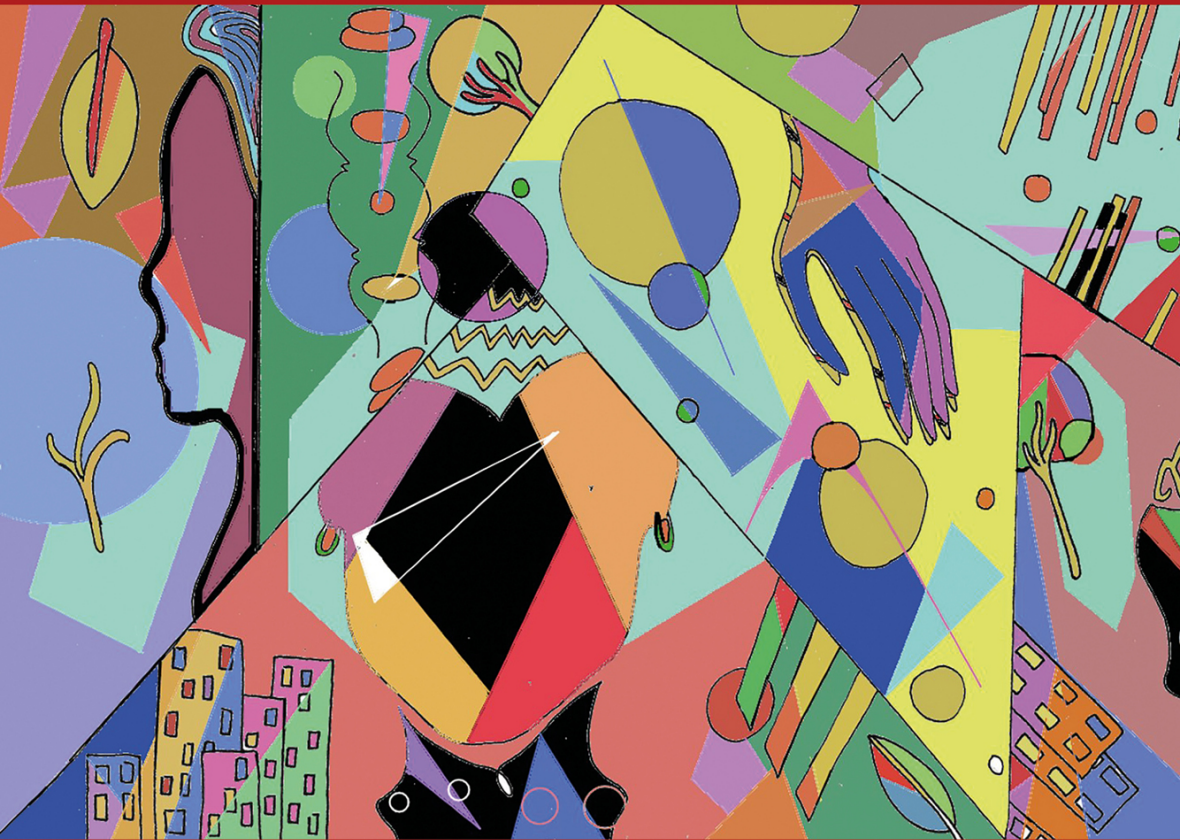


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Cultural Expertise, Law, and Rights

A Comprehensive Guide



Edited by Livia Holden



“In this unique and original volume the authors face realistically the roles that experts – particularly those in the ‘soft’ sciences – play in legal and administrative proceedings. With careful regard for issues of race, colonialism, and gender, the essays cover immigration, journalism, and indigenous rights at the highest professional level. It is a book for specialists and the concerned public alike.” **Lawrence Rosen**, *Princeton University, NJ*

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“With theoretical clarity, conceptual precision, and rigorous ethics, this book offers readers powerful methodological and case study examples of the ways that, as part of our service to the courts as cultural experts, we secure vital space in legal processes for a justice that is sensitive to diversity and inclusion as well as structural inequality and disadvantage.” **Emma Varley**, *Brandon University, President of the Canadian Anthropology Society (CASCA)*



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This is an essential volume for teachers and students in the social sciences – especially law, anthropology, and sociology – and members of the legal professions who engage in cross-cultural dispute resolution, asylum and migration, private international law and other fields of law in which cultural arguments play a role.

Livia Holden is Director of Research at the CNRS, University of Paris I Panthéon Sorbonne, France.



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A Comprehensive Guide

Edited by Livia Holden



INSTITUT DES SCIENCES
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17

CULTURAL EXPERTISE AND INTERNATIONAL HUMAN RIGHTS LAW

Noora Arajärvi

LEARNING OBJECTIVES

This chapter explains the procedural requirements for providing cultural expertise and appointing cultural experts and discusses the differences in utilising cultural expertise in the two main regional human rights courts: the European Court of Human Rights and the Inter-American Court of Human Rights. It does this by engaging in two case studies: (1) the European Court of Human Rights and the headscarf ban; and (2) the Inter-American Court of Human Rights and Indigenous rights. After reading this chapter you will understand (1) how and in which context cultural expertise is invoked in international human rights law, (2) how cultural expertise is presented in different regional courts for the protection of human rights and (3) what has been the role of cultural experts in human rights litigation in selected case studies.

Introduction

In Paraguay, the Yakye Axa, Sawhoyamaxa and Xákmok Kásek Indigenous communities were dispossessed of their ancestral territories by the expansion of the cattle ranching industry starting in 1890. These communities were driven to live at the margins of a highway near their former lands. Due to a lack of clean water, access to hunting and agricultural land and the absence of state services,

living conditions were extremely difficult. The state kept no record of births and deaths of the Indigenous peoples, but the accounts of mothers revealed that many babies and young children died from tetanus, measles, pneumonia, dehydration, malnutrition, dysentery, sepsis and bronchitis. Yakye Axa, Sawhoyamaya and Xákmok Kásek Indigenous communities brought cases to the Inter-American Commission, and eventually, to the Inter-American Court of Human Rights, which found Paraguay guilty of numerous human rights violations. The cases included several cultural experts who, on the one hand, showed the importance of preserving Indigenous ways of life, and on the other, the difficulty of reconciling statutory provisions and customary law regarding the notions of land, territory, property and ownership:

With regard to possession of indigenous land, it is necessary to point out that the way it is adopted differs considerably from how it is regulated in legal codes. Occupation is ... is not always evident due to the cultural mode of production ... [the] historical memory, inseparably associated with geography, is the main sign of traditional possession.

(Statement by José Alberto Braunstein, expert witness in Yakye Axa Indigenous Community v. Paraguay 2005)

Theory and Concepts

WHAT IS INTERNATIONAL HUMAN RIGHTS LAW?

What is international human rights law? Elements of international human rights law can be traced to philosophical and religious thought in all cultures and regions. Conversely, both Donnelly (2003) and Merry (2003) have described international human rights, respectively, as “a set of social practices that regulate relations between, and help to constitute, citizens and states in ‘modern societies’” and as “a particular cultural system [...] rooted in a secular transnational modernity”. All cultural traditions contain elements supporting some international human rights and elements which may be problematic or contravene some other human rights standards (Lenzerini 2014).

Cultural considerations in relation to human rights law are often linked to minority rights, in particular group rights of Indigenous peoples. The UN Human Rights Committee has observed that

culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as

fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

(CCPR General Comment No. 23 1994)

Perhaps the most authoritative legal text on the protection of culture as a human right can be found in Article 27 of the International Covenant on Civil and Political Rights (1966), which reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Further, Article 4 of the UNESCO Universal Declaration on Cultural Diversity (2001) outlines the relationship between human rights and cultural diversity:

The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of Indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

General Comment No. 21 on Article 15 of the International Covenant on Economic, Social and Cultural Rights (2009) outlines the right of everyone to take part in cultural life, and that concerned individuals and communities should be consulted, but that the right may be limited “in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights” (General Comment No. 21, Art. 16(c) and 19 2009).

Several international human rights instruments include references to cultural diversity and touch upon the potential clash between international human rights law and cultural practices. For instance, the UN Convention on the Rights of the Child recognises the Islamic law concept of *kafalah*, which provides alternative care for children deprived of their natural family environment. Some instruments explicitly prohibit certain practices that some may consider cultural, such as FGM (CEDAW General Recommendation No. 14 1990) (see Mestre i Mestre, Wendel and Johnsdotter, Chapter 6 in this volume).

Institutionally, international human rights law is monitored and enforced by human rights courts and treaty mechanisms. These have been agreed upon by states, often within an international institutional setting, such as the United Nations, or in the case of regional human rights treaties, among the members of the Council of Europe, the Organization of American States and the African

Union. Human rights courts exercise an international judicial function and address state-to-state and individual applications. Many monitoring mechanisms and reporting procedures – for example, set up by the ten main international human rights treaties, or the Universal Periodic Review of the UN Human Rights Council – entail an individual complaints mechanism, and usually meet as an expert committee examining complaints and issuing recommendations. On occasion, there may be some overlap between different mechanisms, as illustrated in the following case study on the headscarf/veil ban.

In 2009, the Human Rights Council established the UN Special Rapporteur in the field of cultural rights, who promotes and protects cultural rights at local, national, regional and international levels and produces reports on cultural diversity, religious extremism, women, cultural heritage and the relation of these topics to international human rights. Similarly, in 2001, the Commission on Human Rights – the predecessor of the Human Rights Council – appointed a Special Rapporteur on the rights of Indigenous peoples (UN Commission on Human Rights, Res. 2001/57). This was followed by the adoption of the UN Declaration on the Rights of Indigenous Peoples by the UN General Assembly in 2007, the first time that the UN included Indigenous participation and Indigenous experts in the process of negotiating a declaration.

In applying international human rights law to specific cultural contexts, international courts and other mechanisms may require additional knowledge, which can be provided by cultural experts. Cultural experts can relieve the tensions between the universalist project of human rights and the calls for acknowledging cultural relativism and legal pluralism in the interpretation and application of the law. These experts – their utility having become increasingly recognised in recent years – come from a variety of disciplines: from anthropology and legal geography to sociology and psychology. They provide specialised knowledge in disputes where culture and cultural arguments are deemed useful for dispute resolution and for the claim of rights (Holden 2011, 2020). Although the emergence of definitions and the systematic identification of cultural expertise are recent, the use of arguments that fall under the umbrella definition of cultural expertise is not a new phenomenon. For example, *O. Sara et al. v. Finland* (1994) discussed whether logging within areas used for reindeer husbandry constituted an interference with the Indigenous Samis' right to enjoy their own culture. The Human Rights Committee took note of two expert statements, submitted previously to the national Supreme Administrative Court, which concluded that logging negatively affects nature-based methods of reindeer herding.

Case Studies

Both case studies, first, introduce the legal instrument, the institution and the rules of procedure on the instruction of experts – including *amicus curiae* submissions by experts and expert organisations. This is followed by a presentation of the legal issue and a summary of the relevant case law, including the utilisation of

cultural expertise. Finally, the impact of the use or non-use of cultural expertise regarding the substantive issue in respective institutions is evaluated.

The European Court of Human Rights: Headscarf Ban

The European Convention on Human Rights (ECHR) is a regional human rights treaty adopted in 1950 by the members of the Council of Europe. It established the European Court of Human Rights (ECtHR), which considers applications of violations of human rights committed by the contracting parties.

The ECtHR utilises both court-appointed experts and experts appointed by the parties and is generous in granting leave to third parties to intervene in proceedings. Article 36 ECHR concerns third-party interventions by states and experts. For example, under this article, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted an intervention in which he shared expert knowledge on the issue at hand (*OOO Flavus v. Russia* 2020). Rule 44 of the Rules of Court specifies the procedure for third-party submissions. The Annex to the Rules determines that the ECtHR may at the request of a party or of its own motion adopt any investigative measures, including instructing experts, and it clarifies the procedure for the convocation and hearing of witnesses and experts. Starting with the interventions of Amnesty International and the German government in *Soering v. United Kingdom* (1989), more than 100 significant third-party interventions have since taken place in the ECtHR jurisprudence, some of which by states parties and others by experts, NGOs and international institutions (Harvey 2015).

One of the most debated issues pertaining to cultural and religious rights in ECtHR jurisprudence concerns the banning of veils and headscarves (see Figure 17.1). The saga began in 2005 with the Grand Chamber upholding the ban on headscarves on university campuses in Turkey, stating that while this ban did interfere with the right to freedom of religion under Article 9, it was legitimately prescribed by law based on the principles of secularism and equality of men and women and that the interference could be considered as “necessary in a democratic society” (*Şahin v. Turkey* 2005). In 2008, the ECtHR found no violation of Article 9 in the cases of *Dogru v. France* and *Kervanci v. France* for the prohibition to wear headscarves during physical education classes in state secondary schools. In these cases, the court records indicate that no expert was instructed or third-party interventions granted.

In 2014, the Grand Chamber considered whether France’s ban on the full-face veil violated Articles 8 (right to private and family life) and 9 (right to religion) under the Convention. With heavy reliance on the *Şahin* judgement, despite the stark political and social differences between Turkey and France, and with reference to “the margin of appreciation”, it stated that the full-face veil ban was valid to preserve the goal of “living together” (*S.A.S. v. France* 2014).

In *S.A.S.*, several third parties intervened, namely the Open Society Foundation, Article 19, Amnesty International, Liberty and the Ghent Human



FIGURE 17.1 Woman wearing a veil. Source: Nicola Fioravanti.

Rights Centre (HRC). Conversely to the ECtHR, in 2018 the United Nations Human Rights Committee held that France’s prohibition on concealing one’s face violates the right to freedom of religion enshrined in Article 18 of the ICCPR. Moreover, it noted that the ban has a disproportionate impact on Muslim women, violating the right to non-discrimination. This is directly at odds with *S.A.S. v. France*. Adding to the mix of decisions by different institutions, on 15 July 2021, the Court of Justice of the European Union found that private companies and employers in the EU can ban people from wearing religious symbols, including headscarves, justified by the “employer’s desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, in order to take account of their legitimate wishes” (*WABE eV & MH Müller Handels GmbH v. MJ* 2021).

In the 2018 Belgium cases (*Dakir v. Belgium* and *Belcacemi and Oussar v. Belgium*), the ECtHR followed the reasoning in *S.A.S.* and found no violation. In *Dakir*, the HRC submitted written comments, noting that the submission may also provide useful background information for the case of *Belcacemi and Oussar v. Belgium* for which the HRC was not able to introduce a timely request for leave to intervene. *Lachiri v. Belgium* concerned the expulsion of an ordinary citizen from a courtroom because of her refusal to remove her hijab, an Islamic headscarf. The HRC, again, submitted written comments, and argued that the case would offer “a fine opportunity for the Court to clarify the limits of States’ discretion to ban religious dress/symbols”. The ECtHR did, indeed, find a violation of the right to religion under Article 9 as there were no proper grounds

to restrict the freedom to manifest the applicant's religion and the infringement was not justified in a democratic society. In contradiction to previous cases, the government focused its arguments for removing the hijab on respecting the judiciary and the smooth operation of the judicial process, and not on secular and/or democratic values. This is also an illustration of the ECtHR acknowledging the margin of appreciation with regard to different countries – although the margin itself might be labelled as a cultural relativist tool (Sweeney 2005): it considered that there is uncertainty among Belgian judges on the matter, as was highlighted also in the report by the HRC based on their survey of over 500 Belgian judges.

In the veil and headscarf cases of the ECtHR, cultural expertise has been presented in the form of *amicus curiae* briefs in support of the applicants. These third-party interventions have presented the court with analyses of comparative case law, national trends on the necessity and proportionality of restrictions on wearing religious dress and an assessment of the living-together argument in the context of the face veil discussion. Despite persuasive arguments presented by expert groups through the briefs, to date, the ECtHR has been reluctant to recognise the change in the cultural and religious landscape in many European countries.

The Inter-American Court of Human Rights: Indigenous Rights

The American Convention on Human Rights is a regional human rights treaty adopted in 1969 by members of the Organization of the American States. In 1979, the Inter-American Court of Human Rights (IACtHR) was established to enforce and interpret the Convention through its jurisprudence. Cases can be referred to the IACtHR by either the Inter-American Commission on Human Rights (IACommHR) or a state party. In contrast to the European human rights system, individuals cannot apply directly to the IACtHR but must first lodge a complaint with the IACommHR, which then rules on the admissibility of the claim. In 2016, the Organization of American States adopted the American Declaration on the Rights of Indigenous Peoples (2016), which together with the UN Declaration (2007) and Indigenous and Tribal Peoples Convention (1989) by the International Labour Organization can serve as interpretative tools and provide content in the consideration of topics on Indigenous rights.

The Rules of Procedure grants the IACtHR the power to instruct expert witnesses, invite parties to provide any evidence at their disposal, request any entity to obtain information, express an opinion or deliver a report and commission one or more of its members to conduct an inquiry. Expert witnesses can also be named by any party, and the party who wishes to do so must submit the identity and the subject of the expert's statement (Rules of Procedure 2009, Art. 35(f) and 36(f)). Sometimes, parties call experts as ordinary witnesses in order to overcome procedural hurdles (e.g., *García Lucero et al. v. Chile* 2013). The IACtHR accepts documents or written opinions presented by expert witnesses (*Boyce et al. v. Barbados* 2007; *Vélez-Loor v. Panama* 2010). It has adopted an

inclusive and integrated methodology, relying on anthropologists, sociologists and other professionals for a contextual and comprehensive approach to judicial decision-making. The role of an expert in the IACtHR has been described as “an advisor that offers to the judges their specialised culture, different from the general and judicial of that of the judges” whose “testimony is the means of proof used to obtain an opinion based in specialized scientific, technical, or artistic knowledge; useful for the discovery and understanding of the elements of proof” (Monge 1999).

The IACtHR has developed a rich jurisprudence on Indigenous peoples’ rights, especially rights to land and cultural identity, drawing much focus on the effective participation of communities and collective rights. It has “set out a series of parameters to be respected by the States in order to protect land rights and, ultimately, the cultural rights of Indigenous peoples” (D’Addetta 2014). In this context, anthropologists and sociologists, among others, have provided expert evidence on Indigenous history, culture and lifestyle.

The first IACtHR judgement on Indigenous land rights was *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), which concerned the absence of official title to territory by Awas Tingni, an Indigenous community living on the Atlantic Coast of Nicaragua. Several judges noted that “the attention due to the cultural diversity seems to us to constitute an essential requisite to secure the efficacy of the norms of protection of human rights, at national and international levels” and accepted the Indigenous communal and ancestral right to property. Many NGOs, human rights groups and a law firm on behalf of another Indigenous community submitted *amicus curiae* briefs. The IACCommHR, as a party to the case on behalf of the Awas Tingni, offered several experts, including sociologists, anthropologists and Indigenous rights attorneys. The IACtHR also heard members and leaders of Indigenous communities. The distinction between a witness and an expert witness was somewhat blurred, and some experts were included as witnesses. The witnesses and expert witnesses successfully showed that “in Nicaragua there is a general lack of knowledge about the issue, an uncertainty of what should be done, and to whom the request for demarcation and title should be addressed” (Picolotti and Taillant 2003).

The reasoning and reliance on expert witnesses were followed in similar subsequent cases on Indigenous communities. Three Paraguayan cases concerned Indigenous groups whose “ways of life were on the way to extinction” and who were denied legal rights as their births and deaths were not even acknowledged or recorded by the state (Feria Tinta 2008). In *Yakye Axa Indigenous Community v. Paraguay* (2005), the IACtHR received expert opinions from the IACCommHR, representatives of the Yakye Axa and the state, some of which were delivered in a public hearing and others in writing. The experts consisted of a linguist, physicians who had worked in the Indigenous community, a human rights lawyer and anthropologists. Also, Organización Nacional Indígena de Colombia filed an *amicus curiae* brief.

In *Sawhoyamaxa Indigenous Community v. Paraguay* (2006), Judge Cançado Trindade in his separate opinion noted that the case was very similar to the *Yakye Axa* case, with regards to the breaches, evidence and expert testimony – including six expert reports prepared for the *Yakye Axa* case to the record in the *Sawhoyamaxa* case. In addition, the IACtHR received in the form of affidavits several expert statements, instructed by the parties, from medical professionals, a geographer expert in Indigenous people’s land rights, the president of the Paraguayan Institute of Indigenous Peoples and a legal expert, who came to serve as an *ad hoc* judge in a subsequent case, *Xákmok Kásek Indigenous Community v. Paraguay* (2010). In *Xákmok Kásek*, again, the IACtHR included several expert opinions previously presented in the *Yakye Axa* case and instructed some of the experts who were involved in the *Awás Tingni Community* case. In addition, the IACtHR received written testimonies from expert witnesses in the fields of geography, anthropology and medicine and many community members and leaders. The IACCommHR considered that disconnection from ancestral lands and natural resources had damaged the community’s cultural identity. In all three cases, albeit to differing degrees, the IACtHR found Paraguay responsible for numerous violations, in particular failing to take the necessary measures to ensure the community members’ right to life, guarantee dignified living conditions and recognise the cultural and spiritual value of ancestral territory.

The IACtHR receives expert reports and statements from the parties – the state, the IACCommHR and representatives of the individuals and communities – and at its own instruction. Also, *amicus curiae* briefs are common. In *Awás Tingni* and in the three aforementioned Paraguay cases (Antkowiak 2013), experts of various disciplines were involved, many of whom attested to cultural aspects of the rights and cultural consequences of their violations. The IACtHR’s renewed inclusion of, and probable reliance on, expert reports delivered in previous cases illustrates their impact in materialising Indigenous land and resource rights in the IACtHR.

Conclusion

This chapter shows that in both the ECtHR and IACtHR cultural expertise in the form of expert witnesses and *amicus curiae* submissions by experts and expert groups serve an important function in providing the courts with detailed information on specific issues – such as the judges’ views on headscarves in Belgium in the *Lachiri* case. Two main conclusions can be drawn. First, overall institutional cultures differ: the IACtHR is more welcoming to a wider range of experts and takes these into account in its decision-making – expert reports are accessible, summarised in judgements and discussed often at length. Meanwhile, the ECtHR is more hesitant and less transparent in this regard and not all expert reports are readily available – this calls for further research into the court documents and archives to comprehensively assess the types, numbers and impact of cultural expert witnesses and reports. Secondly, the types of experts vary: the ECtHR expert submissions – at least in the cases considered – were offered by legal experts rather than experts in, say, religion,

anthropology, sociology or psychology. In the IACtHR cases, witnesses have included experts in linguistics, geography, anthropology, sociology and medicine, and, importantly, community representatives. This is explained – in addition to the institutional culture – by the different subject matter of the case studies: simply put, the breadth of topics related to the Indigenous cases justifies and benefits from the inclusion of many experts from different disciplines. Nonetheless, the ECtHR may need to welcome, appoint and take more seriously cultural experts as cases involving complex considerations of sociocultural diversity, equality, non-discrimination and assimilation, to name but a few, continue to emerge in European courtrooms.

Further Reading

Lenzerini, Federico. 2014. “Chapter 3: Reconceptualizing International Human Rights Law Through a Culturally Based Approach: International and Regional Practice.” In *The Culturalization of Human Rights Law*, 116–212. Oxford: Oxford University Press. This piece provides a focused discussion of the theory and practical application, supported by examples from regional and international institutions.

Brems, Eva. 2016. “SAS v. France: A Reality Check.” *Nottingham Law Journal* 25: 58. This article discusses the ECtHR’s jurisprudence on the burqa/veil ban, drawing draws on empirical research based on interviews with women who wear/wore a face veil in Belgium and France. It builds a mediated dialogue between the face veil wearers’ realities and the reasoning of the ECtHR.

Loperena, Christopher A. 2020. “Adjudicating Indigeneity: Anthropological Testimony in the Inter-American Court of Human Rights.” *American Anthropologist* 122, no. 3: 595–605. Written by an expert witness in a case concerning the communal property rights of the Garifuna people, this article examines the challenges of presenting cultural evidence in a court and the coarticulation of anthropology and law.

Q&A

1. What are some of the conflicting interests in ensuring cultural diversity and the prohibition of harmful cultural practices in international human rights law?

Key: This question should open a discussion about cultural relativism and universalism of human rights, supported by examples found in the case studies. The aim is to encourage students’ critical thinking and ways to reconcile important but potentially conflicting values under international human rights law.

2. Do you think cultural norms are embedded in human rights norms or vice versa? How would you assess their relationship?

Key: Students should discuss the history of human rights as a value system and the impact of formalised and institutionalised international human rights law. They should grasp the interlinkages between culture and cultural norms, with references to regional, religious and other differences.

3. Why are cultural experts needed in international human rights disputes?

Key: Students should discuss the instruments, the rules of procedure allowing the instruction of cultural experts and the underlying need to supplement the courts' knowledge of cultural issues.

4. Can international and regional instruments respond to specific national issues adequately?

Key: Students should show an understanding of different instruments and the hierarchy between national courts and international/regional institutions and note the bindingness of decisions. With the concept of "margin of appreciation", students should consider the limits of legal pluralism at the national and international levels.

References

- Antkowiak, Thomas M. 2013. "Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court." *University of Pennsylvania Journal of International Law* 35, no. 1: 113–87.
- D'Addetta, Michele. 2014. "The Practices of the Regional Human Rights Bodies on the Protection of Indigenous Peoples' Right to Culture." *Rivista Giuridica dell'Ambiente* 29, no. 5: 586–627.
- Donnelly, Jack. 2003. *Universal Human Rights in Theory and Practice*, 2nd ed., Ithaca, NY; London: Cornell University Press.
- Feria Tinta, Mónica. 2008. *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child: Protecting the Most Vulnerable at the Edge*. Boston, MA: Martinus Nijhoff Publishers.
- Harvey, Paul. 2015. "Third Party Interventions Before the ECtHR: A Rough Guide." *Strasbourg Observers*, February 24, 2015. <https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/>
- Holden, Livia. 2011. *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. Abingdon: Routledge.
- . 2020. "Cultural Expertise and Law: An Historical Overview." *Law and History Review* 38, no. 1: 29–46.
- Lenzerini, Federico. 2014. "Chapter 3: Reconceptualizing International Human Rights Law Through a Culturally Based Approach: International and Regional Practice." In *The Culturalization of the Human Rights Law*, authored by Federico Lenzerini, 116–212. Oxford: Oxford University Press.
- Merry, Sally Engle. 2003. "Constructing a Global Law? Violence Against Women and the Human Rights System." *Law and Social Inquiry* 28, no. 4: 941–77.
- Monge, Ma. Auxiliadora Solano. 1999. "The Expert Testimony before the Inter-American Court of Human Rights." *ILSA Journal of International & Comparative Law* 5, no. 3: 567–81.
- Picolotti, Romina and Jorge Daniel Taillant. 2003. *Linking Human Rights and the Environment*. Tucson, AZ: University of Arizona Press.
- Sweeney, James A. 2005. "Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era." *The International and Comparative Law Quarterly* 54, no. 2: 459–74.

Legislation

- Council of Europe. 1950. *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14*. European Treaty Series – No. 5. Rome, November 4, 1950.
- Inter-American Court of Human Rights. 2009. *Rules of Procedure of the Inter-American Court of Human Rights*. Approved November 28, 2009.
- International Labour Organization (ILO). 1989. *Indigenous and Tribal Peoples Convention*. No. 169.
- Organization of American States (OAS). 1969. *American Convention on Human Rights, 'Pact of San Jose, Costa Rica'*. San José, November 22, 1969.
- Organization of American States (OAS). 2016. *American Declaration on the Rights of Indigenous Peoples*. AG/RES. 2888 (XLVI-O/16), Adopted at the third plenary session held on June 15, 2016.
- UNESCO. 2001. *UNESCO Universal Declaration on Cultural Diversity*. 31/Res. 25, Annex I. Paris November 2, 2001.
- United Nations – Committee on Economic, Social and Cultural Rights (CESCR). 2009. *General comment No. 21, Right of everyone to take part in cultural life (Art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*. E/C.12/GC/21, December 21, 2009.
- United Nations – Committee on the Elimination of Discrimination against Women (CEDAW). 1990. *CEDAW General Recommendation No. 14: Female Circumcision*, 1990, A/45/38 and Corrigendum.
- United Nations – Department of Economic and Social Affairs Indigenous Peoples. 2007. *United Nations Resolution on the United Nations Declaration on the Rights of Indigenous Peoples*. A/RES/61/295, adopted on September 13, 2007.
- United Nations – Human Rights Office of the High Commissioner. 1966. *International Covenant on Civil and Political Rights*. Adopted December 16, 1966. Entry into force March 23, 1976.
- United Nations – Human Rights Office of the High Commissioner. 2001. *Human Rights and Indigenous Issues*. Commission on Human Rights resolution 2001/57, April 24, 2001.
- United Nations – Human Rights Committee (HRC). 1994. *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*. CCPR/C/21/Rev.1/Add.5. April 8, 1994.

Cases Cited

- Belcemi and Oussar v. Belgium*. Application No. 37798/13, [2017] ECHR 655 (European Court of Human Rights July 11, 2017).
- Boyce et al. v. Barbados*. IACHR Series C no. 169 (Inter-American Commission of Human Rights November 20, 2007).
- Dakir v. Belgium*. Application No. 4619/12, [2017] ECHR 656 (European Court of Human Rights July 11, 2017).
- Dogru v. France*. Application No. 27058/05, [2009] 49 EHRR 8 (European Court of Human Rights June 30, 2009).
- García Lucero et al. v. Chile*. IACHR Series C no. 267 (Inter-American Commission of Human Rights August 28, 2013).
- Kervanci v. France*. Application No. 31645/04, XIV ECHR 1 (European Court of Human Rights December 4, 2008).

- Lachiri v. Belgium*. Application No. 3413/09 ECHR (European Court of Human Rights September 18, 2018).
- OOO Flavus and Others v. Russia*. Application No. 12468/15, [2020] ECHR 463. (European Court of Human Rights June 23, 2020).
- O. Sara et al v. Finland*. Communication No. 431/1990 (UN Human Rights Committee March 23, 1994).
- Şahin v. Turkey*. Application No. 44774/98, 2005-XI ECHR 173, [2005] ECHR 819 (European Court of Human Rights November 10, 2005).
- S.A.S. v. France*. Application No. 43835/11, [2014] ECHR 695 (European Court of Human Rights July 1, 2014).
- Soering v. United Kingdom*. Application No. 14038/88, A/161 [1989] ECHR 14 (European Court of Human Rights July 7, 1989).
- The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. IACHR Series C no. 79 (Inter-American Commission of Human Rights August 31, 2001).
- The Sawhoyamaya Indigenous Community v. Paraguay*. IACHR Series C no. 146 (Inter-American Commission of Human Rights March 29, 2006).
- The Yakye Axa Indigenous Community v. Paraguay*. IACHR Series C no. 125 (Inter-American Commission of Human Rights June 17, 2005).
- The Xákmok Kásek Indigenous Community v. Paraguay*. IACtHR Series C no. 214 (Inter-American Court of Human Rights August 24, 2010).
- Vélez-Loor v. Panama*. IACtHR Series C no. 218 (Inter-American Court of Human Rights November 23, 2010).
- WABE eV & MH Müller Handels GmbH v. MJ*. C804/18 & C341/19 (Court of Justice of the European Union July 15, 2021).