

# Legalities unbound? Assessing the role of religion and legal pluralism at four UN human rights committees

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## Abstract

International human rights law (IHRL) has traditionally enjoyed an uneasy relationship with customary, religious, and indigenous forms of law. International courts and tribunals have considered these non-state forms of law to represent both structural and material challenges to the implementation of human rights norms at the domestic level. Over the course of the last decades, however, the theory and practice of human rights has increasingly started recognizing and accommodating multiple legal orders. This article traces the gradually increasing accommodation of legal pluralism in IHRL in the monitoring practice of four UN human rights committees over a period of 20 years, looking in particular at the increasing recognition of religious forms of legality across the committees.

Keywords: religion; legal pluralism; human rights; United Nations

## 1. Introduction

International human rights law (IHRL) enjoys a longstanding relationship with religion. From its origins and material provisions, to its promotion, implementation, and monitoring, the development of IHRL is closely interwoven with religious doctrines, interpretative traditions, organizations, and communities “on the ground.” In some of its aspects, IHRL has been likened to a new “civil religion,” with its deployment of seemingly universal categories of human dignity, a shared vision of a common standard, and new direction for the progress of humankind.<sup>1</sup> Within this all-embracing framework, the role of religious and other non-state forms of law have until recently been ignored, if not actively opposed as a potential threat to the implementation of the provisions of IHRL in domestic law.

Over the course of the last decades, this studied disinterest has gradually given way to new perspectives in the theory and philosophy of law on the complex nature of legal domains and their interaction, with repeated rounds of discussion on foundational questions regarding the nature and scope of law within the social order.<sup>2</sup> Following debates on these foundational questions, the role of legal pluralism in general, and religious legal rules in particular, have become more pressing topics, primarily in domestic law,<sup>3</sup> but also in IHRL.<sup>4</sup> In tandem with

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<sup>1</sup> See Helle Porsdam (ed), *Civil Religion, Human Rights and International Relations: Connecting People across Cultures and Traditions* (2012).

<sup>2</sup> See Lauren Benton, “Historical Perspectives on Legal Pluralism”, 3 *Hague Journal on the Rule of Law* (2011), 57, Brian Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global”, 30 *Review Literature And Arts Of The Americas* (2007), 375 and John Griffiths, “What Is Legal Pluralism?”, 24 *Journal of Legal Pluralism and Unofficial Law* (1986), 1.

<sup>3</sup> See Maria Ashe and Anisa Hélie, “Realities of Religio-Legalism: Religious Courts and Women’s Rights in Canada, the United Kingdom, and the United States” 20 *U. Cal.-Davis J. International Law & Policy* (2014), 139 and Russell Sandberg et.al, “Britain’s Religious Tribunals: ‘Joint Governance’ in Practice” (2012) 33 *Oxford Journal of Legal Studies* 263

this increased interest in legal pluralism, foundational questions have arisen regarding the political role of “religion” more generally, and its “return” to the public sphere and international relations in particular.<sup>5</sup>

This article takes the newfound interest within IHRL in legal pluralism as the starting point for an empirical analysis of how four UN human rights committees have approached this topic over 20 years of monitoring practice.<sup>6</sup> After this general introduction, Part 2 provides an introduction to the reorientation toward legal pluralism in theorizing on human rights. Part 3 contains a brief overview of the monitoring procedure. Part 4 presents the approaches to legal pluralism developed in the course of report monitoring practice by the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Rights of the Child (CRC), the Human Rights Committee (HRC), and the Committee on the Elimination of Racial Discrimination (CERD) from 1993 to 2013. Part 5 provides a brief summary and a conclusion.

## 2. Legal pluralism, religion, and human rights

The modern human rights enterprise has traditionally adhered to the self-proclaimed universality of the Universal Declaration of Human Rights (UDHR, 1948), dismissing religious, customary, cultural, and other alternatives to modern, legal rationality.<sup>7</sup> Derived from the presumed secularism of the Atlantic revolutions, the provisions of the UDHR and ensuing instruments have cordoned off religion to the private domain, with only limited manifestations allowed in the public sphere. The suspicion toward religion as a source of anything more than the private beliefs of individual citizens builds on a long-standing civilizational ideal that considers the singularity and unity of a secular legal system as the only acceptable solution for social organization. According to this ideal, the coexistence of parallel legal orders, or legal pluralism, is viewed as an indicator of incomplete territorial control, and social and political backwardness.<sup>8</sup>

As the human rights enterprise has grown and diversified over the years, the initial suspicion toward other forms of law has gradually subsided, and approaches to competing legal orders have become more refined and sensitive to the importance of context. It is now widely acknowledged that the international legal order in itself is inherently pluralist and reliant on cooperation with other, overlapping legal mechanisms.<sup>9</sup> Activists working to promote women’s rights recognize the need to sometimes work with, not against, other legal

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<sup>4</sup> See Colleen Sheppard and René Provost (eds), *Dialogues on Human Rights and Legal Pluralism* (2013) and Helen Quane, “Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?”, 33 *Oxford Journal of Legal Studies* (2013), 675.

<sup>5</sup> The literature on this topic is enormous. For an overview, see Erin Wilson, *After Secularism. Rethinking Religion in Global Politics* (2012) and Elizabeth Shakman Hurd, *The Politics of Secularism in International Relations* (2008).

<sup>6</sup> For a broader assessment of this relationship, see Helge Årsheim, *Making Religion at the United Nations* (2018).

<sup>7</sup> Sally E. Merry, “Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)”, 26 *Political and Legal Anthropology Review* (2003), 55.

<sup>8</sup> Benton 2011, *supra* note 2, at 65.

<sup>9</sup> Eyal Benvenisti and George W. Downs, “The Empire’s New Clothes: Political Economy and the Fragmentation of International Law”, 60 *Stanford Law Review* (2008), 595, 625, William Burke-White, “International Legal Pluralism” 25 *Michigan Journal of International Law* (2004), 963, 977.

traditions,<sup>10</sup> and the recognition of customary forms of law is considered vital to the protection of the rights of indigenous peoples.<sup>11</sup> The necessity of involving religious legal forms in the protection of children's rights was already acknowledged in the 1980s, when the Convention on the Rights of the Child (1989) was adopted with an express recognition of the Islamic adoption principle of *kafalah* in article 20 on the obligations of state parties to provide care for children deprived of their family environment.<sup>12</sup>

This reorientation toward increased recognition of legal pluralism as a viable option to strengthen the protection of a variety of human rights can be seen as a move from considerations of *substance* to considerations of *salience*.<sup>13</sup> Whereas former theoreticians and practitioners in the field of human rights emphasized the inherently incompatible nature of plural, co-existing legal orders by virtue of their perceived challenges to positive, state-sanctioned law, present human rights theory is more concerned with the efficacy of such forms of law, emphasizing the potential complementarity of state law and other forms of legalities and normative commitments.<sup>14</sup> There is now widespread consensus that informal religious concepts and ideas play an important role in the implementation and monitoring of human rights law.

One part of this consensus is promoted by scholars who point to the *interdependence* of religion and law, recognizing that law provides religion with structure, and religion furnishes law with spirit.<sup>15</sup> According to this line of reasoning, human rights norms cannot aspire to the moral authority necessary to create respect for basic human dignity without the assistance of religious traditions.<sup>16</sup> The idea that human rights require the backing of religious traditions to function is related to the claim that human rights norms represent a cross-section of religious beliefs. This view is based primarily on the textual approach to religion that emphasizes the preeminence of the written word and the shared doctrines of the major religions of the world

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<sup>10</sup> Elizabeth Heger Boyle and Amelia Cotton Corl, "Law and Culture in a Global Context: Interventions to Eradicate Female Genital Cutting", 6 *Annual Review of Law and Social Science* (2010), 195, 209, Sally Engle Merry, "Constructing a Global Law-Violence against Women and the Human Rights System". 28 *Law and Social Inquiry* (2003) 4, 941, 947.

<sup>11</sup> Robin Perry, "Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty", 24 *Harvard Human Rights Journal*, 71, 79.

<sup>12</sup> Annette Laquer Estin, "Where (in the World) do Children Belong?" 25 *Brigham Young University Journal of Public Law* (2011), 217, 229. Article 20(3) of the CRC reads: "3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

<sup>13</sup> This development parallels a similar shift in the historiography of the human rights movement, which is also increasingly moving from substantive appreciations of hard human rights law on the books, to thematic analysis of the salience of human rights law in relation to their surroundings, i.e., the softer law in action. See Samuel Moyn, "Substance, Scale, and Salience: The Recent Historiography of Human Rights", 8 *Annual Review of Law and Social Science* (2012), 123. for a discussion of this shift.

<sup>14</sup> Sheppard and Provost 2013, *supra* note 4, at 11.

<sup>15</sup> For some examples of this widely held view, see Harold J. Berman, "The Interaction of Law and Religion", 31 *Mercer Law Review* (1980), 405, John Witte Jr, "Law, Religion, and Human Rights", 28 *Columbia Human Rights Law Review* (1996), 1, Michael J. Perry, *Toward a Theory of Human Rights. Religion, Law, Courts* (2007) and Hans Joas *The Sacredness of the Person. A New Genealogy of Human Rights* (2013). For a more subtle version of this argument, see Robert M. Cover, "The Supreme Court, 1982 Term Foreword: Nomos and Narrative" 97 *Harvard Law Review* (1983), 4.

<sup>16</sup> Abdullahi An-Na'im, "The Interdependence of Religion, Secularism, and Human Rights. Prospects for Islamic Societies", 11 *Common Knowledge* (2005), 56, 68.

as the normative core of the human rights project.<sup>17</sup> Consequently, the more important is the *text* originating from a religious tradition, the more vital the input of this tradition is perceived to be for the legitimacy of human rights norms. This approach favors some traditions over others, in particular the three Abrahamic religions, where the role of scripture is considered to be central. It also favors some parts of religious traditions over others, in particular the “higher,” more orthodox and commonly more powerful segments of religious traditions over “lower,” heterogeneous and marginalized communities, with more eclectic and less scripturalist traditions.<sup>18</sup> According to this line of thought, the primary contribution of religion to the human rights enterprise is its normative and scriptural authority, which should be taken duly into account in the implementation of human rights norms.

Counter to this approach, several scholars and practitioners have increasingly emphasized the potential contributions to the implementation of human rights norms represented by the more practical dimensions of religiosity—what sociologists and anthropologists of religion have conventionally labelled “lived religion,” stressing the lives led by individuals who self-identify as religious—over deductions and abstractions about the authoritative beliefs and practices of “religions.”<sup>19</sup> Pointing out that the strictures and confines of a modern, self-consciously “secular” law can never appreciate the complexity and multidimensional nature of the ways in which people live their religious allegiances and identities, researchers within this approach have spearheaded powerful critiques of the propensity of law to discipline and distort the ways in which religion works in practice.<sup>20</sup>

The discourse on the relation between “lived religion” and the implementation and monitoring of human rights is largely optimistic, pointing to the multiple opportunities for cross-fertilization and overlapping consensus between human rights provisions and religious teachings and actions. Non-state, “private” actors, including religious groups, and particularly their leaders, are increasingly being involved in the implementation and monitoring of human rights. The acknowledgment that religious practices play a decisive role in the recognition and implementation of human rights norms has gained increasing acceptance in the international community, sparking regional and global initiatives that seek to engage and harness religious practices for the protection of human rights. Religious actors who work from outside official structures have particularly been addressed in human rights initiatives against female genital

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<sup>17</sup> Until quite recently, this was the standard view of the origin of human rights. See Thomas Banchoff and Robert Wuthnow (eds), *Religion and the Global Politics of Human Rights* (2011) and Micheline R. Ishay, *The history of human rights: From ancient times to the globalization era* (2008) for examples of this approach.

<sup>18</sup> The tendency to single out one dimension of religion at the expense of others bears striking resemblance to the continuous debate within religious studies and related disciplines as to what dimensions constitute the essence of religion, and what the relationship between these dimensions can or should be. For an analysis and critique of the historical trajectory of scriptural authority as the determining essence to a family of “world” religions, see Tomoko Masuzawa, *The invention of world religions: or how European universalism was preserved in the language of pluralism* (2005). For an assessment of how the hierarchy between “high” and “low” religion has been handled by the legal system, see Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (2005).

<sup>19</sup> For some of the earliest and most influential accounts of the turn toward lived religion, see Meredith B. McGuire, *Lived Religion. Faith and Practice in Everyday Life* (2008) and Robert A. Orsi, *Between Heaven and Earth: The Religious Worlds People Make and the Scholars Who Study Them* (2006).

<sup>20</sup> For a powerful critique of the ways in which self-consciously secular law delimits and distorts “lived” religion, see Winnifred Sullivan, Robert Yelle and Mateo Taussig-Rubbo (eds), *After Secular Law* (2011).

mutilation (FGM)<sup>21</sup> and HIV/AIDS,<sup>22</sup> but also in development issues more generally, including gender equality in the workplace and access to education.<sup>23</sup>

### 3. Monitoring procedure

The treaty bodies monitoring state compliance with human rights norms consist of a large and unwieldy machinery. The strictures of the monitoring procedure curtail broad-based assessment of any but a handful of the provisions covered by each treaty, as the time and space available for the production of periodic reports and their review by the committee are notoriously insufficient. The challenges of a clear-cut approach to how the committees view the scope of their provisions are particularly entrenched in issues like legal pluralism, which lack coverage in specific provisions, and tend to be brought into the review only occasionally. As a result, the role of legal pluralism in the reporting procedure is ambiguous and under-determined, offering state parties little in the way of normative guidance on how to deal with non-state forms of law while complying with treaty provisions.

This ambiguity raises important challenges to a strictly legal analysis of the ways in which the treaty bodies have approached non-state forms of law. At the same time, it represents a unique opportunity to compare the many different ways in which the committees include, discuss, dismiss, or promote various conceptions of legality beyond their main provisions. Below I describe the makeup and legal significance of the three basic steps of the reporting cycle that are common to all the treaty bodies, examining the role of legal pluralism in the reporting guidelines issued by the committees, and mapping the ways in which the different parts of the procedure feed into one another. In chronological order for each cycle, these are: state reports, summary records from meetings between the committee and the state party, and the concluding observations issued by the committees.<sup>24</sup>

#### 3.1 Periodic reports on treaty implementation

The introductory part of state reports is structured according to common principles outlined in a compilation assembled by the Office of the High Commissioner for Human Rights

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<sup>21</sup> Boyle and Corl 2010, see *supra* note 10 at 197, and Sonia Harris-Short, “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child”, 25 *Human Rights Quarterly* (2003), 130, 181.

<sup>22</sup> V. Paiva, J. Garcia, L. F. Rios, A. O. Santos, V. Terto, and M. Munõz-Laboy, “Religious communities and HIV prevention: An intervention study using a human rights-based approach.” (2010) 5 *Global Public Health*, 280, 291, Isaac N. Luginaah, Emmanuel K. Yiridoe, and Mary-Margaret Taabazuing, “From mandatory to voluntary testing: balancing human rights, religious and cultural values, and HIV/AIDS prevention in Ghana.” 61 *Social Science & Medicine* (2005), 1689, 1697.

<sup>23</sup> Séverine Deneulin and Carole Rakodi, “Revisiting Religion: Development Studies Thirty Years On” 39 *World Development* (2011), 45, 52, Ambe J. Njoh and Fenda A. Akiwumi, “The Impact of Religion on Women Empowerment as a Millennium Development Goal in Africa” 107 *Social Indicators Research* (2011), 1, 15.

<sup>24</sup> These characteristics have been derived from the treaties themselves, and from the most recent (2012) version of their working methods and internal rules of procedure available at the OHCHR website for each committee (CCPR/C/3/Rev.10 for the Human Rights Committee, CERD/SP/2/Rev.1 for the Committee on the Elimination of Racial Discrimination, HRI/GEN/3/Rev.3 for the Committee on the Elimination of Discrimination against Women, and CRC/C/4/Rev.2 for the Committee on the Rights of the Child).

(OHCHR).<sup>25</sup> Reports provide a general introduction, featuring demographic, economic, social, and cultural characteristics, followed by an introduction to the constitutional, political, and legal structure of the state. Building upon this general information, state reports introduce the general framework for the protection and promotion of human rights, outlining various legislative mechanisms and their working methods, before providing basic information on measures in place to prevent discrimination, and existing remedies against human rights violations in their domestic legal framework.

The general information in the first part of the report constitutes a “core” document that is common to all treaty bodies. It is generally included in its full form only in the initial report of the state party, and can be submitted in a separate document that is periodically updated.<sup>26</sup> According to the reporting guidelines, all core documents should contain information about “any systems of customary or religious law that may exist in the State,”<sup>27</sup> indicating an overarching interest in the role of legal pluralism and its potential influence on the implementation of human rights provisions across the treaty body system.

In their treaty-specific reporting guidelines, committees take somewhat different approaches to the role of legal pluralism in the reports of state parties. Whereas the guidelines issued by the committees monitoring the CRC and CEDAW have requested the inclusion of specific information on the effect of “legal systems” and “the interaction of plural legal systems” on the implementation of the provisions of their treaties, the Committee on the Elimination of Racial Discrimination (CERD) does not address the issue.<sup>28</sup> The Human Rights Committee (HRC) is the only one to require information on legal pluralism related to the implementation of specific provisions, urging state parties to provide an account of “[t]he existence of courts based on customary law or religious courts and their competencies, including information on their practices,”<sup>29</sup> in light of the provisions of article 14 of the International Covenant on Civil and Political Rights on the right to equality before courts and tribunals.

According to the general guidelines, common core documents should not exceed 60-80 pages, initial treaty-specific reports should not exceed 60 pages, and subsequent periodic documents should be limited to 40 pages.<sup>30</sup> Although most periodic reports follow these maximum limits, the 6-page report submitted to CERD by Mongolia in 1998,<sup>31</sup> and the 470-page report

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<sup>25</sup> United Nations International Human Rights Instruments, Report of the Secretary General. *Compilation of Guidelines on the Form and Content of Reports to be submitted by States Parties to the International Human Rights Treaties*, HRI/GEN/2/Rev.6, 2009, 3 June 2009.

<sup>26</sup> For an updated list of core documents, see United Nations Office of the High Commissioner for Human Rights: *Common Core Document*, retrieved 15.03.2017, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/CoreDocuments.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/CoreDocuments.aspx)

<sup>27</sup> *Supra* note 25, at para. 36.

<sup>28</sup> See *supra* note 25, at p. 66 para. A.4.2. and Committee on the Rights of the Child. *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child* (CRC/C/58/Rev.3), 3 March 2015, at para. 12.

<sup>29</sup> Human Rights Committee. *Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights* (CCPR/C/2009/1) 22 November 2010, at para. 73.

<sup>30</sup> *Supra* note 25, at para. 19.

<sup>31</sup> Committee on the Elimination of Racial Discrimination. *Reports submitted by States Parties under Article 9 of the Convention. Fifteenth Periodic Reports of States Parties due in 1998. Addendum. Mongolia*. (CERD/C/338/Add.3), 20 July 1998.

submitted by India to the CRC in 2003<sup>32</sup> illustrate the complexity of the reporting procedure and the methodological challenges involved in the systematization of data. Apart from scope, reports also tend to differ widely in content, from mere listing of legal provisions to entire treatises on social structures, programs, and relevant research, and from self-flagellating statements on problems to hyperbolic claims of impossibly harmonious societies. Unfortunately, this diversity has limited the utility of the reports, both in furthering the rights they are set to map, and in their inclusion in research.

### *3.2 Committee meetings*

All committees appoint designated “country rapporteurs” to lead the examination of delegations from state parties during their interactive, public meetings, which take place at the headquarters of the OHCHR in Geneva, Switzerland.<sup>33</sup> Meetings are usually preceded by closed consultations with NGOs, where committees can receive supplementary information on the situation in the state party, which can be brought up during the review. Until the early 1990s, when the Committee on Economic, Social and Cultural Rights (CESCR) spearheaded the practice of issuing “concluding observations,” the summary records from meetings with state parties were the closest thing to a verdict or legal opinion published by the treaty bodies. Representatives sent to Geneva are expected to be able to answer the questions posed by the committee, and most states send high-level delegations with technical expertise on the treaties in question. Nevertheless, true dialogue between committee members and state representatives is considered to be rare.<sup>34</sup>

Summary records from meetings with state parties are unreliable indicators of what matters most to each committee. Meetings frequently descend into wars of words, not only between delegations and committees, but at times also between committee members and internally within delegations, complicating the clarification of what obligations can be derived from the treaty in question. Implementing, monitoring, and assessing the rights in question is highly complex, and matters are not easily resolved in oral discussions. Their applicability as a source for a better understanding of how committees approach religion is further reduced by their dependence on the staff transcribing the discussion, necessarily compressing and shortening arguments and views. Finally, summary records have no independent legal significance, and cannot provide reliable insight into where the committee as a whole stands on a particular issue. Nevertheless, summary records offer a valuable glimpse into the complexities involved in the monitoring process.

### *3.3 Concluding observations*

Concluding observations have been described as “the single most important activity of human rights treaty bodies.”<sup>35</sup> The first steps toward the present procedure were taken in the mid-

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<sup>32</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under Article 44 of the Convention. Second periodic reports of States parties due in 2000. India (CRC/C/93/Add.5)* 16 July 2003.

<sup>33</sup> Unlike the other committees, CEDAW was originally under the supervision of the Commission on the Status of Women (CSW) in New York, and held its sessions there. Since 2008, however, the committee has been serviced by the OHCHR, and after a transitional period with alternating sessions in New York and Geneva, the committee now holds sessions only in Geneva.

<sup>34</sup> See David Kretzmer: “Human Rights, State Reports” in *Max Planck Encyclopedia of International Law* (2008).

<sup>35</sup> Michael O’Flaherty, “The Concluding Observations of United Nations Human Rights Treaty Bodies”, 6 *Human Rights Law Review* (2006), 27.

1980s by the HRC, with the individual observations of committee members attached to the summary records from meetings with state parties. In 1990, the records matured into a separate document, complete with recommendations, at the initiative of the Committee on Economic, Social and Cultural Rights (CESCR). Although the views presented in concluding observations are not legally binding, their standing as representing the views of the committees have been gradually strengthened over the years, as the number of issues and the body of observations have grown.

Concluding observations have a common structure.<sup>36</sup> A summary introduction outlining the time and date of the meeting with the state party is followed by a summary of “positive aspects.” Such aspects typically include the adoption of new legislation and the implementation of programs and other initiatives, with reference to earlier observations by the committee, if these have been followed through. The main body of the observation details issues of particular concern, followed by the recommendations of the committee. Although concluding observations follow the general structure of the treaty in question, some issues are necessarily emphasized at the expense of others.

Despite their non-legal nature, concluding observations serve several important functions. First, they form the basis for the subsequent state report, singling out issues that should be addressed in the interim. Second, observations and recommendations from committees on the implementation of human rights by the state party provide a baseline for demands for reform within state parties by political forces and NGOs. Third, concluding observations are at times used to draft mandates for special rapporteurs from the committee charged with the task of following up particularly problematic issues. Finally, concluding observations are the most important source for an authoritative interpretation by committees of their treaty provisions, constituting an important source of law for scholarly, political, and legal human rights work.<sup>37</sup> Several special rapporteurs evaluating the system have been sharply critical of the quality of concluding observations, and although greater consistency and better prioritization are still needed, the evolution of the system has been described as “remarkable.”<sup>38</sup> Considering the above, a systematic analysis of how human rights treaty bodies have approached religion and legal pluralism in their reporting practice must begin with an assessment of their concluding observations, as the authoritative source for their interpretation of the nature and scope of the conventions they monitor.<sup>39</sup>

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<sup>36</sup> The structure of concluding observations has evolved somewhat over the years, mainly in the subdivision of topics to be addressed. Nevertheless, the main structure of presenting concrete observations of issues of concern followed by recommendations for their rectification has been part of the procedure since its inception. Harmonizing the working methods of treaty bodies, including the format of concluding observations, has been integral to the ongoing effort to reform the reporting system from the start. For an overview of the reform process, see United Nations Office of the High Commissioner for Human Rights: *Treaty Body Strengthening*, retrieved 15.03.2017, <http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx>

<sup>37</sup> See O’Flaherty 2006, *supra* note 35, at 34.

<sup>38</sup> *Ibid.* at 51.

<sup>39</sup> The majority of concluding observations are available in the annual reports of the committees, at the OHCHR website (<http://www.ohchr.org/EN/Pages/WelcomePage.aspx>). Concluding observations that are not published in annual reports, state reports, lists of issues, and their replies and summary records are available through a variety of sources: the official documentation system of the United Nations (ODS): <https://documents.un.org/prod/ods.nsf/home.xsp>, the UN Bibliographical Information System (UNBISNET): <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=bib&menu=search#focus>, the Universal Human Rights Index (UHRI): <http://uhri.ohchr.org/en>, the UN Treaty Body Database (UTBD): [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/TBSearch.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/TBSearch.aspx), and the independent database created

#### 4. Religion and Legal Pluralism at the UN Human Rights Committees<sup>40</sup>

In the theory and practice of human rights protection, the last decades have seen an expansion from a position that regards religions primarily as moral commitments that furnish human rights with normative legitimacy, to a broad engagement with religious leaders, practices, and organizations as partners in the practical implementation of human rights norms on the ground (see Part 2). This expansion can also be detected in the monitoring practices of the UN human rights treaty monitoring bodies, as the committees have gradually started encouraging the increased engagement with religious leaders rather than blanket dismissal, and the reform and reinterpretation of religious and customary legal systems rather than their dissolution. These questions rarely surfaced during the 1990s, but are presently included in virtually every session of the committees monitoring CEDAW and the CRC, although they are less frequently addressed by the HRC and CERD. In the remainder of this article, I map the ways in which the committees have encountered and engaged with religion and legal pluralism between 1993 and 2013, discussing overlapping and contradictory approaches to the proper role of “lived” religion and of alternative legalities in the implementation of human rights.

None of the committees have confronted the question of legal pluralism head-on, in the sense of developing a theory of the proper role of non-state forms of law in their monitoring procedure, or a systematic approach to it. None of the committees have published general comments or recommendations on the issue, indicating their view of the issue as unimportant or peripheral to their work. More often than not, the committees center their attention on legal provisions covered by their conventions, while listing a variety of culprits and potential remedies to adopt. Whenever legal pluralism has been addressed by the committees, it has generally been in the form of singular sentences or general passages in the lists of hindrances or potential remedies that should be addressed by the state in question. Because of this lack of attention, the approaches of the committees to legal pluralism can be assessed only indirectly and in retrospect, as patterns and systems appear only when put together over a longer period of time.

##### 4.1 *The Committee on the Elimination of Discrimination against Women*

Despite its omission from the treaty provisions of CEDAW, the centrality of religion to the interpretation of the convention is not disputed. Reservations are commonly motivated by the predominance of religious law,<sup>41</sup> and the prevalence of religion in the practice of the CEDAW committee means that “references to culture and tradition as needing redefinition... should be taken as including religion.”<sup>42</sup> This assessment is supported by the language of the concluding observations of the committee, which have made extensive references to the effect of religion on the enjoyment of the rights enshrined in its convention. From the beginning of its

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by human rights scholar Anne Bayefsky, <http://www.bayefsky.com/>. On the rare occasion that cited documents have been unavailable in English, I have used Google Translate, <https://translate.google.com>. All translations are indicated in the references throughout the text [all sites accessed 26.08.2016].

<sup>40</sup> Parts of the materials and discussions in this section can also be found in Helge Årsheim, *Making Religion at the United Nations* (2018). For a limited discussion of the monitoring practice of CERD and the CEDAW committee, see Helge Årsheim, “Secularist Suspicion and Legal Pluralism at the United Nations”, in *Religion and Human Rights* 11 (2016), 166-188.

<sup>41</sup> Ekaterina Yahyaoui Krivenko, *Women, Islam and International Law within the Context of the Convention on the Elimination of All Forms of Discrimination Against Women* (2008), 116-118.

<sup>42</sup> Carolyn Evans and Amanda Whiting (eds.), *Mixed Blessings: Laws, Religions, and Women’s Rights in the Asia Pacific Region* (2006), 12

work in 1982, the committee has engaged with religion primarily as a feature of the environment, an irritant preventing the proper implementation of its core provisions on gender equality. The committee has chastised states for promoting or allowing patriarchal system of religious norms that legitimize the subjugation of women in various social spheres, including law and religious institutions and organizations. Recently, however, the committee has increasingly referred to the social role played by religion as one of several intersecting dimensions of identity and daily life, a role that can be both detrimental and conducive to the implementation of human rights provisions in unequal measures. The committee has gradually become more accommodating of this social dimension of religion, recognizing the need to work with religious leaders and institutions to achieve progress in the implementation of its core provisions.

The first fleeting indications that the committee started recognizing the possibility of constructive engagement with religious actors became evident during the review of Tunisia in 1995, after which the committee expressed its “great admiration” for the Tunisian will to maintain progressive interpretations of both religious and civil laws, hailing Tunisia as a “shining example” for other countries because of its interpretation of Islam.<sup>43</sup> Starting in 2001, the committee adopted a standardized response to the influence of Islamic law on the implementation of its core provisions, issuing similarly worded concluding observations on the Maldives<sup>44</sup> and Singapore<sup>45</sup> with respect to the role of Islamic law in their domestic legal systems. The recommendation to Singapore is the more elaborate one, and was directed at the reservations lodged by the state against articles 2 and 16 of the convention.

Recognizing that the pluralistic nature of Singapore society and its history call for sensitivity to the cultural and religious values of different communities, the Committee nevertheless wishes to clarify the fact that articles 2 and 16 are the very essence of obligations under the Convention. Since some reforms have already been introduced in Muslim personal law, the Committee urges the State party to continue this process of reform in consultation with members of different ethnic and religious groups, including women. It recommends that the State party study reforms in other countries with similar legal traditions with a view to reviewing and reforming personal laws so that they conform with the Convention, and withdrawing these reservations.<sup>46</sup>

Although the recommendation to the Maldives was shorter and directed more narrowly at its effort to reform its family law, the suggestion that the state party seek out the experiences of other countries with similar (in this case, Islamic) legal systems, was largely identical.<sup>47</sup> During the meeting with representatives from Singapore, one committee member recommended that Singapore study examples of the reconciliation between Sharia and secular law in “Muslim countries throughout the world,”<sup>48</sup> without specifying which countries, and the successes that had been achieved. Several times in the first decade of the 2000s, the committee repeated the recommendation to countries with legislation derived from Islam, which were perceived to be in conflict with the convention, to seek out the experiences of other Muslim countries or countries with similar legal traditions. With minor differences, such

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<sup>43</sup> United Nations General Assembly. *Report of the Committee on the Elimination of Discrimination against Women, 14th Session (A/50/38)*, 31 May 1995, para. 222, 265.

<sup>44</sup> United Nations General Assembly. *Report of the Committee on the Elimination of Discrimination against Women, 24th and 25th session (A/56/38(SUPP))*, 1 January 2001, para. 114-146.

<sup>45</sup> *Ibid.*, para. 54-96.

<sup>46</sup> *Ibid.* para. 74.

<sup>47</sup> *Ibid.* para. 141.

<sup>48</sup> Committee on the Elimination of Discrimination Against Women. *Summary records of the 515th meeting: Singapore (CEDAW/C/SR.515)*, 7 September 2001, para. 34 (Acar).

recommendations have been made to Yemen,<sup>49</sup> Sri Lanka,<sup>50</sup> Malaysia,<sup>51</sup> Jordan,<sup>52</sup> Indonesia,<sup>53</sup> and Djibouti,<sup>54</sup> and repeated during the next periodic reviews of the Maldives<sup>55</sup> and Singapore,<sup>56</sup> albeit still without mentioning which countries had achieved the best practices in this area.

The development of a standardized recommendation indicates the formulation of a common view of religious law within the committee as a body of norms that may conflict with the implementation of the convention. The decision to recommend that states not only study the experiences of other states with similar challenges, but also work with religious groups in their society, seems to be an expansive reading of the requirement of article 2(f) of CEDAW, that the state should “modify or abolish” discriminatory legislation, which would seem to suggest unilateral state action. The standardized recommendation illustrates that the committee does not view the recognition of religious law *as such* as a violation of the convention. Rather, the admonition to seek out the reform experiences of other states reflects a view of religious law as a dynamic and negotiable set of norms that can be harnessed to assist with the implementation of the convention.

Although this general view seems clear, three issues complicate the picture. First, the recommendation to states that they seek out comparative jurisprudence from other countries with similar challenges lacks specific reference as to which countries have succeeded in this effort,<sup>57</sup> and as to whether the comparison and modification of religious law should be performed by the state or by the religious community in question. Although article 2(f) suggests that modification or abolition of discriminatory laws are primarily obligations of state parties, the recommendations of the committee seem to indicate that state parties should collaborate with religious groups in these reform efforts. This impression is confirmed by the concluding observations following up the initial recommendation to Singapore (2001) in

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<sup>49</sup> United Nations General Assembly. *Report of the Committee on the Elimination of Discrimination against Women, 26th, 27th and Exceptional session (A/57/38(III))*, 1 January 2002, para. 393.

<sup>50</sup> *Ibid.* para. 275.

<sup>51</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Malaysia (CEDAW/C/MYS/CO/2)*, 13 June 2006, para.14.

<sup>52</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Jordan, (CEDAW/C/JOR/CO/4)*, 15 August 2007, para. 12.

<sup>53</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Indonesia (CEDAW/C/IDN/CO/5)*, 15 August 2007, para. 13.

<sup>54</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Djibouti (CEDAW/C/DJI/CO/1-3)*, 2 August 2011, para. 13.

<sup>55</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Maldives (CEDAW/C/MDV/CO/3)*, 2 February 2007 para. 37.

<sup>56</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Singapore (CEDAW/C/SGP/CO/3)*, 15 August 2007, para.16.

<sup>57</sup> On one occasion, following the review of the United Arab Emirates, in 2010, the committee expressed its encouragement of ongoing comparative research on the legal experiences of other Arab and Islamic countries, although it stressed the work that still remained to be done. See Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: United Arab Emirates (CEDAW/C/ARE/CO/1)*, 5 February 2010, para. 45-46.

2007<sup>58</sup> and 2011,<sup>59</sup> where the committee expressed its satisfaction that law reform was underway, stressing the importance of including religious groups in the effort. Similar calls for the engagement of religious groups and their leaders in reform efforts have been directed at the Philippines,<sup>60</sup> Mauritius,<sup>61</sup> Niger,<sup>62</sup> Jordan,<sup>63</sup> Syria,<sup>64</sup> Myanmar,<sup>65</sup> Tunisia,<sup>66</sup> Uganda,<sup>67</sup> Egypt,<sup>68</sup> Bangladesh,<sup>69</sup> South Africa,<sup>70</sup> and Indonesia.<sup>71</sup>

Second, the criteria for the recommendation are somewhat unclear, as some states with comparable religious legal systems that also did not conform to the requirements of the treaty did not receive similar recommendations. Reviewing Ghana,<sup>72</sup> Kenya,<sup>73</sup> and Sierra Leone,<sup>74</sup>

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<sup>58</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Singapore* (CEDAW/C/SGP/CO/3), 15 August 2007, para. 15-16.

<sup>59</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Singapore* (CEDAW/C/SGP/CO/4), 10 August 2011, para. 15-16.

<sup>60</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Philippines* (CEDAW/C/PHI/CO/6), 28 August 2006, para. 12.

<sup>61</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Mauritius* (CEDAW/C/MUS/CO/6-7), 8 November 2011, para. 15.

<sup>62</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Niger* (CEDAW/C/NER/CO/2), 11 June 2007, para. 16.

<sup>63</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Jordan* (CEDAW/C/JOR/CO/4), 15 August 2007, para. 18.

<sup>64</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Syrian Arab Republic* (CEDAW/C/SYR/CO/1), 11 June 2007, para. 18.

<sup>65</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Myanmar* (CEDAW/C/MMR/CO/3), 7 November 2008, para. 47.

<sup>66</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Tunisia* (CEDAW/C/TUN/CO/6), 5 November 2010, para. 17.

<sup>67</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Uganda* (CEDAW/C/UGA/CO/7), 5 November 2010, para. 12.

<sup>68</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Egypt* (CEDAW/C/EGY/CO/7), 3 February 2010, para. 16.

<sup>69</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Bangladesh* (CEDAW/C/BGD/CO/7), 21 March 2011, para. 16.

<sup>70</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: South Africa* (CEDAW/C/ZAF/CO/4), 5 April 2011, para. 42.

<sup>71</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Indonesia* (CEDAW/C/IDN/CO/6-7), 7 August 2012, para. 18.

<sup>72</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Ghana* (CEDAW/C/GHA/CO/5), 28 August 2006, para. 35.

<sup>73</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Kenya* (CEDAW/C/KEN/CO/6), 15 August 2007, para. 44

the committee observed conflicts between “Mohammedan” laws, primarily concerning marriage, but refrained from suggesting studies of comparable legal systems, apparently seeing little potential for learning from the experiences of other countries in these cases. Likewise, reviewing Kazakhstan,<sup>75</sup> Azerbaijan,<sup>76</sup> Tajikistan,<sup>77</sup> Bahrain,<sup>78</sup> and Egypt,<sup>79</sup> the committee pointed to the problems of parallel legal systems based on religious affiliation, particularly concerning early marriage and polygamy, but suggested a unified family law and reforms rather than amendments to the religious legal systems through studies of comparative jurisprudence.

Third, the relation between the recommendation to states with Islamic legal systems on one hand and states with legal systems derived from other religious traditions on the other, is not clear. Reviewing Israel, the committee found an undue influence of religious law on reservations and provisions of the convention, urging the state party to alter its course. But whereas states with Islamic religious laws were asked to study comparative jurisprudence and to reinterpret its religious texts, Israel was requested to “complete the secularization of the relevant legislation,” suggesting a considerably more comprehensive restructuring of the legal order.<sup>80</sup> During the review, one member of the committee flatly stated that it was “unacceptable to base a legal system on the religious, cultural or traditional practices of any ethnic group within a country,”<sup>81</sup> despite the established practice of the committee of recognizing such systems and suggesting their amendment in dialogue with the communities in question. During the following reviews of Israel, the committee expressed its concern that the state party claimed that religious laws could not be reformed,<sup>82</sup> before recommending the “harmonization” of religious laws with the convention during the 2011 review,<sup>83</sup> indicating a possible spillover effect from its practice on Islamic religious laws. In the case of Israel, however, the recommendations of the committee have been entirely unilateral, as key religio-

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and Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Kenya* (CEDAW/C/KEN/CO/7), 5 April 2011, para. 11-12.

<sup>74</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Sierra Leone* (CEDAW/C/SLE/CO/5), 11 June 2007, para. 39.

<sup>75</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Kazakhstan* (CEDAW/C/KAZ/CO/2), 2 February 2007, para. 29-30.

<sup>76</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Azerbaijan* (CEDAW/C/AZE/CO/3), 2 February 2007, para. 29-30.

<sup>77</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Tajikistan* (CEDAW/C/TJK/CO/3), 2 February 2007, para. 53.

<sup>78</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Bahrain* (CEDAW/C/BHR/CO/2), 20 November 2008, para. 39.

<sup>79</sup> *Supra* note 68, para. 48.

<sup>80</sup> United Nations General Assembly. *Report of the Committee on the Elimination of Discrimination against Women, 16th and 17th session*, 1 January 1997, A/52/38/Rev.1, para. 173.

<sup>81</sup> Committee on the Elimination of Discrimination Against Women. *Summary records of the 351st meeting: Israel* (CEDAW/C/SR.351), 3 April 1998, para. 16 (Khan).

<sup>82</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Israel* (CEDAW/C/ISR/CO/3), 3 August 2005, para. 25.

<sup>83</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Israel* (CEDAW/C/ISR/CO/5), 5 April 2011, para. 49.

legal concepts should be “prohibited” and the scope of religious courts “limited” by the state, with no apparent need for the involvement of the religious communities affected by these amendments.

In its recent practice, the committee seems to have embraced a more legalist approach to adjustments of religious law, as it has increasingly refrained from encouraging states to seek out comparative jurisprudence, settling for legal reforms of discriminatory religious laws in concluding observations issued to Kuwait,<sup>84</sup> Jordan,<sup>85</sup> Comoros,<sup>86</sup> Cyprus,<sup>87</sup> and Greece.<sup>88</sup> One exception to this general turn is the 2013 review of Afghanistan, where members of the committee suggested during the meeting with the state party that Afghan authorities seek assistance from moderate Islamic leaders attached to Al-Azhar University in Cairo to ensure consistency between its positive law and Islamic law,<sup>89</sup> and that they should conduct awareness-raising campaigns to help the public understand that harmful practices “were in fact contrary to Islam.”<sup>90</sup> These concerns were also carried over to the concluding observations of the committee, where it suggested that the state party adopt a policy and strategy of “raising the awareness of religious and community leaders with the aim of preventing misinterpretations of Sharia law and Islamic principles.”<sup>91</sup>

Taken together, the CEDAW approach to religious law is subordinate to its general view of legal pluralism as an implicit threat to women’s rights. From the practice of the committee, it seems evident that religious law is considered a key building block in the social and cultural patterns that states should modify or abolish according to article 5(a) of the convention. In this reading, religion is not only influential, but is at the very core of the creation and maintenance of patterns of conduct and practices that are detrimental to gender equality, because of its ordered, institutional strength as a force to be reckoned with in society, as pointed out by a former member of the committee.<sup>92</sup> This dismissive stance notwithstanding, the tendency of the committee to recommend reinterpretations of religio-legal systems in states with Islamic law seems to indicate a gradual shift toward an appreciation of salience over substance in its view of legal pluralism. Acknowledging the entrenched, integral nature of these forms of law

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<sup>84</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Kuwait* (CEDAW/C/KWT/CO/3-4), 8 November 2011, para. 51.

<sup>85</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Jordan* (CEDAW/C/JOR/CO/5), 23 March 2012, para. 50.

<sup>86</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Comoros* (CEDAW/C/COM/CO/1-4), 8 November 2012, para. 40.

<sup>87</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Cyprus* (CEDAW/C/CYP/CO/6-7), 25 March 2013, para. 36.

<sup>88</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Greece* (CEDAW/C/GRC/CO/7), 26 March 2013, para. 37.

<sup>89</sup> Committee on the Elimination of Discrimination Against Women. *Summary records of the 1132nd meeting: Afghanistan*, (CEDAW/C/SR.1132), 23 July 2013, para. 43 (Gabr).

<sup>90</sup> *Ibid.*, para. 44 (Al-Jehani).

<sup>91</sup> Committee on the Elimination of Discrimination Against Women. *Concluding observations of the Committee on the Elimination of Discrimination against Women: Afghanistan* (CEDAW/C/AFG/CO/1-2), 30 July 2013, para. 23.

<sup>92</sup> Frances Raday. “Culture, Religion and Gender”, 1 *International Journal of Constitutional Law* 4 (2003), 663, 667-668.

in the states in question, the committee seems to consider amendment more conducive to the implementation of human rights norms than abolition.

#### 4.2 *The Committee on the Rights of the Child*

The committee monitoring the Convention on the Rights of the Child (CRC) has engaged the effects of religious laws since its inception, in 1991. Unlike the CEDAW committee, however, the practice of the CRC committee on non-state law has gradually moved toward emphasis on the relationship between such forms of law and the prevalence of harmful traditional practices, and an awareness of the need to involve religious and community leaders in the effort to harmonize legislation and prevent such practices. This general pattern has been repeated, with minor variations, in the concluding observations issued to Eritrea,<sup>93</sup> Pakistan,<sup>94</sup> Nepal,<sup>95</sup> Nigeria,<sup>96</sup> and Madagascar<sup>97</sup> in the early 2000s.

This practice suggests a view of non-state forms of law as thoroughly embedded in the social fabric and intimately related to harmful practices, but the parallel views of the committee on more clearly delineated “religious” laws seem to suggest a different role for these legal forms: the committee has consistently found religious systems of law to be squarely at odds with provisions of the convention, primarily in the field of marriage. The obligations of state parties to eliminate these inconsistencies, however, indicate a strong willingness to work together with, religious traditions, bodies of law, and organizations rather than in opposition to them. In its recommendations, the committee has suggested that reforms of religious law should be conducted “in cooperation” with the communities in question.<sup>98</sup> The committee advised states to establish criteria to assess whether actions were “in accordance with Islamic texts,”<sup>99</sup> to “[u]ndertake all possible measures to reconcile the interpretation of Islamic texts

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<sup>93</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Eritrea* (CRC/C/15/Add.204), 2 July 2003, para. 19.

<sup>94</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Pakistan* (CRC/C/15/Add.217), 27 October 2003, para. 33.

<sup>95</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Nepal* (CRC/C/15/Add.261), 21 September 2005, para. 66.

<sup>96</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Nigeria* (CRC/C/15/Add.257), 13 April 2005, para. 55. Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Nigeria* (CRC/C/NGA/CO/3-4), 21 June 2010, para. 66.

<sup>97</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Madagascar* (CRC/C/15/Add.218), 27 October 2003, para. 22. Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Madagascar* (CRC/C/MDG/CO/3-4), 8 March 2012, para. 26, 28, 54.

<sup>98</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Lebanon* (CRC/C/15/Add.169), 21 March 2002, para. 10. Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Lebanon* (CRC/C/LBN/CO/3), 8 June 2006, para. 26.

<sup>99</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Islamic Republic of Iran* (CRC/C/15/Add.123), 28 June 2000, para. 34. Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Islamic Republic of Iran* (CRC/C/15/Add.254), 31 March 2005, para. 40.

with fundamental human rights,”<sup>100</sup> to “reconcile the interpretation of religious laws with fundamental human rights,”<sup>101</sup> and, in the case of Malaysia:

The Committee recommends that the State party conduct an international comparative study on the implications of the dual legal system of civil law and Syariah law and, based on the results of this assessment, take necessary measures to reform this dual system with a view to removing inconsistencies between the two legal systems in order to create a more harmonious legal framework that could provide consistent solutions, for example, to family-law disputes between Muslims and non-Muslims.<sup>102</sup>

In addition to these specific recommendations concerning conflicts between concrete provisions of religious laws and the convention, the committee issued numerous observations early in the 2000s on the more general influence of particular interpretations of religion on the legal framework. In the reviews of Iran,<sup>103</sup> Jordan,<sup>104</sup> Djibouti,<sup>105</sup> Egypt,<sup>106</sup> Saudi Arabia,<sup>107</sup> Qatar,<sup>108</sup> Bahrain,<sup>109</sup> and the United Arab Emirates,<sup>110</sup> the committee included the following observation:

Noting the universal values of equality and tolerance inherent in Islam, the Committee observes that narrow interpretations of Islamic texts by authorities, particularly in areas relating to family law, are impeding the enjoyment of some human rights protected under the Convention.<sup>111</sup>

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<sup>100</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: United Arab Emirates* (CRC/C/15/Add.183), 13 June 2002, para. 22.

<sup>101</sup> “The Committee encourages the State party to take all possible measures to reconcile the interpretation of religious laws with fundamental human rights”, Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Israel* (CRC/C/15/Add.195), 9 October 2002, para. 11. A near identical passage was included in the observations issued by the committee following the 2003 review of Syria, Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Syrian Arab Republic* (CRC/C/15/Add.212), 10 July 2003, para. 10.

<sup>102</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Malaysia* (CRC/C/MYS/CO/1), 25 June 2007, para. 15. This passage is almost entirely similar with a paragraph from the observations issued to Malaysia by CEDAW the year before (Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Malaysia* (CEDAW/C/MYS/CO/2), 13 June 2006, para. 14.

<sup>103</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Islamic Republic of Iran* (CRC/C/15/Add.123), 28 June 2000, para. 6.

<sup>104</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Jordan* (CRC/C/15/Add.125), 28 June 2000, para. 9.

<sup>105</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Djibouti* (CRC/C/15/Add.131), 28 June 2000, para. 8.

<sup>106</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Egypt* (CRC/C/15/Add.145), 21 February 2001, para. 6.

<sup>107</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Saudi Arabia* (CRC/C/15/Add.148), 21 February 2001, para. 6.

<sup>108</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Qatar* (CRC/C/15/Add.163), 6 November 2001, para. 9.

<sup>109</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: Bahrain* (CRC/C/15/Add.175), 11 March 2002, para. 4.

<sup>110</sup> Committee on the Rights of the Child. *Consideration of Reports submitted by States Parties under article 44 of the Convention. Concluding Observations: United Arab Emirates* (CRC/C/15/Add.183), 13 June 2002, para. 4.

<sup>111</sup> See *supra* note 104, Jordan, 2000, para.9.

This paragraph summarizes the general view of the committee on religious laws, as a body of norms that essentially safeguard equality and tolerance, which have been distorted by narrow interpretations offered by state authorities. This view disconnects religious law from religious practices, making possible reform and reinterpretation on a par with other legal systems. This view is markedly different from the observations of the committee on customary laws, which are considered to be little more than slightly formalized rules for cultural, traditional, and customary practices.

In approaching the influence of religion on the implementation of its key provisions, the CRC has emulated several of the steps taken by CEDAW, in particular the singling out of religious law for special treatment, the dissociation of religion from certain harmful practices, and the engagement of religious leaders. Despite similarities to CEDAW, however, the approach of the CRC also displays substantial differences, and its recommendations on the influence of religious law have been considerably more focused than those of CEDAW. They have also been less suggestive of the types of reform efforts states should engage in, generally refraining from calls to reinterpret religious legal traditions, and opting for reforms in cooperation with the communities in question. Although the recent practice of the CRC and CEDAW on the influence of religion seem to diverge in their views of the correlation between religion and harmful traditional practices, they appear to converge on the need to reform and harmonize religious laws with state laws, to eradicate or reform systems of customary law, and to engage religious leaders in these reform efforts.

#### *4.3 The Human Rights Committee*

Extensive ICCPR provisions clearly define the acceptable boundaries of religion in society, situating religion in the beliefs and conscience of individuals, and accepting only limited manifestations inspired by such beliefs in the public sphere. Consequently, legal provisions, policies, and social issues raised in the monitoring practice of the committee relating to religion tend to be associated with this minimalist, internal conception of religion. The potential influence of non-state forms of law on the implementation of the ICCPR in the practice of the HRC is recognized in two documents issued by the committee, both requesting the inclusion of information on these topics in periodic reports.

First, the reporting guidelines of the committee request that state parties include information on “the existence of courts based on customary law or religious courts and their competencies, including information on their practices” (see part 3.1.)<sup>112</sup> Second, General Comment No. 28 on the equality of rights between men and women, published by the committee in 2000, requests states to “furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardize, or *may* jeopardize, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors.”<sup>113</sup> Despite these requests, states often do not include such information in their reports, leading to limited interactions with the influence of religious laws on the implementation of the ICCPR. States rarely call upon religious principles to explain their noncompliance with the Covenant, the committee rarely accuses states of doing so, and generally, the committee

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<sup>112</sup> *Reporting Guidelines*, para. 73, 2010. See *supra* note 29.

<sup>113</sup> Human Rights Committee. *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)* (CCPR/C/21/Rev.1/Add.10), 29 March 2000, para. 5, my emphasis.

does not propose to include religious leaders, communities, and institutions in the implementation of the provisions of the Covenant.

The early practice of the committee regarding the influence of religious law on the implementation of the provisions of the ICCPR departs significantly from that of CEDAW and the CRC. In particular, the HRC has been more careful to relate its comments to material provisions of the Covenant, rather than the more sweeping statements offered by the CRC and CEDAW in their standardized responses to how states should handle the interrelationship between human rights and Islam (see Parts 4.1 and 4.2). The committee has also refrained from suggestions to involve religious leaders, communities, or institutions in the effort to reform religious systems of law, and from recommending that states examine the reform experiences of other states with similar legal systems.

This basic line of argument has been consistent throughout the practice of the HRC concerning the topic of religious laws, in concluding observations issued to Gambia,<sup>114</sup> Greece,<sup>115</sup> Costa Rica,<sup>116</sup> Ethiopia,<sup>117</sup> the Philippines,<sup>118</sup> Indonesia,<sup>119</sup> Mauritania,<sup>120</sup> and Djibouti.<sup>121</sup> In these observations, which have related mainly to gender discrimination and marriage laws, the committee has combined observations on the provisions of the ICCPR that are violated by the existence and enforcement of certain legal rules derived from religious traditions, with recommendations to states parties to eliminate these violations by means of legal reform.<sup>122</sup> Thus, whereas CEDAW and the CRC appear to consider the participation of non-state actors as vital to the implementation of their provisions, the HRC seems to prefer unilateral state action.

#### *4.4 The Committee on the Elimination of Racial Discrimination*

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<sup>114</sup> *Human Rights Committee. Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: The Gambia* (CCPR/CO/75/GMB), 12 August 2004, para. 16.

<sup>115</sup> *Human Rights Committee. Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: Greece* (CCPR/CO/83/GRC), 25 April 2005, para. 8.

<sup>116</sup> *Human Rights Committee. Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: Costa Rica* (CCPR/C/CRI/CO/5), 16 November 2007, para. 10.

<sup>117</sup> *Human Rights Committee. Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: Ethiopia* (CCPR/C/ETH/CO/1), 19 August 2011, para. 22.

<sup>118</sup> *Human Rights Committee. Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: The Philippines* (CCPR/C/PHL/CO/4), 13 November 2012, para. 11.

<sup>119</sup> *Human Rights Committee. Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: Indonesia* (CCPR/C/IDN/CO/1), 20 August 2013, para. 6.

<sup>120</sup> *Human Rights Committee. Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: Mauritius* (CCPR/C/MRT/CO/1), 20 November 2013, para. 6.

<sup>121</sup> *Human Rights Committee. Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: Djibouti* (CCPR/C/DJI/CO/1), 18 November 2013, para. 7.

<sup>122</sup> The articles addressed by the committee in these observations include article 2 (discrimination), 3 (gender equality), article 14 (equality before the courts), article 18 (freedom of religion or belief), article 23 (marriage equality), article 24 (the rights of children) and article 26 (the rights of minorities).

CERD does not monitor any material provisions on the influence of religious laws on the implementation of its provisions. In much the same way as the committees monitoring CEDAW and the CRC, however, CERD has increasingly been brought into contact with the influence of non-state forms of law, including religious law, and the doctrines and practices of minorities and indigenous peoples, including the expression of their spiritual and religious identities. This contact has been established as a result of the strong emphasis of the committee on non-discrimination and minority rights, which are integral not only to the material provisions of the convention, but to the entire human rights enterprise.<sup>123</sup>

Despite indications of internal disagreement, in the 1990s and early 2000s the practice of the committee on the role of religious laws in the implementation of the convention displayed a fairly consistent approach in which the general tenor was one of watchful caution and scepticism when faced with allowing different religious communities to be ruled by different sets of laws. A marked difference from the CRC and CEDAW committees is the exclusively state-centric approach of the recommendations of CERD, without calls for the engagement of religious communities or their leaders in the effort to reform laws and practices to bring them in line with the convention. On this topic, CERD has been much more closely aligned with the HRC, which has similarly emphasized the duties of state parties as the principal actors in reforming legal systems and adopting policies.

Throughout the 2000s, the committee repeatedly expressed its concern with the possibility that recognizing different laws for different communities could lead to ethnic discrimination, and violations of the various civil rights enshrined in article 5 of the convention. Reviewing Nigeria in 2005, the committee noted the “intersectionality” of ethnic and religious discrimination, and expressed its concern “that members of ethnic communities of the Muslim faith,” in particular Muslim women, could be subjected to harsher sentences than other Nigerians because of the influence of religious law, but refrained from advising particular actions, reminding the state party of its obligations under the convention.<sup>124</sup> Similarly, Ethiopia was criticized in the reviews of two consecutive reports, for the potential ethnic discrimination resulting from the application of religious laws.<sup>125</sup> In its most recent practice, the committee has largely maintained its view of religious legal rules as potentially discriminatory in concluding observations to Yemen (2011),<sup>126</sup> Israel (2012),<sup>127</sup> and Mauritius (2013).<sup>128</sup>

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<sup>123</sup> Patrick Thornberry, “Confronting Racial Discrimination: A CERD Perspective” 5 *Human Rights Law Review* (2005), 239, 254.

<sup>124</sup> *Human Rights Committee. Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: Nigeria (CERD/C/NGA/CO/18)*, 1 November 2005, para. 20.

<sup>125</sup> *Committee on the Elimination of Racial Discrimination. Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ethiopia (CERD/C/ETH/CO/15)*, 20 June 2007, para. 14 and *Committee on the Elimination of Racial Discrimination. Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ethiopia (CERD/C/ETH/CO/7-16)*, 7 September 2009, para. 12.

<sup>126</sup> The committee recommended that the state party ensure that the application of the Sharia is consistent with the obligations of the state party under international law, and that the state party should take active measures to ensure that Sharia law is not applied to foreigners and non-Muslims without their consent. See *Committee on the Elimination of Racial Discrimination. Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Yemen (CERD/C/YEM/CO/17-18)*, 4 April 2011, para. 10.

At the same time, CERD has issued a body of concluding observations that relate to the legal rules cultivated by indigenous communities, and the range of recognition offered to such rules by states. This body of decisions approaches the issue of competing forms of law from the opposite direction, as the committee has consistently supported the recognition of indigenous legal traditions, and the exceptions and alternative mechanisms established to realize such recognition. Thus, whereas the practice of the committee on religious law is concerned with non-discrimination and equal opportunity, the practice of the committee on the rights of indigenous communities starts from the recognition of the particular rights of minority communities by virtue of their radically different starting point, after suffering centuries of abuse and neglect.

The official stance of the committee on indigenous populations was spelled out in its general recommendation no. 23, in which it emphasized the importance of indigenous peoples' right to "practice and revitalize their cultural traditions and customs" and "own, develop, control and use their communal lands, territories and resources."<sup>129</sup> In its review of Chile in 1999, the committee applied this perspective explicitly, commending the setting up of a judicial system for the trial of members of indigenous communities that recognized custom as a mode of proof. Responding to a question from the committee on what exactly this entailed,<sup>130</sup> one member of the state delegation explained that custom could be used as an "excusing or attenuating circumstance" in criminal cases, and as a means of conciliation for the resolution of land disputes.<sup>131</sup> Following the review, the committee published a set of concluding observations, in which it commended

...the setting up of a special judicial system for the indigenous population which recognizes custom as a mode of proof and which allows for legal conciliation of, in particular, land disputes<sup>132</sup>

For CERD, then, the establishment of a "special judicial system" was not only acceptable, but actively welcomed as a tool to accommodate the needs of the indigenous population that "in particular," but not exclusively, relate to land disputes. Similar views of the necessity of legal

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<sup>127</sup> The committee expressed its concern with discrimination targeting women from Jewish minorities in relation to the implementation of religious laws. See Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel* (CERD/C/ISR/CO/14-16), 3 April 2012, para. 21.

<sup>128</sup> The committee expressed its concern with the exception from non-discrimination measures regarding the application of personal laws, which may affect women of certain ethnic groups because of their religious affiliation, requesting the state party to abrogate such exceptions. See Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Mauritius* (CERD/C/MUS/CO/15-19), 18 April 2013, para. 23.

<sup>129</sup> *General recommendation XXIII on the rights of indigenous peoples*, in United Nations General Assembly. *Report of the Committee on the Elimination of Racial Discrimination*, (A/52/18), 1 January 1997, annex V: 122.

<sup>130</sup> Committee on the Elimination of Racial Discrimination. *Summary Record of the 1346<sup>th</sup> Meeting* (CERD/C/SR.1346), 15 November 1999, para. 25 (Ferrero Costa).

<sup>131</sup> Committee on the Elimination of Racial Discrimination. *Summary Record of the 1347<sup>th</sup> Meeting* (CERD/C/SR.1347), 17 August 1999, para. 19.

<sup>132</sup> United Nations General Assembly. *Report of the Committee on the Elimination of Racial Discrimination* (A/54/18), 1 January 1999, 369.

acknowledgment of traditional indigenous authorities have been expressed to Guatemala,<sup>133</sup> Mexico,<sup>134</sup> Ecuador,<sup>135</sup> Namibia,<sup>136</sup> Nicaragua,<sup>137</sup> Fiji,<sup>138</sup> Colombia,<sup>139</sup> Australia,<sup>140</sup> and Cameroon.<sup>141</sup>

The practice of CERD with respect to alternate forms of legal reasoning on the implementation of its provisions illustrates the basic tension between the general principle of non-discrimination and the protection due to minorities and their cultural and other specifics. This basic tension is at the heart of the human rights enterprise, and finds its fullest realization in the practice of CERD, where these conflicting principles constitute the dividing line between the criticism of the discriminatory effects of recognizing religious laws, and the praise of the anti-discriminatory effects of recognizing indigenous laws.

## 5. Summary and Conclusion

The combined output of the HRC, CERD, and the committees monitoring the CRC and CEDAW from 1993 to 2013 suggests that religious and customary legal systems influence the implementation of the provisions of international human rights treaties, and may be gaining in

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<sup>133</sup> Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Guatemala* (CERD/C/GTM/CO/11), 15 May 2006, para. 8 and Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Guatemala* (CERD/C/GTM/CO/12-13), 19 May 2010, para. 8.

<sup>134</sup> Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Mexico* (CERD/C/MEX/CO/15), 4 April 2006, para. 8.

<sup>135</sup> Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ecuador* (CERD/C/ECU/CO/19), 22 September 2008, para. 12 and Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ecuador* (CERD/C/ECU/CO/20-22), 24 October 2012, para. 19.

<sup>136</sup> The observations issued to Namibia also expressed concern with the potential for ethnic discrimination inherent in customary law. See Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Namibia* (CERD/C/NAM/CO/12), 22 September 2008, para. 11, 18.

<sup>137</sup> Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Nicaragua* (CERD/C/NIC/CO/14), 19 June 2008, para. 18.

<sup>138</sup> Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Fiji* (CERD/C/FJI/CO/17), 16 May 2008, para. 10.

<sup>139</sup> Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Colombia* (CERD/C/COL/CO/14), 28 August 2009, para. 21.

<sup>140</sup> Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia* (CERD/C/AUS/CO/15-17), 13 September 2010, para. 20.

<sup>141</sup> Committee on the Elimination of Racial Discrimination. *Consideration of Reports submitted by States Parties under Article 9 of the Convention. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Cameroon* (CERD/C/CMR/CO/15-18), 30 March 2010, para. 17.

influence as the number of concluding observations on the topic increases. Furthermore, attention to the social influence of religion in the implementation of human rights provisions seems to be on the rise among the committees, with the exception of the HRC. These trends suggest that the majority of the human rights committees are gradually shifting their approach to see religion as an increasingly influential factor in the implementation of their provisions from a substantial, dismissive one, to an accommodative one that emphasizes the salience of religious input for the protection of human rights.

Despite these broad, overarching trends, several issues divide the approaches of the committees in their concluding observations. The forms of religion that are of most concern, the rights they influence, and the way in which states should manage such influences are topics of some disagreement between the committees. One issue in particular, which has been addressed by all the committees, stand out: the view of religious law, and its relation to other, alternate forms of law is a matter of some contention, as committees have displayed fundamentally opposing views of the desirability of religious law, the proper modes of its reform, and its potential influence on the implementation of human rights provisions. These differing views have inspired divergent recommendations to state parties on how to deal with religious law. The overall increase in concluding observations on the influence of religion and the corollary increase in recommendations to include religious leaders may suggest that the approach to religion favoured by the HRC has become increasingly isolated, as the other committees employ considerably broader conceptualizations of religion than the minimalist concept of religion contained in article 18 of the ICCPR.

Although the recommendations of the committees display clear and evident patterns and developmental trajectories, they are never explicitly linked to a systematic view of non-state forms of law in general, but limited to general observations of the tensions between the provisions monitored by the committees and the influence of singular items of religious or customary law. Therefore, none of the committees have developed a coherent or principled view of legal pluralism, but seem to address the issue in more or less happenstance fashion. In light of the findings of this article, which demonstrate the extent to which the committees differ in their approach to legal pluralism, and their tendency to treat different non-state forms of law differently, the committees should be encouraged to discuss the role of legal pluralism more generally. In particular, the different views espoused by the CERD and the CEDAW committees should be addressed specifically, through the inter-committee meetings between the chairpersons of the treaty bodies, through a day of thematic discussion, or by drafting of a joint general comment on the issue.