

# Human Rights and Transnational Culture: Regulating Gender Violence through Global Law

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# Human Rights and Transnational Culture: Regulating Gender Violence through Global Law

## **Abstract**

In the current era of human rights activism, the global production of human rights approaches to violence against women generates a wide variety of localization processes. Activists translate between global discourses and local contexts and meanings. Culture is conceptualized in quite different and sometimes contradictory ways in this process. Essentialized ideas of culture inhibit recognition of the potential contributions of local cultural practices and provide justifications for groups to resist these changes. This article shows, with reference to a case study of Fiji, that a more anthropological conception of culture provides a better picture of the localization process and foregrounds the role of activists who translate between global human rights ideas and local grievances.

## **Keywords**

Human rights; Legal polycentricity; Fiji; Law and globalization

# HUMAN RIGHTS AND TRANSNATIONAL CULTURE: REGULATING GENDER VIOLENCE THROUGH GLOBAL LAW<sup>©</sup>

SALLY ENGLE MERRY\*

In the current era of human rights activism, the global production of human rights approaches to violence against women generates a wide variety of localization processes. Activists translate between global discourses and local contexts and meanings. Culture is conceptualized in quite different and sometimes contradictory ways in this process. Essentialized ideas of culture inhibit recognition of the potential contributions of local cultural practices and provide justifications for groups to resist these changes. This article shows, with reference to a case study of Fiji, that a more anthropological conception of culture provides a better picture of the localization process and foregrounds the role of activists who translate between global human rights ideas and local grievances.

À notre époque où s'exprime l'activisme en faveur des droits de la personne, la production mondiale de démarches, de la perspective des droits de la personne envers la violence contre les femmes, engendre une grande diversité de processus de localisation. Les activistes circulent entre les discours mondiaux, et les contextes locaux et significations locales. Dans ce processus, la culture est conceptualisée de nombreuses façons très différentes, parfois contradictoires. Les idées essentialisées de culture inhibent la reconnaissance des contributions potentielles qu'apportent les pratiques culturelles locales, et fournissent aux groupes des justifications leur permettant de résister à ces changements. Se référant à une étude de cas de Fidji, cet article montre qu'une conception plus anthropologique de la culture représente plus fidèlement le processus de localisation, et fait ressortir le rôle des activistes qui circulent entre les idées mondiales concernant les droits de la personne, et les griefs locaux.

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## I. INTRODUCTION

It was Harry Arthurs who first persuaded me that legal pluralism was not only a phenomenon of small-scale societies that had been incorporated into colonial states, but also of modern industrial society. He made clear that all societies have plural systems of law, and that the relationships among them are continually being redrawn over time. He was an intellectual mainstay of a wonderful seminar on critical legal pluralism sponsored by the Canadian Institute for Advanced Research, of which I was a member for several years. I am also grateful to Harry for reminding me of the imperial nature of my country, the United States, particularly with regard to Canada. He always emphasized to me the limitations of thinking of social justice only in terms of rights, pointing in particular to the flaws in the rights-conscious United States, which has strayed far from its earlier, more socialist ideals. Current developments in the United States confirm his worry about the dangers of focusing on justice only in terms of individual rights rather than on the collective good. Harry's insights have continued to shape my work, for which I am grateful.

I draw on these insights as I explore another instance of contemporary legal pluralism: the rise of the international system of human rights law. I began to conduct research on human rights law because it represents an emerging dimension of legal pluralism, analogous to imperialism but in some ways quite different. I wanted to compare the pluralism generated by the imposition of American law and legal institutions on indigenous law in Hawaii during the nineteenth century, with that which occurred when the transnational system was not imperial U.S. or British law but human rights law.<sup>1</sup> The expansions of both forms of transnational law are serendipitous and negotiated processes that take place within great inequalities of wealth and power. The Hawaii research revealed that the colonizing process was less one of simple imposition than one of negotiation. This was, of course, a negotiation, taking place in the context of vast inequalities of power. Hawaiian political elites sought to retain sovereignty through transforming the legal system into a form that was acceptable to the global powers of Europe and North America. A gunship in Honolulu's

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<sup>1</sup> Sally Engle Merry, *Colonizing Hawaii: The Cultural Power of Law* (Princeton: Princeton University Press, 2000).

harbor with its cannons trained on the town was a common way for global powers to persuade the Hawaiian King and Chiefs to go along with their wishes. Similarly, contemporary human rights projects take place in an ever-increasing situation of global inequality. This inequality determines which countries can pressure which other ones to change, where the funding for Non-Governmental Organization (NGO) activism comes from and who receives it, and which offences are foregrounded and which ignored.

In my present research, I have become increasingly interested in the role of intermediaries, or translators, between plural legal systems. These are people who live in two worlds and navigate between them, interpreting each to the other. Such translators were critical during Hawaii's imperial encounters of the nineteenth century. They are critical now as human rights ideas are appropriated, encouraged, and resisted in many locations around the world. Translators are people who move between local and global sets of cultural understandings, helping each to make sense of the other. I recognize how problematic the terms "global" and "local" are in practice; here they stand multiply for location, orientation, social class, education, mobility, and wealth.<sup>2</sup>

The impact of human rights law depends, as does all law, on changing local consciousness of rights and relationships. In order for human rights ideas to be effective, they need to be translated into local terms and situated within local contexts of power and meaning. They need, in other words, to be remade in the vernacular. How does this happen? Do people in local communities reframe human rights ideas to fit into their system of cultural meanings? Do they resist ideas that seem unfamiliar? Examining this process is crucial to understanding the way human rights act in the contemporary world.

Remaking human rights in the vernacular is difficult. Local communities often conceive of social justice and fairness in quite different terms from human rights activists. They lack knowledge of relevant documents and provisions of the human rights system. Global human rights reformers, on the other hand, are typically rooted in a transnational legal culture remote from the myriad local social situations in which human rights are needed. Nevertheless, global human rights law has become an important resource for local social

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<sup>2</sup> These issues are discussed further in Sally Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2005).

movements. This article explores how global law is translated into the vernacular, highlighting the role of activists who serve as intermediaries between different sets of cultural understandings of gender, violence, and justice.

Gender violence provides an ideal issue for examining this process. As a human rights violation, gender violence is a relative newcomer, but since the 1990s it has become the centrepiece of women's human rights. Strenuous activism by NGOs along with a series of major world conferences on women in the 1980s and 1990s defined violence against women as a human rights violation. But establishing women's rights as human rights is still an uphill struggle. Because violence against women refers to bodily injury as do other human rights violations, such as torture, it is a relatively straightforward violation. Like torture, it is about injury, pain, and death. However, in many parts of the world it appears to be an everyday, normal problem, not a serious violation of human rights.<sup>3</sup> Moreover, because gender violence is deeply embedded in systems of kinship, religion, warfare, and nationalism, its prevention requires major social changes in communities, families, and nations. Powerful local groups often resist these changes.

The relevance of human rights for the campaign against violence against women has taken on new importance as human rights have become the major global approach to social justice. Since the 1980s, human rights concepts have gained increasing international credibility and support at the same time as a growing body of treaties and resolutions have strengthened their international legal basis. The global human rights system is now deeply transnational, no longer rooted exclusively in the West. It is present in global settings with representatives from nations and NGOs around the world. Activists from many countries enthusiastically adopt human rights language and translate it for grassroots people. Vulnerable people take up human rights ideas in a wide variety of local contexts because these ideas offer hope to subordinated groups. An Indo-Fijian lawyer told me, for example, that she had experienced racism and discrimination in Fiji and

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<sup>3</sup> As it did in the United States less than thirty years ago. Research in India in the 1990s shows that about half of ever-married women (56 per cent) think that men have the right to hit their wives in response to some kinds of offenses. *India: National Family Health Survey* (International Institute for Population Sciences: 1998-99) at 72-73, online: National Family Health Survey, India <<http://www.nfhsindia.org/india2.html>>.

in New Zealand and only the international human rights system gave her the tools and consciousness to fight back. In the New Territories of Hong Kong, women were denied the right to inherit property under a law passed by the British colonial government and legitimated as ancient Chinese custom, even though it had long since been changed in China. The international human rights language of women's rights and sex discrimination proved critical to overturning this legislation.

However, the idea that everyday violence against women is a human rights violation has not been easy to establish, nor has it moved readily from transnational to local settings. There are fissures between the global settings where human rights ideas are codified into documents and the local communities where the subjects of these rights live and work. Human rights ideas, embedded in cultural assumptions about the nature of the person, the community, and the state, do not translate simply from one setting to another. If human rights ideas are to have an impact, they need to become part of the consciousness of ordinary people around the world. Considerable research on law and everyday social life shows that law's power to shape society depends not on punishment alone but on becoming embedded in everyday social practices, shaping the rules people carry in their heads.<sup>4</sup> Yet, there is a great distance between the global sites where these ideas are formulated and the specific situations in which they are deployed. We know relatively little about how individuals in various social and cultural contexts come to see themselves in terms of human rights.

Nor do ideas and approaches move readily the other way—from local to global settings. Global sites are a bricolage of issues and ideas brought to the table by national actors. But transnational actors are often uninterested in local social practices or too busy to understand them in their complicated contexts. Even some national elites share this view. Discussions in transnational settings rarely deal with local situations in context. There is an inevitable tension between general principles and particular situations. Transnational reformers must adhere to a set of standards that apply to all societies if they are to gain

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<sup>4</sup> See e.g. Austin Sarat & Thomas Kearns, eds., *Law and Everyday Life* (Ann Arbor: University of Michigan Press, 1993); Patricia Ewick & Susan Silbey, *The Common Place of Law* (Chicago: University of Chicago Press, 1998); and Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago: University of Chicago Press, 1990).

legitimacy. Moreover, they have neither the time nor the desire to tailor these standards to the particularities of each individual country, ethnic group, or regional situation. National and local actors often feel frustrated at the lack of attention to their individual situations.

The division between transnational elites and local actors is based less on culture or tradition than on tensions between a transnational community that envisions a unified modernity and national and local actors for whom particular histories and contexts are of critical importance. Intermediaries such as NGO and social movement activists play a critical role in interpreting the cultural world of transnational modernity for local claimants. They appropriate, translate, and remake transnational discourses into the vernacular. At the same time, they take local stories and frame them in national and international human rights language. Translators often participate in two cultural spheres at the same time; translating between them with a kind of double consciousness.

What is the interface between global and local activism? How do ideas about violence against women as a human rights violation, which are produced in global conferences in New York and Geneva, get appropriated in local community centers in Hawaii, Delhi, Beijing, Fiji, and Hong Kong? The language of human rights contributes to transnational and local social movements and a gradual rethinking of gender inequality around the world. It creates a political space for reform using a language legitimated by a global consensus on standards. But this political space comes with a price. Human rights promote ideas of individual autonomy, equality, choice, and secularism even when these ideas differ from prevailing cultural norms and practices. Human rights ideas displace alternative visions of social justice that are less individualistic and more focused on communities and responsibilities, possibly contributing to the cultural homogenization of local communities. The localization of human rights reflects the vastly unequal global distribution of power and resources that channels how ideas develop in global settings and how they are picked up or rejected in local places.

In January 2002, in the grand conference room of the United Nations in New York, the delegation from Fiji presented its very first report to the committee, monitoring the Convention on the Elimination



of All Forms of Discrimination Against Women (CEDAW).<sup>5</sup> Government and NGO representatives from Fiji had flown half way around the world for this hearing. As the government delegation presented its report to the CEDAW monitoring committee, made up of twenty-three experts on gender issues from around the world, some tension developed over a Fijian customary practice called *bulubulu*. The conflict illustrated the challenges of communicating across the fault line separating the transnational human rights community from local and national spaces. The Fiji country report noted that *bulubulu*, a traditional village custom for reconciling differences, was being used to take rape cases out of court. The committee asked the government delegation when they were going to eliminate this custom.<sup>6</sup> However, the concern expressed in the report was not about the custom itself but about using it to get rape cases out of court. The problem suddenly seemed more complicated than just eliminating the custom. I wondered why the experts jumped to that conclusion. Why did they assume that the custom itself was the problem rather than its application to court cases? And why did they focus on culture and religion rather than economic or political conditions that might affect the way the custom functions?

The experts concluded that the custom was the problem because they saw “customs” as harmful practices rooted in traditional culture. Customs oppress women and need to be changed. The experts have neither the time nor the inclination to investigate when and how customs such as *bulubulu* are better able to protect women from rape than the courts; nor do they have the time or inclination to investigate how these customs are intersecting with state legal systems in new ways. Their task is to apply the law of the Convention. There is a general assumption that problems such as violence against women are the responsibility of the state and that local culture is an excuse for non-compliance. The divide between transnational, national, and local activists is exacerbated by their differing understandings of the concept of culture.

After discussing various ways that culture is conceptualized in contemporary human rights practice, I will return to the question of

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<sup>5</sup> Report from the Government of Fiji to CEDAW, 26th Sess., CEDAW/C/FJI/1 (2002).

<sup>6</sup> The government minister was annoyed and said that *bulubulu* was essential to Fijian village life and could not be given up. Interview of Losena Salabula, Assistant Minister of Fiji's Ministry for Women, Social Welfare and Poverty Alleviation [on file with the author].

*bulubulu* to show how a more anthropological conception of culture would facilitate the translation of ideas to improve communication among cosmopolitan global and local spaces. This conception would also inhibit the creation of nationalistic forms of opposition to global human rights categories that are engendered by essentialized concepts of culture.

## II. THEORIZING THE GLOBAL/LOCAL INTERFACE

The global/local divide is often conceptualized as the opposition between rights and culture, or even civilization and culture. Those who resist human rights often claim to be defending culture. For example, male lineage heads in the rural New Territories of Hong Kong claimed that giving women rights to inherit land would destroy the social fabric. Fijian politicians worried that restricting the use of a *bulubulu* might undermine Fijian culture. However, as considerable work within anthropology and sociology has demonstrated, these arguments depend on a very narrow understanding of culture and the political misinterpretation of this concept.<sup>7</sup> Amartya Sen provides an eloquent critique of this notion of culture in his advocacy of a human rights approach to development.<sup>8</sup> As Cowan, Dembour, and Wilson point out, a more flexible and contested model of culture provides a better way of understanding the practice of human rights both in global sites such as international meetings and local sites where these ideas are picked up and used by social movements and non-governmental organizations.<sup>9</sup>

Even as anthropologists and others have repudiated the idea of culture as a consensual, interconnected system of beliefs and values, the idea has taken on new life in the public sphere, particularly with reference to the global South. For example, in 2002 I was interviewed by a local radio station about an incident in Pakistan that resulted in the

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<sup>7</sup> See especially Richard A. Wilson, "Introduction: Human Rights, Culture and Context" in Richard A. Wilson, ed., *Human Rights, Culture and Context: Anthropological Perspectives* (London: Pluto Press, 1996) 1; Jane K. Cowan, Marie-Benedict Dembour & Richard Wilson, eds., *Culture and Rights* (Cambridge: Cambridge University Press, 2001) at 6-7; and Abdullahi An-Na'im & Jeffrey Hammond, "Cultural Transformation and Human Rights in African Societies" in Abdullahi An-Na'im, ed., *Cultural Transformation and Human Rights in Africa* (London: Zed Books, 2002) 13 at 13-14.

<sup>8</sup> *Development as Freedom* (New York: Knopf, 1999) at 240-46.

<sup>9</sup> Cowan, Dembour & Wilson, *supra* note 7 at 13-14.

gang rape of a young woman, an assault apparently authorized by a local tribal council. The interviewer, who was looking for someone to speak on the radio show, wanted to know if I was willing to defend the council's actions. I explained that I considered this an inexcusable act, that many Pakistani women's rights and human rights groups and the Pakistani press had condemned the rape, and that it was connected to local political struggles. The woman was of a subordinate group in the village and had been attacked by members of the dominant landowning group. I said it should not be seen as an expression of Pakistani "culture." Indeed, it was the local Imam, an Islamic religious leader, who talked about the incident in his Friday sermon and made it known to the world, condemning the actions as unfitting for a panchayat and for Islam.

The interviewer was distressed. She wanted me to defend the value of respecting Pakistani culture at all costs, despite the sentence of rape. When I told her that I could not do that, she wanted to know if I knew of any other anthropologists who would. I could think of none, but I began to wonder what she thought about anthropologists and their views of culture. She apparently assumed that anthropologists made no moral judgments about "cultures" and failed to recognize the contestation and changes taking place within contemporary local communities around the world. Apparently cultures have no contact with the expansion of capitalism, the arming of various groups by transnational superpowers using them for proxy wars, or the cultural possibilities of human rights as an emancipatory discourse. I found this interviewer's view of culture wrong-headed and her opinion of anthropology discouraging.

But she was clearly reflecting a wider public opinion. Her view was echoed by U.S. and U.K. news coverage of the event. The Omaha World Herald editorialized that

Pakistan may be an ally of the United States in the fight against terrorism, but Americans should have no illusions about how deeply into rural and backward portions of the nation the veneer of civilized law and order extends ... This abhorrent action may make it easier to understand how Islamic militants, even terrorists, can sprout and grow in some parts of the country.<sup>10</sup>

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<sup>10</sup> Kamila Shamsie, "Women: Child abuse in Belgium 'shocks the nation'—so why is gang rape in Pakistan 'a cultural issue'?" *The Guardian* (6 September 2002) G2 at 7.

A journalist in London pointed out that the U.K. press did not report any surprise in Pakistan over the event, in contrast to the outrage it described in Belgium when nineteen men raped or abused an eleven year old child.<sup>11</sup> She too reports being asked to discuss the case on a radio show and explain “the culture behind it.” She rejected the idea that Pakistan is a nation with a culture of rape that does nothing until international human rights groups take up the case. Instead, she sees Pakistan as a country where there is a grim struggle between progressive factions and those who want to return to more repressive gender regimes. The Pakistani press did express a great deal of outrage about the incident. Fourteen men were arrested soon after the rape and quickly tried in an anti-terrorist court; six were sentenced to death only nine weeks after the incident.<sup>12</sup> They were, however, released in 2005. The Minister for Women visited the remote village and gave a substantial cheque to the affected family.<sup>13</sup>

To view this incident as symptomatic of Pakistani culture is analogous to seeing the Enron thefts as characteristic of American culture. When corporate executives in the United States steal millions of dollars through accounting fraud, we do not criticize American culture as a whole. We recognize that these actions come from the greed of a few along with sloppy institutional arrangements that allow them to get away with it. Similarly, the actions of a single tribal council in Pakistan do not characterize the entire country as if it were a homogeneous entity. Although Pakistan and many of its communities do have practices and laws that subordinate women and subject them to violence, these are neither universal nor uncontested. Pakistan as a “culture” can be indicted by this particular council’s authorization of rape only if culture is understood as a homogenous entity whose rules evoke universal compliance. Despite widespread critiques,<sup>14</sup> this

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Press Trust of India* (1 September 2002).

<sup>13</sup> *Press Trust of India* (2 July 2002).

<sup>14</sup> See An-Na'im & Hammond, *supra* note 5; Cowen, Dembour & Wilson *supra* note 7; Sen, *supra* note 8; Christine J. Walley, “Searching for ‘Voices’: Feminism, Anthropology, and the Global Debate over Female Genital Operations” (1997) 12:3 *Cultural Anthropology* 405; and Deborah M. Weissman, “The Human Rights Dilemma: Rethinking the Humanitarian Project” (2004) 35:2 *Colum. H.R.L. Rev.* 259.

essentialized concept of culture remains a powerful idea within popular culture.

Seeing culture as open to change emphasizes struggles over cultural values within local communities and encourages attention to local cultural practices as resources for change. An example from Australia illustrates this complex understanding of culture. At a conference on culture and violence against women held in Sydney, Australia in 2002, representatives from an Australian Aboriginal group dealing with violence against women displayed a brochure they had developed for battered women that was richly decorated with the swirls and spots of Aboriginal art. They drew on the artistic traditions of Aboriginal peoples to tailor information about how to seek help for battering in a way that might appeal to other Aboriginal women. But this is not the only way to localize imported practices. Representatives from another Aboriginal group described their efforts to protect young Aboriginal men from harassment in the shopping malls in Sydney. They had developed a tee-shirt. The back of the tee-shirt listed the legal rights of people in public spaces while the front displayed several stylized faces, some apparently Aboriginal, and the phrase, "It's public space, Get Outta My Face."<sup>15</sup> As the Aboriginal presenter pointed out, "get outta my face" is a phrase commonly used by young Aboriginal people and therefore the one the young people chose for the tee-shirt. The words and images were not those of Aboriginal art but of African Americans. The young people, facing racism in Australia, chose a phrase from the transnational language of resistance to racism. They localized their claims to rights with transnational images. This example shows the creativity and flexibility of culture in its mobilization by local activists. Appropriating signs and sentiments is fundamental to the way culture works within contemporary globalization.

Moreover, local cultural practices are far more fluid and open to change than the essentialized model suggests. For example, Celestine Nyamu-Musembi shows how local norms and practices in Kenya offer opportunities as well as barriers to gender equality and that the production of local custom is a dynamic and changing process, even

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<sup>15</sup> Presentation from Wirringa Baiya/Tranby Aboriginal Cooperative College, Sydney, 22 February 2002.

when it specifies inheritance practices.<sup>16</sup> She concludes, “a genuine engagement with practice at the local level is powerful in dislodging both the abolitionist imagination of the local as the repository of unchanging patriarchal values and the defensive relativist portrayal of local norms as bounded, immutable, and well settled.”<sup>17</sup> Hussaina J. Abdullah’s analysis of women’s groups in Nigeria shows how over time these groups change their approaches to women’s rights—including their willingness to invoke human rights—depending on the shift from military to civilian government, economic crises, and the growth of religious fundamentalism.<sup>18</sup> These studies present a complex and fluid understanding of culture.

The way culture is conceptualized determines how social change is imagined. If culture is fixed and unchanging, it is simply a barrier that needs to be removed through education. If culture is a set of practices and meanings shaped by institutional contexts, it is both malleable and embedded in structures of power. These different perspectives on culture affect policies concerning women. For example, in Uruguay’s country report to the committee monitoring the Women’s Convention, the government expressed regret that more women were not involved in politics and blamed cultural traditions, women’s involvement in domestic tasks, and the differences in wages by gender.<sup>19</sup> In contrast, facing the same absence of women politicians, Denmark offered funds to offset babysitting expenses when women attended meetings.<sup>20</sup> In the first case, the barrier to change is theorized as cultural tradition; in the second case, as institutional arrangements of child care. The first model sees culture as fixed; the second assumes that the meanings of gender will change as institutional and legal arrangements change.

Culture defined only as tradition or as national essence implies that villages are full of culture but that there is no culture in the conference halls of New York and Geneva. Yet, culture is as important

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<sup>16</sup> “Are Local Norms and Practices Fences or Pathways? The Example of Women’s Property Rights” in An-Naim, ed., *supra* note 7, 126 at 133-34.

<sup>17</sup> *Ibid.* at 145.

<sup>18</sup> “Religious Revivalism, Human Rights Activism and the Struggle for Women’s Rights in Nigeria” in An-Na’im, ed., *supra* note 7, 151.

<sup>19</sup> Report from the Government of Uruguay to CEDAW, 26th Sess., CEDAW/C/URY/2-3 (2002).

<sup>20</sup> UN, Convention on the Elimination of All Forms of Discrimination Against Women, C/DEN/5, 3 July 2000:16.

in shaping human rights conferences as it is in structuring village mortuary rituals. Thinking of those peoples, who were formerly labeled “backward,” as the only bearers of culture neglects the centrality of culture to the practice of human rights. UN meetings are deeply shaped by a culture of transnational modernity, one that specifies procedures for collaborative decision making, conceptions of global social justice, and definitions of gender roles. Human rights law is itself primarily a cultural system. Its limited enforcement mechanisms mean that the impact of human rights law is a matter of persuasion rather than force, of cultural transformation rather than coercive change. Its documents create new cultural frameworks for conceptualizing social justice. It is ironic that the human rights system tends to promote its new cultural vision through a critique of culture.

### III. THE FIJI REPORT TO CEDAW AND THE PROBLEM OF *BULUBULU*

Let me return to the example of *bulubulu* at the UN hearing. The country report is a procedure in which a country prepares a detailed report concerning its compliance with the international convention after it has been ratified. Within this procedure exists a committee whose purpose is to monitor a country's compliance with the convention on women's rights, which it has signed. The goal is to assess the extent to which the country's practices conform to these global principles of law. Yet, these hearings do not consider the contexts within which local practices are carried out, contexts that determine the meaning and implication of these practices. This gap between a global vision of justice and the way local contexts shape that vision, creates a fundamental dilemma for human rights practice. There is an inevitable struggle between the generalizing strategies of the transnational elites who construct a global law and the particularities of situations in which this law is applied. It is grounded in a legal rationality that insists on universal application of the law.

Let me illustrate this tension with a story. At the January 2002 presentation of its report to the committee monitoring CEDAW, the Fijian government report raised the problem of *bulubulu* in the context of a critique of the courts' failure to intervene firmly in sexual assault and violence cases.

The prevalent attitudes about gender-based violence are reflected in the relatively lenient penalties imposed on offenders. For example, rape is a form of violence that is particularly directed against women. Despite the serious nature of this crime, Fiji's courts tend to treat rape and indecent assault as reconcilable in the same way as common assault and it is currently the only form of serious crime that can be reconciled. Furthermore, the Fijian custom of *bulubulu* (apology and recompense/reconciliation) is accepted by the courts as a reason not to impose a charge or custodial sentence on a convicted rapist. In some cases, the victim's father accepts the apology and the victim has little say in the outcome. This situation is changing, largely as a result of active lobbying by women's organizations. This is evident from a recent judgment by a magistrate for the award of the maximum sentence. The magistrate commented: "*Women are your equal and therefore must not be discriminated on the basis of gender. Men should be aware of the provisions of the CEDAW, which our country had [sic] ratified. Under the Convention the State shall ensure that all forms of discrimination against women must be eliminated at all costs. The courts shall be the watch-dog with the obligation. The old school of thought, that women were inferior to men, or part of your personal property, that can be discarded or treated unfairly at will, is now obsolete and no longer accepted by our society. I hope that this sentence imposed on you, shall be a deterrent to all those who are still practicing this outmoded evil and cruel behaviour (from Fiji Daily Post, Jan 20, 2000).*" Offenses against property are, however, still more likely to attract custodial and lengthier sentences than rape, even though rape is a felony for which the maximum sentence is life imprisonment.<sup>21</sup>

It is important to notice that this statement is a critique of the legal system and its ineffectiveness in dealing with rape. Recourse to *bulubulu* is presented as one reason the legal system is not more effective.

In the questions they posed to the Fiji government, the CEDAW committee challenged the custom itself.<sup>22</sup> One expert said that it sounded like *bulubulu* was a very old and very patriarchal custom and asked, "Have you provided to eliminate that custom? What has your ministry done to abolish this practice?" Another said it provided an escape route for people who commit crimes against women to avoid punishment. At least two experts asked, "When will this practice be made illegal?" One said,

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<sup>21</sup> UN, Convention on the Elimination of All Forms of Discrimination Against Women, C/Fiji/1, 14 March 2000: 11.

<sup>22</sup> UN, Press Release, "Committee on Elimination of Discrimination against Women Considers Initial Report of Fiji" (16 January 2002), online: United Nations Press Release <<http://www.unhcr.ch/hurricane/hurricane.nsf/0/CC8B1034DD20FB46C1256B45002B0B02?opendocument>>.



While acknowledging the importance of cultural practices, and even the importance of reconciliation, we think it is important that the requirements of the convention be attended to, especially in the case of sexual violence. Thus it is important to the committee that you increase awareness of practices such as *bulubulu*, and of rape, because sometimes the impact of rape comes years after negotiation takes place.<sup>23</sup>

According to a UN Press release, “[a] question was asked about the custom of ‘bulu-bulu,’ which imposed only a custodial sentence on the convicted rapists. The victim’s father had a right to accept an apology from him, and the victim herself had no say in that situation. What was being done to abolish such practices?”<sup>24</sup> These questions reveal the slippage between condemning the use of *bulubulu* for rape and condemning the practice altogether.

The Fiji government objected to this critique of *bulubulu*. In its official reply to the CEDAW committee, Assistant Minister of Fiji’s Ministry for Women, Social Welfare and Poverty Alleviation, Losena Salabula said:

[*Bulu-bulu* is] a vital custom of the indigenous Fijian community for reconciliation and cementing kinship ties. The Government was addressing its recurrent abuse in relation to modern court processes and the legal system in handling sexual offences such as rape. The acceptance of “bulu-bulu” often led women victims not to report crimes. Offenders were discharged and sentences mitigated. Improved awareness of the practice had allowed the law to take its course on sexual offences. In some cases, families had declined the offer of “bulu-bulu”. In other cases, families had accepted “bulu-bulu” but had agreed that the law should take its course. The reform of the sentencing law, which was at an advanced phase, was aimed at codifying sentencing options and guidelines.<sup>25</sup>

In response to this report, the Committee’s Chairperson, Charlotte Abaka of Ghana, said that while acknowledging the importance of national traditions, especially the practice of reconciliation, it was important to do away with traditions discriminating against women, especially in the case of domestic violence. The country should pay more attention to negative aspects of the problem, such as the practice of *bulubulu*, she said. Measures were needed to increase

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<sup>23</sup> Quotations are based on the author’s notes.

<sup>24</sup> *Supra* note 22.

<sup>25</sup> UN, Press Release, “Completing Consideration of Fiji Report, Committee Told Convention is ‘A Living Reality’ in Fiji” (22 January 2002), online: United Nations Press Release <<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/549AB277E823E35BC1256B4A00306425?op=endocument>>.

public awareness of the issues involved. It was also disturbing that some cases of violence were referred to as “family discipline” in Fiji.<sup>26</sup>

The Committee’s Concluding Comments criticized *bulubulu* for providing legitimacy to rape. After stating the committee’s concern about the high incidence of ethnic and gender-based violence in civil unrest, and about domestic violence and sexual abuse of girls and women, the Concluding Comments say, “[t]he Committee is also concerned that the social customs on the husband’s right of chastisement, and ‘bulu bulu,’ give social legitimacy to violence.”<sup>27</sup> The Committee requests the State party to strengthen its initiatives against gender-based violence and to adopt proposed laws on domestic violence and sexual offences. “In particular, it calls on the State party to reinforce its ‘no drop’ policy by prohibiting the reconciliation of cases of rape and sexual assault on the basis of the ‘*bulu bulu*’ custom.”<sup>28</sup>

The Assistant Minister for Women said that the CEDAW committee did not understand *bulubulu* and how important it is, and noted that there have already been legal decisions that define it as inappropriate for rape.<sup>29</sup> The problem is not the custom but its use for rape, which has already been judicially ruled inappropriate, although in all likelihood the practice continues. She said that eliminating *bulubulu* was impossible since it was the basis of village life. The custom was used for a wide range of conflicts and disputes as well as for arranging marriages. Without it, the village could not function. She said that the people who wrote the report did not know Fijian custom. “The Fijian people won’t let this go, this custom. If they don’t have it, society will fall apart.”<sup>30</sup> Changing *bulubulu*, she said,

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<sup>26</sup> *Ibid.*

<sup>27</sup> Committee on the Elimination of Discrimination against Women, *Concluding Comments, A/57/38* (Part I) (2002) at para. 58, online: Office of the High Commissioner for Human Rights, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/206085180eaba54fc1256c6a003b956a?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/206085180eaba54fc1256c6a003b956a?Opendocument)>.

<sup>28</sup> UN, Convention on the Elimination of All Forms of Discrimination Against Women, *A/57/38*(Part I): 12 (2002) at para. 59.

<sup>29</sup> Interview of Losena Salabula, *supra* note 6.

<sup>30</sup> *Ibid.*

is very contradictory with our culture. When the family wants a girl, they will plant for her for three or four years, and present things for her. It is an investment. But now, with women's rights, you can marry anyone you want, and forget about this custom.<sup>31</sup>

Here she refers to the use of elopement as a way of marrying instead of the protracted marriage arrangements and exchanges normally expected. It is typically followed by a gesture of reconciliation by the family of the groom to the family of the bride in the form of a *bulubulu* ceremony.

In response to the critique of *bulubulu* as well as criticism of racial policies and affirmative action for Fijians from this and other UN treaty bodies, she said that if the international community did not like what Fiji did, Fiji would go its own way. She felt that the committee did not understand *bulubulu*, and the formal nature of the setting prevented her from explaining it to them.

Her comments reflect contemporary Fijian politics: a nationalist ethnic Fijian movement is asserting the centrality of Fijian village life to the nation. The Women's Minister did not defend the use of *bulubulu* for rape, but she did insist on the importance of *bulubulu* for village conflict resolution. At the end of our meeting, the minister gave an impassioned plea for Fijian tradition, which she says this individualist human rights system is disrupting. Her central concern was that the Fijian culture and its conditions were not understood, that the "expert" label of the CEDAW committee members sounded intimidating, and that they did not appreciate the particularities and specific features of Fiji.

How did this discussion between the Fiji government representatives and the CEDAW experts go wrong? Both groups shared a concern about an overly lenient treatment for rape. Yet, they seem to have spoken past each other. Using village reconciliation for rape could certainly fail to protect a victim, but it was also clear that the courts were not working effectively. Perhaps it depended on how *bulubulu* actually functioned in different contexts.

In order to answer this question, two critically important points should be considered. First, *bulubulu* can to some extent redeem a woman's honour and punish the offender, but only if there are powerful kin groups and strong leaders. This tends to be true only of villages, not urban areas. It is an ancient practice in Fiji, often used by subordinates

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<sup>31</sup> *Ibid.*

to deflect the wrath of their superiors in a hierarchical system. It is a way of making peace and avoiding vengeance between two kin groups, usually *matagali* or lineages, after there has been an injury. It is used to resolve many conflicts in villages but not often rape. When it is used for rape, it is typically a strategy for apologizing to the family of the victim and sometimes offering restitution such as arable land. The apology is delivered to senior males in the family, and the victim is rarely consulted about whether she wishes to accept it. It is possible for this ceremony to enable her to marry, however, and somewhat diminish the stigma of sexual violation. Moreover, in some cases, the senior males of the offender's kin group hold the offender accountable, reprimanding him or punishing him with violence.

However, the nature of village life has changed dramatically during 150 years of contact with Europeans, colonialism, and since 1970, independence. About half of the country's population are people of Indian ancestry, brought to work the sugar fields by the British colonial government and Australian sugar plantations. The population is now largely literate and increasingly urban. By 2000 about 40 per cent of the ethnic Fijian population lived in urban or peri-urban settings.<sup>32</sup> As village life has changed, so has the practice of *bulubulu*.<sup>33</sup>

Some urbanites have begun to redefine the custom itself. For example, one powerful woman, who was highly placed in the Methodist church, described how she responded to an abusive husband whose wife had taken refuge in her house. When the husband arrived offering to reconcile with his wife using *bulubulu*, the Methodist woman received the request, but did not accept it herself. She consulted with the victimized wife and did not insist that she accept the apology when the wife refused. Indeed, the abused woman stayed with her senior relative for a year, despite her husband's frequent pleas that she return. She finally agreed to return home, but by her own decision. In this case, the affluent urban woman revised *bulubulu* to allow the victim herself to choose whether to accept the apology. In addition, she changed the

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<sup>32</sup> Brij V. Lal, "Making History, Becoming History: Reflections on Fijian Coups and Constitutions" (2002) 14 *The Contemp. Pac* 148 at 155.

<sup>33</sup> When I talked to a variety of people in the urban areas, some reported that ceremonies were not taken seriously and offenders were barely reprimanded. Others regretted the change in marriage practices so that couples eloped without the ritual exchanges formerly fundamental to the process.

process because she was a woman. However, she did rely on her adult son to serve as a male kinsman along side her. This example shows that *bulubulu* can be retained in urban areas, but may be performed in very different ways.

In village practice, the girl would not have been asked her opinion about accepting the apology, and the apology would be delivered to the kin group, not to the victim. Within close-knit villages, this custom could reinstate a woman's virtue and punish the offender, but it was basically designed to prevent killing between the kin groups. The gift of a *tabua* or whale's tooth provided a way to make peace within villages. As the nature of Fijian society has changed, the custom itself has begun to shift from a practice that focuses on preventing vengeance between clans to one that supports a victim and holds the offender accountable.

A second important point is that the real grievance of the CEDAW women's groups was not the use of *bulubulu* for rape cases, but the use of *bulubulu* to persuade prosecutors to drop charges and magistrates to mitigate sentences. In other words, their complaint was not the use of *bulubulu* itself but the way it was being used to undermine the legal process. They were concerned about the legal system's willingness to be deterred by assertions that *bulubulu* had been done. Indeed, the anti-rape campaign criticizing *bulubulu* began in the late 1980s after a judge issued more stringent guidelines for rape cases and defendants began to search out alternatives for escaping these new, more severe penalties. *Bulubulu* was one of them. The mounting enthusiasm for *bulubulu* was also fostered in the 1980s and 1990s by a growing Fijian nationalism that sought to exclude Indo-Fijians from political power and celebrate Fijian village life as the essence of the nation. Coups in 1987 and 2000 underscored the unwillingness of some Fijian political leaders to share power with Indo-Fijians, although the issues are more complicated than any simple ethnic conflict. One of the demands of Fijian nationalists was the creation of traditional Fijian courts. Although there were efforts to create such courts in the 1990s, with substantial funds dedicated to the project, it appears that there are no courts in operation.<sup>34</sup>

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<sup>34</sup> My research assistant, Eleanor Kleiber, was unable to find any indication that these courts were operating when she interviewed the person who, at least in theory, was running them in

Indeed, when I reread the Fiji country report to CEDAW, I realized that the report itself complained about the use of *bulubulu* to diminish the effectiveness of the courts, not about the custom itself. Even the leader of the anti-rape campaign had no objection to the use of *bulubulu* in parallel with the courts; she just did not want it to replace the courts.<sup>35</sup> The critique of the Fiji feminists, then, was not about the use of a traditional reconciliation procedure for rape, but about the way the modern courts were allowing *bulubulu* to diminish their effectiveness. Nor were they concerned about the use of *bulubulu* in rural villages, but primarily in urban areas.

This analysis raises the question: why did the experts misinterpret the use of *bulubulu*? And what does this tell us about the tensions between global law and local situations? The UN discussion did not deal with the complexity of the custom or its use, but focused on the problem of the custom itself. The experts discussed not only avoiding *bulubulu* for rape cases, but also eliminating *bulubulu* itself. Neither the report, nor the NGO representatives, nor the government representative made clear how fundamental and widespread the practice is, nor how often or how long it had been used for rape. Obviously, they did not have the time to read the anthropological literature and interview Fijian leaders about the practice. This lack of detailed, specific knowledge is an inevitable feature of such transnational forums. Yet, there are at least two other explanations as well. The first is a cultural, interpretive one, the second a more structural one linked to the nature of human rights monitoring.

First, the committee moved quickly from condemning the use of the custom for rape to a condemnation of the custom altogether because many of the CEDAW committee members assumed that the problem they confronted was one of a "custom" embedded in "traditional culture." They were inclined to condemn the entire practice, not just its use for rape. They talked about *bulubulu* as a barbaric custom for handling rape by compensation, an example of a harmful traditional practice that needs to be changed to improve the status of women. The custom was defined as a violation in and of itself rather

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2003. High-ranking lawyers and prosecutors told me that, despite a substantial expenditure of government funds over the last decade, there were in fact no Fijian courts in operation.

<sup>35</sup> Interview of Peni Moore (2002) [on file with the author].

than as one inappropriately applied to a particular kind of offence in the context of an urban criminal case used to derail more severe legal penalties.

The experts hearing these reports bring to their work a concept of culture that shapes the way they interpret what they hear. Having listened to reports and discussions for five sessions, over a period of two and a half years, it is clear to me that the term culture is used to describe the way of life of people in rural villages, remote valleys and mountaintops, and isolated islands. Culture is not found in the UN or among transnational elites, but only among those still living in what is often referred to as traditional society. This particular usage of the term assumes that people with culture live in circumscribed and unchanging ways governed by strict traditions and share the same set of values and practices. Female genital cutting is the model for this understanding of culture, since it is widely seen as a barbaric practice embedded in culture and very difficult to root out. It is an example of the well-established category of harmful traditional practices. Such a perspective on culture is reinforced by human rights documents about women that repeatedly insist that no cultural, religious, or traditional practice should undermine women's rights. As experts listen to one country report after another, they often hear about customs that violate the terms of the convention and undermine women's rights. They share the widespread opinion that customs are a remnant of the past that must be changed to accommodate modernity. Thus, they are predisposed to see customs such as *bulubulu* as violating women's rights.

Second, the experts are applying the law. They are acting as a legal body to enforce compliance with the terms of a treaty ratified by the country. The human rights system is a legal system committed to the universal application of a code of conduct and to finding ways to apply this code to myriad particular situations. Its documents spell out this shared code, one legitimated by the process of consensual document production and ratification. This law does not accept the existence of alternative normative codes as justification to withdraw its scrutiny. Of course, this universalizing approach is structured by the Convention itself and the committee's mandate to apply it to all countries equally. Countries that ratify it assume the burden of conforming to its requirements, regardless of their specific cultural attributes. Human rights conventions are not understood as one legal code among alternatives in a plural legal field.

The CEDAW committee is not deliberately promoting a universalistic transnational modernity, but is part of a process in which the convention itself is the moving force toward transnational modernity. Indeed, the whole human rights process is based on the assumption that local features of culture, history, and context should not override universal principles. Human rights documents create a universal vision of a just society in which local differences are not important. Cultural difference is respected, but only within limits: it does not justify assaults on the bodily integrity of vulnerable populations. The human rights process is based on the assumption that local features of culture and history should not override universal principles concerning how societies should be organized. The goal of the human rights system is to create a universal vision of a just society in which local differences are not important.

#### IV. CONCLUSION

The particularities of local practices and the contexts within which they operate are often thought of as falling in the domain of culture. Demands to recognize specific features of context usually appear as demands to recognize culture. Yet, culture is most often raised in international forums as an excuse by governments that fail to act energetically to promote gender equality and the values of autonomy and choice that are at the heart of the human rights system. Consequently, transnational women's human rights activists see claims to respect the particularities of local cultures, traditions, or religious practices as forms of resistance to their efforts to promote women's equality. These claims oppose universal women's human rights.

This position has significant implications for the practice of human rights. It means that there is little sympathy for societies that have separate personal laws for different religious communities or that practice customs that violate the terms of the international covenants. This is a fundamental tension within the structure of global reformism and human rights: the contradiction between the desire to maintain cultural diversity and at the same time to achieve progress in terms of equality, rights, and universality. These two sets of goals are in conflict: applying a universalistic framework obscures local particularities, but emphasizing local situations impedes applying universal categories for reform. Rather than understanding how the practice of *bulubulu* meshes with a complex set of kinship interventions, police and court actions, and



village hierarchies to affect women's protection from rape, and rather than appreciating the variety of local village and town situations in which this takes place, the human rights intervention must settle for a critique of the practice itself, in this case feeding into a resistant ethnic nationalism that attributes its problems to human rights. Recognizing the fluid and contested nature of culture, and the extent to which the human rights project itself is a cultural one, could expand understanding across the global/local interface.

Finally, foregrounding the work of intermediaries, people who translate across the cultural boundaries between transnational law and local normative orders, would help us to understand the dynamics of this plural legal situation. These translators are often NGO activists, academics, or local political leaders. Had there been effective translators between the Fiji government and the CEDAW experts, the outcome might have been far different. Instead of a sense of opposition and misunderstanding the hearing might have produced a more constructive dialogue about how to navigate between changing customs and urban/rural differences in order to control rape more effectively, a goal that all the participants shared. But recognizing the role of translators depends on abandoning notions of culture as an integrated whole that is to some extent untranslatable into other terms. As the call for a critical legal pluralism suggests, recognizing forms of intersection and influence among the constituent parts of culture is of critical importance.

