Human Rights and Gender Violence

TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE

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CHAPTER THREE

deep forests, or among minority communities. These areas are sometimes referred to as “traditional societies,” implying that they have a static and timeless social system. This usage distances societies that are not represented at the global conference tables. Here there is law, with culture hiding from view, buried in the everyday practices of modernity. The appeal of global modernity is reminiscent of the appeal of civilization during the era of empire. In the post-colonial era, the glamour of the modern is still juxtaposed to backward others, but now it includes those who are “developing” but still burdened by culture. Transnational legal settings are producing culture, but it is a culture that rejects culture to the margins. The fight against “culture” is a deeply cultural one.

CHAPTER FOUR

Disjunctures between Global Law and Local Justice

As a legal system, human rights law endeavors to apply universal principles to all situations uniformly. It does not tailor its interventions to specific political and social situations, even when these might suggest different approaches to social justice. Local context is ignored in order to establish global principles. Moreover, human rights interventions are framed within a particular vision of social justice based on a neoliberal privileging of choice rather than alternatives that could be more community-based or focused on socialist or religious conceptions of justice. These gaps between global visions of justice and specific visions in local contexts create a fundamental dilemma for human rights practice. There is a struggle between the generalizing strategies of transnational actors and the particularistic techniques of activists working within local contexts. How to negotiate this divide is a key human rights problem. This chapter describes these tensions while the next two chapters examine the processes of transplantation and translation that bridge them.

The CEDAW Committee is one of the human rights mechanisms that confront the challenge of applying general principles to specific situations. The CEDAW monitoring process is committed to using CEDAW norms for all situations and resists excuses for noncompliance based on the particularities of local situations. The reliance on legal rationality further diminishes the incentive to take local context into account. Nor does the structure of international regulation provide the time or resources to examine local political, social, and historical conditions. Faced with the frequent use of local culture as an excuse
for failure, CEDAW members, along with most transnational women’s human rights activists, reject claims to culture that justify practices detrimental to women’s human rights. In practice, human rights standards are powerful because of this resolve to commit to norms that transcend particular situations. Such tenacity makes them more valuable resources for local activists. When these activists challenge the acceptability of domestic violence, for example, they find the transnational prohibition that rejects all cultural justifications very helpful.

Yet, the reified conception of culture that underlies this rejection impedes transnational activists’ ability to work with local situations. It denies alternative conceptions of social justice and obscures ways that local arrangements can promote human rights and social justice. This tension between transnational principles and the importance of local context is inevitable. National and local NGOs tend to take local contexts more seriously. It is these groups that navigate the divide between the local and the global, translating global approaches into local terms and seeking to give local groups voice in global settings. The NGOs who work at this interface typically recognize the contested and shifting nature of culture and rarely describe culture as an obstacle or a thing.

The disjuncture between global norms and local contexts emerged dramatically when the CEDAW Committee considered the country reports of India and Fiji. In both cases, the CEDAW Committee criticized certain national and local practices as oppressive to women. It chastised India for retaining its system of distinct personal laws for different religious communities and complained about Fiji’s use of a traditional reconciliation procedure for rape. In both situations, the committee did not consider the local political context. Feminist activists in each country, who pay greater attention to local conditions, took a somewhat different approach from the CEDAW Committee. The committee’s lack of attention to local situations impedes productive collaboration with grassroots activists despite the desire of the CEDAW Committee to promote this collaboration and the shared commitment of both transnational and local activists to improving the situation of women. These two case studies reveal the underlying tension between a transnational perspective on reform and one grounded in local particularities. They show how a reified conception of culture as tradition exacerbates this tension.

The Reform of Personal Laws in India

In the presentation of the initial report from India in January 2000, which I did not observe, CEDAW experts complained about India’s use of separate reli-

igious laws for family relations and marriage. They felt that these separate laws undermined women’s status. India has long had separate personal laws for different religious communities: Hindu, Muslim, Christian, Jewish, and Parsi. Personal laws govern family relationships such as marriage, divorce, inheritance, maintenance, guardianship, succession, and custody. Although various religious communities have their own family laws, the current arrangement of separate systems of personal law is not an ancient practice but a legacy of the British colonial era. The colonial state ensured uniform application of the civil law but left women’s position in the family to be governed by the customary laws and practices of different communities (Agnes 1996a: 106, 1996b: 72; see also Cohn 1996). A regionally diverse set of local laws was reformulated into four uniform systems, one for each major religious community. Since independence, the government of India has maintained a policy of noninterference in the personal laws of minority religious communities, despite the directive in the Indian Constitution to develop a uniform secular personal law (Singh 1994: 378). When India ratified CEDAW in 1993, the government of India filed a declaratory statement (in effect a reservation) on Article 16 (i) that calls for nondiscrimination in marriage and family relations because of its policy of “non-interference with the personal affairs of any community without its initiative and consent” (India Report to CEDAW 1999, CEDAW/C/IND/1/1, 10 March 1999: 2), reaffirming the statement India made when it signed CEDAW in 1980 (Byrnes 1996: 52–53).

The women’s movement in India has long pressed for a uniform secular code for personal laws, often bemoaning the state’s lack of effort in developing such a code (Singh 1994: 378–80). However, with the rise of a Hindu right social movement and a Hindu nationalist political party in the 1980s, the demand for a uniform civil code took on a new political complexion. For Hindu nationalists, demanding a uniform secular code was a way to criticize Muslim law with regard to women’s status. The Hindu right sees less concern about women’s rights than about attacking minorities, particularly Muslims (Basu 1995; Kapur and Cosman 1996: 156). The rise to political power of the Hindu right has been accompanied by a resurgence of ethnic violence against minority religious communities, particularly Muslims (Hossain 1994; Singh 1994; Agnes 1995, 1996b; Basu 1995: 161, 141–46; Sarkar and Butalia 1995; Chowdhury, Kannabiran, and Kannabiran 1996; Kapur and Cosman 1996: 234; Sarkar 2001). There were serious riots in 1992 and again in 2002 (see International Initiative for Justice in Gujarat 2003).

Consequently, by the 1990s the women’s movement found itself in an uncomfortable alignment with the Hindu right and backed away from demanding a uniform civil code. By 2000, the year India reported to CEDAW, the is-
issue of a uniform civil code pitted women’s rights groups against minority rights groups. Although a uniform system of personal laws had been a key demand of the women’s movement for at least fifty years, at this point this reform fanned the flames of communal hostilities. Promoting a uniform code of personal law was an important part of the antiminority propaganda of the Hindu right. It enabled them to focus on the inadequacies of Muslim law, ignoring gender biases of Hindu law which lead to murders, suicide, and female feticide. “A myth created by the media is that the ‘enlightened’ Hindus are governed by an ideal gender-just law and this law now needs to be extended to Muslims in order to liberate Muslim women” (Agnes 1996a: 107). Opposition to the uniform civil code came from minority communities fearful of the Hinduization of civil law (Chowdhury, Kannabiran, and Kannabiran 1996: 99). Many women’s groups dropped their support for a uniform civil code, worried that this issue was being used to promote communal tensions between Hindus and Muslims (Basu 1999). A prominent Indian feminist argues that reforms are necessary, but that it is important to avoid placing fuel in the hands of antiminority forces (Agnes 1996a: 111). Leaders of the women’s movement whom I interviewed in Delhi in 2001 agreed that the women’s movement has withdrawn from the campaign to promote a uniform civil code. They now seek gender justice and women’s rights rather than uniformity of personal laws across religious communities (Hasan 1999: 86–87).

Muslim-Hindu tensions surrounding personal laws erupted in the 1980s in the aftermath of a celebrated case concerning maintenance for a divorced Muslim woman. In 1985, Shah Bano, a seventy-five-year-old woman who was abandoned by her husband, filed for maintenance under the criminal code. Under neither Muslim nor Hindu law does a woman have the right to alimony. Muslim law entitles her to the return of the engagement gift and Hindu law to the gifts she brought with her to the marriage (stridhan). Concerned about the large number of destitute windows in India, the British colonial government passed a law under the Criminal Procedure Code (Section 125) that entitled destitute women to maintenance by their husbands. Shah Bano filed for maintenance under the criminal code, which applies to all religious communities. Although the Congress Party defended retaining an unreformed separate Muslim law (Hasan 1999: 73), the Indian Supreme Court upheld Shah Bano’s right to permanent maintenance from her husband and asserted that the criminal law transcended personal law. Moreover, it criticized law that subjected women to unjust treatment, citing both Hindu and Muslim religious lawmakers, and urged the government to frame a common civil code (Kumar 1999: 77).

The leaders of the Muslim minority community protested vigorously against this intrusion into Muslim personal law and argued that the judgment violated the principles of Islam. Large demonstrations against the judgment took place in Bombay and Bhopal. On the other side, some cast Muslims as “archaic, obscurantist, and anti-national” (Hasan 1999: 79). During this period, the Hindu right escalated agitation against the Babri Masjid, a Muslim mosque in the city of Ayodhya, claiming that it was built on the site of a Hindu temple. These issues became linked in a communal assault on the Muslims (Kumar 1999: 78). In 1986 the government of India acceded to the demands of Muslim leaders and passed the Muslim Women’s (Protection of Rights on Divorce) Act, perhaps reflecting the importance of Muslim voters to the Congress Party (Hasan 1999: 82). This law excluded Muslim women from the protections of the criminal statute providing for maintenance of divorced women (Singh 1994: 376). It required maintenance of the wife only for the iddat period, 3 months and 10 days after the divorce (Hameed n.d.: 32). A report by a member of the National Commission of Women on Muslim women’s perspectives says, “A section of the progressive Muslim opinion declared this enactment to be the most retrograde step for all Muslims” (Hameed n.d.: 32). Shah Bano herself faced such pressure that she gave up the right she had fought for. As Kumar notes, it was one of a series of incidents that showed Indian feminists how easily their issues could be exploited by groups with other political agendas (1999: 78–79). Thus, women’s rights fell victim to communalism, with women’s rights claims buried by ethnic politics.

The Hindu right, including its political party Bharatiya Janata (BJP), a paramilitary organization Rashtra Swayamsevak Sangh, and a religious organization Visha Hindu Parishad, gained substantial power during the 1990s. The BJP was the governing party of India from 1999 until 2004. The origins of the Hindu right movement lie in the nationalist movements of the nineteenth century, but in the 1920s it took on its distinctive form as a movement of Hindus against Muslims. Since the 1960s, the movement has expanded, promoting references to “Muslim domination,” “appeasement of minorities,” and “Hindu pride.” It argues that the policy of giving Muslims and other religious minorities separate treatment has perpetuated the oppression of Hindus and caused the political malaise allegedly widespread in society. As a solution, the movement urges converting India into a Hindu state (Kapur and Cosman 1996). While the BJP is in most respects deeply patriarchal, it sometimes promotes women’s rights as a way of isolating and attacking the Muslim community (Basu 1995: 170). Basu observes that Hindu nationalists bemoan the degraded status of Muslim women to demonstrate their own superiority in a manner reminiscent of British colonial discourses about degraded Indian women (1955b: 176).
Support for a uniform civil code is the most important BJP stance concerning women (Basu 1995: 172). It allows the BJP to emphasize its support for women and at the same time talk about the repressive aspects of Muslim law. The Hindu right argues that Hinduism is the only religion with tolerance and therefore the only basis for a secular country. The movement's goal is to assimilate minorities into the broader, more tolerant fabric of Hinduism (Kapur and Cosman 1996: 239–40). There is an assumption that the code the BJP promotes would be based primarily on Hindu norms and practices (Kapur and Cosman 1996: 261). Yet, despite claims that Hindu law is less discriminatory toward women than the law of other religions, there are many features of Hindu law that subdivide women and define them as dependent wives within joint families (see also Agnes 1996b). In Hindu law, as well as in the law of other religious communities, succession and property rights discriminate against women and reflect the assumptions of a patrilineal/patriarchal family system. For example, the provision of dowry and the subsequent battles over it are a consequence of the failure to provide inheritance rights to women other than dowry (Kapur and Cosman 1996: 127–29). The case law on dowry deaths relies on the idea that women are weak, passive, and in need of protection as they are transplanted from one family to another (Kapur and Cosman 1996: 129). There are similar assumptions about women's economic dependency in all of the personal laws. Wives and sometimes daughters are not entitled to the same inheritance as husbands and sons (Kapur and Cosman 1996: 137). One scholar notes that all the personal laws are antiwoman, antiliberal, and antihuman (Singh 1994: 379). In fact, Sarkar points out that, as the BJP becomes more patriarchal, its earlier pride in a reformed Hindu law that was used to assert superiority over Muslims seems to have declined. "It seems that Hindu patriarchy, uncontaminated by western influence, has once again emerged as the embodiment of preferred values. And once again, women must forget about gender rights to ensure community supremacy" (1995: 212).

Moreover, feminists argue that the most significant barrier to women's rights in India is a hostile state uninterested in giving women rights or in implementing the laws that exist. Despite the amendment of rape and dowry laws during the 1980s, for example, these laws have not been enforced or implemented. The problem of dowry murders continues (Singh 1994: 376). There is also a pervasive gender bias in the judiciary. Organizations such as Sakshi in Delhi have reported very conservative views among the judiciary in surveys and have worked to train judges in new ways of thinking about gender. In the early 1990s, Sakshi studied judicial attitudes toward women and violence against women in India by interviewing 109 judges in a project supported by the Canadian International Development Agency (Sakshi 1996). They found widespread gender bias among judges with reference to how they viewed marriage and domestic violence. Three quarters thought that they should preserve the family even if there was violence in the marriage (74%). Half of the judges thought that women who stay with men who abuse them are partly to blame and just about half thought that there were certain occasions when a man was justified in slapping his wife (Sakshi 1996: 5–6). Over three quarters (78%) had never heard of CEDAW and the other 22 percent knew nothing of its contents or its General Recommendation 19 on violence. The head of Sakshi told me in a 2001 interview that when they showed this study to the judges, they were shocked.

Feminists in India recognize the difficulty of locating CEDAW and a uniform civil code in this political context. Flavia Agnes, a pioneer feminist activist in India, observes: "While the Women's Convention stipulates equality for spouses within the marriage, this provision needs to be contextualized within national and regional politics and plurality of cultures. Resisting homogenization of communities through uniform legislation has become an important agenda of human rights, and women's rights need to be situated within this context" (Agnes 1996a: 111). The demand for a uniform civil code places minority women in an especially difficult dilemma: they have loyalties both to their religious community and to their gender and confront the constant imposition of the majority over the minority. To argue for a secular law is to oppose one's own community (Agnes 1996b: 90). There are currently efforts by Muslim women to reform Muslim family law, but many Muslim women's activists do not want a uniform law, such as a proposed ban on polygamy, that would drive a further wedge between communities without strengthening the position of Muslim women (Agnes 1996a: 110). The All-India Muslim Women's Association would like to see reforms in the Muslim personal law but not a uniform civil code (Kapur and Cosman 1996: 258).

THE COLONIAL LEGACY

Even though the retention of religion-based personal laws is defended in the name of culture and tradition, the personal law system is a British colonial legacy. The colonial state focused on uniform application of the civil law but left women's position in the family to be governed by the customary laws and practices of different communities. This was a common British colonial policy intended to minimize resistance to imperial rule. In the past, the regulation of family relationships had fallen to religious heads or local caste or community
bodies, producing a great diversity of cultural practices (Agnes 1996a: 106). Gradually, however, the British intervened in some aspects of family relationships, such as the regulation of sati (widow immolation) and child marriage. Moreover, they relied heavily on ancient texts and the interpretations of religious pundits and ulama to determine the laws for Hindus and Muslims (Singh 1994: 380). The creation of personal law systems for religious groups united a highly disparate system of regional and caste-based legal systems. This had the added effect of strengthening the sense of commonality within religious communities. At the same time, the British approach ignored the way customary indigenous systems were flexible and open to change. They rendered the law more certain, rigid, and uniform. As a result, personal laws remained static as society changed (Agnes 1996b: 72; see also Cohn 1996).

During the 1930s and 1940s, separate personal laws were increasingly linked to distinct communal identities. The creation of a common Muslim law in the 1930s had the hidden agenda of joining disparate Muslim communities together, much as the postindependence reform of Hindu personal laws had the goal of unifying the nation through uniformity in law and establishing the supremacy of the state over religious institutions (Agnes 1996b: 76, 78). During the communal conflict in India at the time of partition in 1947, Muslim leaders came to see personal laws as a symbol of their cultural identity. They resisted state interference in personal laws. Reform of Hindu family laws was also linked to communal politics. There were efforts to reform the Hindu laws in the 1940s and 1950s, but Hindu fundamentalists opposed them (Kapur and Cossman 1996: 56–57). Women gained the right to divorce and acquired more property rights but not equal rights of inheritance. Thus, the communal politics of partition and its aftermath gave new political significance to separate personal laws.

Colonial rule contributed to the crystallization of personal law and, in the case of the Muslim law of inheritance, even its retrogression (Hossain 1994: 475–76). Although the system of personal laws is largely the product of British colonial policy, it is defended in the name of culture. In the new Hindu nationalism, the defense of ancient Hindu culture takes on great significance and is opposed to a secular feminism based on human rights. The opposition to women's human rights is again framed in the language of culture, both culture as national identity and culture as tradition.

The CEDAW Hearings

The government's report to the CEDAW Committee stressed its commitment to a policy of noninterference in personal laws, noting that there have been reforms in Hindu, Parsi, and Christian laws (CEDAW/C/IND/1, 10 March 1999: 3). It also noted that the Supreme Court has recently asserted the need for a uniform civil code for all women regardless of religion, in accordance with the Directive Principles of the Constitution (pp. 5, 21). The report indicates that the Christian community is working to reform its archaic personal laws dating from 1869 (which was accomplished in 2001) and that there have been reforms in Parsi laws (pp. 99–100). It notes, however, that "Recent fundamentalist assertions of a specific view of culture by both religious and ethnic groups have... posed new threats to gender" (p. 28).

At the CEDAW hearings, the experts were critical of India's stance of not intervening. One commented that the state's principle of nonintervention was impeding progress in guaranteeing women's rights. The committee insisted that the government be charged to change the personal laws of the distinct religious communities. It was firm that there needed to be a single, nondiscriminatory system and pressed India to adopt a uniform code for all its religious communities and to eliminate separate personal laws on the grounds that they were discriminatory. The experts noted that ethnic and religious groups tended to maintain patriarchal traditions and that perpetuating the personal laws of these ethnic and religious communities was incompatible with women's rights and was a breach of the convention (UN Press Release WOM/1161, 24 January 2000 and UN Press Release WOM/1162 453rd Meeting (PM) 24 January 2000). One expert said that it was necessary to change social and cultural values often perpetuated by religious and ethnic communities to eliminate existing discrimination. The expert added that India needed to reinterpret its values governing religious and cultural norms. She observed further that ethnic and religious groups were often responsible for patriarchal traditions that discriminated against women and that the state had the obligation to enact legislation to counteract those values. "Perpetuating the personal laws of ethnic and religious communities was incompatible with women's rights and a breach of the Convention. Unless a creative way was found to deal with the country's position, the many specific advances in India's policies on education, health and other areas could be nullified." The expert concluded her comments by asking what active steps would be taken to induce a nondiscriminatory mindset (UN Press Release WOM/1161: 9). Another expert asked if there could be one comprehensive code to ensure equality of women in all aspects of Indian life regardless of religion or culture (UN Press Release WOM/1161: 9).

The government representatives apparently ignored this issue in their response. The UN press release did not indicate any statements by the delegation chair—the Secretary of the Department of Women and Child Development of
India — on the issue of separate personal laws for religious and ethnic communities (UN Press Release WOM/1171, 31 January 2000: 2–3). The committee chairperson, Aida Gonzalez Martinez of Mexico, reiterated in her reply to the government that the committee was concerned about the question of amendments to personal and family laws, and that rather than waiting for the religious communities to amend their personal and family laws themselves it was important to encourage them to change (UN Press Release WOM/1171, 31 January 2000: 4). She noted that separate legal codes for religious communities violates the presumption of CEDAW that women should be treated equally. Moreover, at least some and probably all of the systems of personal law violate some of the nondiscrimination provisions of the convention.

In its extensive concluding comments, the committee praised India for its constitutional guarantee of fundamental human rights and the recognition of a fundamental right to gender equality and nondiscrimination, as well as for its affirmative action program, which has reserved 33 percent of seats in local government bodies for women (UN General Assembly 2000: 9). But it worried that there had not been steps taken to reform the personal laws of different ethnic and religious groups in order to conform to the convention and that the policy of nonintervention perpetuates sexual stereotypes, son preference and discrimination against women (UN General Assembly 2000: 10). The committee urged India to adopt a secular universalism in its laws governing the family, a significant cultural break from past practice. Further, the committee expressed concern about the high rate of gender-based violence against women, “which takes even more extreme forms because of customary practices, such as dowry, sari and the devadasi system. Discrimination against women who belong to particular castes or ethnic or religious groups is also manifest in extreme forms of physical and sexual violence and harassment” (UN General Assembly 2000: 11). The committee recognized that there is legislation against these practices but encouraged the government to implement this legislation. While applauding the equal gender rights provided in national-level government documents and noting the existence of laws against dowry, discrimination against Dalits, and sex-selective abortions, the committee worried about the lack of implementation of laws and the inadequate allocation of resources for women’s development in the social sector, which they saw as serious impediments to the realization of women’s human rights in India (UN General Assembly 2000: 10).

In my conversations with experts after this hearing, most agreed that the government should reform these separate personal laws. One expert said women should not have to live under patriarchal laws. Another said that it was the gov-
ernment’s responsibility to reform personal laws rather than leaving it to the leaders of minority communities, who are often religious leaders opposed to change. A third member of the committee thought a uniform secular code was neither necessary nor possible in India, but she was overruled by others who strongly advocated a secular state with a uniform legal code. The CEDAW Committee, following the mandate of the convention, interpreted the situation entirely in terms of gender. An intersectional approach that looks simultaneously at gender, ethnicity/race, and class would have provided a better analysis, but this is not part of CEDAW. Moreover, the brief, formal exchanges at CEDAW hearings do not lend themselves to discussions of complex intersectionality.

Ironically, the committee’s concern about the discriminatory provisions in these personal laws could strengthen the positions of Hindu nationalists and Islamic religious leaders. When transnational activists criticized India for failure to reform personal laws or eliminate them altogether, they provided ammunition for Hindu nationalists trying to demonize Muslims and their personal laws. At the same time, they might encourage Islamic leaders to resist this pressure by defining women’s subordinate status in Islam as foundational to an Islamic communal identity.

The CEDAW hearing did not navigate this complex conjuncture of feminism and communalism. Instead, the committee juxtaposed the secular modernity of uniform civil law to a religion-based and oppressive set of family laws and sought to support the former and undermine the latter. They saw the persistence of separate religious laws as oppressive to women. However, it was the colonial ossification of marriage laws and the very contemporary politicization of culture that confronted the CEDAW Committee, not a tenacious ancient culture. The system of personal laws is not simply rooted in the past but created by contemporary political struggles in which women’s subordinate status has been ethnicized: redefined as fundamental to the maintenance of an ethnic identity and communal political group. Viewing personal laws as a cultural problem underemphasizes this political context.

Bulubulu and Transnational Modernity

The debate over a Fijian customary practice called bulubulu at the January 2002 CEDAW hearings demonstrated dramatically the challenges of communicating between the transnational human rights community and the specificities of local and national situations. In bulubulu, a person apologizes for an offense and offers a whale’s tooth (sabua) and a gift and asks for forgiveness. The
offended person is under some pressure to accept the apology and make peace. The Fiji country report complained about the use of bulubulu for rape cases in court, but committee members objected to using the custom at all. The Fiji government representative told me later that bulubulu was central to Fijian village life and that she was frustrated and annoyed that she did not have enough time to explain the situation in Fiji to the committee. This example shows the difficulty transnational experts face in locating cultural practices in context. It also reveals the power of the interpretive lens that envisions many nonstate customs as harmful traditional practices.

The January 2002 hearing was Fiji’s first report to the CEDAW Committee. The assistant minister for women presented the report and I observed the proceedings. Two other representatives from the government attended, along with three from NGOs. The government’s official report criticized the courts’ failure to intervene firmly in sexual assault and violence cases. It objected to the use of bulubulu to escape legal penalties.

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

are likely to attract lengthier custodial sentences than rape, even though rape is a felony for which the maximum sentence is life imprisonment. (CEDAW/C/Fiji/1, 14 March 2000: 11)

Thus, the country report criticizes the legal system’s ineffectiveness in dealing with rape and blames bulubulu for contributing to the problem. In the questions they posed to the Fiji government, however, the CEDAW Committee challenged the custom itself. I took detailed notes on the questions, which are also available as press releases. One expert said that it sounded like bulubulu was a very old and very patriarchal custom and asked, “Have you provided to eliminate that custom? What has your ministry done to abolish this practice?” Another said it provided an escape route for people who commit crimes against women to avoid punishment. At least two experts asked, “When will this practice be made illegal?” One said, “While acknowledging the importance of cultural practices, and even the importance of reconciliation, we think it is important that the requirements of the convention be attended to, especially in the case of sexual violence. Thus it is important to the committee that you increase awareness of practices such as bulubulu, and of rape, because sometimes the impact of rape comes years after negotiation takes place” (quotations based on my notes). According to the UN press release (January 16, 2002), “A question was asked about the custom of bulubulu, which imposed only a custodial sentence on the convicted rapists. The victim’s father had a right to accept an apology from him, and the victim herself had no say in that situation. What was being done to abolish such practices?” These questions reveal the slippage between condemning the use of bulubulu for rape in court proceedings and condemning the practice altogether.

The Fiji government objected to this critique of bulubulu. In its official reply to the CEDAW Committee delivered in New York in January 2002, Assistant Minister Losena Salabula, of Fiji’s Ministry for Women, Social Welfare, and Poverty Alleviation, said:

“No-bulu-bulu” is a vital custom of the indigenous Fijian community for reconciliation and cementing kinship ties. The Government was addressing its recurrent abuse in relation to modern court processes and the legal system in handling sexual offences such as rape. The acceptance of “bulubulu” often led women victims not to report crimes. Offenders were discharged and sentences mitigated. Improved awareness of the practice had allowed the law to take its course on sexual offences. In some cases, families had declined the offer of “bulu-bulu.” In other cases, families had
accepted "bula-bula" but had agreed that the law should take its course. The reform of the sentencing law, which was at an advanced phase, was aimed at codifying sentencing options and guidelines. (UN Press Release 22/01/2002)

In response to this report, the committee's chairperson, Charlotte Abaka, of Ghana, said that while acknowledging the importance of national traditions, especially the practice of reconciliation, it was important to do away with traditions discriminating against women, especially in the case of domestic violence. The country should pay more attention to such negative aspects of the problem as the practice of bulubulu, she said. Measures were needed to increase public awareness of the issues involved. It was also disturbing that some cases of violence were referred to as "family discipline" in Fiji (UN Press Release January 23, 2002).

The committee's Concluding Comments criticized bulubulu for providing legitimacy to rape. After stating the committee's concern about the high incidence of ethnic and gender-based violence in civil unrest and about domestic violence and sexual abuse of girls and women, the Concluding Comments say, "The Committee is also concerned that the social customs on the husband's right of chastisement, and 'bula bula', give social legitimacy to violence" (par. 58). It requests the state party to strengthen its initiatives against gender-based violence and to adopt proposed laws on domestic violence and sexual offenses. "In particular, it calls on the State party to reinforce its 'no drop' policy by prohibiting the reconciliation of cases of rape and sexual assault on the basis of the 'bula bula' custom (par. 59)" (A/57/38 [Part I]: 12).

When I interviewed the assistant minister for women a few weeks later in Suva, the capital of Fiji, she said that the CEDAW Committee didn't understand bulubulu and how important it is, and she noted that there had already been legal decisions that defined it as inappropriate for rape. I talked to her again in 2003. Again she said that the committee did not give her time to explain. The CEDAW hearing was so formal there was no time to talk. The custom of bulubulu, she said, is to encourage people not to hold grudges. Eliminating bulubulu was impossible since it was the basis of village life. The custom was used for a wide range of conflicts and disputes as well as for arranging marriages. Without it, the village could not function. She said that the people who wrote the report did not know Fijian custom. "The Fijian people won't let this go, this custom. If they don't have it, society will fall apart." Changing bulubulu, she said "is very contradictory with our culture. When the family wants a girl, they will plant crops for her for three or four years and present things to her.

It is an investment. But now, with women's rights, you can marry anyone you want, and forget about this custom." Elopement is increasingly used instead of the protracted gifts of food and goods by the boy's family to finalize a marriage. It is typically followed by a bulubulu ceremony in which the groom's family apologizes and gives gifts to the bride's family. When I talked to the assistant minister in 2003, she bemoaned the impact of women's rights, which have persuaded women that they can do whatever they want, including dressing and acting without sexual modesty. These ideas have contributed to the breakdown of the family. There is little bulubulu now in the villages, even after elopement. Those who do bulubulu to get out of court are the "smart" people. She said that Fiji feminists told her she was old-fashioned and not promoting women's rights when she expressed these views.

In response to the critique of bulubulu as well as criticism of racial policies and affirmative action for Fijians from this and other UN treaty bodies, she said that if the international community did not like what Fiji did, Fiji would go its own way. Her comments reflect contemporary politics: a nationalist Fijian movement is asserting the centrality of Fijian village life to the nation. As Fijian village custom has become a politicized aspect of Fijian nationalism, attacks on Fijian village custom are seen as assaults on the Fijian nation. The women's minister did not defend the use of bulubulu for rape, but she did insist on the importance of bulubulu for village conflict resolution. At the end of our meeting, the minister gave an impassioned plea for Fijian tradition. She said that the individualist human rights system is disrupting this tradition and that the Fijian culture and its conditions were not understood. The "expert" label of the CEDAW Committee members sounded intimidating, but they did not appreciate the particularities and specific features of Fiji. When I spoke with the NGO representatives from Fiji, they also thought that the committee had misunderstood bulubulu.

How did this discussion go wrong? Both the Fiji government representatives and the CEDAW experts shared a concern about overly lenient treatment for rape. Yet, they seem to have spoken past each other, annoying the Fiji government representative even though she was also concerned about using bulubulu for rape cases in court. It certainly seemed to me that using village reconciliation for rape could fail to protect a victim, but it was also clear that the courts were not working effectively either. Perhaps it depended on how bulubulu actually functioned in different contexts.

In order to answer this question, I scoured the anthropological literature for descriptions of bulubulu and returned to Fiji to interview the activists in the antirape movement who had complained about the practice as well as
magistrates, police, and religious leaders who worked on rape and questions of Fijian custom. In the spring of 2003, a research assistant, Eleanor Kleiber, spent three months investigating the question of bulubulu and rape. I joined her for an additional nine days of interviewing. Altogether we interviewed 42 people during this period and two additional weeks of research in Fiji. The story we uncovered differed in important respects from the view that the experts — and I — had gleaned from the CEDAW hearing.

Two critically important points emerged. First, the way bulubulu functions depends a great deal on the social context in which it takes place. As Fijians shift from a predominantly rural village life to a more educated, urban style of life, the custom itself is being redefined. In some cases, it has become a shallow and meaningless exercise, while in others it is being reshaped to emphasize offender accountability and victim support. Second, the real grievance of the women’s groups was not the use of bulubulu for rape cases but the use of bulubulu to persuade prosecutors to drop charges and magistrates to mitigate sentences. They were worried about the way a modern and relatively superficial use of the custom was used to undermine the legal process. Indeed, as punishments for rape increased in severity in the late 1980s, the use of bulubulu shot up and feminists became concerned about the way it was being used to escape legal penalties.

Why did the CEDAW Committee miss these important points? The nature of transnational legal processes and the conceptions of culture shared by CEDAW experts through which they interpreted the meaning of bulubulu both contributed. It is, of course, impossible to understand the complexities of the operation of a particular custom when a committee is dealing with eight different countries in two weeks. One cannot expect committee members to spend a month reading the anthropological literature and two weeks interviewing Fijians in order to determine the meaning of a custom. As I discovered, bulubulu is a complicated and changing practice.

BULUBULU IN THE VILLAGE AND THE CITY

A foray into the ethnographic literature on the process reveals something of the complexity of this custom and its changing meaning over time. Bulubulu is an instance of soro, sometimes considered another name for the same process or a more informal version of it (Arno 1976: 49, 53; personal communication 2002; Geraghty personal communication 2002). Ethnographic studies from the 1970s and 1980s describe soro as a formal ceremony of apology in which the offender offers gifts such as a whale’s tooth and kerosene along with an apology and seeks reconciliation with the victim (Hickson 1975; Arno 1976, 1980, 1993; Aucoin 1990). It provides reconciliation between equals or when an inferior has offended a superior (Hickson 1975; Arno 1976, 1980, 1993; Aucoin 1990; Toren 1994; Brison 2001). In the 1970s, it was used by villagers throughout Fiji as a form of surrender or submission and a request for forgiveness (Arno 1976: 49). Arno and Hickson describe its use by both men and women for a variety of forms of personal insult and conflict as well as rape and marriage transgressions. Soro was suggested (but not carried out) when a cow broke into a neighbor’s garden and ate the produce and was used when a man became drunk and insulted his father (Arno 1993: 19, 99). Hickson reports the use of soro among women when a child becomes sick and the angry person needs to make peace in order to restore good relations and therefore heal the child (1975). Arno asked many heads of households in the remote island village where he worked what they remembered as its common uses. The most common was making peace between families after an elopement (1976: 55). Before the period of British colonialism, abducting women caused intervillage raiding and warfare, so ritual apology may have been a way to avert this kind of warfare. Hickson also reports the use of soro in the past when there was considerable intervillage fighting and a village might make an unconditional surrender and accept a subordinate role in order to prevent attack (1975: 105–6). If a man’s sister is sexually assaulted, he has an obligation to beat up the offender (Geraghty, personal communication, 2002). Bulubulu replaces vengeance.

More recent studies report that it is still frequently used to negotiate a peaceful relationship between kin groups after a marriage by elopement (Brison 2001; Geraghty 2002). The boy’s family approaches the girl’s family after the elopement and offers gifts and an apology, seeking bulubulu, which means literally to bury the bad feeling between the two groups. Although its primary use is to manage conflicts among kin groups in a Fijian village, ritual apologies can also take place at the level of the nation. Arno reports, for example, that the nonchiefly Fijian who carried out the 1987 political coup in Fiji used soro to apologize to the chiefs for overriding them in his actions (1993: 131).

Bulubulu is a practice of renegotiating relationships of inequality. Fijian villages are organized into patrilineal households that are aggregated into larger patrilineal subclans, called mataqali (Hickson 1975; Kaplan 2004). Households are the groups engaged in everyday economic cooperation and intimate family life while the mataqali are the corporate landholding units (Arno 1980: 344, 1993: 9). Individuals trace their membership in lineages and clans by descent through males, but they also have important kin ties with the mother’s patrilineage. Marriage is exogamous and residence after marriage is virilocal: the
bride typically goes to live with her husband’s kin group. Hierarchy is fundamental to the system. Within the village, households within a mataqali are ranked by birth order. Rank also depends on whether a mataqali, or household group, is chiefly or of the land (Arno 1993: 55, 54–56). However, villages also have important relations of equality. Relations within households are hierarchical as are relations between chiefly lines and subordinate lines, while relations across households are relatively egalitarian. These more equal relationships are marked by balanced reciprocal exchange. Cross-cousins and affines tend to have more equal relationships (Toren 1994). Marriage takes place between cross-cousins, who are relative equals, and wedding rituals express the relationship of equality between the groups involved (Arno 1993: 70).

This juxtaposition of hierarchical and egalitarian relationships means that villages are constantly negotiating the relative status of individuals and kin groups (Toren 1994). Ceremonies of apology and reconciliation take place between these kin groups and are an important way of renegotiating these relationships (Arno 1976, 1980, 1993; Brison 2001). The person seeking an apology brings a gift and subordinates himself to the person he or she wishes to make peace with. The penitent remains silent and looks down, acting and dressing in a conservative and nonassertive way while a spokesman presents the yajona (kava, a beverage) or whale’s tooth he or she has brought. There is no substantive discussion of the problem during the soro, but it restores normal relationships after a breach (Arno 1993: 98, 132). The relative merits of both sides are typically thrashed out in village gossip. Within the pervasive inequalities that characterize Fijian village life, soro is a way for subordinates to escape punishments from their superiors when they have offended them (Hickson 1975: 106–7). Within the situation of pervasive inequality that Hickson observed in the early 1970s, the soro exaggerates the inequality, since the subordinate surrenders to the superior, but at the same time by capitulating to the superior in anticipation of the exercise of his power, the subordinate may avoid legal sanctions, such as court, supernatural sanctions, such as illness, or other social sanctions, such as severing a relationship (1975: 106–7).

This use of soro to escape punishment by subordinates is not recent. A missionary writing in 1859 describes the practice as a failure of justice, since it is used by the guilty as well as the innocent to escape punishment (Hickson 1975: 107). However, Hickson argues that since the ceremony occurs in situations of status inequality in which the weaker surrenders and thus forces the superior to accept the apology out of pride, it minimizes the punishment for an inferior. Within a system of pervasive inequalities of rank and power, it serves to mitigate the control of higher-ranked individuals over lower-ranked ones (1975: 188; Kaplan 2004).

When bulululu is embedded in the village kinship system, it holds a perpetrator responsible for his actions. The offender experiences sustained gossip and is shamed, along with his close patrilineal relatives. Chiefs and senior men lecture and correct juniors who are a source of shame and embarrassment to the family (Hickson 1975: 54–55). Offenders may receive a tongue-lashing or beating not only for hurting a girl from another clan but also for wrongdoing the spirits. Offenses may lead to illnesses and other supernatural sanctions. If the offender leaves his village, he may be accepted back if he stays away for five or six years. While a person can leave his village and settle in another one if relationships sour, he will always be viewed as an outsider and is ultimately better off to stay in his own village (Hickson 1975: 32).

Thus, the process of apology and reconciliation sanctions the offender, particularly if senior kin view the offense as important and the offender wishes to stay on good terms in the village. Within interdependent, face-to-face communities, bulululu works along with other forms of social pressure to exert some control over offenders. In the past, when villages were more isolated and the control exercised by seniors over juniors was greater, bulululu was a powerful process that could reintegrate a raped woman into the community. She might be married to the offender. Under village conditions, a bulululu carried out by powerful, respected leaders with the support of an outraged village could provide better punishment and deterrence than the police. One Fijian leader I interviewed said that an offender’s family might give the victim arable land that would belong permanently to her mataqali. This is a major loss for the family that surrenders the land and benefit to the victim.

However, the nature of village life has changed dramatically during 150 years of contact with Europeans and colonialism and, since 1970, independence. The population is now largely literate and increasingly urban. About half the residents of Fiji are people of Indian ancestry brought to work the sugarfields by the British colonial government and Australian sugar plantations. By 2000 about 40 percent of the ethnic Fijian population lived in urban or periurban settings (Lal 2002: 155). As village life has changed, so has the practice of bulululu and the social pressure the village can exert on its members. My interviews with judges, lawyers, and religious and political leaders in Fiji in 2003 indicated that bulululu is increasingly rare even in villages. I talked to a variety of people in the urban areas who generally reported that ceremonies were not taken seriously and offenders were barely reprimanded. Some said that if a girl
is raped in town, even by a boy from the same village, it is not seen as a problem by the village, only by the immediate family.

Bulubulu is being used in new contexts reshaped by urbanism and Christianity. A leading Methodist minister told me that bulubulu is a way of saying sorry to a victim or the victim's family, and is therefore similar to Christian forgiveness. The gifts bridge the gap severed by wrongdoing while recognizing our sinful nature and the possibility of repentance. Sometimes churches take a role in the process. One woman who had been battered twice by her partner refused to forgive the perpetrator but after he went to his church to apologize, the church leader approached her with the ritual drink, yaqona, and again asked her to take him back. She refused and sent him to jail for a month. But when she returned to his village, the villagers blamed her for putting him in jail. It is obviously much harder to resist accepting the ceremonial gift if a person lives in the offender’s village. In urban areas, relatives are often distant and thus have less influence.

The Methodist minister I interviewed said that the church’s position now is that the victim has to be asked if she accepts the apology. She said that victims need counseling and support, which was not provided in the traditional practice. She described a domestic violence case she herself handled through bulubulu, in which she revised the process to give the victim a greater voice. The woman had been beaten by her husband for a long time. This woman took refuge in the minister’s house in town. As an educated, financially independent urban woman, the minister was a powerful person and able to protect her. When the husband arrived with tabua, yagona, and the chief of his mataqali to offer bulubulu, she and her son told him his behavior was intolerable and that he had to talk to his wife before she would accept the bulubulu. The wife refused to accept. The man made several further attempts to persuade his wife to return, and after a year, she agreed to return to him.

In this case, a woman orchestrated the bulubulu rather than a man, but her son was present and spoke for her. She did not accept the apology on behalf of the victim but required the offender to speak with the victim directly and allowed the victim to live with her until she was ready to accept the offering and return to her husband. In village practice, the girl was not asked her opinion about accepting the apology and the apology was delivered to the kin group, not to the victim. If she refused, she was pressured to go along. Thus, as Fijian society changes, the custom has changed from a practice that focuses on preventing vengeance between clans to one that supports a victim and holds the offender accountable. Both a leader of the antirape movement and a Fiji mag-

istrate told me that bulubulu can be good or bad depending on the gender sensitivity of the process and who is doing it.

There are also variations in the way the offender is treated after a bulubulu. In the past, he received a stern lecture from senior males and could be beaten by a stingray skin, which leaves permanent marks. In more recent times, severe sanctions from the offender’s kin may still occur, but particularly in urban areas or where kin are dispersed, it is likely that nothing is said to him except “next time, do not get caught.” Several people told me that if a bulubulu is performed today, there is little effort to punish the offender afterwards. The process is often done in a pro forma way without any apology or repentance. Even the gifts can be minimal. Offenders who have been pardoned are likely to offend again. While village elders may be severe to young kinsmen who offend, when young people move to the city, elders often remain in remote villages. Thus, in recent times, the victim has greater voice but the offender feels less pressure. Indeed, the process is intended to “forget” (bury) the offense, and some claim it does just that for the offender.

Thus, the same practice — ritual presentation of tabua and speaking the words of apology — differs significantly depending on the social status of the parties, their interpretation of it, and the engagement of a wider community. The custom, which was powerful as a mode of making peace in a small remote village where senior males exerted considerable power over young people, takes on a very different meaning in urban settlements in which young people earn their own living and no longer depend on senior males for land, fishing rights, and social power. Despite these enormous changes, it is, confusingly, called by the same name.

**BULUBULU AND THE LAW**

There are fundamental differences between the logic of bulubulu and the law. The law punishes the offender to deter future offenses. Bulubulu makes peace to avert vengeance. In the absence of reconciliation, the family of the victim is entitled to attack, beat up, or possibly kill the offender. The goal of the process is forgetting the offense between the families and restoring community peace. The apology is offered to the senior males of the family, not to the victim. It is not directed toward providing support to the victim or punishment to the offender, since these responsibilities rest on individual kin groups.

Injuries are conceived and remedies imagined quite differently. The law holds the offender accountable and views the raped person herself as the vic-
mit. It punishes the offender but fails to compensate the victim for her injuries. Bulubulu envisions the injury as an offense to the husband's or father's kin group. The elders apologize for what their son has done, and those receiving the apology feel that the injury has been done to their whole mataqali. Each kin group is responsible for controlling the behavior of its members and is shamed by the offenses of close kinsmen (Arno 1993: 98). Elders of a kin group may intervene to criticize, lecture, and scold an offender and may themselves initiate a soro. If the conflict is between younger men of different mataqali, the elders of both may intervene directly and conduct a soro, taking the matter out of the individuals' hands and expressing "the accepted idea that a person's actions are attributable to his group, and that therefore there are no strictly interpersonal conflicts" (Arno 1993: 98). Following this logic, rape is an offense against the victim's husband or family rather than the woman herself. Indeed, in one rape case Arno describes from the early 1970s, the husband of the victim lodged a complaint with the police (1980). Restoring good relations between groups will not necessarily diminish the suffering of individual victims. Ratuvu notes that shifting the responsibility from the offender to the kin group can undermine the individual rights of the victim for personal redress or compensation (2002).

Court and bulubulu are not alternative processes; they are interconnected and have been so for at least three decades. In the 1950s violence or the threat of violence was used to pressure defendants to apologize in cases of rape and domestic violence (Arno 1976: 62–63). With the advent of the threat of criminal prosecution, the police were used to force the offender to apologize. Filing a complaint with the police might encourage an apology. At the same time, ritual apology was used to avoid court penalties. If the offender can press the victim's husband into accepting his apology, he escapes the criminal penalties. Arno describes two cases from the 1970s where the victim filed a charge with the police, inducing the perpetrator to soro. One involved a rape (1980), the other a public attack on a senior man (1976: 59). If the offender apologized, the courts were willing to drop the cases. Accounts from the 1970s describe the courts dropping charges if a man has dealt with his offense through bulubulu. Magistrates sometimes sent cases back to the village to settle (Arno 1976).

Hickson says that in 8 out of 34 (24%) criminal cases involving Fijians heard in one magistrate's court between 1967 and 1971, charges were dropped after soro (1975: 228, n. 28). Indeed, the law stipulated that they were to seek amicable settlements (Wynn Furth, cited in Arno 1976: 52).

Arno gives a detailed account of a rape case from 1971–72 in which the aggrieved husband filed a charge with the police because the offender failed to apologize. A police officer came to the island and told the husband that the charge was very serious and that the offender faced prison. While admitting that he had done it, the offender said he was "only a game." Seven months later, a police official told the offender that he faced a prison sentence because the charge against him was very serious, but if the husband would accept a whale's tooth and send a telegram to the police headquarters saying that the matter had been settled by traditional means, the case would be dropped (Arno 1980: 348–54). The offender raced home to perform the soro as soon as possible. The husband of the victim forgave him and wired the police to drop the charge. Thus, there is a long history of using bulubulu to avoid court penalties. However, in the context of village life, bulubulu may have been more effective for the victim than was the court.

Since 1987, when some ethnic Fijian leaders engineered a coup to remove elected Indo-Fijians from power, there has been a resurgence of interest in Fijian custom along with Fijian cultural nationalism. A strong political and cultural movement celebrates Fijian custom and village life, including the use of bulubulu. One high-ranking Fijian chief condemned its use for rape, but for many the new emphasis on Fijian culture makes it more difficult to criticize its use as an alternative to courts. After 1987, the government declared it legal to use bulubulu for rape cases. In 1988, a group of feminist activists met with the chief justice of Fiji to voice concerns about the spate of rapes and the lenient sentencing of rapists. In response, he issued new, more severe, sentencing guidelines for rapists (Fiji Women's Rights Movement 2000: 13). The chief justice's circular memorandum no. 1 of 1988 recommended an immediate custodial sentence for rape (Beattie 1994: 74–75). This inspired an increasing use of bulubulu to escape custodial sentences. Eighteen months later the judge backed away from the more severe penalties.

Sparked by this retreat from more stringent penalties and the increasing use of bulubulu to get off, feminist organizations in Fiji, including the Fiji Women's Rights Movement, the Fiji Women's Crisis Centre, and the YWCA joined together in an antirape campaign (Bromby 1991: 19). From 1988 until 1994, the Fiji Women's Rights Movement lead the campaign, which included a critique of the court's use of traditional reconciliation practices for rapists. When I interviewed Peni Moore, the coordinator of the campaign, she said one impetus for the campaign was the 1990 decision by the chief justice to overturn the more stringent sentencing guidelines for rape. These guidelines had produced custodial sentences for rape of up to five years, but custodial sentences were no longer being given. Moreover, Moore was concerned about judges' acceptance of "traditional reconciliation," or bulubulu, as mitigation for rape cases. The anti-rape campaign focused on getting the judge to change his guidelines. In
2003 Moore said that the objection was not to using bulubulu in a parallel track to the courts but using the process to undermine legal punishment.

In an early 1990s Radio Australia broadcast, Moore said that using bulubulu to settle rape offenses is a new practice, not an old one.13

In fact, a very alarming new development is coming about because of a ceremonial practice called a bulubulu and this is when they present a tabua and all should be forgiven, and it is called a traditional reconciliation. In fact, from research we know that the bulubulu has never been used for situations of rape. Traditionally it was used when woman and man eloped. The man would go back to the woman's family and present the tabua as a bulubulu, or if two men fought and they wanted to reconcile, the bulubulu would be done. But a new development has come about where a bulubulu ceremony is performed and the rapist will come to the family and present it to the father. The girl isn't even discussed in this. If the family accepts the bulubulu, the girl must accept that. And then they try to get it out of court. If it has already been reported, then they go to court. The courts have started to recognize this. We've protested against this, and they are now accepting that it isn't correct and it shouldn't be accepted in court because rape isn't reconcilable. The problem is that because of this whole push about tradition, it's very easy to say, it's traditional and therefore you must do it. And what we're trying to say is, it's not traditional. It's a new invention, and in fact the women that we speak with, the Fijian women, say they believe it is the police who encouraged this in order to drop cases so they don't need to go through to court.

Thus, the antirape movement sought to return to an earlier, more stringent legal policy. It opposed bulubulu for rape because it was being used increasingly to provide offenders an escape from the new, harsher punishments such as jail time. There are accounts of forms of village and intervillage ritual apology and forgiveness dating back at least until the middle of the nineteenth century, but the use of this approach for rape seems to be relatively new. One Fijian commentator notes that bulubulu was never used in precolonial times to deal with the crime of rape, which was punished by death. But by the early 1990s, its use was on the rise in the courts and with the police (Emerson-Bain 1994: 32). The increasing popularity of bulubulu for rape reflected the mobilization of an old practice to deflect the new, more severe, court sentences for rape. Bulubulu offered rapists a new way to persuade police to drop charges and magistrates to reduce sentences. Thus, the antirape campaign was not against using an old tra-

dition but against the new use of an old practice to escape the new, sterner penalties for rape.

One of the questions raised about the use of bulubulu in courts is whether courts should consider the nature of the gifts and their severity. One of the most ardent defenders of Fijian custom argued that the gifts for serious offenses could be quite significant, such as a piece of land that devolves permanently to the kin group of the victim. In order for courts to judge the significance of a bulubulu, she argued, they have to ask what the gifts were. However, courts apparently do not ask, although one magistrate I spoke to said that she did. Others apparently only note that the bulubulu took place, perhaps in an affidavit provided by the defendant. It is primarily "Suva lawyers," those in the capital city, who try energetically to use bulubulu as a strategy to get their clients out of court. Some are civil lawyers rather than criminal ones. The girl is pressured to accept bulubulu to protect her family's name and to avoid public attention.

Bulubulu enters the legal deliberations at two distinct points. The first is at the point of arresting and charging. Fiji has a system of police prosecutors for much of its criminal work, so that the police face the decision of whether or not to press charges. In the past, bulubulu was often raised as a reason to drop charges. In recent years, the police have enacted a no-drop policy for rape and domestic violence as a way of preventing this problem. Although prosecutors told me that they never drop these cases now, I have not carried out the empirical research to determine if this is in fact the case. One prominent lawyer told me that cases of rape and domestic violence are still being dropped because of reconciliation processes, and a prosecutor said that, despite their efforts, girls are sometimes forced to accept bulubulu and drop the charges. The second way bulubulu enters the legal process is at the point of sentencing. Some argue that the completion of bulubulu should mitigate the sentence of a rapist, particularly the custodial sentence. Rape is currently handled in magistrate's courts, but some advocate shifting it to the high courts, which might be more resistant to this argument.

BULUBULU AND CULTURAL NATIONALISM

Even as there is pressure to eliminate consideration of bulubulu in courts, there is an ongoing project to reestablish Fijian courts to enforce Fijian customary law. The debate about using bulubulu for rape takes place within a larger context of the struggle between the ethnic Fijian and the Indo-Fijian communities. These two groups were treated very differently by the British colonial author-
fter Britain took Fiji in 1874, sugar planters imported large numbers of people from India to work as laborers in the fields. The populations reached parity in the middle of the twentieth century. Yet the British viewed the Indians as workers and the Fijians as villagers who needed to be protected and safeguarded in an unchanging way of life (see N. Thomas 1994). While the Indians, denied ownership of land, pursued education and business as the road to survival, Fijians remained in rural village enclaves, protected and isolated. By independence, some Indo-Fijians had joined the professional and business classes although most still lived as poor tenant farmers working land leased from Fijian clans on a limited-time contract. The British also established a system of communal voting in which each ethnic group voted for candidates of its own identity and seats in the legislature were allocated by group. Thus, British colonial policies created a situation of communal division and conflict (see Kelly 1991, 1997; Lal 1992, 2002; Kaplan 2004; Merry and Brenneis 2004).

In contemporary Fiji, bulubulu, like other village practices, is taking on new meaning within the politics of indigeneity. In the years following independence, Indo-Fijians have twice acquired power through electoral politics only to be displaced by an ethnic Fijian coup, once in 1987, when there were two coups close together, and once in 2000. The new Fijian nationalism excludes Indo-Fijians from political power. The doctrine of a paramountcy of Fijian interests, developed originally by Sir Arthur Gordon at the time of British annexation in 1874 and expanded in the early twentieth century, promises special privileges and preferential treatment for Fijians because of their indigenous status and primordial claims to land (Ratuva 2002). The concept of traditional Fijian culture and the values of the Fijian village are being mobilized to justify the continuing Fijian control of politics and more than 80 percent of the land. There is a need to justify land ownership in terms of the sacred link between the village and the land (Brison 2001; Kaplan 2004). The harmonious, sharing life of the village is contrasted with Indo-Fijian settlements that are portrayed as more individualistic and preoccupied with individual gain. Moreover, tourism has increased attention to this vision of the Fijian village, thus reinforcing the need to maintain the myth. As the Fiji Women's Rights Movement points out, practices that are described as traditional have now acquired new weight as essential to national identity. This contemporary political development makes it much harder to challenge the way custom is being used in Fijian communities.14

There is now a substantial out-migration of professional and educated Indo-Fijians, although poorer and less educated ones remain locked in rural poverty. Many Indo-Fijians have turned to a rights framework. On the other hand, Fijians are increasingly seen as bearers of the national culture. This pattern is reinforced by tourism, one of the major economic engines of the country, which features Fijian village life, arts and crafts, and traditions, such as fire-walking, but makes no mention of Indian cultural practices or festivals. Thus, Fijians defend their political control in terms of Fijian culture, epitomized in village life, while Indo-Fijians make claims to human rights. The opposition between culture and rights is being mapped onto ethnic differences. In this increasingly oppositional context, those who assert the importance of human rights do not think culture should trump rights, while those who defend culture see human rights, and particularly women's rights, as threats to culture. The juxtaposition of bulubulu and the law for rape cases replays this opposition. In this debate, culture is defined as national essence, even if it is shared by only half of the population.

BULUBULU AT THE UN

None of these issues came up at the CEDAW discussion. The CEDAW Committee adopted a straightforward view of bulubulu that did not include these complex considerations of urban-rural context and ethnic politics. There was no discussion of the fact that bulubulu could be helpful to a victim under certain circumstances nor that it is changing. Obviously, committee members did not have time to read the ethnographic literature, interview feminist, judiciary, and legal leaders in Fiji or develop a nuanced analysis of the practice. Bulubulu was only a small part of the issues in Fiji that the committee considered. The NGO shadow report did not discuss it nor did the NGO representatives raise it in their report to the committee. In the absence of detailed knowledge, the experts relied on the well-established category of harmful traditional practices and the assumption that village customs hinder women's equality. The idea of culture as tradition framed these customs as remnants of the past that must be changed to accommodate modernity, exemplified by human rights and gender equality, rather than as old customs newly deployed in urban contexts. From the vantage point of transnational modernity, such customs are part of traditional culture.

Why did the experts see bulubulu this way? And what does this tell us about the tensions between global law and local situations? The UN discussion did not deal with the complexity of the custom but focused on preventing its use for rape or eliminating it altogether. Neither the report, the NGO representatives, nor the government representative made clear how fundamental and widespread the practice was, or that it was used for many other offenses besides rape. They did not examine the practice of bulubulu in context or the ways it is
changing. Their lack of detailed, specific knowledge is an inevitable feature of such transnational forums. Yet, there are at least two other contributing factors. The first is an interpretive one, the second a more structural one linked to the nature of law itself.

First, I think the committee moved quickly from condemning the use of the custom for rape to a condemnation of the custom altogether because many of the CEDAW Committee members assumed that the problem they confronted was one of a custom embedded in traditional culture. They were inclined to condemn the entire practice, not just the way it extracted rape cases from court in urban areas. They talked about bulubula as a reprehensible custom for handling rape and as a harmful traditional practice that needs to be changed to improve the status of women. The custom was defined as a violation in and of itself rather than something used to derail legal penalties. It was presumed to be unchanging rather than adapting to a more gender equal, urban society.

In CEDAW hearings, as in other segments of the international human rights field, culture is used to describe the way of life of “others,” usually the rural and urban poor. Culture is not found in the UN or among transnational elites, but only among those still living in what is often referred to as traditional society. This particular usage of the term assumes that people with culture live in circumscribed and unchanging ways governed by strict traditions and share the same set of values and practices. Such a perspective on culture is reinforced by human rights documents about women that repeatedly insist that no cultural, religious, or traditional practice should undermine women’s rights. As experts listen to one country report after another, they often hear about customs that violate the terms of the convention and undermine women’s rights. They share the widespread opinion that customs are a remnant of the past that must be changed to accommodate modernity and gender equality. Thus, they are predisposed to see customs such as bulubula as problems.

Second, the experts are applying the law. They are acting as a legal body to enforce compliance with the terms of a treaty ratified by the country. The human rights system is a legal system committed to the universal application of a code of conduct to myriad particular situations. Its documents spell out this shared code, one legitimated by the process of consensual document production and ratification. The legal rationality at the heart of the process does not accept the existence of alternative normative codes as a reason to withdraw its scrutiny. Within the logic of legal rationality, there is no space to adjust the law to particular situations and contexts or to withhold its attention in favor of an alternative vision of justice. Of course, this universalizing approach is structured by the convention itself and the committee’s mandate to apply it to all countries equally. Countries that ratify it assume the burden of conforming to its requirements, regardless of their specific cultural attributes.

The CEDAW Committee is not deliberately promoting a universalistic transnational modernity but is part of a process in which the convention itself is the moving force. Indeed, the whole human rights process is based on the assumption that local features of culture, history, and context should not override universal principles. Human rights documents create a universal vision of a just society in which cultural difference is respected but only within limits: it does not justify assaults on the bodily integrity of vulnerable populations. Local features of culture and history should not override universal principles concerning how societies should be organized and individuals protected. Nor does this system provide space to recognize other, non-rights-based understandings of social justice.

Furthermore, since governments often raise culture as an excuse for their failure to promote gender equality and the values of autonomy and choice that are at the heart of the human rights system, women’s human rights activists see claims to respect the particularities of local cultures, traditions, or religious practices as resistance to women’s equality. These claims challenge the universality of women’s human rights. Consequently, transnational human rights activists have little sympathy for societies that allow separate personal laws for different religious communities or that practice customs that appear to violate the rights of women.

Conclusions

The contradiction between the desire to maintain cultural diversity and the effort to promote equality and rights universally is a fundamental tension within human rights practice. These two sets of goals are in conflict: applying a universalistic framework obscures local particularities, but yielding to local situations impedes applying universal categories. Rather than understanding how the practice of bulubula meshes with a complex set of kinship interventions, police and court actions, and urbanization, the human rights actors criticized the practice itself. Ironically, this feeds into a resistant ethnic nationalism that attributes its problems to human rights. By misinterpreting the practice as the problem, the CEDAW Committee evoked a nationalist and resistant response even from feminists opposed to leniency for rapists. It fed into an ethnic nationalism that blames contemporary social problems on the expansion of human rights and celebrates a reified culture as national essence.

In both of these cases, human rights approaches have the potential to im-
prove the position of women and to serve as a resource for marginalized ethnic groups. Under different political conditions, women's groups in India advocated a uniform civil code. Muslim and Hindu feminists recognize the need for reform of their personal law. Many Indo-Fijians see human rights as an important protection against ethnic Fijian claims to paramourcy. Ethnic Fijians are themselves claiming indigenous rights and developing affirmative action plans. Feminists of both ethnic groups in Fiji agree that in certain situations bulbulu allows rapists to escape punishment. Human rights are clearly an open resource, a source of political power available for mobilization by various groups in many different ways, but how they work depends on the context.

The tensions between the general and the particular arise frequently as the Committee deals with countries for which it inevitably lacks deep and detailed historical and particular knowledge. Government representatives, such as those from Fiji and Trinidad and Tobago, complained to me about the relatively limited amount of information the CEDAW Committee has about the particular history and situation of their countries. Despite the effort to solicit contributions from NGOs and the sketchy introduction each country provides in its report, it is impossible for experts to gain detailed knowledge of the social conditions of each country. In the absence of this information, the committee treats all countries more or less the same, as the convention requires. It does not judge local practices in context but applies the law as uniformly as possible. This means insisting on a uniform personal law in India despite the political uses of this demand by Hindu nationalists and seeking to eliminate bulbulu although even the Fiji feminists sought only to prevent using it as an excuse to get rape cases out of court. The committee has watched how claims to culture justify women's oppression and is deeply suspicious of cultural claims, even when they seem deeply rooted historically. The personal laws in India appear to be cultural traditions oppressive to women as does bulbulu. In both cases, the committee focused narrowly on gender subordination rather than viewing the intersections of gender with ethnic, religious, and class exclusions.

A more anthropological view of culture could highlight changes in the sociocultural life of village communities or urban neighborhoods. The cash economy, state bureaucracy, media, and warfare, for example, have penetrated deep into the most rural and remote places. Interventions that promote social equality for women now may be different from those of twenty years ago. Focusing on culture only as a barrier both ignores the extent to which change is taking place and de-emphasizes the importance of economic and political factors in furthering those changes. It is part of "culturalizing" the social life of peoples remote from the urban middle and upper classes: seeing their behavior only in terms of culture rather than in terms of economics, politics, and social class. It subtracts the economic and political effects of globalization such as the spread of capitalism and the shrinkage of state services in favor of a focus on beliefs and values. It ignores the possibility that there are embedded in local communities alternative visions of social justice that are not founded on conceptions of rights but on ideas such as sharing, reconciliation, or mutual responsibility. Finally, it engenders national identity claims reminiscent of German romantic defenses of Kultur. A more elaborated theory of culture would underscore the ways local cultural practices and beliefs interact with global legal principles and the importance of seeing these in context.