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INTERNATIONAL HUMAN RIGHTS LAW AND RELIGIOUS AND CULTURAL LAW:
Breaking the Impasse

Hallie Ludsin

Abstract

The international human rights movement is facing an existential crisis—a crisis created in part by its continuing failure to adequately address strong criticism that international human rights law (IHRL) is a form of cultural imperialism designed to destroy local religion and culture. While the debate underlying the crisis is not new, the strength of its threat to IHRL and the liberal democratic order is. One of the primary points of friction is over IHRL's seeming rejection of a group right to be governed by religious or cultural law—a right IHRL proponents fear would open the doors to discrimination against women, the LGBT community and nonconformists. Already, populist leaders like President Erdogan of Turkey have been able to capitalize on a combination of demands for a role for religion in governance and frustration with economic inequality to claw back on human rights and democratic guarantees.

The debates surrounding group rights have reached an impasse that will do little to promote either human rights or greater respect for religion and culture. This Article seeks to break that impasse. First, it relies on progressive Muslim and African scholarship to tear down the assumptions shared by both IHRL and group rights proponents that make the impasse seemingly intractable: (1) that religious and cultural law are determined from the top down; and (2) that they demand total submission of their followers. Having debunked those assumptions, it then challenges both groups to consider whether a theory of substantive human rights could allow countries to guarantee individuals the right to feely and equally choose whether to be governed by religious or cultural law without risking that this choice will become a ruse for favoring the majority group or for subjugating women and vulnerable groups.

About the Author

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Introduction

The international human rights movement is facing an existential crisis—a crisis created in part by its continuing failure to adequately address strong criticism that international human rights law (IHRL) is a form of cultural imperialism.[1] While the debate underlying the crisis is not new, the strength of its threat to IHRL and the liberal democratic order is.[2] Until recently, liberal democracies assumed they had won the ideological battle against authoritarianism based on the innate value of human rights: "all humans, at all times, sought, above all, the recognition of their intrinsic worth as individuals and protection against all the traditional threats to their freedom, their lives and their dignity that came from state, church and community."[3]

Capitalizing on growing economic inequality and corruption and a sense that liberalism "come[s] at the expense of the traditional bonds that family, ethnicity and religion provide," populist leaders around the world have been reinvigorating authoritarian ideology.[4] Perhaps nowhere has a leader been more successful at this than in Turkey, where President Recep Tayyip Erdoğan harnessed popular support for a more public role for religion—in direct contradiction to Turkey's constitutional secularism—and discontent with a weak economy to get elected. He then used his power to amend the constitution to concentrate power in the President.[5]

At the heart of the critique of cultural imperialism is IHRL's seeming rejection of group rights that would allow a state to adopt religious or cultural law into the legal system and enforce it against all members of the group. Proponents of religious or cultural establishment are seeking to institute a form of legal pluralism in which each individual is governed by her religious or cultural law, at least with respect to family law and sometimes more broadly.

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1. Additional explanations for the crisis relate to the failure of liberal democracy, which is underpinned by human rights, to close the gap on economic inequality or adequately take hold in post-conflict societies as a successful means for achieving peace as well as the economic success of nonliberal democracies. Richard Youngs, *Exploring "Non-Western Democracy*,*"* 26 J. Democracy 140, 140–44, 146–48 (2015).

2. *See* Peter LaBarbera, *Trump's UN Speech Rejected Globalism and Cultural Imperialism*, Life Site, Sept. 22, 2017; Terrence Chapman & Stephen Chaudoin, *People Like the International Criminal Court—As Long As It Targets Other Problems in Other Countries*, Wash. Post, Jan. 20, 2017; Josh Craddock, *The New Cultural Imperialism*, Nat'l Rev. (Apr. 28, 2015), https://www.nationalreview.com/2015/04/new-cultural-imperialism.

3. Robert Kagan, Opinion, *The Strongmen Strike Back*, Wash. Post (Mar. 14, 2019), https://www.washingtonpost.com/news/opinions/wp/2019/03/14/feature/the-strongmen-strike-back.

4. Bruce Jones & Torrey Taussig, Brookings, Democracy & Disorder: The Struggle for Influence in the New Geopolitics 21 (2019); Kagan, *supra* note 3.

5. *See* Leo Kabouche, *Explaining Erdogan's Persistent Popularity*, Global Risk Insights (Feb. 14, 2018), https://globalriskinsights.com/2018/02/erdogan-popular-support-turkey; Burak Bekdil, *Why Does the Average Turk Love Erdoğan?*, Begin-Sadat Ctr. for Strategic Studies (Dec. 10, 2017), https://besacenter.org/perspectives-papers/erdogan-popularity.

Traditionally, the IHRL movement asserts that state recognition of religious and cultural law for any group subordinates the individual to the group in direct violation of IHRL, with very little exception.[6] It reflexively and uncritically argues that under IHRL, the individual rights to autonomy and equality trump any right to be governed by religious and cultural law, and that IHRL is binding because most countries have ratified its treaties. Many societies with strong communal bonds see the rejection of religious and cultural establishment as the continuation of the colonial project—or the domination of the West over all others—and individual rights as an effort to break the communal bonds that are at the heart of their societies. To fend off what they see as the threat of destruction of their religion or culture, they often uncritically accept as truth that religious and cultural law elevate the group above individuals. There is little middle ground. The failure of the IHRL camp to engage more deeply with these claims leaves critics feeling marginalized, delegitimizes the IHRL movement and international law in much of the non-Western world, and places human rights gains at risk.[7] The failure of proponents of group rights to examine more closely their own claims of truth may put them in conflict with the very religious and cultural law they profess to follow, cements the power of the—elite typically older men—over the remainder of the population, and places them at unnecessary risk for authoritarian domination.[8]

The cultural imperialism debate surrounding group rights is built on two faulty assumptions that make a stalemate inevitable—assumptions that both IHRL and group rights proponents make. The first is that religious and cultural law are dictated from the top down; the second is that they demand total submission. Together, these assumptions treat individuals as subordinate to the group, paving the way for an impasse between proponents of group rights and proponents of IHRL.

But what if these assumptions are wrong? Building on progressive Muslim and African Customary Law scholarship, this Article argues that traditionally, Islamic law and African Customary Law were built on individual consent, not simply submission to God or culture through their legal systems.

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6. *See* Partisi v. Turkey, 2003-II Eur. Ct. H.R. 209, 247, 255.

7. *See* Chapman & Chaudoin, *supra* note 2; Solomon A. Dersso, Taking Ethno-Cultural Diversity Seriously in Constitutional Design 98–102 (2012); Janaka Jayawickrama, Opinion, *Humanitarian Aid System is a Continuation of the Colonial Project*, Al Jazeera (Feb. 24, 2018), https://www.aljazeera.com/indepth/opinion/humanitarian-aid-system-continuation-colonial-project-180224092528042.html; Ajamu Baraka, *The Universal Declaration of Human Rights at 70: Time to De-Colonize Human Rights!*, CounterPunch (Dec. 7, 2018), https://www.counterpunch.org/2018/12/07/the-universal-declaration-of-human-rights-at-70-time-to-de-colonize-human-rights.

8. Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, 18 Ind. J. Glob. Legal Stud. 87, 88, 91 (2011); Khaled Abou El Fadl, *The Culture of Ugliness in Modern Islam and Reengaging Morality*, 2 UCLA J. Islamic & Near E. L. 33, 61 (2002). Notably, adoption of progressive interpretations of religious and cultural law could avoid the potential for authoritarian domination.

Proponents of IHRL fiercely believe in the idea of consent to be governed but seemingly assume that this concept developed from the Enlightenment period and social contract theory of the West and that it exists only in a liberal democracy.[9] They ignore or, more likely, never learned that this same type of consent was essential to the very survival of social groups not governed by a strong, centralized government, as in much of Africa, and to the functioning of precolonial majority Muslim societies.[10] Colonization's "civilizing" mission and postcolonial "modernization" centralized previously plural legal systems, imposing a singular religious law for each religion or stripping local communities of their control over succession of traditional leadership, and in doing so obliterated the requirement of individual consent.[11] Within contemporary debates, any historical memory of the importance of individual consent in these systems seems to have been erased, especially as religious and cultural leaders have sought to consolidate their power through enforcement of religious and cultural law. The end result is that, in many cases, religious and cultural law are used to force the submission of constituents who—prior to colonization—would have been allowed to withdraw consent to the laws, albeit not necessarily without facing massive social pressure.

Understanding that neither Shari'a nor African Customary Law favors the group over the individual, at least traditionally, helps break the dichotomous debates surrounding claims for the right to be governed by religious or cultural law. By looking internally at the history of these legal systems, it quickly becomes apparent that (1) Shari'a and many African customary legal systems did not demand the total submission of the individual to the group until after interference by the colonial governments and (2) that treating individuals as agents in their legal system is indigenous to most societies and not a Western construct. The implication of these findings is that there is a principled basis for relying on individual rights to challenge the imposition of religious and cultural law on those who do not consent that does not amount to cultural imperialism and that is consistent with religious and cultural legal practices. These findings also suggest that IHRL proponents cannot simply rely on fears that religious and cultural establishment will coerce individuals to justify rejecting these rights out of hand. Instead, they force IHRL proponents to critically assess whether strict separation of religion and culture from the

9. For example, Dictionary.com defines "consent to be governed" by reference to the West and Enlightenment thinker John Locke: "A condition urged by many as a requirement for legitimate government: that the authority of a government should depend on the consent of the people, as expressed by votes in elections. (*See* Declaration of Independence, democracy, *and* John Locke.)" *Consent of the Governed*, DICTIONARY.COM, https://www.dictionary.com/browse/consent-of-the-governed (last visited July 6, 2020).

10. *See infra* Part II.

11. Importantly, this does not mean they got rid of legal pluralism in its entirety, but rather the government adopted a singular law for each religion and for all cultural systems, whereas in the past there would have been legal pluralism applied within each of the religious communities and cultural systems.

state is always necessary to fulfill human rights or whether a religion/culture and state relationship can pass human rights muster in some circumstances. In doing so, these findings open the possibility of compromise between the two camps that could fully protect human rights while ameliorating the sense of cultural imperialism. To achieve this, this Article recommends that both camps reassess their assumptions. If religious and cultural law depends on individual consent, checked regularly, then it becomes possible to consider a substantive theory of human rights, akin to substantive equality, to determine whether states could adopt religious and cultural law that neither coerces individuals into compliance nor results in the state favoring one religion or culture above all others.

This Article starts in Part I by providing the background information needed to understand the cultural imperialism critique. More specifically, it defines and describes group rights and the debates that surround them before examining the extent to which IHRL currently protects them. Next, in Part II, this Article challenges the two assumptions that lead to the impasse between IHRL and group rights proponents, specifically finding that religious and cultural law as exemplified by Shari'a and African Customary Law historically did not demand subservience to the group and its law but, in fact, required individual consent to be governed. With the assumptions underpinning the impasse likely false, Part III, pushes the two sides to bridge the gap between them. It recommends that group rights proponents return to their roots and recognize that religious and cultural law do not demand blind submission but rather considered choice. To IHRL proponents, it recommends that they reconsider whether a state could formally recognize religious or cultural law without violating IHRL or limiting human rights using a substantive theory of the rights to self-determination and freedom of religion and culture. Ultimately, this Article does not purport to find a perfect solution for bridging this gap, but rather suggests a method for reaching a mutually satisfying compromise.

I. Background

To start to understand how to break the impasse between IHRL and group rights proponents, this Part provides an overview of group rights, their debates and the extent to which IHRL protects them. It starts by differentiating group rights and individual rights before turning to why individuals and groups want group rights and why the IHRL movement rejects them. Next, this Part distinguishes between a corporatist theory of group rights and a collectivist theory. The corporatist theory allows the group to override its members' interests in pursuit of its own. In contrast, the collectivist theory treats the group's interests as no more than the aggregate of each member's interests, which means the group can never override its members' interests. Finally, this Part describes the limited circumstances in which IHRL protects group rights.

The information in this part provides the background knowledge necessary for understanding the discussion in the remainder of this Article.

A. *Differentiating Group Rights and Individual Rights*

At the heart of the debates about whether IHRL permits groups to be governed by religious or cultural law is the concept of group rights. Traditionally, IHRL has protected individual rights—rights that accrue to us as individuals simply because we are human. With only a few exceptions, IHRL has been reluctant, until recently, to recognize group rights or rights that inhere to groups, not the individuals who make up those groups.[12] The key to understanding the difference between individual and group rights is determining who is entitled to enforce the right—the individual or the group.[13] To put this in context, IHRL grants all individuals the right to freely practice their religions. If a government decides to close all Catholic churches because it thinks the religion is false, each member is entitled to claim a violation of her rights, not the Catholic churches.[14] Simply aggregating each member's right does not create a group right even if the end result benefits the group, or in this example, the Catholic churches.[15] If the system protected group rights, in contrast, the Catholic churches would be able to enforce their rights independently of their members. The United Nations originally rejected protections for group rights, seeing them as unnecessary in light of the Universal Declaration of Human Rights' prohibition on discrimination.[16] The exception was for a group right to be free of genocide, which was codified in the United Nations Genocide Convention, and the right to self-determination guaranteed in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[17]

Traditionally, debates about group rights assume they belong either to minority groups or groups that are struggling to retain their group identity in the face of forced assimilation, ethnic cleansing or other existential threats to them or to majority groups under some type of domination, such as colonialism or occupation.[18] What unites group members is expected to be something

12. Peter Jones, *Human Rights, Group Rights, and Peoples' Rights*, 21 HUM. RTS. Q. 80, 82 (1999).

13. *Id.* at 83; ERIC J. MITNICK, RIGHTS, GROUPS, AND SELF-INVENTION: GROUP-DIFFERENTIATED RIGHTS IN LIBERAL THEORY 30 (2006).

14. Robert N. Clinton, *The Rights of Indigenous Peoples as a Collective*, 32 ARIZ. L. REV. 739, 743 (1990).

15. Jones, *supra* note 12; Robert McCorquodale, *Rights of Peoples and Minorities*, *in* INT'L HUM. RTS. L. 366 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., 2010).

16. Natan Lerner, *Group Rights and Legal Pluralism*, 25 EMORY INT'L L. REV. 829, 831 (2011).

17. *Id.*

18. Csaba K. Zoltani & Frank Koszorus, Jr., *Group Rights Defuse Tensions*, 20 FLETCHER F. WORLD AFF. 133, 134 (1996); McCorquodale, *supra* note 15, at 370; Olajide O. Akanji, *Group Rights and Conflicts in Africa: A Critical Reflection of ife-Modakeke, Nigeria*, 16 INT'L

immutable, "relatively permanent," or "impossible to opt out of," such as ethnicity, religion, language or culture.[19]

In the context of the application of religious or cultural law, the group right at issue is self-determination—whether the group can choose for itself how it wishes to be governed, including whether to adopt a religious or cultural legal system (or both).[20] IHRL protects the right to self-determination for peoples.[21] There is no single, authoritative definition of peoples but existing definitions, such as the UNESCO's, look for common, relatively permanent characteristics, a sense of community or of being a group and a territorial connection to the location in which the group is claiming this right.[22] The citizens of any state are considered a people. Majority groups typically assert a right to adopt religious or cultural law when they are governed by a constitution that guarantees state secularism or when the government faces international criticism for formally adopting religious or cultural law. Some minority groups hold a separate right to self-determination—typically because they have been historically marginalized, if not brutalized—and assert this right to protect against what they perceive (often rightly) as the existential threat posed by the dominance of the majority group. Whether IHRL supports these assertions is described in Subpart I.E below.

B. *Legal Centralism and Legal Pluralism*

Groups arguing for a right to be governed by religious or cultural law are usually seeking legal pluralism. With the limited exception of indigenous rights, IHRL, through the right to equality before the law, typically demands legal centralism—or that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."[23] Autonomy rights, the right to freedom of religion, minority rights, and the prohibition on discrimination further demand that the legal system be agnostic to the particularities of different group beliefs, requiring instead that the state institute laws based on common norms shared across all members of society. These rights prohibit the government from forcing constituents to live by any particular set of religious or cultural laws. Thus, "[t]o the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the

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J. Minority & Grp. Rts. 3, 32 (2009).

19. Lerner, *supra* note 16, at 833.

20. Jones, *supra* note 12, at 102–103.

21. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 1 (Dec. 16, 1966); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 1 (Dec. 16, 1966).

22. McCorquodale, *supra* note 15, at 369–70.

23. John Griffiths, *What is Legal Pluralism?*, 24 J. Legal Pluralism & Unofficial L. 1, 3 (1986).

state."[24] Accordingly, because the state does not recognize these "normative orderings" as law, they are not law.[25] Instead, individuals can choose to follow their religious or cultural beliefs in practice, as long as they do not conflict with state law and, especially, human rights.

Groups seek group rights to gain formal recognition of religious or cultural law and, with it, formal recognition of legal pluralism. Legal pluralism exists when two or more legal systems operate within a single jurisdiction, which means different laws apply to different people although they live within the same jurisdiction.[26] So far, where a majority group has the right to be governed by religious or cultural law under domestic law, the state also recognizes separate laws for minority groups whose religious or cultural norms differ greatly from the majority.[27] Minority groups seeking legal pluralism typically are looking to establish their legal systems separately from the state legal system or for exemptions from state law and sanctions where their religious and cultural laws and practices conflict with state law.[28]

Importantly, when a group claims a group right, it is seeking a right to state enforcement of religious or cultural laws. Here lies the rub. For every right that exists, there is a corresponding duty that someone or something must fulfill to achieve the right. IHRL's system of individual rights traditionally places a duty on the state to fulfill each person's rights. Group rights, in contrast, place the duty not just on the government but also on individuals. More specifically, a group right to be governed by religious or cultural law places a duty on the government to enforce religious or cultural law and, in doing so, places a duty on group members to comply with the law—even on those who would otherwise choose not to be governed by religious or cultural law.[29] The group right cannot be fulfilled without both sets of duties. The group is then insulated from claims by individual members that religious or cultural law violates their individual rights—including their rights to autonomy and equality that are at the heart of IHRL.[30]

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24. *Id.*

25. Sherman A. Jackson, *Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?*, 30 Fordham Int'l L.J. 158, 160 (2006).

26. The concept developed to recognize that despite formal legal centralism in many countries, churches, associations and really any societal group can create norms that members believe they are obliged to follow, creating law that group members do not necessarily consider subordinate to state law. *Id.* at 160; Jones, *supra* note 12, at 83.

27. Constitution of the Arab Republic of Egypt, art. 3, 18 Jan. 2014; Lerner, *supra* note 16, at 846 (describing Israel and India).

28. Jackson, *supra* note 25, at 161.

29. Cindy L. Holder & Jeff J. Corntassel, *Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights*, 24 Hum. Rts. Q. 126, 127–28 (2002).

30. *Id.*

C. *Traditional Debates*

The current debates about whether groups should have a right to enforce religious or cultural law against their members is highly contentious. They pit the individual against the group, making it seemingly impossible to find common ground. The remainder of Subpart I.C describes those debates as they are relevant to breaking the dichotomy that causes an acrimonious stalemate.

1. All in Favor of Group Rights

Those in favor of group rights feel that there is something essential that individuals gain from their membership in a group and that without group rights that essential element will be lost. Group rights proponents argue that these rights recognize that for many people, their dignity, pride and security rests with their membership in the group.[31] For example, in communitarian societies across Africa, "[t]he community is the locus by reference to which the identity and place of a person in the world is defined and given meaning . . . Membership in a community (culture) for peoples in Africa is a fundamental framework that defines 'the most important parts of a person's identity.'"[32] It also underpins many of the choices individuals make not just for themselves but in the public sphere.[33] The concept of group rights recognizes that community membership and identity are so fundamental to people's lives and choices that they deserve protection. Group rights proponents argue that individual rights alone cannot protect religious, cultural, ethnic, or racial groups because they fail to "regulate important aspects of public life that directly impact upon the cultural identity" of group members.[34] As a human good, "groups themselves need recognition in international law."[35]

This line of reasoning challenges the assumption under IHRL that religious and cultural law are always sources of oppression. For group rights supporters, international human rights and its preference for protecting individuals and not groups is a Western construct emerging from Western history.[36] The demand for separation of church and state erupted from the European experience of authoritarian governments that used religion as a tool to control their populations.[37] To prevent this type of oppression, IHRL prevents governments from imposing laws that favor any one religion or culture or from

31. Dersso, *supra* note 7, at 97–98; Akanji, *supra* note 18, at 34.

32. Dersso, *supra* note 7, at 98.

33. Rights, Culture and the Law: Themes from the Political Philosophy of Raz 172 (Likas H. Meyer, Stanley L. Paulson, & Thomas W. Pogge eds., 2003) [hereinafter Rights, Culture, and the Law]; Dersso, *supra* note 7, at 99.

34. Dersso, *supra* note 7, at 100–01; *see also*, Joel E. Oestreich, *Liberal Theory and Minority Group Rights*, 21 Hum. Rts. Q. 108, 109 (1999).

35. Oestreich, *supra* note 34.

36. Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 Va. J. Int'l L. 339, 342–43 (1995).

37. Asifa Quraishi-Landes, *Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible*, 16 Rutgers J.L. & Religion 553, 553–54 (2015).

allowing a role for religion or culture in governance—or religious or cultural establishment.[38]

According to IHRL's critics, these assumptions that religious and cultural law are dangerous to individuals ignore that outside the West, religious and cultural law and communal systems are a source of security and autonomy for group members. The emphasis on individualism and secularism then alienates these groups from IHRL and their governments.[39] Group rights proponents similarly argue that their societies thrived under legal pluralism, without suffering any of the potential consequences the IHRL movement fears.[40] In fact, many of them blame legal centralism brought by colonists for the rise of authoritarianism in some Muslim majority countries.[41]

Continued efforts to impose or encourage IHRL standards within communal or religious societies, then, are a form of ethnocentrism and cultural imperialism that undermines group members' individual autonomy to choose how they wish to live their lives and disrupts social cohesion.[42] Advocating for religious or cultural law then "manifests a resistance to the colonial and post-colonial denigration, devaluation, marginalization and suppression of indigenous . . . cultures and the resultant sense of alienation and dispossession."[43] Some take the argument further to claim cultural relativism—the idea that religious and communal societies should not be judged by Western standards or any other external standards, including by IHRL.[44] Rather, their behavior should be judged only for consistency with their internal standards.

Overall, proponents of group rights see them as necessary for "self-preservation" and "survival" of the group, as well as for the protection of each member's individual interests.[45] The threats to the group they perceive are both external and internal. The external threats come either in the form of cultural imperialism described above or from colonial domination. Internal threats typically arise from majority groups that seek to assimilate, suppress or even destroy the minority groups in the state.[46] In this case, group rights then

38. Office of the High Comm'r on Human Rights, General Comment 22: The Right to Freedom of Thought, Conscience, and Religion (Art. 18), HRI/GEN/1/Rev.1 (1993).

39. DERSSO, *supra* note 7, at 100.

40. Jackson, *supra* note 25, at 168–69.

41. *See id.* at 172.

42. *See* Mutua, *supra* note 36, at 341; Oestreich, *supra* note 34, at 109; MICHEL ROSENFELD, LAW, JUSTICE, DEMOCRACY, AND THE CLASH OF CULTURES 79 (2012); Mitnick, *supra* note 13, at 25.

43. DERSSO, *supra* note 7, at 100; *See also*, Mutua, *supra* note 36, at 342–343 (adoption of liberal democracy and an IHRL framework creates "above all a crisis of cultural and philosophical identity: the delegitimization of values, notions, and philosophies about the individual, society, politics, and nature developed over centuries.").

44. Abou El Fadl, *supra* note 8, at 56.

45. Oestreich, *supra* note 34, at 115–16; Akanji, *supra* note 18, at 32.

46. AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 23 (2001).

"permit a national minority or historical community to preserve its unique characteristics and to express its cultural identity, while at the same time shielding the group from discrimination."[47] From within the group, nonbelievers, nonconformists or others who wish to disassociate with the group or the group's religious or cultural practices, norms and laws perpetrate the internal harm as any assimilation threatens the group with "extinction."[48] Again, this makes group rights essential to the group's survival.

2. All Against Group Rights

Critics of group rights emphatically proclaim that recognition of group rights makes little conceptual sense and that it will destroy individual autonomy, leaving in its wake a loss of free will, oppression, and patriarchy. At the heart of liberal theory—the theory upon which human rights is built—is the individual, whose autonomy and freedom must be protected in order for individuals to realize their full potential and happiness.[49] Individuals have freedom when they make choices without coercion, particularly about what makes for a good life. This view does not reject culture or religion, but rejects coercion to follow culture or religion.[50] Elevating the group to a recipient of rights enforceable against individuals effectively compels members to abide by these laws in violation of the very purpose of human rights—which is to protect the individual from coercive power, no matter who exercises it.[51] Critics of group rights then cannot see how to protect the group using group rights without oppressing the members, particularly with respect to the enforcement of religious and cultural law.[52] If groups are allowed to curtail individual rights, then IHRL loses its force.[53]

The biggest victims of group rights, according to its critics, are women, secularists, nonconformists, and the LGBT community. IHRL proponents believe that group rights override differences between community members and effectively "reinforce[e] power hierarchies," particularly patriarchy, within religious and cultural groups.[54] For them, women pay the cost of equal-

47. Zoltani & Koszorus, *supra* note 18, at 134.

48. Shachar, *supra* note 46, at 24.

49. Mitnick, *supra* note 13, at 35–36; Oestreich, *supra* note 34, at 116.

50. Oestreich, *supra* note 34, at 116–17.

51. Jones, *supra* note 12, at 82.

52. *See* Luis Rodriguez-Abascal, *On the Admissibility of Group Rights*, 9 Ann. Surv. Int'l & Comp. L. 101, 108 (2003).

53. *Id.* at 109.

54. Shachar, *supra* note 46, at 17; Susan Moller Okin, Is Multiculturalism Bad for Women? 12 (1999); Abou El Fadl, *supra* note 8, at 44 ("Put simply, those who enjoy an advantageous position within a particular context have a strong incentive to immunize themselves from judgment by others by claiming relativism or exceptionalism. For example, men who might enjoy the advantage of patriarchy have a strong incentive to resist notions of universal feminist rights by invoking cultural relativism or exceptionalism. But the fact that a particular paradigm tends to play a conservative legitimating role in relation to established power dynamics is not necessarily disqualifying. Rather, what is called for is a healthy skepticism

ity between majority and minority groups in achieving self-determination.[55] Claims of cultural relativism also serve as a shield against challenges to those hierarchies: "Not surprisingly, critics of Western universalism and the proponents of Muslim exceptionalism are often able to position themselves as the jealous guardians of an Islamic authenticity and a supposed genuineness, and in doing so, they are often able to marginalize their opponents and condemn opposing views as heretical corruptions."[56] These jealous guardians of religion are then able to assert their expertise to maintain their power and the corresponding marginalization of women and nonconformists.

Critics also challenge the conception of group rights as part of human rights as illogical. Human rights developed specifically "to protect individuals from the power of groups, whether or not that power is institutionalized;" to protect the group then "entails the risk of defeating the very purpose."[57] Also at the heart of the conceptual debate is whether groups are entitled to the same moral standing that individuals have—traditional IHRL proponents disagree with the idea that there is something so inherently essential or special about the group to justify granting it the same rights as individuals.[58] Others argue more literally that human rights can only belong to humans, not groups.[59] Practically, treating group rights as human rights creates different rights for different people based on their group identity, which rocks the foundational principle of universality of human rights—that they inhere in all people simply because they are human.[60]

D. *Conceptual Basis for Group Rights*

The dichotomous debates surrounding group rights are built around the assumptions that religious and cultural law are imposed from the top down and that group rights allow groups to limit the rights of individuals. Whether this is true depends on whether group rights are conceptualized as corporate or collective. Rights exist—whether individual or group—if there is "an interest of sufficient moment, all things considered, to justify imposing a duty upon another."[61] Some theorists imagine group rights as built on the aggregated or collective interests of a substantial number of people; others believe that there

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towards any paradigm that tends to legitimate instead of challenge established power dynamics. More specifically, instead of accepting the claim of exceptionalism at face value, and deferring to the supposed particularity of a culture, one ought to search for explanations that are subversive to established power dynamics.").

55. Shachar, *supra* note 46, at 17–20.

56. Abou El Fadl, *supra* note 8, at 56.

57. Jones, *supra* note 12, at 82.

58. *Id.* at 86.

59. James Griffin, *Group Rights*, *in* Rights, Culture and the Law, *supra* note 33, at 163.

60. Sherman A. Jackson, *Shari'ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism*, 27 Fordham Int'l L.J. 88, 103–04 (2003).

61. Jones, *supra* note 12, at 83.

is something intrinsically valuable in the group that its corporate interests are worth protecting. Only in the latter case can coercion of individuals be justified, since the focus is on the interest of the corporate group, not the joint interests of individuals.[62] What follows describes more fully the collectivist and corporatist theories of group rights. When described theoretically or in a vacuum, both conceptions seem plausible. When put into context of the groups seeking these rights, as Part II does, it becomes evident that, traditionally, there is little religious or cultural support for a corporate conception, despite vociferous claims to the contrary.

1. A Collectivist Theory of Group Rights

The need for collective group rights emerges in at least two circumstances. The first is when individual interests alone are too insignificant to justify placing a duty on the government or the duty holder, but when aggregated cross the threshold justifying such a duty.[63] Peter Jones illustrates the thinking as follows:

> Thus, imagine that a factory gives off polluting fumes that adversely affect the lives of people who live in its vicinity. Do those people have a right to stop the factory from engaging in the polluting activity? In answering that question, we would have to consider not only the adverse effects of the pollution, but also the costs of putting a stop to them. Suppose that the pollution is serious in that it has a significantly adverse impact upon the quality of people's lives, but is not so serious that it constitutes a significant threat to any individual's health. Suppose also that the costs of stopping the pollution are serious: the process will be financially expensive and will result in some of the factory's workers losing their jobs. In that case, we may conclude that the interest of any single individual in not suffering the pollution is not enough, on its own, to justify imposing a duty upon the factory's owner to stop the pollution. However, if we consider the interests of all of the individuals adversely affected by the pollution, their aggregate interest may well suffice to ground the duty. If it does, then those living in the vicinity of the factory have a right, as a group, to stop the factory's polluting activity. As a group, they jointly possess a right that none of them possesses individually.[64]

A collective group right also may arise to prevent harmful actions that target not just individuals, but also the group, despite individual rights offering similar protections.[65] Discriminatory policies intentionally harm individuals, but the goal is to harm the group as a whole, not just the individuals directly affected by them. The goal of a group right to be free of discrimination would be to create a separate avenue to protect the interests of all group members,

62. *Id.* at 89.

63. *Id.* at 84; Rights, Culture and the Law, *supra* note 33, at 166; Adina Preda, *Group Rights and Shared Interests*, 61 Pol. Stud. 250, 253 (2013).

64. Jones, *supra* note 12, at 84.

65. *Id.* at 92.

even though the harm for some is indirect. The group itself is not what is being protected, but rather its members.

Because collective group rights are founded solely on the aggregate interests of the individuals, the groups that deserve protection go well beyond racial, religious, ethnic, or linguistic groups that are typically considered the recipients of group rights.[66] In Jones' illustration, proximity to the factory could be enough to create a group. What unites the group may change over time or may disintegrate. A cost/benefit analysis effectively determines which collective interests are worth protecting with group rights.[67] Importantly, the collectivist theory of group rights effectively assumes everyone in the group shares the same interests.

Under a collectivist theory, the group has no moral standing independent of the individuals who form it.[68] For this reason, the group cannot enforce its rights against members by placing a duty on them to follow its dictates. To do otherwise would elevate the interests of some of the individuals over others in the collective, which is a violation of equality principles at the heart of individual rights. Or, conceptually, it would allow for individuals to "hold rights against themselves," which makes no sense.[69]

To put this in context, the citizens of every country are entitled to a group right to self-determination and a corresponding individual right to public participation in governance, which provides the means for exercising the group right. Realistically, governments have to function even without the agreement of every citizen who composes the people on what their interests are and how best to protect and promote them. So far, IHRL promotes democracy as the best option to promote and protect these interests. As explained above, the group, or the citizens who form it, can choose religious or cultural law if it complies with other democratic and rights obligations. Democracy imagines a fluid majority that changes based on the issue and over time—which is reflected through democratic elections and the democratic legislative process. In this context, the group as an entity cannot simply impose a particular type of law on all citizens—there is nothing special about the group as an entity, only the individuals who comprise it—but instead must subject the choice to democratic scrutiny and choice and measure it against constitutional and other rights obligations. And, if the majority of citizens does choose to adopt a religious or cultural legal system, that choice is always subject to change through the same democratic process that instituted it. That does not mean that the democratic choice to adopt a religious or cultural legal system is not problematic or is always legitimate, but simply that this theory does not protect the right of a

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66. *Id.* at 87.
67. *Id.* at 100.
68. *Id.* at 85.
69. *Id.* at 94 (1999); Preda, *supra* note 63, at 252.

group—as a static entity—to impose a particular type of law without consent tested at regular intervals.

In the context of minority groups asking for special protection for their religious or cultural law, in practice, it is unlikely that every member of the group is going to agree that their interests are best served by religious or cultural law. Under a collectivist theory of group rights, if there is no democratic vote, but simply recognition by the central government or constitution of the right to be governed by religious or cultural law, then the government or constitution is favoring the collective interests of some of the group members at the expense of others.[70] The question then is how coercion of some of the group can be justified if every individual's interests are equal. The individuals that favor religious or cultural law can continue to follow it, even if it is not enforceable by the state; absent a chance to opt out, those who do not want to live under this law would not have a comparable choice. Both in theory and in practice, a collectivist group rights rationale cannot justify allowing a group to impose religious or cultural law on its members, leaving a corporatist theory as the only conceptual support for formally recognizing and enforcing religious or cultural law.

2. A Corporatist Theory of Group Rights

The corporatist theory of group rights stands in contrast to the collectivist theory because it "ascribes moral standing to the group" as a group.[71] What makes the group worthy of protection is the belief there is something special about the group itself; protection is not contingent on the weight of the aggregate interests of its members. The group becomes "a right bearing 'individual'" that can advance its interests separately from group members.[72] To qualify for this type of group right, the group must have "a clear identity to which we can ascribe moral significance."[73] A corporatist theory of group rights treats only racial, ethnic, religious, and linguistic groups as sufficiently special to deserve group rights.[74]

If the group as a group holds specific rights, the question then is who has the corresponding duty to fulfill the right. State governments are one obvious answer, but not the only one. Under a corporatist theory, individual members also are duty bearers: "The corporate conception of group rights makes it possible for a group to hold rights against its own members because it accords

70. *See* Constitution of the Second Republic of The Gambia, art. 7(f), Aug. 8, 1996 (the provision appears in Article 1(e) of The Gambia's 2019 draft Constitution); Constitution art. 24(4) (2010) (Kenya); Constitution of the Arab Republic of Egypt, art. 3, 18 Jan. 2014; Article 41, Dustūr Jumḥūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005; The Constitution of The Hashemite Kingdom of Jordan, art. 105, Jan. 1, 1952.

71. Jones, *supra* note 12, at 86–88.

72. *Id.* at 86; Preda, *supra* note 63, at 251–52.

73. Jones, *supra* note 12, at 97.

74. *Id.*

moral standing to the group independently of its members."[75] This is where the contentious debates come in—IHRL does not permit groups to place duties on individuals yet corporatist group rights demand it. In fact, the only way for racial, ethnic, religious, and linguistic groups to override the rights of individuals protected under IHRL is to adopt a corporatist theory of group rights.

E. *Corporatist Group Rights Under IHRL?*

Groups that are seeking to claim a group right to be governed by a communal legal system, whether religious, cultural or something else, will find mixed support for corporatist group rights under IHRL. Religious and cultural rights in IHRL are typically individual rights and limited to protecting an individual's freedom to practice her religion or culture.[76] According to the International Covenant on Civil and Political Rights (ICCPR) Article 18, the right to practice one's religion belongs to "everyone," without any reference to it belonging to the group. Article 18 grants the right to practice "in community with others" but so far that has not been read to create a corporatist group right. In fact, the provision expressly states in Article 18(2) that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.[77]"

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75. *Id.* at 92, 94 (1999). Jones supplies the following hypothetical to illustrate his point:

> Suppose, for example, that within a well-established and well-defined cultural group some individuals develop a wish to live in ways that depart from, and are at odds with, the group's traditions. Should they be free to break from the group's traditional pattern of life? If we ascribe ultimate moral standing on the issue of how people should live to the group's members individually, it will be for each individual to decide how he shall live. However, if we ascribe ultimate standing on this matter to the group qua group, the group's voice will be authoritative.

Id. at 92.

76. ANAT SCOLNICOV, THE RIGHT TO RELIGIOUS FREEDOM IN INTERNATIONAL LAW 12 (2011).

77. The full provision reads:

Article 18

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
> International Covenant on Civil and Political Rights, supra note 21, art. 18.

Similarly, the right to practice one's culture is protected in ICCPR Article 27 and also is worded to specify that individuals are the right holders. It reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Much like with the right to religious freedom, the provision provides little support for group rights of any kind.

Notably, however, IHRL allows indigenous groups a right to follow their own system of law, but as a collective right.[78] The U.N. Declaration on the Rights of Indigenous Peoples states in Article 24: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards." The world "peoples" is the same word that grants a right to self-determination to groups as described above. A declaration is nonbinding but supports an indigenous group right to be governed by religious or cultural law. This right was given to indigenous groups primarily in recognition that they have suffered a severe loss of rights during colonization with harm that continues today. This is apparent in the preamble to the declaration, which notes:

> [I]ndigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

Similarly, U.N. bodies define indigenous people deserving of group rights in large part by the injury inflicted on them:

> Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them.

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78. According to the United Nations Permanent Forum on Indigenous Issues, "indigenous people" are identified based on:

Self-identification as indigenous peoples at the individual level and accepted by the community as their member.

1. Historical continuity with pre-colonial and/or pre-settler societies
2. Strong link to territories and surrounding natural resources
3. Distinct social, economic or political systems
4. Distinct language, culture and beliefs
5. Form non-dominant groups of society
6. Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities

United Nations Permanent Forum on Indigenous Issues, Factsheet: Who Are Indigenous Peoples? https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (last visited Aug. 17, 2020).

> They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal system.[79]

What makes indigenous groups special is not something inherent in them, but rather that they are threatened into extinction, which supports a collectivist theory of group rights. This conclusion is further supported by Article 24's requirement that the indigenous law can be recognized but only if it is consistent with IHRL, and also by Article 44, which requires all rights to be guaranteed equally to men and women. Together, these provisions make it impossible for the group to override the individual rights of its members.

The right to self-determination guaranteed in ICCPR Article 1 and ICESCR Article 1 belong to peoples and have been interpreted as allowing "peoples" the right to choose how they wish to be governed. Common Article 1 reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Neither the treaties nor the treaty bodies that monitor compliance with them have defined peoples. One authoritative definition comes from experts at UNESCO who have defined peoples as follows:

> A people for the [purposes of the] rights of people in international law, including the right to self-determination, has the following characteristics: (a) A group of individual human beings who enjoy some or all of the following common features: (i) A common historical tradition; (ii) Racial or ethnic identity; (iii) Cultural homogeneity; (iv) Linguistic unity; (v) Religious or ideological affinity; (vi) Territorial connection; (vii) Common economic life. The group must be of a certain number who need not be large (e.g. the people of micro States) but must be more than a mere association of individuals within a State. (c) The group as a whole must have the will to be identified as a people or the consciousness of being a people-allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness. (d) Possibly the group must have institutions or other means of expressing its common characteristics and will for identity.[80]

Peoples can be both majority groups and minority groups. The right was drafted initially as an effort to end colonialism or to allow for external self-determination, which is when the right is asserted against a foreign power.[81] The

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79. Workshop on Data Collection and Disaggregation for Indigenous Peoples, *The Concept of Indigenous Peoples*, para. 2, PFII/2004/WS.1/3 (Jan. 19–24, 2004).

80. UNESCO International Meeting of Experts on Further Study on the Concept of the Rights of Peoples, *Final Report and Recommendations*, SNS-89/CONF.602/7 (Feb. 22, 1990), *reprinted in* Martin Dixon, Robert McCorquodale, & Sarah Williams, Cases and Materials on International Law 220 (5th ed. 2003).

81. McCorquodale, *supra* note 15, at 376.

right has also been used to protect minority groups facing severe oppression and violence at the hands of majority groups particularly to protect them from forced assimilation or even genocide and ethnic cleansing.[82] When used this way, minority groups are exercising internal self-determination against the majority group within the state.[83] The fact that the group only gains the right to self-determination when its interests become so gravely threatened again supports a collectivist theory of group rights.

Nothing in IHRL explicitly states that countries cannot adopt religious or cultural legal systems. Rather, the U.N. Human Rights Committee, which is the treaty body responsible for monitoring compliance with the ICCPR, at a minimum restricts establishment of these legal systems when they conflict with human rights:

> The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion, giving economic privileges to them, or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26.[84]

A quick but close reading of IHRL and this comment by the U.N. Human Rights Committee show that, at least currently, IHRL does not support a corporatist theory of group rights but only a collectivist theory that protects groups only as a means to protect the shared interests of their members.

II. Bridging the Gap Between IHRL and Group Rights Proponents

The stalemate between IHRL and group rights proponents arises over the issue of whether a group should be entitled to make religious and cultural

82. *See* World Conference on Human Rights, *Vienna Declaration and Program of Action*, ¶ 2, U.N. Doc. A/CONF.157/23 (June 25, 1993) ("In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind."); Christine Bell & Kathleen Cavanaugh, *'Constructive Ambiguity' or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement*, 22 Fordham Int'l L.J. 1345, 1349–50 (1999).

83. McCorquodale, *supra* note 15, at 376.

84. Office of the High Comm'r on Human Rights, *supra* note 38, ¶ 9.

law legally enforceable in a state and, with it, against individual members of the group. It is framed as a debate between individual rights and corporatist group rights. Both sides, for the most part, agree that religious and cultural laws are dictated from the top down and that religious and cultural legal systems demand total submission. As the story goes, God determines religious law that is faithfully employed in countries with religious legal systems and customary law is learned by traditional leaders who have the hierarchical power to employ it in their communities. For religious adherents, God demands utter submission—this is man's duty to God; individuals have no rights.[85] For communal societies, the group is at the heart of the society, which means that group's rights and interests trump those of the individual.[86]

But what if those assumptions are wrong? What if religious and cultural legal systems were never intended to treat the group as something special or superior to individuals? What if, up until the colonial interference and the imposition of legal centralism, religious and cultural legal systems required individuals to provide their consent to be governed by the law, following more of a collectivist theory? Recent feminist and progressive Islamic scholarship, which dissent from and challenge conservative and currently prevailing interpretations of Shari'a, suggests this possibility might in fact be a reality based on Islamic jurisprudence and precolonial Muslim practice; as does a close examination of communal systems of African Customary Law. If this proves true and gains acceptance, it may be possible to bridge the gap between proponents of IHRL and its critics, many of whom do not see human rights and their religion or culture as mutually exclusive. This Part examines whether Sharia and African customary law traditionally support the corporatist assumptions of group rights.

A. *Islamic Law and Individual Consent*

Progressive and feminist Islamic legal scholars are increasingly using religious text to challenge the assumption that religious law is determined by religious leaders or the government and that it demands complete submission by all Muslims. Their starting point is that under Islamic jurisprudence, "sharia, God's Law, cannot be known with certainty."[87] While some of this law is contained in the Quran,the sacred Islamic text, and in the Sunnah—which details how the Prophet Muhammad lived his life as an example of what is required—these sources do not answer all questions about what Shari'a requires of its followers. For this reason, Islam permits *ijtihad*, or legal reasoning to find those answers from the Quran and Sunnah. The work of *ijtihad* creates laws called *fiqh*. Importantly, Islam and "Muslims never established any clerical establishment or central institution to establish Islam's official religious doctrine,

85. Najma Moosa, *Human Rights in Islam*, 14 S. Afr. J. on Hum. Rts. 508, 519 (1998).

86. Edward LiPuma & Thomas A. Koelble, *Deliberative Democracy and the Politics of Traditional Leadership in South Africa*, 27 J. Contemp. Afr. Stud. 201, 209 (2009).

87. Quraishi-Landes, *supra* note 37, at 554.

so the religious rules of Islam are the result of the work of a diverse community of *fiqh* scholars operating according to their own collective standards of integrity and professionalism."[88] These scholars, also referred to as Islamic jurists, form schools of thought that create vastly divergent *fiqh* that "are considered equally authoritative and legitimate and are treated as alternative but co-equal pathways to the Divine Truth and Will."[89] Traditional Islam "clos[ed] the gate to *ijtihad"* in the 9th Century, having concluded that all legal questions have been answered.[90] Progressive Islamic scholars, however, believe that the challenges and changes of the modern world demand reopening *ijtihad*.[91] Others assert the gate was never closed in practice.[92] Either way, *ijtihad* allows Islam to remain a living religion—able to respond to the changing needs of its adherents.

Islamist jurists also recognize their own fallibility or the possibility that their human judgement cannot accurately discern what God intended. For this reason, individuals are tasked with determining for themselves, through study, which interpretations they believe are right and with following those interpretations.[93] Islam expects its adherents to submit to God by "diligently investigat[ing] a problem and then follow[ing] the results." [94] The Quran actively discourages blind submission by refusing to excuse individuals for "deferring to the commands of their superiors or for blindly adhering to the prevailing social mores or inherited religious beliefs and practices."[95] Rather, in Islam, *fiqh* is only as good as its ability to convince others to follow it.[96]

The jurisprudence of human fallibility in interpreting God's law makes it difficult for a state to enforce a particular religious law or even any religious law as an authoritative statement of God's law. As one Islamic scholar explained: "human beings may attain parts of the truth, but they can never embody the whole truth, and in my view, if a government, group, or people arrogantly claim that they are capable of representing the Divine truth or Will, then they have committed a grievous moral offense by associating partners with God."[97] Thus,

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88. *Id.*

89. Khaled Abou El Fadl, *The Place of Ethical Obligations in Islamic Law*, 4 UCLA J. Islamic & Near E. L. 1, 15 (2005); Mohammad Fadel, *The True, the Good, and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 Can. J.L. & Juris. 5, 65–66 (2008). *See also* Quraishi-Landes, *supra* note 37, at 554; Jackson, *supra* note 25, at 164.

90. Wael B. Hallaq, *Was the Gate to Ijtihad Closed?*, 15 Int. J. Middle E. Stud. 3, 3 (1984).

91. Tah J. al Alwani, *Taqlid and Ijtihad*, 8 Am. J. Islamic Soc. Sci. 129, 129 (1991).

92. Hallaq, *supra* note 90, at 4; Ziba Mir-Hosseini, *How the Door of Ijtihad Was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco*, 64 Wash. & Lee L. Rev. 1499, 1501 (2007).

93. Quraishi-Landes, *supra* note 37, at 555–556; Abou El Fadl, *supra* note 89, at 14.

94. Fadel, *supra* note 89, at 66–67; Abou El Fadl, *supra* note 89, at 5–6, 34–36.

95. Abou El Fadl, *supra* note 89, at 5.

96. *Id.* at 15.

97. *Id.* at 14.

simply because a state adopts a particular version of religious law does not make that law authoritative or guarantee it is correct.[98] Rather, "[t]hese laws are a part of Shari'ah law only to the extent that any set of human legal opinions can be said to be part of Shari'ah. A code, even if inspired by Shari'ah, is not Shari'ah."[99] Notably, this Islamic jurisprudence allows for scholars to reinterpret religious text and, if compelling, to apply or have others follow their reinterpretations.

In precolonial Muslim societies, "individual Muslims [had a] choice over which school of *fiqh* law they would follow," a choice respected by rulers generally.[100] The ruler would appoint a *qadi*, or judge, to resolve disputes based on the individual's chosen school of thought and had rules they followed to determine which school to apply when parties did not agree, which meant there was a system of legal pluralism and choice of law in these societies.[101] Included in the system of legal pluralism were minority religious systems, such as for Jews and Christians, which Quraishi-Landes describes as having "created a 'to each his own' quality of religious laws."[102] Islamic jurists fought periodic attempts by rulers to claim the primacy of a particular school of thought, trying to avoid what they saw as power grabs.[103]

Another jurisprudential challenge to arguments favoring state enforced religious law is based on understanding the difference between the rights of God and the rights of man. The rights of God are those that God has an interest in and that would make God a victim if not followed.[104] These rights include "fasting during the month of Ramadan, praying five times a day, or the punishment for adultery" and are considered immutable.[105] The rights of God "belong to God in the sense that only God can say how the violation of these rights may be punished and only God has the right to forgive such violations, these rights are, so to speak, subject to the exclusive jurisdiction and dominion of God."[106] Accordingly, the state or ruler has no power to enforce the rights of God, to punish them or forgive them; instead, the state or ruler must provide the conditions necessary for individuals to fulfill their duties to God.[107]

Rights not expressly reserved for God belong to man.[108] These rights of man are those that interest man alone.[109] They govern relationships between

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98. *Id.* at 21.

99. Fadel, *supra* note 89, at 70.

100. Quraishi-Landes, *supra* note 37, at 555–56.

101. *Id.*; Fadel, *supra* note 89, at 28–29.

102. Quraishi-Landes, *supra* note 37, at 556.

103. Abou El Fadl, *supra* note 89, at 24; Jackson, *supra* note 25, at 168.

104. Abou El Fadl, *supra* note 89, at 29.

105. Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 FORDHAM INT'L L.J. 4, 49 n.102 (2003).

106. Fadel, *supra* note 89, at 49–50.

107. *Id.*

108. *Id.*

109. Abou El Fadl, *supra* note 89, at 29.

individuals and are not fixed, but rather contingent and negotiable.[110] Notably, the rights of man are tied to fairness and justice and can be fluid:

> As to the rights of people, Muslim jurists did not imagine a set of unwavering and general rights that are to be held by each individual at all times. Rather, they thought of individual rights as arising from a legal cause brought about by the suffering of a legal wrong. A person does not possess a right until he or she has been wronged and, as a result, obtains a claim for retribution or compensation.[111]

Only man can forgive violations of the rights of man.[112]

Progressive Muslim scholars see conservative Islamists as increasingly interpreting the rights of man to be the rights of God, which places a duty on the state to enforce "the rights of God on earth" in violation of the traditional understanding of what differentiates these rights.[113] According to these scholars, "God created human beings as individuals, and their liability in the Hereafter is individually determined as well."[114] They call for:

> [C]reat[ing] a wall of separation between matters within God's jurisdiction and matters that belong to the state. The state would not be able to play God or claim to represent the Divine judgment and will. This is all the more so considering that the classical jurists argued that since God can vindicate God's own rights, in this world, the state must concentrate on vindicating the rights of individuals.[115]

The final category of rights is mixed rights, which affect the interest of both man and God.[116] It covers areas under criminal law, such as theft.[117] Because violations of these rights affect both man and God, both are able to punish them.

Under this jurisprudence, rulers and states do not have the power to demand compliance with religious law as part of enforcing the rights of God, which means they do not have the power to establish a theocracy.[118] Rather, they have a right to legislate matters related to rights of man and mixed rights. When they do enforce religious law, it is "binding . . . only as a fundamental principle because law and order is a practical necessity."[119] The law is state law, not God's law even if it is derived from religion.[120] Thus, the choice of *fiqh* is

110. Abou El Fadl, *supra* note 105.
111. Fadel, *supra* note 89, at 51–52.
112. *Id.* at 49–50.
113. Abou El Fadl, *supra* note 105.
114. Fadel, *supra* note 89, at 55.
115. Abou El Fadl, *supra* note 89, at 29.
116. *Id.*
117. Abou El Fadl, *supra* note 105.
118. Quraishi-Landes, *supra* note 37, at 556. As Quraishi-Landes explains, rulers only had the power to enforce laws related to public order or *siyasa* but had no control over *fiqh*. *Id.*
119. Abou El Fadl, *supra* note 89, at 18.
120. Fadel, *supra* note 89, at 69 ("If a legal opinion is adopted and enforced by the State,

not considered immutable and holds no special force of power—but rather is adopted out of a necessity to maintain public order—meaning the state cannot monopolize lawmaking by relying on religious law.[121] The role of the leader or government is to guarantee justice, not decide what it is.[122] Progressive Islamic scholars explain that "a religious State law is a contradiction in terms."[123] It violates the role of the individual in determining which interpretations of religious laws are the correct one and the classical differentiation between the rights of God and the rights of man.[124] This jurisprudence directly undermines the assumption that religious law, at least with respect to Shari'a, is imposed from the top down and requires total submission.

The seemingly idyllic premodern or precolonial age in which Muslims were able to choose for themselves how best to practice their religion and follow God's law, came to an end during colonialism. At this time, the colonial governments forced civil law or common law on their colonies and, with it, an ideal of legal centralism.[125] Notably, that did not mean that there was one law governing all living in the colonies. Christians and Jews were allowed to be governed by their own laws. What makes this legal centralism is that a singular law governed all Muslims. Even Muslim majority states that were not under colonial domination ultimately adopted legal centralism.[126] Accordingly, "[c]

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it cannot be said to be God's law. By passing through the determinative and enforcement processes of the State, the legal opinion is no longer simply a potential: it has become an actual law, applied and enforced. However, the law applied and enforced is not God's law; instead, it is the State's law. Effectively, a religious State law is a contradiction in terms.").

121. Abou El Fadl, *supra* note 89, at 18.

122. Fadel, *supra* note 89, at 38.

123. *Id.* at 69.

124. Abou El Fadl, *supra* note 89, at 30.

125. *Id.* at 25. Abou El Fadl provides the following story of Egypt:

> Colonialism represented nothing short of a complete ravishing of Muslim societies and the ripping of Muslims from their roots. In this regard, Islamic law was no exception. One anecdotal incident regarding the adoption of the Napoleonic Code of law in Egypt will illustrate the point. With the emergence of Colonialism and the extension of Western influence, Khedive Isma'il Pasha (r. 1863–1879) reportedly requested that the Azhar seminary lead an effort to codify Islamic law. Isma'il explained that Western interests have greatly increased in Egypt, and that the Western powers complained that the law of fiqh, which is implemented by Egyptian judges, is too complicated, diverse, and full of disagreements and disputations. The Colonial powers were pressuring the Khedive to adopt a uniform law, and so the Khedive told the jurists of Azhar that unless they codify Islamic law, he would have to oblige the Europeans by adopting the Napoleonic Code. Incidentally, the Khedive himself did not speak or read Arabic, had received a Western education, and had no familiarity whatsoever with Islamic law. The Azhari jurists protested that the codification of Islamic law, the imposition of uniformity, and eliminating diversity would be unheard of and even heretical. The Khedive responded by adopting the Napoleonic Code as the law of the land. *Id.*

126. Quraishi-Landes, *supra* note 37, at 560.

olonialism formally dismantled the traditional institutions of civil society, and Muslims witnessed the emergence of highly centralized, despotic, and often corrupt governments that nationalized the institutions of religious learning and brought the waqf under state control. This contributed to the undermining of the mediating role of jurists in Muslim societies."[127]

Colonialism and the adoption of legal centralism effectively "created theocratic-leaning Muslim governments."[128] Many modern Muslim majority states coopt the rights of God and especially mixed rights, claiming a right to enforce them as religious duties.[129] Muslims now owe a duty to the state, society and other Muslims to follow religious law, and they are stripped of their individual right to choose their own understanding of Islam.[130] The effect, in many cases, is to entrench authoritarianism as the total submission to God's law, which in turn becomes total submission to the state. Importantly, the West pushed legal centralism in postcolonial states as a symbol and necessity of modernization, making it complicit in the development of these "theocratic-leaning" governments.[131] Either way, most Muslim majority states, including some that were not colonized, have gained a monopoly on determining which religious rules apply—making religious law a top down imposition that requires full submission in stark contrast to the past.[132] Added to this, many of these governments have adopted conservative and patriarchal interpretations of Islam that progressive Islamic scholars complain "is woefully out of step with modern realities and sensitivities."[133]

According to these progressive Islamic scholars, the colonial and postcolonial enforcement of religious law as God's law is inauthentic and a naked attempt to grab authoritarian power.[134] A thoughtful reading of Islamic jurisprudence, something that is not simply allowed but is required in Islam, leads them to conclude that the religion protects individual autonomy rights, not group rights and especially not corporatist group rights: "From a theological perspective, the notion of individual rights is easier to justify in Islam than a collectivist orientation."[135] Islamic jurisprudence rejects efforts to impose religious law on individuals, which means it cannot support corporatist group rights. This conclusion, however, does not mean that these scholars are ready to simply reject any role for religion in governance and wholesale adopt IHRL's individual rights. This is apparent in some scholars' recommenda-

127. Abou El Fadl, *supra* note 8, at 64.

128. Quraishi-Landes, *supra* note 37, at 560–561; Abou El Fadl, *supra* note 8, at 65. In situations where there are Shi'a and Sunni populations, the codification might divide again so one Sunni code applies and one Shi'a code applies.

129. Abou El Fadl, *supra* note 89, at 30.

130. Fadel, *supra* note 89, at 53.

131. Abou El Fadl, *supra* note 89, at 24–25.

132. Quraishi-Landes, *supra* note 37, at 561.

133. Jackson, *supra* note 60, at 90; Abou El Fadl, *supra* note 8, at 61.

134. Fadel, *supra* note 89, at 34; Abou El Fadl, *supra* note 89, at 23, 36.

135. Fadel, *supra* note 89, at 55.

tion that Muslim majority states should return to a system of legal pluralism modeled after premodern Islamic societies.[136] It is also apparent from how some of these scholars describe the individual rights protected under Islam, which range from claims that rights in Islam are neither collectivist nor individual to those who define individual rights as something other than "privileges, entitlements or immunities."[137]

B. *African Customary Law and Individual Consent*

A similarly careful reading of African Customary Law shows that neither the assumption of top down lawmaking nor an expectation of total submission of individuals to cultural law hold true, which means it also cannot support a corporatist theory of group rights. Before starting the examination, while this discussion is of African Customary Law, there is no such thing as African Customary Law as a singular set of laws.[138] Instead, the term encompasses vastly different legal systems built by vastly different tribes in vastly different locations—meaning there is nothing monolithic about African Customary Law. Despite this, there are enough similarities among the many different systems of customary law to allow for a generalized overview of African Customary Law as a category of legal systems and laws.[139]

At the heart of customary law or traditional legal systems throughout Africa is the community. The primary function of customary law and the traditional leaders who enforce it is to ensure harmony in the community—Africans "understand and construe 'control', 'justice', and 'law' themes as instruments of general social cohesion."[140] Until colonial times, social cohesion was necessary to ensure the survival of the group that otherwise was not protected by a state government with a centralized military force.[141] Built during those times, African Customary Law established a system of individual duties and rights aimed at achieving group survival, with duties sometimes overriding rights:

> In the West, the language of rights primarily developed along the trajectory of claims against the state; entitlements which imply the right to seek an individual remedy for a wrong. The African language of duty, however, offers a different meaning for individual/state-society relations: while people had rights, they also bore duties. The resolution of a claim was not necessarily directed at satisfying or remedying an individual wrong. It was an opportunity for society to contemplate the complex web of individual

136. *See* Quraishi-Landes, *supra* note 37.

137. Fadel, *supra* note 89, at 45–46, 53, 55.

138. Abdulmumini A. Oba, *The Future of Customary Law in Africa*, *in* THE FUTURE OF AFRICAN CUSTOMARY LAW 58, 60 (Jeanmarie Fenrich, Paolo Galizzi, & Tracy E. Higgins eds., 2011).

139. Salvatore Mancuso, *African Law in Action*, 8 J. AFR. L. 1, 2 (2014).

140. Nonso Okafo, *Relevance of African Traditional Jurisprudence on Control, Justice and Law: A Critique of the Igbo Experience*, 2 AFR. J. CRIM. & JUS. STUDS. 36, 38 (2006).

141. PETER ONYANGO, AFRICAN CUSTOMARY LAW: AN INTRODUCTION 29 (2013); Mutua, *supra* note 36.

> and community duties and rights to seek a balance between the competing claims of the individual and society.[142]

Individual duties focused on tending to the needs of the group—whether by serving as warriors to protect the group or by ensuring that the basic needs of the family and collective were met using communal lands.[143] Those duties became a right individuals could enforce against others and no individual's rights or duties remained static. For example, young African males who serve as warriors in fulfillment of an obligation to protect the community one day would receive a right to protection from the next generation of males; older people once responsible for feeding and caring for their families were entitled to have their children or younger family members care for them.[144] The law itself is living law, expected to grow and develop with society and changes in societal norms, and is mostly an oral tradition.[145]

The emphasis on social harmony and the protection of the group leads many—both African and others—to assume that communalism puts the group ahead of the individual to the near exclusion of the individual.[146] Logically, if African Customary Law views individuals as the means to the ends of group survival, then individuals must be coerced to abide by it. What this description misses is the element of consent that African Customary Law required to maintain social cohesion.[147] Communal systems only work if individuals are willing to be a part of the group. During precolonial times, without a centralized state to enforce the law, traditional leaders had to continually seek the consent of community members to govern. Despite suggestions to the contrary, what transformed rules into customary law was not a legal code dictated by the ruler but rather the agreement of members of the group to follow the rules, accept the judgments in traditional dispute resolution processes and fear of breaking up the community.[148]

Consent traditionally was gained through individual participation in dispute resolution and governance processes and, as such, was gauged regularly.[149] To keep community harmony, traditional leaders received advice and

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142. Mutua, *supra* note 36, at 344–45.

143. Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law*, 21 Berkeley J. Int'l L. 62, 70 (2003); N.J.J. Olivier et al., Indigenous Law 160 (1995).

144. Matua, *supra* note 36, at 353–54, 361–62.

145. Onyango, *supra* note 141, at 33.

146. Jones, *supra* note 12, at 92, 94; David Otieno Ngira, *The Implication of an African Conception of Human Rights on the Women Rights Movement: A Bottom-up Approach to Women's Human Rights Protection*, 2018.

E. Afr. L.J. 128, 132 (2018).

147. Okafo, *supra* note 140, at 38.

148. Onyango, *supra* note 141, at 18 (quoting George W. Kanyeihamba, Kyeihamba's Commentaries on Law, Politics and Governance 11 (2006)).

149. *See* Mutua, *supra* note 36, at 349–50.

questions from participants, traditionally only men, and applied customary law in a manner the community could support.[150] Accordingly,

> Most aspects of control, justice, and law are rooted in the members' general consent to the . . . principles, as well as the modes and agents for effectuating the principles for the greater public good. Thus, traditions, customs, and laws are usually developed and made with the consent, and to the satisfaction, of most community members . . . The community members' sense of involvement and worth motivate the members to accept the law making, law application (case management), and enforcement features of control, justice, and law.[151]

Overall, "[t]he test of validity of its rules and norms is its acceptance by the people, rather than the command of a sovereign or pronouncement of a legislator."[152] With that said, social pressure was instrumental to gaining consent. Community members who did not follow customary law, not simply disagreeing with it in particular disputes, found themselves ostracized or simply forced out of the group.[153] Where dissent was broader, however, a traditional leader might find his power being challenged or that his community simply left him.[154] The requirement of consent to be governed stands in contrast to the fact that African Customary law is hierarchical with traditional leaders at the helm and respected elders with their own influence, roles often restricted to men.[155] While African customary systems were not "idyllic nor free of abuses of power . . . the despotic and farreaching [sic] control of the individual by the omnipotent state, first perfected in Europe, was unknown."[156]

Colonial governments, however, imposed a corporatist theory of group rights on these communities. To prevent resistance, they coopted traditional leaders by offering them greater power over their communities by way of colonial courts willing to enforce customary law as translated to them by traditional leaders and colonial masters.[157] Gone was the once necessary requirement of individual consent to participate in the communal system; it was replaced with simple domination by traditional leaders willing to serve the colonial masters.[158]

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150. Adenike Aiyedun & Ada Ordor, *Integrating the Traditional with the Contemporary in Dispute Resolution in Africa*, 20 L. Democracy & Dev. 154, 163–64 (2016); Okafo, *supra* note 140, at 44, 46.

151. Okafo, *supra* note 140 at 45.

152. Chuma Himonga, *The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa*, *in* The Future of African Customary Law, *supra* note 138, at 35.

153. Oba, *supra* note 138, at 70.

154. Okafo, *supra* note 140, at 46; Gordon R. Woodman, *A Survey of Customary Laws in Africa in Search of Lessons for the Future*, *in* The Future of African Customary Law, *supra* note 138, at 17; LiPuma & Koelble, *supra* note 86, at 207.

155. Woodman, *supra* note 154, at 24.

156. Mutua, *supra* note 36, at 346–47.

157. *See* TW Bennet, Human Rights and African Customary Law 63 (1999).

158. Marie Lechler & Lackhlan McNamee, Univ. of Munich Dep't of Econ., Discussion Paper No. 2017-7, Decentralized Despotism? Indirect Colonial Rule Does

Those traditional leaders who could not be coopted were replaced.[159] Further, colonial adjudication of "official" customary law, or the customary law recognized and enforced in these courts, is blamed for distorting traditional customary law.[160] In particular, it is blamed for entrenching patriarchy into African Customary Law, which still persists today.[161]

In an effort to protect customary legal systems after the colonial powers tried to destroy them, many postcolonial states adopted special protections for traditional leaders and for customary law in their constitutions.[162] Through these protections and other efforts to recognize indigenous systems, "the traditional leaders are increasingly allowed to speak on behalf of their communities about those communities' resources, without any effective statutory requirement of proper community participation and consultation."[163] Under these constitutions, the state is the source of power and resources for traditional leaders, so much so that traditional leaders in South Africa, for example, have been found to "have incentives to support incumbent political parties who can guarantee their survival and provide them with rents."[164] In trying to protect the cultural institution, these constitutions remove the requirement of consent to be governed that was integral to precolonial African Customary Law. Instead, they treat customary legal systems as special because of their historical importance and the colonial efforts to kill them, rather than because they reflect the interests of individual community members.[165] Many traditional leaders in South Africa are promoting a return to African, communitarian values, seeing rampant crime and other social ills as a result of a drive toward individualism.[166] No longer solely reliant on their populations for their power, they are effectively claiming a corporatist version of group rights.[167]

The historical role of individual consent in maintaining the power of traditional leaders and African Customary Law challenges any effort to claim

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Undermine Contemporary Democratic Attitudes 4 (2017), https://doi.org/10.5282/ubm/epub.36388.

159. Thomas A. Koelbele & Edward LiPuma, *Traditional Leaders and the Culture of Governance in South Africa*, 24 Governance 5, 7 (2011).

160. Ndulo, *supra* note 8, at 88.

161. S. Afr. L. Comm'n, Discussion Paper 74, Customary Marriages para. 2.3.5 (1997), https://www.justice.gov.za/salrc/dpapers/dp74_prj90_cstmar_1998.pdf; Ndulo, *supra* note 8, at 88.

162. Daniel de Kadt & Horacio A. Larreguy, *Agents of the Regime? Traditional Leaders and Electoral Politics in South Africa*, 80 J. Pol. 382, 382 (2018); *see* S. Afr. Const., 1996 § 181; Constitution of Uganda, Oct. 8, 1995, art. 246(1) (Revised 2017); Constitution of Zimbabwe Amendment (No. 20) Act, 2013, May 9, 2013, chapter 15; Constitution of the Republic of Angola, Jan. 21, 2010, art. 7; Constitution of Botswana, Sept. 30, 1966, art. 88(2).

163. Wilmien Wicomb, *The Chief is a Chief Through the People*, 49 S. Afr. Crime Q. 56, 56 (2014).

164. de Kadt & Larreguy, *supra* note 162.

165. LiPuma & Koelble, *supra* note 86, at 202.

166. *Id.*

167. *Id.*

corporatist group rights as somehow indigenous. It supports, instead, a collectivist theory since the group as an entity is not special, but rather deserves protection as a collection of individual interests, particularly their interest in survival.[168] Prominent African leaders, including the late Nelson Mandela, and many traditional leaders see the scope for returning to a model built on consent to be governed, promoting a "more democratic version" of traditional leadership and African Customary Law.[169] It is important to note, however, that traditional leaders are hereditary and the system is hierarchical, which poses challenges to efforts to simply equate the consent to be governed historically required in African customary legal systems with IHRL's right to self-determination and the individual right to public participation.

African feminist scholars, many of whom see the value in both the customary law system and in human rights, reject that they can never be reconciled. These scholars have been diligently working to show that living African Customary Law—or the law actually practiced in traditional societies—is moving away from the patriarchy built into it during colonialism and focusing instead on its tradition of "equity and justice," which shows the potential for this system to achieve individual rights without undermining the community.[170] While there are certainly examples of this, the change is not necessarily happening quickly enough. For example, South Africa's Constitution requires state recognition for customary law but only to the extent it is consistent with the Constitution's human rights protections.[171] It also requires the judiciary to develop customary law to bring it in line with these protections, where possible.[172] For years, the South Africa Law Reform Commission, tasked with advising Parliament on law reform, attempted to harmonize the customary law of succession, which does not allow women, nonmarital children or anyone who is not a first born male child to inherit from a husband or father, with the constitutional right to equality.[173] It was not able to do so, leading the South African Constitutional Court to deem customary succession laws a constitutional violation of equality rights and one that could not be corrected by developing customary law.[174] Justice Ngcobo dissented in part from the opinion, seeing this decision as a missed opportunity to pay respect to customary law as an integral part of the legal system and to look more closely at living customary law, which was

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168. Woodman, *supra* note 154, at 23.

169. LiPuma and Koelble, *supra* note 86, at 203.

170. *See* Rita N. Ozoemena & Michelo Hansungule, *Re-Envisioning Gender Justice in African Customary Law Through Traditional Institutions*, Policy Brief 63, Ctr. for Pol'y Stud. (2009).

171. S. Afr. Const., 1996 § 211(3).

172. *Id.* at § 39(2).

173. S. Afr. Law Reform Comm'n, Project 90, Customary Law of Succession 9 (2004), https://www.justice.gov.za/salrc/reports/r_prj90_CustomaryLawSuccession2004.pdf. At best the report suggested incorporating families governed by customary law into the European style Intestate Succession Act. *Id.*

174. *Bhe v. Khayalitsha* 2005 (1) SA 580 (CC) at 85–86 para. 139 (S. Afr.).

already moving towards greater equality.[175] He effectively accused the decision of achieving ethnocentrism: "When dealing with indigenous law every attempt should be made to avoid the tendency of construing indigenous law concepts in the light of common law concepts or concepts foreign to indigenous law."[176]

C. *Lessons From Precolonial Islamic Societies and Precolonial African Customary Law*

The debates between IHRL proponents and those who see it is cultural imperialism intent on destroying, in this instance, Islamic law and African Customary Law are built on the colonial and modern histories of these legal systems and reflect the grave distortion and interference by colonial administrations. What the brief, and possibly idealized, description of premodern Muslim majority states and precolonial African Customary Law shows is that perhaps the stalemate between these two groups could be broken by looking more closely at how Islamic legal pluralism built on strong Islamic jurisprudence and the foundational principles underpinning African Customary Law once protected individual rights. As this history shows, group rights to be governed by religious and cultural law in that era were collectivist, not corporatist, in large part because Islam recognizes that individuals need to think for themselves when it comes to understanding the meaning of God's Law and African customary legal systems depended heavily on individual consent to be governed to survive. These findings show some promise towards finding common ground between IHRL and its critics, however, the individualism reflected in premodern Islamic and African customary law systems cannot simply be equated with individual rights guaranteed by IHRL. More will need to be done to fully bridge the gap without resorting to reflexive claims of universal human rights or cultural relativism.

III. Breaking the Stalemate

So far in this Article, the onus has fallen on proponents of group rights to rethink their understanding of religious and cultural legal systems—more specifically Shari'a and African Customary Law—by examining whether these systems followed a corporatist theory of group rights before they were distorted by colonialism and Western modernization drives. Now, the onus falls on IHRL proponents to rethink whether IHRL really demands strict separation of religion and culture from the state or whether states can recognize religious and cultural law as long as it complies with human rights, as required by the Human Rights Committee. Basically, the challenge is to determine whether states can fulfill human rights only by rejecting formal recognition of religious and cultural legal systems. Western feminists, in particular, have staunchly answered this question with a yes, pointing to entrenched patriarchy

175. *Id.* at 89–90 para. 148, 93 para. 155.
176. *Id.* at 93–94 para. 156.

in these systems that make it impossible for them to fulfill human rights.[177] Progressive African and Islamic scholars and feminists disagree, seeking to reinterpret religious and cultural law so it is consistent with human rights and so they do not have to choose between fundamental aspects of their identity and human rights.[178]

One possible way to bridge the gap between those who fear that religious and cultural law will always be used as a tool for domination and those who do not see a fundamental incompatibility between the cultures and religions they cherish and the human rights they consider essential is to consider testing whether human rights can be met substantively. Substantive human rights would allow states to treat different people and groups differently as long as in the end they have equal access to their rights. IHRL recognizes the difference between procedural rights and substantive rights in its equality discourse. Procedural equality demands that the state treat all people the same. IHRL rejects procedural equality as the sole standard of equality because treating people the same achieves equality in outcome only if everyone is starting on a level playing field.[179] Instead, IHRL demands substantive equality—or equality in outcome. Substantive equality allows people to be treated differently in order to level that playing field so that, in the end, everyone has equal access to their rights.[180] This Article proposes applying this same thinking to all rights, not just equality rights, with a focus on pushing IHRL proponents to think harder about their assumption that strict separation of religion, culture and state is the only way to fully achieve human rights.

More narrowly, this Part asks whether state recognition of a role for religious and cultural law in governance could fulfill the people's rights to self-determination and the individual rights to autonomy and religious and cultural freedom without violating equality rights. Creativity stands as the only limit on models and methods for achieving this goal. With that said, this Article will examine a few of the options already being tested that, while imperfect, at least offer a starting point for this discussion. As such, this discussion is not meant to be exhaustive but rather provide a sense of possibility and present the kinds of questions that must be answered before a compromise satisfactory to both camps can be reached.

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177. *See* Okin, *supra* note 54, at 12–16; Beverley Baines, *Gender and Constitution: Is Constitutionalism Bad for Intersectional Feminists?*, 28 Penn St. Int'l L. Rev. 427, 444–45 (2010).

178. Quraishi-Landes, *supra* note 37; Aziz Y. Al-Hibri, *Is Western Patriarchal Feminism Good for Third World/Minority Women?*, *in* Is Multiculturalism Bad for Women?, *supra* note 54, at 43–44; Ursula Lindsey, Opinion, *Can Muslim Feminism Find a Third Way?*, N.Y. Times (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/opinion/islam-feminism-third-way.html.

179. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 25, on Article 4, Paragraph 1 of the Convention on the Elimination of All Forms of Discrimination Against Women para. 8 (2004).

180. *Id.*

A. *Privatizing Religious and Culture Law*

The first possibility for achieving substantive rights to self-determination and to freedom of religion and culture is to keep religion and culture wholly private, not just in Western countries, but also in the countries that currently allow a formal role in governance for religion or culture.[181] This does not mean individuals cannot practice these laws or continue to develop them, only that the state will not enforce them. If the state cannot enforce the law, religious and cultural leaders must encourage or persuade group members to follow the law, maintaining the historic requirement of democratic input into or consent to the law. This is consistent with the idea that *fiqh* is only as good as its ability to convince others to adopt it or the requirement of individual buy-in in African Customary Law. It is also consistent with current state practice in Western countries.

This option is likely to be dissatisfying to group rights proponents because it seems like nothing more than the inevitable result of IHRL's domination. It may be perceived as a capitulation to cultural imperialism, which undermines the very purpose of this exercise. IHRL proponents also should be concerned. As many feminists point out, in practice, the private sphere is often the sight of hidden discrimination where women have little choice but to follow traditional gender roles assigned by their families, religions, and cultures.[182] They may face social stigma if they choose secular law, which could render the choice to follow religious or cultural law meaningless. Because individual autonomy rights, including the right to freely practice religion and culture, allow people to privately follow illiberal practices, states may be reluctant to intervene on behalf of women.[183] The solution to this issue—one that applies even now—is that states need to make a much greater effort to ensure equal power relations between men and women and between women and their families.[184]

B. *Legal Pluralism*

A second option for trying to achieve a compromise between proponents of formal recognition of religious and cultural law and IHRL is to recognize legal pluralism, but with three important caveats.[185] First, there must always be a civil law option that abides fully by IHRL norms for those who prefer non-religion, noncultural law. This is the only way to ensure that nonbelievers and nonconformists will be able to equally access their rights to self-determination and religious and cultural freedom. The second caveat is that legal pluralism only truly protects these rights if people have a meaningful choice about which

181. Rosenfeld, *supra* note 42, at 78.

182. *See* Is Multiculturalism Bad for Women?, *supra* note 54, at 22–23.

183. *See* Office of the High Comm'r on Human Rights, *supra* note 38, at para. 8.

184. Efforts to achieve this goal often focus on valuing women's unpaid labor in caring for the home and family members or on guaranteeing socioeconomic rights that could free women from these duties so they can enter the labor market.

185. Woodman, *supra* note 154.

law applies to them and understand the consequences of their choice. The laws themselves do not need to be egalitarian, but rather the choice to form part of the group governed by religious or customary law must be free and equal. The third caveat is that the system cannot be a disguise for a state preference of a particular culture or religion. This would defeat the very purpose of a substantive rights framework by making it impossible to achieve the rights to freedom of religion and culture in outcome as well as other equality rights. The legal pluralism option, if developed properly, may offer people greater personal autonomy without compromising equality.[186] However, it raises myriad issues that must be addressed before this goal can be achieved.

1. Opt In or Opt Out

Starting with understanding the caveats, the first question is whether people would have to opt into religious or cultural law or opt out in exercising their choice of legal systems. It seems likely that inertia will lead individuals to remain governed by the law that applies to them by default or will only think about their choice once there is a dispute. If a government chooses an opt-out system of legal pluralism, is that tantamount to a nudge towards religious or cultural law and therefore a preference for it? If so, then the system of legal pluralism must default to secular law, which is likely, at the very least, to be seen as problematic by group rights proponents in countries that already formally recognize religious and cultural legal systems.

2. Consent

The issues related to a consent requirement are numerous. The discussion here focuses only on how to achieve meaningful consent and when consent must be determined. Again, in practice, women may find it particularly difficult to choose not to be governed by religious or cultural law because of family pressure. The only way legal pluralism could possibly fulfill substantive human rights is if countries proactively address power inequalities in gender relations so women can have a real choice about what law governs them. Unless these power inequalities are fixed, it is hard to imagine how this system of legal pluralism could ever truly guarantee equality and autonomy rights. Importantly, this does not require the state to fix the patriarchy or hierarchies built into the religious and cultural legal systems; only that it guarantee that women, and really everyone, have a real choice about what law governs them. This no small feat given existing power dynamics in more traditional families and is likely to take a considerable amount of time to achieve. IHRL proponents are unlikely to imagine a world in which this can be achieved and certainly not quickly enough for women to exercise their equality and autonomy rights before the system of legal pluralism takes force. Yet, to hide behind this is to capitulate to the idea that equality is an ideal that will never be a reality. Group rights

186. ROSENFELD, *supra* note 42, at 80.

proponents hiding behind a corporatist theory to justify patriarchal social relations are also likely to protest, but for this group there is likely no desire to conform to IHRL at all or to reach a compromise.

The requirement of having a meaningful choice also demands that individuals have real access to their preferred legal system when making their choice. This access may be more difficult for people living in rural areas, areas under a security threat and any other areas into which the state system does not reach.[187] Alternatively, meaningful access to the state run civil law system may face challenges from perceptions that the system is not fair. Where individuals rely on religious or cultural systems because of deep problems with the government-run legal systems, no one has meaningful choice as to the law that applies to them. Before a government could formally adopt legal pluralism, it would have to clean up its legal system.

A third consent issue is at what point must a person give consent? In Nigeria, for example, how the couple marries determines which family law applies—religious, cultural or civil.[188] Many couples marry under civil law and either customary or religious law, with the possibility they will marry under all three.[189] Which ceremony is performed first—civil, religious, or cultural—establishes which family law applies to them. The only way this process serves as the consent necessary under a substantive human rights theory is if both parties to the marriage realize the consequences of their marriage ceremony and of their choice of law.

Another alternative to when consent must be determined is to wait until the dispute arises—as it seems to have been done in precolonial Muslim societies. The danger here is that no one will be certain what law applies to them, an uncertainty the rule of law and IHRL forbid. A related point, people could easily abuse this system through forum shopping; they could simply choose the law that is most beneficial to their interests at the moment rather than the one that generally reflects their convictions. The lack of certainty of the law, however, is likely the biggest barrier to this option for IHRL proponents.

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187. *Necessary Condition: Access to Justice*, U.S. Inst. Peace https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice (last visited Aug. 17, 2020).

188. Halima Doma-Kutigi, *Certification of Islamic Marriages in Nigeria: Realities, Challenges, and Solutions*, 7 Electronic J. Islamic & Middle E. L. 22, 27 (2019). Notably, many Nigerians equate the civil law system with Christian law, not secular law, which makes this a choice between religious and cultural law. The civil law system in large part applies IHRL, pointing to the fact that Nigerians see IHRL as a Western, Christian construct. Hyacinth Kalu, Together as One: Interfaith Relationships Between African Traditional Religion, Islam, and Christianity in Nigeria 106 (2011).

189. M.K. Imam-Tamim, Najibah Mohd Zin, Norliah Ibrahim & Roslina Che Soh, *Impact of Globalization on Domestic Family Law: Multi-Tiered Marriage in Nigeria as a Case Study*, 48 J. Legal Pluralism & Unofficial L. 256, 259 (2016).

3. Enforcement

The next question raised by legal pluralism as a compromise between IHRL and group rights proponents is who will enforce these laws—religious or cultural institutions, the state or both? While jurisdiction is likely to be the subject of much political bargaining, the real issue is whether IHRL would allow a state to enforce religious or cultural laws that violate equality, particularly gender equality, either directly through its courts or by ceding jurisdiction to religious and cultural systems. ICCPR Article 2(1) reads:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(3) then requires states to immediately reform any laws that violate human rights. While it seems this provision would prohibit states from enforcing religious or cultural laws that are contrary to human rights, at the same time, IHRL does allow for the possibility that the law may treat individuals differently if it is in pursuit of substantive equality. It should be at least possible to analogize substantive rights to self-determination and freedom of religion and culture to allow for similar differentiation between people to achieve equal access to these other rights.

Another possibility for assuaging this dilemma is to impose limits on when a state can enforce religious and cultural law, prohibiting it from violating human rights. Israel offers an imperfect example of how this could work. For Jews in Israel, marriage and divorce are governed by Jewish law. Only Rabbis can marry Jews and only the Rabbinical Courts have the power to issue a divorce.[190] There is no civil law alternative, which would not be permitted in the system of legal pluralism imagined here. The substance of Jewish divorce law is patriarchal. Rabbinical Courts, for example, grant a divorce only if the husband first gives his wife a *get*—a document consenting to the divorce.[191] Yet, Israel adopted secular laws to govern the division of marital property, which must be split evenly between spouses, and child custody, which must be determined by the best interests of the child, that temper the harsh consequences of Jewish law and align with IHRL.[192] No one doubts that Israel respects Jewish law even as it limits it, imperfectly, to protect human rights. If a religious or cultural system of law is built on traditional gender roles, it is hard to imagine how the state could fully correct for the human rights violations, a point evident

190. Pascale Fournier, Pascal McDougall, & Merissa Lichtsztral, *Secular Rights and Religious Wrongs—Family Law, Religion and Women in Israel*, 18 Wm. & Mary J. Women & L. 333, 341 (2012).

191. *See* Edmund Sanders, *Israel Divorce Law Traps Women in Marriages that Died Long Ago*, L.A. Times (July 26, 2013), https://www.latimes.com/world/middleeast/la-fg-israel-divorce-problems-20130726-story.html.

192. Fournier, McDougall, & Lichtsztral, *supra* note 190, at 341.

from the Israel example. This means either that the state would have to effectively rewrite religious or cultural law in this situation, which group rights proponents are likely to find unacceptable, or the state will need to enforce, at least in part, laws that violate IHRL.

A final alternative presented here to address the concern that legal pluralism could lead to state enforcement of IHRL violations is to have the state enforce only the religious and cultural laws that conform to equality and other human rights. Of course, this requires someone, perhaps a legislature or a court, to determine which laws the state can enforce. This determination could open the state to complaints of cultural imperialism as it continues to use IHRL to strike down religious and cultural law or, even worse, of naked favoritism, whether real or perceived, towards one religious or cultural law whose practices are approved for state enforcement. This route seems more painful and more open to abuse than having the legislature set the limit on the application of these laws to ensure human rights.

C. *Harmonizing IHRL and Religious and Cultural Law*

A last option in this Article for reconciling IHRL and group rights proponents on the issue of offering religion or culture a role in governance is to look for opportunities to harmonize religious and cultural law with human rights. This could happen by design—the legislature actively seeking law reform that accomplishes that goal—or organically as the religion or culture evolves as society evolves. Tunisia's decision to prohibit polygamy serves as a particularly cogent example of how this could work in practice. After decades of advocacy for women's equality, in 1956 King Bourguiba passed one of the most progressive family law statutes in a Muslim majority state, using Islamic jurisprudence to justify greater rights for women. More specifically, he prohibited polygamy, which Islam allows for men, but only up to four wives and only if the husband can treat them equally.[193] The King justified the abolition of polygamy on the basis that in modern times, it is impossible for men to treat all of their wives equally, which means if the state allowed polygamy, it would be violating Shari'a.[194] The religious justification remains contested by conservative Muslims in Tunisia, but the prohibition on polygamy persists more than sixty years later. The primary benefits of harmonization are that (1) it does not repudiate religion, only conservative interpretations of the law; and (2) it does not rely on IHRL but religious law to achieve greater gender equality. The downside of harmonization is that it is likely to be a piecemeal and time-consuming process that does not guarantee equal rights immediately, which is something IHRL proponents are likely to reject as a violation of ICCPR Article 2's requirement of immediate enforcement of rights.

193. Amira Mashhour, *Islamic Law and Gender Equality—Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 Hum. Rts. Q. 563, 568, 570 (2005).

194. *Id.* at 585.

D. *No Perfect Solution*

Currently, none of the three options considered here offers a perfect compromise between IHRL and group rights proponents on the issue of whether a state can formally recognize religious or cultural law without violating IHRL. Rather, they show the potential for creating one while identifying issues that will need to be addressed in breaking the stalemate.

IV. Conclusion

IHRL faces severe and increasingly threatening criticism that it is little more than cultural imperialism intent on continuing the colonial master's "civilizing" mission to eradicate their religions and cultures. These critics see little of the communal values and norms on which their societies were built reflected in the individual rights system created by IHRL. One of the primary points of friction is over whether IHRL should recognize group rights in the form of formal recognition of religious or cultural law. The impasse in the debates between IHRL and group rights proponents threatens to undermine the IHRL system and, with it, the growth of human rights around the world. With increasing challenges to the system, unless the impasse is broken, IHRL proponents could see states outside the West at best ignoring IHRL or, at worst, withdrawing from the IHRL treaties or their enforcement mechanisms. These countries' citizens will likely pay the price, although many of them carry a deep respect for both human rights and their religion and culture.

Underpinning this contentious debate are two assumptions both sides adopt: (1) religious and cultural law are determined from the top down and, (2) they demand total submission. Group rights proponents rely on these assumptions to justify a corporatist conception of group rights that allows the group's interests to trump its members' interests. IHRL proponents respond that IHRL could never allow the individual to be subsumed by the group, rejecting group rights out of hand, creating an impasse. This Article sought to break the impasse first by showing that both of these assumptions are false. The precolonial and premodern history of Shari'a and African Customary Law show that individuals both helped to determine these laws and also had to consent to them before they would be governed by them. At best, group rights in these systems were collectivist, which means the group's interest could not override those of the individual, in which case rights in these systems were individual, even if they are not identical to IHRL rights.

If group rights are no longer corporatist, but instead are collectivist and therefore individual, then IHRL proponents must critically assess whether formal recognition of religious and cultural legal systems always violates IHRL or only when group interests trump individual rights. The Article suggests applying a theory of substantive human rights—or evaluating whether the rights at stake are met in outcome, not process—to this assessment. It then suggests models of the religion/culture and state relationship, based on imperfect

real world examples, that might allow individuals to freely and equally choose whether to be governed by religious and cultural law or not—a steep challenge—without risking that this recognition will become a ruse for favoring one group over all others. These models show the possibility of achieving a compromise between IHRL and group rights proponents—a possibility only limited by our imaginations—that allows everyone to fully enjoy their human rights. Importantly, this Article is merely a starting point toward resolving the dispute over whether IHRL is a form of cultural imperialism. More research will be needed to address critiques of cultural imperialism in other areas of IHRL and, more particularly, to determine whether a substantive theory of human rights could help that process.