the eviction of Roma and Travelers, inquires could determine whether enabling common sites, providing alternative pitches for parking caravans, or even regularizing informal Roma settlements were considered. In both kinds of cases, questions of governmental dialogue or engagement with the communities at stake might also be a matter for judicial consideration.

C. *Mechanisms to Recognize and Accommodate Non-Dominant Norms and Cultural Practices*

The cases examined thus far underscore the extent and the way in which non-dominant cultural claims have penetrated the judicial interpretation of human rights courts. They gave rise, for instance, to a collective right to land and natural resources, as well as a right to cultural identity and

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144. For a critical view on the approach taken by the Court in this respect, see the comment by Saïla Ouald Chaib at the Strasbourg Observers Blog. Saila Ouald Chaib, *Serife Yigit v. Turkey: The Court did it Again!*, STRASBOURG OBSERVERS (Nov. 10, 2010), http://strasbourgobservers.com/2010/11/10/serife-yigit-v-turkey-the-court-did-it-again.

145. *See* Muñoz Díaz, Eur. Ct. H.R. ¶ 61 (2009); Connors v. United Kingdom, App. No. 66746/01, Eur. Ct. H.R. ¶84 (2004); Chapman v. United Kingdom, App. No. 27238/95, Eur. Ct. H.R. ¶96 (2001); Winterstein and Others v. France, App. No. 27013/07 Eur. Ct. H.R. ¶ 76 (2013).

to a traditional lifestyle. If we were to stick to the idea that human rights law is what the drafters originally wrote or what a group of sovereign states originally agreed upon, it would be difficult to explain those normative developments. The idea of interacting and evolving laws, as offered by a legal pluralist approach, is much more useful to understand the dynamism of the rights enshrined in human rights treaties, which take divergent and particular meaning in certain contexts. In some of the above examples, the European and Inter-American courts aimed at giving their respective conventions effective force in contemporary circumstances of cultural and normative plurality. In several of the cases revised both Courts relied, although perhaps to different degrees, on a variety of normative sources: international, regional, national, and even non-state law. In this regard, it is important to consider that litigants (in their quality of "translators") play a key role in integrating a vast set of norms into the adjudicating setting.

Regarding the IACtHR's evolutionary interpretation of the ACHR, the integration of international norms outside the Inter-American context has played out significantly. The IACtHR has relied on the International Labour Organization's Convention No. 169 concerning indigenous and tribal peoples in independent countries and other general and specific instruments, some of which were considered even if the state in question had not ratified them. The Court has also referred to domestic laws and, more importantly, to indigenous laws and customs. Throughout the process, the Court is guided by an interpretation *pro-personae,* according to which the Convention provisions should be read in the way that is most protective of human rights.[146]

Similarly, the ECtHR also appears influenced by other international sources, although most of them are state-generated. The ECtHR considers, for instance, the European Framework Convention for the Protection of National Minorities, the European Social Charter, Resolutions and Recommendations of the Committee of Ministers, and the Parliamentary Assembly of the Council of Europe. It has also considered decisions from the European Committee of Social Rights, and General Comments of the UN Committee on Economic, Social and Cultural Rights. On several occasions, the Court has also referred to the ECHR as "a living instrument." Albeit the Court often uses the living instrument doctrine to highlight common normative developments within the Council of Europe (which evokes a sense of legal homogeneity rather than plurality), the appeal of the living instrument doctrine to a broader set of norms has been employed to justify a departure

146. *See, e.g.*, Yakye Axa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶125-30 (June 17, 2005).

from the cultural and normative setting prevailing in the responded state.[147] It follows that the living instrument device may be of particular relevance to uphold or accommodate cultural and normative claims that do not enjoy state recognition. Moreover, the living instrument approach is also important to consider in the context of human rights implementation, as cultural norms are dynamic and therefore the implementation measures based upon them need to be revisited to ensure that they remain relevant and up-to-date.

One may therefore argue that an "integrated perspective to human rights"[148] facilitated the cultural re-signification of legal concepts (e.g., property, home, family life) and the accommodation of non-dominant group's norms and commitments. Although the idea of integration in human rights law is usually seen as standing in opposition to legal pluralism,[149] the jurisprudence examined here suggests that bringing in a broad range of relevant norms may assist courts and litigants in accounting for particular normative and cultural demands. In this sense, integrating human rights norms in an interpretive process does not necessarily produce, harmonized, or uniform normative outcomes.[150] Equally in the case of implementation, different normative orders may be integrated to deliver a unique measure that protects the right in question in that context. Recalling that cultural systems are in perpetual evolution, the fact that normative systems influence and shape one another is not problematic. On some occasions, one system or the other may be effective, however, novel measures (like the *Nari Adalat*) could be created by integrating normative systems.

Furthermore, the case law examined also shed light on the importance of participatory mechanisms. An outstanding approach in this respect is that adopted by the IACtHR in indigenous land rights cases, where it has considered that engagement with the affected communities themselves allows each relevant actor to define and advance their interests and needs. This is reflected in the state duty to ensure informed prior consultation on matters affecting indigenous communities and even their free prior informed con-

147. George Letsas, *The ECHR as a living instrument: its meaning and legitimacy*, *in* CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 112 (Andreas Føllesdal et al. eds., 2013) (referring to the third pattern disclosed by the Court's early case law which portrayed the convention as a living instrument. The author regards the use of present-day developments in the Council of Europe as a counterweight to the moral climate prevailing on the respondent state as "the central feature of evolutive interpretation as applied by the old Court.")

148. Eva Brems, *Should Pluriform Human Rights become one? Exploring the benefits of Human Rights Integration*, 4 EUROPEAN J. HUM. RTS. 447, 451-456 (2014).

149. Oomen, *supra* note 6, at 484.

150. Brems, *supra* note 148, at 469.

sent in certain circumstances.[151] This is a valuable tool for bridging the legal and cultural worlds of the parties at stake. By requiring states to undertake a process of dialogue, the IACtHR fosters an encounter between the abstract/ universal human rights, the state normative order, and the particular needs, values, and norms of indigenous and tribal people. Participation can also mitigate the objectivizing force of the legal process over cultural identity claims, as those belonging to the cultural group in question will be able to define and contest what is regarded as their culture.

By encouraging states to use participatory methods, human rights courts may contribute to a more dialogical construction of rights, which is something that should not be confined only to indigenous or tribal people's cases. Dialogical mechanisms may be helpful in a number of different situations, such as in cases of informal settlements and forced eviction, which underlie the plight of many Roma and Travelers,[152] or in cases concerning religious claims. It follows then that the ECtHR could also benefit from promoting the use of participatory mechanisms. In doing so, the Court might endorse a sort of indigenous-like consultation requirement, or introduce this as a procedural safeguard or as an element in its proportionality analysis. The ECtHR could, for instance, take into account the extent to which state authorities and the affected communities have endeavored to find solutions through dialogue, or it may weigh up evidence provided by empirical studies based on the views of those concerned.[153]

This also applies to human rights implementation, and some rights specifically require a state to involve the public through consultation and participation when implementing rights, such as the right to health.[154] Public participation is an important way to achieve community buy-in or endorsement, and promote the effectiveness of an implementation measure. This is particularly important given that in many states (especially post-colonial states), the state itself may not be the locus of authority and the participation of certain actors who do hold such authority (like the Council of Ulemas in Indonesia) is crucial. The UN treaty bodies have recognized the

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151. Saramaka People v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 134-37 (Nov. 28, 2007).

152. On the use of consultation like mechanisms, *see, e.g.*, Comm. On Econ., Soc. & Cultural Rights, International Movement ATD Fourth World Against France, ¶ 78, No. 33/2006 (Dec. 5, 2007); UN Comm. on Econ., Soc. & Cultural Rights, Forced Evictions, and the Right to Adequate Housing, ¶¶ 14, 16 UN Doc. E/1998/22 (May 20, 1997); *see also* Liebenberg, *supra* note 106, at 26.

153. For this it would be of course necessary that litigants incorporate this kind of material into the judicial setting.

154. Comm. On Econ., Soc. & Culture Rights, The Right to the Highest Attainable Standard of Health ¶¶ 11, 17 Doc. E/C. 12/2000/4 (Aug. 11, 2000).

importance of public dialogue and participation, and often calls states to engage thoroughly with civil society, community and religious leaders when implementing human rights.

Finally, *Şerife, Yiğit, Muñoz, Díaz,* and some of the cases discussed above also provide the scope to consider the benefits of two normative tools devised within the framework of equality and non-discrimination: intersectionality and the prohibition of indirect discrimination. Both of these tools may facilitate a better handling of legal hybridity. In the first place, the notion of intersectionality acknowledges a reality where individuals are crossed by many identities, feel bound to several communities, and suffer simultaneously different forms of oppression.[155] For example, those who petitioned the *Nari Adalats* for redress would typically suffer multiple forms of oppression based on being women, poor, and uneducated. The intersectional approach focuses on the unique types of violations occurring at the intersections of various systems of subordination.[156] These may certainly include cultural and normative structures. Furthermore, by recognizing a person's multiple identities and community affiliations, the need to take heed of the various normative and cultural orders involved becomes more evident.

The notion of indirect discrimination also helps to address questions of legal plurality and cultural diversity. The prohibition of indirect discrimination casts as impermissible laws or regulations that, despite being neutral in their formulation and general in their application, are, in practice, liable to have a particularly disadvantageous impact on certain groups.[157] As addressed in this paper, this includes (internally diverse) groups such as women, Muslims, and Roma and Travelers. Hence, as observed by Ast, this legal tool may call for the introduction of exceptions or flexible legal regimes to cope with diverse social realities.[158] It may also alert us to care-

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155. In this vein, Bond who explains how intersectionality enriched the understanding of women's experiences who, at the time of the drafting of CEDAW, were not viewed as members of cultural communities. Johanna E. Bond, *Women's Rights, Customary Law and the Promise of the Protocol on the Rights of Women in Africa*, THE FUTURE OF AFRICAN CUSTOMARY LAW 467, 474 (Jeanmarie Fenrich et al. eds., 2011).

156. Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 157-158 (2003).

157. INTER-RIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW. A HANDBOOK FOR PRACTITIONERS 70 (2011); OLIVIER DE SCHUTTER, THE PROHIBITION OF DISCRIMINATION UNDER EUROPEAN HUMAN RIGHTS LAW: RELEVANCE FOR THE EU NON-DISCRIMINATION DIRECTIVES - AN UPDATE 23 (2011).

158. Frédérique Ast, *European Legal Framework Responding to Diversity and the Need for Institutional Change. Indirect Discrimination as a Means of Protecting Plu-*

fully scrutinize the invocation of contextual factors –such as prevailing ideologies or social customs- to justify the refusal to accommodate other cultural claims and norms. These concerns regarding intersectionality and indirect discrimination are relevant in the adjudication of human rights and the implementation processes discussed above. For example, while women may theoretically have the same access to state courts for dispute resolution as men, in practice, they are not able to access the courts and receive favorable outcomes to the same extent as men.

Without downplaying the complexities of accommodating non-dominant religious or other culturally motivated practices in a given society, the cases reviewed here raise the issue of how to deal with the social reality of religious and cultural communities who abide by their customs and norms in plural legal situations. They also present the question of how courts and other supervisory bodies may do so without taking the role of defining and fixing the meaning and value of a given culture or identity, or without foreclosing opportunities of empowerment for the people concerned. We turn to some of these challenges in the next section.

III. SOME CHALLENGES IN ACCOUNTING FOR NORMATIVE PLURALITY AND NON-STATE CULTURAL CLAIMS

The analysis conducted in the previous sections inevitably leads us to assess normative discourses over tradition, culture, and way of life, which entail political, social, and legal implications. In this part of the paper we sketch a few of them, namely, cultural essentialism, group boundaries, and the limitation of opportunities for further empowerment. These issues all arise in the process of human rights implementation and adjudication involving plural normative orders.

Initially, the ECtHR in a number of cases reduced the protection of a "Gypsy way of life" mainly to the occupation of caravans and nomadism. While the Court acknowledged that many Roma no longer live a nomadic life,[159] it noted that applicants appeared not to be pursuing an itinerant lifestyle, which meant that the case was not about "the traditional itinerant Gypsy lifestyle."[160] Even if this constitutes a fair legal simplification of

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ralism: Challenges and Limits, *in* INSTITUTIONAL ACCOMMODATION AND THE CITIZEN: LEGAL AND POLITICAL INTERACTION IN A PLURALIST SOCIETY 85, 86-88 (2009).

159. *See, e.g.*, Chapman v. United Kingdom, App. No. 27238/95, Eur. Ct. H.R. ¶ 73 (2001); Beard v. United Kingdom, App. No. 24882/94, Eur. Ct. H.R. ¶ 84 (2001); Coster v. United Kingdom, App. No. 24876/94, Eur. Ct. H.R. ¶ 87 (2001).

160. Chapman, App. No. 27238/95, Eur. Ct. H.R. ¶ 105; Beard, App. No. 24882/94, Eur. Ct. H.R. ¶ 116; Coster, App. No. 24876/94, Eur. Ct. H.R. ¶ 119; Lee v. United Kingdom, App. No. 25289/94, Eur. Ct. H.R. ¶ 107 (2001); .

Roma and Travelers' culture, the characterization has its risks. As observed by Poulter in the British context, the definition of Roma along nomadic lines is mostly a legal creation of policy-makers and judges.[161] Moreover, "by defining Travelers by what they do (or by folkloric expectations of their behavior) the state has retained the power to control their use of the land, differentiate their authentication and respond to the prejudices of the majority population."[162] Nomadism, in fact, does not adequately reflect the lived experience of many Roma and Travelers, nor is its protection instrumental to achieve (better) justice. Protecting a Gypsy lifestyle to the extent that it is nomadic excludes many sedentarized Roma who continue to regard the use of mobile homes as a central part of their experience. Further, recognition on the basis of nomadism exposes Roma and Travelers to greater socio-economic disadvantage as itinerancy confines them to a life that is no longer economically viable.[163] Fortunately, however, the ECtHR has moved away from the emphasis on nomadism,[164] which nonetheless remains an important criterion in state regulations.

An additional problem may arise in terms of who is entitled to protection. In fact, conferring rights to the extent that a certain cultural script is met implies that many may not be able to live up to the cultural or normative tradition legally recognized. This difficulty, linked to the question of essentialism, materializes in fixed group or cultural boundaries. Thus, for example, in deciding the inadmissibility of an application submitted by a "[n]ew [t]raveler," the ECtHR recalled that these people, unlike Gypsies by birth, live a nomadic lifestyle through personal choice and not on account of being born into any ethnic or cultural group. Accordingly, it was doubtful whether new Travelers who *choose* that lifestyle would be entitled to the protection afforded to *true* Gypsies or Travelers.[165] A preference for inner traits, like in this case, is relevant to the question of how the law -in this case human rights law- deals with diversity. Such a preference actually en-

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161. *See* SEBASTIAN POULTER, ETHNICITY, LAW, AND HUMAN RIGHTS: THE ENGLISH EXPERIENCE 541 (1998); Robert Home, *supra* note 118, at 538 (2009).

162. POULTER, *supra* note 161, at 541.

163. THE TRAVELLER MOVEMENT, A PLACE TO CALL HOME: ETHNICITY, CULTURE AND PLANNING FOR TRAVELLER SITES 3-4, 8 (2014).

164. Connors v. United Kingdom, App. No. 66746/01, Eur. Ct. H.R. ¶ 93 (2004). For a more recent example of how the Court affords protection to settled Travelers living in mobile homes, *see* Winterstein v. France, App. No. 27013/07, Eur. Ct. H.R. (2013).

165. Horie v. United Kingdom, App. No. 31845/10, Eur. Ct. H.R. ¶¶ 28-29 (2011). On this case *see* Lourdes Peroni and Alexandra Timmer. Lourdes Peroni & Alexandra Timmer, *Gypsy Way of Life "By Birth" or "By Choice,"* STRASBOURG OBSERVERS (Feb. 22, 2011), http://strasbourgobservers.com/category/cases/horie-v-uk.

tails an assimilationist bias. As explained by Yoshino, when courts protect traits that cannot be changed (e.g., skin color or ethnic ascendancy), but do not do so for characteristics that individuals are able to modify (e.g., dress, the way of life, or the religion one practices), then an individual's only alternative is conformity to the dominant norms.[166] Supervisory bodies thus need to be aware of the cultural character of any form of social categorization and of its effects, including those they make in the course of adjudicating and implementing human rights norms.

The IACtHR, in turn, also discloses a rather essentialist cultural view in a number of judgments in which it characterizes the ties between indigenous/tribal peoples and their ancestral territories. The Court has consistently referred to traditional uses and customs. The examples given by the Court include ceremonial activities, languages, arts and rituals, practices in connection with nature, customary law, dress, seasonal or nomadic hunting, fishing or gathering, and use of natural resources associated with their customs or other elements characteristic of their culture.[167] Like in the cases discussed above, this also brings risks of essentialism and group boundaries. This discourse may force indigenous populations to present themselves according to a frozen cultural lifestyle in order to secure protection for their rights, while also reducing the possibilities that peasants and other rural communities, who may legitimately articulate similar demands to collective lands, could benefit from a rights framework whose cultural imprint they may not meet. Additionally, as noted by some scholars, this portrait of indigenous identity/culture may also entail economic and political drawbacks, such as foreclosing opportunities for the communities who may wish to benefit from non-traditional practices or techniques for managing or exploiting their natural resources.[168] The IACtHR has even suggested that certain special safeguards to regulate the restriction of indigenous peoples' collective property would only be applicable to those resources *traditionally* used by the community and which are vital to their survival and way of life.[169] These cases, therefore, provide some insight to the dangers of lock-

166. Kenji Yoshino, *Pressure to Cover*, N.Y. TIMES, Jan. 15, 2006, at 4.

167. Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 148 (June 27, 2012); Yakye Axa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 154 (June 17, 2005).

168. Ariel E Dulitzky, *When Afro-Descendants Became "Tribal Peoples": The Inter-American Human Rights System and Rural Black Communities* 1 UCLA J. INT'L L. & FOREIGN AFF. 29, 47-48 (2010); Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113, 161 (2013).

169. Such safeguards are (1) the community's effective participation; (2) independent environmental and social impact assessment; and (3) reasonable benefit sharing.

ing indigenous people and members of other ethnic communities into their traditional cultures and norms– and ignoring the inherent dynamism of all cultures and normative systems.

Equally in the case where non-state norms are used to implement human rights, members of cultural communities should not be locked into this identity and normative system. In order to ensure human rights protection and access to effective remedies, it is crucial that state functions and interventions are not dispensed with altogether. It is important that, for example, women can continue to be able to forum shop and to select the system (formal or informal) and the norms (state or non-state) – or a combination thereof - that best support their rights. Women in cultural communities need to be able to 'opt-out' of their customary system if necessary or desirable.[170] As such, the state cannot leave matters entirely to the system of local norms, but needs to provide safeguards, supervision, and remedies where women's rights are not protected – as is their responsibility under international law. Yet, it is recommended that when states provide for these responsibilities, they recognize the crucial role of other norms and to engage with them.

Of course, the law works through categorizations and therefore it is very difficult to devoid the adjudication and implementation processes from their essentializing force. Yet it is important to note that the aforementioned risks arise despite the cultural essentialism being premised on a certain positive or valued account of the identities at stake, as that appears to be the Courts' view of Roma and indigenous cultures. There are, however, other instances where the judicial essentialization of a given culture or identity conveys harm in itself, as it occurs where courts rest on a negative stereotype of a given culture or identity. This is well illustrated by the ECtHR's depiction of Islam in the case of *Şerife Yiğit v. Turkey*. It is equally illustrated in the example of customary law adapting to provide for women's inheritance, where the state and UN treaty bodies had deemed the system incompatible with women's rights standards. As noted in the first section, the treaty bodies at times have essentialized culture, interpreting it as static and uniform when in fact it is changing and varied. To avoid issues of essentialism and exclusion, those within the cultural communities are best placed to articulate their norms, and such a process of articulation should be inclusive of all community members. This is also vital given that all cultural

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See Saramaka People v. Suriname, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 155 (Nov. 28, 2007). For a critique on this, *see* Antkowiak, *supra* note 166, at 167.

170. Yvonne Donders, *Do cultural diversity and human rights make a good match?*, 61 INT'L SOC. SCI. J. 15, 18 (2010); *see also* Sezgin, *supra* note 50, at 29.

systems are constantly evolving. As a consequence, states as well as supervisory bodies should be careful to refrain from essentializing culture, or making outside determinations of such norms for the purposes of human rights implementation and adjudication.

Finally, some of the examples discussed above regarding human rights implementation via non-state, normative systems also raise problematic issues of empowerment. As noted, the *Nari Adalat* have been criticized for not challenging the patriarchy enough and, even once reformed, traditional Adat law in Bali still did not provide for women's equal inheritance with men. As this demonstrates, there can be a limit on the agency of community members to reform their own systems to better protect human rights, and sometimes a persistent reluctance of systems to such change. As such, there is still a role for the state in meeting the challenges of navigating plural legal systems regarding human rights. These problems also demonstrate that no one system will necessarily provide all the solutions, and that legally plural situations are complex, multifaceted, and sensitive. Therefore, while the assertion of cultural commitments through human rights law have found their way before supranational human rights bodies, the increasing leverage of cultural claims has brought about important challenges that require these bodies to be careful in their methods and reasoning for accommodating cultural diversity.

CONCLUSIONS

As demonstrated in this paper, legal pluralism can assist in understanding the link and interaction between human rights and culture as normative orders with overlapping subject matters. In both human rights implementation and adjudication, the legal pluralist perspective reveals the competition and contestation between local, national, and also international norms. This dynamic is apparent through the process of international human rights supervision via the UN treaty bodies and the regional courts in Europe and Latin America. This paper explored how a legal pluralist perspective can reveal opportunities and challenges for the effective implementation and adjudication of cultural rights claims raised by non-dominant groups.

The first section examined how different normative orders may assist to more effectively implement human rights standards. It contended that mobilizing non-state dispute resolution mechanisms and non-state law could work to help protect women's rights regarding domestic violence and property. To be most effective, implementation measures need to be tailor made to each situation, catering for the particular issues and actors involved. Given the role of culture in human rights, effective implementation measures in one setting may be ineffective in another given the variety of

competing normative systems. This fact favors local over national implementation measures where possible, reflecting the fact that human rights are not one size fits all. This underscores the need for a diversity of human rights implementation measures, both within and between states. Human rights law creates space for and also welcomes such diversity. The human rights treaty bodies accept a variety of implementation measures and human rights courts increasingly engage in responding to claims that attempt to make human rights standards reflective of cultural diversity. This applies to the cultural and normative particularism raised by states parties, but also to cultural claims advanced by non-dominant actors. Despite this, we argued that in their supervision of state compliance with human rights standards, the UN treaty bodies fail to consistently engage meaningfully with non-state normative systems. As such, the treaty bodies are called upon to more thoroughly and consistently consider implementation beyond the possibilities offered by state law and institutions. As already cautioned, this does not mean dispending with state functions. Rather, the suggestion advanced is that while in principle the role of "all organs of society" in protecting and promoting human rights has been recognized internationally, treaty bodies are yet to fully engage with it and states to fully operationalize it.

The second section argued that the legal pluralist lenses are useful to understand questions of normative space and cultural diversity beyond state claims of deference before supranational human rights courts. Exploring several illustrative cases concerning people with indigenous, ethnic, and religious affiliation before regional courts demonstrated how cultural rights claims that evoke non-dominant normative commitments have gained currency and been used strategically by different actors. The ECtHR and IACtHR have incorporated or accommodated some of these claims. In that context, certain mechanisms appear particularly well placed to deal with the normative hybridity at stake. This is the case for interpretative techniques that regard human rights treaties as living instruments or that resort to a wide set of relevant norms, including transnational rules and norms with a local and customary character. Here again, as with implementation, a conversation is apparent between international, national, and non-state law as mediated by the regional court. Additionally, for both the adjudication and implementation of human rights, participatory mechanisms that allow a more dialogical and context-sensitive construction of rights have also proven valuable to address normative and cultural diversity. Due to this, it has been argued that dialogical devices could be further promoted and utilized by human rights bodies. A similar claim has been advanced regarding the application of an intersectional approach and the prohibition of indirect discrimination.

As argued in this paper, there are numerous mechanisms in international law to engage with and incorporate non-state law and plural legal systems. These are important in order to better protect the rights of those who belong to cultural minorities and non-dominant groups. These mechanisms may serve to counteract some of the critical challenges offered by the normative discourses on culture and tradition adopted by supervisory bodies for the purposes of implementing and adjudicating human rights in culturally-sensitive matters. The challenges include the risk of essentializing culture or making outside determinations of its norms; drawing exclusionary boundaries among groups or cultures; and overlooking issues of socio-economic disempowerment. While avoiding these pitfalls is not a straightforward task, an important first step is to interrogate the operation of international human rights law in light of cultural norms that co-exist with state-sanctioned laws and traditions. Despite international law's tendency to focus on the state as its subject, recognition of other actors and norms is increasing and expanding the dialogue on what human rights are in practice.