

Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty

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I. INTRODUCTION

In 2007, after more than 20 years of exhaustive negotiations, drafts and re-drafts between indigenous groups and member states, the United Nations (“UN”) finally adopted the Declaration on the Rights of Indigenous Peoples (“Declaration”) by an overwhelming majority.² The UN thereby recognized the right of indigenous peoples “to promote, develop and maintain their . . . distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”³ This right will hereafter be expressed as the right to use customary systems of law (“CSLs”).

Although merely one of a number of rights enshrined in the Declaration, this is a right whose importance is belied by the small space it occupies in the text of the Declaration. The right to use CSLs is a core expression not only of indigenous identity but also of indigenous sovereignty, an attempt to retain autonomy in the face of a monolithic state seeking to exercise its authority over a diverse geographical space through formal state laws, among other things. In many senses the conflict between formal, state sys-

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2. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007) [hereinafter Declaration]. For an insightful series of essays about the process of negotiating and drafting the Declaration, written by actors who were directly involved in this process, see generally MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Claire Charters & Rodolfo Stavenhagen eds., 2009).

3. Declaration, *supra* note 2, art. 34.

tems of justice and informal CSLs is one of the most visible and enduring tensions between the Westphalian nation-state system and the multiplicity of autonomous ethnic groupings that have been subsumed within it. However, although CSLs are well-adapted to comprehending and appropriately addressing the specific problems in the communities in which they are applied, where there are jurisdictional conflicts between the two systems they are invariably resolved in the state courts by applying formal, state laws.⁴ In short, under international law, indigenous sovereignty must yield to state sovereignty.

The reality is that the majority of people in developing countries rely on CSLs as a means of resolving disputes and ordering life within their respective communities.⁵ The imposition of formal, state laws tends to alienate these communities and exacerbates resentment towards the often-corrupt urban elite that administers them. Furthermore, ignorance or dismissal of CSLs is potentially crippling for attempts to build the rule of law (“RoL”) in developing countries: if governments and their supporting international donors refuse to engage with or even acknowledge the legal systems with which most people are familiar and trust, then any endeavor to promote RoL is destined to fail. Thus, not only is recourse to CSLs an important right in itself, it also has important repercussions for the exercise of many other important rights, particularly the overarching right of self-determination, which is of critical importance to furthering indigenous sovereignty.

The concept of indigenous sovereignty and its relationship with self-determination is an underlying theme of this Article, and I touch on it throughout in order to locate the function and significance of CSLs in the growing international debate about evolving forms of indigenous autonomy from the state. It is not, however, the focal point and is deserving of far more attention than this Article can hope to offer.

Part II of this Article will begin by locating CSLs in the undeniable social reality of legal pluralism. Part III will demonstrate that, situated within the burgeoning body of indigenous rights, there is an emerging norm recognizing the right of recourse to indigenous CSLs, albeit one that potentially conflicts with other more established rights. One of the principal aims of the Article is to demonstrate, in Part IV, that the inherently dynamic nature of the international human rights system is such that it is capable of evolving in a way that embraces recently recognized norms, rather than being a closed, fixed system unable to respond to changing international legal and political orders. Thus, any conflict between the operation of CSLs and established civil and political rights can be resolved in a way that gives space for CSLs to not only operate consistently with interna-

4. Mattias Ahrén, *Indigenous Peoples' Culture, Customs and Traditions and Customary Law — the Saami People's Perspective*, 21 ARIZ. J. INT'L & COMP. L. 63, 100–01 (2004).

5. Leila Chirayath et al., *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems 1* (World Bank, Background Paper to World Development Report, 2005).

tional human rights law (“IHRL”), but also in a way that is mutually reinforcing and constructive for both systems. Significantly, this tension is a positive one and can be engaged in a way that will “build rights” rather than require that they be “balanced” or forced to yield to more widely recognized rights as if in a zero-sum competition.

After establishing that the operation of these supposedly conflicting systems is theoretically reconcilable, Part IV.C posits a tentative, practical framework, founded on consultation, negotiation and community participation, by which to engage with customary systems in pursuit of a more deeply rooted conception of indigenous rights. This is, in short, an application of the positive theoretical tension between customs and rights that can be used as a vehicle to “build” and provide mutually reinforcing strength to potentially competing rights in pursuit of greater recognition of indigenous, non-state legal orders.

II. LEGAL PLURALISM AND CUSTOMARY SYSTEMS OF LAW

A. *What Is Legal Pluralism?*

Put simply, all societies are in one form or another legally plural.⁶ The concept of legal pluralism refers to “the possibility that within the same social order, or social or geographical space, more than one body of law, pertaining to more or less the same set of activities, may co-exist.”⁷ Legal pluralism can be contrasted to the ideology of legal centralism or monism, which dictates that:

[L]aw is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.⁸

Hence, the conception of law as a unified, hierarchical ordering of norms is intrinsically and inseparably connected to the idea of the state as the basic unit of political organization.⁹

6. INT’L COUNCIL ON HUMAN RIGHTS POLICY, *WHEN LEGAL WORLDS OVERLAP: HUMAN RIGHTS, STATE AND NON-STATE LAW*, 1 (2009) [hereinafter ICHRP, *WHEN LEGAL WORLDS OVERLAP*].

7. Franz Von Benda-Beckmann & Keebet Von Benda-Beckmann, *The Dynamics of Change and Continuity in Plural Legal Orders*, 53–54 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 14 (2006). According to the International Council on Human Rights Policy, legally plural environments are invariably characterized by one of three arrangements: a legal order having no state sanction exists parallel to state law; the state legal order is plural; quasi-state legal orders are established, or the state recognizes or incorporates non-state legal orders. ICHRP, *WHEN LEGAL WORLDS OVERLAP* *supra* note 6, at 3–5.

8. John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 3 (1986).

9. *Id.*

In its weakest manifestation, legal pluralism describes a situation in which the sovereign implicitly commands the application of different, supposedly pre-existing customary laws for different groups within the national population, groupings ordinarily defined according to ethnicity, religion, or geography.¹⁰ This is commonly found in colonial or post-colonial contexts and, although technically describable as a type of legal pluralism, it is in truth derived from a centralized node of legal power to which non-state legal orders are subject. A state-driven designation of distinct legal systems implicitly requires the state to determine which group's laws apply in which situations, and how conflicts between them ought to be reconciled.¹¹ The confusion that inevitably arises from this attempt at legal and normative ordering by the state results in a "messy compromise which the ideology of legal centralism feels itself obliged to make with recalcitrant social reality," demanding the accommodation of ethnic heterogeneity until these cultural identities can be "smelted into a homogenous population" deemed essential for all modern states.¹²

The critical point to make with respect to legal pluralism, particularly for the purposes of this Article, is that it provides a conceptual basis for recognizing, first, the fact that state law is rarely, if ever, the only relevant and effective legal order in people's lives.¹³ There is, in fact, a multiplicity of non-state systems of law that govern peoples' lives in both developed, western societies and developing, non-western societies, including religious, informal-urban and indigenous-chthonic systems of law.¹⁴ For example, for many indigenous Australians, CSLs rather than formal Australian law are the principal mode of regulating communal relations and resolving disputes, especially in rural areas.¹⁵ Second, the relationships between multiple legal orders do not consist merely of conflict, rather, they are dialectic, mutually constitutive, fluid, and contested.¹⁶ For example, courts in Australia may take indigenous customary laws into account when considering

10. Griffiths, *supra* note 8, at 5. For example, in Sierra Leone the British colonizers passed legislation in 1896 recognizing customary law through the "courts of the native chiefs." In doing so, however, they subordinated customary law to enactments of the parliament and provided that it would be invalid to the extent of repugnancy with principles of natural justice. Allison D. Kent, *Custody, Maintenance, and Succession: The Internalization of Women's and Children's Rights under Customary Law in Africa*, 28 MICH. J. INT'L L. 507, 522 (2007). Similarly, Liberia's *Revised Rules and Regulations Governing the Hinterland 1949* formally recognized the customary laws of those deemed to be living in the "hinterland" (i.e. in non-urban areas) and restricted its application to those people. See LIZ ALDEN WILY, SUSTAINABLE DEV. INST. & FERN, SO WHO OWNS THE FOREST, Annex D (2007), available at <http://www.rightsandresources.org/documents/index.php?pubID=102>.

11. Griffiths, *supra* note 8, at 7. The implications of a state-controlled delineation of non-state orders are explored further in Part III.C.

12. *Id.*

13. ICHRP, WHEN LEGAL WORLDS OVERLAP, *supra* note 6, at 15.

14. See *infra* Part II.B.

15. LAW REFORM COMM'N OF NEW SOUTH WALES, SENTENCING: ABORIGINAL OFFENDERS, (REP. NO. 96), §§ 3.4–3.9 (2000).

16. Galit Sarfaty, *International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation*, 48 HARV. INT'L L. J. 441, 448 (2007).

the appropriate sentence for an indigenous offender, who may have been punished already by his or her community under its customary laws.¹⁷

Therefore, in a legally plural context:

[L]aw and legal institutions are not all subsumable within one “system” but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another, so that the “law” which is actually effective on the “ground floor” of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like.¹⁸

“Customary systems of law” is the phrase used to describe those laws effective on the ground floor of indigenous societies.¹⁹

B. *What Are Customary Systems of Law?*

At the outset it is essential to disavow the crude, primitive stereotypes with which CSLs are frequently associated. In the Australian context, for example, Aboriginal laws are commonly reduced to crude and brutal punishments and nothing more.²⁰ This represents only one small aspect of CSLs, and one should not presume that harsh punishments are accepted by all adherents of the many forms of Aboriginal CSLs. In short, discussions of CSLs are plagued by misinformation, ambiguity, and confusion.²¹ As such, there is no universally accepted definition of customary law.²² “Customary systems of law” is the term adopted in this Article to describe what other commentators have described elsewhere as “traditional,” “informal” or, less commonly, “chthonic” systems of law.

Nevertheless, although frequently used interchangeably, there are small but important differences between these conceptions of law. “Traditional law” generally refers to non-state systems that have existed at least since pre-colonial times and are commonly confined to rural areas, while “infor-

17. For an analysis of the relationship between indigenous customary laws and the Australian legal system, see generally AUSTL. L. REFORM COMM’N, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS (REP. NO. 31) (1986); Mark Finnane, “Payback.” *Customary Law and Criminal Law in Colonised Australia*, 29 INT’L J. SOC. L. 293 (2001); HEATHER McRAE ET AL., INDIGENOUS LEGAL ISSUES: COMMENTARY AND MATERIALS (3d ed. 2003).

18. Griffiths, *supra* note 8, at 39.

19. *Id.*

20. Megan Davis & Hannah Mcglade, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, in ABORIGINAL CUSTOMARY LAW: PROJECT 94 BACKGROUND PAPERS 381, 386–87 (Law Reform Comm’n of W. Austl. ed., 2006).

21. This is perhaps best reflected in the fact that even the term “custom” was unable to be defined by experts after two days of debate at a conference in the 60s. WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA 471 (2d ed. 2006).

22. RAJA DEVASISH ROY, MINORITY RIGHTS GROUP INT’L, TRADITIONAL CUSTOMARY LAWS AND INDIGENOUS PEOPLES IN ASIA 6 (2005).

mal law” tends to refer to non-state systems that can be found in urban settings.²³ These would include popular justice forums and alternative dispute resolution facilities convened by NGOs.²⁴ “Chthonic laws,” meanwhile, are used by Glenn synonymously with aboriginal or indigenous laws.²⁵

At the end of the day it is best to think collectively of these systems as types of non-state legal orders that often overlap, compete with and adapt to both one another and to state legal orders.²⁶ According to the International Council on Human Rights Policy, non-state legal orders refer to:

[N]orms and institutions that tend to claim to draw their moral authority from contemporary to traditional culture or customs, or religious beliefs, ideas and practices, rather than from the political authority of the state. We use ‘legal’ to acknowledge the fact that these norms are often viewed as having the force of law by those subject to them.²⁷

It is therefore critical to reiterate that the complexity of legally plural societies behooves us not only to recognize both formal and customary laws but also to go beyond this simple dichotomy and recognize that, at any given moment in time, there are numerous colliding state and non-state legal orders through which people must navigate.²⁸

As reflected in Glenn’s terminology, there is an inherent connection between an indigenous people and the particular system of law that they practice. Settling on a universal definition of “indigenous” is notoriously difficult and controversial, loaded as it is with potentially far-reaching socio-political consequences, and this is one of the reasons why the Declaration fails to define the peoples to whom it purports to apply. There is no single authoritative definition, however, one that is often cited is that of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, José Martínez Cobo, who in 1987 defined indigenous peoples as:

[T]hose which, having a historical continuity with pre-invasion and pre-colonial societies . . . [who] consider themselves distinct from other sectors of the societies now prevailing in those territo-

23. PENAL REFORM INT’L, ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA 11–12 (2000).

24. *Id.*

25. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 59–91 (2d ed. 2007). According to Glenn, “chthonic laws” apply to “people who live ecological lives . . . which means that they live in or in close harmony with the earth . . . chthonic is thus to attempt to describe a tradition by criteria internal to itself, as opposed to imposed criteria. It is an attempt to see the tradition from within . . .” *Id.* at 60–61.

26. ICHRP, WHEN LEGAL WORLDS OVERLAP, *supra* note 6, at 43.

27. *Id.*

28. Tanja Chopra, Panel address at Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies Conference: Women’s Rights and Legal Pluralism in Post Conflict Societies: An Analytical Agenda (Nov. 18, 2009).

ries, or parts of them . . . and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, *in accordance with their own cultural patterns, social institutions and legal systems.*²⁹

Although Cobo does not characterize “legal systems,” he does situate them at the heart of what it means to be indigenous. As exemplified by Glenn’s definition, the various legal systems applied by indigenous peoples are generally described as being “traditional,” “chthonic,” “informal,” or, as in this Article, “customary,” although these are clearly not fixed or precise categories. CSLs are commonly, but not exclusively, used by indigenous peoples and, similarly, indigenous peoples commonly, but do not exclusively, use CSLs. Inevitably, then, there are exceptions to the general synonymy of indigenous with customary, which in part reflect the fluidity of and problems associated with defining “indigenous.”³⁰

It must be emphasized that CSLs are founded on a body of customary laws, that is, they are systems of law, but not in the same sense that this word is used by Western, positivist lawyers to describe laws. Customary law is something that emerges and evolves from the social practices that a given jural community eventually comes to accept as obligatory.³¹ It has also been referred to as “living law,” something that is adaptable, evolving and innovative.³² Lawyers have generally been disdainful of CSLs and perceive them to be a kind of “friendly folklore” rather than a sophisticated system of laws to be put on an equal footing with other legal families such as the common law and civil law.³³

Legal anthropologists and legal pluralists, on the other hand, argue that customary law is more accurately described as “a customary mode of the production of law.”³⁴ In other words, CSLs entail a set of practices or usages that are, or ought to be, equal in status to other legal systems but are derived from fundamentally different processes. In short, the appellation of

29. Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations — Volume 5: Conclusions, Proposals and Recommendations*, ¶¶ 21–22, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (Mar. 1987) (by José Martínez Cobo) (emphasis added).

30. For example, depending on the complex and highly controversial question of who could be considered “indigenous” in India, it might be argued that there are numerous indigenous Indian legal systems, such as the *Nyaya Panchayats* or village-level courts, which are not customary in nature. PENAL REFORM INT’L, *supra* note 23, at 86–89.

31. T.W. Bennett, *Comparative Law and African Customary Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 641–42 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

32. MENSKI, *supra* note 21, at 470; Christine Zuni Cruz, *Law of the Land — Recognition and Resurgence in Indigenous Law and Justice Systems*, in INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES 315, 315–16 (Shin Imai et al. eds., 2009).

33. Norbert Rouland, *Custom and the Law*, in CUSTOM AND THE LAW 1, 6 (Paul de Deckker & Jean-Yves Faberon eds., 2001).

34. *Id.* at 14.

law to custom is an emphasis of function over form.³⁵ Beyond this, it is difficult to define CSLs with real precision and any attempt to do so would ignore the flexibility and dynamism that are the key features of customary laws and at the same time impose detailed prescriptions that do not necessarily apply to all of the manifold forms of CSLs practiced by indigenous peoples around the world. Nevertheless, it is helpful to briefly identify some of the dominant characteristics of CSLs.³⁶

First, CSLs tend to be disseminated and applied orally.³⁷ Consequently, attempts to record custom in writing risk transforming it into something completely different.³⁸ Second, they are dynamic and constantly evolving, not fixed or static. Nevertheless, while CSLs adapt to changing, modern conditions there is still a perception that they are firmly rooted in tradition.³⁹ Third, the problems that are the subject of CSL-based disputes generally are viewed as being those of the whole community or group and not just the particular disputants.⁴⁰ For this reason, the principal objective of dispute resolution oftentimes is to promote reconciliation and restore social harmony.⁴¹ Fourth, disputes tend to be resolved on a flexible, ad hoc basis and not by way of rigid procedure or rules of evidence.⁴² One consequence of this is that like cases need not be treated alike. The process tends to be voluntary and, as a result, decisions are based on agreement and not coer-

35. INT'L COUNCIL ON HUMAN RIGHTS POLICY, RESEARCH PROJECT ON PLURAL LEGAL ORDERS AND HUMAN RIGHTS: AN APPROACH PAPER ¶ 14 (2008) [HEREINAFTER ICHRP, RESEARCH PROJECT ON PLURAL LEGAL ORDERS].

36. PENAL REFORM INT'L, *supra* note 23, at 22–37; Bennett, *supra* note 31, at 651–71.

37. For example, in Timor Leste disputes are commonly resolved through meetings of the village council of elders, the *Conselho do Katuas*, who will convene to hear and then discuss the evidence from the accuser and the respondent. DAVID MEARNs, AUSTL. LEGAL RES. INT'L, LOOKING BOTH WAYS: MODELS FOR JUSTICE IN EAST TIMOR 47 (2002).

38. As John Marincola has said in relation to Herodotus' *The Histories*:

The nature of oral tradition – the ways in which oral societies preserve, hand down and modify their traditions – is seen to be very different from that of written tradition. Assumptions that we make as members of a society where writing is an everyday part of life may be invalid when applied to the very different cultures of the ancient world. Those things that we find unusual in the traditions reported by Herodotus may owe much to the fact that they were preserved without the aid of writing. Moreover, it has come to be seen that the interaction between an inquirer and his source is not simple and straightforward but is conditioned by and dependent on the cultural presuppositions of both sides. Inquiry, it seems, is not a simple matter of asking questions and getting answers.

John Marincola, *Introduction to HERODOTUS, THE HISTORIES*, at xxvii–viii (Aubrey de Sélincourt trans., Penguin Classics 3d ed. 1996) (footnote omitted).

39. For example, while the *gacaca* mode of dispute resolution used in Rwanda is seen as customary and traditional, it has increasingly become co-opted by local government administration and, as a result, has begun to lose of some of its customary character. PENAL REFORM INT'L, *supra* note 23, at 78–79.

40. In the Oecussi region of Timor Leste, an offender will be made to pay compensation as part of the punishment for his or her offence. However, the obligation to repay that debt often falls additionally upon the individual's family or even the wider community of which they are a part. MEARNs, *supra* note 37, at 43.

41. PENAL REFORM INT'L, *supra* note 23, at 24.

42. *Id.* at 30–31.

cion.⁴³ In combination, these characteristics render CSLs amenable to adaptation and development. When there is interface and engagement between CSLs and IHRL, the dynamism and adaptability of these two systems raises the possibility of sustained, normative change, particularly when this is produced by indigenous agency. These themes underpin, and will be explored in greater detail throughout this Article.

C. *Why Are Customary Systems of Law Important?*

1. *Subsidiarity*

There are many important reasons to avoid undermining or diminishing the role of CSLs in indigenous communities and, in a more positive sense, to actively support indigenous peoples to exercise their right to use these CSLs. In particular, as discussed below, CSLs can contribute to RoL promotion, depending how one conceptualizes this heavily contested term. Even more importantly, the very survival of indigenous cultures depends at least in part on their ability to maintain and develop their CSLs. Over and above these specific considerations, recognition of the importance of localized, communal systems of law and governance rests on ancient moral and philosophical foundations that are contemporarily manifested in the principle of subsidiarity. This principle “has become an extremely influential concept in global governance” and has been adopted by the UN, the World Bank, and a number of NGOs as a guide for their development policies.⁴⁴ Put simply, subsidiarity dictates that “governments need to delegate their powers, authorities, and duties to the smallest (or to the closest-to-the-citizens) jurisdiction that can efficiently perform them.”⁴⁵

Although subsidiarity belongs to the twentieth century, it has its roots in ancient Greek Aristotelian thought⁴⁶ and was further developed by Locke, Montesquieu, and de Tocqueville, among others.⁴⁷ Subsidiarity also came to acquire a religious dimension through the work of St. Thomas Aquinas and Catholic social thought of the nineteenth century.⁴⁸ The entities to which authority and powers ought to be conferred under the justification of subsidiarity are “pre-legal social associations, whose existence precedes, historically and even ontologically, that of the state or even of the

43. For example, in sub-Saharan Africa, disputants are given wide latitude to speak on a number of matters “which at first are apparently irrelevant, but which may later turn out to be crucial.” Furthermore, traditional judges may often adopt the role of counsel for disputants who are struggling to organize their case coherently. Also, in Zimbabwe, a Shona judge “will hesitate to pronounce judgment unless he is reasonably certain that the parties will abide by his decision or settlement.” *Id.* at 31–32.

44. Yishai Blank, *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 *FORDHAM URB. L.J.* 509, 531 (2010).

45. *Id.* at 533.

46. *Id.* at 540.

47. Paolo Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *AM. J. INT'L L.* 38, 40–41 (2003).

48. *Cf. id.* at 41.

church.”⁴⁹ These entities might include families, churches, NGOs, or units of local government. In essence, according to Pope Pius XI, the moral rationale for this devolution of power is that:

Just as it is gravely wrong to take from individuals what they can accomplish on their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association *what lesser and subordinate organizations can do*.⁵⁰

Importantly, for the purposes of this article, subsidiarity has been described as a structural principle of IHRL.⁵¹ According to Carozza, it provides us with a tool by which to “mediate the polarity of pluralism and the common good in a globalized world and helps us make sense of international human rights law.”⁵² In particular, through its respect for sub-national, localized authority, it encourages and protects pluralism while maintaining a “substantive vision of human dignity and freedom.”⁵³ Furthermore, claims that this pluralism undermines the universality of IHRL rest on a fundamental misunderstanding of the discretion that IHRL grants to local authorities to protect human rights in a contextually appropriate way.⁵⁴

In this manner, it becomes clear that subsidiarity can support indigenous communities seeking to exercise a degree of localized governance and cultural autonomy through recourse to CSLs in the face of state attempts to exercise sovereign control over all aspects of public life. It also provides a robust historical and philosophical foundation for the assertion that CSLs are critical to the functioning of states with indigenous populations. In short, disputes between indigenous peoples can be more effectively resolved if done in accordance with their own customs rather than by the state under formal laws.

2. Customary Systems of Law Can Contribute to Rule of Law Promotion

It ought to be clear from Part II.B that CSLs are not merely quaint traditions whose use is confined exclusively to indigenous peoples occupying remote corners of the developing world. It is a fundamental, but often overlooked, reality that the majority of the world’s population has a greater familiarity with and relies more on CSLs rather than the formal, state legal systems to which CSLs are ordinarily subject.⁵⁵ For example, in Ban-

49. Blank, *supra* note 44, at 540–41.

50. Carozza, *supra* note 47, at 42 (emphasis added).

51. *Id.* at 38.

52. *Id.*

53. *Id.* at 40.

54. *Id.* at 71–72.

55. MARGUERITE GARLING, INT’L COUNCIL OF HUMAN RIGHTS POLICY, ENHANCING ACCESS TO HUMAN RIGHTS 54 (2004). According to the United Kingdom’s Department for International Devel-

gladesh, Burundi, and Malawi it is estimated that 60-70%, 80% and 80-90% of disputes, respectively, are resolved through CSLs.⁵⁶ On that basis CSLs ought to be an integral aspect of any attempt to promote RoL.

The precise meaning and scope of the RoL concept is uncertain to say the least and subject to considerable academic debate or, as one scholar put it, even “conceptual anarchy.”⁵⁷ On any definition of the “rule of law,” however, if it is accepted that customary law is a form of law, given that it regulates the relations between and activities of citizens and thereby provides them with a system of governance, then RoL clearly would include the use of CSLs within its ambit.⁵⁸ Furthermore, it is often expressed as a given that RoL promotion plays a central role in the overall development process in developing countries, although the various dimensions of this assumption are increasingly being questioned.⁵⁹ As the United Nations Secretary-General, Kofi Annan, stated: “[c]oncepts such as . . . the rule of law . . . are essential to understanding the international community’s efforts to enhance human rights, protect persons from fear and want, address property disputes, encourage economic development, promote accountable governance and peacefully resolve conflict.”⁶⁰

Therefore, international programs of development assistance to developing countries will, at best, have limited success if they fail to address RoL. In turn, the failure to address and grapple with the socio-cultural norms encompassed by CSLs and to consider their relationship with formal laws has been identified as perhaps the greatest cause of the disappointing performance in international RoL programs to date.⁶¹ The corollary of this is that strong CSLs can potentially play a critical role in contributing not only to the development of the indigenous communities that rely on them, but also to the broader process of national social, political, and economic development. The use and promotion of CSLs could be one way of enabling indigenous communities to participate in that process if they wish.

opment, “In many developing countries, traditional or customary legal systems account for 80% of total cases.” DEP’T FOR INT’L DEV., JUSTICE AND POVERTY REDUCTION: SAFETY, SECURITY AND ACCESS TO JUSTICE FOR ALL 14 (2000), available at <http://www.gsdc.org/docs/open/SSAJ35.pdf>.

56. EWA WOJKOWSKA, UNITED NATIONS DEV. PROGRAMME, DOING JUSTICE: HOW INFORMAL JUSTICE SYSTEMS CAN CONTRIBUTE 12 (2006).

57. Thom Ringer, Note, *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the “Rule of Law” and its Place in Development Theory and Practice*, 10 YALE HUM. RTS. & DEV. L.J. 100, 107 (2007).

58. As Krygier states, “[lawyers] know about state law, but many of the problems that bedevil attempts to generate the rule of law arise from other sources, among them non-state norms, attitudes, beliefs, practices and institutions.” Martin Krygier, *The Rule of Law and ‘The Three Integrations,’* 1 HAGUE J. ON THE RULE OF LAW 21, 21–22 (2009).

59. See, e.g., David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 74, 74 (David M. Trubek & Alvaro Santos eds., 2006).

60. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, ¶ 5, U.N. Doc. S/2004/616 (Aug. 23, 2004).

61. Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2285–86 (2003).

3. *Indigenous Peoples' Survival Depends on Their Customary Systems of Law*

Customary systems of law are not something that can be neatly compartmentalized and separated from other pillars of communal life in the way that state legal systems can be distinguished from other spheres of state power, such as the executive branch. The processes and purposes of regulating communal activity and resolving disputes in accordance with customary norms are inseparable elements of the general cultural life of indigenous communities. They are an integral part of indigenous identity.⁶² In Robert Porter's view, indigenous peoples, especially in the United States, have three choices regarding their future relationship with the settler nation-state.⁶³ One would be to take no action, which would result in the convergence of indigenous and settler societies and, ultimately, indigenous extinction. The second would be to take the path of "pragmatic indigenization," which would entail taking some steps to halt the convergence and maintain distinctness and separation from the settler society. The third path would be to actively promote divergence as to widen the gap with the settler society and establish a parallel indigenous system that promotes even greater distinctness ("enhanced indigenization").

The path to securing "indigenization" — defined by Porter as the "resumption of important responsibilities currently in the hands of the colonizing . . . government"⁶⁴ — whether it be Porter's pragmatic path or the enhanced path or a combination of the two, depends on overcoming a series of psychological and physical barriers. Defining these terms, Porter contends that "[p]sychological barriers are those that lie within the mind and spirit of Indigenous peoples. Physical barriers are those that relate to the physical and institutional framework shaping and supporting Indigenous societies."⁶⁵

For example, an indigenous person might be psychologically deterred from applying customary practices because of a perception, inculcated by the state, that these practices are primitive and thus undesirable. A physical impediment to indigenization, on the other hand, might be the legal prohibition of certain customary practices deemed abhorrent by the state, such as the practice of spearing an offender's legs practiced in some indigenous Australian tribes.⁶⁶

One of the fundamental physical impediments to the restoration of indigenous sovereignty is indigenous adaptation of formal, positivist legal values and structures from the settler society at the expense of customary

62. Cruz, *supra* note 32, at 327; ROY, *supra* note 22, at 7.

63. Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE HUM. RTS. & DEV. L.J. 123, 128 (2002).

64. *Id.* at 125.

65. *Id.* at 133.

66. See AUSTRALIAN L. REFORM COMM'N, ABORIGINAL CUSTOMARY LAWS: THE INTERACTION OF WESTERN AUSTRALIAN LAW WITH ABORIGINAL LAW AND CULTURE, (REP. 94) 90 (2006).

dispute resolution processes, which tend to focus on community harmony.⁶⁷ As such, the integrity and indigeneity of customary processes depends on their ability to resist the corrupting influence of the values and practices espoused by the state's formal court system.⁶⁸ For example, continued application of CSLs can serve as a vehicle for reiterating and entrenching particular beliefs and folklore upon which the indigenous group's identity is based. In this manner CSLs could play a key role in invigorating indigenous cultures and peoples and enabling them to withstand the homogenizing threat of the nation-state. The survival of indigenous peoples as distinct ethnic groupings therefore depends on the survival, indeed, the development, of indigenous cultures. The use of CSLs may contribute significantly to this process.

III. DOES INTERNATIONAL HUMAN RIGHTS LAW RECOGNIZE A RIGHT TO USE CUSTOMARY SYSTEMS OF LAW?

The right of indigenous peoples to use CSLs is recognized both directly and indirectly through a variety of international instruments. Most notably, the right of self-determination, enshrined in the "Twin Covenants", International Covenant on Civil and Political Rights ("ICCPR")⁶⁹ and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),⁷⁰ has evolved and expanded in such a way as to implicitly command recognition of the right of indigenous peoples to use their CSLs. This is strengthened by the Declaration, which is founded on and seeks to give more detailed content to the right of self-determination. This is further reinforced by recognition under numerous other international instruments, including the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"),⁷¹ International Labour Convention Concerning Indigenous and Tribal Peoples in Independent Countries ("ILO 169")⁷² and miscellaneous international guidelines and declarations. Over and above these instruments, however, indigenous rights advocacy has played a crucial role as the engine driving not only adoption of these instruments, but also in stimulating the dynamic, evolving meanings which these instruments have come to acquire under international law. This has in turn generated a

67. *Id.* at 148.

68. *Id.*

69. International Covenant on Civil and Political Rights, art. 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

70. International Covenant on Economic, Social and Cultural Rights, art. 1, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

71. Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* 12 Mar. 1969, 660 U.N.T.S. 195 [hereinafter CERD].

72. International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO 169].

process of crystallization of indigenous rights under customary international law.

A. *The Twin Covenants*

1. *Common Article 1: The Right to Self-Determination*

Although it had its roots in the protection of minorities between the two world wars, self-determination was first explicitly enunciated in Article 1 of the United Nations Charter in 1945.⁷³ Nevertheless, its meaning at that time was far from clear and it was only in 1960 with the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples that it began to develop substance.⁷⁴ It was then enshrined in Common Article 1 of the Twin Covenants and expressed as the right of peoples to “freely determine their political status and freely pursue their economic, social and cultural development.”⁷⁵ This formulation has been repeated most recently in Article 3 of the Declaration.⁷⁶

Self-determination plays a central role in the realization of indigenous rights generally and has been described by indigenous representatives as “the heart and soul” of the Declaration.⁷⁷ Indeed, the survival of indigenous peoples — as indigenous peoples — depends on it.⁷⁸ It is, however, a particularly ambiguous and disputed concept that must be unpacked to reach a clearer understanding of its significance for indigenous peoples and the implications it may have for the use of CSLs and vice-versa.

a. *The History and Evolution of the Right to Self-Determination*

Self-determination is an overarching right, a “supernorm” according to the majority of UN member states,⁷⁹ which is at once more accepted but also more controversial than many other human rights.⁸⁰ It is both a principle of international law and a bedrock human right that encompasses a

73. U.N. Charter art. 1, para. 2.

74. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), art. 2, U.N. Doc. A/4684 (Dec. 14, 1960); see also Alexandra Xanthaki, *The Right to Self-Determination: Meaning and Scope*, in MINORITIES, PEOPLES AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY 15–16 (Nazila Ghanea & Alexandra Xanthaki eds., 2004).

75. ICCPR, *supra* note 69, art. 1; ICESCR, *supra* note 70, art. 1.

76. Declaration, *supra* note 2, art. 3; see also *infra* Part III.D.

77. Joshua Castellino, *Conceptual Difficulties and the Right to Indigenous Self-Determination*, in MINORITIES, PEOPLES AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY 55, 63–64 (Nazila Ghanea & Alexandra Xanthaki eds., 2004).

78. MAIVÂN CLECH LÂM, *AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION* 201–02 (2000).

79. See Dianne Otto, *A Question of Law or Politics? Indigenous Claims to Sovereignty*, 21 SYRACUSE J. INT'L L. & COM. 65, 85 (1995).

80. Claire Charters, *Indigenous Peoples and International Law and Policy*, in INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES, 161, 163 (Benjamin J. Richardson et al. eds., 2009).

number of other, more discrete rights.⁸¹ It therefore constitutes a jus cogens norm, that is, a peremptory norm of international law from which no derogation is permitted.⁸² The International Court of Justice (“ICJ”) recently described the right of self-determination as “one of the major developments of international law during the second half of the twentieth century.”⁸³

According to the Human Rights Committee: “[t]he right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”⁸⁴ Moreover, the right of self-determination also has a collective, group dimension and is one of the few collective rights that is legally binding.⁸⁵ Indeed, it has been argued that it represents the only international law principle capable of supporting a people’s struggle for greater empowerment and liberation from oppression by a foreign power.⁸⁶

Self-determination was initially characterized as a legal and moral response to the phenomenon of colonialism. Hence, up to and for a brief period after the adoption of the Twin Covenants, self-determination was understood to refer only to the right of subject peoples to rid themselves of colonial rule.⁸⁷ This is the paradigmatic exercise of the right to self-determination.⁸⁸ Thus, self-determination does not entail a general right of peoples to secede from the state of which they are a part, unless this can be characterized as decolonization within the narrow international legal meaning of the term.⁸⁹ Because of the limited legal scope of this concept, indigenous peoples have been unequivocally excluded from the category of colonized peoples.⁹⁰ The right to secession or statehood is often referred to as the external dimension of self-determination.⁹¹

81. Cf. Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB. J. INT’L L. 1, 19 (2008).

82. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 489 (6th ed. 2003); Christine M. Chinkin, *Resolving Conflicting Human Rights Standards in International Law*, 85 AM. SOC’Y OF INT’L L. PROC. 349 (1991).

83. Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141 (June 22) [hereinafter *Kosovo* opinion].

84. U.N. Human Rights Comm., General Comment No. 12: The Right to Self-Determination of Peoples, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.6 at 134 (Mar. 13, 1984).

85. Mahmood Monshipouri, *Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries*, 4 YALE HUM. RTS. & DEV. L.J. 25, 35 (2001).

86. See LÂM, *supra* note 78, at 146.

87. See Xanthaki, *supra* note 74, at 16–17.

88. LÂM, *supra* note 78, at 126.

89. See Xanthaki, *supra* note 74, at 23–24. It has been suggested that there *may* be a right under international law for peoples to secede but only in a very narrow set of circumstances involving persistent and severe governmental discrimination. *Id.* at 61.

90. See Otto, *supra* note 79, at 86.

91. See, e.g., KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* 67–96 (2010).

The process of external self-determination in the form of decolonization in the 60s and 70s — a process which has been virtually completed⁹² — has therefore heightened the importance of and brought opportunities to give content to the concept of *internal* self-determination. The ICJ has played a critical role in the evolution of the right to self-determination. For example, in its *Namibia* opinion it decided that the right to self-determination is of an erga omnes character, that is, one of universal application.⁹³ This was subsequently affirmed in 1995 in the ICJ's *East Timor* decision.⁹⁴ Even more significantly, in 1975 the ICJ held in its *Western Sahara* opinion that indigenous people occupied the region of the Western Sahara prior to Spanish annexation and it could not be considered to be vacant, unoccupied land, or terra nullius.⁹⁵ As a result, states could not rely on the notion of discovery as a basis for sovereign title.⁹⁶ The ICJ's decisions, delivered in the 70s and a time at which decolonization was not yet completed, are a compelling illustration of the rapidity with which accepted understandings of fundamental principles of international law can evolve.⁹⁷ Furthermore, they presaged the emergence of novel understandings of self-determination that were soon to challenge colonial-era orthodoxy on the subject.

b. Novel and Emerging Understandings of Self-Determination

Principles of international law are, by their nature, dynamic, capable of multiple and often contradictory applications, and have considerable normative potential.⁹⁸ Thus, an important point to understand with respect to the contemporary conception of self-determination is that its potential breadth and ambiguity is not a legitimate basis for diminishing its legal status:

[L]egal rules are made to be general to allow for a wide spectrum of application Notions like sovereignty, freedom, participation, and the right to expression all have a certain degree of gen-

92. Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1150 (2008).

93. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 ¶¶ 52–53 (June 21).

94. *East Timor* (Port. v. Austl.), 1995 I.C.J. 90 ¶ 34 (June 30).

95. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 ¶¶ 79–82 (Oct. 16); Charters, *supra* note 80, at 166.

96. Charters, *supra* note 80, at 166–67.

97. Although in its *Kosovo* opinion the ICJ did not consider it necessary to address self-determination in depth, it did consider the closely-related question of whether a unilateral declaration of independence by a territorial entity from the state of which it is a part violated international law. The ICJ concluded that “general international law contains no applicable prohibition of declarations of independence.” *Kosovo* opinion, *supra* note 83, ¶¶ 83–84. The ICJ also reaffirmed the self-determination principle obiter dictum, stating that: “[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.” *Id.* ¶ 79.

98. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 128–29 (1995).

erality which can be interpreted as vagueness [T]his generality allows them to evolve according to the international realities and needs. In essence, the evolution of the meaning of self-determination, the gradual expansion of its beneficiaries and the continuous violation of the right in many areas of the world does not take away its legal status but reaffirms the need for self-determination.⁹⁹

The progression toward “a more flexible, less statist understanding of self-determination” has been recognized even by states who endorse a minimalist interpretation of self-determination.¹⁰⁰ Furthermore, the activism of indigenous peoples at the UN in the last three decades is arguably stimulating the most innovative expansion of the right to self-determination since the mid-1900s.¹⁰¹ This is in keeping with the insistence of the overwhelming majority of indigenous peoples that, rather than secede from the state of which they are citizens, wish to maintain an association with it, albeit in a form which better recognizes their cultural identity and special relationship with the territory they inhabit and which might be described as affording some degree of sovereignty.¹⁰²

The right to self-determination can therefore be reconfigured to engender a novel conception of indigenous sovereignty.¹⁰³ There is some support for the notion of “parallel sovereignty” for indigenous peoples and that this has become a norm of customary international law. This concept dictates that states are obliged to grant “a reasonable degree of sovereignty to indigenous peoples” to enable them to pursue their own economic, social, and cultural development, provided that this autonomy is exercised within and subject to the sovereignty of the state.¹⁰⁴ The expansion of self-determination beyond its rigid origins as a tool of decolonization is also a rejection of the fiction that the suffering of colonized peoples is somehow different or more heinous, and that they are consequently entitled to a higher set of rights, than the suffering which indigenous peoples around the world continue to experience at the hands of the nation-state.¹⁰⁵ Aside from giving

99. Xanthaki, *supra* note 74, at 21; *see also* BROWNIE, *supra* note 82, at 553–54.

100. Xanthaki, *supra* note 74, at 26.

101. LÂM, *supra* note 78, at 135.

102. *Id.* It is beyond the scope of this Article to consider the vexed question of self-determination and sovereignty under international law. Indeed, Larissa Behrendt cautions that confusion and miscommunication over the loaded language of sovereignty can significantly impede indigenous claims made in these terms. Nevertheless, that is not to say that it should not be pursued as an objective of indigenous self-determination, but rather that its scope is clarified and conveyed as precisely as the concept will allow. LARISSA BEHRENDT, *ACHIEVING SOCIAL JUSTICE: INDIGENOUS RIGHTS AND AUSTRALIA'S FUTURE* 103 (2003).

103. Otto, *supra* note 79, at 93.

104. Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples* 42 *TEX. INT'L. L.J.* 155, 189 (2006); *see also* Wiessner, *supra* note 92, at n.81.

105. Castellino, *supra* note 77, at 65; LÂM, *supra* note 78, at 128 (“Indigenous peoples see their subjugation as identical to that of colonial peoples: their territories and cultures were, and in varying degrees remain, distinctive from those of dominant peoples until these reduced them to subjugation.

credence to the artificial geographic lines of colonialism, this notion also deprives indigenous peoples of international legal personality.¹⁰⁶ The right to self-determination would indeed be a hollow one if it did not confer international legal personality on indigenous peoples and the access to international fora that this would bring.¹⁰⁷

Cultural autonomy — that is, the right to live according to one's own culture — is usually more readily recognized than other aspects of self-determination pertaining to autonomy.¹⁰⁸ Among other things, cultural autonomy “would enable indigenous peoples . . . [to] live in accordance their traditional practices, customs and laws . . . and to . . . develop those practices in response to the evolving society in which they find themselves.”¹⁰⁹ As Ahrén asserts in relation to the indigenous Saami people of Scandinavia:

An integral part of the right to self-determination is the right to have their own legal system recognised and applied, because legal norms constitute a central part of the system through which a people govern its society. Consequently, the Saami people have the right to have their customary legal system recognised as equal to the non-Saami legal systems. Any other policy is discriminatory.¹¹⁰

On that basis, the right to self-determination would support indigenous claims for the right to use CSLs. Indeed, CSLs have been recognized by academics and indigenous representatives alike as playing a critically important role in the realization of self-determination.¹¹¹ This contention is further strengthened if customary systems of law, given their nature as described in Part II.B, can be characterized as supporting indigenous political power, participation, and control, qualities which are at the heart of the right to self-determination.¹¹²

In its broadest sense, then, the significance of self-determination for indigenous peoples is that it is what Lâm refers to as a “power-right,” one which enables them to pro-actively implement an international agenda for

The occupation of their lands by dominant societies today, moreover, are often secured by military force and justified on the basis of racist policies.”).

106. Castellino, *supra* note 77, at 65.

107. LÂM, *supra* note 78, at 191.

108. RHONDA K M SMITH, TEXTS AND MATERIALS ON INTERNATIONAL HUMAN RIGHTS 444 (2007).

109. *Id.*

110. Ahrén, *supra* note 4, at 108.

111. See Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239, 239 (2005); Cruz, *supra* note 32, at 327–28; Campbell McLachlan, *The Recognition of Aboriginal Customary Law: Pluralism beyond the Colonial Paradigm: A Review Article*, 37 INT'L & COMP. L.Q. 368, 375 (1988); Otto, *supra* note 79, at 71; Xanthaki, *supra* note 74, at 29 (noting that this position is even supported by the U.S. government, which has traditionally adopted one of the narrowest constructions of the right to self-determination).

112. Xanthaki, *supra* note 74, at 29.

securing their own survival rather than being merely a “need-right,” which, like most other human rights, is a right requiring protection of individuals and which is dependent on the state for enforcement.¹¹³ Thus, the actual process of seeking to realize the right of self-determination is a valuable procedural right in and of itself, in addition to the multiple substantive rights also conferred by the right of self-determination. By providing opportunities to exercise indigenous agency, furthermore, the self-determination process enables indigenous peoples to actively shape its meaning and, in turn, that of IHRL.

2. *Article 27 International Covenant on Civil and Political Rights: Protecting the Minority Rights of Individuals*

Article 27 of the ICCPR entitles persons belonging to ethnic, religious, or linguistic minorities “to enjoy their own culture, to profess and practice their own religion, or to use their own language.” The Human Rights Committee has adopted an expansive interpretation of the meaning of “culture” such that it would arguably encompass CSLs.¹¹⁴ Historically, the jurisprudence of human rights treaty bodies was not very receptive to indigenous peoples’ rights,¹¹⁵ however, in recent decades there have been a number of progressively more robust decisions from the Human Rights Committee pertaining to protection of minorities’ cultural rights.¹¹⁶ Hence, although Article 27 has often been criticized as a superfluous provision that adds little to the ICCPR, as the cases below illustrate, it has now been well-established that it has a force and an independent sphere of operation of its own.¹¹⁷

Nevertheless, it must be stressed that Article 27 is an individual right to participate in the life of a minority group, and does not amount to a group right per se.¹¹⁸ This individualist interpretation may adequately protect minority groups when state action conflicts with the interests of both the individual and the group, however, it also would demand that states give precedence to international individual rights norms in the event of a conflict with group rights.¹¹⁹ For example, in *Lovelace v. Canada*, the Human

113. LAM, *supra* note 78, at 202.

114. U.N. Human Rights Comm., General Comment No. 23: The Rights of Minorities, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (April 8, 1994).

115. Claire Charters, *Developments in Indigenous Peoples’ Rights under International Law and Their Domestic Implications*, N.Z. U. L. REV. 511, 535 (2005).

116. U.N. Human Rights Comm., Chief Bernard Ominayak and Lubicon Lake Band v. Canada, U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990); U.N. Human Rights Comm., Kitok v. Sweden, Comm. No. 197/1985, U.N. Doc. A/43/40 (July 27, 1988) [hereinafter *Kitok*]; U.N. Human Rights Comm., Hopu and Bessert v. France, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (Dec. 29, 1997); U.N. Human Rights Comm., Lansman et al v. Finland, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994).

117. PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 157–58 (2002).

118. See U.N. Human Rights Comm., *Lovelace v. Canada*, U.N. Doc. CCPR/C/13/D/24/1977 (July 30, 1981) [hereinafter *Lovelace*].

119. Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 708–09 (1993).

Rights Committee stated that a Maliseet Indian woman's Article 27 rights were violated by a Canadian law that was based on an indigenous customary law and which deprived her of her tribal status upon marriage to a non-Indian.¹²⁰ As a result, she was prevented from returning to her reservation after the annulment of the marriage.¹²¹ By finding a violation of Article 27, the Human Rights Committee implicitly ruled that the complainant's rights as an individual superseded the rights of her tribe, insofar as the tribal rights were manifested in their customary laws. This represents a critical shortcoming of ICCPR in that it denies minority groups the power to define their own membership.¹²² This prioritization of individual human rights is replicated in the Declaration.¹²³

On the other hand, the Human Rights Committee's decision in *Kitok v. Sweden* demonstrates that on occasion the group interest in cultural survival may take priority over an individual's rights under Article 27. In that case, Kitok challenged Swedish legislation reserving reindeer herding rights to ethnic Saami.¹²⁴ Although ethnically a Saami, Kitok had lost his tribal membership and had been denied readmission by the tribe.¹²⁵ The Human Rights Committee concluded that while the challenged legislation denied Kitok official recognition of membership to his tribe, it was justified as a means of preserving the cultural life and welfare of the Saami as a whole.¹²⁶ Through extensive Committee jurisprudence, then, Article 27 has been established as an important source of recognition for indigenous peoples, although its characterization as an individual right necessarily limits the potential for broader indigenous claims.¹²⁷

B. *Convention on the Elimination of All Forms of Racial Discrimination*

Although CERD does not explicitly refer to the right of self-determination, it does contain a number of broad provisions prohibiting discrimination in areas of considerable significance to indigenous peoples.¹²⁸ The CERD Committee has urged states to respect indigenous culture and promote its preservation, even noting that the preservation of indigenous culture can enrich the state itself.¹²⁹ With regard to the sovereign relationship between the state and indigenous groups living within it, the CERD Committee has asserted that states should "ensure that . . . no decisions directly

120. *Lovelace*, *supra* note 118, ¶ 17.

121. *Id.* ¶¶ 1, 9.6.

122. Herz, *supra* note 119, at 709.

123. *See infra* Part III.D.

124. *Kitok*, *supra* note 116, ¶ 2.1.

125. *Id.* ¶ 4.2.

126. *Id.* ¶¶ 9.5–9.8.

127. THORNBERRY, *supra* note 117, at 181.

128. *See, e.g.*, CERD, *supra* note 71, art. 5 (c)–(d) (regarding rights of political participation and property ownership); *see also* Charters, *supra* note 80, at 179.

129. U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation XXI: Right to Self-determination, ¶ 5, U.N. Doc. A/51/18 (Aug. 23, 1996).

relating to [indigenous peoples'] rights and interests are taken without their informed consent."¹³⁰ Most importantly, the CERD Committee recommended that states parties adopt national strategies to "ensure respect for, and recognition of the traditional systems of justice of indigenous peoples."¹³¹ Thus, the interpretation of CERD by its corresponding treaty body suggests that it is yet another international instrument that reflects the growing recognition of forms of indigenous sovereignty and protection of indigenous rights.

C. ILO 169

ILO 169 entered into force on September 5, 1991. As of December 2010 it has been ratified by 22 states.¹³² The drafting of ILO 169 by the International Labour Organization ("ILO") was initiated in 1988 as a discussion to revise the Convention concerning Indigenous and Tribal Peoples in Independent Countries ("ILO 107")¹³³ and entailed consultation with, but no direct participation by, indigenous peoples.¹³⁴ ILO 169 is a standard-setting treaty rather than a prescriptive one.¹³⁵ The foundational theme of ILO 169 is the right of indigenous peoples to live and develop as distinct communities according to their own objectives and interests.¹³⁶ The Preamble explicitly rejects the assimilationist orientation of previous ILO standards regarding indigenous peoples and it is thus an attempt to update these standards to reflect the changes in attitudes towards indigenous rights during the 1970s and 1980s.¹³⁷ Principles of indigenous participation in decision-making,¹³⁸ non-discrimination,¹³⁹ and recognition of land rights¹⁴⁰ are prominent features of ILO 169. Furthermore, ILO 169 contains re-

130. U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation XXIII: Indigenous Peoples, ¶ 4(d), U.N. Doc. A/52/18, Annex V (Aug. 18, 1997) [hereinafter CERD, General Recommendation XXIII].

131. U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation XXXI: The Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, ¶ I.B.5(e), U.N. Doc. A/60/18 (Aug. 17, 2005).

132. Ratifying Countries of ILO 169, INT'L LABOUR ORG., <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169> (last visited Dec. 27, 2010).

133. International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 26, 1957, 328 U.N.T.S. 247.

134. THORNBERRY, *supra* note 117, at 339–40.

135. Alison Humphry, *An Opportunity Lost for Aboriginal Self-Determination: Australia's Compliance with ILO 169*, 2(1) MURDOCH U. ELECTRONIC J. L. 6, 6 (1995).

136. Wiessner, *supra* note 92, at 1156. For example, according to Article 7 indigenous peoples have the right to "decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control over their economic, social and cultural development." ILO 169, *supra* note 72, art. 7.

137. The Preamble states: "Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards. . . ." ILO 169, *supra* note 72.

138. *Id.* art. 6(1)(b).

139. *See, e.g., id.* arts. 3(1), 4(3).

140. *See id.* arts. 13–19.

peated references to indigenous notions of culture, traditions, and customary law, and moves away from the positivist Eurocentric view of laws as enshrined in ILO 107.¹⁴¹

Articles 8 and 9 are particularly important for their recognition of CSLs. In short, they compel the state to have due regard to indigenous peoples' "customs or customary laws" and to respect customary methods for dealing with offences.¹⁴² This is, however, subject to their compatibility with nationally and internationally recognized human rights, a requirement that has been heavily criticized by indigenous leaders as simply reinforcing notions of assimilation and undermining the concept of self-determination.¹⁴³ As the ILO itself recognized, it was difficult to finely prescribe the degree of deference to be paid to CSLs and how to balance CSLs with established human rights standards.¹⁴⁴ The uncertainty of the meaning of "due regard" exacerbates this confusion. The wording of Articles 8 and 9 was intended to allow for "the gradual incorporation of the concept [of customary law] into national law without damaging the established legal system."¹⁴⁵

In summary, ILO 169 has not been widely ratified and it is viewed with caution by indigenous peoples.¹⁴⁶ Nevertheless, it represents significant progress from the integrationist language and spirit of ILO 107 and its effect on promoting international consciousness of indigenous rights should not be underestimated.¹⁴⁷ Also, the text of ILO 169 has been described as radical in comparison to previously established human rights standards in that it contains detailed provisions on a range of important issues critical to indigenous life.¹⁴⁸

D. *The UN Declaration on the Rights of Indigenous Peoples*

The Declaration is effectively the result of a compromise between what indigenous participants wanted and what the experts in the Working

141. *E.g., id.* arts. 8–9; *see also* THORNBERRY, *supra* note 117, at 359.

142. The text of the Articles states:

8(1) In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws,

8(2) These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.

9(1) To the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected.

9(2) The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

ILO 169, *supra* note 72, arts. 8–9.

143. Humphry, *supra* note 135, at 12.

144. *See* THORNBERRY, *supra* note 117, at 360.

145. *Id.*

146. *Id.* at 366.

147. *Id.*

148. *Id.* at 366–67.

Group on Indigenous Populations (“WGIP”) realistically believed states would accept.¹⁴⁹ After all, the end product is a UN document which needed the support of member states to have any prospect of success.¹⁵⁰ Nevertheless, compromise or not, the Declaration represents a remarkable achievement in that it is a visionary attempt to cast a new form of association between indigenous peoples and the states of which they are citizens. The precise content of this association is as yet undefined and is something that will evolve with time as a consequence of the agency of indigenous peoples and other non-state actors.¹⁵¹ It seems clear at this stage that the Declaration will play a critical role in generating the momentum for the exercise of that agency. The Declaration is particularly notable for the fact that it is the first human rights instrument negotiated directly between states and the rights-holders standing to benefit from the instrument, namely, indigenous peoples.¹⁵² The Declaration is the indirect result of the creation of the WGIP, which was established by the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1982, in large part as a response to considerable lobbying by indigenous civil society organizations.¹⁵³

The right to self-determination in Article 3 provides the foundation for the Declaration, while all remaining articles detail the more specific rights that collectively constitute the basis for the overarching concept of self-determination.¹⁵⁴ In this way, evolving conceptualizations of human rights and, more specifically, indigenous rights are strengthening the principle of self-determination.¹⁵⁵ The Declaration is an attempt to codify effectively, at least in declaratory form, the meaning of the right to self-determination as it relates to indigenous peoples. The rights set out in the Declaration are organized thematically as positive and negative rights pertaining to threats to the survival of indigenous peoples;¹⁵⁶ cultural, religious, spiritual, and linguistic identity;¹⁵⁷ education and public information;¹⁵⁸ participatory rights;¹⁵⁹ and land and resources.¹⁶⁰

Significantly, the Declaration does not define “indigenous peoples,” which was a major sticking point for a number of African states and an

149. LÂM, *supra* note 78, at 50.

150. *Id.*

151. *Id.* at 53–54.

152. Davis, *supra* note 81, at 2.

153. Cf. Asbjørn Eide, *The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples*, in *MAKING THE DECLARATION WORK*, *supra* note 2, at 32, 34–38.

154. Davis, *supra* note 81, at 23.

155. HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 49 (1990).

156. Declaration, *supra* note 2, art. 43.

157. *Id.* arts. 11–13.

158. *Id.* arts. 14–15.

159. *Id.* arts. 5, 18, 27, 41.

160. *Id.* arts. 8, 10, 25–6; see also Davis, *supra* note 81, at 22–23.

important victory for indigenous peoples. To do so would have meant squeezing the diversity and dynamism of indigenous traditions and beliefs into a definitional straightjacket.¹⁶¹ Nevertheless, it could also be seen as a weakness insofar as defining the class of rights-holders is necessary to promote the protection of their rights.¹⁶² Additionally, Article 4 establishes the right of indigenous peoples to “autonomy or self-government,” although it also has the effect of narrowing the scope of the right to self-determination to *internal* self-determination.¹⁶³

Most importantly, at least for the purposes of this Article, is Article 34. It states that:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.¹⁶⁴

Article 34 is noteworthy for a number of reasons. First, it enshrines a right to use CSLs while simultaneously reaffirming the predominance of other “international human rights standards.” Indigenous CSLs must therefore be developed in accordance with these standards. Thus, Article 34 gives content to, yet in so doing limits the scope of, the broadly expressed right of self-determination contained in Article 3.¹⁶⁵ Second, by referring to the right to “develop” CSLs, Article 34 reiterates the important fact that CSLs are dynamic, not fixed or static, and are thus capable of being adapted to the changing circumstances of their indigenous users. Third, in referring to “customs, spirituality, traditions, procedures, practices and . . . juridical systems or customs,” Article 34 confirms that the CSLs by which indigenous peoples live their lives are ordinarily more multi-faceted, deeply rooted and all-encompassing for indigenous peoples than the formal laws by which the state regulates its citizens.

While the Declaration is an aspirational, non-binding, standard-setting instrument of the UN General Assembly aimed at establishing norms that can serve as guidelines to states,¹⁶⁶ it also reflects a degree of states’ *opinio juris* and thereby contributes to the development of customary norms in this field.¹⁶⁷ Hence, although many of the rights set out in the Declaration are enshrined in binding form in human rights treaties, and it does not, of

161. Wiessner, *supra* note 92, at 1163.

162. *Id.*

163. Davis, *supra* note 81, at 22–23.

164. Declaration, *supra* note 2, art. 34.

165. Christopher J. Fromherz, *Indigenous Peoples’ Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples*, 156 U. PA. L. REV. 1341, 1371 (2008).

166. Davis, *supra* note 81, at 2, 17.

167. Charters, *supra* note 80, at 175.

itself, create any new rights, it does have the capacity to trigger the development of an international law on indigenous peoples.¹⁶⁸ As Megan Davis suggests, the Declaration has had an immediate impact in its short history,¹⁶⁹ which is perhaps unsurprising given that it is the authoritative instrument on, and effectively a non-binding codification of, internationally recognized indigenous rights.

E. The Status of the Right to Use Customary Systems of Law under International Human Rights Law

International law, as it relates to indigenous peoples, has undergone several generational changes. In the sixteenth and seventeenth centuries, a sense of universal sovereignty prevailed.¹⁷⁰ However, this was replaced in the eighteenth century by new notions of discovery and terra nullius. These new notions were a means of impeaching the sovereignty of indigenous persons whose supposed backwardness justified subjugation.¹⁷¹ In between the two world wars, there was increasing recognition of minority rights which provided the seed for decolonization as an exercise of self-determination following World War Two.¹⁷² In the new millennium, we are now witnessing the emergence of a new indigenous discourse of self-determination.¹⁷³ This is challenging long-held assumptions about the nature of international law, namely, that the state has exclusive power and protects indigenous peoples as “wards of the state,” that the territorial integrity of states is an end in itself, and that “geographies of subjugation” are not about subjugation at all.¹⁷⁴

There is growing support for the general proposition that the protection of indigenous rights has achieved the status of custom.¹⁷⁵ This was first asserted in 1996 by S. James Anaya, currently the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, well before the momentous adoption of the Declaration.¹⁷⁶ The Declaration itself is unusually detailed for a declaratory human rights instrument and is laden with numerous rights that do not have a previously recognized legal character. Nevertheless, a number of its key provisions reflect emerging norms of customary international law.¹⁷⁷ On that basis they would be

168. Davis, *supra* note 81, at 27.

169. *Id.* at 28–29.

170. LÂM, *supra* note 78, at 209–10.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 61–72 (2d ed. 2004).

176. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 49–58 (1996).

177. According to Anaya, “[t]he claim . . . is not that each of the authoritative documents [on indigenous rights] referred to can be taken in its entirety as articulating customary law but that the documents represent core precepts that are widely accepted and, to that extent, are indicative of custom-

binding on all states except those who voted against the Declaration: the U.S., Canada, New Zealand, and Australia.¹⁷⁸ More specifically, in a comprehensive treatment of indigenous rights, Wiessner has strongly asserted that there is widespread practice and *opinio juris* that indigenous peoples are entitled to maintain and, importantly, strengthen their own systems of justice.¹⁷⁹ Partly, this is reflected in the fact that indigenous life is increasingly being celebrated, respected, and accepted as an important aspect of the life of the modern nation-state.¹⁸⁰

It is quite clear that there has been a significant increase in the recognition of indigenous rights, including the right to use CSLs, in the last 20 years, signifying the emergence of an “international indigenous law”¹⁸¹ or, as Richard Falk puts it, the “first truly intercivilizational critique of the prevailing human rights discourse.”¹⁸² Indigenous rights have never been given as much attention at the international level as they are now receiving,¹⁸³ in no small part because of the indigenous activism that produced the Declaration. This is manifested not only in the Declaration, ILO 169 and the various “soft law” instruments mentioned above, but also in the greater recognition of indigenous representative groups in international fora and their inclusion in processes leading to decisions that affect their rights. There are now three UN mechanisms dedicated to promoting indigenous rights, namely, the Expert Mechanism on the Rights of Indigenous Peoples (which in effect superseded the WGIP in 2008), the Permanent Forum on Indigenous Issues, and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. International institutions, such as the World Bank and the Asian Development Bank, are also increasingly recognizing and implementing programs to respect and protect indigenous rights.¹⁸⁴

This is further reinforced by the recognition of indigenous culture, and CSLs in particular, in various subsidiary UN declarations and guidelines. Among other things, these instruments compel the state to have regard for

ary law.” Anaya, *supra* note 176, at 69–70; cf. Alexandra Xanthaki, *Indigenous Rights in International Law over the Last 10 Years and Future Developments*, 10 MELB. J. INT’L L. 27, 36 (2009).

178. Wiessner, *supra* note 92, at 1165. The Australian government reversed its position and formally expressed support for the Declaration on April 3, 2009. See Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Policy Speech to Parliament House (Apr. 3, 2009).

179. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 127 (1999). For example, according to the CERD Committee, states are under a positive obligation to “ensure that Indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs.” CERD, General Recommendation XXIII, *supra* note 130, art. 4(e).

180. Wiessner, *supra* note 179, at 58. One well-known example is the recognition of native title in Australia. *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1 (Austl.).

181. Wiessner, *supra* note 179, at 93.

182. RICHARD FALK, HUMAN RIGHTS HORIZONS: THE PURSUIT OF JUSTICE IN A GLOBALIZING WORLD 151 (2000).

183. Xanthaki, *supra* note 74, at 34.

184. Charters, *supra* note 80, at 189–90.

informal dispute resolution mechanisms (including customary justice or indigenous practices, for the purpose of providing redress to victims),¹⁸⁵ “national customs” in the drafting of codes of professional conduct for lawyers,¹⁸⁶ and the possibility of diverting criminal cases from the formal justice system to allow them to be resolved informally.¹⁸⁷ It must also be added that the Organization of American States has prepared and is engaged in the “Final Revision” of its Draft American Declaration on the Rights of Indigenous Peoples. This Draft Declaration contains detailed provisions recognizing “indigenous law” and the right of indigenous peoples to maintain, reinforce, and apply that law.¹⁸⁸ As is the case with ILO 169 and the Declaration, the right to use indigenous legal systems is expressed to be subject to “international human rights standards.” It is worth noting, however, that previous versions of the Draft Declaration guaranteed the right of recourse to indigenous legal systems without reference to, and thus unlimited by, international human rights standards. Clearly, the perception of conflict between international human rights and CSLs is a critical and persistent source of tension in the ongoing negotiation of indigenous claims.

Finally, Article 31(3)(c) of the Vienna Convention on the Law of Treaties¹⁸⁹ adds extra force to the contention that the right to use CSLs can be entrenched within the broader and more established right to self-determination. It stipulates that “any relevant rules of international law” are to be used as an instrument of treaty interpretation.¹⁹⁰ According to Sands, this is an international legal tool — apparently the only tool — for “reconciling norms arising in treaty and custom across different subject matter areas” and thereby constructing a “general international law.”¹⁹¹ It provides a means of recognizing and categorizing the expanding, amorphous body of

185. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, ¶ A7, U.N. Doc. A/RES/40/34 (Nov. 29, 1985).

186. Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Role of Lawyers*, ¶ 26, U.N. Doc. A/CONF.144/28/Rev.1 (Sept. 7, 1990).

187. *Id.* ¶ 18.

188. In part, the current draft of Article 21 reads:

1. [Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.]

2. The indigenous law and legal systems shall be recognized and respected by the national, regional and international legal systems.

Perm. Council of the Org. of American States, Comm. on Juridical and Political Affairs, *Consolidated Text of the Draft American Declaration on the Rights of Indigenous Peoples*, art. XXI, Doc. No. OEA/Ser.K/XVI GT/DADIN/doc.334/08 rev. 6 (Jan. 20, 2011). The bracketed terms are those that remain in controversy and therefore future debate by state members and indigenous representatives is limited to these terms.

189. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

190. *Id.* art. 31(3)(c).

191. Philippe Sands, *Treaty, Custom and the Cross-fertilization of International Law*, 1 YALE HUM. RTS. & DEV. L.J. 85, 87 (1998).

international legal principles, decisions, and rules that exist beyond the realm of custom and treaty. In the contemporary, globalized world of proliferating legal and quasi-legal institutions, these non-treaty principles and rules might provide the foundation for emerging fields of international law. The burgeoning body of indigenous subsidiary law is one such field, and its growth is arguably contributing to the development of “relevant rules of international law.” These rules could then be used as an aid to construct the meaning of ambiguous treaty provisions, most notably the right to self-determination enshrined in Common Article 1, in a way that reflects evolving notions of indigenous sovereignty. Ultimately, Article 31(3)(c) provides a potentially dynamic mechanism to enable IHRL to evolve with and adapt to changing global conditions.

Therefore, on the basis of the evolving and expanding scope of the right to self-determination, the proliferation of international instruments recognizing CSLs, and developing state practice and *opinio juris*, the right of indigenous peoples to use CSLs is beginning to crystallize as an emerging norm of customary international law.¹⁹² However, it would perhaps be premature to express the position any more forcefully than that.¹⁹³ To this formulation it is necessary to add the proviso: provided CSLs are used “in accordance with international human rights standards,” as expressed in Article 34 of the Declaration. Hence, how and to what extent the right to use CSLs will emerge as a customary norm will be significantly influenced by the development of its relationship with established standards of IHRL. This will in turn depend on how and to what extent indigenous peoples are willing to engage in developing this relationship.

IV. WHAT IS THE RELATIONSHIP BETWEEN THE RIGHT TO USE CUSTOMARY SYSTEMS OF LAW AND OTHER HUMAN RIGHTS?

Conflicting interpretations of the scope of, and relationship between, the rights contained within the large and ever-expanding body of IHRL is somewhat inevitable. According to David Kennedy:

We know that normative principles travel in pairs, at the global as at every other level. Rights conflict. Principles conflict. The most revered texts in the human rights canon are vague and open to interpretation. As a result, it is unlikely that any articulation of a global normative consensus will escape being perceived by those who disagree — and people *will* disagree — as partial,

192. See Xanthaki, *supra* note 74, at 35–37.

193. *Id.*

subjective, selective. These are the wages of speaking universally in a plural world.¹⁹⁴

Nevertheless, in the following section I will argue that the potential clash upon which this Article focuses — a clash between aspects of the CSLs that indigenous peoples have a right to use and the fundamental civil and political rights (which are often) enshrined in state laws — can, in fact, be recast as a mutually reinforcing process for the creation of indigenous sovereignty by drawing on the dynamic, evolutionary character of IHRL. The framework that I propose in Part IV.C as a means of reconciling these conflicts is premised upon a recognition of the theoretical and practical folly of hierarchically ordering human rights, a notion explored throughout Part IV. My analysis is simultaneously grounded in an appreciation of the developmental contexts in which CSLs often prevail, and on two fundamental precepts of development practice: consultation and community participation.

A. *How Do Customary Systems of Law Conflict with Basic Human Rights Standards?*¹⁹⁵

There is broad consensus that important aspects of the way in which CSLs function clearly conflict with a number of fundamental rights enshrined in the Twin Covenants.¹⁹⁶ At its most general level, this tension is part of and reflects the human rights debate on cultural relativism. Briefly, the theory of cultural relativism conceptualizes the moral rules inherent in human rights as dependent on and influenced by cultural context such that human rights cannot be said to exist everywhere in the same form.¹⁹⁷ This is an ongoing and critical debate that directly confronts the purported universalism of IHRL. In part, this tension is the price paid for the rapid codification of IHRL. The codification necessitated the drafting of broad, abstract human rights principles, avoiding exploration of potential conflict between competing rights claims, such as was done in the Universal Decla-

194. David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L. & SOC. CHANGE 641, 656 (2007).

195. When considering the ways in which CSLs conflict with other rights, the generality with which CSLs are described in Part II.A must be borne in mind. The rights-deficiencies described here obviously could not be said to apply to the CSLs of all indigenous peoples.

196. See, e.g., GARLING, *supra* note 55, at 52; ROY, *supra* note 22, at 23; INTERNATIONAL CRISIS GROUP, LIBERIA: UNEVEN PROGRESS IN SECURITY SECTOR REFORM (AFRICA REPORT No. 148) 8 (2009); Connolly, *supra* note 111, at 246, 256; Sari Wastell, *Being Swazi, Being Human: Custom, Constitutionalism and Human Rights in an African Polity*, in THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 320, 335 (Mark Goodale and Salley Engle Merry eds., 2007) (“Whereas human rights is predominantly concerned with protecting incursions into the integrity of each individual’s humanity, Swazi law and custom safeguards the quality of being Swazi through a fortification of the family.”).

197. HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 517–18 (3d ed. 2008).

ration of Human Rights (“UDHR”).¹⁹⁸ However, the UDHR was a beginning, not an end, and the series of human rights instruments that have been adopted since then, and the novel, changing ways in which these continue to be interpreted and adapted, reflect the ongoing nature of this process.

Hence, the notion that there is a “pervasive irreconcilability” between custom and individual rights that renders coexistence impossible is a simplistic fiction.¹⁹⁹ To the contrary, the type of discursive approach to human rights that is adopted in this Article assumes that “social practice is, in part, constitutive of the idea of human rights itself, rather than simply the testing ground on which the idea of universal human rights encounters actual ethical or legal systems.”²⁰⁰ As the New Zealand Law Commission points out, in the Pacific context, there are many areas of commonality, such as the belief in the dignity of all persons, respect for the beliefs of others, and the acknowledged importance of “robust debate.”²⁰¹ The thorny issue of cultural relativism should instead be seen as an opportunity to develop a more nuanced conception of an international human rights system that is adapted to and can have resonance in local contexts. The recent evolution of IHRL to encompass indigenous rights must be seen in this light.

Nevertheless, this does not address the fact that certain aspects of CSLs — as opposed to CSLs per se — are inherently inimical to certain basic human rights. Will Kymlicka refers to these aspects of CSLs as group-oriented claims giving rise to “internal restrictions,” as opposed to “external protections.”²⁰² Internal restrictions pertain to *intra*-group relations, for example, cultural mores regarding marriage. External protections pertain to *inter*-group relations, such as the right to use CSLs. Although this complex rights quandary is well recognized, apparently very little has been written about the possible theoretical and practical mechanisms that exist to address it. One of the key challenges of this Article is to attempt to pragmatically, if tentatively, reconcile the potential conflict between the right to use CSLs and the more established civil and political rights within the structure of IHRL. The rights discussed below arguably illustrate the most striking conflicts between CSLs and IHRL. It is by no means an exhaustive enumeration of all of the potential points of conflict.²⁰³

198. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

199. Leigh McDonald, *Can Collective and Individual Rights Coexist?*, 22 MELB. U. L. REV. 310, 318 (1998).

200. Mark Goodale, *Locating Rights, Envisioning Law Between the Global and the Local*, in THE PRACTICE OF HUMAN RIGHTS, *supra* note 196, at 1, 8–9.

201. N.Z. LAW COMM’N, CONVERGING CURRENTS: CUSTOM AND HUMAN RIGHTS IN THE PACIFIC (STUDY PAPER 17) § 6.9 (2006).

202. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 35–36 (1995).

203. For a broader overview of the rights-based weaknesses of CSLs, see WOJKOWSKA, *supra* note 56, at 20–23.

1. *Women's Rights*

Active discrimination is said to be a foundational element of CSLs.²⁰⁴ One of the most conspicuous ways in which CSLs contravene basic human rights standards is in the resolution of disputes involving women.²⁰⁵ This discrimination can be manifested in a number of ways. First, the cultural foundations of CSLs can be deeply discouraging and deter women from even coming forward to make a claim in the appropriate forum. Although these types of deterrent factors can be observed in even the most sophisticated formal legal systems, they can be particularly acute in relation to CSLs. A woman may, for example, be forced by her family, possibly on threat of punishment, to withhold her claim against the member of a more senior family within the community.²⁰⁶

Second, assuming that a woman has been able to overcome this deterrence, the procedures by which her claim is settled will often be prejudicial to her interests. For example, the testimony of women is often more restricted in time and scope, held to stricter standards or given less weight by judges, assuming that women are even given an opportunity to be heard.²⁰⁷ For example, in cases of assault against women in Timor Leste it is not uncommon for a family member of the victim to resolve the issue in the absence of and without consulting the victim.²⁰⁸

Third, the redress which women can expect to receive from settlement, whether as claimants or victims of a serious offence, is frequently inadequate, overly-accommodating of a male disputant's interests, or wholly inappropriate. For example, in Timor Leste, rape cases usually are resolved by the families of the victim and perpetrator, without considering the victim's interest or needs.²⁰⁹ The victim is generally forced to accept the families' agreement. This may require nothing more than the perpetrator's family to pay compensation to the victim's family in the form of a buffalo, for example.²¹⁰

204. Chidi Anselm Odinkalu, *Informal Responses to Access to Human Rights* ¶ 39 (Int'l Council on Human Rights Policy, Working Paper 2003); ICHRP, *WHEN LEGAL WORLDS OVERLAP*, *supra* note 6, at 73–74.

205. *See, e.g.*, N.Z. LAW COMM'N, *supra* note 201, §§11.51–11.60; *see also* Convention on the Elimination of All Forms of Discrimination Against Women, art. 5, Sept. 3 1981, 1249 U.N.T.S. 13 [hereinafter CEDAW] (referencing the elimination of discriminatory customs); Davis & McGlade, *supra* note 20, at 388–89 (noting that gender inequality and discrimination can be compounded by other, more overarching forms of discrimination such as racism).

206. *Cf.* N.Z. LAW COMM'N, *supra* note 201, §§ 7.42, 11.55.

207. *Cf.* AISLING SWAINE, INT'L RESCUE COMM., *TRADITIONAL JUSTICE AND GENDER-BASED VIOLENCE* 22–30 (2003).

208. MEARNS, *supra* note 37, at 40.

209. *See* SWAINE, *supra* note 207, at 47–49.

210. *Id.* at 47. Rape cases are resolved in a similar way in Liberia. *See* EZEKIEL PAJIBO, INT'L INST. FOR DEV. AND ELECTORAL ASSISTANCE, *TRADITIONAL JUSTICE MECHANISMS: THE LIBERIAN CASE* 20 (2008).

2. Fair Trial Rights

Although adherents of CSLs would not view the hearing of customary offences in the positivistic legal terminology of a trial before a court, the procedural guarantees contained in Article 14 of the ICCPR are fundamental to ensuring that defendants to a criminal charge — regardless of the trial system — are fairly treated. These include the right to equality before the law, to be presumed innocent until proven guilty, to present and examine witnesses, to be informed of the nature of the charge, to be given the opportunity to prepare their defense, and to not be compelled to incriminate oneself.²¹¹ These comprehensive protections are often flouted in the determination of accusations against perpetrators under CSLs.²¹²

A particularly extreme example of the flouting of these trial guarantees is trial by ordeal. For instance, in Liberia, defendants are traditionally forced to consume a mixture of plants known as “sassywood,” usually as an answer to charges of property theft, murder, or sorcery.²¹³ If the defendant regurgitates the concoction then this indicates his or her innocence. If the defendant fails to regurgitate it, he or she is found guilty and punished, usually in the form of forced restitution or banishment from the community.²¹⁴ Though technically illegal, the practice is still widespread in Liberia today.²¹⁵ Also in Liberia, the “palava hut” process is another common and far less abhorrent means of resolving disputes, usually involving divorces, land ownership claims, debt, and sometimes theft or murder.²¹⁶ It is a dialogic process over which a tribal elder presides, and it is attended by the parties and relevant witnesses. In principle, it is an effective and fair means of resolving disputes and determining guilt.²¹⁷ In practice, however, it is open to abuse. The imperative of a fair hearing could be difficult to realize when, for example, the judge is selected from within the community and might bear some relationship to, or at least be biased towards, the perpetrator or victim. Additionally, this dispute resolution mechanism is often co-opted by the central government, which appoints the presiding leaders instead of respecting local power structures, thereby compromising the integrity of the process.²¹⁸

The sassywood and palava hut processes illustrate that CSLs can conflict with basic procedural guarantees in at least two, very different ways. On the one hand, sassywood directly and fundamentally violates basic guarantees of due process while, on the other, palava hut processes only indirectly,

211. ICCPR, *supra* note 69, art. 14.

212. For a thorough discussion of fair trial rights in the context of the South Pacific, *see* N.Z. LAW COMM'N, *supra* note 201, §§11.36–11.50.

213. PAJIBO, *supra* note 210, at 17.

214. *Id.* at 17.

215. *Id.* at 17–18.

216. *Id.* at 18.

217. For a detailed description of the process, *see id.* at 18–22.

218. *See id.*

consequentially — and not necessarily inevitably — violate those same standards. In the latter case, the nature of the violation, if any, is influenced by the particular power dynamics of relations between individual community members while in the former case the violation is incontrovertible. As discussed through the remainder of Part IV, these kinds of distinctions may be useful in determining whether particular customary practices conflict with basic human rights standards and, if so, whether the conflict is irremediable or negotiable and reconcilable.

B. How Are Conflicts between Competing Rights Resolved under International Human Rights Law?

The potential conflict arising from reliance on CSLs can be located in a more general, ongoing clash between local-indigenous and universal-statist conceptions of human rights, identified by Carozza as “an inherent tension . . . between affirming a universal substantive vision of human dignity and respecting the diversity and freedom of human cultures.”²¹⁹ It also reflects the ongoing tension that exists between the nation-state, with its formal laws and constitutional rights, and the indigenous peoples of that state, with their customary laws. According to Roy, conflict between these two systems is “the rule rather than the exception.”²²⁰ According to liberal pluralists, the level of state tolerance for indigenous customs and practices is in part determined by the extent to which indigenous peoples choose to maintain, modify, or discard what the state deems to be “illiberal” practices.²²¹ Unsurprisingly, a dualist, formal constitutional recognition of both human rights standards and CSLs merely reduces the problem to writing and is not, of itself, sufficient to address this problem.²²² Nor does IHRL adequately address the question of how to reconcile conflicting human rights.²²³

As a result there is no precise formulation or universally accepted mechanism by which to resolve conflicts between human rights. Given the inevitability of conflict between rights,²²⁴ this is a particularly deficient feature of IHRL. On the other hand, the lack of such a mechanism is hardly surprising in light of the broad scope of existing human rights and the potentially limitless permutations in their interaction and application. After all, human rights are often classified as “indivisible, interdependent and inter-

219. Carozza, *supra* note 47, at 38.

220. Roy, *supra* note 22, at 21.

221. Elena A. Baylis, *Minority Rights, Minority Wrongs*, 10 UCLA J. INT'L L. & FOREIGN AFF. 66, 78 (2005).

222. Sue Farran, *Is Legal Pluralism an Obstacle to Human Rights? Considerations from the Pacific*, 52 J. LEGAL PLURALISM & UNOFFICIAL L. 77, 100 (2006).

223. See Christine Chinkin, *Cultural Relativism and International Law*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN 55, 55 (Courtney W. Howland ed., 1999).

224. McDonald, *supra* note 199, at 323 (quoting Jeremy Waldron, *Rights in Conflict*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 203, 205–06 (1993)).

related,”²²⁵ and are not always applied in contexts that permit neat, hierarchical classification. Even individual rights (e.g., the right to a fair trial) and collective rights (e.g., the right to use CSLs) intermingle and cannot be divided dichotomously.²²⁶ This reflects the broader observation that IHRL is not a fixed, closed system; rather, it is ever-changing and responding to, among other things, the agency and activism of persons seeking its protection in a diverse range of circumstances.²²⁷

The conflict between the indigenous and individual rights referred to in Part IV.A reflects Isaiah Berlin’s world of value pluralism, one in which there are multiple moral ends that “may be equally correct and fundamental, and yet in conflict with each other.”²²⁸ As Berlin puts it, people “are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others.”²²⁹ In other words, human rights operate in a world imbued with plural values that may sometimes conflict. Any conception of a strictly ordered hierarchy of human values is unsustainable and the underlying values of human rights may as a result be contestable.²³⁰ Furthermore, any attempt to construct such a hierarchy will merely undermine the very system of human rights it is seeking to reinforce.²³¹ On the other hand, it must also be recognized that some human rights are, in their operation, more valued than others.²³² Any attempt to elucidate a universal theory on conflicting rights, and the moral conflicts upon which they are founded, is likely to be futile.²³³ Ultimately, resolving conflicts between rights is something that can only be done pragmatically,²³⁴ that is, on a case-by-case basis, taking into account the character and underlying values of the particular rights in question and their relationship to one another, the nature of the inconsistency, and the surrounding circumstances.

225. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 1.5, U.N. Doc. A/CONF.157/23 (July 12, 1993).

226. McDonald, *supra* note 199, at 321–22.

227. See *infra* Part IV.C.

228. Gunnar Beck, *The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness*, 25 PENN ST. INT’L L. REV. 615, 620 (2007).

229. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 168 (1969).

230. Gunnar Beck, *Legitimation Crisis, Reifying Human Rights and the Norm-Creating Power of the Factual: Reply to “Reifying Law: Let Them Be Lions,”* 26 PENN ST. INT’L L. REV. 565, 575 (2008).

231. Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 21 (1986), reprinted in STEINER ET AL., *supra* note 197, at 158–59.

232. Theo van Boven, *Distinguishing Criteria of Human Rights*, in 1 *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 43 (Karel Vasak ed., Philip Alston trans., 1982), reprinted in STEINER ET AL., *supra* note 197, at 157–58.

233. McDonald, *supra* note 199, at 333.

234. Beck, *supra* note 230, at 570.

C. *Building Rights, Not Balancing Rights: A Tentative Framework for Developing Rights-Compliant Customary Systems of Law*

First, it should be emphasized that the focus of this Article is on reconciling rights — specifically, inimical aspects of CSLs with rights prescribed by, and in accordance with the system of, IHRL. It is beyond the scope of this article to consider the closely related and equally difficult question of how to reconcile CSLs generally with state laws within a domestic legal system.²³⁵ Second, the framework for developing rights-compliant CSLs that I posit in this Part is broad and flexible; it is not intended to apply specifically to states with either an effective, functioning legal system or developing states in which the legal system is barely functioning. Adaptation for particular contexts is, of course, essential.

Although it is not feasible to construct a clear, ordered hierarchy of rights, a strong argument could be made that some rights are more fundamental, or “more equal” (to borrow from Orwell),²³⁶ than others. Makau Mutua asserts that the right to self-determination is the most fundamental of all human rights and, importantly for the purposes of this Part, one which is not overridden by any other right.²³⁷ Collective rights that do not pertain to self-government automatically acquiesce to individual rights with which they conflict.²³⁸ On the other hand, and consistent with Mutua’s assertion, conflicting rights that do pertain to self-government should not acquiesce in the same way, as the state intervention that this would entail would be fundamentally inconsistent with the notion of a collective right to self-determination.²³⁹

There are a number of theoretical concerns that arise in relation to the “political-haggling” process of reaching a balance or trade-off between rights.²⁴⁰ A trade-off implies that the rights being balanced are equal in terms of the interests and values they protect and the scope of that protection. According to McDonald:

What is troubling is the combination of trade-offs with a single metric of value, as this denies that there are some human interests of intrinsic worth which cannot be simplistically traded against one another. Thus, a consideration of the relative importance of the interests or values underlying rights and their costs

235. It is worth noting, however, that there are at least four paradigms by which to define and conceptualize the relationship between state and non-state legal systems: state abolition of non-state systems, formal incorporation, partial incorporation/coexistence, and coexistence. Connolly, *supra* note 111, at 247–49; Baylis, *supra* note 221, at 122; *see also* ICHRP, RESEARCH PROJECT ON PLURAL LEGAL ORDERS, *supra* note 35, at 6.

236. GEORGE ORWELL, ANIMAL FARM 148 (1945) (“All animals are equal but some animals are more equal than others.”).

237. MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 108 (2002).

238. McDonald, *supra* note 199, at 330.

239. *Id.* (citing KYMLICKA, *supra* note 202, at 67).

240. McDonald, *supra* note 199, at 327–28.

(the duties imposed) is a legitimate part of determining the limits of rights and their importance in particular circumstances.²⁴¹

On that basis, I argue that reconciling self-determination and the constituent right to use CSLs with the competing individual rights referred to in Part IV.A is not a question of prioritizing or even *balancing* (or “haggling” for) rights, rather, it is one of *building* rights. IHRL is constantly evolving and responding to international social and political developments. The growing corpus of indigenous rights, responding in part to the agency of indigenous peoples, is a particularly active focal point for the evolution of IHRL as it re-defines the relationship between indigenous peoples and the state in a way that reinforces and gives tangible meaning to self-determination. A mere 40 years ago, it scarcely would have been believed that the UN would one day adopt a detailed declaration enshrining a comprehensive set of rights for indigenous peoples and that this would include, among other things, the right to autonomy or self-government, to the lands which they have traditionally occupied, and to maintain and strengthen their political, legal, economic, social, and cultural institutions.

Although there is clearly no formulaic panacea, it is possible to distil from both academic theory and practitioners’ field experience several key, guiding principles and to construct around these principles a tentative, flexible framework which can be applied to promote harmonization between CSLs and IHRL, that is, to “mediate the polarity of pluralism and the common good.”²⁴² At the end of the day, it is hoped that, by actively engaging with CSLs, indigenous communities, states, and the international human rights community will be able to work in partnership to elaborate and “build” a legitimate, nuanced, and workable conception of the right to use CSLs and, ultimately, give added concrete meaning to indigenous self-determination.²⁴³ This process rests on acknowledgement of the fact that CSLs are dynamic, not static. Thus, a return to an idealized, halcyon past of complete reliance on tradition, on the one hand, or an absolute transplantation of state-centric constitutional rights systems, on the other, is neither feasible nor appropriate.²⁴⁴

IHRL is very clear on the principle — although not on the application — of subjecting CSLs to other human rights standards. First, ILO 169 and the Declaration (and, partially on that basis, the emerging customary norm

241. *Id.* at 328.

242. *Id.* at 327–28.

243. See Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Human Rights and Indigenous Issues*, Comm’n on Hum. Rts., 60th Sess., ¶ 68, U.N. Doc. E/CN.4/2004/80 (Jan. 26, 2004) (by Rodolfo Stavenhagen) (“According to the UN Special Rapporteur . . . this is a challenge to bring both approaches closer together by making them more effective in the protection of human rights – both individual and collective. Legal pluralism in States is an opportunity for allowing indigenous legal systems to function effectively as parts of or parallel to national legal systems.”).

244. MENSKI, *supra* note 21, at 485.

regarding CSLs) explicitly provide that the use of CSLs must be “compatible”²⁴⁵ or “in accordance”²⁴⁶ with international human rights standards. Second, only some rights are absolute and those that are not can be restricted. The right to use CSLs is clearly not absolute and so can be limited so as to protect individual rights and freedoms. Third, Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women obliges states parties to adopt measures to modify socio-cultural patterns of conduct in order to eliminate customs and other practices founded on the notion of the inequality of the sexes.²⁴⁷

Nevertheless, rights continue to exist and must be respected even if they are sometimes defeated by the exercise of another right.²⁴⁸ As such, IHRL leaves the following questions unanswered: by what specific criteria or standards should compatibility be measured? What other limitable rights should the right to use CSLs defer to and why? How and to what extent should customs be modified to eliminate gender inequality or other forms of discrimination? There are no simple, mechanistic answers to issues of this scope and complexity. Nonetheless, I argue that it is possible to accommodate individual rights and contravening aspects of a CSL in any given situation, and thereby build consensus on a culture-specific conception of human rights, by applying two broad guiding principles, namely, through consultation and negotiation and community participation.

1. *Consultation and Negotiation*

Any endeavor to engage with indigenous peoples must be premised on mutual trust, respect, and exchange. This is particularly so in relation to the CSLs by which they live. The role of the state “is not to appropriate or define customary law . . . [but] to take account of its existence and adjust itself accordingly.”²⁴⁹ Thus, the aim of any state-led engagement with CSLs should be to develop an understanding of those systems and to develop practical mechanisms that can harmonize or “progressively align”²⁵⁰ them with rights-compliant state systems while ensuring that ownership remains vested in the relevant indigenous community. This encapsulates the spirit of Abdullahi An-Na’im’s exhortation to the human rights community to work within the interpretive spaces afforded by the ambiguities

245. ILO 169, *supra* note 72, art. 9(1).

246. Declaration, *supra* note 2, art. 34.

247. CEDAW, *supra* note 205, art. 5. Nevertheless, the CEDAW Committee has taken something of a nuanced approach to the question of custom, rather than calling for outright abolition of traditional practices. For example, it has called on Canada to implement awareness-raising activities in relation to women’s rights within indigenous communities. U.N. CEDAW Comm., Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Canada, ¶ 362, U.N. Doc. A/58/38 (Mar. 20, 2003).

248. McDonald, *supra* note 199, at 324.

249. McLachlan, *supra* note 111, at 375.

250. This is the terminology adopted in South Africa to describe this harmonization process. Chirayath et al, *supra* note 5, at 5–6.

of custom and religion in order to arrive at a more rights-compliant consensus.²⁵¹ In this regard, it should be stressed that the right is not only to maintain CSLs but, as expressed in the Declaration, to “develop” them in accordance with IHRL. For that reason, a collective right pertaining to self-governance should be reconciled with competing individual rights “by peaceful negotiation, not force.”²⁵² This is the rational corollary of the type of system that Sari Wastell describes in the context of Swaziland:

It is not that custom is an alternative legal form jostling for space within constitutionalism. Rather, custom takes its rightful place as the extra-legal conceptual framework in which the existing relations of meaning and production that are human rights can be realized in uniquely Swazi ways.²⁵³

The importance and utility of consultation and negotiation for this purpose is well recognized.²⁵⁴ By contrast, colonial enterprises have shown that attempts to formally recognize and regulate CSLs — for example, by way of legislation — transform the character of CSLs from the “living law” described in Part II.B to a static, sterile monolith viewed by indigenous adherents as co-opted and not authentic.²⁵⁵

There are a number of specific strategies and analytical techniques that can be deployed to assist in the extremely complex task of determining if and how certain customary practices violate basic individual rights and, on that basis, how to realize those rights in ways which are uniquely adapted to those customs. The state, and domestic or international supporting agencies, should initiate any harmonization program by conducting a comprehensive assessment aimed at identifying and characterizing the points of both conflict and consistency between the community’s customary practices and the rights enshrined in national laws or international instruments that the state has adopted. This is, of course, conditioned on the prior identification and mapping of jural communities within the state followed by the conclusion of an agreement with the relevant community on the need for and objectives of the program.²⁵⁶ In negotiating this agreement, the state must apprise the community of all relevant information and provide it with

251. See generally Abdullahi An-Na’im, *Human Rights in the Muslim World*, 3 HARV. HUM. RTS. J. 13 (1990).

252. KYMLICKA, *supra* note 202, at 167.

253. Wastell, *supra* note 196, at 339.

254. Baylis, *supra* note 221, at 100 (suggesting utilizing national human rights institutions as a forum for consultation and negotiation); Davis and McGlade, *supra* note 20, at 415, 425; Shin Imai, *Indigenous Self-Determination and the State*, in *INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES* 286, 302, 335 (Kent McNeil Benjamin J. Richardson ed., 2009); McLachlan, *supra* note 111, at 376.

255. Brett L. Shadle, *Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60*, 40 J. AFR. HIST. 411, 411–12 (1999).

256. See generally T.W. Bennett, *Re-introducing African Customary Law to the South African Legal System*, 57 AM. J. COMP. L. 1 (2009) (discussing the problems associated with identifying the applicable CSLs in the context of South Africa).

adequate time and resources to deliberate and seek independent advice, if necessary.

As discussed in Part IV.A, a genuine, comprehensive examination of the nature of any given conflict between an indigenous custom and an individual right must rest on a careful analysis of their respective underlying values. If we take the right to equality before the law and the inimical, discriminatory treatment of a low-caste person in some customary courts, it could be said that the underlying value of the former is to preserve procedural justice for all individuals while the value of the latter might be to preserve the definitive hierarchical relations in the community, premised as they often are on constructed narratives of what it means to belong to that community. In cases of extreme, systematic discrimination, the victimized person — or perhaps a particular family or social group — may be forced to renounce membership of the community in order to avoid unjust application of customary law by, for example, moving to the city. This would simultaneously undermine the cultural integrity of the community, which the state is otherwise duty-bound to respect and protect.²⁵⁷

Therefore, abhorrent though it may be to powerful scions within the community, the group's survival and invigoration may sometimes rest on applying certain customary privileges to *all* individuals' rights. To use McDonald's phraseology, the very reasons for valuing CSLs point to the means by which their use can be reconciled with the right to equality before the law.²⁵⁸ While useful, however, an "internal relations analysis" will not be able to resolve all rights conflicts. Irrespective of these theoretical analyses, supposedly "illiberal" practices must not be prejudged or characterized prematurely and it should be borne in mind that these types of practices can be found in all cultures of the world, even those designated as "liberal."²⁵⁹

There are a number of useful questions that need to be asked to assist in negotiating otherwise overwhelmingly complex incidents of conflict: to what extent does the particular custom or practice impair a person's right to exercise other rights, in addition to the specific right in question? To what extent does the custom have historicity and widespread acceptance within the community? What impact will restriction on the custom have on the significance and legitimacy of the CSLs — i.e., how integral to the system is it?²⁶⁰ When considering all of these questions it must be emphasized that not all "customs" are authentic or culturally legitimate — sometimes they are adopted by powerful leaders for their own political purposes. As Sally Merry states, "the pervasive struggles over cultural values within local

257. McDonald, *supra* note 199, at 333.

258. *Id.* at 329.

259. KYMLICKA, *supra* note 202, 171–72 (noting that the death penalty continues to be applied as a sentencing option in a number of states in the United States, notwithstanding that country's record as a vocal proponent of human rights).

260. See Hilary Charlesworth, *Resolving Conflicting Human Rights Standards in International Law*, 85 AM. SOC'Y INT'L L. PROC. 336, 346 (1991).

communities are competitions over power.”²⁶¹ It is also useful to consider Tamanaha’s criteria for the legitimacy of legal systems, which require that their constituencies: (a) understand and relate to them; (b) respect the officials implementing them; (c) have access to them and; (d) have their basic needs satisfied by them.²⁶²

Finally, in devising “consultation and negotiation strategies,” it is particularly useful to consider Goodman and Jinks’ trichotomy of advocacy mechanisms for influencing state practice in relation to human rights, namely, coercion, persuasion, and acculturation.²⁶³ Coercion would not be an appropriate tool given the history of state-indigenous relations and the imperative of respect for indigenous autonomy. However, the techniques of persuasion and acculturation, and the psychologies and sociologies upon which they are founded, would provide a powerful theoretical foundation for any process of cultural change. Although these mechanisms are directed to state practice, there are lessons to be drawn from this approach with regards to communal indigenous practices.

For example, Sarfaty has demonstrated that the Cree of North America are increasingly incorporating and adapting their customary practices to the global rights discourse, a process which intensifies as Cree engagement with international institutions and transnational advocacy networks increases.²⁶⁴ At the same time, however, ideas flow in the opposite direction; local indigenous norms simultaneously influence national and international norms. This creates a “feedback loop” under which

local actors deploying or resisting national or international norms may well subvert or transform them, and the resulting transformation is sure to seep back “up” so that, over time, the “international” norm is transformed as well . . . [S]tate and international law and institutions are recognizing and incorporating customary norms and indigenous law. . . [I]ndigenous peoples participating in the international human rights community are negotiating the meaning and application of customary laws and practices as they integrate international and domestic norms.²⁶⁵

This illustrates the transformative capacity of dialogic processes of consultation and negotiation. This kind of norm negotiation will not, however, be

261. SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 9 (2006); see also AMARTYA SEN, DEVELOPMENT AS FREEDOM 246–47 (1999).

262. Brian Tamanaha, Address at George Washington University Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies (Nov. 17–18, 2009).

263. Ryan Goodman, Colloquium Paper presented at New York University’s Institute for International Law and Justice: Sociological Theory Insights into International Human Rights (Apr. 3, 2008).

264. Sarfaty, *supra* note 16, at 444, 450.

265. *Id.* at 450 (quoting Paul Schiff Berman, *From International Law to Law and Globalization*, 43 J. TRANSNAT’L L. 485, 551 (2005)).

genuine or legitimate unless it is conducted on a community-wide basis. Development of CSLs must be driven by the community as a whole, and not exclusively by the indigenous leaders who commonly represent their communities, if it is to be deeply rooted and sustainable.

2. *Community Participation*

If we acknowledge that the process of creating the law is often more important than the law itself,²⁶⁶ then engagement with legal pluralism must be premised on broad, genuine, community-based participation that takes into account, and thus is not limited by, the communal politics that permeate the formation of legal orders.²⁶⁷ Discriminatory customary practices will remain entrenched unless victims of discrimination are able to participate in and give real input to the development of their own traditions through processes which enrich and expand the scope of communal dialogue. Again, it should be stressed that customs and traditions are contested terrain whose construction is inherently dependent on power relations.²⁶⁸

As should now be clear, the culture claimed by indigenous peoples is neither monolithic nor static; it is instead dynamic and adaptable. Consequently, it may be possible for any given system of customary laws to demonstrate conflict between the varying sets of rights contained within it, and not just as against formal state laws.²⁶⁹ As many development practitioners would be quick to point out, however, established power cliques are unlikely to help facilitate or participate in processes that might ultimately require them to renounce practices on which their power is based.²⁷⁰ It is, therefore, necessary to devise strategies to ensure that the harmonization process is not co-opted by autocratic leaders purporting to speak for the entire community. For that reason the state must invest the time and resources (which may be considerable) necessary to facilitate broad-based stakeholder participation in the “jurisgenerative” process by which legal meaning is created within the community.²⁷¹ The form of association must be sufficiently free as to confer on all community members the “liberty and capacity to create and interpret law — minimally, to interpret the terms of

266. See generally SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978).

267. MENSKI, *supra* note 21, at 492; CARSTEN STAHN, *THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION* 527 (2008) (referring to “participatory legitimacy”).

268. ICHRP, *RESEARCH PROJECT ON PLURAL LEGAL ORDERS*, *supra* note 35, at 47.

269. *Id.*

270. Cf. Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 *BERKELEY J. INT’L L.* 571, 603–26 (2009) (discussing the opposition of governments allied with extractive resource corporations to the use of community referenda to resist mining projects near indigenous communities).

271. Sarfaty, *supra* note 16, at 455.

the association's own being."²⁷² Participation which does not meet this quality — and it is in many ways an aspirational standard — will be subverted to a greater or lesser extent to established power interests.

The need for community participation may be self-evident, but there are no simple solutions to address these kinds of problems. Over the years development practitioners have experimented with, adopted or discarded a variety of methodologies to address these types of conundrums. One approach that is increasingly gaining currency is that of “community-driven development” (“CDD”). CDD is an approach to participatory development that treats beneficiary communities as active partners rather than as passive recipients in the utilization of aid resources.²⁷³ It does so by assisting target communities to elect democratically their own community development committees. Each committee is then given control over donor resources and the decision-making process to implement the particular development project in the community to which it must regularly make account.²⁷⁴ The process of establishing the development committee is, therefore, one of the most important aspects of CDD. While the CDD approach is not necessarily appropriate in all contexts, at the very least, there may be important lessons that can be drawn from it and applied to communities seeking to develop and harmonize their own CSLs. There is also an important role here for civil society organizations to enlarge the spaces for the expression of alternative opinions where dissident voices within the community are being silenced and prevented from participating in reform processes.²⁷⁵

Similarly, the New Zealand Law Commission advocates supporting and building the capacity of existing “community justice bodies” as a means of promoting human rights within CSLs.²⁷⁶ These types of bodies could be used as the vehicle for the development of a unique indigenous jurisprudence that reconciles IHRL with the prevailing customs of the indigenous group in question. This body would then act as the principal point of

272. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 32 (1983). The Cree's law-making process appears to partially meet this standard. Sarfaty, *supra* note 16, at 476 (“(i) A law is proposed by the Chief and Council. (ii) The law must be approved through traditional consensus by the Council of Elders and the Women's Council and be referred to the Youth Council for consultation. The Council of Elders and Women's Council can also refer the law back to the Chief and Council with a recommendation that it be amended before being reconsidered for approval. (iii) The proposed law then requires public approval at a General Assembly meeting held through consensus decision-making. If it is not approved, the law is referred back to the Chief and Council for redrafting. (iv) The law and any amendments made to it are adopted and signed by the Chief and Council. Under this new legislative process, the three councils and the Cree citizens cooperate with the Chief and Council in the formulation and approval of laws.”).

273. See Philippe Dongier et al., *Community Driven Development*, in A SOURCEBOOK FOR POVERTY REDUCTION STRATEGIES: CORE TECHNIQUES AND CROSS-CUTTING ISSUES 301, 303 (Jeni Klugman ed., 2002).

274. See *id.*; cf. WORLD BANK, COMMUNITY-DRIVEN DEVELOPMENT IN THE CONTEXT OF CONFLICT-AFFECTED COUNTRIES: CHALLENGES AND OPPORTUNITIES (REPORT NO. 36425-GLB) 7 (2006).

275. ICHRP, WHEN LEGAL WORLDS OVERLAP, *supra* note 6, at 146.

276. N.Z. LAW COMM'N, *supra* note 201, § 11.66.

interface between external state or non-governmental organizations and would collaboratively perform core tasks, such as identifying and explaining (without codifying) principal components of their CSLs, monitoring, recording, and evaluating dispute resolution processes on an ongoing basis, proposing techniques and methodologies for modifying rights-inimical customary practices, and conveying communal needs and interests to external actors.

V. CONCLUSION

CSLs have historically been, and still often are, treated as little more than objects of anthropological curiosity or obstacles to nation building and development. There is increasing recognition, however, that CSLs are *not* inimical to national social and economic development. In fact, they can, if engaged in the appropriate manner, actually contribute to development. Furthermore, as indigenous peoples repeatedly emphasize, CSLs underpin the cultures that define them and distinguish them from the national populations by whom their existence is oftentimes threatened. Thus, as I have argued in this Article, defining and enshrining a right to practice CSLs is at the heart of the evolving and rapidly expanding right of self-determination and reflects the considerable agency of indigenous peoples at the international level and the increasing respect that they are being accorded by states and other international actors. This has seen tangible results in the form of an emerging customary norm regarding the use of CSLs, in addition to the numerous international human rights instruments that now recognize its importance.

In referring to Richard Falk's proposed framework for a more humane, diverse, and inclusive post-Westphalian system, Maivân Clech Lâm states that:

[I]f international law is to effectively regulate international society still, it will have to be reconstructed, conceptually and institutionally, to include peoples as well as states as its rightful subjects, entitled to engage in the mutual if different construction, interpretation and implementation of its norms.²⁷⁷

Ultimately, it could be said that by providing an expression of indigenous identity, the growing corpus of indigenous rights within an IHRL framework offers a potentially powerful challenge to assertions that IHRL is a Western, state-centric artifice with little significance for the developing world (or developing parts of the developed world). We can learn a great deal from the possibilities of reconciling state legal systems, and the human rights which they enshrine, and CSLs, and the potentially competing

277. LÂM, *supra* note 78, at 203.

human rights which they enshrine. That these competing legal systems can be reconciled within an IHRL framework is, as I have argued, attributable to the nature of IHRL as a flexible, evolving body of law capable of having real meaning in the daily lives of all peoples, irrespective of their ethnicity, religious persuasion, political orientation, or gender. In this way, the IHRL system can be used as a vehicle to “build” and provide mutually-reinforcing strength to potentially competing rights in pursuit of a more holistic, sustainable conception of indigenous sovereignty rather than being half-heartedly applied to strike a “balance” which compromises this worthy and necessary goal. Thus, if colonization meant that, to borrow from Chinua Achebe, “things fall apart,”²⁷⁸ then the arrival of indigenous peoples on the international scene may well signal an era of rebuilding.

278. See generally CHINUA ACHEBE, THINGS FALL APART (1994).