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Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach

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ABSTRACT

States are free to choose their own means for implementing international human rights obligations. Western states usually rely on legal means, in particular legally enforceable individual rights. However, law does not enjoy a monopoly. The receptor approach assumes that, especially in Eastern and Southern states, international human rights obligations can be implemented more fully through local social institutions. It identifies domestic social institutions capable of meeting human rights standards and assumes that, where these social arrangements fall short of human rights obligations,

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they will have to be improved and reformed. This should be done as much as possible with the help of home-grown remedies to foster the cultural legitimacy of international human rights standards.

I. INTRODUCTION

In the adversarial debate on universalism and cultural relativism, international human rights and local culture are often regarded as being diametrically opposed.[1] Those who support universalism believe that the implementation of international human rights might require giving up traditional values. Cultural relativists, on the other hand, claim that local values may validly oppose the implementation of international human rights in whole or in part. This article argues that the twain can actually meet and that international human rights can be more fully implemented with the help of existing local social institutions.

The article provides an alternative view on the implementation of international human rights, the so-called receptor approach, which assumes that the culture and the existing social institutions of Eastern and Southern countries can actually contribute to meeting international human rights obligations. The receptor approach starts from the premise that, by relying on local socio-cultural arrangements during the implementation stage, human rights protection will be enhanced and reinforced rather than diminished. This can be done first by matching, i.e. identifying and making visible, domestic social arrangements supporting and protecting human rights that are already in place. Second, if these arrangements fall short of the international human rights requirements, amplification is the next step: elements must be added to the existing institutions rather than attempting to replace them with Western-centered solutions.

The receptor approach is based on two interlocking premises. First, states are bound by the obligations laid down in the human rights treaties which they have ratified. In other words, they may neither water down nor compromise such obligations unilaterally by invoking local cultural values, but should implement them diligently and in good faith. Second, states are encouraged to rely as much as possible on their own culture and social institutions at the implementation stage to enable them to fulfill their treaty obligations fully.

1. *See, e.g.*, Jack Donnelly, Universal Human Rights in Theory and Practice 89–90 (2d ed. 2003); Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 Hum. Rts. Q. 315, 317 (1993); Michael J. Perry, The Idea of Human Rights: Four Inquiries 80 (1998); John J. Tilley, *Cultural Relativism*, 22 Hum. Rts. Q. 501, 507 (2000); Makau Mutua, Human Rights: A Political and Cultural Critique 39 (2002); Daniel A. Bell, East Meets West: Human Rights and Democracy in East Asia 14–15 (2000).

The receptor approach owes its name to the receptors known from biomedicine. The cells in our bodies are exposed to numerous external signals. The receptor molecules, located at the outer membrane of the cell, determine which signals are allowed to enter the cell and which ones will be blocked.[2] The receptor approach in the field of human rights assumes that international human rights will be most effective if they are able to lock on to socio-cultural receptors in diverse cultures, which will allow them to play a role in the societies concerned.

The receptor approach is currently being tested in close cooperation with a team of Chinese scholars working at the Institute of International Law of the Chinese Academy of Social Sciences, led by its Director, Professor Zexian Chen, and the Research Center for Human Rights of Shandong University School of Law, led by the Dean of the Law School, Professor Yanping Qi.

This article advances in six sections. Section II will discuss precisely what the duty of states to implement human rights obligations entails by dealing with two assumptions. The first assumption is that human rights treaties need to be implemented by according enforceable rights to individuals and by relying on law. The second assumption is that international human rights law requires states in the East and the global South to give up their traditions and institutions to make way for the Western values and institutions that are supposed to underlie human rights. As will be explained, both public international law and human rights treaties leave it to the states to determine how to implement their obligations. In addition, states are not expected to sacrifice their culture or their values when they ratify human rights treaties. Section III will lay out the matching phase of the receptor approach, while section IV will deal with the amplification phase. In section V, the receptor approach will be contrasted with other concepts put forward to bridge international human rights and local cultural diversity, most notably those of Alison Renteln, Abdullahi An-Na'im and Sally Engle Merry. Section VI contains concluding observations.

For the purpose of this article, a "social institution" is defined as "a complex of positions, roles, norms and values lodged in particular types of social structures and organizing relatively stable patterns of human activity with respect to fundamental problems in producing life-sustaining resources, in reproducing individuals, and in sustaining viable societal structures within a given environment."[3] This definition covers both formal institutions, such as state law, and informal ones, like customary law and values. Family, religion, education and law are examples of such social institutions. The

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2. Hiram F. Gilbert, Basic Concepts in Biochemistry 123–26 (2d ed. 2000); Timothy J. Maher & David A. Johnson, *Receptors and Drug Action*, *in* Foye's Principles of Medicinal Chemistry 85 (Thomas L. Lemke & David A. Williams eds., 6th ed. 2008).
3. Jonathan H. Turner, The Institutional Order 6 (1997).

term "culture" describes a "historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life."[4] A "tradition" is an element of culture that is passed on to and accepted by a new generation.[5] "The West" refers to societies that embrace Western culture—found mainly in Europe, North America, and Australasia—which should be distinguished from Asian societies in the East and African and Latin-American societies in the global South. The examples described in this article have been taken from Africa.

II. THE SCOPE OF THE DUTY TO IMPLEMENT HUMAN RIGHTS OBLIGATIONS

A. Human Rights Treaties Do Not Require Implementation Through Granting Individual, Enforceable Rights

The Western liberal approach towards human rights tends to equate the implementation of human rights treaties with granting enforceable rights to individuals.[6] However, in many African and Asian societies, which are communal in nature, substantial cultural texture is provided by non-legal social institutions like community, duties, and religion.[7] In the West, the Southern and Eastern reluctance to translate human rights obligations into legal rights has sometimes been regarded as a failure to implement them.[8] The question thus begged is whether international law and human rights treaties require implementation through taking legal steps or conferring enforceable rights, or whether states parties may rely on other social arrangements instead.

Under general international law, states enjoy discretion with regard to the implementation of treaty obligations within the municipal order.[9] As long as they meet the obligations laid down in the treaty they have ratified, they are free to choose the most appropriate way of implementing those rights at the domestic level. In other words, domestic application is an obligation of

4. Clifford Geertz, The Interpretation of Cultures 89 (1973).
5. Pierre Bonte & Michel Izard, Dictionnaire de L'ethnologie et de l'anthropologie 710 (4th ed. 2010).
6. John Charvet & Elisa Kaczynska-Nay, The Liberal Project and Human Rights, The Theory and Practice of a New World Order 223–88 (2008).
7. Mutua, *supra* note 1, at 71–93, 112–25. *See generally* Bell, *supra* note 1, at 23–105.
8. Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 Am. Pol. Sci. Rev. 303 (1982).
9. Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 57 (2d ed. 2005).

result rather than an obligation of means.[10] The implementation of treaties, including human rights conventions, is thus governed by the principle of "'domestic primacy.'"[11]

Domestic primacy has been reconfirmed by the implementation clauses of international human rights treaties. Thus, Article 2(2) of the International Covenant on Civil and Political Rights ("the Covenant") obliges the states parties "to adopt *such laws or other measures* as may be necessary to give effect to the rights recognized in the present Covenant."[12] The Covenant regards law as a means, but not the sole means, of implementation. Furthermore, it does not require the contracting states to grant individual enforceable rights to those who are under their jurisdiction. It is true that the Human Rights Committee has indicated that incorporation into national law of the Covenant guarantees may enhance their protection, but it has also made clear that Article 2(2) does not require such action.[13] This rebuts the view expressed by Anja Seibert-Fohr that the Covenant requires incorporation of its guarantees into national law.[14] Although some provisions expressly require states to take legal measures to implement their obligations,[15] these confirm the rule that in general they are free to choose whatever means they see fit. Consequently, under both public international law and the implementation clauses of human rights treaties, states parties enjoy discretion with regard to the means they employ to meet their treaty obligations, be it law or other social institutions.[16]

Public international law regards the implementation of human rights treaties as a discretionary authority, leaving it to the contracting states to choose the most appropriate means.[17] These include, for example, organizing awareness-raising campaigns,[18] setting up training programs,[19] initiating

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10. Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, *in* The International Bill Of Rights: The Covenant on Civil and Political Rights 311 (Louis Henkin ed., 1981); Nowak, *supra* note 9, at 57.
11. Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 Ga. J. Int'l & Comp. L. 1, 12 (2006).
12. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 2(2), U.N. Doc. A/6316 (1966) [hereinafter ICCPR], 999 U.N.T.S. 3 (*entered into force* 23 Mar. 1976)(emphasis added).
13. *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted* 29 Mar. 2004, U.N.GAOR, Hum. Rts. Comm., 80th Sess., 2187th mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).
14. Anja Seibert-Fohr, *Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 Para. 2*, 5 Max Planck Y.B.U.N.L. 399, 420–39 (2001).
15. The obligation to protect the right life by law laid down in Article 6(1) of the Covenant is treated similarly. ICCPR, *supra* note 12, art. 6(1).
16. Shachter, *supra* note 10, at 313–15; Nowak, *supra* note 9, at 58.
17. Shachter, *supra* note 10, at 319–20.
18. *Summary Record of the 630th Meeting of the Committee on the Elimination of Discrimination against Women*, U.N. GAOR, Comm. on Elim. of Discrim. Against Women, 30th Sess., ¶ ¶ 3, 5, U.N. Doc. CEDAW/C/SR.630 (2004).
19. *Summary Record of the 606th Meeting of the Committee on the Elimination of Discrimination against Women*, U.N. GAOR, Comm. on Elim. of Discrim. Against Women, 28th Sess., ¶ 7, U.N. Doc. CEDAW/C/SR.606 (2003); *supra* note 18, ¶ 7.

educational reform,[20] and providing childcare and similar support services to allow women to continue their education.[21] Consequently, human rights treaties adopt an approach which is both discretionary and functional, leaving it to the states to choose the most suitable national means to meet their obligations.

As a result, Eastern and Southern states are perfectly free to implement their treaty obligations without using legal means or conferring individual, enforceable rights. They are allowed to rely on other social arrangements, like bonds of kinship, community relations, and duties, which may fit better into their culture and traditions. The social arrangements in place are meant to give meaning to the human rights obligations entered into by the state. Only when the existing social institutions fall short of this aspiration may the problem be lifted to and dealt with at the international level, where the state will be held accountable in legal terms. While Western countries may prefer rights, others are free to opt for functional equivalents. Therefore, if a state chooses to implement a human rights provision through a social arrangement other than rights it is not failing its duties, but using one of several legitimate courses of action open to it.[22]

B. Human Rights Treaties Do Not Require Sacrificing Local Values and Culture

Western observers tend to believe that human rights are inalienable, natural rights in the sense that every person, by virtue of being a human being, should be able to enjoy them, regardless of time and place, and whether or not these rights have been recognized by existing law.[23] This conception of rights emanates from the Enlightenment and is therefore undergirded by liberal values like personal autonomy, choice, freedom, secularity, rationality, and a scientific approach.

Commentators in other parts of the world beg to differ.[24] Members of societies that revolve around the family and the community often express the view that individuals should not only serve their own interests by claiming rights, but should also contribute to the commonweal by fulfilling duties and by discharging responsibilities. This approach is rooted in the Confucianism

20. *Id.* ¶ 9.
21. *Id.* ¶ 46.
22. T.W. Bennett, Human Rights and African Customary Law Under the South African Constitution 4 (1995).
23. Donnelly, *supra* note 1, at 7–53; Perry, *supra* note 1, at 11; Mark Goodale, Surrendering to Utopia: An Anthropology of Human Rights 18 (2009).
24. Mutua, *supra* note 1, 71–93; Bell, *supra* note 1, 49–105; Thandabantu Nhlapo, *The African Customary Law of Marriage and the Rights Conundrum*, *in* Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture 136 (Mahmood Mamdani ed., 2000).

that marks many Asian societies[25] and the collectivism which characterizes African societies.[26]

Both of these views on human rights are equally valid. However, some Western commentators believe that Western human rights values, which they regard as being universal or cosmopolitan, should not only guide Westerners, but also the other members of the world community.[27] The important contributions to the debate made by Merry, who believes that the human rights regime articulates a "cultural system . . . rooted in secular transnational modernity," exemplify this approach.[28] Consequently, when commentators describe human rights as universal, sometimes they mean not only that everybody should be able to enjoy them, but also that the value system underlying the Western view on human rights is the model to be emulated. Under those circumstances the universalism ambition becomes a push for uniformity.

The position that one worldview is morally superior to another is difficult to maintain.[29] More importantly, claims of superiority have lost their significance as a result of the emergence of the legal international human rights regime after World War II. Under this regime international human rights obligations are binding on states, not because they flow from a particular philosophy, but because they are rooted in positive law. In other words, the obligations of states in the area of human rights are legal commitments resulting from the treaties they have ratified, rather than moral ones.

All contracting states parties, regardless of their philosophical views on human rights, have decided to put their eggs in the treaty mechanism basket. They have moved from philosophy to positive law as the source of the binding nature of human rights.[30] By ratifying these treaties, Western states also have accepted that law rather than the accomplishments of the Enlightenment, serve as the basis of human rights obligations. Human rights treaties are neither Western nor Eastern, neither Northern nor Southern. Instead, states parties must live up to the obligations to which they have committed themselves, nothing more, and nothing less.

The receptor approach, in contrast, holds that within this regime of human rights grounded in positive law, states can remain loyal to their own philosophical convictions to the extent the legal regime allows them.

25. Xinzhong Yao, An Introduction to Confucianism 153–89 (2000).
26. Vincent B. Khapoya, The African Experience: An Introduction 39–40 (3d ed. 2010).
27. Donnelly, *supra* note 1, at 7–53; Perry, *supra* note 1, at 11–41; Goodale, *supra* note 23, at 18.
28. Sally Engle Merry, Human Rights and Gender Violence: Translating International Law Into Local Justice 90, 220–21 (2006).
29. Mutua, *supra* note 1, at 109–110.
30. Jerome J. Shestack, *The Philosophic Foundations of Human Rights*, 20 Hum. Rts. Q. 201, 209 (1998).

Nowhere in the treaties does it say that human rights are the prerogative of modern states and, therefore, that signatory states with traditional societies should modernize by embracing rational secularism. Such a conclusion would be difficult to reconcile with the importance attached by the Covenant to traditional institutions like the family, as the "natural and fundamental group unit of society," religion, and marriage.[31]

Despite the existence of this straightforward legal regime, Western normative assumptions frequently spill over into the interpretation of states parties' treaty obligations. This mixing of the legal and philosophical discourses is caused by the ambiguity of the concept of "human rights," which inherently signifies multiple meanings.[32] On the one hand, human rights stand for the Western movement that promotes the accomplishments of the Enlightenment and assumes that people possess human rights because they are human. On the other hand, they are also commonly used to describe the rights laid down in the human rights treaties, which the signatory states are bound to uphold.[33] Thus, the same phrase describes two different concepts, one rooted in natural law theory and the other grounded in positive law. This confusion is increased even further because supporters of the natural law theory regard the consensus manifested through the ratification of human rights treaties as proof that human rights exist regardless of whether they are recognized by positive law.[34] This linguistic looseness contributes to the idea that all states parties to human rights treaties have committed themselves to the Western view on human rights. The treaties themselves, however, require no such thing and therefore the assumption cannot stand.

III. THE MATCHING STAGE OF THE RECEPTOR APPROACH: RELYING ON ETHNOGRAPHY AND ETHNOLOGY

The receptor approach is based on sensitivity to and respect for the culture of every society.[35] It assumes that every value system—whether Northern or Southern, Eastern or Western—has its own inner logic and is aimed at achieving its own conceptualization of fairness and human dignity. This means that every concept in every system has to be approached with an open mind in order to identify its rationale.

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31. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., art. 16(3), U.N. Doc. A/RES/3/217A (1948).
32. Shestack, *supra* note 30, at 215–34; Marie-Bénédicte Dembour, *What Are Human Rights? Four Schools of Thought*, 32 Hum. Rts. Q. 1 (2010).
33. Dembour, *supra* note 32, at 2–3; Perry, *supra* note 1, at 46.
34. Dembour, *supra* note 32, at 6.
35. This approach is also promoted by Mutua, *supra* note 1, at 109–10.

Thus, to people from the West, which is characterized by a belief in retributive justice based on punishment, the restorative justice model relied upon in Africa, which focuses on re-establishing harmony, may not make much sense. Why should a person who has committed a murder be allowed to get away with it by apologizing to the family of the victim and by drinking a bitter drink or stepping on an egg?[36]

However, there is a very convincing explanation why Africans, especially in rural areas, attach so much value to this kind of mediation.[37] Communities in Africa are multiplex societies, in which economic, social, and family relations are intertwined. Consequently, one comes across the same people in multiple social settings. Thus, the person one works with on the land may at the same time be a member of one's family, the traditional healer who takes care of the sick, and a member of the family council, which takes important decisions affecting every day life. Therefore tensions in one area of social life may have a rippling effect on other areas as well. A conflict with the fellow laborer on the land may easily spill over into the provision of healthcare and the conduct of politics, which may poison the atmosphere in the community and paralyze its social life. Administering restorative justice helps resolve the conflict and restore harmony quickly. This will not be immediately obvious to someone who is used to living in a simplex society, which is characterized by a clear division of labor and less overlap between roles.

The receptor approach therefore aims at providing an ethnography of the social institutions that are in place in any given society to achieve fairness and human dignity, like kinship, education, community, or self-help. As part of an ethnological exercise those social institutions are then related to the international human rights requirements. Where there is a full match, the state is living up to its international human rights obligations, despite the fact that it may not be relying on law or rights. If there is no match, or only a partial one, the state has to improve existing social arrangements to meet its international obligations.

In order to identify the institutions in African society that can serve as receptors, one should keep in mind that human rights relations on the continent are different from those in the West. Because in Africa "power … radiates outward from the core political areas and tends to diminish over distance,"[38] the state plays only a limited role in the daily lives of many Africans.[39] Therefore the individual/state paradigm, which structures human

36. Conflicting perspectives on the merits of local restorative justice also feed into the discussion on the complementarity requirement laid down in the Rome Statute. *See* Gregory S. Gordon, *Complementarity and Alternative Justice*, 88 Or. L. Rev. 621 (2009).
37. Fatou Kiné Camara, Pouvoir et Justice Dans la Tradition des Peuples Noirs (2004).
38. Jeffrey Herbst, States and Power in Africa: Comparative Lessons in Authority and Control 252 (2000).
39. *Id.* at 251–72.

rights relations in the West, is of less relevance in the African setting. Instead Africans tend to rely on and to invest in their local community, in particular in their extended family, rather than far away state institutions. The African approach focuses on collective survival, rather than pursuing individual self-interest, and therefore relies on "cooperation, interdependence, and collective responsibility."[40] Individual rights exist within the context of the group and therefore must always be balanced against the collective interest.[41]

In Africa, entitlements and obligations form the very basis of the kinship system. Each member is supposed to assist the family in operating as an economic and social unit, and such assistance is embedded in a framework of interconnected rights and duties.[42] Certain rights are inherent to the membership of the extended family[43] and they are complemented by the duties one has towards the members of one's family. In Western societies it is up to the state to assist the infirm and the vulnerable, like elderly people, widows and orphans, through social welfare. Within the African context, by contrast, such assistance is deemed a family matter.[44] It is the responsibility of the family to help out those who have fallen victim to a "bad harvest, fire, or theft, [to] settle[] disputes between its members, including husbands and wives engaged in domestic battles, and [to invest in] education and advancement of its members."[45] In Africa, therefore, duties are not owed to a distant and anonymous state entity, but to relatives who are close, and on whose support one depends in order to survive. Consequently, human rights relations in Africa are more direct, personal, and reciprocal, and therefore more horizontal than they are in the West.

Within the context of kinship in Africa, several social institutions may serve as human rights receptors, in particular: the support generated by membership of an extended family; the performance of duties by others; religious charitableness; and the stimulation of self-help. Membership in the extended family provides a number of human rights, like the communal right of succession to family property; the right to be supported in times of scarcity; the right to claim social and psychological help in moments of need;[46] and the right to social welfare, including benefits, social security, and old age pensions.[47] "Membership in an extended family is itself regarded as

40. Josiah A.M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 Hum. Rts. Q. 309, 320 (1987). *See id.* at 320–324.
41. Lakshman Marasinghe, *Traditional Conceptions of Human Rights in Africa, in* Human Rights and Development in Africa 32, 33 (Claude E. Welch, Jr. & Ronald I. Meltzer eds., 1984); Cobbah, *supra* note 40, at 321.
42. Cobbah, *supra* note 40, at 32.
43. Marasinghe, *supra* note 41, at 34–36.
44. *Id.* at 34.
45. *Id.* at 36.
46. *Id.* at 34.
47. Cobbah, *supra* note 40, at 322; Nhlapo, *supra* note 24, at 142.

a fundamental human right."[48] The control of membership of the group and the power to exclude are a powerful instrument of coercion in the hands of its members.[49]

Renteln has made the important point that moral systems that are duty-based can accommodate human rights, because rights often correlate with duties performed by others.[50] Thus, in Africa parents are supposed to take care of their children, while grown children are expected to provide for their parents. Mothers with young children may call on the entire community for support, while the aged and the infirm can fall back on the network of security offered by the family.[51] The younger family members in particular are supposed to show respect for parents, for elders belonging to the same extended family, and for the head of the whole family.[52] This "principle of respect" serves the honor and reputation of those who are hierarchically superior, but may also limit the exercise of certain rights by younger family members, like the freedom of expression. This is part of the "belief that all freedoms are ultimately limited by the need to preserve the traditional society."[53]

In Africa, religion serves as an important receptor for human rights. This is exemplified by the study performed by Richard Baah into the human rights culture of the Akan, a people in Ghana.[54] In Akan society, religion is a significant part of everyday life and it has a major impact on human relations. Like many other people in Africa, the Akan are motivated to be good to each other because they believe that this is the best way to translate the will of God into daily practice. Therefore, within Akan society the human rights culture has a strong religious foundation. As Baah[55] and Seth Kaplan[56] have noted, the importance of religion as a conduit for human rights is often overlooked or avoided by Westerners, because of their attachment to the concept of separation of church and state and the notion that human rights ought to support a modernization agenda. Kaplan has convincingly demonstrated, however, that improvements in the area of human rights can be achieved by building on faith and religion.[57]

48. Marasinghe, *supra* note 41, at 34.
49. *Id.* at 33.
50. Alison Dundes Renteln, International Human Rights: Universalism Versus Relativism 12 (1990). *See also* Chung-ying Cheng, *Transforming Confucian Virtues into Human Rights: A Study of Human Agency and Potency in Confucian Ethics, in* Confucianism and Human Rights 142, 146 (Wm. Theodore de Bary & Tu Weiming eds., 1998).
51. Cobbah, *supra* note 40, at 322; Nhlapo, *supra* note 24, at 142.
52. Marasinghe, *supra* note 41, at 36–37.
53. *Id.* at 37.
54. Richard Amoako Baah, Human Rights in Africa: the Conflict of Implementation 53–57 (2000).
55. *Id.* at 55.
56. Seth Kaplan, *Faith and Fragile States: Why the Development Community Needs Religion*, Harv. Int'l Rev., Spring 2009, at 22; Seth Kaplan, *Inspiring Development in Fragile States*, Rev. Faith & Int'l Aff., Dec. 2010, at 11.
57. Seth D. Kaplan, Fixing Fragile States: A New Paradigm for Development (2008).

That self-help can act as a receptor for human rights is exemplified in the strategies developed by Malawian women in the fight against HIV/AIDS.[58] They often discuss with their husbands the risk of contracting HIV/AIDS as a result of extramarital relations; they confront their husbands' girlfriends about this risk; and they threaten their husbands with divorce if they do not adjust their behavior.[59]

Women who have been victims of domestic abuse are often reluctant to lodge a criminal complaint against their husbands or to testify against them, because they and their children will suffer if the breadwinner ends up behind bars. Therefore, as December Green has noted, organizations of women in Africa are increasingly replacing legal strategies by economic ones in order to tackle domestic violence.[60] They focus on housing, employment, and economic alternatives that enable women to leave abusive relationships.[61] The Family and Marriage Association of South Africa (FAMSA), which invests in the economic empowerment of women, is such an organization.[62] Thus, the Grahamstown branch of FAMSA offers skills training and support in setting up small businesses, which allows women to close the door on their violent relationships.[63]

Since implementation is not necessarily a legal exercise, its study should not be left exclusively to lawyers. Consequently, the receptor approach does not settle for a quick scan of domestic law, but aims for a detailed analysis of social institutions operating in the country, which may play a role in the implementation of international human rights obligations. Thus, to map the human rights performance of a particular state, ethnographic research will be more important than legal analysis. The receptor approach relies on social research methods, like consensus analysis, to identify socio-cultural arrangements that promote and protect human rights.[64] To collect the necessary data the researchers rely upon the so-called "free listing" interview technique, which helps to filter out any ethnocentric biases that may exist.[65]

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58. Enid Schatz, *'Take Your Mat And Go!': Rural Malawian Women's Strategies in the HIV/AIDS Era*, 7 Culture, Health & Sexuality 479 (2005).
59. *Id.* at 483–88.
60. December Green, Gender Violence in Africa: African Women's Responses 222 (1999).
61. *Id.*
62. *See* FAMSA Families South Africa, *available at* http://www.famsa.org.za/
63. I am indebted to Anne Harris, the Director of FAMSA Grahamstown, and the members of her team for allowing me to observe them while they were engaging in these projects in April 2010.
64. A. Kimball Romney, Susan C. Weller & William H. Batchelder, *Culture as Consensus: A Theory of Culture and Informant Accuracy*, 88 Am. Anthropologist 313, 329 (1986).
65. Stephen P. Borgatti & Daniel S. Halgin, Elicitation Methods for Cultural Domain Analysis 9 (7 Apr. 2011)(unpublished manuscript), *available at* http://www.steveborgatti.com/papers/bhetk.pdf.

IV. THE AMPLIFICATION STAGE OF THE RECEPTOR APPROACH

A. The Existing Social-Cultural Context Should be Taken as the Point of Departure

Under the receptor approach, states parties to human rights treaties are encouraged to meet their obligations with the help of existing social arrangements. If these existing social institutions fall short of the treaty requirements, they will have to be adjusted or amended in order to bring them into line with treaty standards. As will be explained in more detail in Section IV below, social and legal engineering alone are likely to have only limited effects. Such institutional changes therefore require cultural legitimacy, so that accepting them becomes a sensible option. Consequently, under the receptor approach reforms which are meant to bring existing social arrangements into line with international human rights standards should also be linked to cultural receptors as much as possible. This viewpoint presumes that reformers have a clear understanding of the socio-cultural setting.

According to Bonny Ibhawoh, cultural barriers to human rights cannot be removed by simply papering over them with legislation.[66] Thus, in some African countries statutory bans of female genital mutilation ("FGM") exist, but they are not being enforced for fear of alienating powerful players or increasing tensions between practicing and non-practicing communities. Criminalizing practitioners and families has only led to the practice being driven underground. Reforms will only be effective if they result in changes in cultural attitudes which are sustained by local communities.[67]

In order to find a way to eradicate FGM, one should start by understanding its socio-cultural context. Although to the outside observer all these practices may look the same, the reason why they are kept in place actually differs from culture to culture. In order to end the practice in a particular area, it is therefore necessary to understand why women are circumcised in that region in the first place. In this vein, Ellen Gruenbaum has identified five motives for female circumcision: enhancing marriageability through preservation of virginity; undergoing a rite of passage to adult womanhood; making intercourse more pleasurable for men; marking ethnic identity or ethnic superiority; and meeting religious expectations.[68] To find the appropriate remedy to implement the ban on inhuman or degrading treatment,

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66. Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 Hum. Rts. Q. 838, 856 (2000).
67. *Id.* at 857–58.
68. Ellen Gruenbaum, *Socio-Cultural Dynamics of Female Genital Cutting: Research Findings, Gaps, and Directions*, 7 Culture, Health & Sexuality 429 (2005).

one should find out which of these motives enables or legitimates female circumcision in any given society.

If female circumcision serves to enhance marriagabilty through preservation of virginity, the remedy should be tailored to this rationale. In societies where FGM serves marriagability, the mothers of the girls subjected to the practice usually are the strongest advocates of its preservation.[69] Mothers usually insist that their daughters undergo circumcision, so that they may marry and have children, thus achieving a degree of economic security.[70] Without a husband there may be barriers to or limitations on access to land, cattle, grazing rights, or cash income.[71] The hope is that grandchildren will contribute labor to the family enterprise, and they will support the grandparents when they reach old age.[72]

In such a cultural setting a so-called pledge society will likely serve as an effective remedy. The practice may be abandoned if the parents of boys pledge that their sons will only marry uncircumcised young women, as a result of which parents of girls can safely pledge not to circumcise their daughters.[73] By encouraging the members of the entire intermarrying community to make such pledges, the practice can be eradicated. An NGO called Tostan has been doing this with considerable success in Senegal.[74]

B. Reforms Should Be Based on Home-Grown Solutions

The receptor approach assumes that human rights shortfalls should not be remedied by legal engineering, i.e. by simply transplanting the international individual right norms laid down in the treaties to national systems. The judgment of the South African Constitutional Court in the *Nonkululeko Letta Bhe* case exemplifies such legal engineering.[75] In 2002 Mrs. Bhe's husband had died. Because they had been married under customary law, the inheritance was subject to the principle of male primogeniture, meaning that the deceased's material goods, including the property where he and Mrs. Bhe had

69. Ellen Gruenbaum, The Female Circumcision Controversy, an Anthropological Perspective 45 (2001).
70. *Id.*
71. *Id.* at 45–46.
72. *Id.* at 46.
73. Gruenbaum, *Socio-Cultural Dynamics of Female Genital Cutting*, *supra* note 68, at 437.
74. *See Abandoning Female Genital Cutting,* Tostan: Community-led Development, *available at* http://tostan.org/web/page/586/sectionid/547/parentid/585/pagelevel/3/interior.asp. The concept of the pledge society actually is a Chinese invention, which was introduced successfully to bring the practice of foot binding to an end at the beginning of the twentieth century. *See* Gerry Mackie, *Ending Footbinding and Infibulation: A Convention Account*, 61 Am. Sociological Rev. 999, 1001 (1996).
75. Nonkululeko Letta Bhe v. Magistrate, Khayelitsha, 2005(1) BCLR 1 (CC) (S. Afr.).

lived, were inherited by his father. Mrs. Bhe, who was left empty-handed, challenged this unsatisfactory outcome before the courts and the case went all the way up to the Constitutional Court.

The Court concluded that the principle of male primogeniture discriminated against women and it struck down the contested customary law provisions as being contrary to the equal protection clause in the South African Constitution,[76] a provision based on international examples. By way of relief, the Court decided to fill the legal void by allowing state succession law to replace the customary provisions that had been stricken down, until Parliament would have an opportunity to legislate on the matter.[77] By introducing a right to inherit, the Constitutional Court did indeed remedy the violation of the equal protection clause, because the widow no longer was in an inferior position. However, it did so by vesting a property right in the widow that is alien to the collective ownership which characterizes customary law. In that tradition land is owned collectively by the people and it is allocated to families; the husband is not the individual owner of the land, but the steward acting in the interest of his family and the entire community, rather than in his own individual interest.

As Elmarie Knoetze suggests, in *Bhe* the Court considered succession through a Western lens as a transaction aimed a redistributing the wealth of the deceased, rather than an important mechanism to safeguard the traditional way of life of a particular household.[78] Under the receptor approach an indigenous reform would have been sought.[79] For example, the widow could have been appointed the co-administrator of the estate, together with the male relative who took over stewardship from the deceased. There are precedents for such a concept in customary law. This would have done justice to a traditional legal system to which approximately 40 percent of the South African population is subject.

Therefore, if the social institutions in a particular state fall short of international human rights standards, the answer should not be sought in legal engineering with the help of transplants, but in finding home-grown remedies. The receptor approach is based on the idea that reforms should add to, but not replace, the existing social arrangements. It opposes the introduction of *Fremdkörper* into customary law if home-grown remedies can be found that, while undoing the violation, remain loyal to the social relations existing in that particular society. Judges should not use Western-centered concepts if customary law can be tailored to meet the requirements. The local values

76. *Id.* ¶ ¶ 95–97, 136.
77. *Id.* ¶ ¶ 116–17.
78. Elmarie Knoetze, *Westernization or Promotion of African Women's Rights?*, 20 Speculum Juris 105, 109 (2006).
79. *Id.* at 110 (opining that alternative, customary law remedies could have been found).

should serve, therefore, as sources for solutions which meet human rights obligations, like stem cells. This microsurgery will ensure that the reforms take root and become embedded in the society concerned. Changes that add to the existing arrangements stand a far better chance of being supported and carried by the community than those that are enforced top-down.

This approach draws inspiration from the views expressed by An-Na'im and Ibhawoh. An-Na'im has argued that, "since people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions, observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards."[80] Ibhawoh has pleaded for adopting a "sensitive approach that seeks to understand the social basis of cultural traditions and how cultural attitudes may be changed and adapted to complement human rights."[81] According to Ibhawoh, these changes require local involvement and they will have to be executed in a way that does not compromise the cultural integrity of the people: local people "must feel a sense of ownership of the process of change and adaptation for it to succeed."[82]

This approach also finds support in institutional change theory. In their comparative study of theories of institutional change, Christopher Kingston and Gonzalo Caballero point out that institutional change is a blend of evolution and design[83] and Sally Falk Moore holds that social fields are semi-autonomous.[84] This means that informal rules, i.e. customs, develop within the social field, but that the social field is also governed by official rules, i.e. state law. The relationship between these customary and state-enacted rules is crucial. According to Moore, there is a widespread belief in social engineering, i.e. the ability to control social arrangements with the help of state rules.[85] Legislation is often passed with the intention of altering the social arrangements in specified ways, but the existing social arrangements are often stronger than the new laws and resistant to alteration. Relationships that have long been established are difficult to change instantly by legislative measures.

If social institutions are inadequate from a human rights point of view, they should be reformed rather than replaced. In other words, in order to bring about social change, legislation should add to rather than replace the

80. Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment, in* Human Rights in Cross-Cultural Perspectives: A Quest for Consensus 19, 20 (Abdullahi Ahmed An-Na'im ed., 1992).
81. Ibhawoh, *supra* note 66, at 856.
82. *Id.*
83. Christopher Kingston & Gonzalo Caballero, *Comparing Theories of Institutional Change*, 5 J. Institutional Econ. 151 (2009).
84. Sally Falk Moore, Law As Process: An Anthropological Approach 54–81 (1978).
85. *Id.* at 58.

existing customs. Reformers, therefore, cannot simply assume that informal rules will change in response to legislation. They will have to make an effort to play into them.

The need to rely on home-grown solutions is exemplified by the fight against HIV/AIDS in Malawi.[86] International agencies, like the World Bank, have developed a strategy consisting of abstinence, being faithful, and using condoms: the so-called ABC strategy.[87] However, this strategy does not fit well into the local culture: abstinence does not lead to the necessary offspring, having extramarital affairs is quite common among men in Malawi, and married couples often regard using condoms as a vote of no confidence.[88] Pushing such a foreign strategy, therefore, is likely to be ineffective and also ignores and denies the importance of the strategies Malawian women have developed themselves, which have already been discussed in Section III. Although these indigenous strategies may look less effective on paper than the ones that were designed internationally, they need to be enhanced rather than replaced because they are rooted in local society.

The *Gacaca* courts set up in Rwanda to deal with the suspects involved in the 1994 genocide are a good example of the "adding to" approach. Traditionally, when individuals involved in a dispute were unable to resolve it, they would turn to a *Gacaca* court. The *Gacaca* courts were traditional community-based tribunals for resolving disputes among individuals within a community or among family or clan members.[89] They dealt with conflicts related to land use, marriage and succession, small tort claims, and petty crime. The proceedings before the *Gacaca* courts consisted of a dialogue between the parties to establish the truth and to decide on an appropriate means for resolution. They had a conciliatory character and their main goal was to restore social order through the re-integration of the offenders into the community. Usually, the agreed upon sanction would be some kind of restitution.[90]

During the aftermath of the genocide a vast number of suspects had to be tried and the state courts were not able to cope with the workload. *Gacaca* courts caught the attention of the Rwandan government as a possible solution because they involve an impressive number of lay magistrates and they would be able to process many more accused in a compressed amount of time than the ordinary courts.[91] The government therefore decided to set

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86. Schatz, *supra* note 58, at 479.
87. UNAIDS, 2004 Report on the Global Aids Epidemic: 4th Global Report 68 (June 2004), *available at* http://www.un.org.np/sites/default/files/report/tid_107/Global_Report_2004.pdf.
88. Schatz, *supra* note 58, at 483.
89. Nicholas A. Jones, The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha 54–55 (2010).
90. *Id.* at 55.
91. *Id.* at 74.

up a new type of *Gacaca* court for this purpose. Changes were necessary because, contrary to the traditional *Gacaca* courts, the new ones would engage in determination of guilt and the imposition of punishment. In addition, they would not be dealing with petty crime, but with serious murder cases.[92] Therefore, the 1996 legislation introduced by the government to set up the new *Gacaca* courts specifically combined the concept of reconciliation with the need for justice.[93]

The new *Gacaca* courts have been modeled on the traditional ones. Thus, the courts are still engaged in settling disputes within local communities.[94] The first phase of each *Gacaca* is to uncover the truth about what happened within its jurisdiction during the genocide, which is an important aspect of achieving reconciliation. The proceedings take the shape of a dialogical process involving the victims, the offenders, and the wider community.[95] Grafted on this restorative justice foundation, a number of retributive elements enable the *Gacaca* to deal with its role in trying the suspects of the genocide. Thus, the courts have been entrusted with the responsibility of determining individual guilt and applying a state-imposed, coercive punishment.[96] As such, the new *Gacaca* courts serve as an example of what can be achieved through amplification rather than replacement.

The HOPE experiment conducted in the South African Cape region to combat HIV/AIDS also offers a very good example of an effective homegrown solution. The public health care system, which is based on Western medicine, is only able to reach a fraction of the target group because the system is under-resourced and, more importantly, it does not relate to beliefs about illness which are part of South African culture.[97]

Illnesses in Africa typically have a cause and a reason. The cause, which is called the proximate cause, accounts for how the disease is contracted, like having the flu as a result of being infected with a virus, as in Western biomedicine. The reason, which is called the ultimate cause, explains why the disease is contracted by a particular person.[98] Many South Africans believe that they may become ill as a result of witchcraft which is invoked by people who have been offended by them. Illness may also be sent as a punishment for not paying enough attention to ancestors. Because the proximate as well as the ultimate cause must be addressed in order to cure the illness, patients

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92. *Id.* at 55.
93. *Id.* at 57.
94. *Id.* at 56–57; Phil Clark, *Hybridity, Holism, and "Traditional" Justice: The Case of the* Gacaca *Courts in Post-Genocide Rwanda*, 39 Geo. Wash. Int'l L. Rev. 765, 775–81.
95. Jones, *supra* note 89, at 69, 71; Clark, *supra* note 94, at 807–19.
96. Jones, *supra* note 89, at 69.
97. Joanne Wreford, *The Pragmatics of Knowledge Transfer: An HIV/AIDS Intervention with Traditional Health Practitioners in South Africa*, 32 Anthropology S. Afr. 37 (2009).
98. Christine Liddell, Louise Barrett, & Moya Bydawell, *Indigenous Representations of Illness and AIDS in Sub-Saharan Africa*, 60 Social Science & Medicine 691, 692 (2005).

tend to seek the help of traditional healers who can deal with both. There is a strong mystical side to traditional healing.[99] It is therefore estimated that 80 percent of black South Africans regularly consult traditional healers to receive healthcare.[100] In light of their large numbers and strong community ties, traditional healers need to be included as providers in order for any effort to offer large scale HIV/AIDS care and prevention to be successful.[101]

The HOPE experiment, which has been set up in the Cape region, links biomedicine to traditional healing.[102] To be able to reach and treat patients who shun Western medicine, the HOPE project recruited a number of traditional healers who were willing to incorporate counseling, testing, and antiretroviral treatment into their divination practice.[103] Consequently, the patients who would usually avoid Western biomedicine, but were attracted to traditional healing, were exposed to the benefits of Western biomedicine nonetheless. Rather than replacing the local approach towards healing across the board by scientific medicine, which would probably have driven away the patients, the experiment added to the already existing and operative indigenous system.

V. THE RECEPTOR APPROACH IN RELATION TO OTHER RECONCILIATORY APPROACHES

The receptor approach does not constitute the first attempt to reconcile international human rights and local culture. Renteln, An-Na'im, Merry and George have developed theories to join these two elements. These concepts will be briefly discussed below and contrasted with the receptor approach.

In her 1990 book, Renteln redefines the concept of cultural relativism and adopts it as her starting point. In the book she deals with the question whether there can be any such thing as universal human rights. In her view the central question is whether cultures other than those in the West have a concept of human rights and, if they do, whether their concept resembles that of the Universal Declaration of Human Rights or any other human rights instruments. Instead of assuming that human rights are universal, she argues that the question needs to be answered empirically. If empirical research can lead to the discovery of values shared by all cultures, she reasons, then the process of building human rights standards that have genuine support

99. Liddell et al., *supra* note 98, at 694.
100. Justin M. Shuster, Claire E. Sterk, Paula M. Frew, & Carlos del Rio, *The Cultural and Community-Level Acceptance of Antiretroviral Therapy (ART) Among Traditional Healers in Eastern Cape, South Africa*, 34 J. Community Health 16 (2009).
101. *Id.* at 16.
102. Wreford, *supra* note 97, at 39.
103. *Id.* at 39.

across the globe can begin. To avoid the charge of cultural imperialism, cross-cultural support for international human rights standards must be sought.[104]

Renteln makes clear that "[t]here is no guarantee . . . that cross-cultural universals will be found to support the international human-rights standards most important to either Westerners or non-Westerners. For example, there may be no worldwide support for women's rights."[105] Although Renteln's study "suggests a method for identifying universals that would carry moral weight in the international arena . . . it cannot . . . guarantee social change. Even if a cross-cultural universal is shown to exist—say universal condemnation of apartheid—that [would] not in itself bring about reforms in South Africa."[106]

According to An-Na'im, because "people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions, observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards."[107] Like Renteln, An-Na'im takes cultural relativism, which he regards as the best antidote to ethnocentricity, as his point of departure. "The appreciation of our own ethnocentricity should lead us to respect the ethnocentricity of others."[108] Such appreciation and respect for other cultures is vital for the international protection and promotion of human rights. Considering the broad range of cultural diversity throughout the world's nations, it has been suggested that human rights should be based on the least common denominator among cultural traditions.[109]

On the other hand, restricting international human rights to those accepted by prevailing perceptions of the values and norms of the major cultural traditions of the world would not only limit these rights and reduce their scope, but also exclude extremely vital rights. An-Na'im therefore parts company with Renteln, who, by adopting "a cross-cultural understanding that will shed light on a common core of acceptable rights . . . seems to be content with the existing least common denominator."[110] An-Na'im believes that "expanding the area and quality of agreement among the cultural traditions of the world may be necessary to provide the foundation for the widest possible range and scope of human rights."[111] This process of expanding agreement among cultures, however, must be culturally legitimate regarding the norms and mechanisms of change within any particular culture. According to An-Na'im this can be accomplished "through internal discourse and cross-cultural dialogue."[112]

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104. Renteln, *supra* note 50, at 11–15.
105. *Id.* at 13.
106. *Id.* at 14–15.
107. An-Na'im, *supra* note 80, at 20.
108. *Id.* at 24.
109. *Id.* at 21, 26.
110. *Id.* at 22.
111. *Id.* at 21.
112. *Id.* at 22, 25.

An-Na'im "propose[s] to broaden and deepen universal consensus on the formulation and implementation of human rights through internal reinterpretation of, and cross-cultural dialogue about, the meaning and implications of basic human values and norms."[113] Once these values and norms have achieved an adequate level of legitimacy independently within each major culture in the world, the focus of human rights advocates ought to shift to increasing legitimacy between cultures, fostering agreement regarding the meaning, scope, and procedures for implementing human rights across the globe.[114] Cross-cultural dialogue should be aimed at broadening and deepening international, or rather intercultural, consensus.

In her book on human rights and gender violence, Merry describes the dilemma facing those who try to promote human rights and combat gender violence.[115] She argues that certain traditional values and practices underlie such violence against women, which should be changed without undermining local culture. Merry seeks to promote a third way to overcome the tension between the desire to maintain cultural diversity and to promote rights universally. She rejects the portrayal of the global-local divide as the opposition between rights and culture, or even civilization and culture. Instead of perceiving universalism and cultural relativism as dichotomous, she argues that the tension between the positions should be seen as part of the continuous process of negotiating ever-changing and interrelated global and local norms.[116]

According to Merry universal human rights and cultural diversity can be reconciled through vernacularization, i.e. a process of appropriation and translation. [117] Human rights ideas and feminist ideas are appropriated by national elites and middle level social activists and translated into local terms. This translation takes place as part of an exchange between transnational actors and activists working within local contexts, with NGOs and social movements acting as intermediaries.[118] "Those who are most vulnerable, often the subject of human rights, come to see the relevance of this framework for their lives only through the mediation of middle-level and elite activists who reframe their everyday problems in human rights terms."[119]

According to Merry "translation does not mean transformation."[120] Despite changes in the cultural phrasing of human rights ideas and the structural conditions of interventions, the underlying assumptions of person and action

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113. *Id.* at 21
114. *Id.* at 21–22.
115. Merry, *supra* note 28, at 103–33.
116. *Id.* at 131–33.
117. *Id.* at 1.
118. *Id.* at 1–2.
119. *Id.* at 219.
120. *Id.* at 220.

remain the same. Human rights are part of a distinctive modernist vision of the good and just society that emphasizes autonomy, choice, equality, secularism, and protection of the body. These core values of the human rights system endure even as the ideas are translated. "Although human rights ideas are repackaged in culturally resonant wrappings, the interior remains a radical challenge to patriarchy."[121] 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"[122] and "ideas of individual autonomy, equality, choice and secularism" are promoted "even when these ideas differ from prevailing cultural norms and practices."[123] "Human rights ideas displace alternative visions of social justice that are less individualistic and more focused on communities and responsibilities, possibly contributing to the cultural homogenization of local communities."[124]

The "capabilities theory and pragmatism" proposed by Erika George focuses on the practical implications of human rights implementation in local communities.[125] George seeks to "recast a divisive debate where gender equality appears to clash with cultural autonomy into a discussion of how to advance a right to health and adapt culture to promote both health and gender empowerment."[126] George proposes the use of pragmatism, which she defines as observing and then seeking to promote whatever works in practice and will "prompt[] people to leave aside normative disputes to engage in the common pursuit of practical results."[127] In her article, George does not attempt to conceptualize a more comprehensive theoretical framework.

Renteln and An-Na'im focus on how the universality of international human rights at the global level can be improved with the help of local culture. Renteln tries to identify norms which are truly universal with the help of ethnographic research and by drawing comparative ethnological conclusions on the basis of that research. An-Na'im, while emphasizing the need to safeguard the legitimacy and embeddedness of human rights norms in every culture, tries to improve the universal nature of the international human rights regime through internal and cross-cultural dialogue.

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121. *Id.* at 221.
122. *Id.* at 103.
123. *Id.* at 4.
124. *Id.*
125. Erika R. George, *Virginity Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism toward Health Capabilities,* 96 Cal. L. Rev. 1447, 1486 (2008)(capitalization altered).
126. *Id.* at 1486.
127. *Id.* at 1494 (*citing* Michel Rosenfeld, *Pragmatism, Pluralism, and Legal Interpretation: Posner's and Rorty's Justice Without Metaphysics Meets Hate Speech, in* The Revival of Pragmatism 324, 325 (Morris Dickstein ed., 1998)).

Merry and the proposed receptor approach, on the other hand, focus on how international norms can be translated into the local community, while tying in to local culture. While Merry views international human rights norms cosmopolitan in nature and therefore universal, the receptor approach assumes international human rights norms as given, not so much because of their supposed cosmopolitan nature, but because they are rooted in positive law.

Because Renteln only accepts norms as universal when they are shared by communities across the world, her work is not focused on challenging the status quo or bringing about reform. Similarly, the receptor approach takes as its point of departure the existing social institutions, which can serve as receptors for international human rights, and it relies on ethnography and ethnology.

However, in line with An-Na'im and Merry, but not Renteln, the receptor approach also enables and facilitates reform. An-Na'im takes a process approach towards reform while focusing on internal and cross-cultural dialogue. Merry focuses on ways to give meaning to international human rights at the local level by using local culture as a conduit. Under either approach, if there is a conflict between the two, traditional culture will have to give way to international human rights. The receptor approach instead assumes that states will often be able to meet their human rights obligations by relying on existing social institutions and traditional culture, both of which must be discovered and interpreted with the help of ethnographic research. If, despite the existence of these social institutions, there appears to be an implementation gap, the gap must of course be filled through reform. This should be done as much as possible, however, by adding to existing social arrangements rather than by replacing them, and by applying home-grown rather than Western-centered solutions.

VI. CONCLUSION

Under public international law, states are bound by the treaty obligations they have accepted, but, so long as they meet the international standards, they may implement them as they see fit. States may therefore choose the means by which they must give effect to their human rights obligations, and they do not necessarily have to rely on the creation of enforceable rights or the augmentation of their domestic laws. The receptor approach reflects this reality by embracing both the duty of states to live up to their human rights obligations and their discretion in choosing the appropriate means to implement them.

During the matching phase of the receptor approach, social institutions are identified that can serve as receptors for human rights implementation,

like family, kinship, solidarity, education, awareness-raising, and community. If these social institutions are found to fall short of the treaty obligations, they will be improved during the amplification phase, while taking account of the socio-cultural context and relying as much as possible on home-grown solutions.

By relying on existing institutions and home-grown remedies, the receptor approach sets out to do justice to local culture and, at the same time, to enhance international human rights protection, especially in areas where such enhancement is most needed.

The receptor approach will therefore appeal to societies with rich cultural traditions, because it takes those traditions as its point of departure. This appeal is amplified by its view that social institutions other than law and rights may serve to honor human rights obligations. This approach will fit well with countries that have a communal rather than an individualistic culture and which value restorative justice over litigiousness.

At the same time, the receptor approach should also appeal to those who favor a strong and effective international human rights regime. While acknowledging that public international law leaves it to the discretion of states parties to choose the means they deem most appropriate to implement their human rights obligations at the national level, the receptor approach also emphasizes that they ought to implement these obligations faithfully and diligently. In other words, states are not allowed to unilaterally invoke culture as an excuse for not honoring their international human rights commitments, but they may honor those obligations through non-legal means. Finally, the receptor approach is not content with preserving the status quo, but will push for reform if a state falls short of its human rights obligations. The receptor approach thus seems to be a very suitable means to bring countries which are currently sitting on the fence into the international human rights fold.