

**HOW ‘UNIVERSAL’ IS THE UNITED NATIONS’ UNIVERSAL
PERIODIC REVIEW PROCESS?
AN EXAMINATION FROM A CULTURAL RELATIVIST
PERSPECTIVE**

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Dedicated to my beloved parents, for their unconditional love

Abstract

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By Gayatri Patel

This thesis explores the United Nations’ human rights monitoring mechanism, the Universal Periodic Review (UPR) process. The aim of the UPR process is to peer review states’ human rights records through an interactive dialogue session. One of the core elements of the review process is its claim of universality, which is based on two grounds: first, the universal applicability of the process, and second, the normative claim of universalism that is embedded in the operation of the process. Focusing on the second claim of universalism, I challenge the normative claim of universality of the process using the theories of cultural relativism. I ask whether, and to what extent, member states adopt positions that affiliate with the cultural relativist perspective during the interactive dialogue stage in the UPR process. Guided by the theoretical framework of this investigation, I selected three women’s rights categories as the focus of this investigation: women’s rights to health, women’s rights under private and family law and violence against women. The findings of this investigation reveal that there was evidence of states introducing arguments from a form of cultural relativism to challenge universality of international women’s rights.

The foundations of this investigation are laid down in the first three chapters of this thesis, which broadly provide details of the UPR process, define the theoretical framework and justify the research methods adopted for this study. Chapters 4, 5 and 6 of this thesis present, analyse and discuss the findings of this research project. Drawing upon the findings, this thesis provides two main conclusions. First, that the extent to which the universality of human rights is promoted is contingent on the states participating in the review and the human rights issue being discussed. Second, an unchecked challenge of universalism expressed by some states from a form of cultural relativism threatens not only the creditability of the UPR process, but could potentially question the very infrastructure of international human rights norms.

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List of Abbreviations

UPR	Universal Periodic Review
HRC	Human Rights Council
UDHR	Universal Declaration of Human Rights
OHCHR	Office of the High Commissioner for Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	Non Governmental Organization
WEOG	Western European and Others Group
EEG	Eastern European Group
GRULAC	Latin American and Caribbean Group
UNESCO	United Nations Educational, Scientific and Cultural Organization
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
FGM	Female Genital Mutilation
QCA	Qualitative Content Analysis
CAQDAS	Computer Assisted Qualitative Data Analysis
UK	United Kingdom
CAR	Central African Republic
UAE	United Arab Emirates
U.S	United States of America

PREFACE

One of the most daunting, mundane or possibly irritating questions that may gander into one's conscious, or unconscious, thoughts during the study of international human rights law is: 'Does international human rights law make a difference?'¹ Professor Douglass Cassel emphasises that the importance of this question is obvious due to the fact that 'the institutions of international human rights law deserve our energetic support only to the extent they contribute meaningfully to protection of rights'.² Such a promise of improving the human rights situation on the ground,³ in all member states,⁴ through the promotion of universality of all human rights⁵ was made in the establishing resolution of the United Nations (UN) human rights monitoring mechanism, the Universal Periodic Review (UPR) process in 2008. The UPR process is employed by the UN Human Rights Council (HRC) with an ultimate aim to 'improve the human rights situation in all countries and address human rights violations wherever they occur'.⁶ The aim is met by reviewing the human rights records of the UN member states on the basis of their compliance with their human rights obligations arising from the UN Charter, the Universal Declaration of Human Rights (UDHR), and any other human rights instruments to which the state is a party, as well as any voluntary pledges and commitments.⁷ Every member state of the UN is reviewed once in a cycle of 4 years under the same uniform procedure.⁸

All state's human rights records are reviewed by peer states through an interactive discussion, which forms the focus of the review. Peer states hold the responsibility of assessing the human rights situation of the state under review, and suggesting reforms

¹ Professor Douglass Cassel, 'Does International Human Rights Law Make a Difference?' (2001) 2 Chicago Journal of International Law 121. On the importance of implementation for improvement in human rights protection see Rachel Murray and Elizabeth Mottershaw, 'Mechanisms for the Implementation of Decisions of the African Commission on Human Rights Peoples' Rights' (2014) 36 Human Rights Quarterly 349, 350.

² Ibid.

³ UNHRC 'Res 5/1 Institution-building of the United Nations Human Rights Council' (18 June 2007) Annex A/HRC/RES/5/1, para 4 (a) (A/HRC/RES/5/1).

⁴ A/HRC/RES/5/1, para 3 (c)

⁵ A/HRC/RES/5/1, para 3 (a)

⁶ Office of the High Commissioner for Human Rights, 'Universal Periodic Review' <www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> accessed 31st August 2015.

⁷ A/HRC/RES/5/1, para 3 para 1.

⁸ UNGA 'Human Rights Council' (15 March 2006) A/RES/60/251 para, 5(e). (A/RES/60/251). On the importance of active periodic monitoring of human rights obligations see Rachel Murray and Debra Long, *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press, 2015) 30.

where issues of concerns arise. The review itself is based on three reports.⁹ The first report is submitted by the state under review, which is the state's opportunity to provide an account of its human rights situation. The second report is a collection of information that is submitted by a number of UN entities. The third report is based on information provided by stakeholders, such as non-governmental organisations (NGOs), or other national human rights institutions (NHRIs). Collectively these reports form the body of information to undertake the state reviews in the UPR process. Once the reports have been circulated amongst member states, any state of the UN can provide notice of its intention to raise concerns, ask questions, or issue recommendations to the state under review. These concerns, questions and recommendations are then relayed to the state during the interactive dialogue session, as well as being circulated among other HRC members.¹⁰

The first cycle of state reviews commenced in 2008 and was completed in 2011. At the time of writing, the states are being reviewed in the second cycle of the process. When the UPR process was first established, it was received with great optimism, which was shared by key political figures and academics. For instance, the UN Secretary General, Ban Ki-Moon, who described the process as having 'great potential to promote and protect human rights in the darkest corners of the world'.¹¹ This optimism was also shared by an academic, who described the process as a 'breath of fresh air' and a 'genuinely innovative, positive, and encouraging monitoring mechanism'.¹² This optimism was also voiced at the first session of the Human Rights Council in 2006, where the UPR mechanism was described as 'a significant value-added to the Council'.¹³ In addition, the review process has been applauded as 'one of the most important and innovative features and mechanisms of the Council'¹⁴ and as 'an

⁹ On the benefits of an effective reporting procedure see R Murray and M Evans, 'The State Reporting Mechanism of the African Charter' in R Murray and M Evans (eds), *The African Charter on Human Peoples' Rights: The System in Practice, 1986-2006*. (2nd edn, Cambridge University Press 2008) 49-51.

¹⁰ UNHRC, 'Human Rights Council President, Modalities and Practices for the Universal Periodic Review' (9 April 2008) A/HRC/PRST/8/1, para 4.

¹¹ Office of the High Commissioner for Human Rights, 'Universal Periodic Review' <www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> accessed 31st August 2015.

¹² See J Carey, 'The UN Human Rights Council: What would Eleanor Roosevelt say?' (2009) 15 ILSA Journal of International and Comparative Law 460.

¹³ Peter Mackay, 'Statement by Honourable Peter MacKay to the 1st Session of the Human Rights Council' (Geneva, 19 June 2006) <<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session1/HLS/canada.pdf>> accessed 31st August 2015.

¹⁴ KP Sharma Oli, 'Statement by Honourable KP Sharma Oli to the 1st Session of the Human Rights Council' (Geneva, 19 June 2006) <<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session1/HLS/nepal.pdf>> accessed 31st August 2015.

extraordinarily ambitious project that will greatly influence the credibility and future standing of the Human Rights Council'.¹⁵

The optimism surrounding the review process is largely based on a significant trait of the UPR process, its *universal* nature. The claim of universality of the process is founded on two grounds. First, is the universal applicability of the UPR process, whereby all 193 member states of the UN are periodically reviewed under the same uniform process.¹⁶ To date, this objective of the UPR process has been met, as all UN member states have been reviewed, according to their scheduled dates. The second claim of universality of the UPR process is embedded in the normative claim of universalism that is made through the operation and work of the process. For instance, the review process draws upon a comprehensive list of international human rights obligations by enlisting the UN Charter and the UDHR as one of a number of standards against which the states' records will be reviewed. In this way, states' human rights records will be monitored against a number of human rights obligations, regardless of the member states' ratification of international human rights treaties, with the ultimate aim of promoting the universality of all human rights.¹⁷ It is this second form of universality that is the primary focus of this investigation. The aim of this investigation is to question the normative universal claim of human rights embedded in the work of the UPR process using the most pertinent challenge posed to any universal claim of human rights: the theories of cultural relativism.

On the most basic of terms, the core belief of most theories of cultural relativism is that values and beliefs embedded in culture should be a - or indeed, *the* - legitimating factor in assessing the validity of international human rights law. The theories of cultural relativism range from a rejection of the universality of certain international human rights on the basis that beliefs embedded in culture should regulate certain practices;¹⁸ to a more moderate form of relativism that accept a degree of universality of human rights norms, whilst maintaining the significance of culture to the discourse of human

¹⁵ Frank-Walter Steinmeier, 'Speech by Frank-Walter Steinmeier to the 1st Session of the Human Rights Council' (Geneva, 19 June 2006) <<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session1/HLS/germany.pdf>> accessed 31st August 2015.

¹⁶ UNGA 'Human Rights Council' (15 March 2006) A/RES/60/251 para, 5(e). (A/RES/60/251).

¹⁷ A/HRC/RES/5/1 para, 3 (a).

¹⁸ See The Executive Board, American Anthropological Association, 'Statement on Human Rights' (1947) 49 American Anthropologist 539.

rights.¹⁹ Using the challenge posed to the universalist claim of human rights from the various forms of cultural relativism as the theoretical underpinning of this investigation, the research question of this thesis is: whether, and to what extent, member states adopt positions and attitudes that affiliate with the cultural relativist perspective in the discussions held during the state reviews at the interactive dialogue stage in the UPR process. More specifically the thesis will assess whether, and to what extent, states under review use culture as a foundation to accept, justify or criticise certain practices when their human rights records were subject to review during the UPR process. In the same manner, I explore whether, and to what extent, the states carrying out reviews make reference to culture when approving, assessing or criticising certain practices when undertaking reviews of states' human rights records.

In undertaking this research project, I adopted a socio-legal method of investigation. I undertook a documentary analysis of the reports produced as part of the review process of all 193 member states, which amounted to nearly 600 reports. During the first cycle of the UPR process, a total of 52 human rights issues were raised during all the member state reviews. To ensure sufficient depth of analysis of this investigation, I selected the issue of women's rights as the focus for this investigation, which was guided by the theoretical framework of this thesis. The primary reason for selecting women's rights as the focus of this investigation was based on the inherent relationship between women and culture, whereby issues and concerns are more susceptible and 'fragile to the claims of culture'.²⁰ In this way, a challenge to the universality of human rights is more likely to have a direct, or indirect, influence on the issues and concerns of women. In addition, during the research process of this investigation, I further confined the focus of this investigation to three women's rights categories. First, women's rights to health; this included issues of: Female Genital Mutilation (FGM), abortion, and access to health care services. Second, women's rights under private and family law. This included the issues of: polygamy, inheritance, and forced and early marriage. Third, violence against women, which included three issues; honour killing, marital rape and domestic violence.

¹⁹ A An-Na'im, 'The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia' in Joanne R. Bauer and Daniel A. Bell(eds), *The East Asian Challenge for Human Rights* (Cambridge University Press 1999) 153. For further elaboration see section 2.3.3.3.

²⁰ B E Hernandez- Truyol B E, 'Human Rights through a Gendered Lens: Emergence, Evolution, Revolution' in Kelly D Askin and Dorean M Koenig (eds), *Women and International Human Rights Law* (Volume 1, Transnational Publishers Inc 1999) 3.

The UPR process has been the subject of a number of scholarly articles since its inception. The literature on the review process can largely be divided into two broad categories. The first is what I have conceptualised as an internal assessment of the UPR process, as the focus of the studies was to gain a better understanding of the process itself.²¹ Here, scholars focus on how the review process functions by assessing its effectiveness as a regulatory process, and the implications of it being an inherently political mechanism. The second category of literature is interpreted as an external assessment of the review process, as the focus of these studies is based on a phenomenon that is external to the review process itself.²² Here, the literature provides as an account of an external experience of the UPR process, rather than providing an insight as to how the process operates as a whole.

The focus of this study largely falls under the first category, as the aim of this project is to enhance the understanding of how the UPR process operates in practice. However, unlike the existing literature on the UPR process that focuses largely on the political nature of the process and whether it is an effective regulatory mechanism, the unique perspective of this investigation is that it examines the review process as a phenomenon of exploration in itself. In this way, the findings of this investigation is the first sustained analyses to enhance the understanding of what the UPR process is, and how it operates, through a detailed examination of the positions and attitudes adopted by states participating in the state reviews, when the selected women's rights issues were the focus of discussions.

Whilst it is accepted that the UPR process is subject to strict formality requirements, and all the state reviews are conducted in a uniform manner, the peer review nature of the process means that in order to form an accurate picture of how the process operates in practice, it is essential to undertake a comprehensive analysis of the positions and attitudes adopted by state representatives to form an accurate and insightful understanding of the operation of the review process. What makes the aims of this study unique is that it is the first comprehensive analysis of the discussions held between states during the interactive dialogue stage in the first cycle of the review process. I undertake an in-depth examination of the recommendations issued by states, and the corresponding responses issued by the states under review when the issue of women's

²¹ For further elaboration see section 1.4.1.

²² For further elaboration see section 1.4.2.

rights is the focus of discussions. In this way, I will forge a unique and comprehensive understanding of the manner in which the review process operates through the positions and attitudes adopted by states during the review process.

The findings of this investigation reveal that the embedded normative universalism of the UPR process was evident through the positions adopted by states during the discussions of all the issues that fell under the women's rights to health and women's rights under private and family law. However, the *degree* of universalism expressed by the states undertaking the reviews varied depending on the women's rights issue at stake. Strikingly, when discussing the issues of honour killing and marital rape, no member states expressed the universality of women's rights protection in relation to the two issues when undertaking state reviews. More fundamentally, the findings of this investigation reveal that a challenge from a strict form of cultural relativist perspective was raised by states during the discussions of FGM, inheritance, polygamy and marital rape. In these instances, the states challenged the suggested reforms, to comply with international standards in relation to women's rights, based on cultural justifications. In addition, there was also evidence of states adopting attitudes that affiliated with a moderate form of cultural relativism during the discussions of FGM, forced and early marriages, domestic violence and honour killing. From this, it can be seen that the states in the first cycle of the review process adopted positions that affiliated with a spectrum of positions, with some states that expressed a universalist position, whereas others adopted a strict form of cultural relativism, and some adopted a mediatory position of a moderate form of cultural relativism. In this thesis I will present the findings of these discussions held by states in detail. I will then undertake an analysis of the context of these positions, and discuss the theoretical and practical implications of the positions adopted by the states during the discussions held on women's rights in the first cycle of the review process.

However, for present purposes it suffices to say that whilst the universal applicability of the UPR process has been met due to the full participation of states in the first cycle of review, the findings of this investigation give grounds to question the embedded normative universalist claim of the UPR process, as in relation to certain issues, the universality of women's rights issues has been challenged from a cultural relativist perspective by states in the review process.

This thesis is divided into 6 chapters. The aim of the first chapter is to examine the broad context and background against which the research question of this thesis is set. I provide an overview of the theoretical framework of this thesis to help contextualise the research question of this investigation. In this first chapter, I will also provide a background to the monitoring mechanism before the UPR process, to help clarify the aims and objectives of the review process. I will also provide detailed explanation of the mechanics and modalities of the review process. The first chapter concludes with a critical analysis of the current literature on the review process, and I explain how and why this investigation fills a significant gap in the existing knowledge of the review process.

The second chapter of this thesis will provide a much needed elaboration on the meaning of universalism and the challenge posed by the theories of cultural relativism. The aim of this chapter is to critically analyse the theories of cultural relativism. I will form a reasoned conclusion as to why, and to what extent, a moderate form of cultural relativism should be incorporated into the monitoring of state compliance of international human rights law. I will also examine the inherent relationship between women and culture, and explain how women's rights issues and concerns are more susceptible to the challenge of cultural relativism, thus making women's rights the natural selection for the purposes of this thesis. This analysis will form the theoretical framework for this investigation, and will help to analyse the implications of states adopting a form of cultural relativism, or lack of them, during the discussions held on women's rights in the first cycle of the review process.

The third chapter of this thesis is dedicated to the research methods of this investigation. The purpose of this chapter is to provide a reasoned account for the methods that were employed in answering the research question of this thesis. I provide a detailed explanation of the choices and methodological approaches I adopted to confine the data of this investigation to focus on three women's rights categories and the specific women's rights issues. I will also explain how the theoretical framework adopted for this thesis informed the selection of the specific women's rights issues as the focus of this investigation.

Chapters 4, 5, and 6 are dedicated to presenting and discussing the findings of this investigation. Chapter 4 focuses on women's rights to health, which consists of three issues: FGM, polygamy, and access to health care services. Chapter 5 will present and discuss the findings of women's rights under private and family law, which consists of three issues: polygamy, inheritance and forced and early marriage. Chapter 6 focuses on violence against women, which includes the issues of honour killing, marital rape and domestic violence. Each of the sections that present findings of the 9 women's rights issues follow the same structure. I begin each section by contextualising the specific women's rights issue by outlining the international human rights norms in relation to each issue. I then move on to presenting the findings of the explorations, by providing details of the discussions held by states on the specific women's rights issue. This is followed by a discussion section, which will analyse the findings in light of the theoretical framework of this thesis with the aim of answering the research question of this investigation.

Drawing upon the findings of these chapters discussed in chapters 4, 5 and 6, this thesis provides two main conclusions. First, that whilst the innovative and ambitious nature of the UPR process is primarily based on egalitarian principles, the peer review nature of the review process means that each state review is unique in nature as it primarily depends on the actors participating in the state review, as well as the issue being discussed. This means that the extent to which the ultimate aim of the process to promote the universality of all human rights is likely to vary, not only between each state under review, but also, between the lines of dialogue held on specific human rights issues. Second, it was notable that when a strict form of cultural relativism was raised by some states to justify a challenge to the universal compliance of certain women's rights, this challenge remained unchecked by other states participating in the review process. I argue that such an express challenge to the universality of women's rights, if made on a repeated and sustained basis on an international platform such as the UPR process, could have wider ramifications that may damage the very infrastructure of international human rights norms. On this basis I argue that the findings of this investigation reveal that there is a need to further explore the process with a focus on the possible challenges to the normative universalist claim of the UPR process.

Chapter 1

An Introduction to the United Nations’ Universal Periodic Review

1.1. Introduction

The Universal Periodic Review (UPR) process is a unique and innovative development in the monitoring of human rights at the United Nations (UN). It is a mechanism that is used by the UN Human Rights Council with an ultimate aim to ‘improve the human rights situation in all countries and address human rights violations wherever they occur’.¹ This aim is fulfilled through the peer review of the human rights records of all 193 UN member states once every 4 years. The central focus of the UPR process is the 3-hour interactive dialogue session, where all member states of the UN have the opportunity to engage in a discussion on the human rights records of the state under review. At the time of writing, the human rights records of all member states of the UN have been reviewed under the first cycle of the UPR process.² The first cycle of state reviews were held between April 2008 and October 2011. The UPR process is currently in its second cycle of review, which is scheduled to be completed in November 2016.

There are three main purposes of this chapter, each of which will be discussed under three separate sections. First, I will define and explain the research question that guides this investigation by providing an overview of the theoretical focus that underpins this study. Second, I will explain the nature and function of the UPR process and provide a comprehensive account of the manner in which states are reviewed under this process. I begin the second section by providing a historical account of the human rights procedures as operated under the much-criticised predecessor of the UN Human Rights Council, the UN Commission on Human Rights. This provides the necessary backdrop to understand why the UPR process was established in the first place. In the third section, I will provide an analysis of current literature on the review process, and

¹ Office of the High Commissioner for Human Rights, ‘Universal Periodic Review’ <www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> accessed 31st August 2015.

² Ibid.

explain the unique contribution that this investigation makes to the understanding of the UPR process.

1.2. The Research Question of this Investigation

1.2.1. The UPR process and its embedded Universalism

The UPR process is a human rights monitoring mechanism that was created in the resolution that established the UN Human Rights Council (HRC).³ It is a peer review mechanism with the primary purpose to assess the human rights situation in each member state in an ‘objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner’.⁴ The state reviews undertaken in the UPR process are based on three main reports: a national report submitted by the state under review, information supplied by the UN’s treaty bodies, and a stakeholder report. These reports form the basis of reviews at the interactive dialogue session, where all UN members can take the floor to scrutinise the human rights record of the state under review.

One of the reasons why the UPR process has been described as being an innovative and ambitious development in the monitoring of human rights is primarily because of its *universal* nature. This claim of the universality of the process is made on two fundamental grounds. The first is the universal applicability of the process, as it is the first human rights monitoring mechanism whereby all 193 member states of the UN are reviewed periodically under a uniform process.⁵ Moreover, each state under review is subject to strict formality requirements before, during, and after the review to ‘ensure equal treatment for every country when their human rights situations are assessed’.⁶

The second claim of the universality of the UPR process is embedded in the normative claim of universalism that is evident in the work and operation of the review mechanism. The review of each member state is based on its compliance with the

³ UNGA ‘Human Rights Council’ (15 March 2006) A/RES/60/251, para 5(e). (A/RES/60/251).

⁴ UNHRC ‘Res 5/1 Institution-building of the United Nations Human Rights Council’ (18 June 2007) Annex. A/HRC/RES/5/1 para, 3(g) (A/HRC/RES/5/1).

⁵ A/RES/60/251.

⁶ A/HRC/RES/5/1. These principles were reaffirmed in UNHRC, ‘Review of the work and functioning of the Human Rights Council’ (12 April 2011) A/HRC/RES/16/21 (A/HRC/RES/16/21).

following: Charter of the United Nations; the Universal Declaration of Human Rights (UDHR); any voluntary pledges; principles of international humanitarian law; any other international human rights instruments to which the state under review is a party.⁷ By enlisting the human rights obligations under the Charter of the UN and the UDHR, the process draws upon a comprehensive set of human rights obligations that form part of the formal standards according to which the states will be reviewed. This is particularly significant during the reviews of those states that have low ratification rates in respect of international human rights obligations. Therefore, the process provides a unique opportunity to engage those states that are reluctant to ratify international human rights treaties in a discussion of human rights obligations. In this way, states undertaking the reviews in the UPR process are not restricted to discussing or making recommendations on international human rights norms to which the states under review have specifically adopted.⁸ In addition, in its founding resolution, one of the fundamental objectives of the UPR process is to ‘promote the universality, interdependence, indivisibility and interrelatedness of all human rights’.⁹ In this way, by enlisting a comprehensive set of human rights obligations as the foundation of the review process, together with its ultimate aim of promoting universal human rights norms through the reviews of states, a normative form of universalist claim on human rights can be seen to be embedded in the work and functions of the review process.

At the heart of any aim of achieving universal human rights lies the belief that human rights are the inherent right of every human being, which transcend all national and cultural boundaries.¹⁰ Amongst the various forms of universalisms,¹¹ I argue that the aims and objectives of the UPR process, together with the basis and manner in which the review is carried out, is largely underpinned by what is sometimes referred to as the international normative or legal universalist claim on human rights. This is a practical form of universalism which bases its universalist claim on human rights by referring to ‘the system of normative standardisation that was launched by the UDHR’ and

⁷ A/HRC/RES/5/1 para, 1 (a) – (d).

⁸ Hilary Charlesworth and Emma Larking E, ‘Introduction: the regulatory power of the Universal Periodic Review’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press, 2014) 13.

⁹ A/HRC/RES/5/1 para, 3 (a).

¹⁰ K Addo, ‘Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights’ (2010) 32 *Human Rights Quarterly* 601, 661.

¹¹ R Sloane, ‘Outrelativising Relativism: A Liberal Defence of the Universality of International Human Rights’ (2001) 34 *Vanderbilt Journal of Transnational Law* 527, 541-2. See also M W Cranston Cranston, *What are human rights*, (2nd edn, Taplinger 1973); C Bay, ‘Self Respect as a Human Rights: Thoughts on the Dialects of Wants and Needs’ (1982) 4 *Human Rights Quarterly* 53, 55-60; Al Gewirth, *Human Rights: Essays on Justification and Application* (University of Chicago Press 1982).

expanded through the numerous human rights treaties, conventions, resolutions and other international human rights instruments produced by the United Nations.¹² In addition, the universalist claim of human rights is based on the notion that member states engage in a ‘global participation, negotiation and implementation’ of the international human rights instruments that are accepted at a number of international human rights forums.¹³ Identifying this form of universalism under a different label, Lone Lindholt calls this factual universalism. Lindholt argues that the claim of universal human rights is based on the belief that human rights instruments have achieved ‘massive’ support across states, and on this basis, principles embedded in the international instruments apply to the vast majority of the states worldwide.¹⁴ Similarly, Jack Donnelly terms this form of universalism as ‘international legal universality’, which gives grounds to promote universality of international human rights norms on the basis that they have been accepted by almost all states as binding obligations under international law.¹⁵

The core beliefs of international legal/normative universalism form the central premise of the manner in which the UPR process operates to promote the universality of human rights norms.¹⁶ The member states are assessed to the extent to which they comply with international human rights norms as founded in a number of international instruments. In addition, in line with the core beliefs of international legal universalism, the process enables all member states to further the universal implementation of international human rights instruments through a global participation of states in the review process.

1.2.2. Cultural Relativist critiques of normative Universalism

As with most claims of universalism, the foundations upon which the claim of international legal universalism is based can be challenged. One such challenge is raised from a cultural relativist perspective. At the risk of oversimplification, this is the belief that values and beliefs embedded in culture should be a - or indeed, *the* - legitimating factor in assessing the validity of international human rights law. At the

¹² K Addo, ‘Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights’ (n 10) 661.

¹³ Ibid. 660.

¹⁴ L Lindholt, ‘The African Charter: Contextual Universality’ in Kirsten Hastrup (ed), *Human Rights on Common Grounds: The Quest for Universality* (Kluwer Law International 2001).

¹⁵ J Donnelly, *Universal Human Rights: in Theory and Practice* (3rd edn, Cornell University Press 2013) 94.

¹⁶ A/HRC/RES/5/1, para 3 (a).

heart of the theory is an emphasis on the significance of *culture* in influencing and shaping human behaviour and perceptions in society.¹⁷ It is argued that the influence of culture is so fundamental to all aspects of society, that an individual's perception of the world is unconsciously conditioned by the standards and beliefs of a particular culture.¹⁸ On this basis, the cultural relativist critique challenges the international normative universalist claim of human rights by arguing that moral value judgments, such as interpretations of what constitutes human rights, are relative to different cultural contexts from which such moral judgments arise.¹⁹ The emphasis placed on the significance of culture in assessing the validity of human rights varies according to the different forms of cultural relativism, which will be discussed in the next chapter.

For the present purposes, it is important to clarify the reasons why the cultural relativists challenge merits serious consideration. To begin with, the cultural relativist challenge to the universalist theory of human rights is significant as its foundations are based on similar grounds as the claim of universalism. Universalists draw upon humanity and human nature to claim the inherent value of human rights simply because one is human.²⁰ Similarly, cultural relativists draw upon the concept of human nature and humanity by emphasising the significance of 'culture' in shaping and moulding the beliefs, practices and perceptions of human nature itself.²¹ In fact, the scholars Pearce and Kang go the extent of arguing that 'to be human is to have been encultured to some specific culture whose characteristics have been internalised'.²² In this way, both the universalist and cultural relativist positions draw upon the inherent nature of human beings in substantiating their respective claims. For this reason, the cultural relativist critique poses a serious challenge to the basic premise of the universalist claim of human rights.

¹⁷ See C Geertz, *Interpretations of Cultures* (Basic Books 1973) 49; A An-Na'im, 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' in *Human Rights in Africa: Cross Cultural Perspectives* in An-Na'im and Deng (eds) (Brookings Institution 1990) 333.

¹⁸ Alison Dundes Renteln, *International Human Rights: Universalism versus Cultural Relativism* (Quid Pro Book 2013) 59; A An-Na'im 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' (n17) 339. For an elaborate discussion on the significance of culture see 2.3.1 What is culture, and why is it significant?.

¹⁹ E Hatch, *Cultural and Morality: The Relativity of values in Anthropology* (Columbia University Press, 1983). See also A Renteln, *International Human Rights: Universalism versus Relativism* (n 18); C Joyner and J Dettling, 'Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law (1990) 20 California Western International Law Journal 275; Guyora Binder, 'Cultural Relativism and Cultural Imperialism in Human Rights Law (1999) 5 Buffalo Human Rights Law Review 211, 214.

²⁰ J Donnelly, *International Human Rights* (4th edn, Westview Press 2013) 37-38. See also R Wasserstrom, 'Rights, human rights and racial discrimination' (1964) 61 Journal of Philosophy 628; M W Cranston, *What are human rights?* (n11).

²¹ See section 2.3.1 What is culture, and why is it significant?.

²² WB Pearce and K Kang, 'Conceptual Migrations: Understanding Travellers' Tales for Cross Culture adaptation' in YY Kim and WB Gudykunst (eds), *Cross Cultural Adaptation: Current Approaches* (Sage Publications 1988) 29.

Going further, it can be argued that the theory of cultural relativism is necessary, if not essential, to provide a check and balance to the theory of universalism that is often accused of possessing ethnocentric tendencies. For instance, Sonia Harris Short criticises the ethnocentric nature of the ‘presumed universality of human rights’, which asserts that human rights are determined as the ‘absolute truth’ and thus by definition universal.²³ It is argued that such a pure universalist position is not only impossible to be objectively verified, but also can be rightfully dismissed as being morally imperialistic.²⁴ An-Na’im similarly recognises the merits of a degree of cultural relativism on the international human rights discourse, especially ‘when compared to claims of universalism that are in fact based on the claimant’s rigid and exclusive ethnocentricity’.²⁵ Thus, to establish genuinely universal human rights, there is a need to be aware of the limitations of our own ethnocentricity and appreciate cultural differences.²⁶ For this reason, the challenge of cultural relativism is significant as it helps to enlighten and question one’s own ethnocentricity and helps to rebut the accusations of moral imperialism that are often associated with the universalist claims of human rights.

To summarise, there is an embedded form of normative universalism evident in the operation and function of the UPR process. The critique posed by the theory of cultural relativism is a serious and significant challenge to the normative universalist claim of international human rights. For this reason, I will question the normative claim of universality embedded in the UPR process from a cultural relativist perspective, with the ultimate aim of providing a comprehensive understanding of the manner in which the UPR process operates.

1.2.3. The Research Question and Focus of this Investigation

In this investigation I aim to assess whether, and to what extent, member states adopt positions and attitudes that affiliate with the cultural relativist perspective in the discussions held during the state reviews in the UPR process. More specifically, I

²³ Sonia Harris Short, ‘Listening to ‘the other’? The Convention on the Rights of the Child (2011) 2 Melbourne General of International Law 305, 308.

²⁴ Ibid.

²⁵ A An-Na’im, ‘Toward a Cross Culture Approach to Defining International Standards of Human Right: The Meaning of Cruel, Inhuman or Degrading Treatment’ in Abdullahi An-Naim (ed), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1995) 25.

²⁶ Ibid

explore whether, and to what extent, the states under review use culture as a foundation to accept, justify or criticise certain practices when their human rights records were subject to review during the UPR process. In the same manner, I explore whether, and to what extent, the observer states made reference to culture when approving, assessing or criticising certain practices when reviewing human rights records of states.

In answering the research question of this study, I have selected the broad category of women's rights as the focus for this investigation. Briefly, the selection of women's rights was made for two fundamental reasons. The first reason is based on the outcome of a numerical analysis of the data found in the first cycle, which revealed that women's rights was one of the most prevalent issues to be raised during the review of all UN member states. The second reason for selecting women's rights as the focus for this investigation is based on the inherent association between women and culture, which means that women's issues and concerns are more susceptible to critiques of universal human rights from a cultural relativist perspective.²⁷ A detailed explanation for the reasons for selecting women's rights are set out in chapters 2 and 3 of this thesis.

To further narrow down the focus of this investigation, I primarily focused on examining three women's rights categories. The first category is women's rights to health, which consists of three main issues: female genital mutilation, abortion and access to health care services. The second category is women's rights under private and family law, which consists of three women's rights issues: polygamy, inheritance and forced marriage. The third category of focus for this investigation is violence against women, which consists of three issues: honour killings, marital rape and domestic violence. The details of the research process, together with the reasons for choosing women's rights, and the specific issues, are the focus of Chapter 3 of this thesis.

²⁷ See section 2.4.2. The Relationship between Women and Culture.

1.3. The Nature and Function of the Universal Periodic Review Process

1.3.1. A Historical Account of the Human Rights Monitoring Procedures under the Commission on Human Rights

Before providing details on the mechanics and modalities of the UPR process, it is important to understand the historical context in which the UPR process was established to fully appreciate the purpose, aims and objectives of the review process. The focus of this section is to briefly discuss the manner in which the human rights monitoring mechanisms operated under the predecessor to the UN Human Rights Council: the Commission on Human Rights (hereinafter ‘Commission’). In concluding this section, I suggest that there are unexplored grounds in explaining *why* member states resorted to the much criticised political tactics during the operation of the Commission in the first place, which eventually led to its demise.

In the 1946 resolution that established the Commission, it was unclear whether the body had the mandate to respond to claims of human rights violations by individuals, and therefore, monitor the human rights records of member states.²⁸ In addressing this ambiguity, the Commission in 1947 issued a statement that it had ‘no power to take any action in relation to communications received by individuals.’²⁹ Despite this declaration, the Commission continued to receive an annual figure of 25,000 communications of human rights violations.³⁰ After a period of 20 years, the ‘doctrine of no action’ was brought to an end by the Commission.³¹ Over the years, the body devised three procedures that were used in response to the alleged human rights violations in member states and to monitor states’ compliance with its international human rights obligations.

²⁸ UNECOSOC ‘Commission on Human Rights’ (16 February 1946) ECOSOC resolution 5(I), para 9(ii).

²⁹ UNECOSOC ‘Report of the Subcommittee on the Handling of Communication’ (6th February 1947) E/CN.4/14/Rev.2 para 3).

³⁰ UNECOSOC ‘Report of the Ninth Session of the Commission on Human Rights’ (30th May 1953) E/CN.4/689, para 293.

³¹ Economic and Social Council Resolution 1102 (XL) of 4th March 1966. See also, General Assembly Resolution 2144 (XXI) of 26th of October 1966.

First, the 1503 procedure was devised primarily as a complaints procedure, which authorised the Commission to privately investigate specific country situations if the communications received appeared to reveal a consistent pattern of gross violations of human rights.³² However, it was argued that the private nature of the process stunted its effectiveness, as it failed to persuade governments to cooperate with the procedure.³³ For example, Ton J. Zijldwijk stated that ‘it is worth sending petitions to the United Nations under the 1503 (XLVIII), but petitioners should limit their expectations.’³⁴ From 1978 to 1985, 29 countries were considered under this procedure. During this period, whilst some states such as South Korea and Iran were considered, others requiring similar attention, such as North Korea and some Arab countries were not.³⁵ This selective nature of the monitoring procedures at the Commission led to some describing the Commission as a ‘sinking boat’, as the selective nature of the monitoring procedure led to the body’s work lacking in credibility.³⁶

Second, the 1235 procedure authorised the Commission to examine information relevant to the gross violation of human rights, and to carry out public debates on country situations in its annual session. Alternatively, the Commission could designate one or more experts to investigate the human rights records of a number of countries under a general ‘theme’ of human rights.³⁷ Over the years, the Commission faced heavy criticism for the manner in which the procedure was operated. One such criticism was that the Commission was highly selective when reviewing the human rights records of states under the 1235 procedure, as it was accused of disproportionately targeting the human rights records of non-western states.³⁸ Wheeler and Lauren’s assessment of the 1235 procedure concludes that the less dominant and politically powerful states were more readily targeted due to the lack of support in the Commission.³⁹

³² P Alston, H Steiner and R Goodman, *International Human Rights in Context: Law, Politics and Morals* (Oxford University Press 2009) 754-755.

³³ Iain Guest, *Behind the disappearance: Argentina’s dirt war against Human Rights and the United Nations* (University of Pennsylvania Press 1990) 441.

³⁴ T J M Zijldwijk, *Petitioning in the United Nations: A Study in Human Rights* (Palgrave Macmillan 1982) 377. See also William Shawcross, *The Quality of Mercy: Cambodia, Holocaust and Modern Conscience* (Simon & Schuster 1984) 66-67.

³⁵ J Donnelly, ‘Human Rights at the United Nations 1955-85: The Question of Bias’ (1988) 32 *International Studies Quarterly* 278, 294.

³⁶ UN Commission on Human Rights, *Commission on Human Rights Opens Sixty First Session*, speech by the Cuban Representative (14th March 2005).

³⁷ UNECOSOC ‘ECOSOC resolution of 1967’ ECOSOC Resolution 1235 (XLII).

³⁸ Ron Wheeler, ‘The United Nations Commission on Human Rights, 1982-1997: A Study of “Targeted” Resolutions’ (1999) 32 *Canadian Journal of Political Science* 75, 86.

³⁹ P G Lauren, ‘“To Preserve and Build on its Achievements and to Redress its Shortcomings”: The Journey from the Commission on Human Rights to the Human Rights Council’ (2007) 29 *Human Rights Quarterly* 307, 330. See

The third procedure devised by the Commission authorised actions against the alleged violations of human rights by an expert who provided technical advice to a situation in a particular country. Ultimately, the reports produced in the end differed little from those that resulted from the 1235 procedure.⁴⁰ These thematic procedures, which encompassed the 1235 procedure, were also subject to the same criticism of being exercised in a politicised manner. This is because the thematic procedures were so specifically initiated, that the procedure became very similar to the country specific investigations.⁴¹ For example, it is argued that the United States supported the creation of a Special Rapporteur on Religious Tolerance in order to focus attention on East European and Islamic states.⁴² Similarly, at the Commission's 49th session in 1993, due to the support of the majority of the western states, a Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression was appointed, despite strong opposition from non-western countries.⁴³

1.3.1.1. Asking a New Question in relation to the Old Explanations on the Failings of the Commission

The majority of the scholars that have written on the failings of the Commission argue that the politicisation of the human rights monitoring procedures were a major, if not the sole, contributing factor that led to the body's abolition. However, I question whether the politicisation of the monitoring procedures in itself fully explains the reasons behind the failings of the Commission. Accusing a body like the Commission, composed of state delegates, as being 'political' is a misnomer as intergovernmental organisations are inherently political. Other international bodies, such as the UN Security Council and the General Assembly, both suffer from a degree of 'politicisation', have not been subject to the same rigorous criticism as the Commission and calls to be abolished.

I argue that the member states' use of political tactics in the monitoring mechanisms under the Commission clearly indicated a lack of state support for the work and

also Ron Wheeler, 'The United Nations Commission on Human Rights, 1982-1997: A Study of "Targeted" Resolutions' (n 38).

⁴⁰ P Alston et al, *International Human Rights in Context: Law, Politics and Morals* (n32) 746.

⁴¹ Mike Lempinen, *The United Nations Commissions on Human Rights and the Different Treatment of Government; An inseparable part of Promoting and Encouraging Respect for Human Rights?* (Abo Akademi University Press 2005) 231.

⁴² Ibid.

⁴³ Ibid 172.

operation of the body. Therefore, I suggest that there is an unappreciated dimension in the assessment of the failings of the body, which explores the reasons why states rejected the Commission as a credible human rights body by adopting political tactics during its work in the first place. In examining the reports produced as a result of the operation of the monitoring procedures by the Commission, it seems the body failed to adapt its approach to monitoring human rights records in response to a deviation away from the international human rights standards in the treaties based on cultural differences. I argue that the Commission's lack of cultural sensitivity in its monitoring of human rights records is a factor that has been underappreciated when considering the reasons why the body failed to generate state support in its work and operation.

The potential oversight of the Commission's lack of cultural adaptability as a possible reason why it lacked state support is particularly surprising in light of two points in relation to the manner in which the monitoring procedures were undertaken. First, it is clear that the only references to culture in the reports produced for the monitoring procedures were condemnatory in nature. To state a few examples, following a mission to Afghanistan, it was stated that 'discriminatory traditional and cultural laws and practices' act as a barrier to women accessing rights such as employment, food, land and social security.⁴⁴ Similarly, a country report following an investigation into Mexico explicitly criticised the machista culture for relegating women to a subordinate role in their family and community, and describing the values held in the machista culture as causing or perpetuating high levels of violence against women.⁴⁵ In fact, in the reports of monitoring of human rights under the Commission, there was no evidence to suggest the body was open to adopting a culturally sensitive approach in the face of cultural differences in relation to specific human rights issues in the states under review. Further, there was no indication that the Commission was open to portraying 'culture' in a positive manner to facilitate reforms of the violating practices that were contrary to international human rights obligations of the state under review. In fact, any references to culture were made to criticise practices in the domestic context. This largely condemnatory approach in response to cultural differences at the Commission gives reason to question whether the lack of cultural sensitivity was the reason why states

⁴⁴ UN Commission on Human Rights, 'Report on violence against women, its causes and consequences, Addendum, Mission to Afghanistan' (15 February 2006) E/CN.4/2006/61/Add.5 para, 22 and 23. See also UN Commission on Human Rights, 'Human Rights Resolution 2005/41: Elimination of Violence Against Women' (19 April 2005) E/CN.4/RES/2005/41 para, 17d.

⁴⁵ Ibid..

rejected the creditability of the body, and adopted political tactics during its work and processes.

Second, the monitoring procedures were inherently condemnatory and confrontational in nature. The states under review were subject to review by independent experts, who adopted a confrontational method to human rights monitoring through the use of external pressure, coercion and, in some cases, public condemnation to encourage member states to comply with international human rights norms.⁴⁶ It can be argued that this approach places states being reviewed at a disadvantage. This is because the states under review could not respond with the same gravity and weighting as the condemnation that was issued. In addition, the states being reviewed were given little opportunity to present their interpretations of human rights norms that may be grounded in their particular cultural norms.

Consequently, there are grounds to suggest that there is a possibility that the Commission's lack of adaptability in response to cultural differences led to some states under review being consistently assessed against a set of human rights standards which they did not entirely adhere to, without a platform to substantially voice their position. The nature of this frustration was evident in the 56th Commission session report, where a representative of Saudi Arabia argued that 'it was a matter of concern that some members of the international community appeared to have difficulty in understanding human rights within the context of Islam.'⁴⁷ I argue that the condemnatory and confrontational approach to monitoring human rights records with a lack of consideration of cultural differences, could possibly explain the reasons why some states denied support to the work of the Commission by adopting political tactics during the operation of the body.

⁴⁶ Elvira Domínguez-Redondo, 'The Universal Periodic Review - Is There Life beyond Naming and Shaming in Human Rights Implementation' (2012) 4 New Zealand Law Review 673, 685.

⁴⁷ UN Commission on Human Rights, 'The Report of the Commission on Human Rights on its Fifty-sixth Session' (27 April 2000) E/CN.4/2000/167 para, 10.

1.3.2. Establishing the UN Human Rights Council and the UPR Process

The United Nation's reports by Panyarachun in 2004⁴⁸ and Annan in 2005,⁴⁹ laid down the foundations for replacing the Commission with the HRC.⁵⁰ To address the criticisms of the human rights monitoring procedures under the Commission, the former UN Secretary General Kofi Annan proposed that the new body on human rights should have a 'peer review function...to evaluate the fulfilment by all states of their human rights obligations.'⁵¹ Accepting these proposals, the General Assembly, in the same resolution that established the HRC, required the body to undertake:

[a] universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs.⁵²

Based on these objectives, the Ambassador of Morocco, Mohammed Loulichki, was given the responsibility in the first session of the HRC to assist the working group to develop the details on the modalities of the process.⁵³ However, it was not until 2007 that members of the HRC agreed on the 'institution building package' providing the details on the modalities of the review process,⁵⁴ which will be the focus of the next section.

1.3.2.1. Aims and Objectives of the UPR process

Following extensive discussions within the HRC, members agreed on the 'institution building package' which, amongst other things, stated the aims, objectives and the

⁴⁸ A Panyarachun 'A more secure world: Our shared responsibility: Report of the High-level Panel on Threats, Challenges and Change' (United Nations Department of Public Information 2004).

⁴⁹ K Annan, 'In Larger Freedom: Development, Security and Human Rights for All' (United Nations Department of Public Information 2005).

⁵⁰ A/RES/60/251.

⁵¹ UN General Assembly, 'Addendum to In Larger Freedom, Human Rights Council: Explanatory note by the Secretary General' (23 May 2005) A/59/2005/Add.1 para, 6.

⁵² A/RES/60/251 para 5 (e).

⁵³ UNHRC 'Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"' (29 June 2006) A/HRC/1/L.12.

⁵⁴ A/HRC/RES/5/1, Annex 1.

modalities of the UPR mechanism.⁵⁵ The HRC Resolution 5/1 lays down the objectives of the UPR system as:

(a) The improvement of the human rights situation on the ground; (b) The fulfilment of the State's human rights obligations and commitments and assessment of positive developments and challenges faced by the State; (c) The enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned; (d) The sharing of best practice among States and other stakeholders; (e) Support for cooperation in the promotion and protection of human rights; (f) The encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.⁵⁶

The establishing resolution states that all reviews should be based on an interactive dialogue, which is undertaken in a 'non- selective', 'non-confrontational', 'non-politicised' manner.⁵⁷ Thus, it gives the opportunity for member states to share best practices, and the challenges faced, in the promotion and protection of human rights.⁵⁸ The authors, Constance de la Vega and Tamara Lewis, argue that the UPR process is not undertaken in the 'traditional legal atmosphere' in which there is an adversarial relationship.⁵⁹ On the contrary, states' human rights obligations are reviewed through positive encouragement, assistance and incentives.⁶⁰ Further, Obonye Jonas asserts that the very nature of peer review is such that it is 'conducted on a non-adversarial basis and are predicated on the mutual trust and good faith of those involved'.⁶¹ The focus of the UPR process on a non-confrontational interactive dialogue during state reviews is one of the fundamental differences between the review process and the human rights monitoring mechanisms under the Commission.

⁵⁵ A/HRC/RES/5/1.

⁵⁶ A/HRC/RES/5/1, Annex 1 para 4.

⁵⁷ A/HRC/RES/5/1, Annex 1 paragraph 38.

⁵⁸ A/HRC/RES/5/1 Annex 1 section I. B, (2) (4) (d) (e).

⁵⁹ Vega Constance de la and Lewis N Tamara, 'Peer Review in the Mix: How the UPR Transforms Human Rights Discourse' in M Cherif Bassiouni and W A Schabas (eds), *New Challenges for the UN Human Rights Machinery What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 353, 362.

⁶⁰ E Domínguez-Redondo, 'The Universal Periodic Review - Is There Life beyond Naming and Shaming in Human Rights Implementation' (n 46) 685.

⁶¹ Obonye Jonas, 'Reflections on the Practices and Experiences of African States in the African Peer Review Mechanism and the Universal Periodic Review System' (2012) 45 *Comparative and International Law Journal of Southern African* 428, 431.

1.3.2.2. The Stages of the UPR process

Each of the reviews of the 193 states are conducted by the UPR Working Group, which is chaired by the President of the Council and is composed of the 47 member states of the HRC.⁶² A group of delegates called the troika, which consists of three member state representatives, provide general assistance with the reviews.⁶³ The review is undertaken by representatives of peer states, who assess the state under reviews compliance with the following: the Charter of the United Nations 1945, the Universal Declaration of Human Rights 1948, the Human Rights Instruments to which the state is a party, any applicable international humanitarian laws and any voluntary pledges made by the states.⁶⁴ Those states that are a member of the Council are required to be reviewed during their term of membership, in particular, those elected for one or two review terms are to be reviewed first.⁶⁵ During the three UPR Working Group sessions, 42 states are reviewed each year, with each session dedicated to reviewing 14 states each.

It is clear that the UPR process differs substantially from the 1235 and 1503 procedures on one important matter: universal application. All 193 UN member states have their human rights records subject to review in the UPR process using the same uniform procedure, thereby significantly reducing the possibility of political manoeuvring by states to avoid their human rights records being reviewed, as was the case under the Commission. Furthermore, unlike the monitoring procedures under the Commission, the review of states under the UPR process is not restricted to particular human rights issues, as it can hold the state under review accountable on any human rights issue that is of concern.

The UPR process is broadly divided into three stages: (i) the preparation for the review, (ii) the interactive dialogue, and (iii) the follow up process to the second cycle of review.

Preparation of the Review

There are three main documents that form the basis upon which member states' human rights obligations are reviewed. The first is a National Report, which is no more than 20

⁶² A/HRC/RES/5/1, Annex 1, section I 8 (a).

⁶³ A/HRC/RES/5/1, Annex 1 section 21.

⁶⁴ A/HRC/RES/5/1, Annex 1, section I. A, (1) (a)-(d).

⁶⁵ A/HRC/RES/5/1, Annex 1, section I. C, (8) (9).

pages in length and provides an outline of the human rights situation and concerns in the country. It is drafted and submitted by the state under review.⁶⁶ The second report is prepared by the Office of the High Commissioner on Human Rights (OHCHR). The report should be a maximum of ten pages, and is a summary of the information submitted by treaty bodies, special procedures and other human rights entities in relation to the state under review.⁶⁷ The final document is a summary of the information submitted by civil society and non-governmental organisations (NGOs), which is again prepared by the OHCHR and is no longer than ten pages.⁶⁸ The comprehensiveness of the reports have been applauded by authors such as Vega and Lewis, who write “that this is the first time that the human rights picture on the ground for all nations will be formally documented for all to see.”⁶⁹ The collection of data in the form of reports that are prepared for the UPR process has enhanced the information that is available on human rights situations around the world.⁷⁰

Collectively, these reports form the primary body of information that will be used as the basis to undertake state reviews. Once these reports have been prepared and circulated, any state of the UN can provide notice of its intention to raise concerns, ask questions, or issue recommendations to the state under review during the interactive dialogue session.

The Interactive Dialogue Session

Whilst the review is primarily conducted by the UPR Working Group, during the interactive dialogue stage any one of the 193 member states of the UN present at the review can engage in the discussions.⁷¹ The review is commenced by the state under review presenting their National Report to the Working Group. At this stage, members of the troika provide the advance questions to the state under review, which is given the opportunity to address these questions. The national presentation is followed by arguably one of the most important phases of the review, the interactive dialogue session. The observer states are provided with an opportunity to take the floor to ask questions and make recommendations on any aspect of human rights concern in relation

⁶⁶ A/HRC/RES/5/1, Annex 1 section 15 (a).

⁶⁷ A/HRC/RES/5/1, Annex 1 section 15 (b).

⁶⁸ A/HRC/RES/5/1, Annex 1 section 15 (C).

⁶⁹ V Constance de la and L N Tamara, ‘Peer Review in the Mix: How the UPR Transforms Human Rights Discourse (n 59) 568.

⁷⁰ Ibid.

⁷¹ A/HRC/RES/5/1, Annex 1 section 18 (b) (c).

to the state under review. The state under review is under an obligation to respond to the statements and recommendations made to it by the observer states.⁷² The interactive dialogue lasts for three and a half hours, of which, 70 minutes of speaking time is granted to the state under review, with the remaining 140 minutes left for the observer member states.⁷³

It is evident that the interactive dialogue session of the UPR system is the ‘core element of the entire process’.⁷⁴ This is because rather than focusing on legal technicalities of international human rights norms, the UPR process provides a forum for a discourse to be undertaken on human rights issues amongst states.⁷⁵ Moreover, it is the first forum at the UN that enables an interactive dialogue to be undertaken between states in a format that allows for instant responses and feedback.⁷⁶ The discussions held during the interactive session tend to focus on a whole array of human rights issues, as opposed to one specific human right. The instantaneous and cooperative nature of the UPR process can be utilised to discuss human rights issues that would otherwise be too controversial, and risk confrontation amongst states on an international forum.⁷⁷ In this regard, it is likely that some of the human rights issues raised during the reviews may have a cultural dimension to them, which makes the interactive session in the UPR process a good platform to address the aims and objectives of this investigation.

At the conclusion of the interactive dialogue stage, the members of the troika prepare a document containing the summary of the discussions held in an ‘Outcome Report’.⁷⁸ This report is then adopted at the Working Group Session held a few days after the interactive dialogue session. A few months later, the report is adopted at a plenary session of the HRC, which lasts for up to an hour. Time is allocated for further comments by the states under review, other states or the civil society.⁷⁹ At the conclusion of the plenary session of the HRC, a Final Outcome Report for the state

⁷² Amendment made to the modalities as part of the 2011 Review. See UNHRC, ‘Review of the work and functioning of the Human Rights Council’ (12 April 2011) A/HRC/RES/16/21 (A/HRC/RES/16/21) para 16.

⁷³ A/HRC/RES/5/1, Annex 1 section 22. Changes made by UNHRC, ‘Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review’ (July 2011) A/HRC/DEC/17/119 (A/HRC/DEC/17/119) Resolution Part III.

⁷⁴ Björn Arp, ‘Lessons Learned from Spain’s Practice before the United Nations Human Rights Reporting Mechanisms: Treaty Bodies and Universal Periodic Review’ (2011) 15 Spanish Yearbook of International Law 1, 13.

⁷⁵ Ibid.

⁷⁶ Rhona K M Smith, ‘Equality of ‘Nations Large and Small’: Testing the Theory of the Universal Periodic Review in the Asia-Pacific’ (2011) 2 Asia-Pacific Journal on Human Rights and the Law 36, 41.

⁷⁷ Frederick Cowell and Angelina Milon, ‘Decriminalisation of Sexual Orientation through the Universal Periodic Review’ (2012) 12 Human Rights Law Review 341, 346.

⁷⁸ A/HRC/RES/5/1, Annex 1 section 26. See also A/HRC/RES/16/21.

⁷⁹ A/HRC/RES/5/1, Annex 1 section 31.

under review is produced. The Final Outcome report contains all the comments, questions and recommendations made by the observer states, as well as the responses and comments made by the state under review.⁸⁰ Those recommendations that have not been responded to by the state during the oral review are required to be responded to in writing in the ‘addendum’.⁸¹ The recommendations that enjoy the support of the state under review will be identified as being ‘accepted’, and those recommendations that are not accepted will be ‘noted’.⁸² In this way, formally, no recommendations are recorded as being ‘rejected’ by the state under review in the UPR process.

The Follow up Period

The period between the first and the second cycle of state reviews in the UPR process is called the ‘follow up’ period.⁸³ The state under review has the primary responsibility for the implementation of the recommendations that were issued to it in the Final Outcome Report, which is to be undertaken during the follow up period.⁸⁴ The progress on the implementation of the recommendations will form the focus of subsequent reviews.⁸⁵ In addition, the states that have been reviewed are encouraged to submit a mid-term report on the progress of the implementation of the accepted recommendations.

The 2011 Review of the Human Rights Council: Minor changes to the modalities of the UPR process

In accordance with the General Assembly Resolution 60/251, in June 2006 the HRC undertook a review of the five years of its work since its establishment by setting up an intergovernmental working group to review the manner in which it functioned.⁸⁶ Following the process of the review, in April 2011 the HRC adopted the resolution 16/21 entitled the ‘Outcome of the review on the work and functioning of the Human Rights Council’, which included a number of reforms on the modalities of the UPR process.

⁸⁰ A/HRC/RES/5/1, Annex 1, section 27.

⁸¹ A/HRC/DEC/17/119, Annex para 15 and 16.

⁸² A/HRC/RES/5/1, para 32. On the implications using such ‘blunt’ tools in the form of categories for the responses of recommendations, and the implications it has on the follow up and monitoring of compliance see analysis by Rachel Murray and Debra Long, *The Implementation of the Findings of the African Commission on Human and Peoples’ Rights* (Cambridge University Press, 2015) 38.

⁸³ A/HRC/RES/5/1, Annex section 33-38.

⁸⁴ A/HRC/RES/16/21, para 17.

⁸⁵ A/HRC/RES/5/1, para 34.

⁸⁶ A/RES/60/251.

One of the key outcomes of the review was that the focus of the second cycle, and subsequent cycles, will be on the implementation of the accepted recommendations in the previous cycle, and the development of the human rights situation in the state.⁸⁷ More specifically, the states under review in the second cycle of the UPR process are under an obligation to report on the action it has undertaken in relation to the implementation of the recommendations in its National report.⁸⁸ Another change is that the length of each review cycle will now be 4.5 years, which in turn is reflected in an extended 3.5 hours of review for each state.⁸⁹

Despite the recent review of the UPR process, there were some key issues that were left unaddressed in relation to the specific logistics of the second cycle of the UPR process. These included the timetable for the second cycle, the list of speakers and general guidelines for the formulations of documents which form the basis of review. As a result, the decision 17/119 was adopted to follow up on the resolution 16/21 to provide details on the unaddressed issues on the modalities of the UPR process. Following this, the President of the HRC, on 18th September 2013, circulated a letter to clarify the existing rules and practices of the UPR process, particularly in response to the actions of some states that placed the recommendations that were not accepted in the footnotes of the Outcome Report.⁹⁰

1.3.3. The Political Nature of the UPR process

The UPR process is inherently political in nature as it is a peer review mechanism undertaken by state representatives. The meaning of politics and politicisation is interpreted as either when a state (or group of states) takes, or withholds, action against a state (or group of states) purely on the basis of regional alliance, other affiliation or a previous contentious matter. Whilst there is a risk of the state reviews being undertaken in a politicised manner, the benefits emanating from the political nature of the UPR process do not jeopardise its effectiveness in meeting its aim of monitoring and implementing international human rights laws. This is primarily because the central premise of the UPR process is to undertake reviews through a cooperative approach,

⁸⁷ A/HRC/DEC/17/119, paragraph 6.

⁸⁸ A/HRC/DEC/17/119, Part II.

⁸⁹ A/HRC/DEC/17/119, para 3.

⁹⁰ Office of the President of the Human Rights Council letter dated 18th September 2013 by the President of the Human Rights Council Remigiusz A Henczel < http://www.upr-info.org/sites/default/files/general-document/pdf/-2013_09_18_hrc_president_letter_on_upr.pdf> accessed 2 November 2014.

whereby compliance with international human right laws is to be achieved by engaging in an inclusive dialogue amongst observer states, and the state being reviewed.⁹¹ The UPR system's cooperative approach aims to achieve compliance with international human right norms through positive encouragement, assistance and incentives.⁹²

Evidence of some of the benefits of the cooperative approach adopted for the UPR process is reflected in the fact that all 193 member states have voluntarily participated in the first cycle of the review process.⁹³ In addition, states have often sent high ranking delegates to the review process, which demonstrates the seriousness that member states attach to the UPR system.⁹⁴ More fundamentally, the cooperative approach of the UPR process has resulted in member states engaging in a dialogue on important and often neglected human rights issues. It is argued that the cooperative and soft law approach to human rights in the UPR process is advantageous when considering issues that are culturally sensitive, which otherwise would have been too controversial to raise and address on an international forum.⁹⁵ Elvira Domínguez Redondo writes that successes in raising controversial human rights issues in the UPR process are, in some instances, linked to the political and cooperative nature of the process.⁹⁶

Therefore, whilst a number of authors have questioned the effectiveness of the UPR process due to its inherently political nature,⁹⁷ it is argued the political nature of the process does not necessarily mean that the process is less worthy because it does not

⁹¹ A/HRC/RES/5/1, para 3 (a)(d)(g)(k) and 6.

⁹² E Domínguez-Redondo, 'The Universal Periodic Review - Is There Life beyond Naming and Shaming in Human Rights Implementation' (n 46) 685.

⁹³ At the time of writing, Israel has been the only state that has failed to present for its review under the UPR process in January 2013, an action which has been widely criticised. See <<http://www.upr-info.org/+Israel-absent-from-its-own-UPR+.html>; <http://www.upr-info.org/+HRC-President-presents-report-on+.html>>. However, later Israel agreed to have its human rights record to be reviewed in November 2013.< <http://www.upr-info.org/newsletter/archive.php?message=145>> accessed 10 November 2013.

⁹⁴ E Domínguez-Redondo, 'The Universal Periodic Review - Is There Life beyond Naming and Shaming in Human Rights Implementation' (n 46) 688.

⁹⁵ F Cowell and A Milon, 'Decriminalisation of Sexual Orientation through the Universal Periodic Review' (2012) 12 Human Rights Law Review 341, 346.

⁹⁶ E Domínguez-Redondo, 'The Universal Periodic Review - Is There Life beyond Naming and Shaming in Human Rights Implementation' (n 46) 714.

⁹⁷ Allehone Mulugeta Abebe A. M., 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 Human Rights Law Review 1, 19-21; Olivier de Frouville, 'Building a Universal System for the Protection of Human Rights: The Way Forward' M Cherif Bassiouni and William Schabas (eds) *New Challenges for the UN Human Rights Machinery* (Intersentia 2011) 241, 253; Edward McMahon and M Ascherio, 'A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council' (2012) *Global Governance* 231; O Jonas, 'Reflections on the Practices and Experiences of African States in the African Peer Review Mechanism and the Universal Periodic Review System' (n 61) 443; Sharifi Tarazkahi Hossein and Omid Zamani Mohsen, 'Promotion of Human Rights in the Light of Universal Periodic Review' (2013) 5 *Foreign Relations* 7; Leanne Cochrane & Kathryn McNeilly, 'The United Kingdom, the United Nations Human Rights Council and the first cycle of the Universal Periodic Review' (2013) 17 *The International Journal of Human Rights* 152.

have ‘any legal teeth’.⁹⁸ On the contrary, the universal participation of the states, together with evidence of controversial issues being raised in the UPR process, indicates the value of the review process, despite being political in nature. For this reason, I argue that the political nature of the review process does not mean that it lacks effectiveness for monitoring human rights.

1.4. A Critical Analysis of the Current Literature on the Universal Periodic Review process

The primary purpose of this section is twofold. First, I will undertake an analysis of the current literature to understand what is already known about the nature of the review process, and how it operates. Second, I aim to discuss how the objectives of this investigation can be distinguished from the existing research on the UPR process. I will explain how the distinguished approach adopted for this investigation will provide findings that will offer a comprehensive and unique insight into the manner in which the UPR process operates.

The nature of the current literature on the UPR process can be divided into two broad categories. The first is what I call an *internal assessment* of the UPR process. The ultimate aim of the studies that fall under this category is to analyse the review process itself, to further provide an understanding of how the UPR process operates. By contrast, the literature that falls within the second category is called an *external assessment* of the UPR process. Here, scholars examine the UPR process, and assess its significance, by analysing its operation in relation to a phenomenon that exists externally to the UPR process. In this way, the findings of the literature under the second category reveal an understanding of the workings of the UPR process from a particular external focus. I will discuss each category of literature below, before explaining why and how the findings of this research project will provide a unique insight into the workings of the process, and thereby fill a significant gap in the existing literature on the UPR process.

⁹⁸ E Domínguez-Redondo, ‘The Universal Periodic Review - Is There Life beyond Naming and Shaming in Human Rights Implementation’ (n 46) 675.

1.4.1. Literature that focused on an internal assessment of the UPR process

Literature that focuses entirely on the function of the UPR process itself, with the aim of gaining a better understanding of the manner in which the review process operates was, until recently, very scarce. In the early part of 2015, a collection of works edited by Hilary Charlesworth and Emma Larking was the first sustained analysis of the UPR process.⁹⁹

The first three contributions to the book are significant to this thesis, as they focus entirely on the mechanics and modalities of the review process, with the aim of gaining an enlightened understanding of how it operates. The first contribution is made by Walter Kälin, who provides a preliminary account of what the review process is, and how it operates. Kälin's analysis focuses on the aims, objectives and modalities of the UPR process, as he asks the question if, and how, the states are acting in a way to fulfil the objectives of the process.¹⁰⁰ His analysis highlights the strengths of review process as its cyclic and highly formalised methods induce all the members of the UN to participate with a common cause to affirm common rules values.¹⁰¹ On the other hand, he criticises the actions of those states who were allowed to veil a low commitment to human rights by mere participation in the review process.¹⁰² Overall, whilst Kälin's analysis provides an invaluable insight as to the manner in which states perceive and understand the nature of the UPR process, the preliminary and generic nature of his analysis leads to a thought provoking question that remains unanswered. This is whether the attitudes and positions adopted by states change and adapt depending on the particular human rights issue being discussed. It is this question, as to whether states' attitudes in the UPR process change depending on the human rights issue at stake, that I aim to explore.

The second contribution to the book for the purposes of this analysis was made by Jane Cowan, who adopts an anthropological perspective in her analysis of the UPR process. Her primary focus is on the way power imbalances operates in the review process that

⁹⁹ Hilary Charlesworth and Emma Larking, *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2014).

¹⁰⁰ W Kälin, 'Ritual and Ritualism t the Universal Peridoci Review: A preliminary appraisal' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2014),

¹⁰¹ Ibid 26-32.

¹⁰² Ibid 25, 31, 33.

formally operate on egalitarian principles.¹⁰³ In her analysis, she notes the importance of the power relations during state reviews, which are to some extent obscured behind the overtly friendly languages used during the peer review process.¹⁰⁴ From her analysis, Cowan concludes that the modalities of the UPR process are unable to disrupt the power imbalances that exist in a political process like the UPR mechanism.¹⁰⁵

However, the significant point of departure from the aims of this study and Cowan's work is that in this investigation, I look beyond the political nature of the process. This is primarily because the peer review nature of the UPR process means that it is inherently political in nature. In this way, whilst it is essential to appreciate the political power imbalances that help understand how the UPR process operates, I argue that there is considerable merit in investigating the states' positions and attitudes, adopted in the UPR process, as phenomenon of exploration in itself. There is a need to explore the review process in itself, on its own merits, in order to move towards gaining a deeper insight in to what the UPR process is, and how the review process operates through the attitudes and position adopted by the states involved in the review process.

Adopting a slightly different approach, the authors Edward R McMahon and Marta Ascherio focused solely on the nature of the recommendations issued in the UPR process.¹⁰⁶ The authors concluded that there was evidence of regional politicisation in the recommendations issued.¹⁰⁷ Similarly, Gareth Sweeney and Yuri Saito's examination criticises the quality of the recommendations given in the UPR process as being too laudatory, and therefore lacking in effectiveness.¹⁰⁸ An examination of the recommendations issued in the first cycle provides an insight into the manner in which states were reviewed in the UPR process. However, the question that remains open in such an analysis is how the states under review responded to the recommendations. One of the fundamental aspects of the UPR process is the opportunity for observer states, and states under review, to engage in a discussion on particular human rights concerns during state reviews. Therefore, an examination solely of the recommendations only

¹⁰³ Jane Cowan, 'The Universal Periodic Review as a public audit ritual: anthropological perspective on emerging practices in the global governance of human rights' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2014) 49.

¹⁰⁴ Ibid 50.

¹⁰⁵ Ibid 53-60.

¹⁰⁶ Edward McMahon and M Ascherio, 'A Step Ahead in Promoting Human Rights?' (n 97) 231.

¹⁰⁷ Ibid.

¹⁰⁸ Gareth Sweeney and Yuri Saito, 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council' (2009) 9 Human Rights Law Review 203. The quality of the criticism of the recommendations issued in the UPR process was criticised in S Hossein and O Mohsen, 'Promotion of Human Rights in the Light of Universal Periodic Review'(n 97) 7.

provides an insight into how reviews are undertaken in the UPR process. The aim of this investigation is to undertake an assessment of the whole process itself, by examining the recommendations and the corresponding responses issued by the states under review. In this way, the aim is to provide a comprehensive analysis of how observer states and states under review position themselves in the UPR process, resulting in a fuller analysis of the review process and an insight or into how it operates as a whole.

Other authors who have adopted a technocratic assessment of the UPR process as the focus of these works, assess whether the modalities of the review process are sufficient to meet its aims. In amongst the earlier literature on the UPR process, the authors Constance de la Vega and Tamara Lewis made a series of suggestions to reform the modalities of the process to ensure it stands the best possible chance to meet its aims and objectives as outlined in its establishing resolution.¹⁰⁹ A more recent examination of a similar nature was undertaken by Julie Billaud, who examined the document preparation of the UPR process.¹¹⁰ Her analysis revealed how the multiple bureaucracies in the construction of the documentation of the UPR process often leave the human rights issues of concern as technical issues that are isolated from the political context from which the concerns derive from.¹¹¹ However, beyond assessing the bureaucracies and modalities of the UPR process, I argue that there is merit in exploring how member states position themselves when they participate in the review process. This is because as this is a peer review process, it is the positions and attitudes that are adopted by the states that ultimately will provide a comprehensive insight as to how the UPR process operates.

Whilst maintaining an internal assessment of the UPR process, some authors examined review process from a public international law perspective, and assessed what is adds to the existing infrastructure on the international monitoring of human rights standards.

¹⁰⁹ Constance de la Vega and Tamara N. Lewis, 'Peer Review in the Mix: How the UPR Transforms Human Rights Discourse' in *Peer Review in the Mix: How the UPR Transforms Human Rights Discourse* (Intersentia 2011) 353. See also, Purna Sen, *Universal Periodic Review of Human Rights: Lessons, Hope and Expectations* (Commonwealth Secretariat 2011); Jeremy Sarkin, 'Part II Human Rights: How to Better Infuse Gender into the Human Rights Council's Universal Periodic Review Process?' (2010) 2 *Jindal Global Law Review* 172; Adrienne Komanovics & Nives Mazur-Kumrić, 'The Human Rights Council and the Universal Periodic Review: A novel method of promoting compliance with human rights' in Tímea Drinóczi, Mirela Župan, Zsombor Ercsey, Mario Vinković (eds), *Contemporary legal challenges: EU Hungary – Croatia* (University of Pécs 2012) 641.

¹¹⁰ Julie Billaud, 'Keepers of the truth: producing 'transparent' documents for the Universal Periodic Review' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2014) 63.

¹¹¹ *Ibid* 64-65.

For instance, Nadia Barnaz criticises the review process for adopting ‘uncertain standards’ in the UPR process, as opposed to clear substantive international law.¹¹² In contrast, a more optimistic analysis of the review process was undertaken by Edward McMahon and Elvira Dominguez Redondo.¹¹³ The authors argue that the move away from an exclusive legalistic approach of the UPR process is a positive development in the monitoring of human rights, which demonstrates maturity in the international human rights regime.¹¹⁴ The approach adopted for the purposes of this study can be distinguished from the studies discussed above on the fundamental basis that I adopt a socio-legal approach to examining the UPR process.

1.4.2. Literature that focused on an external engagement with the UPR process

In comparison to the category of literature discussed in the previous section, a significant proportion of the existing literature on the UPR process falls under this second category. The primary focus of the writings under this category is that an external phenomenon from the UPR process is used as a focus of examination. In these studies, the findings reveal a focused understanding of how the UPR process operates from the particular phenomenon that is selected by the authors. For instance, the existing literature under this category has explored the UPR process from 4 different focuses: a comparison with other monitoring mechanisms, the impact of the outcomes in the UPR process in the domestic context, an NGO perspective, and individual member state perspectives.

A comparison of UPR process with other human rights monitoring mechanisms

One of the focuses adopted by authors in the existing literature is to compare how the UPR process will stand for its aims and objectives in comparison to the other existing human rights monitoring mechanisms. For instance, Obonye Jonas undertook a

¹¹² Nadia Barnaz, ‘Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism in Kevin Boyle (ed) *New Institutions for Human Rights Protection* (Oxford University Press 2009). See also, Christian Tomuschat, ‘Universal Periodic Review: A New System of International Law with Specific Ground rules?’ in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder (eds) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford Scholarship Online 2011) 610-628.

¹¹³ Elvira Dominguez Redondo and Edward R. McMahon, ‘More honey than vinegar: peer-review as a middle ground between universalism and national sovereignty’ (2013) 51 *Canadian Yearbook of International Law* 1.

¹¹⁴ *Ibid.*

comparative analysis between African states engagement in the African Peer Review Mechanism and the UPR system. Jonas concluded that African states have failed to utilise the two systems effectively to hold other states' human rights records to account.¹¹⁵

Adopting a slightly different perspective, Felice D. Gaer explores whether work of the UPR process will duplicate or overturn the work of the treaty bodies. Whilst Gaer concludes that the UPR process could compliment the treaty bodies, the author raises doubts as to whether the sources of the documentations for the review itself will be an improvement to the international monitoring of human rights.¹¹⁶ A similar examination was undertaken more recently by Heather Collister, who examined the interaction between the UPR process and other treaty bodies and noted the tensions between the two systems as their aims overlapped in a number of areas.¹¹⁷ In a more recent article, Alan Desmond undertook an assessment of how the UPR process will impact the European Union system in relation to the rights of migrants.¹¹⁸

This selection of literature helps to understand the positioning of the UPR process with other human rights monitoring mechanisms, and how the mechanisms will conflict or coincide with each other.

The significance of the outcomes of the UPR process in the domestic context

When examining the UPR process, one focus was to analyse the outcome of the process by assessing the implementation of the recommendations issued to states during their reviews. For example, Elvira Domínguez Redondo noted that the UPR process has barely had any coverage in the national media of states, and thus the process is at risk of

¹¹⁵ Obonye Jonas, 'Reflections on the Practices and Experiences of African States in the African Peer Review Mechanism and the Universal Periodic Review System' (n 97) 450. For a comparison with the Inter American System of review see Antonio M. Cisneros De Alencar, 'Cooperation between the Universal and Inter-American Human Rights Systems in the Framework of the Universal Periodic Review Mechanism' (2010) 13 International Journal on Human Rights 171.

¹¹⁶ Felice D. Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7 Human Rights Law Review 109, 135.

¹¹⁷ Heather Collister, 'Rituals and implementation in the Universal Periodic Review and the human rights treaty bodies' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2014) 109. See also Roland Chauville, 'The Universal Periodic Review's first cycle: successes and failures' in Hilary Charlesworth and Emma Larking, *Human Rights and the Universal Periodic Review: Rituals and Ritualism* 87.

¹¹⁸ Alan Desmond, 'The Triangle that could Square the Circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review' (2015) 17 European Journal of Migration and Law 39.

having little impact at the domestic level.¹¹⁹ In contrast, a more optimistic view was taken in a study by Frederick Cowell and Angelina Milon, who focussed on the role of the UPR process in facilitating the decriminalisation of sexual orientation in member states.¹²⁰ They found that three member states had embarked on the process to repeal or reform the criminalisation of sexual orientation after the states' human rights records were reviewed in the UPR system.¹²¹ Eric Tars and Déodonné Bhattarai in their analysis applauded the UPR process for furthering the recognition of human rights in relation to housing in the United States.¹²²

The implementation of the recommendations issued during reviews is undoubtedly a significant element of the process, in particular to assess the extent of creditability that the states under review attach to the UPR process. However, the aim of this investigation is to step back and assess the very nature of the UPR process, and how it functions.

An examination from an NGO perspective

The importance of the role of non-governmental organisations in the functioning and effectiveness of the UPR process has been recognised by the UN General Assembly Resolution 60/251.¹²³ NGOs make a direct contribution to the developments of the reports that form the basis of state reviews, as well as providing an indirect contribution through lobbying state representatives to influence the discussions held during state reviews. Authors have focused on this role of NGOs in the operation of the UPR process. For instance, Lawrence Moss applauded the opportunity provided to NGOs to engage in advocacy to provide a better protection of human rights through the UPR process.¹²⁴ In contrast, Adrienne Komanovics argues that the UPR process in fact

¹¹⁹ E Domínguez-Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7 Chinese Journal of International Law 721.

¹²⁰ Frederick Cowell and Angelina Milon, 'Decriminalisation of Sexual Orientation through the Universal Periodic Review' (n 77) 341.

¹²¹ Ibid.

¹²² Eric Tars and Déodonné Bhattarai, 'Opening the Door to the Human Right to Housing' (2011) 45 Journal of Poverty Law and Policy 197, 205. See also Rohan Kariyawasam, 'Reparations: the universal periodic review and the right to development' in Ferne Brennan and John Packer (eds) *Colonialism, slavery, reparations and trade: remedying the 'past'?* (Routledge 2011); A Komanovics and M Nives, 'The Human Rights Council and the Universal Periodic Review: A novel method of promoting compliance with human rights' in Tímea Drinóczi, Mirela Župan, Zsombor Ercsey, Mario Vinković (eds), *Contemporary legal challenges: EU Hungary – Croatia* (University of Pécs 2012) 119.

¹²³ A/RES/60/251.

¹²⁴ Lawrence Moss, 'Opportunities for Non-Governmental Organisation Advocacy in the Universal Periodic Review Process at the UN Human Rights Council' (2010) 2 Journal of Human Rights Practice 122. See also Sarah Paoletti, 'Using the Universal Periodic Review to Advance Human Rights: What happens in Geneva Must not Stay in Geneva' (2011) 45 Journal of Poverty Law and Policy 268. Eric Tars and Déodonné Bhattarai, 'Opening the Door to

marginalises and reduces the opportunities for NGOs to put forward their perspective as it ‘manifests wide disparities in the level of engagement by NGOs’.¹²⁵

What is clear from the literature is the recognition that NGOs have a significant responsibility in the UPR process, however, authors tend to disagree as to the extent of effectiveness of the role NGOs play in the review process. NGOs are not granted permission to directly participate during a states’ reviews in the interactive discussions, and instead, their role is limited to influencing the discussions by lobbying state representatives. Thus, whilst NGOs have a significant role in influencing the discussions, in order to obtain comprehensive understanding of the nature of the review process itself, it is essential to undertake a first hand analysis of the positions adopted by states during reviews in the UPR process.

Individual member state experience of the UPR process

One of the most prevalent positions adopted by authors is to focus on a particular member state’s experience of the UPR process.¹²⁶ For example, Leanne Cochrane and

the Human Right to Housing’ (n 122) 197; Laura Landolt, ‘Externalising Human Rights: From Commission to Council, the Universal Periodic Review and Egypt’ (2013) 14 Human Rights Review 107; Ben Schokman and Phil Lynch, ‘Effective NGO engagement with the Universal Periodic Review’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2014) 126.

¹²⁵ A Komanovics and M Nives, ‘The Human Rights Council and the Universal Periodic Review’ (n 122) 142.

¹²⁶ See also Björn Arp, ‘Lessons Learned from Spain’s Practice’ (n 74); For Singapore’s experience see Mahdev Mohan, ‘Singapore and the Universal Periodic Review: An Unprecedented Human Rights Assessment’ (2010) 3 Journal of East Asia and International Law 365; Rhona Smith, ‘More of the Same or Something Different? Preliminary Observations on the Contribution of Universal Periodic Review with Reference to the Chinese Experience’ (2011) 10 Chinese Journal of International Law 565; Adrienne Komanovics, ‘The Human Rights Council and the Universal Periodic Review: Is it more than a public relations exercise?’ (2012) 150 Studia Iuridica Auctoritate Universitatis Pecs 119. For a selected number of different state experiences in the UPR process see Juliana Vengoechea-Barrios, ‘The Universal Periodic Review: A New Hope for International Human Rights Law or a Reformulation of Errors of the Past?’ (2008) 12 International Law Review <http://works.bepress.com/juliana_vengoechea/4> (4 July 2015); Joanna Harrington, ‘Canada, the United Nations Human Rights Council, and the Universal Periodic Review’ (2009) 18 Constitutional forum (2009) 1; Rhona Smith, ‘Equality of ‘Nations Large and Small’: Testing the Theory of the Universal Periodic Review in the Asia-Pacific’ (2011) 2 Asia-Pacific Journal on Human Rights and the Law 41; Rhona Smith, “‘To see Themselves as Others see Them’: The Five Permanent Members of the Security Council and the Human Rights Council’s Universal Periodic Review’ (2013) 35 Human Rights Quarterly 1; Benjamin Authers, ‘Representation and suspicion in Canada’s appearance under the Universal Periodic Review’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2014) 169; Natalie Bird, ‘The Universal Periodic Review; building a bridge between the Pacific and Geneva’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2014) 187; Constance De La Vega and Cassandra Yamaski, ‘The effects of the Universal Periodic Review on human rights practices in the United States’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2014) 213; Takele Soboka Bulto, ‘Africa’s engagement with the Universal Periodic Review: commitment or capitulation?’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2014) 235; Yuyun Wahuningrum, ‘Indonesia and the Universal Periodic Review: negotiating rights’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2014) 256; See also, R Blackburn, ‘Cultural Relativism in the Universal Periodic Review of the Human Rights Council’ (2011) 8 Rights and Workplace Policy Journal 1. Blackburn Examines the UPR process from a predetermined list of states which he describes as the ‘cultural relativist

Kathryn McNeilly examined the United Kingdom's (UK) experience in the UPR process. They applauded many of the recommendations issued to the UK, which were of real human rights concern, whilst observing that other recommendations were politically motivated.¹²⁷ Similarly, Allehone Mulugeta Abebe focused on the African participation in the process. Whilst he criticised the evidence of regional politics in the operation of the process, he concluded that there are some signs that the new mechanism is offering African states the opportunity to move away from being the subject of a condemnatory system, towards being significant participants in a more cooperative forum.¹²⁸

The nature of these examinations of the UPR process provides a valuable insight into the effectiveness of the review process from specific individual state perspectives. Such an analysis can often provide an insight into how successful the review process is in monitoring the human rights records of states. What such examinations do not comprehensively reveal is how the UPR process operates as an infrastructure in itself. Therefore, the question this thesis seeks to explore is the nature of states' positions that are adopted during the review process, which will provide greater understanding of the operation of the UPR process.

1.4.3. How this investigation fills a gap in the current literature on the UPR process

An analysis of the current literature on the UPR process reveals that the current scholarly works fall into two broad categories. Scholars have either undertaken an analysis of the internal aspects of the UPR process, or have used an external phenomenon as a focus to explore the process. This investigation falls within the first category, as it focuses entirely on the review mechanism itself. There are 4 fundamental reasons when combined together make this investigation unique and significant in nature: the aims and purpose of this study, the theoretical perspective adopted, an assessment beyond the politics of the review process, and the methods enlisted for this investigation. I will discuss each of these points in turn.

player's. Here Blackburn uses a list of member states that are to be claimed 'cultural relativist players' and undertakes an examination of the interaction of the selected states on the UPR process and provides a reformed of 'up-to date list' of cultural relativist players.

¹²⁷ Leanne Cochrane and Kathryn McNeilly, "The United Kingdom, the United Nations Human Rights Council and the first cycle of the Universal Periodic Review" (2013) 17 *The International Journal of Human Rights* 152.

¹²⁸ Allehone Mulugeta Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 *Human Rights Law Review* 1.

First, this investigation seeks to undertake a comprehensive analysis of the discussions held between states at the interactive dialogue stage in the first cycle of the UPR process. More specifically, I will undertake an examination of the nature of the recommendations that were issued by states and corresponding responses made by the states under review. Through a close analysis of the recommendations and responses, I will forge a unique and comprehensive understanding of the manner in which the review process operates through the positions and attitudes adopted by states during the review process. This investigation is significant because the peer review nature of the process means an understanding of the mechanism can only be obtained through an analysis of how the states position themselves when undertaking reviews, or being subject to review. In this way, the findings of this investigation will open the possibility of understanding whether the attitudes and positions adopted by member states, in their capacity as states under review or as observer states, change and adapt depending on the particular human rights issue being discussed. In this way, this investigation is the first sustained and comprehensive analysis of the UPR process itself, with the sole aim of gaining an insight into how the review process operates in practice.

The second aspect of this investigation that makes this study unique in nature is the theoretical framework adopted for this study that guides this research project. As discussed earlier in this chapter, there is an embedded form of normative universalism in the work and functioning of the UPR process.¹²⁹ In this investigation, I question this claim of universality that is embedded in the UPR process using the most significant and prevalent critique of universalism, the theory of cultural relativism. More specifically, I examine the extent to which states challenge the normative claims of universality of international human rights norms in the UPR process by adopting positions and attitudes that affiliate with the cultural relativist perspective. In addition, the theoretical framework adopted for this study has informed the selection of women's rights (and the specific issues) as the focus of this exploration. Thus, this research project has a strong theoretical underpinning that challenges the embedded universalist claim of the UPR process. Further discussion on the theoretical framework is expanded in chapter 2 of this thesis.

The third reason why this investigation can be distinguished from existing literature on the UPR process is based predominately on its inherently political nature. The majority

¹²⁹ See section 1.2.1. The UPR process and its embedded Universalism 1.2.1.

of the scholars writing on the UPR process, to varying extents, focus on the political nature of the review process, and the implications that this has for the review process itself.¹³⁰ Therefore, most authors examining the UPR process are predominately drawn towards the implications of the political nature of the UPR process in their analysis. This reveals an obvious gap in the literature for a comprehensive and sustained examination of the UPR process as a phenomenon of examination in itself. In filling this gap, I look beyond the political nature of the UPR process, and focus entirely on investigating the states' mannerisms as a phenomenon of exploration in itself, to gain a comprehensive insight and understanding into how the UPR process operates.

The fourth aspect of this investigation that makes it unique in nature is due to the methods adopted for this research project. I adopt a socio-legal method of investigation to address the research question of this thesis. The investigation is qualitative in nature, as I undertake a sustained documentary analysis of the interactive discussions held in the UPR process. In order to ensure this investigation is as scientific as possible, I have justified the methods adopted, and the selection of women's rights and the specific issues, using the theoretical framework of this project.

From the analysis of this section, it is clear that the aims and nature of this investigation fill an obvious and clear gap in the literature of the UPR process. The findings of this investigation are unique and significant as it will contribute to gaining a better and deeper understanding of how the UPR process operates and functions.

1.5. Conclusion

In this chapter, I began by defining the research question for this study by introducing the theoretical approach that I adopt in undertaking this investigation. I provided a historical account of how human rights monitoring procedures are operated under the Commission before introducing the mechanics and modalities of the UPR process. I have explained why I chose to focus on the interactive dialogue sessions for the purposes of this investigation. Finally, I concluded the chapter by distinguishing the aims and objectives of this research project from the existing literature on the UPR process, and explained how this project fills a gap in the existing literature.

¹³⁰ See n 97 above.

Now that the research question has been defined, and details of the UPR process explained, in the next chapter I will undertake a detailed critical analysis of the theory of cultural relativism, which forms the theoretical framework that is adopted for this investigation.

Chapter 2

A Critical Analysis of the theories of Cultural Relativism

2.1. Introduction

In the previous chapter, I provided a detailed account of the background and modalities of the UPR process. I briefly discussed how enlisting a wide range of international obligations in the monitoring of state reviews, together with its ultimate aim of ‘promoting human rights’, demonstrated an embedded form of normative universalism in the function and operation of the UPR process. I also provided an overview as to why the theory of cultural relativism was a significant challenge to the normative universalist perspective. In this chapter, I will provide a much needed elaboration on the different theories of cultural relativism. The primary aim of this chapter is to critically analyse the theories of cultural relativism, and to provide a reasoned conclusion as to why, and to what extent, a form of cultural relativism should be incorporated into the discourse and monitoring of international human rights laws. This analysis will form the theoretical framework for this study, which will help to analyse the implications of states adopting a form of cultural relativist positions, or lack of them, during the discussions held in the UPR process.

I begin this chapter by providing a definition of universalism in the context of international human rights law, and provide reasons as to why an international normative universalist position was adopted as the focus of criticism for the purposes of this chapter. In the second section, I move on to the focus of this chapter, which is to critically analyse the three main forms of cultural relativism. I explore the strict form of cultural relativism, and provide reasons I believe there are strong grounds to question the plausibility of this theory. I then move onto examine the theory of moderate cultural relativism, and whilst acknowledging that this theory is far from flawless, I emphasise the reasons why I believe that the moderate cultural relativist perspective has sufficient merit to mediate between the often isolated discussions held between universalism and

strict cultural relativism in relation to international human rights norms. In this way, I explain the reasons why the moderate cultural relativist position should be incorporated into the discussions and monitoring of international human rights laws. In the third section of this chapter, I explain the theoretical reasons as to why I selected women's rights as the focus for this investigation. Here, I begin by discussing the inherent association between women and culture, and thereby, explain the reasons why women's rights are more susceptible to the challenge of cultural relativism. I then introduce the moderate cultural relativist perspective in assessing the relationship between women and culture.

2.2. What is Universalism?

The universal nature of the UPR process is based on two fundamental grounds. First, is its universal applicability of the process, as it monitors all 193 member states of the UN under the same uniform procedure.¹ However, the focus of this chapter is on the second aspect of the process' universal nature, which is its embedded normative universalism that is evident in the nature and function of the review process. Member states' human rights records at the UPR process are monitored against the human rights obligations as enlisted in the UDHR and the UN Charter.² For this reason, the state reviews are not restricted to being monitored on international human rights norms to which the states have specifically ratified.³ When these enlisted international human rights obligations, that form the centre of reviews, are coupled with the fundamental objective of the UPR process to 'promote the universality of all human rights',⁴ the embedded normative universalist claim in the work and function of the review process becomes apparent. In order to appreciate the significance of the theories of cultural relativism to the universalist claim of human rights, it is important to define the embedded universalism of the UPR process in the theory of universalism. This will not only help to better understand the underlying beliefs of the claims of universalism, but it will also set the foundations from which a fuller appreciation can be made of the challenge posed by the

¹ UNHRC 'Res 5/1 Institution-building of the United Nations Human Rights Council' (18 June 2007) A/HRC/RES/5/1. (A/HRC/RES/5/1).

² A/HRC/RES/5/1, para 1 (a) – (d).

³ Roland Chauville, 'The Universal Periodic Review's first cycle: successes and failures' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press, 2014) 87.

⁴ A/HRC/RES/5/1, para 3 (a).

theories of cultural relativism to the universalist claim of international human rights laws.

The theory of universalism itself is inherently associated with the definition of human rights and international human rights law.⁵ In broad terms, the universalist claim with respect to human rights is primarily based on the notion that rights are granted to all individuals simply by virtue of being a human.⁶ Maurice William Cranston defines the inherent universalistic nature of human rights when he states that:

A human right is by definition a universal moral right, something which all men, everywhere, at all times ought to have, something which no one may be deprived of without a grave affront to justice, something which is owing to every human being.⁷

Therefore, at the core of any universalist theory is the belief that human rights are the inherent right of every human being, which transcends all national and cultural boundaries.⁸ For the purposes of this thesis, in particular during the examination of the reports, where universalist claims to human rights make specific reference to transcend cultural boundaries, I will call this a strict form of universalism.

There are a number of different forms of universalism, which are based on different philosophical grounds.⁹ For the purposes of this section, I focus on international normative universalism, sometimes referred to as international legal/functional universalism. I have analysed the international normative form of universalism primarily because the two core beliefs of this theory are evident in the aims, objectives and the function of the UPR process. I will discuss each core belief in turn.

⁵ Thoko Kaime, *The Convention on the Rights of the Child: A Cultural Legitimacy Critique* (Europa Law Publishing 2011) 42.

⁶ Jack Donnelly, *International Human Rights* (4th edn, Westview Press 2013) 18. See also, R Pannikar, 'Is the notion of human rights a western concept?' (1982) 120 *Diogenes* 75.

⁷ M W Cranston, *What are human rights*, (2nd edn Taplinger 1973) 1. See also R Wasserston, 'Rights, human rights and racial discrimination' (1964) 61 *Journal of Philosophy* 628; N Ashford, *Human Rights: What they are and what they are not* (Libertarian Alliance 1995) 2.

⁸ R Sloane, 'Outrelativising Relativism: A Liberal Defence of the Universality of International Human Rights' (2001) 34 *Vanderbilt Journal of Transnational Law* 527, 541-2. See also Vitit Muntarbhorn, 'The Universality of Standards', lecture at the René Cassin International Institute of Human Rights, July 1993 cited in Civic M, 'A Comparative Analysis of International and Chinese Human Rights Law – Universality Versus Cultural Relativism' (1995-1996) 2 *Buffalo Journal of International Law* 285, 317. See also, See also Jack Donnelly, 'Human Rights as Natural Rights' (1982) 4 *Human Rights Quarterly* 391.

⁹ See M Cranston *What are human rights*, (2nd edn, Taplinger 1973); C Bay, 'Self Respect as a Human Rights: Thoughts on the Dialects of Wants and Needs' (1982) 4 *Human Rights Quarterly* 53, 55-60; Alan Gewirth, *Human Rights: Essays on Justification and Application* (University of Chicago Press 1982); M K Addo, 'Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights' (2010) 32 *Human Rights Quarterly* 601, 661.

First, international legal universalists based their claim of universality of human rights by referring to the expansive standardisation of international human rights norms over a number of established human rights treaties and conventions.¹⁰ Universalist adopting this position insist that the ratification of human rights laws by states is evidence for the consensus on the universality of human rights,¹¹ as a 'state sovereign cannot be bound without its will.'¹² Jack Donnelly called this form of universalism 'international legal universality', whereby the basis of its universal claim of human rights is grounded on the wide ranging acceptance of the binding nature of international human rights law.¹³ This belief is evident in the operation of the UPR process, as it aims to promote the universality of human rights by holding states to account for their international human rights obligations.

Following on from this, the second core belief of international normative universalism is based on the premise that member states, at a number of different forums, have participated in engaging in an international human rights discourse in relation to the adoption, interpretation, and implementation of international human rights norms.¹⁴ This form of universalism can be compared with what Pieter van Dijk identifies as 'functional universalism', which encompasses the work of international supervisory institutions that monitor the implementation of human rights norms with the aim of promoting the universality of international human rights laws.¹⁵ Thus, the universalist claim is made on the basis that not only are the obligations embedded in international human rights instruments accepted by the majority of states, but also, states globally participate in the interpretation and implementation of these rights at a number of international fora. The UPR process is one such forum where the claimed universality of human rights is promoted through the participation of all member states of the UN in

¹⁰ M K Addo, 'Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights' (2010) 32 Human Rights Quarterly 601, 661.

¹¹ To name a few: International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 220A (ICESCR). Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTZ 1577 (CRC); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS (CEDAW). See also, Jerome Shestack, 'The Jurisprudence of Human Rights' in Theodor Meron (ed), *Human Rights in International Law* (Clarendon Press 1985) 79-81.

¹² K Miller, 'Human Rights of Women in Iran: The Universalist Approach and the Relativist Response' (1996) 10 Emory International Law Review 779, 797, 788.

¹³ Jack Donnelly, *Universal Human Rights: in Theory and Practice* (3rd edn, Cornell University Press 2013) 94. See also Lone Lindholt, 'The African Charter: Contextual Universality' in Kirsten Hastrup (ed), *Human Rights on Common Grounds: The Quest for Universality* (Kluwer Law International 2001) 125.

¹⁴ M K Addo, 'Practice of United Nations Human Rights Treaty Bodies' (n 10) 660.

¹⁵ Pieter Van Dijk, 'The Law of Human Rights in Europe: Instruments and Procedures for a Uniform Implementation' in Academy of European Law (eds), *Collected Courses of the Academy of European Law* (Volume VI Book 2, Kluwer Law International 1997) 1, 29.

the monitoring of human rights norms.¹⁶ This is particularly true as some states may be monitored against human rights laws that some states have not ratified. In this way, the UPR process promotes the universality of these international norms on the basis of states engaging in a global participation in the UPR process.

However, the foundations upon which the claims of international legal universalism are based can be criticised on two significant grounds. First, there was a clear lack of contribution by many member states during the drafting process of the International Bill of Rights. The scholars, Pollis and Schwab, heavily criticise the drafting process of the major international human rights documents as they emphasise that many African and Asian states were still under colonisation during the drafting process.¹⁷ Those developing states that did participate in the drafting process lacked both the resources and expertise to provide an effective and significant input in the construction of the international human rights norms.¹⁸ In light of this, an argument for the universal applicability of human rights norms that exist in the human rights documents seems questionable, as most states did not play an active part during the drafting process.

Second, despite subsequent ratification of human rights treaties by previously disadvantaged states, there is reason to suggest that the current interpretation of human rights was not to be considered absolute or final. The historical process of the consultation prior to the establishment of the UDHR can be used to support this argument. In 1946, the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) appointed a Committee on the Theoretical Basis of Human Rights. The Committee concluded that whilst consensus on some human rights was possible, inevitably there were going to be wide and far reaching differences on the interpretation of rights.¹⁹ As a result, the UNESCO Committee concluded that the human rights norms, as laid out in the UDHR, were not to be the final or the only way of expressing human rights.²⁰ In fact, Filmer S.C Northrop, an American philosopher, emphasised the importance of extracting the values and beliefs of each culture across the globe, and bringing these values to the forefront in order to design an acceptable and

¹⁶ A/HRC/RES/5/1, para 3 (a).

¹⁷ Adamantia Pollis and Peter Schwab, 'Human Rights: A Western Construct with Limited Applicability' in Adamantia Pollis and Peter Schwab (eds), *Human Rights Cultural and Ideological Perspectives* (Praeger 1980) 4.

¹⁸ A An-Naim, 'Problems of Universal Cultural Legitimacy for Human Rights' in A An-Naim and Francis M. Deng (eds) in *Human Rights in Africa: Cross Cultural Perspectives* (The Brookings Institutions, 1990) 331-367, 346-352.

¹⁹ UNESCO, *Human Rights: Comments and Interpretations* (2 July 1949) UNESCO/PHS/3(rev).

²⁰ Jacques Maritain, 'Introduction' in UNESCO, *Human Rights: Comments and Interpretations* (Alan Wingate 1949) 72.

‘adequate bill of rights.’²¹ However, contrary to this idea of the importance of cultural norms in the design and implementation of human rights, the core belief of international normative universalism is that the human rights norms in the international human rights instruments should transcend all national and cultural boundaries.²² In this way, universalists do not deny that cultures differ, instead they argue that any sameness embedded amongst humans should prevail over any cultural differences in relation to human rights.²³ It is this underappreciation of culture that shapes and moulds human nature that exposes the theory of universalism to the significant critique of cultural relativism. The significance of culture in assessing the validity of international human rights norms is comprehensively developed in the theory of cultural relativism, which is the focus of the next section of this chapter.

2.3. The different forms of the Cultural Relativist challenge to the Universality of Human Rights

The theory of cultural relativism is wide ranging with a number of different variants of the theory. The purpose of this section is to provide a critical analysis of the different forms of cultural relativist theories and form a reasoned conclusion as to why the moderate cultural relativist position is the most persuasive form of cultural relativist critique of the universalist claim of international human rights norms.

Before examining the different forms of cultural relativism, it is useful to conceptualise the notion of culture itself. This will help to provide the necessary foundations to gain a better understanding of the fundamental differences amongst the various forms of cultural relativism.

²¹ F.S.C Northrop, ‘Toward a Bill of Rights for the United Nations’ in UNESCO, *Human Rights: Comments and Interpretations* (Alan Wingate 1949) 181.

²² R Sloane, ‘Outrelativising Relativism: A Liberal Defence of the Universality of International Human Rights’ (2001) 34 *Vanderbilt Journal of Transnational Law* 527, 541-2. See also Vitit Muntarbhorn, ‘The Universality of Standards’, lecture at the René Cassin International Institute of Human Rights, July 1993 cited in Civic M, ‘A Comparative Analysis of International and Chinese Human Rights Law – Universality Versus Cultural Relativism’ (1995-1996) 2 *Buffalo Journal of International Law* 285, 317. See also, See also Jack Donnelly, ‘Human Rights as Natural Rights’ (1982) 4 *Human Rights Quarterly* 391.

²³ L Bell, A Nathan and I Peleg ‘Introduction: Culture and human rights’ in L Bell, A Nathan and I Peleg (eds), *Negotiating Culture and Human Rights* (Colombia University Press 2001) 1-5.

2.3.1 What is culture, and why is it significant?

Anthropological and sociological literature has provided a number of different definitions of culture.²⁴ The critical analysis of the different definitions of culture is beyond the scope, or need, for this section. Instead, here, I draw upon various scholarly writings on the conceptualisation of culture, to provide a definition of culture that is adopted for the purposes of this thesis. In this way, this definition will not only help to distinguish the core beliefs of the different forms of cultural relativism in this chapter, but also, will be used as the adopted definition of culture when examining the Final Outcome Reports for the purposes of this investigation.

To begin with, it is important to define the conceptual level of the definition of culture that will be adopted. Writing in the context of international relations, Roy Preiswerk has distinguished between four conceptual levels of 'culture'.²⁵ Briefly, the conceptualisation of 'micro culture' is used to describe particularities of small units such as tribes, minorities, village communities etc.²⁶ The 'national culture' is frequently used to refer to the nationals of a country, for example, 'French Culture'. The 'regional culture' is an extension of the national culture whereby certain characteristics of culture are shared by neighbouring countries. Finally, there is a 'macro culture', which describes characteristics that are common to a number of different cultures, which are not necessarily restricted to national and regional boundaries. For the purposes of this thesis, I will adopt this macro conceptualisation of culture, which is defined as 'an inherited body of informal knowledge embodied in traditions, transmitted through social learning in a community, and incorporated in practices'.²⁷ In this way, culture is interpreted in the widest possible manner, and thereby includes the 'totality of values, institutions and forms of behaviour transmitted within a society, as well as material goods produced by [people]...this wide concept of culture covers Weltanschauung [world view], ideologies and cognitive behaviour'.²⁸ Within this macro interpretation of

²⁴ See Albert Carl Cafagna, 'A formal analysis of definitions of culture' in Gertrude E Dole and Robert L Carneiro (eds), *Essays in the Science of Culture: In Honor of Leslie A White* (Thomas Y Cromwell 1960) 111-132. See also T.S Eliot, *Notes Toward the Definition of Culture* (Faber and Faber 1948); Raymond Williams, *Keywords: A vocabulary of Culture and Society* (Oxford University Press 1976) 76-82.

²⁵ Roy Prieswerk, 'The Place of Intercultural Relationships in the Study of International Relations' (1978) 32 *The Yearbook of World Affairs* 251, 252.

²⁶ *Ibid.*

²⁷ X Li, *Ethics, Human Rights and Culture: Beyond Relativism and Culture* (Palgrave Macmillan 2006) 9.

²⁸ Roy Prieswerk, 'The Place of Intercultural Relationships in the Study of International Relations' (n 25) 251. See also UNESCO 'Universal Declaration on Cultural Diversity' (2 November 2001) UNESCO Doc. 31C/Res 25, Annex 1 (2001).

culture, there are three interrelated concepts. First, the macro conceptualisation subsumes religion as an aspect of culture, and the religious norms often form an integral part of culture.²⁹ The second interrelated concept is the conceptualisation of ‘cultural community’, which is ‘a socially organized population group, a group of shared identity, or a society, within which a body of informal knowledge is socially transmitted and contested.’³⁰ The third interrelated concept which falls within the macro conceptualisation of culture is the concept of ‘cultural tradition’, which is the embodiment of the historically inherited and transformed, social transmitted, practically incorporated, and contested informal knowledge’.³¹

Once the level of conceptualisation of culture is defined, the next aspect is the related aspect of interpreting the nature and boundaries of culture. The most criticised and often dismissed definition of culture is that conceptualised by Franz Boas.³² Known as the Boasian view of culture, he understood culture to be a bounded, static, and homogenous entity that was distinct and resistant to change.³³ Xiarong Li describes this as the ‘classic school vision of culture’ which perceives culture as ‘time insensitive’ and thus determines ‘the destiny of the population and the ways in which they think, feel, judge and behave.’³⁴ This narrow conceptualisation of culture is argued to be used by repressive regimes who exploit the bounded and static interpretations of culture to justify intolerable practices.³⁵ Primarily for this reason, a number of alternative definitions of culture have been proposed.

This thesis adopts what is often known as the contemporary conceptualisation of culture. This position perceives culture as ‘unbounded, contested, and connected to the

²⁹ Frances Raday, ‘Culture, religion, and gender’ (2003) 1 *International Journal of Constitutional Law* 663, 665- 668. See also Walter Burkert, *Creation of the Sacred: Tracks of Biology in Early Religions* (Harvard University Press 1996).

³⁰ X Li, *Ethics, Human Rights and Culture: Beyond Relativism and Culture* (n 27) 19. See also, Charles Taylor, *Multiculturalism and ‘The Politics of Recognition’* (Princeton University Press 1992) 72; M Walzer, *Just and Unjust Wars* (3rd edn, Basic Books 2000) 313.

³¹ X Li, *Ethics, Human Rights and Culture: Beyond Relativism and Culture* (n 27) 20.

³² See Ann- Belinda Preis, ‘Human Rights as a Cultural Practice: An Anthropological Critique’ (1996) 18 *Human Rights Quarterly* 286, 295.

³³ Franz Boas, *The Mind of Primitive Man* (Forgotten Books 2012) 149. See also Ruth Benedict, *Patterns of Culture* (Routledge & K. Paul 1961).

³⁴ Xiarong Li, *Ethics, Human Rights and Culture: Beyond Relativism and Culture* (n 27) 9-10. See also, Lynda Bell, ‘Who produces Asian Identity? Discourse, Discrimination, and Chinese Peasant Women in the Quest for Human Rights’ in L Bell, A Nathan and I Peleg (eds), *Negotiating Culture and Human Rights* (Colombia University Press 2001) 27.

³⁵ See M Iovane, ‘The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations’ (2007) 14 *International Journal on Minority and Group Rights* 231, 24. See also, L Donoho, ‘Relativism versus Universality in Human Rights: The Search for Meaningful Standards’ (1990-1991) 27 *Stanford Journal of International Law* 345, 380.

relations of power'.³⁶ This is a more 'fluid' interpretation of culture, whereby practices and values of a particular culture are subject to 'internal inconsistencies, conflicts and contradictions'.³⁷ In line with this view, Sally Engle Merry clarifies the traditional misconceptions of the anthropological definition of culture by arguing that contemporary anthropologists understand cultural 'boundaries as fluid', and thus culture is 'marked by hybridity and creolization rather than uniformity or consistency'.³⁸

One of the fundamental advantages of adopting a broad and porous definition of culture is that its norms, symbols and institutions are subject to contestation. This means that cultural norms are open to changes and reforms to accommodate and respond to norms that are significant to a particular society. An-Na'im argues that this key process of change and reform of cultural values can be utilised to enhance the implementation of human rights protection.³⁹ As such, the porous definition of culture can be utilised to increase compliance and implementation of human rights in all cultures.

One may argue that this macro conceptualisation of culture is too broad a definition, and the term culture is coined to encompass 'everything'. However, here, I enlist An-Na'im's defence of adopting a broad conceptualisation of culture, that the aim here is to define what is or not included in culture. Indeed, this is addressed in the second aspect of this interpretation of culture when considering the boundaries of culture. Rather the aim here is to suggest there is a 'cultural dimension to every aspect of human consciousness and activity'.⁴⁰ This leads us to the final aspect of the conceptualising culture which is to understand the significance of culture. Regardless of the nuances of the precise conceptualisation of culture, it is difficult to deny the significant role culture plays in influencing the political, religious and ideological developments that occur over a period of time for the collective and individual human behaviour in any particular society.⁴¹ The influence of culture in all aspects of society is so fundamental, that an individual's perception of the world is unconsciously conditioned by pre-

³⁶ Sally Engle Merry, 'Human Rights Law and the Demonization of Culture (And Anthropology along the way) (2003) 26 PoLAR 55, 67.

³⁷ Ibid.

³⁸ Ibid 55, 64.

³⁹ A An-Na'im, 'State responsibility under International Human Rights Law to Change Religious and Customary Law' in Rebecca Cooks (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 173. See also, Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press 2014) 120.

⁴⁰ An-Na'im A, 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' in *Human Rights in Africa: Cross Cultural Perspectives* in An- Na'im and Deng (eds) (Brookings Institution 1990) 336.

⁴¹ See C Geertz, *Interpretations of Cultures* (Basic Books 1973) 49; A An-Na'im 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' (n 40) 333.

existing categories and standards of a particular culture.⁴² An-Na'im succinctly explains the significance of culture as being a:

[A] primary force in the socialization of individuals and a major determinant of the consciousness and experience of the community. The impact of culture on human behaviour is often underestimated precisely because it is so powerful and deeply embedded in our self-identity and consciousness.⁴³

Alison Dundes Renteln describes the unconscious acquirement of categories and standards of culture by individuals as 'enculturation'.⁴⁴ She argues that 'culture exerts a strong influence on individuals, predisposing them to act in ways consistent with their upbringing'.⁴⁵ Writing on the influential nature of culture, Pearce and Kang go to the extent of stating that 'to be human is to have been encultured to some specific culture whose characteristics have been internalised'.⁴⁶

In the next section I will critically analyse the various forms of cultural relativism, each of which place varying degrees of emphasis on the significance of culture when assessing the validity of international human rights norms.

2.3.2. What degree of Cultural Relativism should be considered within international discourse and monitoring of human rights?

At the core of the theory of cultural relativism is the recognition of the influence of culture on the manner in which evaluations or judgments are made by individuals in a particular society.⁴⁷ There are numerous variations of the theory of cultural relativism, each reflecting the different degrees of emphasis that is placed on the significance of culture when assessing the validity of international human rights norms.⁴⁸ Putting the

⁴² A Renteln *International Human Rights: Universalism versus Cultural Relativism* (Quid Pro Book 2013) 59.

⁴³ A An-Na'im, 'Toward a Cross Culture Approach to Defining International Standards of Human Right: The Meaning of Cruel, Inhuman or Degrading Treatment' in Abdullahi An-Naim (ed), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1995) 23.

⁴⁴ A Renteln, *International Human Rights: Universalism versus Cultural Relativism* (n 42) 58.

⁴⁵ A Renteln, 'The Use and Abuse of the Cultural Defence' (2005) 20 *Canadian Journal of Law and Society* 47, 48.

⁴⁶ WB Pearce and K Kang 'Conceptual Migrations: Understanding Travellers' Tales for Cross Culture adaptation' in YY Kim and WB Gudykunst (eds), *Cross Cultural Adaptation: Current Approaches* (Sage Publications 1988) 29.

⁴⁷ A Renteln, 'Relativism and the Search for Human Rights' (1988) 90 *American Anthropologist* 56, 57.

⁴⁸ For critique based on the western domination of the interpretation of international human rights norms see The Executive Board American Anthropological Association 'Statement on Human Rights' (1947) 49 *American Anthropologist* 539; J Cobbah, 'African Values and Human Rights Debate: An African Perspective' (1987) 9 *Human*

theory in the context of international human rights law, Fernando Tesón writes that ‘cultural relativism may be defined as the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society.’⁴⁹

2.3.2.1. A Critical Analysis of Strict Cultural Relativism

Strict cultural relativism is the most extreme form of relativism, and holds two core beliefs. First, all values and moral belief systems are culturally specific;⁵⁰ consequently, ‘what is morally right in relation to one moral framework can be morally wrong in relation to a different moral framework’.⁵¹ Second, following from the first belief, strict cultural relativists claim that there are such wide variations between the beliefs of cultures that cultural values are incomprehensible to one another, with no possibility of constructive dialogue between them.⁵² Therefore, at the heart of the theory of strict cultural relativism is an exaggerated claim for the ‘impossibility of transcultural justification.’⁵³ Applying the central beliefs of strict cultural relativism in the context of international human rights law, it means that;

local cultural traditions....properly determine the existence and scope of [human] rights enjoyed by individuals in a given society [and] no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.⁵⁴

Rights Quarterly 309; Bilahari Kausikan, ‘An East Asian Approach to Human Rights’ (1995-1996) 2 Buffalo Journal of International Law 265; A Pollis and P Schwab, ‘Human Rights: A Western Construct with Limited Applicability’ in Adamantia Pollis and Peter Schwab (eds), *Human Rights Cultural and Ideological Perspectives* (Praeger 1980) 4; Mutua Makau, ‘Savages, Victims, and Saviours: The Metaphor of Human Rights’ (2001) 42 Harvard International Law Journal 201, 214-216; R Pannikar, ‘Is the notion of human rights a western concept?’ (1982) 120 Diogenes 75, 86. Jack Donnelly differentiates between strong, radical and weak cultural relativism. See J Donnelly, *Universal Human Rights: in Theory and Practice* (2nd edn, Cornell University Press 2002) 89.

⁴⁹ Fernando R Tesón, ‘International Human Rights and Cultural Relativism’ (1984 – 1985) 25 Virginia Journal of International Law 869, 870-871.

⁵⁰ W Meyer, ‘Toward a Global Culture: Human Rights, Group Rights and Cultural Relativism’ 3 (1996) International Journal on Group Rights 169, 175.

⁵¹ G Harman and Judith Thomson, *Moral Relativism and Moral Objectivity* (Wiley-Blackwell 1995) 3. See also MJ Herskovits, *Cultural Dynamics* (Knopf 1964) 14.

⁵² See T Spaak, ‘Moral Relativism and Human Rights’ (2007) 13 Buffalo Human Rights Law Review 73, 75; Thomas Khun, *The Essential Tension: Selected Studies in Scientific Tradition and Change* (University of Chicago Press 1979) 290.

⁵³ M Perry, *The Idea of Human Rights: Four Inquiries* (Oxford University Press 1998) 82. See also J Donnelly, ‘Cultural Relativism and Human Rights’ (1984) 6 Human Rights Quarterly 400.

⁵⁴ F R Tesón, ‘International Human Rights and Cultural Relativism’ (n 49) 870-871.

Consequently, strict cultural relativists use cultural norms as the sole legitimating factor in assessing the acceptability of international human rights norms. As such, adherence to local cultural norms is prioritised over compliance with international human rights law. As Alison Dundes Renteln asserts, it is precisely these views which are responsible for the ‘scorn of cultural relativism by philosophers’.⁵⁵ Two main criticisms of strict cultural relativism will be discussed, which I argue seriously undermine the credibility of this extreme form of relativism.

First, from analysing two central beliefs of this form of relativism, it is very clear that strict cultural relativists adopt a heavily criticised traditional interpretation of culture. This school of thought perceives culture as ‘a bounded entity, homogenous, holistic, and time-insensitive’.⁵⁶ Adopting this highly criticised definition of culture presents a serious risk of strict cultural relativism being open to abuse. This is because a monolithic interpretation of culture results in what Jack Donnelly describes as either ignoring politics, or confusing politics with culture.⁵⁷ This means that the construction of ‘culture’ by some political leaders is not a representation of the entire society⁵⁸ and is often ‘misemployed’ to veil non-cultural politics within a state.⁵⁹ Rein Mullerson gives examples of political leaders, such as Milošević of Serbia and Tudjman of Croatia, who have used cultural and religious particularities as a method to suppress the basic human rights of individuals to meet political aims.⁶⁰ Consequently, it is argued that the monolithic interpretation of culture, as adopted by strict cultural relativism, presents a serious risk of being invoked by oppressive regimes to justify human rights violating practices.⁶¹

The second fundamental criticism of strict cultural relativism is in relation to its claim that cultures are incomprehensible to each other. This form of relativism defines cultural boundaries extremely rigidly with an outright rejection of any form of cross cultural dialogue or criticism. Moreover, this exaggerated claim on the impossibility of

⁵⁵ A Renteln, *International Human Rights: Universalism versus Relativism* (n 42) 51.

⁵⁶ Franz Boas, *The Mind of Primitive Mind* (reprinted by Forgotten Books, 2012) 149. See section 2.3.1 What is culture, and why is it significant? 2.3.1 What is culture, and why is it significant?

⁵⁷ J Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, 296.

⁵⁸ Catherine Powell, ‘Introduction: Locating Culture, Identity, and Human Rights’ (1999) 30 *Columbia Human Rights Law Review* 201, 211.

⁵⁹ R Mushkat, ‘Culture and International Law: Universalism and Relativism’ (2002) 6 *Singapore Journal of International and Comparative Law* 1028, 1032.

⁶⁰ Rein Mullerson, *Human Rights Diplomacy* (Routledge 1997) 98-100.

⁶¹ M Iovane, ‘The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations’ (2007) 14 *International Journal on Minority and Group Rights* 231, 241. See also M Cerna, ‘Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts’ (1994) 16 *Human Rights Quarterly* 740.

transcultural dialogue jeopardizes the core of the international human rights framework and the discourse on human rights law. The scholar I.C Jarvie criticises strict cultural relativism by arguing that:

By limiting critical assessment of human works it disarms us, dehumanizes us, leaves us unable to enter into communicative interaction; that is to say, unable to criticise cross culturally cross sub-culturally; ultimately, relativism leaves no room for criticism at all.⁶²

Concurring with this position, I argue that the central tenet of strict cultural relativism suppresses human interaction and communication across cultures. One of the fundamental risks of this position is that the limitation on cross cultural analysis and criticism essentially removes the discussion of certain cultural practices from the mainstream of international human rights discourse with the justification that cultural values and practices are incomprehensible to outsiders. The implications of this are it could potentially grant a licence to repressive regimes to continue to carry out atrocities, without any form of external check or balance. This results in a risk of retaining a status quo under oppressive regimes, leaders of which insist that their cultural values are context specific and incomprehensible to others.

2.3.2.2. A Critical Analysis of Moderate Cultural Relativism

A Middle Ground between Universalism and Strict Cultural Relativism?

So far in this chapter, I have criticised the positions advanced by international normative universalism as well as the strict cultural relativism. The debate on universalism and the cultural relativist perspectives have traditionally been perceived as a 'black and white issue, without taking in to due account the countless shades of grey'.⁶³ Marie-Benedicte Dembour has attempted to mediate between the two positions by stating that the two positions considered in isolation of the other are untenable.⁶⁴ Dembour explains that the sole reliance on universalism tends to breed moral arrogance as it 'excludes the experience of the other'.⁶⁵ However, she also notes that the strict

⁶² I.C. Jarvie, 'Rationalism and Relativism' (1983) 34 The British Journal of Sociology 45.

⁶³ F Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press 2014) 7.

⁶⁴ Marie-Benedicte Dembour 'Following the movement of a pendulum: between universalism and relativism' in Jane Cowan, Marie-Benedicte Dembour and Richard Wilson (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 58.

⁶⁵ Ibid 58.

cultural relativist perspective risks indifference to immoral situations.⁶⁶ Possibly for this reason, in an attempt to reconcile the benefits of universalism and relativism, a number of intermediate approaches have been proposed by scholars, which have been broadly categorised as moderate cultural relativism. However, unlike the strict and strong positions of cultural relativism, it is more challenging to provide a comprehensive definition of moderate cultural relativism as scholars from this school of thought differ in their approaches. For this reason, I have focussed on the general thesis of Abdullahi Ahmed An-Na'im, who is a leading scholar in this area. I focus on this thesis primarily because it is expansive and has been developed over a number of years, as well as being widely accepted by other authors. In fact, many scholars often refer to his thesis in their writings and have been heavily influenced by it when suggesting their own approaches. Thus, whilst the central focus of this section is on An-Na'im's suggestions, I will draw also upon approaches suggested by other authors.

In the final part of this section, I will critically assess the theory of moderate cultural relativism by discussing some of the benefits, as well as identify grounds on which the thesis can be questioned. Overall, I will argue that in between the arguments of universalism and strict cultural relativism, the theory of moderate cultural relativism provides a plausible middle ground that mediates between the extremes of universalism and strict cultural relativism. I primarily argue that this form of relativism has sufficient merit to question the claims of the presumed universality of human rights, and therefore there are grounds to suggest that the moderate cultural relativist perspective should be incorporated into the discussions and monitoring of international human rights law.

The core beliefs of Moderate Cultural Relativism

First, at the heart of the theory of moderate cultural relativism is the recognition of the unique worth of culture in the discourse of human rights. However, unlike the strict cultural relativism, the moderate cultural relativists adopt a contemporary definition of culture.⁶⁷ Thus, culture is conceptualised as unbounded and contested, and its values and beliefs are accepted to be open to reform due to the accepted porous nature of cultural boundaries.⁶⁸ As culture is accepted to be subject to reforms and external

⁶⁶ Ibid 58. See also A Renteln, *International Human Rights: Universalism versus Cultural Relativism* (Quid Pro Book 2013).

⁶⁷ Sally Engle Merry, 'Human Rights Law and the Demonization of Culture (And Anthropology along the way)' (2003) 26 PoLAR 55, 67. See further 2.3.1 What is culture, and why is it significant?.

⁶⁸ X Li, *Ethics, Human Rights and Culture: Beyond Relativism and Culture* (n 27)11-12.

influence, most moderate cultural relativists argue that despite the existence of diverse interpretations of human rights across cultures, an agreement on some shared universal principles on human rights is attainable.⁶⁹ The leading scholar of this school of thought is An-Na'im who states that:⁷⁰

Despite their apparent peculiarities and diversity, human beings and societies share certain fundamental interests, concerns, qualities, traits and values that can be identified and articulated as the framework for a "common" culture of universal human rights.⁷¹

Therefore, the aim of moderate cultural relativists is to make the current formulation of rights more acceptable and better implemented in the various cultures, rather than to outrightly reject the current international human rights instruments.⁷² Consequently, for moderate cultural relativists, the question is not focused on the extent to which the significance of culture is used to reject the universality of international human rights, but rather, how the universality of international human rights norms can be furthered. Methods of achieving universality of international human rights norms form the focus of the second central belief of the theory of moderate cultural relativism.

The second central premise of moderate cultural relativism is the belief that the only way of furthering universal human rights is to ground the rights in cultural values and beliefs.⁷³ More specifically, An-Na'im argues that the goal of universal human rights can only be furthered if human rights are culturally legitimate.⁷⁴ An-Naim writes that the aim of achieving cultural legitimacy of human rights is:

[to] adopt an approach that realistically identifies the lack of cultural support for some human rights and then seeks ways to support and legitimise the particular human rights in terms of the values, norms, and processes of change belonging to the relevant cultural traditions.⁷⁵

⁶⁹ Charles Taylor, 'Conditions of an Unenforced Consensus on Human Rights' in Joanne A Bauer and Daniel A Bell (eds), *The East-Asian Challenge for Human Rights* (Cambridge University Press 1999) 124-146.

⁷⁰ K Schooley, 'Cultural Sovereignty, Islam, and Human Rights- Toward a Communitarian Revision' (1994-1995) 25 *Cumberland Law Review* 651, 682.

⁷¹ A An-Na'im 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' (n 40) 321. See also A Renteln, *International Human Rights: Universalism versus Cultural Relativism* (n 66) 78.

⁷² A An-Na'im, 'The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia' in Joanne R. Bauer and Daniel A. Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press 1999) 153.

⁷³ A Renteln, *International Human Rights: Universalism versus Cultural Relativism* (n 66) 116.

⁷⁴ A An-Na'im 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' (n 40) 332.

⁷⁵ *Ibid* 339.

Similarly, Federico Lenzerini adheres to the goal of achieving cultural legitimacy of human rights and emphasises the advantages of this approach when he writes that:

when human rights are rationalised according to the terms of reference proper of a given culture – i.e. are attributed a meaning which is culturally intelligible in light of the intellectual patterns of the community...their goal, content, and role are better understood by the members of the society.⁷⁶

Consequently, if international human rights norms are incorporated within the ‘cultural substate’, and are integrated by the community as ‘natural components of everyday life’, such human rights norms are more likely to be accepted and implemented.⁷⁷ In this way, the cultural legitimacy of human rights ensures that the support for a particular value is no longer external and as such, those in authority cannot deny its implementation based on ‘national sovereignty’.⁷⁸

To engage in an Internal Discourse

The fundamental aim of an internal discourse is to reform certain values and beliefs that exist in a culture, that are inconsistent with human rights law, and to bring them in line with current international human rights standards.⁷⁹ In this way, the internal discourse is a strategy used to reform cultural beliefs and values so that they conform to international human rights law.⁸⁰ The key factor is that in order to avoid the appearance of ‘dictation by outsiders’, the reinterpretation of cultural beliefs is to be carried out by internal actors.⁸¹ Moreover, the reform of cultural beliefs needs to be undertaken within the cultural framework, and according to the cultural and religious texts.⁸² In this way, the method of reform must emanate from the culture itself if individuals within cultures are to accept international human rights law as binding.⁸³ The aim therefore is to

⁷⁶ L.A Obiora, ‘Feminism, Globalization, and Culture: After Beijing’ (1997) 4 *Indian Journal of Global Legal Studies* 355, 377.

⁷⁷ F Lenzerini, *The Culturalization of Human Rights Law* (n 63) 218. L.A Obiora, (n 76) 377.

⁷⁸ A An-Na’im ‘Problems and Prospects of Universal Cultural Legitimacy for Human Rights’ (n 40) 332.

⁷⁹ A An-Na’im, ‘Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights’ in Claude E Welch, Jr. and Virginia A. Leary (eds), *Asian Perspectives on Human Rights* (Westview Press 1990) 46-48.

⁸⁰ *Ibid* 46-48.

⁸¹ Abdullahi An-Na’im, ‘The Rights of Women in International Law in the Muslim Context’ (1987) 9 *Whittier Law Review* 515.

⁸² An-Na’im, ‘Cultural Transformation and Normative Consensus on the Best Interests of the Child’ (1994) 8 *International Journal of Law and the Family* 68.

⁸³ A An-Na’im, ‘Toward an Islamic Hermeneutics for Human Rights’ in Abdullahi Ahmed An-Na’im, Jerald D Gort, Henry Jansen and Hendrik M Vroom (eds) *Human Rights and Religious Values: An Uneasy Relationship?* (William B. Eerdmans Publishing Company Grand Rapids, 1995) 220.

promote change through reform of existing practices, rather than proposing to ‘replace them immediately.’⁸⁴

Suggestions of a similar nature have been put forward by Ibhawoh, who argues for 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.’⁸⁵ Any changes undertaken must require local involvement, whilst being sensitive to cultural integrity as ultimately, the local people ‘must feel a sense of ownership of the process of change and adaptation for it to succeed.’⁸⁶ Further, Zwart makes an attempt to reconcile international human rights and local culture as he suggests a ‘receptor approach’. He asserts that if social institutions in a particular society fall short of compliance with international human rights law, then changes to the social arrangements need to be ‘home grown’ remedies, rather than replacing them altogether.⁸⁷ Similar to An- Na’im’s suggestion, Sally Engle Merry argues that local and international human rights norms can be reconciled through the ‘vernacularisation’ of human rights by ‘the process of appropriation and translation’.⁸⁸ The translation of international human rights norms to local contexts takes place through a dialogue with transnational actors and local actors or activists such as NGOs.⁸⁹ In her approach, Merry arguably adopts a more universalist stance in comparison to An-Na’im’s approach to an internal discourse. This is because Merry more readily accepts the current interpretation of human rights. This is evidenced by the fact that the emphasis in her approach is an ‘appropriation and translation’ of international human rights norms into local norms, thus, not necessarily accepting the position that local norms may induce reforms to international human rights norms.

⁸⁴ A An-Na’im, ‘The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia’ (n 72) 157.

⁸⁵ B Ibhawoh, ‘Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State’ (2000) 22 Human Rights Quarterly 838, 856.

⁸⁶ Ibid.

⁸⁷ Tom Zwart, ‘Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach’ (2012) 32 Human Rights Quarterly 546, 560. See also K L Zaunbrecher, ‘When Culture Hurts: Dispelling the Myth of Cultural Justification for Gender based human rights violation’ (2011) 33 Houston Journal of International Law 679, 688.

⁸⁸ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law Into Local Justice* (The University of Chicago Press, (2006) 90, 220–21. See also, Carla Makhlouf Obermeyer, ‘A Cross-Cultural Perspective on Reproductive Rights’ (1995) 17 Human Rights Quarterly 366, 377-379.

⁸⁹ Ibid 1-2.

Cross Cultural Dialogue

Once an adequate level of legitimacy is met through an internal discourse in relation to particular cultures, An-Na'im suggests that the next stage is to work towards a cross cultural legitimacy of human rights by engaging in a cross-cultural dialogue.⁹⁰ This involves the participation by people of diverse cultures in agreeing upon the meaning, scope and implementation of human rights.⁹¹ Such a cross-cultural dialogue is to be undertaken between different member states on international human rights norms on an international forum. In this way, this approach utilises the fluctuating nature of culture by proposing some recommendations from outside the culture to influence the direction of change.⁹² Therefore, the suggestion is that for 'external actors should support and encourage indigenous actors who are engaging in internal discourse to legitimise and effectuate a particular human right.'⁹³ Similarly, Richard Falk's contribution seeks to mediate between international human rights norms and the various cultural traditions of the world with an aim of alleviating human rights violations.⁹⁴ In relation to harmful cultural practices, Richard Falk insists that they are not fixed concepts, and as such, can evolve and develop over time as a result of social interactions and engaging with other cultures.⁹⁵

In comparison, Alison Dundes Rentlen accepts the possibility that a dialogue among cultures may result in a lack of support for some international human rights norms simply because there is not worldwide support for the right.⁹⁶ Therefore, under Rentlen's approach, the scope of international human rights laws would be limited to those that are accepted by major cultural traditions.⁹⁷ An-Na'im departs from Rentlen's approach as he criticises it as being 'content with the existing least common denominator'.⁹⁸ In contrast, A-Na'im proposes to engage in a cross cultural dialogue for

⁹⁰ A An-Na'im, 'Toward a Cross Culture Approach to Defining International Standards of Human Right: The Meaning of Cruel, Inhuman or Degrading Treatment' in Abdullahi An-Naim (ed), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1995) 27-28.

⁹¹ Ibid.

⁹² A An-Na'im, 'Introduction' in A An-Na'im (ed), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1995) 4.

⁹³ A An-Na'im, 'State responsibility Under International Human Rights Law to Change Religious and Customary Law' in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994).

⁹⁴ R Falk, 'Cultural Foundations for the International Protection of Human Rights' in A.A. An-Na'im (ed) *Human Rights in Cross Cultural Perspectives* (University of Pennsylvania Press 1995) 46.

⁹⁵ Ibid 51, 59.

⁹⁶ A Renteln, *International Human Rights: Universalism versus Cultural Relativism* (n 66) 62-65.

⁹⁷ Ibid.

⁹⁸ A An-Na'im, 'Toward a Cross Cultural Approach to Defining International Standards of Human Rights' (n 90) 19-20.

ultimately ‘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’.⁹⁹ An-Na’im’s suggestion therefore is to continuously broaden and deepen an agreement across cultures of international human rights law using culturally legitimate methods by engaging in a cross-cultural dialogue.

Reasons to incorporate Moderate Cultural Relativism in the discussions and monitoring on international human rights law

In contrast to strict cultural relativism, most authors adopting the moderate cultural relativist position do not deny the possibility of engaging in criticisms of other cultural values and beliefs.¹⁰⁰ This is a significant advantage of the moderate cultural relativists’ position as it allows the possibility to not only hold some obscure cultural values to account, but also, to undertake reforms of such values to prevent culture being used as a guise to undertake human rights violations. Moderate cultural relativists suggest that such criticism should be carried out by individuals within a particular culture in the form of an internal discourse, as individuals within a culture should focus on obscure cultural values and aim to reinterpret them to bring them in compliance with international human rights standards.¹⁰¹ Similarly, An-Na’im also emphasises the importance for each culture to be prepared to suggest criticism in a sensitive manner, whilst at the same time accepting that the values of their own cultures can be open to criticism.¹⁰² In this way, obscure interpretations given to religious and cultural texts are scrutinised and held accountable by individuals within a particular culture. In addition, I argue that the moderate cultural relativism addresses the common criticism made against cultural relativism of its failure to criticise others cultures and its values.¹⁰³ The moderate cultural relativists’ belief that cultural values can be open to criticism will help to reduce the risk of culture being abused to defend human rights violations, as all beliefs will be subject to scrutiny, either externally or internally, against international human rights standards.

⁹⁹ Ibid 19-21.

¹⁰⁰ A Renteln, *International Human Rights: Universalism versus Cultural Relativism* (n 66) 78.

¹⁰¹ A An-Na’im, ‘Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights’ in Claude E Welch, Jr. and Virginia A. Leary (eds), *Asian Perspectives on Human Rights* (Westview Press 1990) 46-48.

¹⁰² A An-Na’im, ‘Cultural Transformation and Normative Consensus on the Best Interests of the Child’ (n 82) 68.

See also, Boaventura De Sousa Santos ‘Toward a multicultural conception of human rights’ in Berteza Esperanza Hermansex-Truyol (ed), *A Critical Moral Imperialism Anthology* (New York University Press 2002) 47.

¹⁰³ I.C. Jarvie, ‘Rationalism and Relativism’ (n 62) 45.

The second advantage of the moderate cultural relativist perspective is that the process of a cross-cultural dialogue welcomes, to some extent, the values and beliefs from different cultural perspectives to be incorporated into the discourse of international human rights law. An-Na'im emphasises that the interpretation given to human rights norms should be perceived as a 'project to be constructed through a global dialogue and collaboration, not as a predetermined concept of accomplished fact'.¹⁰⁴ Therefore, the interpretation of human rights norms is perceived as a continuing, flexible and inclusive project, which welcomes a contribution from different member states' cultural perspectives.¹⁰⁵ In this way, different cultures and member states are encouraged to see themselves, and be seen by others, as proactively contributing to the protection and promotion of universal human rights norms.¹⁰⁶ Such contributions from different cultural perspectives will, in turn, provide the opportunity to raise 'new areas of concern,' 'add more rights' and generally provide an 'informed interpretation and application of accepted norms.'¹⁰⁷ In addition, this approach is likely to increase compliance with the human rights laws if cultures themselves have contributed to the definition of human rights norms.

The third advantage of the moderate cultural relativist position is that it encourages a cooperative approach between international human rights norms and local cultural norms in achieving consensus on the universality of international human rights. In furthering the goal of universality of human rights, An-Na'im suggests an incorporation of the contingency approach to the discourse of human rights, which is the belief that when assessing the validity of human rights laws, the interpretation given at international and local levels must be seen as complementing each other, rather than being conflicting opposites.¹⁰⁸ In this way, the international standing of human rights laws both influences and is influenced by the universal acceptability at local level.¹⁰⁹ Adopting this approach in the discourse and monitoring of human rights law can be advantageous because international human rights norms and cultural particularities are accepted, to some extent, to influence and validate each other. In this way, human rights

¹⁰⁴ A An-Na'im, 'The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Context' (1997) 11 *Emory International Law Review* 29, 36.

¹⁰⁵ A An-Na'im, 'Religious Minorities under Islamic Law and the Limits of Cultural Relativism' (1987) 9 *Human Rights Quarterly* 1, 5.

¹⁰⁶ A An-Na'im, 'The Contingent Universality of Human Rights' (n 104) 36.

¹⁰⁷ A An-Na'im, 'Religious Minorities under Islamic Law' (n 105) 4.

¹⁰⁸ *Ibid.*

¹⁰⁹ A An-Na'im, 'State responsibility Under International Human Rights Law to Change Religious and Customary Law' (n 93) 173.

interpretations and decisions are more likely to be accepted and implemented at domestic level. This dialectical relationship should be emphasised during the discourse and monitoring of human rights norms, as it is one of the fundamental ways of incorporating various cultural value perspectives to the discourse of human rights to further the goal of making human rights culturally legitimate.

The fourth advantage of moderate cultural relativism is the recognition of the possibility that a cross-cultural dialogue on human rights may lead to the current interpretation of human rights norms open to criticisms as well as to changes and reforms.¹¹⁰ Describing it as the ‘process of retroactive legitimation’ of existing international standards, An-Na’im asserts that the current interpretation of human rights norms must itself be ‘open and responsive to the changing priorities and concerns of the various peoples of the world’.¹¹¹ Similarly, Lenzerini explains that if culture is considered as a living organism that is subject to constant change, and the terms of human rights adjudication is to be determined to a certain extent by cultural needs, then the terms of human rights norms will need to be modified to reflect the development of cultural patterns.¹¹² I argue that accepting the possibility of the current interpretation of human rights as being open to change and reform gives the opportunity for different cultural perspectives to genuinely influence the overall interpretation of human rights norms, thereby making the standards more culturally legitimate.

Reasons to question aspects of the Moderate Cultural Relativist position

There are two main aspects of the theory of moderate cultural relativism that are open to criticism.

First, in the context of the internal discourse, I argue that there is a reason to question the intensity and the rigorous approach that is proposed by An-Na’im. The language used in his writing suggests that he too readily accepts the current interpretation of human rights law as correct and final.¹¹³ For example, he writes that the internal discourse is a struggle to ‘establish enlightened perception and interpretations of

¹¹⁰ A An-Na’im, ‘The Contingent Universality of Human Rights’ (n 104) 36.

¹¹¹ Ibid 42.

¹¹² F Lenzerini, *The Culturalization of Human Rights Law* (n 63) 118.

¹¹³ See A An-Na’im, ‘State responsibility Under International Human Rights Law to Change Religious and Customary Law’ (n 93) 175. See also Boaventura De Sousa Santos ‘Toward a multicultural conception of human rights’ (n 102) 47.

cultural values'.¹¹⁴ I argue that this gives the impression that the current interpretation of human rights is the only correct and final form. Thus, the only process left to be carried out is for cultures to re-interpret cultural norms to comply with international human rights law. Isaiah Berlin's analysis can be enlisted here. He draws analysis of the concepts of 'means' and 'ends' and states that 'where the ends are agreed, the only questions left are those of means, and these are not political but technical'.¹¹⁵ Applying this notion to An-Na'im's proposals in relation to internal discourse, I argue that there is a risk that the 'reinterpretation of cultural norms', aims to reform cultural norms simply as a 'means' to realise the predetermined 'ends', which is to comply with the international standard of human rights. Thus, the current interpretation of human rights is presumed to be correct, which is proposed to simply be adopted by local cultures. This approach is detrimental as there is a risk that the primary function of the internal discourse is to reform and restructure cultural norms to comply with the interpretation of international human rights norms.

The second criticism is in relation to the methodologies and the goal of the moderate cultural relativist position of achieving culturally legitimate human rights laws, which raises a number of challenging questions. For instance, whose voices and concerns are represented as the 'culture' with which an internal discourse or a cross-cultural dialogue is engaged? Which standards of cultural legitimacy should apply? What about alternative or competing standards of cultural legitimacy? Who selects which views and positions are to be represented as culture? These critical questions can be raised in relation to the proposals suggested by those scholars that can be categorised as adopting a moderate cultural relativist position.

Addressing this criticism directly, An-Naim himself does acknowledge these challenges and emphasises that cultural legitimacy or illegitimacy of anything is problematic 'in that it can only be considered within the framework of a number of vague and contestable variables'.¹¹⁶ An-Na'im clarifies that his thesis 'does not assume that all individual or groups within a society hold identical views on the meaning and

¹¹⁴ A An- Na'im, 'Towards a cultural approach to Defining International Standards of Human Rights' (n 90) 19-21, 28-30, 32-43. See also K Schooley, 'Cultural Sovereignty, Islam, and Human Rights- Toward a Communitarian Revision' (n 70) 688.

¹¹⁵ Isaiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlins (ed), *Four Essays on Liberty* (Oxford Paperbacks 1969) 118.

¹¹⁶ A An-Na'im, 'State responsibility under International Human Rights Law to Change Religious and Customary Law' (n 93) 172.

implications of cultural values'.¹¹⁷ In fact, he presumes and accepts that there are actual or potential differences in the interpretation of cultural values within a particular society.¹¹⁸ Dominant groups or classes within a particular society are likely to put forward an argument to maintain perceptions or interpretations of cultural values to support their own interests and to retain the status quo. An-Na'im calls this an internal struggle and the problems presented by what is called the 'politics of culture'.¹¹⁹ An-Na'im argues that the difficult questions of political struggles within a particular culture should be seen in light of 'the ambivalence and contestability of cultural norms and institutions', which permit varying interpretations and practices.¹²⁰ Thus, the contestability of culture recognises the political struggle within cultures between those who challenge the status quo against those who wish to legitimise their power and privilege.¹²¹ Within this political struggle, An-Na'im writes that human rights advocates need to recognise their role in the constantly changing cultural makeup and utilise this process effectively to enhance the recognition and implementation of human rights.¹²² Therefore, the goal of achieving internal cultural legitimacy will facilitate the political struggles within a particular society and mobilize those oppressed individuals or groups to challenge the status quo of those in power.¹²³ Even though outsiders may offer sympathy to the less dominant groups or classes within society, those external of the culture cannot legitimately claim a valid view of internal cultural norms.¹²⁴ In this way, the mechanics of the internal discourse within a particular culture will facilitate the political struggle of those oppressed groups and individuals that are within the culture itself. To bring these internal political struggles to the international forum with the aim to resolve them would surely risk such an attempt being labelled with cultural imperialism.

Women are an obvious example of those who may have their voices silenced within a particular culture and who may be actively engaged in an internal political struggle within a society for their rights to be respected. It is undeniable that in some societies, the notion of culture has been interpreted in a way to maintain the privileged status of

¹¹⁷ A An-Na'im 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' (n 40) 20.

¹¹⁸ Ibid.

¹¹⁹ A An-Na'im, 'State responsibility under International Human Rights Law to Change Religious and Customary Law' (n 93) 173.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ A An-Na'im, 'Toward an Islamic Hermeneutics for Human Rights' (n 83) 332.

¹²⁴ A An-Na'im, 'Introduction' (n 92) 20.

the dominant group in society, usually men, whilst simultaneously oppressing the rights of women. Thus, there are a number of reasons to suggest that there is an inherent association between women and culture. It is due to this inherent relationship between women and culture that women's rights are more susceptible to the challenge of universality from a cultural relativism perspective. For this reason, a consideration of women's rights, in the context of the theoretical framework adopted for this thesis, will be the focus of the next section.

2.4. The Relationship between Women and Culture

The category of women's rights was selected as the focus for this exploration of the UPR process. A methodological explanation of the reasons behind this selection will be expanded in the next chapter. For the present purposes I will focus on the justification of selecting women's rights based on the theoretical framework adopted for this thesis. The primary aim here is twofold. First, I discuss the inherent association between women and culture and explain why claims from a cultural relativist perspective are more likely to affect the rights of women than men. Second, I aim to introduce the moderate cultural relativist assessment on the relationship between women and culture. It is important to note that the discussion below is not intended to be a complete or a comprehensive analysis of women and their rights in the context of culture. Instead, the discussion simply introduces the inherent association between women and culture with the aim to explain why women's rights were selected as a focus for this thesis.

2.4.1. An Overview of the Historical Development of Women's Rights in International Human Rights Discourse

Since the very inception of the UDHR, it has long been argued that the interests and concerns of women and their rights have, until recently, been marginalised from the mainstream human rights discourse.¹²⁵ This is largely because women have been excluded from both the substance and the process of international human rights law,

¹²⁵ Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 621-634.

particularly during the early years of the establishment of the United Nations, where women did not participate during the development and the drafting of the Declaration, and the two Conventions that followed.¹²⁶ As a result, the dominant interpretations given to international human rights law have been defined to primarily address the types of violations that men are subject to, which excludes the specific violations that women experience.¹²⁷

This marginalisation of women from the mainstream human rights discourse was the primary reason behind the development of the women's human rights movement between the years 1976 and 1985, which has been described as the UN Decade for Women.¹²⁸ In 1979, the General Assembly adopted the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which has been described as the most significant emergence in the evolution of women's rights.¹²⁹ This Convention focused on gender issues and brought the interests and concerns of women to the centre stage of the discourse of international human rights by specifically addressing violations carried out against women.¹³⁰

2.4.2. The Relationship between Women and Culture

The division between the 'public' and 'private' spheres that exist in the mainstream international human rights instruments and discourse has been one of the prominent issues raised during the women's rights movement.¹³¹ For instance, Berta Esperanza Hernandez-Truyol argues that the public and private dichotomy is one of the fundamental reasons underlying the subordination and marginalisation of women and their rights from the mainstream international human rights discourse.¹³²

¹²⁶ Hilary Charlesworth, 'What are Women's International Human Rights?' in Rebecca Cook (eds), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 63.

¹²⁷ Charlotte Bunch, 'Transforming Human Rights from a Feminist Perspective' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspective* (Routledge 1995) 13.

¹²⁸ Hilkka Pietilä and Jeanne Vickers, *Making Women Matter: The Role of the United Nations* (Zed Books Limited 1990) 75-83.

¹²⁹ Berta Esperanza Hernandez-Truyol, 'Human Rights through a Gendered Lens: Emergence, Evolution, Revolution' in Kelly D Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Volume 1, Transnational Publishers Inc 1999) 4.

¹³⁰ Berta Esperanza Hernandez-Truyol, 'Women's Rights and Human Rights- Rule, Realities and the Role of Culture: A formula for reform' (1995-1996) 21 *Brooklyn Journal of International Law* 605, 630-631.

¹³¹ Hilary Charlesworth, 'Human Rights as Men's Rights' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspective* (Routledge 1995) 106-110.

¹³² Berta Esperanza Hernandez-Truyol, 'Human Rights through a Gendered Lens: Emergence, Evolution, Revolution' (n 129) 32.

The public sphere is considered to include ‘government, political, and commercial activities’, which are often dominated by men and from which women are largely excluded.¹³³ In contrast, the private realm is the family and domestic life, which is primarily dominated by women,¹³⁴ and where governments should not intrude.¹³⁵ Donna Sullivan criticises the gendered nature of the public and private divide as where the ‘economic, social and political power adheres in the public realm to which women have limited access’ and control over.¹³⁶ The fundamental argument is that the actions of individuals in the public realm are subject to government regulation and scrutiny, whilst the actions undertaken in the private realm, largely affecting women, avoids such regulation.¹³⁷

A convincing explanation of the reasons underlying the very existence of the public and private divide in international human rights law is provided by the legal scholar Donna Sullivan.¹³⁸ She writes that the ‘state centred nature of international law, the dominance of civil and political discourse all account for the emphasis placed on the violations undertaken by the state and the neglect of the gender specific violations that occur in the private sphere.’¹³⁹ Similarly, Charlotte Bunch explains that the public and private divide was first initiated by the ‘western-educated propertied’ men, that first advanced the cause of human rights, feared violations of civil and political rights in the public sphere; In contrast, ‘they did not fear, however, the violations in the private sphere of the home because they were the masters of that territory’.¹⁴⁰

With the backdrop of the public and private discussion, the relationship between women and culture becomes more conspicuous. The issues and concerns that largely affect women are often relegated to the private sphere.¹⁴¹ For instance, the private sphere deals with issues such as sexual and reproductive health, marriage, polygamy,

¹³³ Lucinda Joy Peach, ‘Are Women Human? The Promise and Perils of “Women’s Rights as Human Rights”’ in Lynda Bell, Andrew Nathan and Ilan Peieg (eds), *Negotiating Culture and Human Rights* (Columbia University Press 2001) 159.

¹³⁴ Ibid.

¹³⁵ Berta Esperanza Hernandez- Truyol, ‘Human Rights through a Gendered Lens: Emergence, Evolution, Revolution’ (n 129) 32.

¹³⁶ Donna Sullivan, ‘The Public/Private Distinction in International Human Rights Law’ in Julie Peters and Andrea Wolper (eds), *Women’s Rights, Human Rights: International Feminist Perspective* (Routledge 1995) 128.

¹³⁷ Charlotte Bunch and Samantha Frost, ‘Women’s Human Rights: An Introduction’ in Cheris Kramarae and Dale Spender (eds), *Routledge International Encyclopedia of Women: Global Women’s Issues and Knowledge* (Routledge 2000).

¹³⁸ Donna Sullivan, ‘The Public/Private Distinction in International Human Rights Law’ (n136) 127.

¹³⁹ Ibid.

¹⁴⁰ Charlotte Bunch, ‘Transforming Human Rights from a Feminist Perspective’ (n 127) 13.

¹⁴¹ C Cerna, ‘Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio – Cultural Contexts’ (1994) 16 *Human Rights Quarterly* 740, 746.

divorce and inheritance.¹⁴² However, where the issues that arise in the public sphere are subject to scrutiny and regulation by the government and public bodies, the issues that fall within the remit of the private sphere are more inclined to be informed and governed by cultural norms.¹⁴³ Following on from this, women's roles have traditionally been dominated in the private sphere, and issues and concerns of women have been seen as intertwined with the symbolisation and continuance of the culture itself.¹⁴⁴ For instance, women are considered as the 'repositories, guardians and transmitters of culture',¹⁴⁵ as they are often considered to represent the 'reproduction of the community' as well as being the primary caregivers in the family and domestic life.¹⁴⁶ In this way, a woman's mannerism, characteristics and clothing have sometimes become the visible symbolisation of a particular culture.¹⁴⁷ Thus, some societies have continued to defend unequal treatment of women, and their roles in the private sphere, to preserve cultural particularities.¹⁴⁸ Indeed, the sustenance of group boundaries is often considered as the responsibility of women.¹⁴⁹ For this reason, primarily because women's role is predominantly in the private sphere which is regulated and informed by cultural norms, the issues and concerns of women are more susceptible and 'fragile to the claims of culture'.¹⁵⁰ For instance, practices that are often justified and defended in the name of culture often impede human rights that are gender specific.¹⁵¹ To name some specific examples, FGM, son preference, forced and early marriages, the implications of the dowry system, male control over land and finances, marital rape, family honour killings, and witch hunting all preserve patriarchy at the expense of violating women's rights.¹⁵² In this way, a challenge to the universality of human rights from a cultural relativist perspective is more likely to have direct, or indirect, influence

¹⁴² Ibid.

¹⁴³ C Cerna and Jennifer Wallace, 'Women and Culture' in Kelly D Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Volume 1, Transnational Publishers Inc 1999) 629. Julie Mertus, 'State Discriminatory Family Law and Customary Values' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspective* (Routledge 1995) 135.

¹⁴⁴ Ibid.

¹⁴⁵ Arati Rao, 'The Politics of Gender and Culture in International Human Rights Discourse' in Dorothy Hodgson (ed), *Gender and Culture at the Limits of Rights* (University of Pennsylvania Press 2011) 169.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Salma Maoulidi, 'Between Law and Culture: Contemplating Rights for Women in Zanzibar' in Dorothy Hodgson (ed), *Gender and Culture at the Limits of Rights* (University of Pennsylvania Press 2011) 32.

¹⁴⁹ Yakin Ertürk, 'Report of the Special Rapporteur on violence against women, its causes and consequences: Intersections between culture and violence against women' (United Nations General Assembly 17 January 2007) A/HRC/4/34 para, 63.

¹⁵⁰ Berta Esperanza Hernandez-Truyol, 'Human Rights through a Gendered Lens: Emergence, Evolution, Revolution' (n 129) 32.

¹⁵¹ Frances Raday, 'Culture, religion, and gender' (2003) 1 *International Journal of Constitutional Law* 663, 670.

¹⁵² Ibid.

on women's rights issues and concerns. It is primarily for this reason, whereby women's rights are more susceptible to cultural relativist critiques, that the issue of women's rights was a natural selection for the purposes of this thesis.

2.4.3. An Analysis of the Relationship between Women and Culture from a Moderate Cultural Relativist Perspective

It is common for human rights scholars to depict the relationship between women and culture in a negative light, with the notion of culture often presumed to be detrimental to women and their rights. The central argument of this school of thought is that culture, and its values, are often used as a justification for carrying out harmful practices against women.¹⁵³ For example, Cerna and Wallace argue that despite a number of international human rights conventions to eliminate discrimination against women, 'most cultures continue practices that are detrimental to the wellbeing of girls and women'.¹⁵⁴ Arati Rao on this point argues:

No social group has suffered greater violation of its human rights in the name of culture than women. Regardless of the particular forms it takes in different societies, the concept of culture in the modern state circumscribes women's lives in deeply symbolic as well as in immediately real ways.¹⁵⁵

Similarly, Susan Moller Okin, strongly emphasises the detrimental impact of culture for women as she argues that the principal aim of most culture is control of women by men, and to endorse the suppression of women.¹⁵⁶ This position is similarly reflected in an ever increasing number of human rights documents, which perceive culture as an obstacle to the protection of women's rights.¹⁵⁷ For instance, the Committee on the Elimination of Discrimination against Women has often criticised cultural values in

¹⁵³ Rhoda Howard. 'Women's Rights in English- Speaking Sub- Saharan Africa' in Claude E., Jr. Welch (ed), *Human Rights and Development in Africa* (State University of New York Printers 1984) 46.

¹⁵⁴ Christina Cerna and Jennifer Wallace, 'Women and Culture' in Kelly D Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Volume 1, Transnational Publishers Inc 1999) 624.

¹⁵⁵ Arati Rao, 'The Politics of Gender and Culture in International Human Rights Discourse' in Dorothy Hodgson (ed), *Gender and Culture at the Limits of Rights* (University of Pennsylvania Press 2011) 169.

¹⁵⁶ Susan Moller Okin, 'Is multiculturalism Bad for women?' in Susan Okin (eds), *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 13. Rhoda Howard. 'Women's Rights in English- Speaking Sub- Saharan Africa' in Claude E., Jr. Welch (ed), *Human Rights and Development in Africa* (State University of New York Printers 1984) 46.

¹⁵⁷ Sally Engle Merry, 'Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)' (2003) 26 *Polar* 60.

relation to women in a number of Concluding Observations and General Comments.¹⁵⁸ One such example is in a General Comment whereby the Committee stated that ‘the most significant factors inhibiting women’s ability to participate in public life has been the cultural framework of values and religious beliefs.’¹⁵⁹

Whilst it is recognised that the rich nature of culture means that aspects of its beliefs can be interpreted to veil human rights violations against women, perceiving the relationship between women and culture from a solely negative perspective can be criticised. For example, Sally Goldfarb argues that currently when culture is considered in discussions of domestic violence, it is done so in a negative manner, which considers culture as being harmful to women and which is used as a defence to excuse perpetrators of such violence.¹⁶⁰ However, she argues this position overlooks the support of women’s rights that can be offered by some cultures.¹⁶¹ Moreover, Goldfarb argues that by considering cultural influences in issues such as domestic violence, it can help to gain a better insight to the underlying reasons behind domestic violence and how best to devise suitable legal responses.¹⁶² Similarly, Rupa Reddy asserts that dismissing cultural issues in relation to violence can lead to the lack of contextualisation of important issues.¹⁶³ She argues that with respect to violence against women, taking into account the cultural context can benefit women as it provides a better understanding of the difficulties that they face.¹⁶⁴ Therefore, by incorporating cultural values in the discourse of women and their rights, it may help to better understand the violations suffered by women and help direct the correct manner of response that is required. Such reforms can be carried out using the methodologies suggested by moderate cultural relativists, to ensure that the reforms that are suggested are culturally legitimate, and thus stand the best chance of being accepted and

¹⁵⁸ See UN Committee on the Elimination of Discrimination Against Women, ‘UN Committee on the Elimination of Discrimination Against Women ‘ (10 August 2007) CEDAW/C/COK/CO/1, para 28; UNGA ‘Resolution adopted by the General Assembly’ (7 January 1997), para 45; UNCEDAW, ‘Concluding Observations on sixth report’ (10 August 2007) CEDAW/C/NZL/CO/6.

¹⁵⁹ UNCEDAW, ‘CEDAW General Recommendation No. 23: Political and Public Life’ (1997) A/52/38, para 10. See also UNCEDAW, ‘CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations’ (1994) para 41.

¹⁶⁰ Sally F Goldfarb, ‘A Clash of Cultures: Women, Domestic Violence, and the Law in the United States’ in Dorothy Hodgson (ed), *Gender and Culture at the Limits of Rights* (University of Pennsylvania Press 2011) 69.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Rupa Reddy, ‘Gender, Culture and the Law: Approaches to ‘honor’ crimes in the UK’ (2008) 16 *Feminist Legal Studies* 305. See also Anne Griffiths, ‘Gendering Culture: towards a plural perspective on Kwena Women’s Rights’ in Jane Cowan, Marie- Benedicte Dembour and Richard Wilson (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 115.

¹⁶⁴ Rupa Reddy, ‘Gender, Culture and the Law: Approaches to ‘honor’ crimes in the UK’ (n 160) 305.

implemented.¹⁶⁵ An-Nai'm, who advocates this position, argues that the changes to cultural practices that violate women's human rights need to be proposed by the individuals within the cultures to be effective.¹⁶⁶ Moreover, such changes need to be based on cultural sources and methodologies.¹⁶⁷ A successful practical example of the implementation of this approach can be given in relation to women's rights in Egypt. The representative of Egypt in 2000 presented a report to CEDAW in which she announced that women were now given the right to unilaterally divorce their husbands. The representative stated that the passage of this law was only made possible because the new laws could be justified in line with their own cultural and religious texts.¹⁶⁸

In this way, by adopting the moderate cultural relativist methods, there is a greater chance of the reforms being carried out in a culturally legitimate manner, being thus more likely to be accepted and implemented in the societies and cultures in question.

2.5. Conclusion

I began this chapter by defining the universalistic tendencies of the UPR process within the theory of international normative universalist position. I then moved on to critically analyse the most significant challenge to the presumed universality of human rights, the theory of cultural relativism. I critically analysed the strict form of cultural relativism, and provided reasons as to why there are serious grounds to question this form of relativism. I then explored the theory of moderate cultural relativism and came to a reasoned conclusion that whilst this theory has its flaws; it has sufficient merit to fundamentally question the presumed universality of human rights, and thus, be incorporated into the discussions and monitoring of international human rights law. The final section of this chapter focussed on the association between women and culture. Here, I provided the theoretical reasons for the selection of women's right, and explained the relationship between women and culture from a moderate cultural relativist perspective.

¹⁶⁵ 2.3.2.2. A Critical Analysis of Moderate Cultural Relativism.

¹⁶⁶ A An-Na'im, 'State responsibility under International Human Rights Law to Change Religious and Customary Law' in Rebecca Cooks (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 167. See also, A An-Na'im, 'The Rights of Women in International Law in the Muslim Context' (1987) 9 Whittier Law Review 491.

¹⁶⁷ Ibid.

¹⁶⁸ United Nations, 'Report of the Committee on the Elimination of Discrimination against Women' (17 January 2000) A/55/38, para 6-7.

Going further, there is another methodological and pragmatic reason for why I chose women's rights as the focus for this investigation of the UPR process. The justification for this choice, together with an explanation for the other selections I made during this investigation, will be the focus of discussions in the next chapter of this thesis, which is the research methods chapter.

Chapter 3

Research Methods

3.1. Introduction

In the previous chapter, I discussed why the theory of moderate cultural relativism was the soundest form of critique to challenge the normative universalist claim, which is embedded in the nature and operation of the UPR process. The purpose of this chapter is to provide a reasoned account of the research methods employed for this research project. I aim to explain how the methodological choices that I made were informed by the theoretical framework of this study. The choices and methodological approaches adopted throughout this investigation were consciously selected with the ultimate aim of answering the research question of this investigation. This is to assess whether, and to what extent, member states introduce arguments from a cultural relativist perspective in the discussions held during state reviews in the UPR process.

This chapter is divided into three main sections. In the first section, I will explain why the method of documentary analysis was the most suitable method to answer the research question of this study. In the second section, I discuss the research design of this investigation. I provide a detailed account of the research methods employed for this study, and discuss how the theoretical framework of this thesis informed the selection of women's rights as the focus for this thesis. In the final section, I explain how the findings of this investigation will be presented in the next three chapters of this thesis.

3.2. Documentary Analysis as the Research Method for this Study

In this investigation, I employed the method of documentary analysis for the purposes of answering the research question of this thesis.¹ Authors of social research methods, such as Judy Payne and Geoff Payne, describe documentary research as investigating,

¹ For more information on Documentary Analysis see Lindsay Prior, *Using Documents in Social Research* (Sage Publication 2003); Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 556.

categorising and interpreting written documents that are in the public domain.² The significance of using documents in a research project is emphasised by Lindsay Prior, who writes that ‘a document, especially a document in use, can be considered as a site or field of research in itself.’³ When undertaking documentary research, Jennifer Platt writes that the focus is first, to describe how the documents were examined to answer the research question and second, to assess the quality of the documents used for the study.⁴ In the sections below, I will discuss both of these criteria in the context of this investigation.

3.2.1 The Examination of the Documents

There are a total of three reports produced at the conclusion of each state reviewed in the UPR process. These are the Final Outcome Report, an Addendum (if any), and any statements made at the HRC plenary hearing, a record of which is provided in a HRC Session Report. For the purposes of this investigation, I examined all three reports for each of the 193 member states reviewed in the UPR process. I selected the Final Outcome Reports, together with the supplementary documents, as the primary source of data to analyse as the reports provide a written account of arguably the ‘core element’ of the entire process, the interactive dialogue session.⁵ The dialogical nature of the sessions provides an opportunity for an instant response and feedback on key human rights issues, which means it provides a good platform to assess whether cultural relativist positions are raised in the discussion held amongst member states during the UPR process.

There are a number of different databases available, which store all the documents that are used and produced as part of the UPR process. These include: United Nations UPR Home,⁶ UPR Info,⁷ UPR Watch⁸ and the UPR process pages on the International

² Geoff Payne and Judy Payne, *Key Concepts in Social Research* (Sage Publications 2004).

³ Lindsay Prior, *Using Documents in Social Research* (n 1) 3. See also Lindsay Prior, ‘Using Documents in Social Research’ in David Sliverman (ed), *Qualitative Research* (3rd edn, Sage Publications 2011) 93.

⁴ Jennifer Platt, ‘Evidence and Proof in Documentary Research: 1 Some Specific Problems of Documentary Research’ (1981) 29 *Sociological Review* 31. See also John Scott, *A Matter of Record: Documentary Sources and Social Research* (Polity Press 1990); Paul Atkinson and Amanda Coffey, ‘Analyzing Documentary Realities’ in David Sliverman (ed), *Qualitative Research: Theory, Method and Practice* (3rd edn, Sage Publications 2011) 79.

⁵ Björn Arp, ‘Lessons Learned from Spain’s Practice before the United Nations Human Rights Reporting Mechanisms: Treaty Bodies and Universal Periodic Review’ (2011) 15 *Spanish Yearbook of International Law* 1, 13.

⁶ <<http://www.ohchr.org/en/hrbodies/upr/Pages/UPRMain.aspx>> accessed 6 July 2015.

⁷ <<http://www.upr-info.org/>> accessed 6 July 2015.

⁸ <<http://upr-epu.com/ENG/upr.php?act=2&lang=2>> accessed 6 July 2005.

Service Human Rights Website.⁹ The UPR Info website, which is a non-profit and non-governmental organisation, provides a database for the reports, which I found to be the most informative and accessible, and therefore was the primary source from which the data for this study has been gathered.

3.2.2 An Evaluation of the Quality of the Documents to be examined

Lindsay Prior writes that an evaluation of the quality of the documents examined is an important part of any social scientific research project.¹⁰ John Scott provides authoritative criteria to assess the quality of documents to be analysed.¹¹ For the purposes of this investigation, the most relevant aspects of Scott's criteria for assessing the quality of the documents are the *credibility* and *meaning* of the Final Outcome Reports, and other supplementary material, that were to be examined for this investigation.¹²

The criterion of credibility is concerned with the accuracy of the content of the Final Outcome Reports and the other supplementary reports. There are two main concerns that need to be discussed in relation to the accuracy of the documents. The first is that the Final Outcome Reports are a summary of the interactive dialogue session.¹³ As a result, some omissions and the risk of inaccuracies are inevitable. It was therefore significant to assess the extent to which the reports were summarised, and whether the reports continued to provide a true reflection of the nature of the discussions held amongst states in the interactive dialogue session. To this end, I decided to observe the oral reviews of 10 selected member states through the video archives obtained from the UPR Info's website.¹⁴ To ensure that the 10 selected states represented a wide geographical spread, I selected 2 states from each of the 5 UN regional groups.¹⁵ This method was the only way of ensuring that a fair and achievable sample of states was observed for the purposes of this task. The states selected for review were: Burkina

⁹ <<http://www.ishr.ch/upr-monitor?task=view>> accessed 6 July 2015.

¹⁰ Lindsay Prior, *Using Documents in Social Research* (n 1) 26. See also John Scott (n 4).

¹¹ John Scott, (n 4) 6.

¹² Ibid.

¹³ UNHRC 'Res 5/1 Institution-building of the United Nations Human Rights Council' (18 June 2007) Annex. A/HRC/RES/5/1 para, 26

¹⁴ <http://www.upr-info.org/en/webcast> accessed 31st August 2015.

¹⁵ These are: African Group, Asia- Pacific Group, Eastern European Group, Latin American and Caribbean Group and the Western European and Others Group. < <http://www.un.org/depts/DGACM/RegionalGroups.shtml>> accessed 31st August 2015.

Faso, Gambia, Bahrain, India, Slovakia, Poland, United Kingdom, France, Dominican Republic and Costa Rica.¹⁶

I observed the sessions with the aim of comparing the dialogue exchanged between states during the interactive session with the written record, which is summarised in the Final Outcome Reports. I noted down any omissions and inaccuracies recorded in the report when compared to the video recording. From these observations, I found that the recommendations that were issued to the state under review by observer states were all recorded with word for word accuracy in the Final Outcome Reports. However, the other statements made by states during the interactive dialogue session were not recorded with such accuracy. Nevertheless, the key words mentioned in the oral review by the states were recorded, which meant that the overall gist of the message recorded in the report was clear and accurate. It is also to be noted that the reports are adopted with consensus from all the parties involved during the Working Group sessions and in the HRC sessions. Thus, the state under review and the observer states are given an opportunity to voice any concerns in relation to possible inaccuracies of the statements recorded in the reports.¹⁷ Overall, the Final Outcome Reports represented an accurate summary of the oral review undertaken of states in the interactive dialogue session, and thus met the criterion of creditability.¹⁸

The second issue of concern in relation to creditability was the implications of the translation of the UPR process documents. The state representatives in the interactive dialogue session often speak in their native languages. A live translating service is available to listen to for the other state representatives present during the review. These discussions, and other supplementary documents, are then translated into the 6 official languages of the United Nations: Arabic, Chinese, English, French, Russian and Spanish. The process of translating oral discussions into the 6 official languages means

¹⁶ I observed the interactive dialogue sessions of the states being reviewed using the webcast records of all states available on both the United Nations website and the UPR Info Website. <<http://webtv.un.org/>; <http://www.upr-info.org/>> accessed 6 July 2015.

¹⁷ A/HRC/RES/5/1, para 3 (e).

¹⁸ To ensure I was working with the most accurate reports available, I contacted the United Nations Secretariat enquiring whether a database was available with the full written transcripts of the review, before it was summarised as a report. The response was that no such database existed. However, the representative did provide me with a username and password to access the fuller transcript of the statements made by the observer states in the UPR process. I was optimistic at first with the possibility that these fuller statements could provide a richer and a more accurate source of documents to be analysed. However, when I accessed the written statements, I was found that they were produced in the domestic language of the member state, with no English translation available. Moreover, it was stated by the representative of the UN Secretariat that 'those written statement can differ from what was orally said'. Email from Jean-Claude UPR Info to Gayatri Patel (29th July 2013). In light of this, it was decided that seeking translation of such a substantial amount of documents was on balance not practicable, particularly as there was no guarantee that the statements would reflect what was orally stated.

that an element of inaccuracy will arise in the Final Outcome Reports.¹⁹ However, I argue that the implications for such potential inaccuracies are minimal for the purposes of this investigation for two main reasons.

First, as noted above, one of the most fundamental aspects of the discussions are the recommendations issued, and these were noted with total accuracy. In addition, due to the participatory nature of the UPR process, the states approve the accuracy of the recommendations and responses are noted in the reports at the HRC plenary session.²⁰ Therefore this restricts the implications of potential inaccuracies that may arise during the translation process to a minimum. Second, the fundamental aim of this investigation is not to undertake a purely semantic analysis of the documents. In contrast, the aim of this investigation is to undertake an analysis of the nature of discussions held between states at the interactive dialogue session. This will be undertaken by analysing the nature of the recommendations issued, and the corresponding responses made by the participating states. In this way, I will examine the statements made in a holistic manner, in order to understand the nature of positions adopted by states during the review process. From this, I will be able to form an accurate picture of how the UPR process operates through the positions adopted by the states, rather than undertake a purely semantic analysis of the statements.

The second relevant criterion to assess the quality of the documents for the purposes of this investigation is ‘meaning’, which required an assessment to ensure the documents that are to be examined are clear and comprehensible.²¹ The HRC Resolution 5/1 provides that the documents prepared in advance of a state review must be made available in one of the six official languages.²² Despite this, the Final Outcome Reports for some states consisted of segments which were in French, despite the report itself being categorised as being in English on the UN website or on the UPR Info website. This was the case for Senegal, Central African Republic, Chad, Comoros and the Addendum report for Niger. Whilst these segments formed a small part of the overall reports, the responses by the states under review in the interactive dialogue were

¹⁹ See for example, Christiane Nord, *Text Analysis in Translation: theory, methodology, and didactic application of a model for translation orientated text analysis* (Rodopi, 2005) chapters 1-3.

²⁰ A/HRC/RES/5/1, para 3 (e).

²¹ John Scott (n 4); Monageng Mogalake, ‘The Use of Documentary Research Methods in Social Research’ (2006) 10 *African Sociological Review* 221.

²² UNGA, ‘Institution-building of the United Nations Human Rights Council’ (18th June 2007) A/HRC/RES/5/1, Section D para 17. (A/HRC/RES/5/1). See also, UNGA, ‘Review of the work and functioning of the Human Rights Council’ (12th April 2011) A/HRC/RES/16/21, section E para 51 (A/HRC/RES/16/21).

essential parts for this research project and, as such, these segments were translated to ensure all the reports were analysed in their entirety.

3.3. The Research Design

For the purposes of this research project, I adopted the Qualitative Content Analysis (QCA) approach in analysing the Final Outcome Reports. In the most general terms, QCA is a method used to describe and analyse the meaning of the qualitative material in a systematic way to address the aims and objectives of a study.²³ Holsti describes content analysis as:

Any technique for making inferences by objectively and systematically identifying specified characteristics of messages. Content analysis must be objective and systematic, and, if it is to be distinguished from information retrieval, indexing or similar enterprises, it must be undertaken for some theoretical reason.²⁴

In this way, to avoid simple data indexing or retrieval, the research question of this investigation provides a theoretical angle from which the data was collected, interpreted and analysed. I used the QCA strategy to systematically confine the material available on the UPR process to focus on the specific data which was relevant to the theoretical framework of this study.²⁵ I will explain this process in the section below.

3.3.1 Confining the Data to be analysed using Qualitative Content Analysis

All 193 member states of the UN were reviewed by the HRC during the first cycle of the UPR process, which consisted of twelve sessions taking place between April 2008 and October 2011. At the time of writing, member states are being reviewed under the second cycle of the UPR process. The state reviews are scheduled over 12 sessions of the HRC, taking place from May 2012 to November 2016. For the purposes of this investigation, I focused on the reviews undertaken in the first cycle, held between April 2008 and October 2011.

²³ Margrit Schreier, *Qualitative Content Analysis in Practice* (Sage Publications 2012) 1.

²⁴ O R Holsti, *Content Analysis for the Social Sciences and Humanities* (Addison-Wesley, 1969).

²⁵ Ibid 1-7.

This is because all the UN member states had been reviewed in the first cycle, and therefore, an analysis of all the reports in the first cycle will provide an accurate picture of how the UPR process operates in a complete cycle of state reviews. In addition, the central focus of the first cycle was to highlight and discuss any human rights concerns raised in the reviews of member states. In contrast, the focus of the second cycle is the implementation and acceptance of the recommendations issued to the state under review in the first cycle.²⁶ Further, the time frame selected for examination provided a rich amount of data to analyse for the purposes of answering the research question. Therefore, in order to maintain consistency when answering the research question of this investigation, I focused solely on the first cycle of the UPR process.

3.3.1.1 The Selection of Women's Rights as the Focus for this Study

During the review of member states in the first cycle of the UPR process, a vast number of human rights issues and concerns were raised. An examination of the reports with the aim of answering whether arguments from a cultural relativist perspective were introduced in relation to *all* of the human rights issues was unfeasible, as the final analysis would lack both focus and depth. In light of this, I aimed to make a reasoned and theoretically informed selection from the range of human rights issues that were raised in the UPR process.

In meeting this aim, first, the UPR Info database was accessed, which helpfully organised all the concerns raised in relation to human rights during state reviews into 52 human rights issues.²⁷ Next, the aim was to establish which of these 52 human rights issues were most commonly raised in the reviews of member states in the UPR process. In order to quantify this, the database and search mechanism tools provided on the UPR Info website were used.²⁸ On the website, under the database tab, I selected each human rights issue in the search tool, and then selected the recommendations filter.²⁹ This generated details of the recommendations made on a particular human rights issue in

²⁶ A/HRC/RES/16/21, para 6.

²⁷ <<http://www.upr-info.org/database/>> accessed 11th May 2014.

²⁸ All the statistical data and information was gathered from the UPR info database as of January 2013.

<<http://www.upr-info.org/database/>> accessed 11th May 2014.

²⁹ I focused on quantifying the recommendations as they gave a good indication of the issues that formed the focus of discussions at the interactive dialogue stage in the UPR process.

the UPR system, together with the name of the state receiving it. The number of recommendations made for each human rights issue is presented in figure 3.1.³⁰

³⁰ Data collected from UPR Info website <<http://www.upr-info.org/database/>> accessed 15th January 2013.

Number of Recommendations made in relation to each Human Rights issue raised in the first cycle of the UPR process

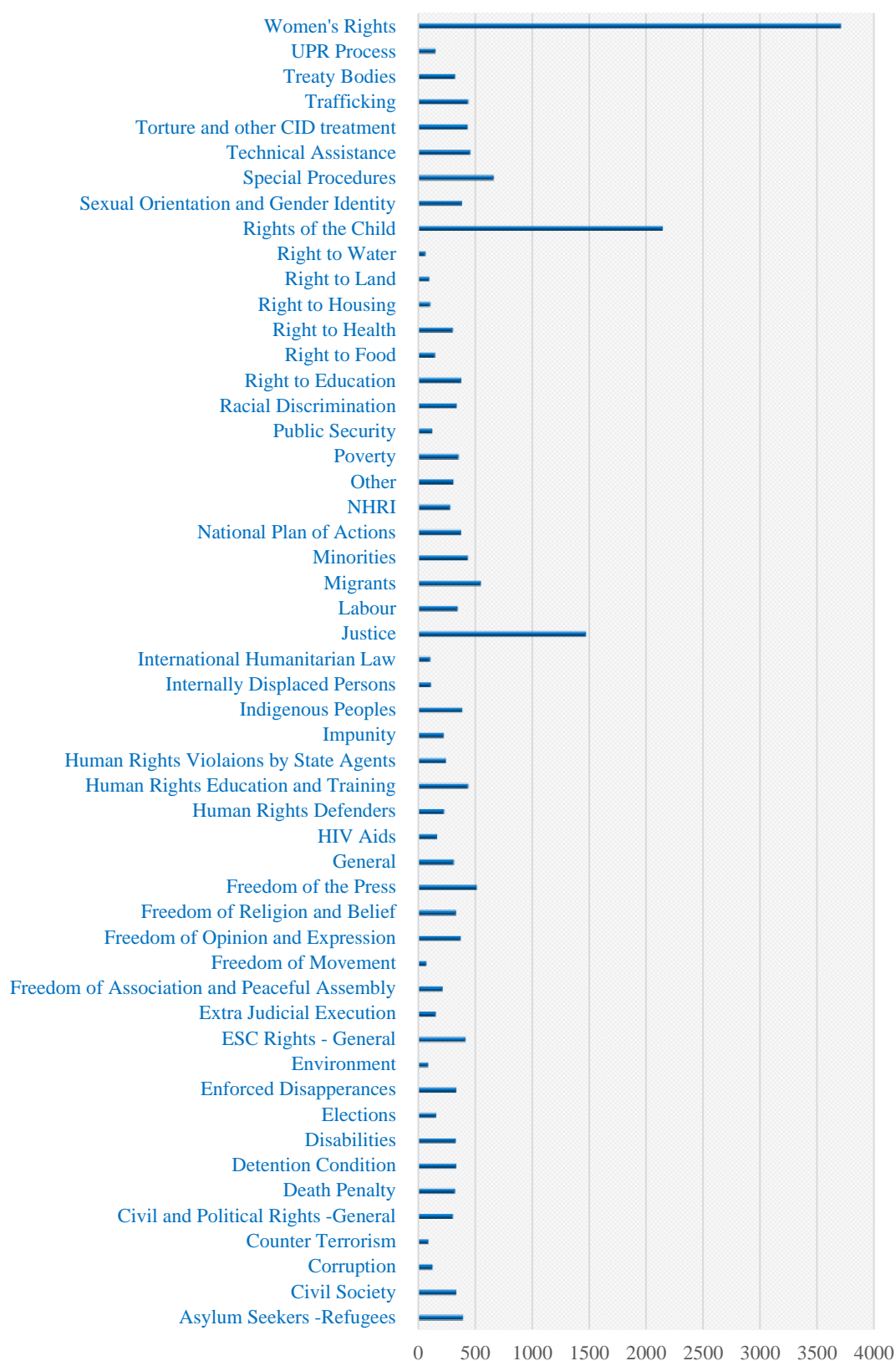


Figure 3.1 The number of recommendations made for each human rights issue raised in the first cycle of the UPR process.

A total of 21,353 recommendations were issued in relation to 52 human rights issues in the first cycle.³¹ From this, women's rights was selected as the focus for this investigation. There are two main reasons for this selection. First, the issue of women's rights was numerically significant, as it was the focus of the highest number of recommendations in the first cycle of review. Second, the examination of women's rights was a theoretically informed choice for the purposes of this investigation. I will provide a detailed explanation for each reason in the two sections below.

The prominence of women's rights being raised during state reviews in the first cycle of the UPR process

The significance of women's rights to the UPR process is clearly specified in the establishing resolution 5/1, which states that a review must 'fully integrate a gender perspective' into all aspects of the review process.³² The importance attached to the issue of women's rights is clearly reflected in the first cycle of reviews, as the issue was the focus of 3,702 recommendations, which is just over 17 per cent of the total recommendations issued to states in the first cycle of the UPR process.³³ Therefore, the highest number of recommendations, amongst all substantive human rights issues, were made in relation to women's rights.³⁴ Further, an interesting steady increase has developed in the prevalence of women's rights being the focus of discussion over the 12 sessions of state reviews held in the first cycle of the UPR process. I have depicted this steady increase in figure 3.2.³⁵

³¹ This was recorded on 16th May 2013 from the UPR Info website. <<http://www.upr-info.org/database/>> accessed 16th May 2013.

³² A/HRC/RES/5/1.

³³ This was recorded on January 2013 from the UPR Info website. <<http://www.upr-info.org/database/>> accessed 11th May 2014.

³⁴ Data collected from UPR Info website <<http://www.upr-info.org/database/>> accessed 15th January 2013.

³⁵ The data was collected on 16th May 2013 from the UPR Info website. <<http://www.upr-info.org/database/>> accessed 16th May 2013.

Number of Recommendations issued on Women's Rights over the 12 sessions of state reviews in the first cycle of the UPR process

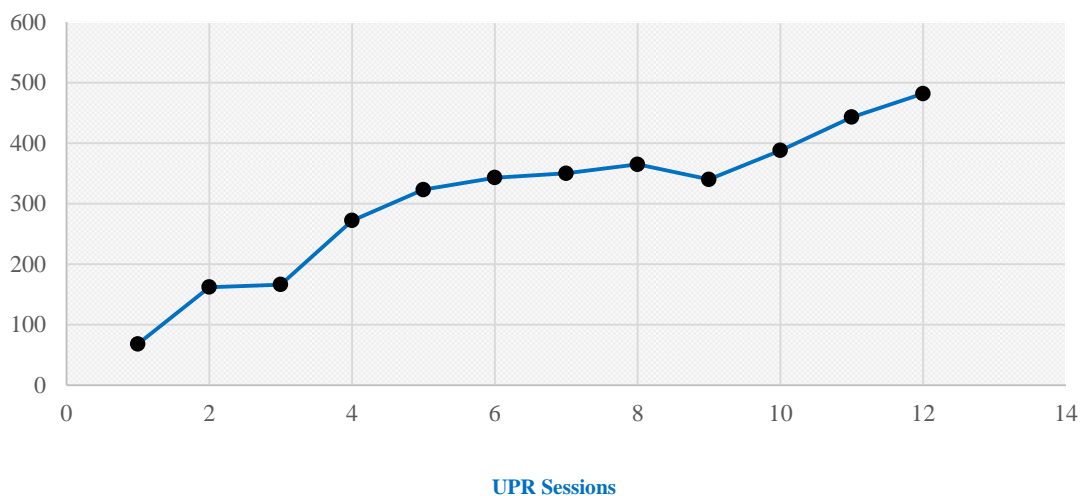


Figure 3.2. Number of recommendations issued on women's rights in the first cycle of the UPR process

From figure 3.2, it can be observed that only 68 recommendations were in relation to women's rights in the first session of the UPR process in 2008. This number had risen to 482 recommendations by the 12th session in 2011. This rise is significant as it suggests that there was a clear increase in the concern amongst member states to raise the issue of women's rights in the human rights discourse undertaken between the years 2008 and 2011 in the review process. In addition, all 193 member states of the UN received recommendations on the issue of women's rights when their human rights records were reviewed.³⁶ Further, a total of 138 observer states raised the issue of women's rights when reviewing the human rights records of states.³⁷ In addition, the nature of the responses to recommendations issued on women's rights was also significant. From the 3,702 recommendations made on women's rights, a total of 3,116 were accepted by the states under review.³⁸ This means that 84% of all the recommendations made on women's rights in the UPR process were accepted. From this, in the first instance, one may presume that there is wide-ranging consensus on the

³⁶ This was recorded on 16th May 2013 from the UPR Info website. <<http://www.upr-info.org/database/>> accessed 16th May 2013.

³⁷ Ibid..

³⁸ <http://www.upr-info.org/database/statistics/index_issues.php?fk_issue=55&cycle=1> accessed 15th May 2013.

implementation of women's rights as guaranteed under numerous international human rights instruments.³⁹

Overall, the number of recommendations issued to states on women's rights, together with the nature of responses made by the states under review, demonstrates that the issue of women's rights was a widespread concern amongst states during the discussions held in the first cycle of state reviews. In this way, the selection of women's rights as focus of this investigation ensured that this investigation was not confined to the examination of reviews of particular member states or regional groups. In addition, it ensured that the findings and analysis of this research is derived from a full account of all state reviews undertaken in the first cycle of the UPR process.

The theoretical justification for selecting women's rights as the focus for this investigation

The second reason for selecting women's rights as the focus of this investigation is based on the theoretical framework adopted for this thesis. As discussed in the second chapter, issues and concerns that relate to women are more susceptible to the claims of culture.⁴⁰ The reasons behind this phenomenon can be explained through the existence of the public and private divide that is present in a number of human rights documents.⁴¹ Women's primary role has traditionally been to preserve and maintain family and domestic life, and therefore, their issues and concerns are often relegated to the private sphere.⁴² However, whereas the public sphere is often considered to be subject to regulation and scrutiny by the states, the issues that fall within the private sphere are often informed and governed by cultural values and traditions.⁴³ Women are sometimes considered to represent 'the reproduction of the community' and pass on the beliefs of culture to the next generation.⁴⁴ In this way, a woman's behaviour has often

³⁹ See UN Committee on the Elimination of Discrimination Against Women, 'UN Committee on the Elimination of Discrimination Against Women' (10 August 2007) CEDAW/C/COK/CO/1, para 28; UNGA 'Resolution adopted by the General Assembly' (7 January 1997), para 45; UNCEDAW, 'Concluding Observations on sixth report' (10 August 2007) CEDAW/C/NZL/CO/6. See also section 2.4.1. An Overview of the Historical Development of Women's Rights in International Human Rights Discourse.

⁴⁰ See section 2.4. The Relationship between Women and Culture.

⁴¹ Lucinda Joy Peach, 'Are Women Human? The Promise and Perils of "Women's Rights as Human Rights"' in Lynda Bell, Andrew Nathan and Ilan Peieg (eds), *Negotiating Culture and Human Rights* (Columbia University Press 2001) 159.

⁴² Ibid.

⁴³ Christina Cerna and Jennifer Wallace, 'Women and Culture' in Kelly D Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Volume 1, Transnational Publishers Inc 1999) 629.

⁴⁴ A Rao 'The Politics of Gender and Culture in International Human Rights Discourse' in Dorothy Hodgson (ed), *Gender and Culture at the Limits of Rights* (University of Pennsylvania Press 2011) 169.

become a visible symbolisation of the beliefs of any particular culture.⁴⁵ Consequently as the sustenance of cultural boundaries is sometime considered to be solely the responsibility of women, the rights of women are most susceptible and fragile to the claims of culture and cultural relativism.⁴⁶ Following from this, any defence of “cultural practices is likely to have much greater impact on the lives of women and girls than on those of men and boys, since far more women’s time and energy goes into preserving and maintaining the personal, familial and reproductive side of life”.⁴⁷ Arati Rao argues that “no social group has suffered greater violation of its human rights in the name of culture than women”.⁴⁸ In this way, a challenge to the universality of human rights from a cultural relativist perspective is often made in relation to issues that most commonly form part of the private sphere.⁴⁹

It is primarily due to this increased susceptibility of the challenge to the universality of women’s rights from a cultural relativist perspective that the issue of women’s rights has been selected as the focus for this investigation. Therefore, in answering the research question of this thesis, the selection of women’s rights is important, as any arguments from a cultural relativist position are more likely to be introduced, explicitly or implicitly, in areas concerning women’s rights.

3.3.2. The Method of Selecting specific Women’s Rights issues

So far, this investigation has been narrowed down by selecting women’s rights as the focus for this study. Despite this selection, it was clear that the category of women’s rights itself covered a number of specific issues. Thus, the next stage of the research process was to identify emerging women’s rights issues that commonly formed the focus of discussions in the UPR process. For the purposes of this task, all 3,702 recommendations issued on women’s rights were examined with the aim of uncovering specific issues that are raised in relation to women’s rights. I examined the final

⁴⁵ Ibid.

⁴⁶ Berta Esperanza Hernandez-Truyol, ‘Human Rights through a Gendered Lens: Emergence, Evolution, Revolution’ in Kelly D Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Volume 1, Transnational Publishers Inc 1999).

⁴⁷ Susan Moller ‘Is multiculturalism Bad for women?’ in Susan Okin (eds), *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 13.

⁴⁸ Arati Rao (n 44)169.

⁴⁹ Christina Cerna and Jennifer Wallace (n 43) ‘629. Elisabeth Friedman, ‘Women’s Human Rights: The Emergence of a movement’ in Julie Peter and Andrea Wolper (eds), *Women’s Rights Human Rights: International Feminist Perspective* (Routledge 1995) 38.

recommendations because they are issued after a statement or discussion was undertaken on any particular human rights issue. In this way, the recommendations gave an accurate reflection of the issues that were discussed during interactive dialogue in the UPR process.

As I examined the recommendations, specific women's rights issues that were raised in each recommendation were noted down. A total of 30 women's rights issues were identified that were the focus of recommendations in the UPR process. I have presented the women's rights issues that were raised, together with the number of recommendations that were issued for each, in figure 3.3.

Number of recommendations made in relation to each women's rights issue

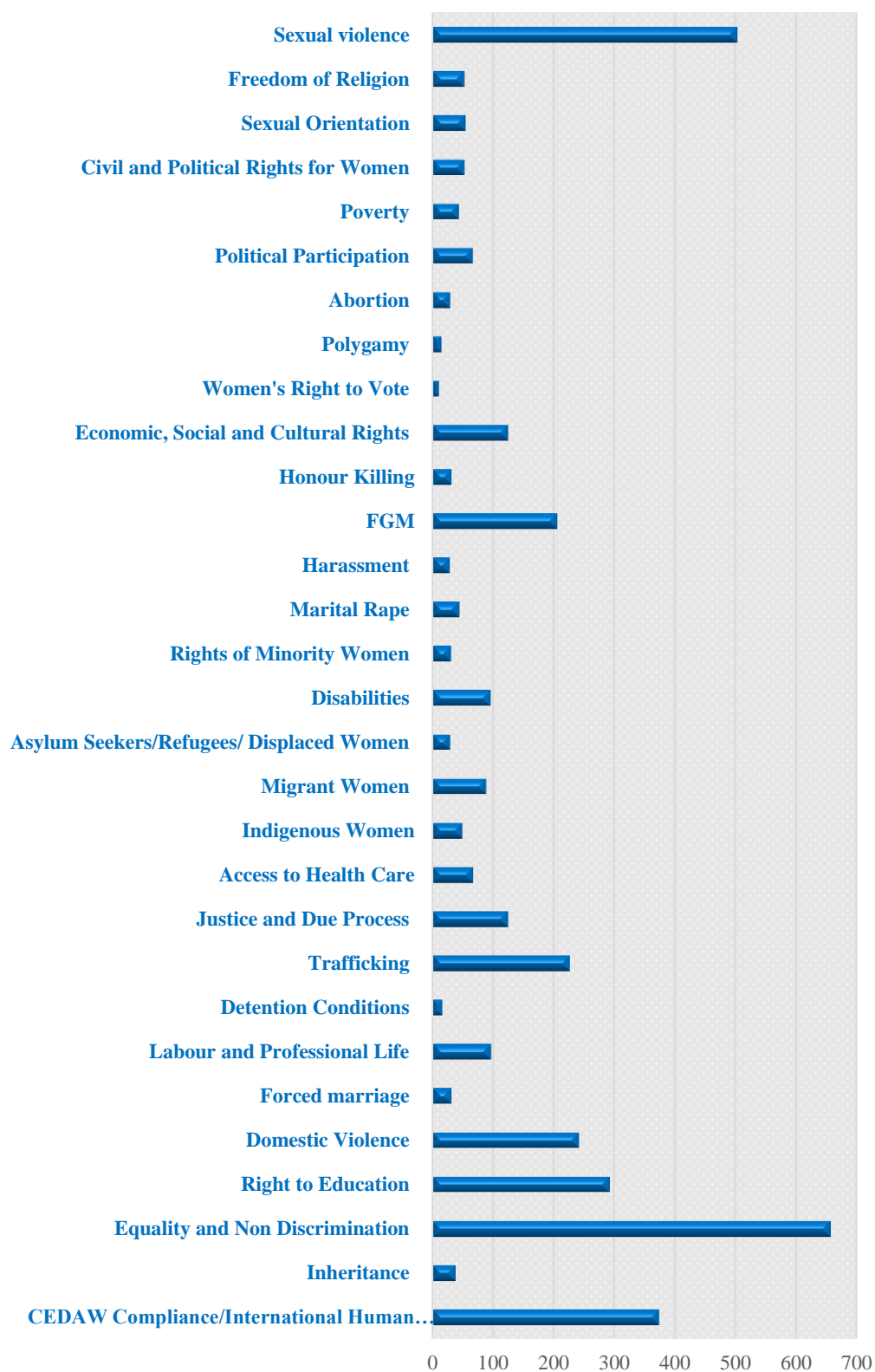


Figure 3.3. Number of recommendations made on each women's rights issue

An examination, presentation and analysis of all 30 women's rights issues was not plausible for the purposes of this thesis. Therefore, the strategy of *reductive coding* was employed to further narrow down the focus of this study within the remit of women's rights. Reductive coding is a form of indexing, whereby pieces of data are categorised under labels or codes.⁵⁰ The aim of reductive coding is to group together data that addresses the same theme, or where there is a link between the data.⁵¹ This form of coding is carried out purely to reduce large amounts of data to a few general categories.⁵²

Using the method of reductive coding, the 30 women's rights issues were grouped into categories. I started with four women's rights issues and grouped them together with a common theme. If the women's rights issues could not be grouped with another, it became a category in its own right, which may be grouped with another category examined later. Using the reductive coding strategy, I grouped the women's rights issues into a total of 6 women's rights categories. These include: (1) women's rights to health, (2) private family law, (3) violence against women, (4) equality, (5) rights of minorities and (6) international human rights instruments/general category of rights. From the six categories, three were selected as the focus for investigating the UPR process. The 3 women's rights categories that were selected each included a total of 3 women's rights issues. Therefore, in total I examined 9 women's rights issues as the focus for this investigation. In the figure 3.4, I have represented the number of recommendations that were issued in relation to each of the 9 women's rights issues.

⁵⁰ Margrit Schreier, *Qualitative Content Analysis in Practice* (Sage Publications 2012) 38.

⁵¹ Ibid. See also Matt Henn, Mark Weinstein and Nick Ford, *A Short Introduction to Social Research* (Sage Publications 2006).

⁵² Margrit Schreier (n 50) 38.

Number of Recommendations made in relation to each women's rights issue

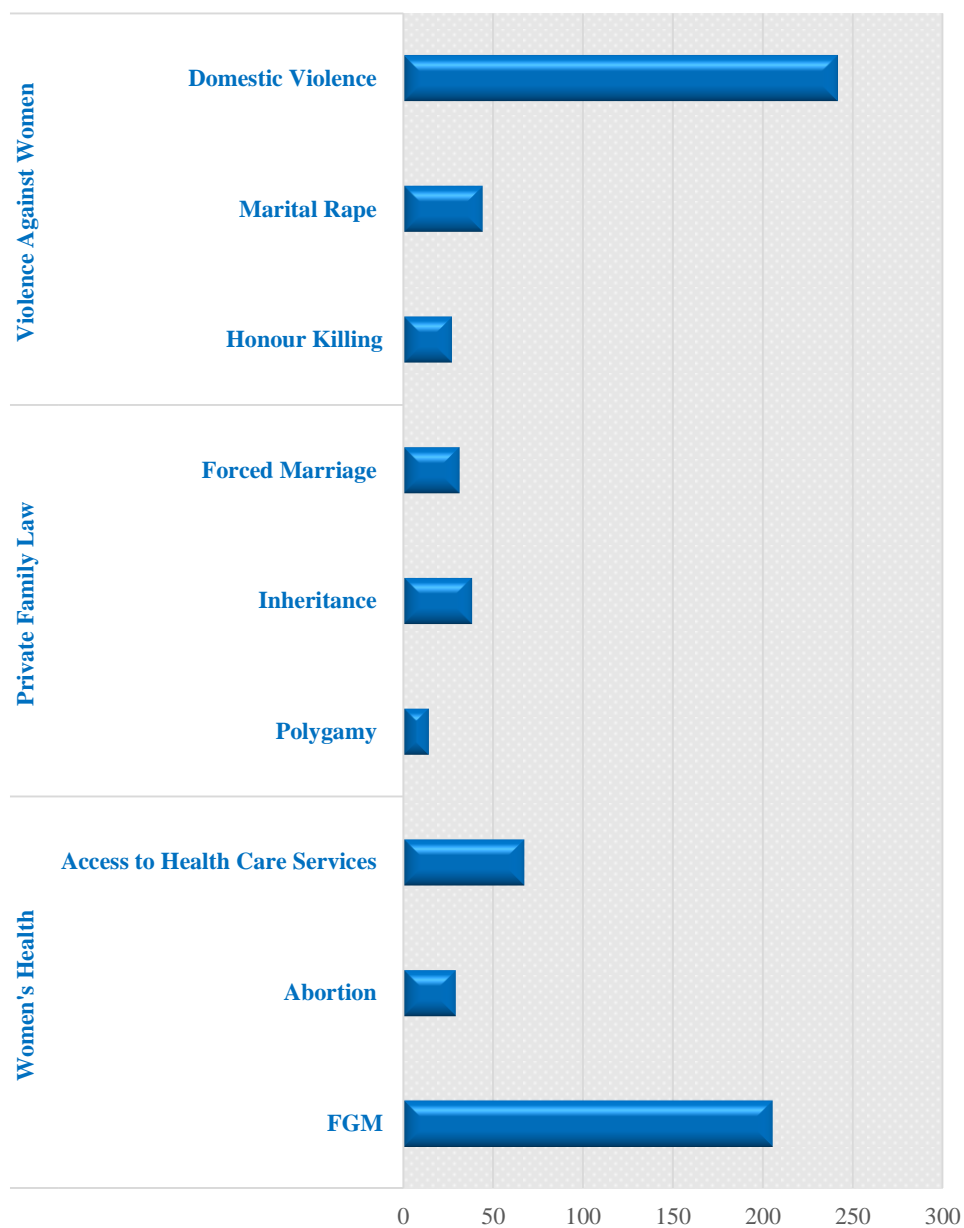


Figure 3.4 Number of recommendations made under each women's rights issues that are selected for this investigation

The first category selected as the focus for this research was women's rights to health, which was the subject of 301 recommendations in the first cycle. This category consisted of three issues: i) FGM, which was the subject of 205 recommendations; ii) abortion, which had 29 recommendations made in relation to it; and (iii) access to health care services, which was the subject of 67 recommendations.

The second category selected as a focus for this investigation was women's rights under private family law, which was the subject of 83 recommendations. This category consisted of three issues. The first was polygamy, which was the subject of 14 recommendations; the second was the issue of inheritance which was associated with 38 recommendations; and finally, the issue of forced and early marriage, which was the focus of 31 recommendations.

The third category selected was violence against women, which was the subject of 312 recommendations. This category consists of three issues: i) domestic violence, which was the subject of 241 recommendations; (ii) marital rape, which was the subject of 44 recommendations; and iii) honour killing, which was the subject of 27 recommendations in the UPR process.

The reasons for the selection of the three women's rights categories will now be explored in more detail.

Reasons for selecting the three women's rights categories as the focus for this investigation

In a quantitative research study, there is heavy emphasis on the importance of ensuring that the data collected comprises a representative sample.⁵³ In contrast, with qualitative research, as is the nature of this investigation, there are 'usually good reasons for side-stepping this requirement'.⁵⁴ The use of sampling in qualitative research is to 'refine ideas rather than to satisfy the demands of calculation'.⁵⁵ For qualitative research studies, pragmatic and purposive sampling is used, which involves selecting the data purely to gain an insight into a process or organisation, rather than to provide a sample

⁵³ Lindsay Prior (n 1) 153.

⁵⁴ Ibid.

⁵⁵ Ibid.

that is representative of the whole process.⁵⁶ In this way, the sample of women's rights issues selected will provide a focused insight into how the UPR operates.

The selection of the women's rights issues is also justified based on the theoretical framework of this study. This is because each of the women's rights issues have an inherent relationship with culture. This is because the violations of rights under each of the women's rights issued have been justified on cultural grounds. In other words, the universality of the women's rights norms in relation to each women's rights issue can potentially be challenged from a cultural relativist perspective.

For example, under the category of women's rights to health there are three women's rights issues: FGM, abortion and access to health care services. In relation to FGM, those that are sympathetic to the practice argue that FGM is inseparable from the cultural identity of the groups, and is defended on the basis of preserving the particularities of the culture.⁵⁷ In relation to abortion, a blanket ban on accessing such services are often defended on cultural and religious norms, which is based on the belief that all life is inviolable, which extends to the rights of the unborn child.⁵⁸ Further, often women's rights to access health care services is not due to the lack of availability of services, but the existence of cultural barriers which prevent women from accessing such services.⁵⁹

Under the second category, there are three women's rights issues: polygamy, inheritance and forced and early marriage. Each of these issues are open to claims based on cultural grounds. For example, those that are sympathetic to polygamous marriages often argue such marriages are mandated on cultural or religious grounds.⁶⁰ In addition, the exclusion of women's rights to acquire land and property through inheritance is justified on the culturally held belief that women are expected to subsume to their male

⁵⁶ Ibid.

⁵⁷ Isabelle Gunning, 'Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries (1991-1992) 23 Columbia Human Rights Law Review 238.; *Female Genital Mutilation/Cutting: A Statistical Exploration* (UNICEF, 2005) 17-19 http://www.unicef.org/publications/files/FGM-C_final_10_October.pdf (accessed 21.01.2014). Further elaboration see Chapter 4.

⁵⁸ Michel Perry, *The Idea of Human Rights: Four Inquires* (Oxford University Press 1998) 9-10. For an overview on the different religious positions for and against abortion see. <http://www.bbc.co.uk/ethics/abortion/religion/religion.shtml> accessed 31st August 2014. Further elaboration Chapter 5.

⁵⁹ UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women*, 31 January 2002, E/CN.4/2002/83 paragraph 94. Further elaboration see Chapter 4.

⁶⁰ Javaid Rehman, 'The Sharia, Islamic family laws and international human rights law: examining the theory and practice of polygamy and talaq' (2007) 21 International Journal of Law, Policy and the Family 108, 115.

counterparts, and therefore should not have legal identity on title deeds.⁶¹ Finally, those sympathetic to forced and early marriages of girls and women often justify such marriages on the culturally conceptualised notion to prevent ‘shame’ on the family.⁶²

The third category of violence against women consists of three issues: honour killing, marital rape and domestic violence. For instance, the perpetrators of honour killing are motivated by a culturally conceptualised notion of honour, which the female victim has apparently defied.⁶³ The issue of marital rape is often tolerated on the presumption of women’s consent to sexual activity in relation to marriage, which is influenced by cultural attitudes towards the subordinate role of women, which mould the acceptability of sexual violence within a marriage.⁶⁴ Finally, domestic violence is often perpetuated and tolerated through deeply held cultural norms that treat women as ‘wayward creatures who require chastisement for their own or society’s good.’⁶⁵

From this, it can be seen that each of the women’s rights issues selected have an inherent relationship with culture. Therefore, there is a possibility that observer states will draw on references to culture when making criticisms on issues that fall within the three women’s rights categories in the review process. In light of this, it is likely that the states under review, when responding to criticisms on these issues, will introduce arguments from a cultural relativist position. Thus, the hypothesis is that cultural relativist positions will be exercised, either implicitly or explicitly and to varying degrees, by some states when the selected women’s rights categories form the focus of discussions in the UPR process.

It is important at this stage to make some remarks on the selection of women’s rights issues as the focus of this study. The central aim of this thesis is to undertake an exploratory investigation of the UPR process. Therefore, the women’s rights issues in this investigation are used as a mechanism for exploring the extent to which cultural relativism is raised in the reviews of member states in the UPR process. As such, the

⁶¹ Ibid.

⁶² Anne Bunting, ‘Theorizing Women’s Cultural Diversity in Feminist International Human Rights Strategies’ (1993) 20 *Journal of Law and Society* 6, 26. For further elaboration see Chapter 5.

⁶³ See G M Kressel, *Soricide/filiacide: Homicide for family honour* (1981) 22 *Current Anthropology* 141-158; M Kurkiala, *Interpreting honour killings: The story of Fadime Sahindal (1975-2002)* (2003) in the Swedish press. *Anthropology Today*, 19, 6-7.

⁶⁴ Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 *Cal. L.R.* 827, 840 (1999). See also, See Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study* (1981) 37 *Journal of Social Issues* 5; *From World Health Organization, First World Report on Violence and Health* 161 (2002).

⁶⁵ Joan Fitzpatrick, ‘The use of International Human Rights norms to combat violence against women’ in Rebecca Cook (eds) *Human Rights of Women: Nationatiobal and International Perspectives* (University of Pennsylvania Press 1994) 562.

aim of this investigation is not to explore or undertake substantive analysis of the individual women's rights issues in themselves. Moreover, it is important to clarify that the aim of this thesis is not to defend or criticise a cultural relativist position for any of the selected women's rights issues.⁶⁶ Rather, the focus is on the significance of cultural relativism in the UPR process, and the implications such positions may have in understanding the operation of the review process.

3.4. Working with the Data from the Final Outcome Reports

In the remaining sections of this chapter, I will explain how I worked with the data itself with the aim of answering the research question of this study. In the next section, I will explain how I have extracted the data for examination from the Final Outcome Reports. The second section will focus on the methods of interpretations I used when analysing the data itself. In the final section of this chapter, I will explain how the findings of this investigation will be presented over the next three chapters with the aim of answering the research question of this study.

3.4.1. Extracting the data from the Final Outcome Reports

For the purposes of this investigation, I examined the Final Outcome Reports, any addendum and supplementary materials, and the reports of the HRC sessions for all 193 member states. This meant that I was using nearly 500 reports for the purposes of this investigation. Therefore, for practical and organisational purposes, I used Computer Assisted Qualitative Data Analysis (CAQDAS) software to aid my investigation.⁶⁷ Alan Bryman writes that 'one of the most notable developments in qualitative research in recent years has been the arrival of computer software that facilitates the analysis of qualitative data'.⁶⁸ Such computer programmes allow the researcher to upload reports on the programme, analyse the data by highlighting relevant parts, and then to retrieve

⁶⁶ For cultural relativism being used as a method rather than a substantive theory see, Melville Herskovits, *Cultural Relativism: Perspectives in Cultural Pluralism* (Vintage Books 1973) 32; Ben White, 'Defining the Intolerable: Child work, Global Standards and Cultural Relativism' (1999) 6 *Childhood* 133, 136.

⁶⁷ The term was first coined in Nigel Fielding and Raymond Lee, 'Computing for Qualitative Research: Options, Problems and Potential' in Nigel Fielding and Raymond Lee (eds), *Using Computers in Qualitative Research* (Sage Publications 1991) 1-13.

⁶⁸ Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 591.

the data for further analysis and conclusions. There is a variety of different software available to assist qualitative research; in light of the research aims and objectives for this study, NVivo version 10 was selected to facilitate this research project.⁶⁹ This software was particularly suited to the nature of my investigation as NVivo allowed me to upload all the reports that I was going to examine to the programme. Therefore, as I read through the reports, I highlighted the relevant statements, recommendations and responses made by states with the focus on the 9 specific women's rights issues. In addition, the tools in the programme allowed me to analyse the reports using the highlighting tools, and to keep an electronic log of my notes of analysis in the programme itself.

3.4.2. Methods of Interpretation and Analysis

Once all the reports had been uploaded to the NVivo programme, I began to interpret and analyse the reports. There are two points that need to be clarified and explained. The first point is in relation to the method of analysis that I adopted when examining the reports. The second is in relation to the interpretation of culture that was adopted when examining the reports. I will discuss each in turn.

First, when undertaking documentary analysis, there are two main methods of content analysis: manifest and latent content analysis. Bruce Berg states that manifest content analysis focuses on those elements that are present in the text of the documents.⁷⁰ This form of analysis focuses entirely on the 'surface meaning of the text,'⁷¹ and therefore focuses on those elements that are physically present in the content of the data.⁷² In contrast, latent content analysis is extended to an interpretative reading of the text and focuses 'on the deep structural meaning conveyed by the message.'⁷³ This method is used to 'analyze the deeper layers of meaning embedded in the document'.⁷⁴ The latent content analysis is therefore 'extended to an interpretative reading of the symbolism underlying the physical data'.⁷⁵ This form of analysis is comparable to semiotic analysis, founded by Ferdinand de Saussure and Charles Peirce, which is an in-depth

⁶⁹ <<http://www.surrey.ac.uk/sociology/research/researchcentres/caqdas/support/choosing/>> accessed 11th May 2013. See also Pat Bazeley and Kristi Jackson, *Qualitative Data Analysis with NVivo* (2nd edition, Sage Publications 2013).

⁷⁰ Bruce Berg, *Qualitative Research Methods for Social Sciences* (7th edn, Allyn & Bacon 2007) 342.

⁷¹ R O Holsti, *Content Analysis for the Social Sciences and Humanities* (Addison-Wesley 1969) 12.

⁷² Bruce Berg, *Qualitative Research Methods for Social Sciences* (7th edn, Allyn & Bacon 2007) 34.

⁷³ Ibid.

⁷⁴ R O Holsti, *Content Analysis for the Social Sciences and Humanities* (n 71) 12.

⁷⁵ Bruce Berg, *Qualitative Research Methods for Social Sciences* (n 72) 342.

method of analysis whereby the researcher goes beyond the literal and face value to ‘uncover underlying hidden meaning that is carried in the text’.⁷⁶

As the UPR process in an intergovernmental mechanism, whereby the reviews were undertaken by state representatives, it was highly likely that certain statements or recommendations could be made due to political and diplomatic pressures. More specifically to the research question of the thesis, states may not openly adopt cultural relativist positions in justifying practices that fell under the women’s rights issues selected. Similarly, observer states may not unambiguously criticise a practice that is justified or defended on cultural grounds by the state under review. As a result, states were likely to make statements which implicitly carry assumptions made by the state or implicitly carry a different message. For this reason, for the purposes of this investigation, I adopted the latent content method of analysis to ensure that the final analysis of this project drew out the implicit assumptions and messages in the statements issued by the states in the review process. In this way, I undertook a holistic analysis of the statements and comments made by the states to understand the nature of the positions adopted by the participating states in the discussion held on the women’s rights issues. This form of analysis enabled a fuller understanding of how the UPR process operates through the nature of positions adopted by states during the discussions.

When undertaking latent content analysis in a research project, Berelson stated that whilst it is acceptable to directly *infer* latent meaning in the documents being analysed, the researcher must be aware of the obvious dangers in inferring an interpretation in latent content analysis.⁷⁷ To minimise the dangers of inferring a meaning from the document being analysed, he suggests that researchers should adopt ‘independent corroborative techniques’ to justify this form of ‘deciphering’ latent content analysis.⁷⁸ Suggestions often include agreement from independent coders on the latent interpretation of the text that is coded.⁷⁹ However, the aims of this project are restricted to exploring the extent to which cultural relativist positions are raised in the dialogue

⁷⁶ John Scott, *A Matter of Record: Documentary Sources and Social Research* (Polity Press 1990) 32. See also, Margrit Schreier, *Qualitative Content Analysis in Practice* (Sage Publications 2012) 53.

⁷⁷ B Berelson, *Content Analysis in Communications Research* (Free Press, 1952) 488. See also, R.K Merton, *Social Theory and Social Structure* (Free Press, 1968) 366-370. See also, R O Holsti, *Content Analysis for the Social Sciences and Humanities* (Addison-Wesley, 1969) 598; B Berelson, *Content Analysis in Communications Research* (Free Press, 1952) 488. See also, R.K Merton, *Social Theory and Social Structure* (Free Press, 1968) 366-370.

⁷⁸ S Hielman, *Synagogue for Life: A Study in Symbolic Interaction* (Prentice Hall, 1976); R O Holsti, *Content Analysis for the Social Sciences and Humanities* (Addison-Wesley, 1969) 12.

⁷⁹ Bruce Berg, *Qualitative Research Methods for Social Sciences* (7th edn, Allyn & Bacon 2007) 343.

exchanged between states in the first cycle of review in relation to specific women's rights issues. The aim of this project is not to generalise the findings of this investigation, or to predict the mannerisms of review for the second cycle.

With this in mind, the independent corroboration of the latent content meaning will be justified and substantiated using the theoretical framework adopted for this investigation. The positions undertaken by the states in the review process will be verified and confirmed using the different forms of cultural relativism as discussed in the theory chapter. The theoretical framework will also aid in the conclusions derived from the latent content analysis of the data, which will ultimately help answer the research question of this study. In this way, the meanings and interpretations deciphered from the Final Outcome Reports will be justified as the theoretical framework is used to verify any interpretations. In line with the suggestions offered to researchers that undertake latent content analysis, I will be providing detailed excerpts from the Final Outcome Reports to support the interpretations and analysis in the three findings chapters of this thesis.⁸⁰ In assessing the degree to which cultural relativity is exercised in the UPR process, the Final Outcome Reports were examined using the latent content method of analysis to give the statements a figurative meaning.⁸¹ Such meaning may not necessarily be extracted from the literal meaning of the text, and therefore may be required to be inferred.⁸²

In contrast, the manifest content analysis would mean that the focus would be solely on the literal text of the reports. For the purposes of this investigation, this would largely entail a semantic form of analysis, whereby the focus would entirely be on the nature of the words used during the discussions, rather than holistic analysis where the aim is to understand the nature of the positions adopted by the states. The obvious problem with adopting a manifest content analysis for this investigation is due to the construction of the Final Outcome Reports, which means that the accuracy of certain words inevitably suffers from the process of translation of the documents.⁸³ For this reason, adopting a manifest content analysis of the reports would mean the investigation would lack accuracy and, possibly, creditability. The other problem is that the inherently political

⁸⁰ Ibid.

⁸¹ Margrit Schreier, *Qualitative Content Analysis in Practice* (Sage Publications 2012) 52. See also, John Scott, *A Matter of Record: Documentary Sources and Social Research* (Polity Press 1990) 31.

⁸² Ibid

⁸³ Christiane Nord, *Text Analysis in Translation: theory, methodology, and didactic application of a model for translation orientated text analysis* (Rodopi, 2005) chapters 1-3.

nature of the UPR process would mean that manifest content analysis would only lead to a surface level examination of the UPR process in answering the research question. Therefore, the findings and conclusions of this study would suffer the serious limitation of merely touching the surface of how the UPR operates in practice. In contrast, adopting the latent content analysis means that the final analysis is likely not only to be more insightful, but also, provide a more accurate depiction of the significance of cultural relativism when the focus of discussions was the three selected women's rights categories.

The second point that needs to be clarified is the interpretation of 'culture' when examining the reports. As noted above, it was clear that the states were not likely to explicitly adopt a cultural relativist perspective during the discussions held in the UPR process. Therefore, whilst the method of latent content analysis meant that I was going to undertake an analysis beyond the mere content of the reports, the precise meaning of 'culture' was important to define to provide a guided focus during the examinations of the reports. As noted in chapter 2, for the purposes of this thesis I adopted a wide interpretation of culture. As a brief reminder, culture is interpreted to include a 'totality of values, institutions and forms of behaviour transmitted within a society ...this wide conception of culture covers Weltanschauung [world view] ideologies and cognitive behaviour'.⁸⁴ In light of this definition, when examining the reports, I specifically looked for statements made in relation to key words such as: cultural, traditions, customary, patriarchal attitudes, custom, cultural stereotypes, religion, prejudices and beliefs that are associated with culture.⁸⁵ This was a non-exclusive list, however, it helped to focus my analysis during the examination of the reports.

At this point it is important to clarify that I adopt a macro definition of culture, which subsumes religion and religious values as aspects of culture.⁸⁶ Therefore, for the purposes of this investigation, religious norms and arguments will be considered as falling within the definition of culture. However, where states in their discussions

⁸⁴ An-Naim A, 'Introduction' in Abdullahi Ahmed An-Naim (eds) *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, 1995) 3.

⁸⁵ This list of key words were derived through a data driven strategy. See, See further Norman Denzin, *The Research Act* (McGraw-Hill, 1978); Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Transaction Publishers 1967). See also Philip Mayring, *Qualitative Inhaltsanalyse. Grundlagen und Techniken* [Qualitative Content Analysis. Basics and Techniques] (11th edn, Weinham Beltz 2010) cited in Margrit Schreier, *Qualitative Content Analysis in Practice* (Sage Publications 2012) 115.

⁸⁶ Frances Raday, 'Culture, religion, and gender' (2003) 1 *International Journal of Constitutional Law* 663, 665. See also, An-Na'im and J Hammon 'Cultural Transformation and Human Rights in African Societies' in An-Na'im and Hammond (eds) *Cultural Transformation in African Societies* (London, 2000) 21.

expressly isolate religious norms and values in their discussions, then their positions will be analysed and discussed separately in the findings of the investigation to ensure there is no misrepresentation.

3.4.3. The Presentation of the Findings of the Investigation

In this final section, I will provide an overview of how the findings of this investigation will be presented over the next three chapters. Each of the three women's rights issues will be presented in three separate chapters. Chapter 4 is dedicated to presenting and discussing women's rights to health; chapter 5 will present the findings of women's rights under private and family law, and chapter 6 is dedicated to discussing violence against women. The three women's rights issues that fall within each of the women's rights categories will be discussed under three separate sections.

The presentation of the findings of each of the 9 women's rights issues follows the same structure. Each section begins with contextualising the specific women's rights issue by discussing the international human rights norms in relation to each issue. This is followed by the findings section, which is divided into two main parts. The first part will present an overview of the findings by providing details of the number of recommendations issued, the regional states that participated in the discussions and the number of recommendations that were accepted and noted.

This is followed by the second, more significant, part of the findings section. This section presents the nature of the recommendations that were made in relation to each women's rights issue. This section begins with a summary of the nature of the recommendations and responses made in relation to the women's rights issue. The first table will provide a summary of the nature of the recommendations issued by the observer states, and will be numbered appropriately. The second table will provide the nature of the responses made by the states under review. There are two sets of categories of responses. Those beginning with 'A' are the comments provided by the states under review when accepting the recommendation. By contrast, those categories of responses that begin with a letter 'N' are comments provided when the states under review note the recommendations in question.

The summary of the categories of recommendations and responses is followed by a diagram, which aims to provide a pictorial account of the discussions held on the women's rights issues. This is done by linking the nature of the recommendations with the corresponding responses made by the states participating in the discussions. For instance, towards the left of each diagram, I provide the nature of the recommendations that were issued using the category numbers. Towards the right of the diagram, I provide the nature of responses made by the state under review for recommendation, using the summary letters and numbers of the responses categories.

An important point on the method of categorisation is required to be made here for clarification. In all the state reviews, the state under review received multiple recommendations, of varying natures, on the specific women's rights issue. To avoid misrepresentation, and to ensure a full account of the discussions is provided, where one particular state has received more than one nature of recommendations, these will be categorised twice under the two different categories of recommendations. This will mean that the total of the states in the figures that present a summary of the data will not match the total figures of states under review provided in the overview of the recommendation section. Second, it is also notable that a number of states under review provide one single response to recommendations differing in nature. This means that when presenting my data, the same response to different natures of recommendations will be repeated when discussing the same states under review. This method ensures that the focus of this investigation is not merely on the nature of the recommendations issued, but provides an insight into how the review process operates in a holistic manner through examining the discussions held amongst states on the specific women's rights issue.

This diagram is followed by a detailed presentation of the findings in relation to each category of recommendations and responses made by states in relation to the women's rights issue. The final section is dedicated to discussing the findings, in light of the theoretical framework for this thesis, with the aim of answering the research question of this investigation.

3.5 Conclusion

This chapter began by explaining why the method of documentary analysis was best suited to answer the research question for this study. This was followed by assessing the quality of the documents that I used for the purposes of this investigation using authoritative criteria provided by John Scott.

In the second part of this chapter, I provided details of the research design of this investigation. I explained the reasons behind the selection of women's rights as the focus for this investigation. I began by presenting the numerical analysis of the human rights issues raised in the state reviews of the first cycle of the UPR process, which revealed the significance of women's rights in the review of states in the process. Second, I provided a theoretical justification for selecting women's rights as the focus for this investigation by drawing upon the strong association between women and culture, which explained the reasons why the issue of women's rights was significant for this study.

The final section of the chapter provided an outline of how I conducted the investigation. I began by explaining how I examined the data from the Final Outcome Reports with the aid of the NVivo software. I then explained the methods of interpretation and analysis that I used in examining the reports, before providing an overview of how the findings will be presented in the next three chapters of this thesis.

In conclusion, in this chapter I provided the details of the research methods employed for the purposes of this investigation. I explained how the methodological choices I made during the research process of this project were informed and guided by the theoretical framework adopted for this study, with the ultimate aim of answering the research question of this thesis. In the next chapter, I will present the findings of the category of women's rights to health.

Chapter 4

Women's Rights to Health

4.1. Introduction

The purpose of this chapter is to present, and discuss, the findings of this investigation which explores the nature of positions adopted by states when the issue of women's rights to health was the focus of discussions in the UPR process. Of the 3702 recommendations issued in relation to women's rights in general, a total of 301 recommendations focused entirely on women's rights to health.

Despite women's rights to health being recognised at the international level since the 1950s, the issue has not received consistent consideration, and therefore, actions to bring any substantial changes have been described as slow and often superficial.¹ One of the most prevalent reasons for the persistence of violation of women's rights to health is because national governments and international communities have failed to appropriately understand the pain, suffering and sometimes death that is inflicted on women due to restricted access to sufficient health care services.² This ignorance, or unawareness, of violations of women's rights to health is often perpetuated through the artificial divide between the public and private sphere that has traditionally existed in the context of international human rights protection.³ Within this divide, women's rights, issues and concerns are often relegated to the private sphere primarily because women are often considered the main caregivers in the family and domestic life.⁴ In this way, issues and concerns about women's health, such as those affecting woman's sexuality and reproductive health, have traditionally been perceived as falling within the private sphere.⁵ For the purposes of this thesis, one of the most significant implications for the artificial divide is that the public realm is largely considered to be subject to

¹ UN OHCHR, 'Factsheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children' (August 1995) < <http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf> > 31st August 2015.

² Ibid.

³ Berta Esperanza Hernandez-Truyol, 'Human Rights through a Gendered Lens: Emergence, Evolution, Revolution' in Kelly D Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Volume 1, Transnational Publishers Inc 1999) 32. For further elaboration see section 2.4.

⁴ A Rao, 'The Politics of Gender and Culture in International Human Rights Discourse' in Dorothy Hodgson (ed), *Gender and Culture at the Limits of Rights* (University of Pennsylvania Press 2011) 169. See also, C Cerna, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio – Cultural Contexts' (1994) 16 Human Rights Quarterly 740.

⁵ Ibid,

government regulation and scrutiny. In contrast, the private sphere is traditionally considered to avoid such regulation, and is therefore more prone to be governed by values and norms embedded in culture.⁶ It is primarily due to this increased susceptibility of women's rights to health from claims of culture⁷, which often materialises as a challenge from cultural relativism in the international human rights discourse, that the issue has been selected as the focus for this study. This chapter will aim to answer the research question which is to explore whether, and to what extent, states introduce arguments from a cultural relativist perspective when issues of women's rights to health are the focus of discussions during state reviews in the first cycle. Under the category of women's rights to health, three specific issues will be considered with the aim of answering the research question of this investigation. These are: female genital mutilation (FGM), abortion and women's access to health care services.

This chapter is divided into three main sections: FGM, abortion and women's rights to access health care services, which will all follow the same structure. Each of the three main sections will begin by contextualising the issue by providing a brief introduction to the international human rights law on each issue. The second sections are dedicated to presenting the findings of these explorations. In the third sections, I discuss the findings of each of the three issues in light of the theoretical framework of this thesis with the aim of answering the research question of this investigation.

4.2. The issue of Female Genital Mutilation in the UPR process

4.2.1. Contextualising Women's Rights in relation to Female Genital Mutilation

For the purposes of this investigation, FGM is defined as 'all procedures involving partial or total removal of the external female genitalia...whether for cultural or other

⁶ Julie Mertus, 'State Discriminatory Family Law and Customary Values' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspective* (Routledge 1995) 135.

⁷ Berta Esperanza Hernandez-Truyol, 'Human Rights through a Gendered Lens: Emergence, Evolution, Revolution' (n 3) 35.

non-therapeutic reasons.”⁸ International human rights treaty jurisprudence has declared FGM as a violation of women’s (and girls’) rights under a range of international human rights instruments.⁹ More specifically, clarification on the issue has been provided in the jurisprudence of the Committee on the Elimination of Discrimination against Women (Committee on the Women’s Convention) who have stated that FGM, together with any underlying cultural justifications that endorse the practice, should be eliminated.¹⁰

Despite the repeated declarations made in treaty jurisprudence that the practice of FGM is in violation of international human rights treaties and conventions,¹¹ it continues to be exercised on women and girls in a number of states.¹² Those that are sympathetic to the practice argue that it is inseparable from the religious and cultural identity of some groups¹³ and, therefore, its continuance is often defended as an expression of the traditional and cultural values of a particular society.¹⁴ Justifications for the practice are sometimes based on preserving women and girls’ virginity,¹⁵ birth control,¹⁶ or to protect the family honour by preventing immorality and preserving group identity.¹⁷ This inherent relationship between FGM and culture, whereby cultural and religious norms are used to justify the practice, is the primary reason why it has been selected as the focus for this investigation. This recognition was reflected in the UPR process as 29

⁸ World Health Organization, ‘Female Genital Mutilation: a joint WHO/UNICEF/UFPA statement’ (World Health Organization, 1997) 3 < http://www.childinfo.org/files/fgmc_WHOUNICEFJointdeclaration1997.pdf > accessed 31st August 2015.

⁹ See UN Human Rights Committee, ‘CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)’ (29 March 2000) CCPR/C/21/Rev.1/Add.10; UN Committee Against Torture, ‘General Comment No. 2: Implementation of Article 2 by States Parties’ (24 January 2008) CAT/C/GC/2; UNGA, ‘Intensifying global efforts for the elimination of female genital mutilations’ (20 December 2012) A/RES/67/146; UN Committee on the Rights of the Child, ‘CRC General Comment No. 7 (2005): Implementing Child Rights in Early Childhood’ (20 September 2006) CRC/C/GC/7/Rev.1.

¹⁰ UN Committee on the Elimination of Discrimination Against Women, ‘CEDAW General Recommendation No. 14: Female Circumcision’ (1990) A/45/38 and Corrigendum 1; UN Committee on the Elimination of Discrimination Against Women, ‘CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)’ (1999) A/54/38/Rev.1, chap. I.

¹¹ See n 9 and n 10.

¹² Dr. Babatunde Osotimehin, ‘Let’s End Female Genital Mutilation/Cutting in Our Generation’ (October 2013) < <http://www.unfpa.org/public/home/news/pid/15460> > accessed (31st August 2015).

¹³ UNICEF, ‘Female Genital Mutilation/Cutting: A Statistical Exploration’ (UNICEF 2005) 17-19.

< http://www.unicef.org/publications/files/FGM-C_final_10_October.pdf > accessed 31st August 2015.

¹⁴ Isabelle Gunning, ‘Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries (1991-1992) 23 Columbia Human Rights Law Review 238.

¹⁵ M A Morgan, ‘Female Genital Mutilation: An issue on the doorstep of the American Medical Community’ (1997) 18 J. Legal. Med. 93, 95-96.

¹⁶ L F Lowenstein, ‘Attitudes and Attitude difference to Female Genital Mutilation in the Sudan: Is there a change on the horizon (1978) 12 Soc. Sci. & Med 417.

¹⁷ Layli Miller Bashir, ‘Female Genital Mutilation in the United States: An examination of Criminal and Asylum law (1996) 4 Am U J Gender & L 415, 424.

states adopted a position which, implicitly or explicitly, highlighted the inherent association between FGM and culture.

The discussion above introduces some of the cultural justifications for the continued practice of FGM. With this in mind, the aim of this part of the investigation is to explore whether, and to what extent, states adopt arguments from a cultural relativist perspective to defend the practice of FGM in the UPR process.

4.2.2. Findings on the issue of Female Genital Mutilation in the UPR process

4.2.2.1. An Overview of the Findings on FGM

In the first cycle of the UPR process, a total of 205 recommendations were issued to 36 states under review. I have categorised recommendations that were issued and received by states on FGM according to 5 regional groups. A brief reminder, the member states of the United Nations are categorised into 5 regional groups: African Group (abbreviated as ‘African’), Asia Pacific Group (abbreviated as ‘Asian’), Eastern European Group (abbreviated as ‘EEG’), Latin American and Caribbean Group (‘GRULAC’) and the Western European and Others Group (‘WEOG’).¹⁸ I have presented the states that received and issued recommendations on FGM according to regional groups in figure 4.1 and 4.2, respectively.

¹⁸ For a full list of states for all groups see <<http://www.un.org/depts/DGACM/RegionalGroups.shtml>> accessed 31st August 2015.

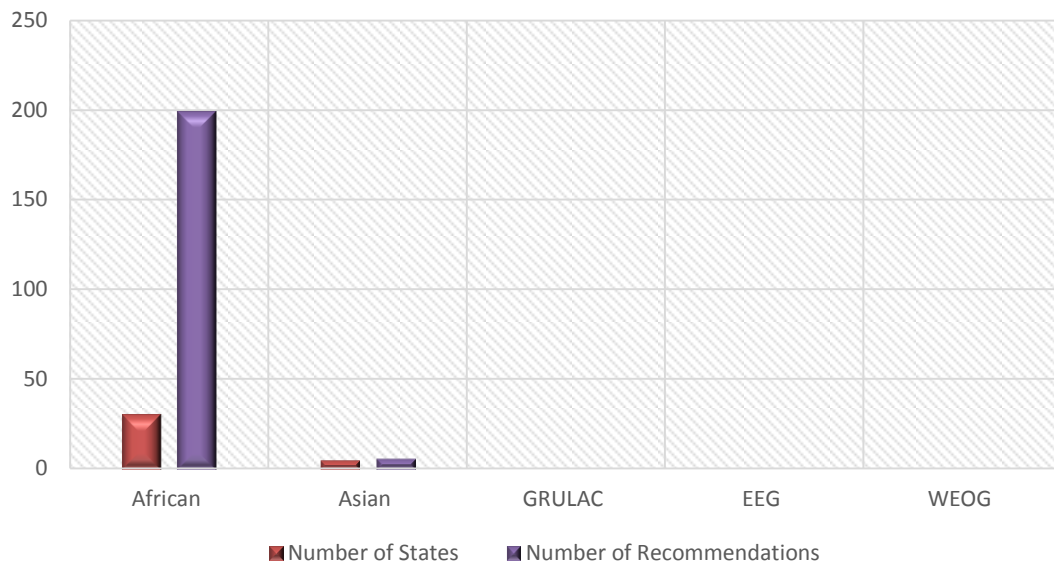


Figure 4.1 States under review that received recommendations on FGM

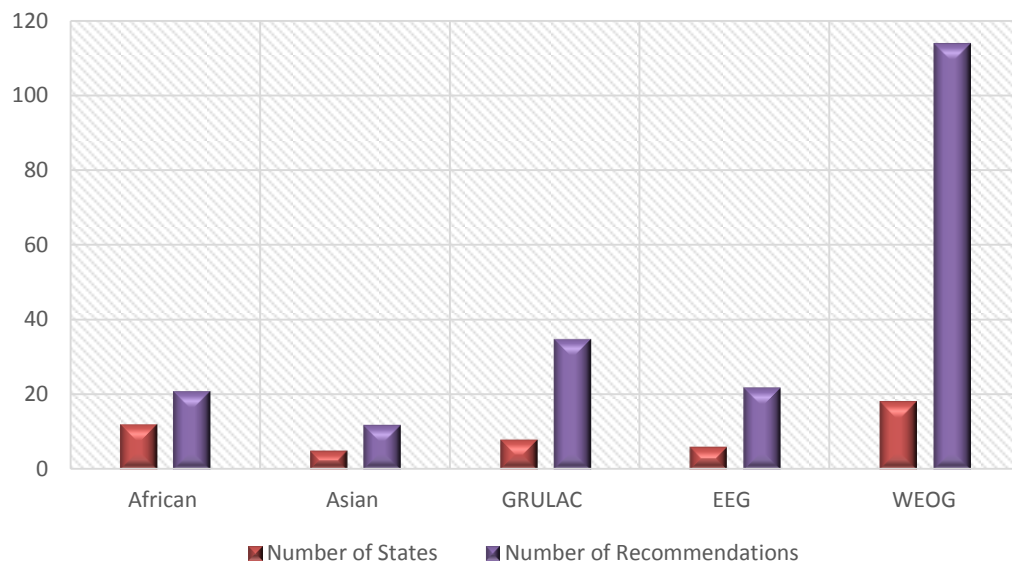


Figure 4.2 Observer states that issued recommendations on FGM

Looking at figure 4.1 and 4.2 together, two main findings are revealed. First, it is apparent that whilst states belonging to the African and Asian groups received the highest number of recommendations, the states belonging to the two groups issued the lowest number of recommendations on FGM. Second, states from the GRULAC, EEG

and WEOG issued the highest number of recommendations on FGM, whilst the states from the three groups themselves received no recommendations on the practice. From this preliminary analysis, it can be observed that whilst concerns in relation to continued practice of FGM were raised by states belonging to all 5 regional groups, the recommendations were only issued to states from the African and Asian groups.

In response to the 205 recommendations issued on FGM, a total of 166 were accepted by the states under review, and the remaining 39 were noted. I have presented the recommendations that were accepted and noted (categorised according to regional groups) in table 4.1 and 4.2, respectively.

Table 4.1 Recommendations on FGM that were accepted.

ACCEPTED	Regional Groups	No. of States	No. of Recommendations
	African	19	160
	Asian	5	6
	GRULAC	0	0
	EEG	0	0
	WEOG	0	0

Table 4.2 Recommendations on FGM that were noted.

NOTED	Regional Groups	No. of States	No. of Recommendations
	African	11	39
	Asian	0	0
	GRULAC	0	0
	EEG	0	0
	WEOG	0	0

From table 4.1 and 4.2, it can be observed that all states belonging to the Asian group accepted the recommendations on FGM. On the other hand, whilst the majority of the recommendations were accepted by states from the African group, a significant total of 39 was noted. This shows that disagreements on the nature of the recommendations issued on FGM were *all* vocalised from states belonging to the African group.

4.2.2.2. Nature of the dialogue on FGM in the UPR process

The nature of the 205 recommendations issued in relation to FGM can be divided into 4 categories, which have been summarised in table 4.3.

Table 4.3 Categories of recommendations on FGM.

Recommendation	Summary of the nature of the recommendation/statement
1	FGM is a harmful cultural practice that is required to be eliminated
2	To implement incremental reforms to address the practice
3	Implement laws to prohibit FGM
4	Comply with international obligations on FGM

The nature of the responses provided by the states under review can be divided into 13 categories. The comments that were accompanied with recommendations that were accepted have been categorised into 6 categories, and the comments that were issued when the recommendations were noted are divided into 7 categories. I have summarised each response category in table 4.4. The categories that begin with the letter ‘A’ were comments made by the states under review when the recommendations were accepted. On the other hand, the categories that begin with the letter ‘N’ represent those comments that were issued when the states under review noted the recommendation.

Table 4.4. Categories of responses on FGM.

Category	Summary of responses made by state under review
A1	Accepted recommendation with no further comments
A2	Domestic Laws already in place against FGM
A3	Domestic Laws under review on FGM
A4	Incremental reforms in place to help eliminate FGM
A5	Cultural justifications for FGM make its elimination challenging
A6	FGM is not embedded in culture
N1	Noted recommendation with no further comments
N2	Laws already in place against FGM
N3	Laws under review on FGM
N4	Incremental reforms in place to address FGM
N5	Cultural justifications hinder the elimination of FGM
N6	FGM does not exist in the state
N7	Legislation was not the answer to FGM

In figure 4.3, I have provided a pictorial account of the nature of discussions held between states on FGM. I have done this by representing the categories of the recommendations towards the left of figure 4.3. Towards the right of figure 4.3, I have provided the corresponding category of comments made in response to the recommendations

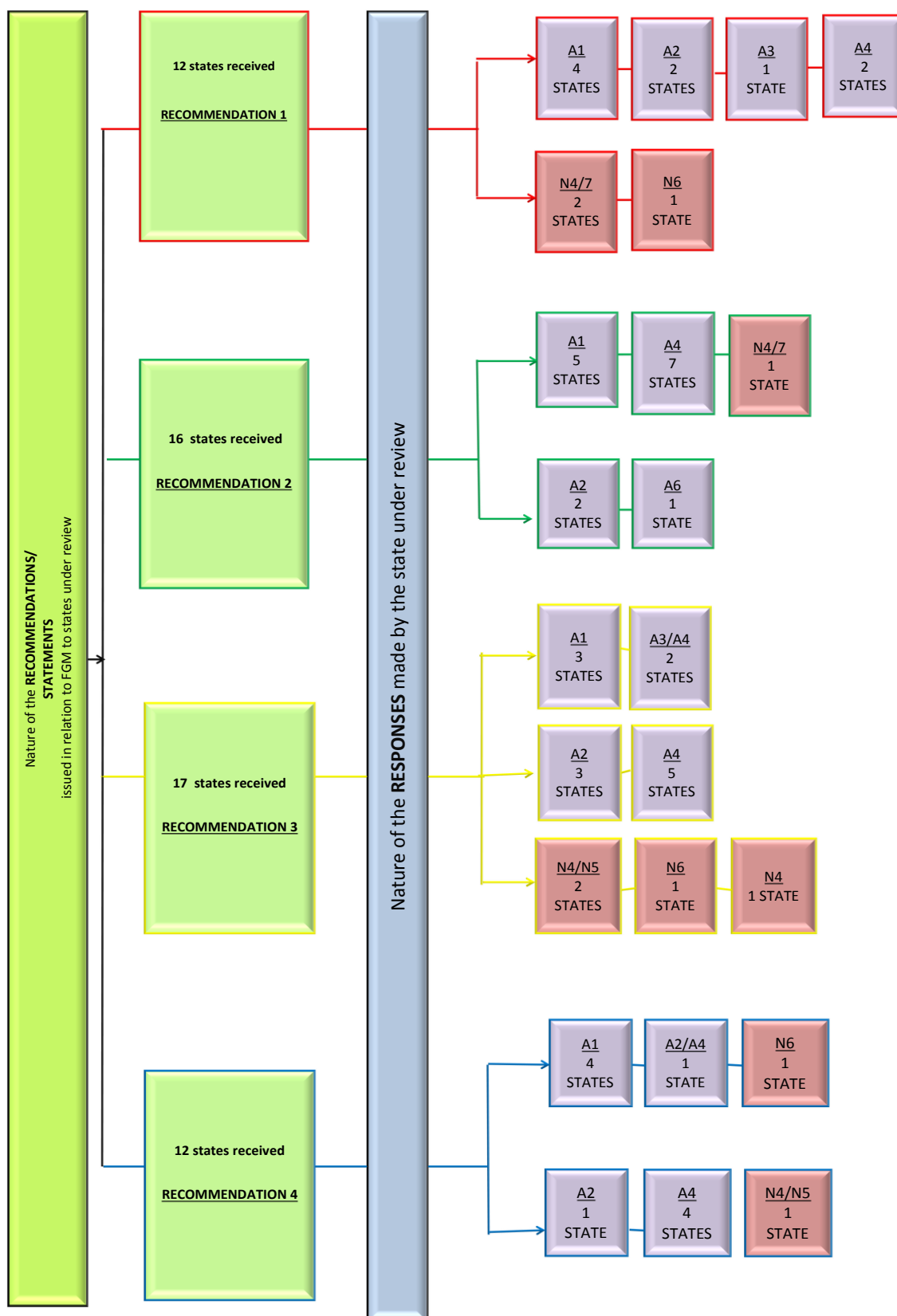


Figure 4.3 Nature of the dialogue held amongst states on the issue of FGM

Recommendation 1: Express declaration that FGM is a harmful cultural practice that is required to be eliminated

Under the first category of recommendations, observer states expressly recognised FGM to be a harmful traditional/cultural practice, before suggesting that the state under review should eliminate it. A typical example of this recommendation was issued during the review of Cameroon when Chile ‘flagged the persistence of deep rooted cultural practice affecting women such as FGM...[and] inquired about steps to...eradicate FGM.’¹⁹ In another example, Mexico issued a recommendation to Ethiopia ‘to eliminate harmful traditional practices such as female genital mutilations.’²⁰ In total 12 states received recommendations of this nature.

In response, a total of 9 states under review accepted the recommendations issued under this category. Of these, the states of Djibouti, Tanzania, Liberia and Guinea Bissau all accepted the recommendations without providing any further comments. These were categorised as an A1 response. The states of Botswana²¹ and Niger provided an A2 response, as they insisted that domestic legislation already prohibited the practice. For instance, Niger stated that ‘a law criminalizing [FGM] had been adopted in 2003.’²² On the other hand, the delegate of Cameroon stated that ‘the reform of the criminal code is underway’ to address the practice of FGM, and thus provided an A3 response.²³ The delegates of Somalia and Ethiopia²⁴ in response to a recommendation under this category provided an A4 response, as both states recognised FGM as a ‘harmful traditional practice,’ but went on to highlight the long term policies that were already in place to help eliminate the practice.²⁵ For example, Somalia noted that it had implemented ‘educational awareness campaigns, and a dialogue with traditional and religious leaders, women’s groups and practitioners to eliminate the practice of FGM.’²⁶

On the other hand, a total of 3 states under review noted recommendations issued under this category and all provided an explanation for their adopted positions. First, the delegate of Malawi provided an N6 response as the delegates explained that it could not accept the recommendation because ‘female genital mutilation...had never been

¹⁹ UNHRC ‘Cameroon’ (3 March 2009) A/HRC/11/21, para 24.

²⁰ UNHRC ‘Ethiopia’ (4 January 2010) A/HRC/13/17, para 41.

²¹ UNHRC ‘Botswana’ (13 January 2009) A/HRC/10/69, para 63.

²² UNHRC ‘Niger’ (25 March 2011) A/HRC/17/15, para 48.

²³ UNHRC ‘Cameroon’ A/HRC/11/21, para 38.

²⁴ UNHRC ‘Ethiopia’ A/HRC/13/1, para 93.

²⁵ UNHRC ‘Somalia’ (11 July 2011) A/HRC/18/6, para 69.

²⁶ UNHRC ‘Somalia, Addendum’ (16 December 2011) A/HRC/18/6/Add.1, para 98.1.

practiced here.’²⁷ Second, the states of Mali and Liberia²⁸ provided very similar responses as the comments issued by the delegates combined an N4 and N7 response. For instance, at the interactive dialogue session, Mali stated that the ‘policy on female genital mutilation centred on awareness-raising and education and was based on the belief that it was essential to obtain widespread public support for the eradication.’²⁹ At the Human Rights Council (HRC) plenary session, the delegate added ‘that excision was deeply rooted in Malian cultural practice’ and so the state has ‘given priority to public education and awareness-raising campaigns rather than the adoption of repressive measures whose practical application could not be guaranteed without the support of all segments of society.’³⁰ In this way, both the states of Mali and Liberia insisted that whilst incremental methods of reforms were in place to address FGM, as the practice was deeply engraved in the cultural value belief system of the state, legislation against it was not the answer now.

Overall, it can be observed that when states were issued with recommendations under this category, 9 out of 12 states under review provided explanations for their positions with their responses. What is notable is that no states under review in their responses challenged the declaration made by the observer states that FGM was a harmful cultural/traditional practice. In fact, it can be noted that whilst observer states drew upon the link between culture and FGM as a basis to issue criticism during state reviews, the states under review themselves did not use this link to defend FGM on cultural grounds. Instead, 7 out of the 12 states that were issued with a recommendation under this category made references to the laws and policies that were already in place to address FGM.

Recommendation 2: To implement incremental reforms to eliminate FGM

Observer states that issued recommendations under this category began by recognising the inherent association between culture and FGM. The observer states then went on to suggest that the state under review should implement incremental policies, such as engaging in a constructive dialogue with relevant stakeholders, with the aim to reform any sympathetic attitudes in favour of FGM. A typical example of recommendation

²⁷ UNHRC ‘Malawi’ (4 January 2011) A/HRC/16/4, para 77.

²⁸ UNHRC ‘Report of the Human Rights Council on its sixteenth session’ (14 November 2011) A/HRC/16/2, para 542.

²⁹ UNHRC ‘Mali’ (13 June 2008) A/HRC/8/50, para 30 & 54.

³⁰ UNHRC ‘Report of the Human Rights Council on its eighth session’ (1 September 2008) A/HRC/8/52, para 997.

under this category was when Slovenia suggested that Niger implement ‘sensitization activities for practitioners, families, traditional or religious leaders and the general public in order to encourage change in traditional attitudes’.³¹ A total of 16 states under review received recommendations of this nature.

In response, 11 states accepted the recommendations. The delegates of Liberia, Chad, Ghana, Tanzania and Senegal all provided an A1 response, as no further comments were provided by the states. On the other hand, the states of Togo³² and Uganda provided an A2 response as the delegate insisted that ‘Parliament had passed the Prevention of Female Genital Mutilation Act 2009’.³³ The states of Somalia, Niger,³⁴ Sierra Leone³⁵, Eritrea³⁶, Ethiopia³⁷, Cameroon³⁸ and Djibouti³⁹ all provided A4 responses. A typical example is when the delegate of Somalia stated that it recognised the importance of ‘dialogue with traditional and religious leaders, women’s groups and practitioners of FGM to eliminate the practice of FGM’.⁴⁰ On the other hand, when Congo was issued with a recommendation under this category, the delegate provided an A6 response insisting that the ‘the practices of genital mutilation that had been referred to were not rooted in Congolese culture.’⁴¹

The state of Gambia was the only state under review that noted recommendations issued under this category. The delegate explained there was ‘continued public education on the dangers of this practice’ and that ‘legislation was not the answer right now.’⁴² Thus, the Gambian delegate provided a combination of an N4 and N7 response.

Overall, it can be noted that only one state noted a recommendation under this category. This makes the nature of reforms suggested under this category the most well received recommendations by the states under review on the issue of FGM. Even the state of Gambia that noted the recommendation did not challenge the aim to eradicate the practice; rather, the delegate challenged the nature of the reforms suggested to address the practice. Further, it can be observed that of the 12 states that provided additional

³¹ UNHRC ‘Niger’ (25 March 2011) A/HRC/17/15, para 29.

³² UNHRC ‘Togo’ (14 December 2011) A/HRC/19/10, para 67.

³³ UNHRC ‘Uganda’ (22 December 2011) A/HRC/19/16, para 22.

³⁴ UNHRC ‘Niger, Addendum’ (8 June 2011) A/HRC/17/15/Add.1, para 23.

³⁵ UNHRC ‘Sierra Leone’ (11 July 2011) A/HRC/18/10, para 26.

³⁶ UNHRC ‘Eritrea’ (4 January 2010) A/HRC/13/2, para 72.

³⁷ UNHRC ‘Ethiopia’ A/HRC/13/17, para 93.

³⁸ UNHRC ‘Cameroon’ A/HRC/11/21, para 40.

³⁹ UNHRC ‘Djibouti’ (3 March 2009) A/HRC/11/16, para 34.

⁴⁰ UNHRC ‘Somalia, Addendum’ A/HRC/18/6/Add.1, para 98.21.

⁴¹ UNHRC ‘Democratic Republic of the Congo’ (4 January 2010) A/HRC/13/8, para 45.

⁴² UNHRC ‘Report of the Human Rights Council on its fifteenth session’ (31 October 2011) A/HRC/15/60, para 542.

comments in relation to their position, the central focus of 9 of the state responses were very similar, despite the official position of the state in response to the recommendation being different. For instance, the 9 states in their comments focused entirely on the long term policies in place, such as public awareness programmes and engagement in a dialogue with local leaders, to help eradicate FGM. Therefore, the pattern that emerged is that when states under review were issued with recommendations that focused on incremental reforms to eliminate FGM, the recommendations were not only well received, but the majority of the states provided very similar comments in their responses.

Recommendation 3: Implement domestic laws to prohibit FGM

Under the third category of recommendations, observer states suggested that states under review should enact legislation against the practice of FGM. A typical example of this recommendation is when the Czech Republic ‘recommended the adoption and implementation of legislation prohibiting and criminalizing FGM’ during the review of Mali.⁴³

A total of 17 states under review were issued with recommendations of this nature. Of these, 13 states accepted recommendations. The states of Senegal, Chad and Kenya accepted the recommendations without any further response, and therefore provided an A1 response. On the other hand, Benin,⁴⁴ Uganda⁴⁵ and Iraq insisted the domestic laws were already in place which prohibited the practice and thus provided an A2 response. For instance, Iraq stated that ‘the crime of female genital mutilation was dealt with under the Penal Code.’⁴⁶ The states of Niger,⁴⁷ Djibouti,⁴⁸ Eritrea,⁴⁹ Mauritania,⁵⁰ and Sierra Leone,⁵¹ all provided an A4 response as they placed emphasis on the policies that were already in place to raise awareness and engage in a constructive dialogue with the stakeholders involved in the practice. Adopting a slightly different position, the states of Guinea Bissau and Somalia⁵² insisted that the domestic legislation on the issue of FGM

⁴³ UNHRC ‘Mali’ A/HRC/8/50, para 16.

⁴⁴ UNHRC ‘Benin’ A/HRC/8/39, para 31.

⁴⁵ UNHRC ‘Uganda’ A/HRC/19/16, para 22.

⁴⁶ UNHRC ‘Iraq’ (15 March 2010) A/HRC/14/14, para 48.

⁴⁷ UNHRC ‘Niger’ (25 March 2011) A/HRC/17/15, para 29.

⁴⁸ UNHRC ‘Djibouti’ (3 March 2009) A/HRC/11/16, para 34.

⁴⁹ UNHRC ‘Eritrea’ (4 January 2010) A/HRC/13/2, para 72.

⁵⁰ UNHRC ‘Mauritania’ (4 January 2011) A/HRC/16/17, para 49.

⁵¹ UNHRC ‘Sierra Leone’ (11 July 2011) A/HRC/18/10, para 26.

⁵² UNHRC ‘Somalia’ (11 July 2011) A/HRC/18/6, para 69.

was under review, and that educational awareness policies were being implemented to help discourage the practice, and thus provided an A3/A4 response. For instance, the delegate of Guinea Bissau stated that ‘regarding the adoption of a specific legislation criminalizing female genital mutilation...the process is ongoing as the country has just started awareness raising campaigns in order to reach the targeted population.’⁵³

On the other hand, a total of 4 states under review noted the recommendations under this category. Of these, the delegate of Lesotho provided an N6 response as it insisted that ‘Lesotho did not practice female genital mutilation’.⁵⁴ The state of Gambia provided an N4 response stating that ‘continued public education on the dangers of the practice were under way.’⁵⁵ The states of Mali⁵⁶ and Liberia both noted the recommendation issued under this category and provided a combination of an N4 and N5 response. Both the states of Liberia and Mali began their responses by providing details of the incremental reforms that were in place in their respective states. However, the states then went to explain that the cultural nature of the practice hindered the complete elimination of FGM through punitive measures. For example, Liberia at the interactive dialogue stage began by stating that it ‘was engaging all segments of society in inclusive and constructive nationwide dialogues to determine the extent and the forms of harmful traditional practices, and those dialogues would form the basis for programme planning in the eradication of female genital mutilation.’⁵⁷ Liberia stated that it ‘continued to take measures to eliminate the practice of female genital mutilation, while respecting the cultural rights of citizens to engage in non-harmful, human rights-conscious traditional and cultural practices.’⁵⁸ At the HRC plenary session, the delegate of Liberia explained that FGM is a ‘deep- rooted traditional practice [and] still shrouded in myth and secrecy. Often, discussions of both are strongly resisted and perceived as attempts to destroy the cultural and traditional heritage of the country... it is currently unable to take a position on recommendation relating to female genital mutilation.’⁵⁹ This statement indicates that whilst the delegate of Liberia was committed to taking measures to eliminate FGM, such action was contingent to respecting the cultural rights to engage in ‘non harmful’ cultural/traditional practices. This point of discussion then

⁵³ UNHRC ‘Report of the Human Rights Council on its fifteenth session’ (31 October 2011) A/HRC/15/60, para 676.

⁵⁴ UNHRC ‘Lesotho’ (16 June 2010) A/HRC/15/7, para 62.

⁵⁵ UNHRC ‘Report of the Human Rights Council on its fourteenth session’ (23 October 2012) A/HRC/14/37, para 542.

⁵⁶ UNHRC ‘Report of the Human Rights Council on its eighth session’ (1 September 2008) A/HRC/8/52, para 997.

⁵⁷ UNHRC ‘Liberia’ (4 January 2011) A/HRC/16/3, para 50.

⁵⁸ Ibid.

⁵⁹ UNHRC ‘Liberia Addendum’ (2011) A/HRC/16/3 Add.1, para 10.

turns on the definition of ‘harm’ as interpreted by Liberia. Indeed, if Liberia considered some forms of FGM to be ‘non harmful’, then the statement indicates that the state will consider it to fall within the cultural right of the citizens, which ought to be respected.

In this way, whilst the states of Liberia and Mali did not use culture to explicitly *justify* the practice, both states used the association between FGM and culture to *explain* why the practice continued to exist in the respective states under review. I argue that this explanation at the HRC session, together with the fact that both recommendations were noted, gives reason to suggest that Liberia and Mali implicitly challenged the suggested reforms to enact laws against the practice on the basis that the cultural nature of the practice hindered the implementation and acceptance of such laws.

Overall, it can be noted that the majority of recommendations that were issued to states under this category were accepted. Of these, 11 out of the total 18 states responded by drawing attention to non-punitive policies that were already implemented to address the practice of FGM. Thus, regardless of the official position in response to the recommendations, the essence of the comments issued by the states under review was that long term policies were in place at domestic level to address the practice.

Recommendation 4: Comply with international obligations on FGM

Under this category of recommendations, observer states suggested that the states under review should take measures against FGM to ensure compliance with the state’s international obligations in relation to the practice. A typical example is when Mali was issued with a recommendation by Canada to ‘take the necessary measures to implement the recommendations of CEDAW and the Human Rights Committee concerning...FGM’.⁶⁰ A total of 12 states under review were issued with a recommendation under this category.

A total of 10 states under review accepted the recommendations issued to them in relation to FGM under category 4. Of these, the states of Chad, Guinea Bissau, Senegal, and Ghana accepted the recommendation and provided no further comments, and therefore provided an A1 response. The delegate of Iraq provided an A2 response stating that laws against the practice were already in place.⁶¹ The nature of the response

⁶⁰ UNHRC ‘Mali’ A/HRC/8/50, para 27.

⁶¹ UNHRC ‘Iraq’ (15 March 2010) A/HRC/14/14, para 48.

provided by Burkina Faso was a combined A2 and A4 response, as the state insisted that measures were in place ‘to enlist the support of traditional leaders. Female Genital mutilation was punishable by law’.⁶² On the other hand, the comments made by Ethiopia⁶³, Sierra Leone, Cameroon⁶⁴ and Djibouti⁶⁵ were categorised as an A4 response. A typical example of this response was when Sierra Leone stated that whilst ‘the Government accepted in principle that the practice ought to be abolished, but recalled that some traditions were deeply rooted and pleaded for implementation on a progressive basis.’⁶⁶

On the other hand, two states under review noted the recommendations issued to them under this category. First the delegate of Malawi provided an N6 response, as it explained that ‘Malawi did not have female genital mutilation, which had never been practiced there.’⁶⁷ On the other hand, Mali provided a combined response of N4/N5, as it stated whilst awareness-raising campaigns against FGM were in place, the cultural nature of the practice was the reason why it continued to exist in the state.⁶⁸

Overall, when observer states drew upon the states’ international human rights obligations in relation to FGM, the majority of the states under review accepted the recommendation. Of the states that provided additional statements with their official response, the essence of the majority of the comments was that laws and/or gradual reform policies were being implemented at domestic level to address FGM.

4.2.3. Discussion on the Findings of FGM in the first cycle of the UPR process

Of the 205 recommendations that were issued on FGM in the first cycle of the review process, a total of 199 recommendations were accepted. In the first instance, one may conclude that the vast number of recommendations being accepted indicates two things: first, that there is a consensus amongst states that FGM should be eliminated and second, that the discourse held on the issue in the review process was relatively uncontentious in nature. However, an analysis of the nature of the positions adopted by

⁶² UNHRC ‘Burkina Faso’ (7 January 2009) A/HRC/10/80, para 63.

⁶³ UNHRC ‘Ethiopia’ (4 January 2010) A/HRC/13/17, para 41.

⁶⁴ UNHRC ‘Cameroon’ (3 March 2009) A/HRC/11/21, para 24.

⁶⁵ UNHRC ‘Djibouti’ (3 March 2009) A/HRC/11/16, para 34.

⁶⁶ UNHRC ‘Sierra Leone’ (11 July 2011) A/HRC/18/10, para 26.

⁶⁷ UNHRC ‘Malawi’ A/HRC/16/4, para 77.

⁶⁸ UNHRC ‘Mali’ A/HRC/8/50, para 27.

states during the discussions reveals how some states grappled with the inherent relationship between FGM and culture. In total, 57 states, in their capacity as observer states or states under review, recognised the association between FGM and culture during discussions held in the first cycle. However, on appreciating the association between culture and FGM, the participating states then went on to adopt one of the three different positions during state reviews.

First, the observer states that issued recommendations under the first category expressly declared FGM to be a harmful cultural practice that was required to be eliminated. From the nature of the recommendations under this category there are two implicit suggestions made by the observer states. First, the statements indicate that the observer states believed that FGM continued to be practiced due to justifications that were embedded in some aspects of cultural belief systems. Second, that the observer states are at the outset making clear that the continuance of the practice, despite being condoned by some cultural values and traditions, is in violation of international norms and thus should be eliminated. I argue that observer states issuing recommendations under the first category adopted a position that resonates with the strict universalist position. This is because strict universalists, whilst recognising that cultural differences exist, insist that universal human rights norms should transcend cultural idiosyncrasies.⁶⁹ Similarly, in the UPR process, observer states issuing recommendations under the first category, whilst recognising the inherent relationship between FGM and culture, insisted that the international norms should transcend these cultural particularities, and thus, the practice should be eliminated.

The implications of the strict universalist position adopted by some observer states during the discussions of FGM becomes apparent when one analyses the underlying presumptions of the states adopting this position. To begin with, the essence of the recommendations issued under the first category is that whilst observer states recognised the cultural nature of FGM, suggestions were made to eliminate the practice. This recognition that FGM is embedded in some aspects of culture means that the observer states hold the presumption that such beliefs are formulated over a period of time. On the nature of culture, Clifford Geertz argues that cultural values are a synthesis of moral belief systems that are formulated, developed and reaffirmed over a period of

⁶⁹ R Sloane, 'Outrelativising Relativism: A Liberal Defence of the Universality of International Human Rights' (2001) 34 Vanderbilt Journal of Transnational Law 527, 541-2.

time.⁷⁰ In this way the standards, values and categories of culture are acquired unconsciously by individuals through a process of ‘enculturation’.⁷¹ Following this logic, any reforms to values and beliefs embedded in culture must be undertaken gradually over a period of time to ensure that such reforms are accepted.⁷² Therefore, reforms undertaken to discourage attitudes in favour of the practice cannot be undertaken in a precipitous manner, and rather require long term reform policies, and a constructive dialogue with relevant stakeholders in a community.⁷³ In light of this, suggestions made by observer states under the first category to precipitously eliminate the cultural practice of FGM indicates that the observer states have not fully appreciated the nature of culture and process of enculturation, which deeply embeds the sympathetic attitudes held by individuals towards FGM.⁷⁴

In fact, the observer states’ lack of appreciation of the nature of culture and the enculturation process, in relation to sympathetic attitudes towards FGM, confirms some of the theatrical critiques of the strict universalist position.⁷⁵ For example, Dembour argues that the sole reliance on universalism is likely to breed moral ignorance ‘because it excludes the experience of the other’.⁷⁶ Further, An-Na’im warns about the dangers of the ‘claims of universalism that are in fact based on the claimant’s rigid and exclusive ethnocentricity’.⁷⁷ These theoretical criticisms of strict universalism are confirmed in the underlying presumptions of the observer states who recommended the elimination of FGM by adopting a strict universalist position. This is because, despite the observer states recognising the cultural nature of the practice, the position of the observer state clearly indicated that the states under appreciated the nature of enculturation as they suggested precipitously to eliminate the practice. Consequently, whilst the overwhelming acceptance of the recommendations from a strict universalist position

⁷⁰ C Geertz, *Interpretations of Cultures* (Basic Books 1973) 49.

⁷¹ A Renteln, *International Human Rights: Universalism versus Cultural Relativism* (Quid Pro Book 2013) 58.

⁷² Ibid 49. See also section 2.3.1.

⁷³ See the nature of internal discourse on human rights suggested by A An-Na’im, ‘The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia’ in Joanne R. Bauer and Daniel A. Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press 1999) 156.

⁷⁴ On the process of enculturation see Alison Dundes Renteln, *International Human Rights: Universalism versus Relativism* (Quidpro Books, 2013) 58. See section 2.3.1.

⁷⁵ Sonia Harris Short, ‘Listening to ‘the other’? The Convention on the Rights of the Child (2011) 2 Melbourne General of International Law 305, 308; A An-Na’im, ‘Toward a Cross Culture Approach to Defining International Standards of Human Right: The Meaning of Cruel, Inhuman or Degrading Treatment’ in Abdullahi An-Naim (ed), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1995) 25.

⁷⁶ Marie-Benedicte Dembour ‘Following the movement of a pendulum: between universalism and relativism’ in Jane Cowan, Marie-Benedicte Dembour and Richard Wilson (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 58.

⁷⁷ Abdullahi A An-Na’im, ‘Toward a Cross Culture Approach to Defining International Standards of Human Right: The Meaning of Cruel, Inhuman or Degrading Treatment’ in (n75) 25.

may indicate a universal consensus on the issue, the underlying assumptions held by the states give reason to question whether recommendations issued by observer states under the first category are realistically attainable in the manner suggested.

The second significant aspect of discussions on FGM in the first cycle also emanated from states recognising the association between culture and FGM. However, in contrast to those observer states that used the link between FGM and culture to adopt a strict universalist position, the delegates of Liberia and Mali used the same association to challenge the reforms suggested by observer states on the practice.⁷⁸ The positions adopted by Mali and Liberia in response to recommendations on FGM seem problematic. This is because whilst neither of the two states have expressly adopted the strict cultural relativist position to justify FGM, I argue that implications of the nature of the responses provided by both states means that their positions are open to the same profound criticism that is subject to strict cultural relativism. One of the most profound criticisms of strict cultural relativism is the possibility of the notion of culture being invoked by oppressive states to justify ‘cruel and degrading practices’ and to deflect international scrutiny.⁷⁹ This criticism can be subject to the positions of Mali and Liberia on the basis that both states used the cultural association of FGM as a basis to not accept the suggested reforms during their state reviews.

The third position adopted by states can be described as being a more nuanced approach when discussing the issue of FGM and its association with culture. In total, on 28 different instances, observer states and states under review recognised the significance of implementing incremental methods of reform to help modify cultural norms and attitudes that condone the practice. For instance, some states insisted that changes in the attitudes towards FGM needed to be instigated from within the culture itself. This was to be carried out by incorporating relevant stakeholders such as tribal chiefs, religious leaders, and FGM practitioners in a national dialogue as part of the reform process.⁸⁰ It can be noted that the nature of this position was adopted by states in the discussions of all 4 categories of recommendations.

⁷⁸ UNHRC ‘Mali’ A/HRC/8/50, para 27; UNHRC ‘Liberia’ A/HRC/16/3, para 50.

⁷⁹ M Iovane, ‘The Universality of Human Rights and the International Protection of Cultural Diversity; Some Theoretical and Practical Considerations’ (2007) 14 *International Journal on Minority and Group Rights* 231, 241.

⁸⁰ See examples under recommendation 2 above.

The nature of this discussion held amongst states affiliates with the moderate cultural relativist position, which aims to implement reforms in a culturally legitimate manner.⁸¹ This is because one of the central premises of moderate cultural relativism is the belief that the only way of furthering universal human rights is to ground international human rights norms in cultural values and beliefs.⁸² One method of doing this is to undertake an internal discourse within the culture itself with the aim of reinterpreting certain values and beliefs, which are inconsistent with human rights law, to bring them in line with current international human rights standards.⁸³ The fundamental aspect of such a discourse is that any reforms of cultural beliefs need to be undertaken from within the culture itself, by ‘internal actors,’ to avoid the appearance of ‘dictation by others’.⁸⁴ Evidence of suggestions that affiliate this internal discourse were recognised by some states during discussions on FGM, who encouraged a constructive dialogue between relevant stakeholders with the aim of changing sympathetic attitudes towards the practice.

The implications of states adopting a position that is comparable with the moderate cultural relativist position is that they indicate that some states in the UPR process recognise that international norms on FGM are more likely to be observed if such norms are rationalised at local level, so that the content and the goals of the norms are better understood by members of local societies.⁸⁵ In this way, by encouraging the involvement of local leaders in the reform process, any suggested reinterpretations of cultural values and beliefs are more likely to be observed by individuals practising FGM.⁸⁶ Further, evidence of states recognising the significance of an internal discourse on FGM indicates a substantial commitment by the states involved to ending the practice. This is because implementing policies and strategies with the aim of encouraging an internal dialogue to discourage FGM requires demanding levels of political, social and economic commitment, through initiatives such as public awareness campaigns and engaging in a dialogue with relevant stakeholders. By comparison,

⁸¹ A An-Na'im, 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' in *Human Rights in Africa: Cross Cultural Perspectives* in An- Na'im and Deng (eds) (Brookings Institution 1990) 332.

⁸² Renteln, *International Human Rights: Universalism versus Cultural Relativism* (n 71) 116.

⁸³ A An-Na'im, 'State responsibility Under International Human Rights Law to Change Religious and Customary Law' in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 175.

⁸⁴ Abdullahi An-Na'im, 'The Rights of Women in International Law in the Muslim Context' (1987) 9 Whittier Law Review 515.

⁸⁵ L.A Obiora, 'Feminism, Globalization, and Culture: After Beijing' (1997) 4 Indian Journal of Global Legal Studies 355, 377.

⁸⁶ See Abdullahi An-Na'im, 'The Rights of Women in International Law in the Muslim Context' (1987) 9 Whittier Law Review 515.

acceptance of recommendations by states to enact laws arguably requires less commitment than those committing to reforms based on moderate cultural relativism.

Overall, the findings of this section reveal there was at least a formal consensus amongst states on the elimination of FGM, as the majority of the recommendations were accepted by the states. However, an analysis of the discussions reveals how the states grappled with the relationship between FGM and culture. Those observer states that used the relationship between FGM and culture to review states from a strict universalist position showed that the presumptions held by states gave grounds to question the attainability of the recommendations issued. On the other hand, the delegates of Mali and Liberia used the same relationship between FGM and culture to explain the continuance of the practice. These positions were open to criticisms that were associated with the strict universalist positions. Finally, some states during the discussions used the association between FGM and culture to adopt a moderate cultural relativist position. This position adopted by states proved to be most fruitful as reforms were suggested in a manner which recognised the cultural nature of the practice.

4.3 The issue of Abortion in the UPR process

4.3.1. Contextualising Women's Rights in relation to Abortion

Women's rights in relation to abortion have been described as 'the most controversial of all rights'.⁸⁷ This is because there is an impassionate debate between those that defend women's rights to decide whether and when to bear children, and the defenders of the fetal rights who contend that the right to life is extended to the fetus.⁸⁸ The controversial nature of abortion was reflected in the UPR process, as over half of all the recommendations issued on abortion were not accepted by states under review. Of course, there are a number of positions in between these two extremes, however, for the purposes of this study, the focus will be on states imposing a blanket ban on women's

⁸⁷ Susan Deller Ross, *Women's Human Rights International and Comparative Law Casebook* (University of Pennsylvania press) 571.

⁸⁸ Ibid.

access to procedures for terminating an unwanted pregnancy, which is often accompanied with laws criminalising all forms of abortion.⁸⁹

Given the controversial nature of abortion, it is not surprising that there is no international human rights norm that directly resolves the conflict of rights in relation to abortion. Nevertheless, the jurisprudence of the treaty monitoring bodies has played a significant role in advancing women's reproductive rights.⁹⁰ For instance, the Committee on the Women's Convention in its General Recommendation 24 on 'women and health' provides that state 'legislation criminalising abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion'. Further, in 2002, a UN Special Rapporteur reaffirmed that hindrances on women's own sexual and reproductive lives, which are based on cultural and traditional norms, were a violation of a woman's human right to health.⁹¹

Despite the advancement of women's reproductive rights, women are often denied control over their ability to bear children due to a blanket ban on abortion services. The pressure in some societies to produce a child within a reasonable time often means that women do not have access to abortion facilities due to cultural barriers in societies.⁹² In other instances, a ban on the availability of abortion services is based on the religious belief that all human life is inviolable, which is argued to extend to human fetuses.⁹³ It is primarily due to this association between culture/religious norms and abortion services, whereby restrictions on abortion services are sometimes justified on such cultural/religious grounds, that the issue has been selected for the purposes of this investigation.

⁸⁹ WHO, 'From concept to measurement: operationalizing WHO's definition of unsafe abortion'

<<http://www.who.int/bulletin/volumes/92/3/14-136333/en/>> accessed 31st August 2015.

⁸⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), 'UN Committee on Economic, Social and Cultural Rights: Concluding Observations: Chile' (1 December 2004) E/C.12/1/Add.105 para 53; UN Committee on Economic, Social and Cultural Rights (CESCR), 'UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Malta' (14 December 2004) E/C.12/1/Add.101 para 41; UN Committee on Economic, Social and Cultural Rights (CESCR), 'UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Monaco' (13 June 2006) E/C.12/MCO/CO/1 para 23

⁹⁰ Ibid.

⁹¹ UN Commission on Human Rights, 'Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women' (31 January 2002) E/CN.4/2002/83, para 90.

⁹² Ibid 91.

⁹³ M Perry, 'Religion, Politics and Abortion' (2001-2002) 79 U. Det. Mercy. L. Rev 1, 9-10; For an overview on the different religious positions for and against abortion see

<<http://www.bbc.co.uk/ethics/abortion/religion/religion.shtml>> access 31st August 2015. R Rainey and G Magill, *Abortion and Public Policy: An interdisciplinary Investigation within the Catholic Tradition* (2nd edn, Fordham University Press 1996).

The discussion above introduces some of the cultural and religious justifications for imposing a blanket ban on abortion. With this backdrop, the primary aim of this section is to assess whether, and to what extent, states introduce arguments from a cultural relativist perspective in the discussions during state reviews on a blanket ban on abortion.

4.3.2. Findings on the issue of Abortion in the UPR process

4.3.2.1. An Overview of the Findings on Abortion

A total of 29 recommendations on the issue of a blanket ban or the criminalisation of abortion were issued to 14 states under review during the first cycle of the UPR process. I have depicted the states that received and issued the recommendations on abortion in figure 4.4 and 4.5, respectively.

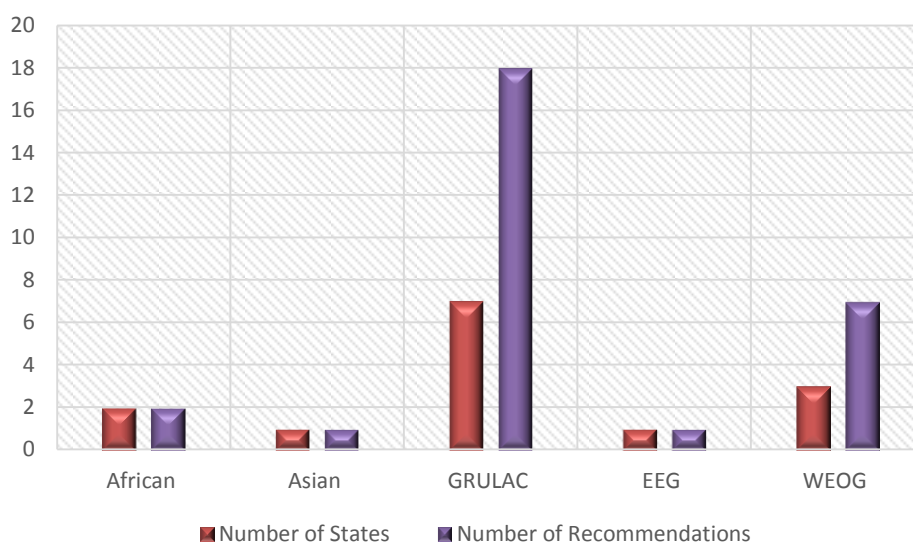


Figure 4.4 States under review that received recommendations on abortion.

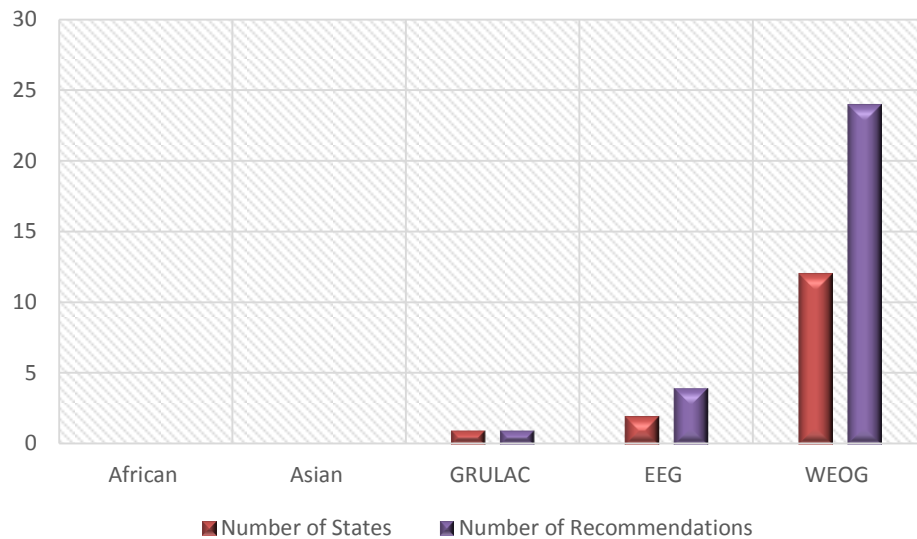


Figure 4.5 States issued recommendations on abortion

From figure 4.4 and 4.5, it can be observed that whilst states from the GRULAC group issued the highest number of recommendations, Paraguay was the only state from within that group that issued a recommendation on abortion. Another notable point is that whilst states belonging to the African and Asian group received recommendations on abortion, states from within the two groups did not themselves issue any recommendations. Further, it can be observed that states from the WEOG and the EEG were the only states that issued more recommendations on abortion than they received. The other three regional groups all received more recommendations on abortion that they issued.

In response to the recommendations issued on abortion, a total of 12 recommendations were accepted, whilst a total of 17 recommendations were noted. I have categorised the number of recommendations that were accepted and noted in table 4.5 and 4.6, respectively.

Table 4.5 Recommendations on abortion that were accepted

ACCEPTED	Regional Groups	No. of States	No. of Recommendations
	African	1	1
	Asian	0	0
	GRULAC	3	11
	EEG	0	0
	WEOG	0	0

Table 4.6 Recommendations on abortion that were noted

NOTED	Regional Groups	No. of States	No. of Recommendations
	African	1	1
	Asian	1	1
	GRULAC	4	7
	EEG	1	1
	WEOG	3	7

The striking finding that can be observed from table 4.5 and 4.6 is that *all* the recommendations on abortion that were issued to states from the EEG and WEOG were noted. This was notable because the states belonging to the two regions issued the highest number of recommendations on abortion in the first cycle of the process. On the other hand, the states belonging to the GRULAC group, which themselves were subject

to the highest number of recommendations, accepted over half of the total recommendations issued to the states of that group.

4.3.2.2. Nature of the dialogue on Abortion in the UPR process

The nature of the 29 recommendations issued by observer states on abortion can be divided into 4 categories. The nature of the responses issued by the states under review can be divided into a total of 6 categories. I have summarised the categories for the recommendations and responses in table 4.7 and 4.8, respectively. This is followed by figure 4.6, which provides pictorial depiction of the discourse on abortion in the first cycle of the review process.

Table 4.7 Categories of recommendations on abortion

Recommendation	Summary of the nature of the recommendation/statement
1	Decriminalise abortion
2	Comply with international human rights obligations against a blanket ban on abortion
3	Generic suggestions in relation to abortion
4	To defend the right to life of the unborn child

Table 4.8 Categories of responses on abortion

Category	Summary of responses made by state under review
A1	Accepted recommendation with no further comments
A2	Domestic Laws/Policies already in place on abortion
N1	Noted recommendation with no further comments
N2	Laws already in place/Under review on abortion
N3	Domestic laws/Constitution used to challenge the reforms to the blanket ban on abortion
N4	General Response to the recommendation

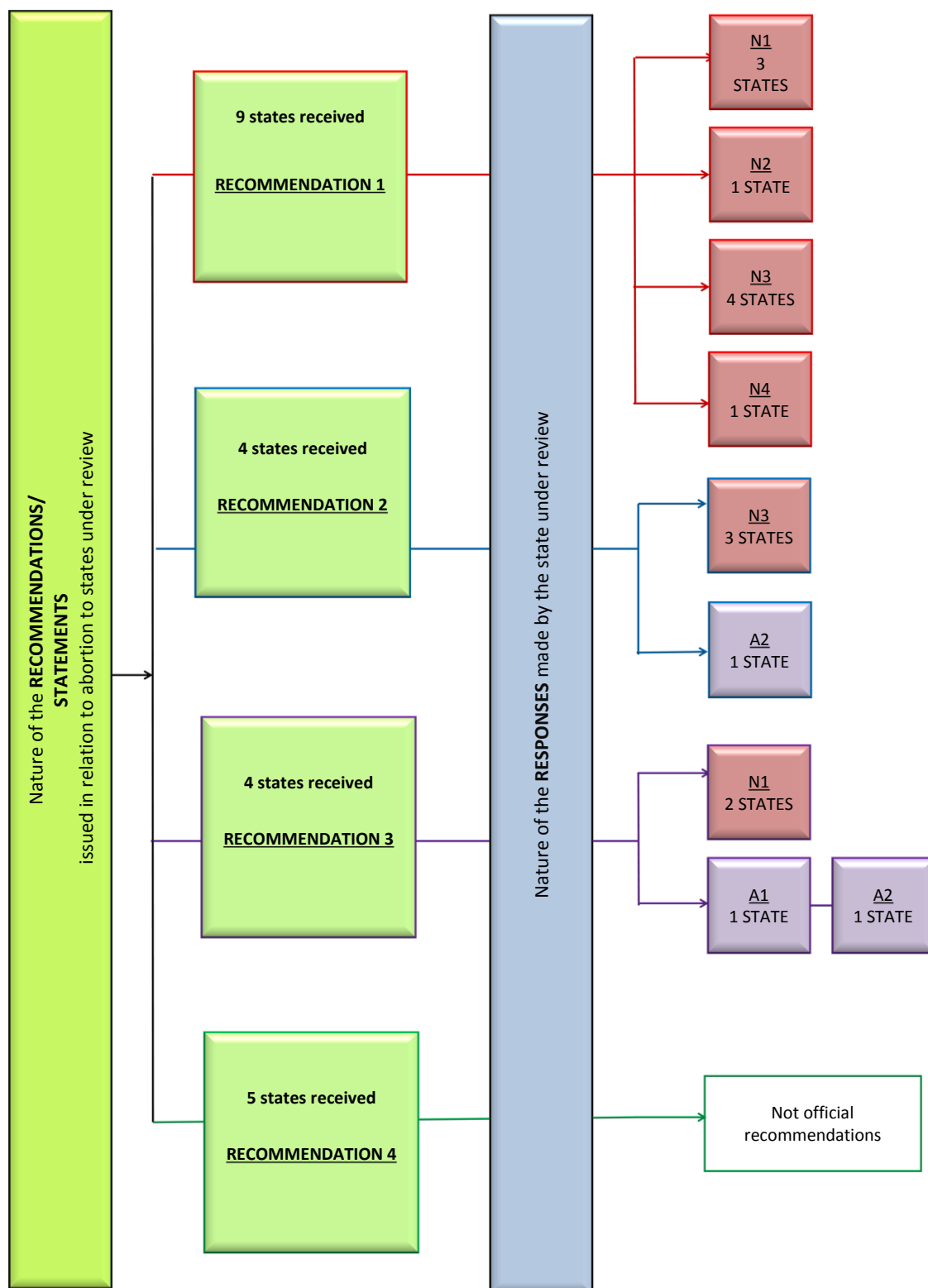


Figure 4.6 Nature of the dialogue held amongst states on abortion

Recommendation 1: Decriminalise abortion

Under the first category of recommendations, the observer states were issued recommendations to amend, repeal or review domestic legislation in order to decriminalise abortion so that it was permitted under certain circumstances. A typical example of a recommendation issued under this category was when the delegate of Sweden suggested Nicaragua ‘consider reviewing laws regarding abortion, removing punitive provisions against women who have had abortion.’⁹⁴ A total of 9 states received recommendations of this nature.

Strikingly, all recommendations issued under this category were noted. The delegates of Hungary,⁹⁵ Malawi⁹⁶ and El Salvador⁹⁷ provided an N1 response, as the states noted the recommendation without providing any other comments. The delegate of Costa Rica⁹⁸ provided an N2 response as it stated that action was undertaken even before the UPR process.⁹⁹ A total of 4 states all provided an N3 response as the states insisted that the domestic law and constitution extended the protection of rights to the unborn child, and on this basis, the states could not accept the recommendation to lift the legal ban on abortion. The states include Andorra,¹⁰⁰ Nicaragua, Papua New Guinea and Ireland.¹⁰¹ For example, Nicaragua stated that it did not accept the recommendation ‘for the amendment of the law prohibiting therapeutic abortion.’ The delegate added that ‘this was clearly an issue of sovereignty, not a religious one. The majority of Nicaraguans believed that the right to life of the unborn was important.’¹⁰² Similarly, the delegate of Papua New Guinea in its response stated that ‘accepting this recommendation will go against the spirit of our Constitution, which is founded on Christian principles’.¹⁰³ This response is noteworthy because it is the only instance when a state, either observer or state under review, introduced religious values in their explanation for the position that was adopted in relation to abortion.

⁹⁴ UNHRC ‘Sweden’ (16 June 2010) A/HRC/15/11, para 23.

⁹⁵ UNHRC ‘Hungary’ (11 July 2011) A/HRC/18/17, para 95.15.

⁹⁶ UNHRC ‘Malawi’ (4 January 2011) A/HRC/16/4, para 105.32.

⁹⁷ UNHRC ‘El Salvador’ (18 March 2010) A/HRC/14/5, para 37.

⁹⁸ UNHRC ‘Costa Rica’ (4 January 2010) A/HRC/13/15, para 12.

⁹⁹ UNHRC ‘Costa Rica, Addendum’ (17 March 2010) A/HRC/13/15/Add.1, page 6.

¹⁰⁰ UNHRC ‘Andorra’ (4 January 2011) A/HRC/16/8, para 46.

¹⁰¹ UNHRC ‘Ireland’ (21 December 2011) A/HRC/19/9, para 108.9.

¹⁰² UNHRC ‘Nicaragua’ (17 March 2010) A/HRC/14/3, para 31.

¹⁰³ UNHRC ‘Papua New Guinea, Addendum’ (30 September 2011) A/HRC/18/18/Add, page 6.

The delegate of the Dominican Republic provided a slightly different explanation for noting the recommendation, as it provided an N4 general response to the recommendation. The delegate stated that ‘in response to comments made on the situation of women, the Dominican Republic indicated that it fully shared the concerns conveyed by various delegations...[and] the Government created a Ministry for Women.’¹⁰⁴ In this way, the state provided no reference to the issue of abortion, and instead provided a very general response in the area of women’s rights.

Overall, when states under review were issued with a recommendation to lift a blanket ban on abortion, no state accepted the recommendation. Of the 9 states that were issued with a recommendation under this category, a total of 4 states provided an N3 response and directly challenged the recommendations for reform on the basis of state sovereignty. This was the only instance in the whole of the investigation, whereby a particular recommendation has been categorically rejected by all the states that were issued with it.

Recommendation 2: Comply with international human rights obligations against a blanket ban on abortion

Observer states issuing recommendations under this category sought to encourage the states under review to lift the blanket ban on abortion by drawing upon the state’s international human rights obligations. A typical example of a recommendation under this category was issued by Norway to Ireland ‘to bring its abortion laws in line with ICCPR’.¹⁰⁵ A total of 4 states under review were issued with a recommendation of this nature.

In response, only the state of Paraguay accepted a recommendation under this category and provided an A2 response. The state explained that the process of reforms on the ban on abortion was being implemented even before the UPR process.¹⁰⁶ The other three states noted the recommendation issued under this category and provided explanations for their positions which were very similar in nature. The states of Ireland,¹⁰⁷ Nicaragua¹⁰⁸ and Chile provided an N3 response, explaining that to accept the

¹⁰⁴ UNHRC ‘Dominican Republic’ (4 January 2010) A/HRC/13/3, para 61.

¹⁰⁵ UNHRC ‘Ireland’ (21 December 2011) A/HRC/19/9, para 108.3.

¹⁰⁶ UNHRC ‘Paraguay, Addendum’ (31 May 2011) A/HRC/17/18/Add.1, para 10.

¹⁰⁷ UNHRC ‘Ireland’ (21 December 2011) A/HRC/19/9, para 108.9.

¹⁰⁸ UNHRC ‘Nicaragua’ (17 March 2010) A/HRC/14/3, para 31.

recommendation would mean that it was contrary to the domestic laws and the constitutional regulation of abortion. For example, the delegate of Chile explained that ‘induced abortion is forbidden in Chilean legislation’.¹⁰⁹

From the analysis above, it can be seen that even when states are issued with recommendations that draw upon their international obligations to encourage states to lift the ban on abortion, the states under review challenged such suggestions on the basis of exercising state sovereignty. From this it can be observed that the states under review are directly challenging the universality of international human rights standards, which have interpreted a blanket ban on abortion as a violation of women’s rights to health.

Recommendation 3: Generic suggestions in relation to abortion

The nature of the recommendations issued under this category were generic in nature as observer states made no specific references to the domestic criminalisation or blanket ban on abortion. Rather, the observer states focused their recommendations on encouraging the state under review to enact measures to prevent any form of unsafe abortion. A typical example of a recommendation under this category was issued by Sweden, who suggested that Sierra Leone ‘address other causes of maternal mortality and other related issues...such as...unsafe abortion’.¹¹⁰

A total of 3 states were issued with a recommendation under this category. In response, the delegate of El Salvador accepted the recommendation and provided an A1 response as no further comments were made. It is notable that this was El Salvador’s only acceptance of a recommendation on abortion; other more specific recommendations issued to El Salvador were noted. On the other hand, when Sierra Leone was issued with a recommendation under this category, it accepted the recommendation but, at the HRC plenary session, it stated that it only accepted the recommendation ‘subject to constitutional review,’ and therefore provided an A2 response.¹¹¹ On the other hand, the delegate of Ireland noted the recommendation and provided an N3 response as it drew upon its domestic constitution to justify not accepting the reforms on abortion.

¹⁰⁹ UNHRC ‘Chile’ (4 June 2009) A/HRC/12/10, para 54.

¹¹⁰ UNHRC ‘Sierra Leone’ (11 July 2011) A/HRC/18/10, para 80.21.

¹¹¹ UNHRC ‘Sierra Leone: Addendum’ (13 September 2011) A/HRC/18/10/Add.1.3 page 6.

Overall, the findings of the nature of discussions under this category lend further support to the suggestion that the issue of abortion was contentious in nature. This is because even the recommendations that were generic in nature, and therefore arguably less demanding, were not received well by the states under review. For instance one state remained silent in their response, and the other two states suggested that the domestic law in the area held priority over any suggestions of reforms on abortion.

Recommendation 4: To defend the right to life of the unborn child

All the recommendations made under this category were issued by The Holy See, who holds a Permanent Observer State status at the United Nations. For the purposes of the UPR process, this means that a representative from the Holy See is permitted to participate in the discussions held at the interactive stage of the review process.¹¹² When abortion was discussed at the interactive dialogue stage, the Holy See issued recommendations during the reviews of 3 states. First, during the review of the Netherlands, The Holy See stated that ‘the best way to respect the human rights of the child starts with the rejection of any forcible termination of his/her life, and with the recognition that the right to life is inviolable.’¹¹³ Second, during the review of Timor Leste, the delegate suggested that it should ‘persevere in its efforts to protect human life from conception until natural demise.’¹¹⁴ Third, at the review of San Marino, the ‘Holy See highlighted the efforts....to protect the rights of unborn children.’ As the three recommendations were not classified as official recommendations, no states under review provided specific responses to the suggestions made by the Holy See.

From these recommendations, it can be observed that the representative of the Holy See adopted a position to actively encourage the state under review to protect the rights of the unborn child, and therefore, to restrict women’s rights to access abortion services. The striking fact is that the delegate of Holy See was the *only* state that issued the recommendations on abortion to the 3 states under review in question. In addition, it is notable that the position adopted by the Holy See to expressly suggest that the state under review defend the rights of the unborn child was not adopted by any other observer state. For instance, the states of Andorra, Nicaragua, Papa New Guinea,

¹¹² UNGA, ‘General Assembly Resolution A/58/314 Participation of the Holy See in the work of the United Nations’ (14 July 2004) A/58/L.64.

¹¹³ UNHRC ‘The Netherlands’ (13 May 2008) A/HRC/8/31, para 21.

¹¹⁴ UNHRC ‘Timor-Leste’ (3 January 2012) A/HRC/19/17, para 79.21.

Ireland and Chile expressly challenged recommendations issued to them to lift the blanket ban on abortion based on the protection of rights of the unborn child. However, in their capacity as observer states, none of the 5 states listed above issued recommendations to states under review to ban abortion services based protecting the rights of the foetus. This shows that whilst the 5 states justified their challenge to lift the ban on abortion based on the protection of the rights of the unborn child, none of the states themselves attempted used this justification as a basis to issue recommendation to ban abortion services during the review of other states. The Holy See's recommendations to protect the rights of the unborn child are therefore unique in nature.

4.3.3. Discussion on the Findings of Abortion in the first cycle of the UPR process

Amongst the discussions held between states on the issue of abortion, two significant findings emerged, which help to answer the research question of this investigation. First, an examination of the discussions held amongst states revealed that a woman's right to access abortion, as interpreted in the treaty jurisprudence, was expressly challenged during the discussions held in the states under review. However, unlike the issue of FGM, this challenge to the suggested reforms was based solely on national sovereignty. The second significant finding that emerged during the discussions held on abortion was that states underappreciated the significance of religious influences on the blanket ban on abortion. I will discuss each of these findings in turn, and analyse the implications of each state's positions for the UPR process.

First, apart from one state under review, all of the states that did not accept recommendations on abortion provided an explanation for their position. This indicates that states not only directly challenged the reforms suggested on abortion, but were also willing to explain the reasons why women's rights to abortion services were restricted in the domestic context. The most interesting explanations for refusing to accept recommendations on lifting a blanket ban on abortion were issued by Nicaragua, Ireland, Papa New Guinea, Andorra and Chile. All 5 states refused to accept reforms to lift a blanket ban on abortion services on the grounds that the state's domestic laws protected the rights of the unborn child. Thus, the 5 states under review challenged the suggested reforms to lift the blanket ban on abortion on the basis of national

sovereignty to govern the regulation of abortion services. The position adopted by the 5 states under review is comparable to the recommendations issued by The Holy See under the 4th category of recommendations, which insisted that the rights of the unborn child should be protected by the states under review. This shows that there was evidence in the discussions held on abortion in the first cycle, that observer states and states under review adopted positions which challenged the international treaty jurisprudence that guarantees women's rights to abortion services based on national sovereignty and the protection of rights of the unborn child.

The implication of states adopting a position, whereby a challenge to the universality of women's rights to abortion is based on national sovereignty is, arguably, a more confrontational challenge to international norms than those that are justified on cultural grounds. This is because a justification of the non-acceptance of recommendations based on state sovereignty can be considered as being more definitive in nature. This is because raising the challenge of national sovereignty as a foundation for not accepting the recommendation arguably indicates a non-negotiable position on abortion adopted by the state in question. For instance, it was clear from the responses by the states under review on the issue of abortion that there was no intention of the non-acceptance of the recommendations being negotiated, or being implemented, in the domestic context. In contrast, when states adopted positions that resembled the cultural relativist perspective during the discussions of FGM, the nature of the statements indicated that their positions were not as definitive as projected by the states during the discussions on abortion. For instance, when states adopted positions that resembled the strict cultural relativist position on FGM, the states did make clear that it perceived the practice was against its international obligations and did not categorically deny the implementation of all aspects of the suggested reforms in the recommendation. By contrast, in the context of abortion, states used national sovereignty and the provisions in the domestic constitution as the basis for the categorical defence to accepting the suggested reforms aimed at lifting the ban on abortion. In this way, the states challenged the universality of women's rights to abortion services on the basis of national sovereignty, which clearly cannot be altered without state authorities initiating the reforms on the issue.

The second significant finding that emerged during the discussions on abortion was that Papua New Guinea was the only state that made reference to religious influences on the attitudes towards a blanket ban on abortion. The delegate of Papua New Guinea explained that it could not accept the recommendation on lifting the ban on abortion as it was contrary to the domestic constitution, ‘which was founded on Christian principles’.¹¹⁵ Aside from this one example, no observer states when issuing recommendations to states under review made references to any religious influences on the blanket ban on abortion. Similarly, no states under review used religious norms to justify the existence of the blanket ban on abortion. In fact, the state of Nicaragua went to the extent of declaring that the challenge to the recommendations to reform laws on abortion was not a religious one, and instead a question of national sovereignty.¹¹⁶

This lack of appreciation by states on the significance of religion in relation to the regulation of abortion is striking considering the influence of religious attitudes on abortion rights.¹¹⁷ For instance, blanket bans on abortions are based on a form of pro-life argument, which is largely also adopted by the religious attitudes that influence abortion rights.¹¹⁸ At the risk of oversimplification, the pro-life argument is based on the belief that it is immoral to kill a human being, as every human life is inviolable.¹¹⁹ Affirming that a human foetus is also a human being, the argument is that the human foetus is also inviolable, and therefore no one should intervene in a pregnancy with the intention of killing the foetus.¹²⁰ Despite this apparent influence of religious norms on attitudes towards a blanket ban on abortion, in the UPR process, aside from one state, all states underplayed the significance and influence of religious norms when there is a blanket ban on abortion services. On the contrary, the states during the discussions in the first cycle focused primarily on the protection guaranteed to the unborn child under domestic laws and constitutions.

The implications of states underplaying the religious influences is that one of the most profound underlying reasons for the implementation of a blanket ban on abortion is not drawn to the centre of discussions in the UPR process. For instance, some traditional interpretations of religious norms often play a fundamental role in the maintenance of

¹¹⁵ UNHRC ‘Papua New Guinea, Addendum:’ (30 September 2011) A/HRC/18/18/Add.1, page 6.

¹¹⁶ UNHRC ‘Nicaragua’ (17 March 2010) A/HRC/14/3, para 31.

¹¹⁷ M Perry, *Religion, Politics and Abortion* (2001-2002) 79 U. Det. Mercy. L. Rev 1, 9-10.

¹¹⁸ *Ibid* 9.

¹¹⁹ *Ibid*.

¹²⁰ P Lee, *Abortion and Unborn Human Life* (The Catholic University of America Press, 1996) 91-95.

patriarchal values and practices, which are often used as foundations to impede women's rights, whether that be in the private and family law, or control over their own health and sexuality.¹²¹ As well as religious norms often predating the concept of women's rights, in addition, religious values and norms can often have both the legal and the institutional structures to enforce their principles.¹²² In the case of a blanket ban on abortions, any religious influences on the attitudes and norms on abortion are enforced through legal and institutional infrastructures.¹²³ However, no discussions amongst states in the UPR process recognised the possible religious influences on the blanket ban on abortion that are enforced through legal institutions. This gives grounds to question whether the UPR process' underlying objective to promote all human rights norms¹²⁴ has been fully met in the context of women's rights to access abortion services as possible religious influences, that underlie reasons as to why women are restricted from accessing abortion, have not been raised and discussed during the state reviews. In this way, the arguments surrounding national sovereignty and the protection guaranteed under domestic law in relation to the unborn child veils the more complex issues in relation to religious attitudes on abortion and women's rights.

Overall, from the 10 states that noted the recommendations on abortion, it becomes apparent the issue of abortion rights of women was contentious during the reviews in the UPR process. A detailed examination of the discussions reveals that the explanation provided for noting the recommendations focused on national sovereignty, and the rights of the unborn child as protected under domestic laws. However, more complex issues surrounding the potential religious influences on the blanket ban on abortion were largely avoided by states during discussions. In this way, whilst the dialogue on abortion was contentious, the content of the discourse is left relatively simplistic as complex issues in relation to religious influences were not raised during the discussions of a blanket ban on abortion.

¹²¹ F Raday, 'Culture, religion, and gender' (2003) 1 *International Journal of Constitutional Law* 663, 669 – 675.

¹²² F Raday, 'Culture, religion, and gender' 669.

¹²³ *Ibid.*

¹²⁴ A/HRC/RES/5/1 para, 3 (a).

4.4. Women's Rights to Access to Health Care Services in the UPR Process

4.4.1. Contextualising the Access to Health Care Services

For the purposes of this section, women's rights to access health care services includes information and services made available by health authorities such as preventative medical care, reproductive choices, screening procedures, dietary factors, and other information on facilities to maintain health.¹²⁵ Access to such information is guaranteed under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which contains four interrelated elements, which include the accessibility of health care facilities.¹²⁶ On women's rights more specifically, the CEDAW places an obligation on states to take appropriate measures to enable women to 'access health care services, including those related to family planning...and pregnancy'.¹²⁷ In fact, the committee on the women's convention has recommended that states should remove "all barriers to women's access to health services, education and information, including in the area of sexual and reproductive health".¹²⁸

In the first cycle of the process, states under review accepted 62 out of the total 67 recommendations issued on women's rights to access health care services. This is the highest acceptance rate amongst all three issues examined in this chapter. Despite this apparent consensus amongst states in the review process, and the numerous declarations of women's rights to access health services under international law, women continue to face restrictions when accessing health care services. These restrictions on women's access to health care are not always necessarily due to the lack of existence of such services. On the contrary, often the traditionally perceived role of women in the private sphere means that a woman's right to access health care services is more susceptible to restrictions from cultural barriers.¹²⁹ For instance women are sometimes prevented from

¹²⁵ Rebecca Cook, 'Women's Health and Human Rights in Afghanistan' (1998) 4 *Journal of American Medical Association* 19, 34. See also, Mervyn Susser, 'Women's Health, Women's Lives, Women's Rights' (1992) 82 *American Journal of Public Health* 663.

¹²⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) E/C.12/2000/4, para 9.

¹²⁷ UN Committee on the Elimination of Discrimination Against Women, 'CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)' (1999) A/54/38/Rev.1, chap. I, para 29.

¹²⁸ *Ibid* para 31(b) and 13.

¹²⁹ Frances Raday, 'Culture, religion, and gender' (2003) 1 *International Journal of Constitutional Law* 663, 670. See further section 2.4.

controlling their own fertility, subject to nutritional taboos and traditional birth practices,¹³⁰ and prevented from accessing scientific medicine in favour of traditional remedies during pregnancy; all of which sometimes result in long term harm or fatality.¹³¹ On this issue, Radhika Coomaraswamy explains that it is often considered that women's primary duty is to reproduce, and therefore, any health consequences from the process of childbirth are often explained by fate, destiny and social and cultural practices, rather than a violation of women's rights to health services.¹³² It is primarily due to this relationship between culture and women's rights to access health care services, whereby cultural barriers can impede women's to access health care, that this issue has been selected as the focus for this investigation.

The discussions above introduced some of the cultural beliefs and norms that are often used to justify restricting women from accessing health care services. In the sections below, I will present and discuss the findings of this exploration when I assess whether, and to what extent, states in the UPR process introduce arguments from a cultural relativist position when discussing women's rights to access health care.

4.4.2. Findings on the issue of Access to Health Care Services

4.4.2.1. An Overview of the Findings on Access to Health Care Services

During the first cycle of the review process, a total of 67 recommendations were issued to 47 states under review in relation to women's rights to access health care services. I have presented the states that have received and issued recommendations in figure 4.7 and 4.8, respectively. I have categorised the states according to regional groups.

¹³⁰ UN Commission on Human Rights, 'Cultural practices in the family that are violent towards women' E/CN.4/2002/83, para 94.

¹³¹ UN OHCHR 'Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children' (August 1995), para 89.

¹³² Ibid paragraph 89.

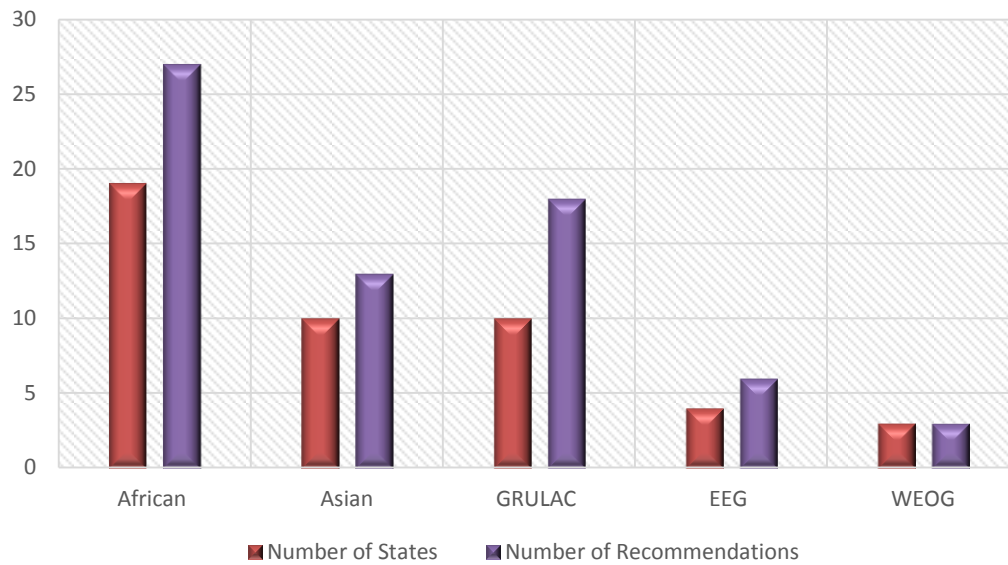


Figure 4.7. States under review that received recommendations on access to health care services

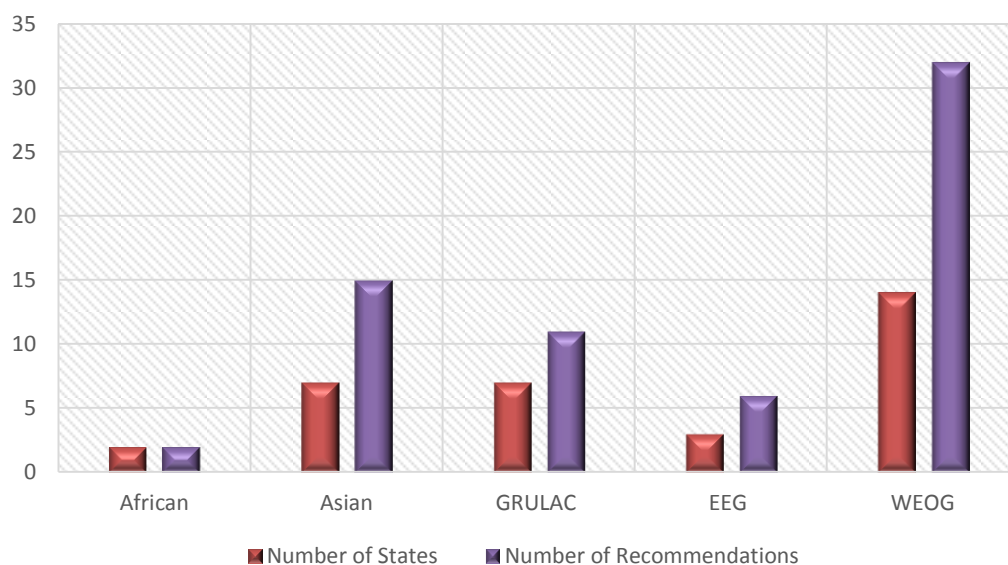


Figure 4.8 Observer states that issued recommendations on access to health care services

Looking at figure 4.7 and 4.8 together, two points can be noted. First, the issue of access to health care services was the only issue investigated in this chapter where states from all regional groups participated both in issuing and receiving recommendations. Second, the states belonging to the African group, Asian group, GRULAC and EEG all received more recommendations than they each issued. In

contrast, states from the WEOG were the only regional group that issued more recommendations on the issue than they received.

In response to the 67 recommendations, a total of 62 recommendations were accepted, and only 5 recommendations were noted. I have categorised the accepted and noted recommendations in tables 4.8 and 4.9, respectively.

Table 4.9 Recommendations on access to health care services that were accepted

ACCEPTED	Regional Groups	No. of States	No. of Recommendations
	African	19	26
	Asian	9	13
	GRULAC	9	17
	EEG	4	5
	WEOG	1	1

Table 4.10 Recommendations on access to health care services that were noted

NOTED	Regional Groups	No. of States	No. of Recommendations
	African	1	1
	Asian	0	0
	GRLUAC	1	1
	EEG	1	1
	WEOG	2	2

From table 4.8 and 4.9, it can be observed that an overwhelming majority of the recommendations issued on health care services were accepted. Therefore, at least formally, there is a consensus amongst the majority of states that were reviewed in the UPR process on the universal nature of women's rights to access health care services. In the sections below, I will present a more detailed account of the nature of dialogue on the issue of access to health care services in the first cycle of the review process.

4.4.2.2. Nature of the dialogue on Women's Rights to Access Health Care Services in the UPR process

During the first cycle of the review process, a total of 67 recommendations were issued to states on women's rights to access health care services. The nature of the recommendations issued can be divided into three main categories. I have summarised these in table 4.10. The responses provided by the states under review when issued with recommendations on access to health care services can be divided into 6 categories. I have summarised these categories responses table 4.11.

Table 4.11 Categories of recommendations on access to health care services

Recommendation	Summary of the nature of the recommendation/statement
1	Generic recommendations on access to health care services
2	References to states' international obligations
3	Amend/Reform/Implement laws to protect women's rights to access health care services

Table 4.12 Categories of responses on access to health care services

Category	Summary of responses made by state under review
A1	Accepted recommendation with no further comments
A2	Domestic laws already implemented/under review
A3	Information on measures and policies that are already in place
A4	Support agreed from another state under review
A5	Recognition of cultural barriers
N1	Noted recommendations with no further comments
N2	Policies already in place

Figure 4.9 provides a pictorial representation of the discourse held amongst states on the issue of women's rights to access health care services. The categories of recommendations are represented towards the left of the figure, and the corresponding categories of responses are provided towards the right of the figure.

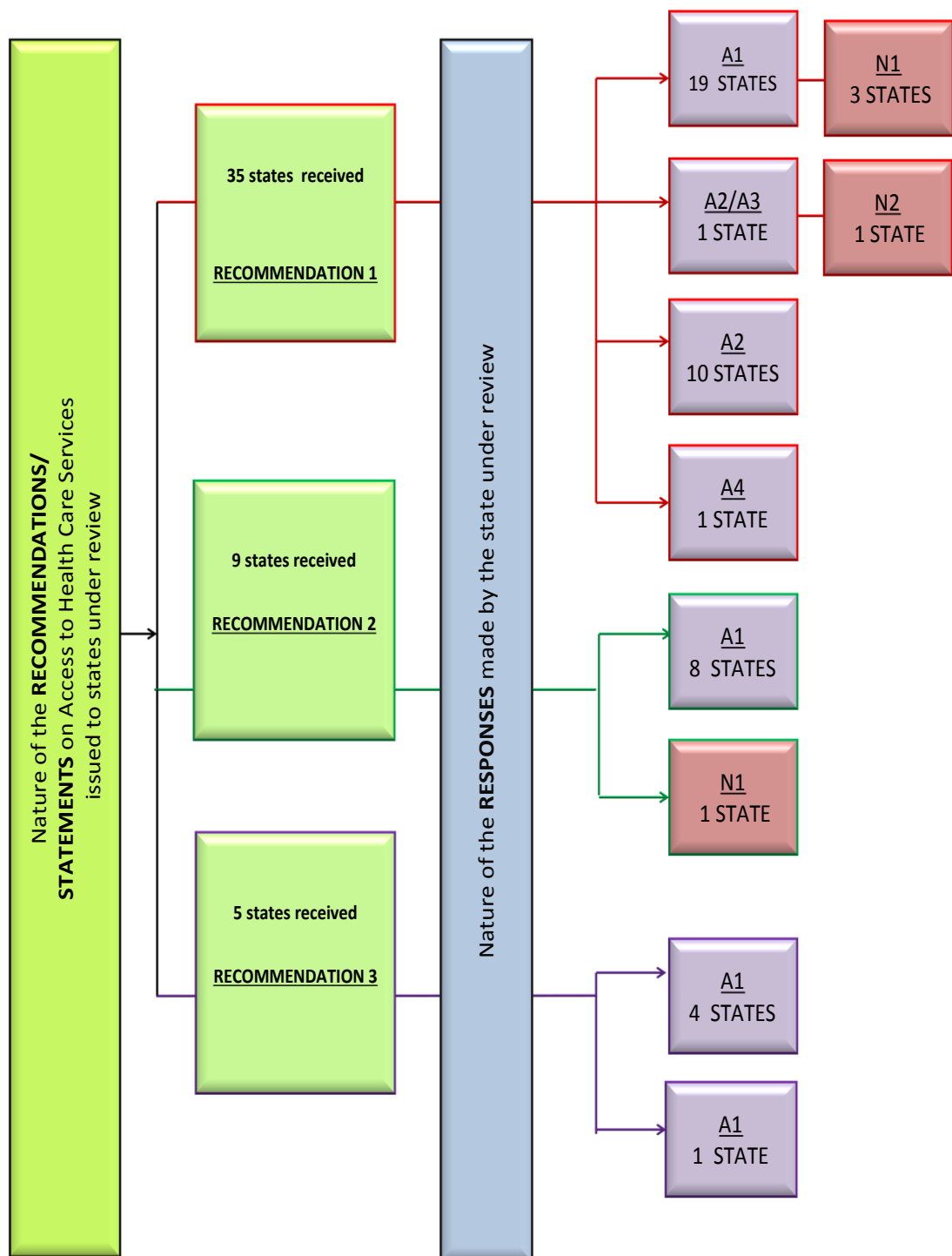


Figure 4.9. Nature of dialogue held amongst states on the issue of women's rights to access to health care services

Recommendation 1: Generic recommendations on access to health care services

The recommendations issued by observer states under this category instructed states under review to ensure that women were provided with adequate health care services. The nature of the recommendations can be described as being generic in nature, as observer states did not make any references to the states' international obligations in the suggestions made, or provide any detailed domestic laws or policies that should be implemented. Instead, the recommendations simply raised concerns, or made suggestions, that women should be provided with access to health services. A typical example of a recommendation issued under this category was made during the review of Equatorial Guinea when the delegate of Uruguay 'referred to concerns at the lack of access to adequate healthcare services for women and girls including pre and postnatal care, access to information on family planning, particularly in rural areas. It asked about measures taken in these areas.'¹³³

A total of 35 states were issued with recommendations under this category. One of the most striking findings was that all the recommendations issued under this category used one of the following key words in their suggestions: 'consider',¹³⁴ 'increase efforts',¹³⁵ 'develop',¹³⁶ 'ensure',¹³⁷ 'improve',¹³⁸ 'enhance',¹³⁹ 'continue',¹⁴⁰ 'strengthen',¹⁴¹ 'take measures',¹⁴² 'intensify'.¹⁴³ These words can arguably be described as less demanding in comparison to other words such as 'eliminate', 'combat' and 'eradicate', which were used for the recommendations issued under FGM and abortion. For this reason, it can be suggested that the nature of the recommendations issued under this category lacked rigour, and as such, did not require highly demanding actions by the states under review.

In response, 19 states accepted the recommendations without any further comments, and therefore provided an A1 response. The state of Afghanistan was the only state that

¹³³ UNHRC 'Equatorial Guinea' (4 January 2010) A/HRC/13/16, para 47.

¹³⁴ UNHRC 'Dominican Republic' (4 January 2010) A/HRC/13/3, para 18.

¹³⁵ UNHRC 'Armenia' (6 July 2010) A/HRC/15/9, para 93.17.

¹³⁶ UNHRC 'Israel' (8 January 2009) A/HRC/10/76, para 36.

¹³⁷ UNHRC 'Burkina Faso' (7 January 2009) A/HRC/10/80, para 47.

¹³⁸ UNHRC 'El Salvador' (18 March 2010) A/HRC/14/5, para 67.

¹³⁹ UNHRC 'Saint Lucia' (11 March 2011) A/HRC/17/6, para 44.

¹⁴⁰ UNHRC 'Lao People's Democratic Republic' (15 June 2010) A/HRC/15/5, para 38.

¹⁴¹ UNHRC 'Venezuela (Bolivarian Republic of)' (7 December 2011) A/HRC/19/12, para 54.

¹⁴² UNHRC 'Afghanistan' (20 July 2009) A/HRC/12/9, para 16.

¹⁴³ UNHRC 'Eritrea' (4 January 2010) A/HRC/13/2, para 62.

provided a combined A2 and A3 response as it stated that the right to health was enshrined in the constitution, and also highlighted the policies that were in place to expand the public health service and improve maternal health.¹⁴⁴ A total of 10 states under review provided an A3 response as the comments focused entirely on the domestic policies that were already in place to ensure women have access to health care services. For example, the delegate of Bolivia in response to a recommendation under this category stated that ‘the Plan of Sexual and Reproductive Health for 2009-2015 is being implemented to respond to the needs of the population, especially women...Bolivia had strengthened its integral healthcare, including the provision of information and services related to contraception.’¹⁴⁵ The delegate of Macedonia was the only state that responded with an A5 response. For instance, at the HRC plenary session, the delegate of Macedonia in relation to access to health care for women stated that ‘supported by Norway, the Government of the Republic of Macedonia will start the implementation of a project intended for women in rural areas’.¹⁴⁶ This is a rare phenomenon where another state has agreed to support a state in helping to promote a certain right. This initiative by the delegate of Norway meets one of the aims of the UPR process which is to promote universality of human rights through sharing practice and supporting other states.¹⁴⁷

On the other hand, a total of 4 states under review noted the recommendations that were issued under this category. The states of Suriname, Malta and Mexico all noted the recommendations without any further response, and therefore provided an N1 response. On the other hand, the delegate of Bosnia and Herzegovina provided an N2 response as it noted the recommendation on the basis that policies in relation to the practice were already in place. For instance, the delegate stated that ‘gynaecological services at the primary, secondary and tertiary levels of health care during pregnancy, childbirth and after childbirth and other health services are available to meet needs of women’.¹⁴⁸

Overall, it can be observed that 23 states provided an official response to the recommendations issued under this category without any further comments. This is a unique phenomenon, as it is the first instance in this chapter where a high number of

¹⁴⁴ UNHRC ‘Afghanistan’ (20 July 2009) A/HRC/12/9, para 89.

¹⁴⁵ UNHRC ‘Bolivia (Plurinational State of)’ (15 March 2010) A/HRC/14/7, para 55.

¹⁴⁶ UNHRC ‘The former Yugoslav Republic of Macedonia, Addendum:’ (16 September 2009) A/HRC/12/15/Add.1 Addendum report, para 13.

¹⁴⁷ A/HRC/RES/5/1 para 4 (d) and (e).

¹⁴⁸ UNHRC ‘Bosnia and Herzegovina’ (17 March 2010) A/HRC/14/16, page 6.

states provided such a subdued response to a category of recommendation. Further, the 11 states under review that did provide comments in response to such recommendations simply made references to the existing laws and policies, in relation to women's rights to access health care services, that were already being implemented. From this, it can be observed that whilst a high number of recommendations were issued to states under this category, the outcome of such a generic nature of recommendations was minimal. This is because states under review largely resorted to not providing comments in response to such recommendations, or reaffirming existing laws and policies.

Recommendation 2: References to states' international obligations

Observer states, when issuing recommendations under this category, drew upon the international obligations of the states under review when making suggestions to ensure that women's rights to access health care services were protected. A typical example is when the delegate of the Netherlands issued a recommendation to Belize to 'take further concrete measures to enhance women's access to health care...as recommended by the Committee on the Elimination of Discrimination against Women'.¹⁴⁹

A total of 9 states under review were issued with a recommendation under this category. In response, a total of 8 states accepted the recommendations and all provided an A1 response, as no further comments were issued. These states were: Belize, Bosnia and Herzegovina, Burkina Faso, Guinea, Gambia, Guatemala, Saudi Arabia and Spain. The only state that noted the recommendation was Israel, who provided an N1 response, and did not provide an explanation for not accepting the recommendation.

Overall, it can be observed that recommendations issued under this category were overwhelming accepted. Further, it can be noted that all the states under review that were issued with a recommendation under this category categorically refrained from issuing any comments in response to such recommendations.

Recommendation 3: Amend/Reform/Implement laws to protect women's rights to access health care services

Under this category of recommendations, the observer states instructed the states under review to reform domestic legislation to guarantee women's rights to access health care

¹⁴⁹ UNHRC 'Belize' (4 June 2009) A/HRC/12/4 para 35.

services. A typical example under this category was issued by Slovenia to Nicaragua to ‘adopt urgent reforms of the Penal Code and other relevant legislation to restore the rights of women...to receive...health care.’ In total 5 states were issued with recommendations of this nature. In response, all states under review accepted the recommendations. Of these, the states of Angola, El Salvador, Nicaragua, and Timor Leste all accepted the recommendations without any further comments and thereby provided an A1 response. On the other hand, the delegate of Paraguay adopted a different position in response to a recommendation under this category. In its addendum report, it stated:

The Government of Paraguay regards research and initiatives focusing on the implementation of women’s right to health...as an essential part of its duties. [I]n the near future the Government of Paraguay expects to achieve a significant reduction in the existing cultural, geographic and economic barriers that hinder access to health services.¹⁵⁰

In this way, the state of Paraguay outlined the initiatives that were in place to ensure women’s rights to access health care services were implemented. However, in the second part of the statement, the state provided that it expected a reduction in numerous barriers that impede women’s rights to access health care, which included cultural barriers. The nature of this response is significant because it was the first time in the discussions held on the issue that a member state had recognised the potential cultural barriers that are in place that hinder access to health services for women.

4.4.3. Discussion on the Findings on Access to Health Care Services in the first cycle of the UPR process

The recommendations that were issued in relation to access to health care services for women were the most well received recommendations of all three issues examined in this chapter. A total of 62 out of the 67 recommendations were accepted by the states under review. Based on the large acceptance of recommendations, in the first instance,

¹⁵⁰ UNHRC ‘Paraguay, Addendum’ (31 May 2011) A/HRC/17/18/Add.1, para 13.

one may conclude that the majority of those states that were reviewed on the issue, share a consensus on the universality of women's rights to access health care services. This may be correct as, at least formally, only 5 states under review noted the recommendations on access to health care. However, on closer examination of the nature of the discussions held on the issue, I argue that there are grounds to question this apparent consensus on women's rights to access to health care amongst states.

First, I argue that the nature of positions adopted by observer states that issued recommendations under the first category indicates a lack of rigour and enthusiasm to ensure all states guarantee women's rights to access health care. This is because a total of 35 states were issued with a generic nature of recommendations; the observer states simply raised concerns on the issue and suggested that the state under review should provide access to health care services, without any form of detailed suggestions. The generic nature of the recommendations means that states that were issued with these recommendations were not required to undertake wide ranging actions to implement the recommendations. What is problematic with such generic form of recommendations on the issue is that it is arguably difficult to monitor the implementation of such recommendations at national level, and in the second cycle of the review process.

The lack of enthusiasm on the issue of women's rights to access health care services was similarly evident in the positions adopted by the states under review in response to the recommendations on the issue. For example, it is notable that a total of 33 states under review, out of the total 49 states, provided A1 and N1 responses, and thereby did not provide any explanations for their positions. In this way, states under review when issued with recommendations on women's access to health care services were largely subdued and on the whole did not provide explanations for their positions. The implication of the lack of explanations by the states under review with their official responses is that it not possible to ascertain what action it intends to take in order to ensure the recommendations are correctly implemented. On the other hand, if the states note the recommendations, it is difficult to assess why the state has adopted the position, without any further explanations. For this reason, I argue that the observer states' lack of rigour in the recommendations could possibly explain why there was an overwhelming consensus in relation to the first category of recommendations.

The second reason to question the apparent universal consensus amongst states on the issue of women's rights to access health care is because there was only one instance whereby states recognised the significance of cultural barriers to women accessing health care services. The only state that recognised the potential cultural barriers was the state of Paraguay, who explained that it endeavoured to remove any cultural barriers that may prevent women from accessing health care services. This shows that the delegate of Paraguay recognised that values embedded in culture create challenges for women in accessing health care services, and action was required to overcome these challenges. No other states, whether in their capacity as observer states or states under review, recognised the possibility of cultural barriers potentially hindering women's rights to access health care services. This shows that despite the concerns raised in the academic literature of the culturally influenced barriers that women face in accessing health care services, states when undertaking reviews or being reviewed in the UPR process largely failed to recognise the cultural norms and values that may impede women's rights to access health care services.¹⁵¹

The implications of states failing to recognise the association between culture and women's rights to access health care services is that there is a superficial and surface level of reviews of states on the issue. This is because some of the underlying reasons as to why women are restricted from accessing health care services were not even raised during the discussions held on the issue, far from being addressed. Instead, the focus of the discussions has been largely of a generic nature with subdued responses by the states under review. Therefore, the states have discussed the issue on a rather surface level without exploring the details of the potential cultural barriers in relation to women's rights to access health care services.

Overall, despite the overwhelming consensus on the issue, I suggest that the largely generic nature of the recommendations, and the lack of consideration of the culturally influenced barriers that impede women's rights to access health care services during discussions, leads one to question the apparent universal consensus on the issue.

¹⁵¹ UN Commission on Human Rights, 'Cultural practices in the family that are violent towards women' (31 January 2002) E/CN.4/2002/83, para 94.

4.5. Conclusion

This chapter presented the findings of the discussions held amongst states during state reviews on three issues under the broad category of women's rights to health: FGM, abortion and women's access to health care services. Through an analysis of the positions and attitudes adopted by states during these discussions, the aim of this investigation was to gain a better understanding of the nature of the UPR process and how it operates. To meet this, the research question that guided this project was to explore whether, and to what extent, states introduced arguments from a cultural relativist perspective when discussing the issues of FGM, abortion and access to health services for women. The findings of this investigation revealed that the nature of the discussions held amongst states differed significantly across the three women's rights issues. For the purposes of answering the research question, there were 3 significant positions adopted by states during the discussions of all three issues.

First, the findings of this study revealed that observer states adopted varied forms of the universalist positions during the discussions of all three issues selected for this project. For example, during the discussions of FGM, states that issued recommendations under the first category adopted positions that resonated with the strict universalist position. Further, in response to recommendations from a strict universalist position, it was found that states under review were overtly defensive in their responses as they either referred to existing laws and policies that were already in place, or justified the continuance of the practice on cultural grounds. By comparison, during the discussions of abortion and access to health care services, the observer states adopted a less strict form of universalism. For instance, observer states during the discussions of abortion and access to health services simply made references to the states under review's international obligations in relation to the issue, and encouraged the state to adopt measures to ensure compliance. Therefore, observer states during the states' reviews on abortion and health care services did not adopt positions which expressly indicate that international human rights norms on the two issues should be implemented, and that they should transcend cultural and religious norms. Further, the findings revealed that when observer states issued recommendations that were of a less strict form of universalism, the states under review provided different responses in relation to the issue of abortion and access to health care services. For example, in relation to abortion, states challenged the

universality of the norms on national sovereignty. On the other hand, in relation to access to health care services, the states under review accepted the recommendations, but provided no further comments. The findings show that the nature of the universalist position adopted by some observer states in relation to the three issues does not instigate a certain form of response by the states under review. In fact, where a state under review did not agree with the international standards in relation to abortion or FGM, challenges to such recommendations from a universalist position were raised during the first cycle of the UPR process.

The second significant difference that emerged between the discussions of the three issues was the significance of the cultural relativist perspective. For example, this investigation found that states under review used the platform of the UPR process to challenge the universality of international norms in relation to abortion and FGM, albeit to varying extents and on different grounds. For example, in relation to FGM, whilst the states did not expressly challenge the universality of international norms on FGM from a strict cultural relativist perspective, the implications of the positions adopted by Mali and Liberia were similar to that of the strict cultural relativist position. In contrast, the states under review in relation to abortion expressly challenged the universality of women's rights to access abortion services on grounds of national sovereignty. By comparison, it is interesting to note here that the responses by states in relation to access to health care services differed. No states expressly challenged the universality of human rights either from a national sovereignty or on cultural grounds. This may be because the nature of the discussions as a whole was very general indeed, which may possibly explain the wide ranging silence on the issue of access to health services.

The third significant difference between the discussions held amongst states on the three issues is the extent to which states adopted the moderate cultural relativist position during the state reviews. For example, in relation to FGM, 16 observer states suggested reforms, which can be interpreted as the moderate cultural relativists' position. This is primarily because the nature of the suggested reforms encouraged the implementation of gradual reforms to attitudes sympathetic to the practice, including through a form of internal discourse on FGM. Similarly, on 16 different instances, the responses issued by states under review in relation to FGM indicated appreciation of the reforms from a moderate cultural relativist position. The nature of this discussion can be contrasted with the overall discussions held amongst states in relation to abortion and access to

health care services, where there was no evidence of states adopting a position that indicated a sympathetic attitude towards the moderate cultural relativist position. Instead the focus was entirely on eliminating laws against the practice, international obligations or generic suggestions.

The implications of the lack of appreciation of the moderate cultural relativist position by the states can be seen when the nature and outcome of the discussions between the three issues are compared. For instance, where states adopted positions resonating with the moderate cultural relativist position during state reviews on FGM, states not only recognised the association between FGM and culture, but also suggested reforms in order to engage in an internal discourse on the issue, as well as implementing awareness-raising programmes, to help discourage the sympathetic attitudes in relation to the practices that are deeply embedded in cultural and traditional norms. In this way, not only have the states acknowledged the relationship between culture and FGM, but have recognised the significance of suggesting reforms that are culturally legitimate to ensure compliance with international human rights norms.¹⁵²

In contrast to the discussions on FGM, there was no evidence of the moderate cultural relativist position during the discussions on abortion and access to health care services. Instead, both observer states and states under review focused entirely on implementing or reforming domestic laws in relation to the issue, ensuring compliance with international human rights obligations or the implementation of generic actions in relation to abortion and access to health care services. There was a minimal level of discussion on the potential religious influences on the blanket ban on abortion laws or the potential cultural barriers that may be in place in relation to women's access to health care services. For this reason, there are grounds to suggest that the findings of this investigation show that lack of appreciation and understanding of the significance of culture in the discussion of international human rights in relation to abortion and access has led to arguably less productive discussions. This is because the possible cultural and religious barriers that may impede women from accessing abortion and health care services were not brought to the centre of discussions. In contrast, in relation to FGM, where there was evidence of some states adopting a moderate cultural relativist position, these lines of discussions were more fruitful as states recognised the

¹⁵² A An-Na'im 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' (n81)332. See section 2.3.3.3.

need to engage in an internal discourse with those that sympathise with the practice to help eliminate it.

In conclusion, the findings of this study reveals that whilst aspects of the universalistic positions are evident through the positions adopted by observer states in all three issues in the UPR process, similarly a challenge to the universality of rights has also been raised by the states under review. However, it is noted that where states adopted positions of a moderate cultural relativist perspective, the result was that the discussions in relation to reasons why women's rights to health were violated through the practice of FGM were more productive and fruitful. In contrast, during the discussions of abortion and access, where there is an underappreciation of the moderate cultural relativist position, states resorted to more simplistic discussions on the issue, which focused entirely on the laws and compliance with international human rights norms.

Chapter 5

Women's Rights under Private and Family Law

5.1. Introduction

The primary purpose of this chapter is to present, and discuss, the findings of the investigation on the nature of state discussions held on women's rights under private and family law in the first cycle of the UPR process. Of the 3702 recommendations issued in relation to women's rights in general, a total of 425 recommendations focused on women's rights to private and family law.

Up until the recent past, the artificial divide between the public and private sphere in the international human rights framework has resulted in human rights norms being conceptualised such a way that women's experiences of oppression, violence and perpetual discrimination that exist in the private sphere, have been largely unappreciated.¹ Since the 1980s, a number of international human rights instruments, together with treaty body jurisprudence, have strongly affirmed that states are considered to be under an obligation to protect women's rights from being violated in the private sphere.² More specifically, the incursion of CEDAW into the private sphere is predominately illustrated by article 16, which obligates states to 'take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations'.³ Despite the repeated declarations at international level, women continue to face violations of their rights under private and family law. One possible explanation for this is that issues that largely affect women are often relegated to the private sphere, which is significantly more likely to be governed by values and beliefs that are embedded in culture.⁴ As a result, the universality of women's rights protection

¹ B E Hernandez-Truyol, 'Women's Rights and Human Rights- Rule, Realities and the Role of Culture: A formula for reform' (1995-1996) 21 Brooklyn Journal of International Law 605, 630-631.

² Sheila Dauer, "Indivisible or invisible: women's human rights in the public and private sphere", in Women, Gender, and Human Rights: A Global Perspective, Marjorie Agosin, ed. (Rutgers University Press 2001).

³ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS (CEDAW), Article 16.

⁴ B E Hernandez-Truyol, 'Women's Rights and Human Rights- Rule, Realities and the Role of Culture: A formula for reform' (n 1) 629; Julie Mertus, 'State Discriminatory Family Law and Customary Values' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspective* (Routledge 1995) 135.

under private and family law is more likely to be challenged from a cultural relativist perspective.⁵ This inherent relationship between women's rights under private and family law and culture forms one of the main reasons why it has been selected as the focus in exploring whether, and to what extent, states in the UPR process adopt a cultural relativist position during state reviews in the UPR process. Under the broad category of women's rights under private and family law, the focus of this chapter is on three specific women's rights issues: polygamy, inheritance and forced and early marriages.

The structure of this chapter is divided into three main sections: polygamy, inheritance and forced and early marriages. I will begin each of the three sections by contextualising each issue and providing a brief overview of the international human rights law and treaty jurisprudence in the area. The findings for each of the three women's rights issues on private and family law are presented in the second sections. This is followed by a section on the discussion of the findings; the aim of this section is to interpret the data in light of the theoretical framework of this thesis, and answer the research question of this investigation.

5.2. Women's Rights in Polygamous Marriages in the UPR process

5.2.1. Contextualising Women's Rights in Polygamous marriages

Polygamy is a general term used to describe a marriage where a husband has more than one wife.⁶ Whilst there are no international human rights norms that expressly prohibit polygamy, treaty jurisprudence has interpreted the practice of such marriages as being incompatible with the principles of equality and non-discrimination in relation to the

⁵ Ibid. See also, Arati Rao, 'The Politics of Gender and Culture in International Human Rights Discourse' in Dorothy Hodgson (ed), *Gender and Culture at the Limits of Rights* (University of Pennsylvania Press 2011) 169.

⁶ Amira Mashour, 'Islamic Law and Gender Equality – Could there be a common ground?: A study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' (2005) 27 *Human Rights Quarterly* 562. See also Javaid Rehman, 'The Sharia, Islamic family laws and international human rights law: examining the theory and practice of polygamy and talaq' (2007) 21 *International Journal of Law, Policy and the Family* 108, 115.

right to marry; and therefore, recommended to be abolished.⁷ Further clarification has been provided by the Committee on the Women's Convention, which has stated that regardless of how deeply rooted traditions are in relation to polygamy, such marriages contravene Article 5 of the CEDAW and therefore should be brought to an end.⁸

Despite the repeated declarations by treaty bodies that polygamous marriages contravene a number of women's rights, such marriages continue to be practiced.⁹ For example, the disagreement amongst states on the acceptance of polygamous marriages was voiced in the first cycle of the UPR process, as 7 (out of 12) states under review did not issue recommendations to eliminate polygamy. Those that are sympathetic to the practice often justify the continuance of such marriages using religious and/or cultural justifications.¹⁰ For instance, Quranic verses IV: 3-5 is cited by some as legitimising, or even mandating, the practice of polygamy.¹¹ Others support the existence of polygamous marriages based on cultural values as they insist that this form of marriage institution facilitates socio-political alliances, as well as being the source of prestige, power and influence.¹² It is primarily because of this inherent link between polygamy and culture, whereby such marriage institutions are often justified on cultural grounds, that this issue has been selected as a focus for this investigation.

With this brief introduction of the international human rights law in relation to polygamy, and an indication of the possible reasons for the continuance of such marriages, the aim of this section is to examine whether, and to what extent, states justified the existence of polygamy using arguments that affiliate with the cultural relativist perspective.

⁷ UN Human Rights Committee, 'CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)' (29 March 2000) CCPR/C/21/Rev.1/Add.10, para 24; UNCEDAW, 'CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations' (1994) para 41.

⁸ UN Press Release, 'Customs, Traditions Remain Obstacles to Women's Rights in Equatorial Guinea say Anti-Discrimination Committee Experts' (8 July 2004) WOM/1452.<<http://www.un.org/press/en/2004/wom1452.doc.htm>> accessed 31st August 2015.

⁹ See n 9 above.

¹⁰ Amira Mashour, 'Islamic Law and Gender Equality – Could there be a common ground?: A study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' (n 6) 562, 568.

¹¹ Javaid Rehman, 'The Sharia, Islamic family laws and international human rights law: examining the theory and practice of polygamy and talaq' (2007) 21 International Journal of Law, Policy and the Family 108, 115.

¹² Fidelis Nkomazana, 'Polygamy and Women within the Cultural Context in Botswana' (2006) 92 Scripture 265, 269.

5.2.2. Findings on the issue of Polygamy in the UPR process

5.2.2.1 An Overview of the Findings on Polygamy

During the first cycle of the UPR process, the issue of polygamy was raised during the reviews of 12 member states, and a total of 14 recommendations were issued to states under review. I have categorised the states that received and issued recommendations on polygamy according to regional groups in figure 5.1 and 5.2, respectively. As a brief reminder, member states of the United Nations are categorised into 5 regional groups: African Group, Asia Pacific Group, Eastern European Group (abbreviated as ‘EEG’), Latin American and Caribbean Group (‘GRULAC’) and the Western European and Others Group (‘WEOG’).¹³

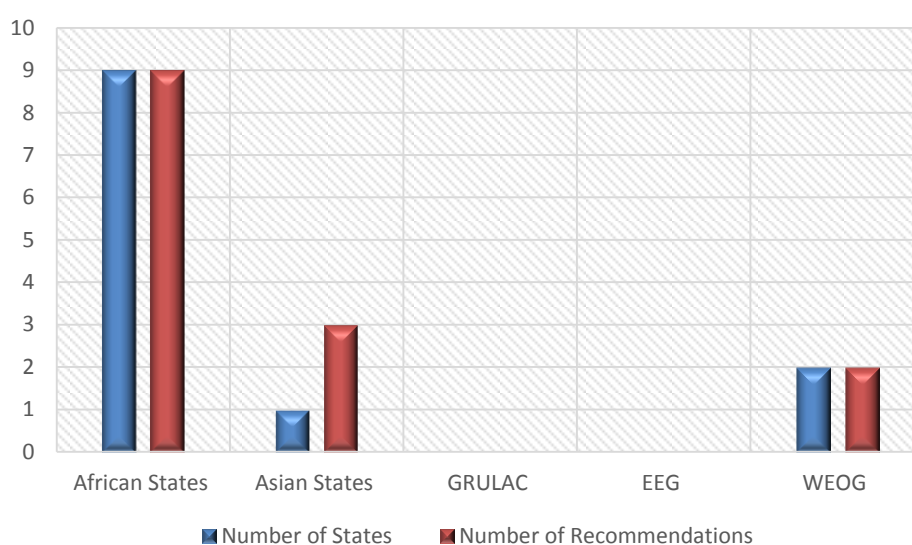


Figure 5.1 States under review that received recommendations on polygamy

¹³For a full list of participants of all groups, please see <http://www.un.org/depts/DGACM/RegionalGroups.shtml> accessed 27/07/2015.

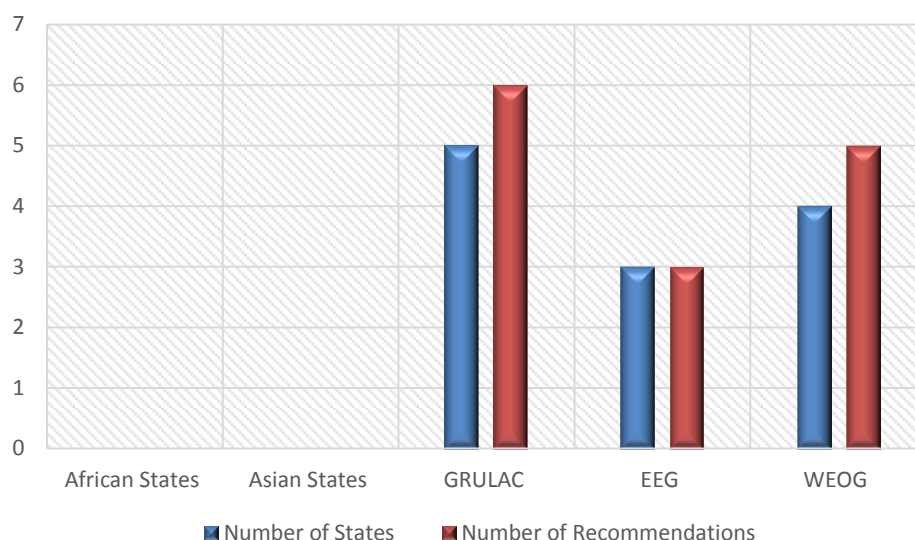


Figure 5.2 Observer states that issued recommendations on polygamy

From figure 5.1 it can be observed that states from the African and Asian groups received the highest number of recommendations on polygamy, receiving 12 out of the total 14 recommendations issued in the first cycle of the UPR process. The surprising finding from figure 5.2 is that states from the African and Asian groups refrained from issuing any recommendations on polygamy. Therefore, all of the recommendations issued on polygamy in the first cycle were issued by states belonging to the GRULAC, EEG and WEOG.

In response to the 14 recommendations that were issued in relation to polygamy, 7 recommendations were accepted, and the remaining 7 recommendations were noted. I have presented the states (categorised according to regional groups) that accepted and noted the recommendations on polygamy in table 5.1 and 5.2, respectively.

Table 5.1 Recommendations on polygamy that were accepted

ACCEPTED	Regional Groups	No. of States	No. of Recommendations
	African	2	2
	Asian	1	3
	EEG	0	0
	GRULAC	0	0
	WEOG	2	2

Table 5.2 Recommendations on polygamy that were noted

NOTED	Regional Groups	No. of States	No. of Recommendations
	African	7	7
	Asian	0	0
	EEG	0	0
	GRULAC	0	0
	WEOG	0	0

From table 5.1 and 5.2, it can be observed that the disagreement in relation to the regulation of polygamy is concentrated in the African group of states. Therefore, the unanimous acceptance of recommendations from states belonging to the GRULAC, EEG, WEOG indicates that, at least formally in the UPR process, states within the three groups accept that polygamous marriages are not permissible.

In the section below, I undertake a more detailed exploration of the attitudes and positions adopted by member states when the issue of polygamy was the focus of discussions in the first cycle of the UPR process.

5.2.2.2 Nature of the dialogue on Polygamy in the UPR process

The nature of the 14 recommendations issued by observer states in relation to polygamy in the first cycle of the review process can be divided into 4 different categories. I have summarised them in table 5.3.

Table 5.3 Categories of recommendations on polygamy

Recommendation	Summary of the nature of the recommendations/statements
1	Polygamy expressly declared as a harmful traditional practice
2	Reforms to domestic legislation on polygamy
3	Ensure compliance with international human rights law on polygamy
4	Adopt measures to eliminate polygamy

The nature of the responses provided by the states under review when issued with a recommendation on polygamy are divided into 6 different categories, which have been summarised in table 5.4.

Table 5.4 Categories of responses on polygamy

Category	Summary of responses made by the state under review
A1	No further comments
A2	Domestic laws already in place which prohibit polygamy
N1	No further comments
N2	Denial of the existence of any practices harmful to women.
N3	Domestic laws on polygamy under review
N4	Reforms challenged on cultural and/or religious grounds

Using the letters and numbers of the categories, in figure 5.3, I have provided a pictorial account of the nature of the dialogue held between states on the issue of polygamy. I have done this by representing all the recommendations in the green boxes, towards the left of the figure. Towards the right of the figure, I have represented the nature of the responses provided by the states under review for each category of recommendations in purple (accepted) and red (noted) boxes.

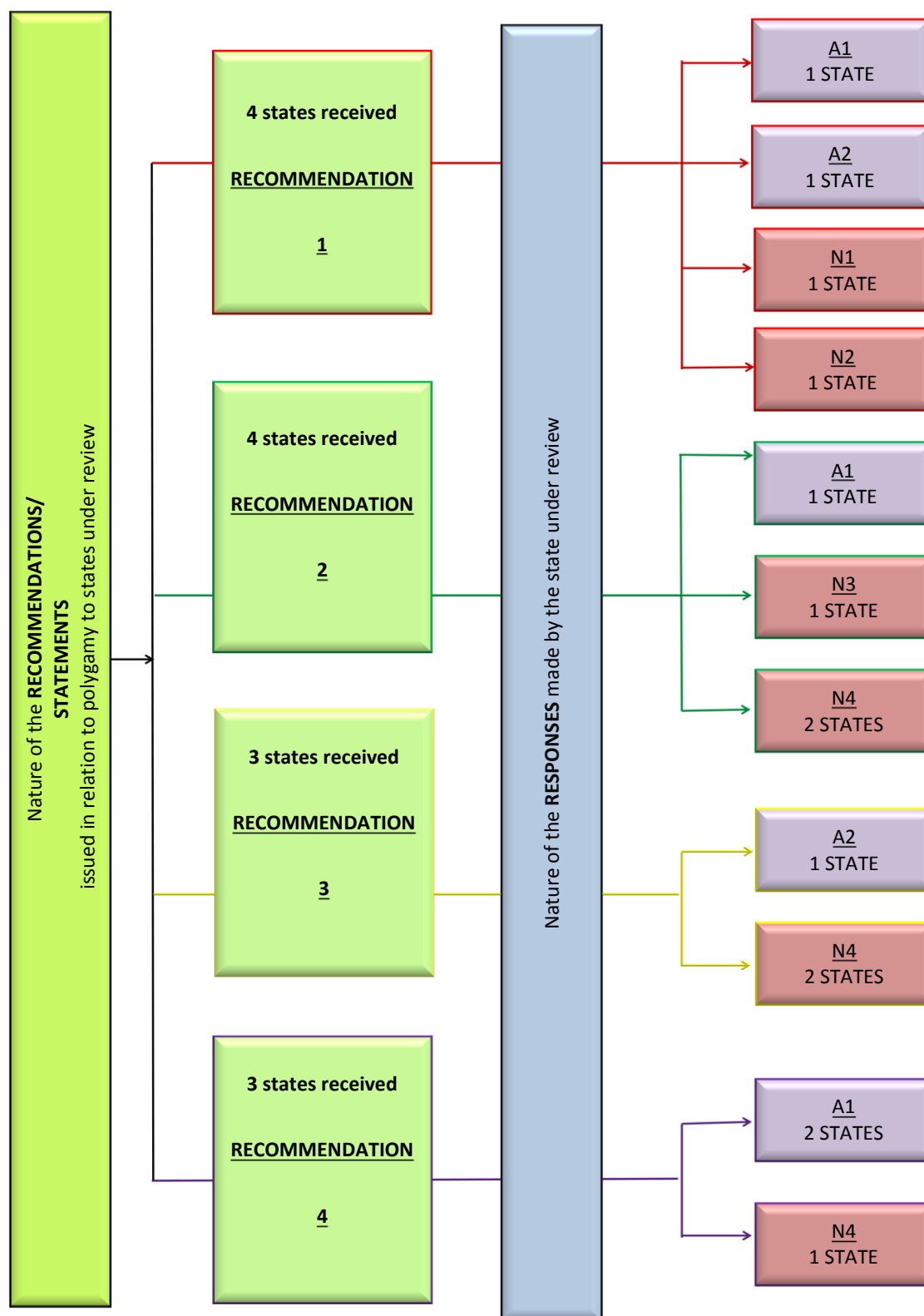


Figure 5.3. Nature of the dialogue held amongst states on the issue of polygamy

Recommendation 1: Polygamy declared as a harmful traditional practice

Observer states that issued recommendations under the first category expressly declared polygamous marriages to be a harmful traditional practice that was required to be eliminated. A total of 4 states¹⁴ were issued with recommendations under this category. A typical example is when Norway recommended Guinea to “combat harmful traditional practices under customary law, such as ... polygamy.”¹⁵

In response, 2 states under review accepted, and the other two noted the recommendations issued under this category. For instance, Guinea noted the recommendation issued during its review, whilst the delegate of Madagascar accepted the recommendations on polygamy. However, in both instances, the delegates of Guinea and Madagascar provided an A1 and N1 response, respectively, as the states provided no further explanations for the positions they had adopted. On the other hand, Botswana’s response is summarised as an N2 response, as the delegate denied the ‘existence of harmful practices to women, especially those alleging the...existence of polygamy.’¹⁶ Finally, Turkey responded to its recommendation on polygamy by accepting the recommendations and insisting that ‘polygamy and mere religious marriages...were prohibited,’¹⁷ thus providing an A2 response.

One common factor that can be observed from the dialogue above is that when issued with a recommendation under the first category, the responses by the states under review were overwhelming subdued. This is because states under review either accepted or noted the recommendations with no further comments, or focused on providing details on the domestic actions already in place to address polygamy.

Recommendation 2: Reforms to domestic legislation on Polygamy

The second category of recommendations issued by observer states focused on the enactment or amendment of domestic legislative provisions in relation to polygamy. A typical example under this category is Argentina’s recommendation to Kyrgyzstan to ‘enact laws criminalizing...polygamy’.¹⁸

¹⁴ UNHRC ‘Botswana’ (13 January 2009) A/HRC/10/69, para 7; UNHRC ‘Madagascar’ (26 March 2010) A/HRC/14/13, para 12; UNHRC ‘Turkey’ (17 June 2010) A/HRC/15/13, para 100.83.

¹⁵ UNHRC ‘Equatorial Guinea’ (4 January 2010) A/HRC/13/16, para 67.4

¹⁶ UNHRC ‘Report of the Human Rights Council on its tenth session’ (9 November 2009) A/HRC/10/29, para 272.

¹⁷ UNHRC ‘Turkey’ (17 June 2010) A/HRC/15/13, para 40.

¹⁸ UNHRC ‘Kyrgyzstan’ (16 June 2010) A/HRC/15/2, para 76.61.

A total of 4 states were issued with recommendations under this category. Kyrgyzstan was the only state that accepted a recommendation under this category, and provided an A1 response. The Central African Republic (CAR) issued a N3 response as the delegate stated that the current ‘family code was being reviewed to ensure its compliance with international standards with a view to either maintaining or abolishing polygamy.’¹⁹ This response shows that CAR was still open to either maintaining or abolishing the legitimacy of polygamous marriages.

The next two responses by the states under review provided an N4 response, as the state justified the continuance of polygamous marriages on the basis that they were condoned by cultural or religious norms of the state under review. First, the delegate of Burkina Faso noted the recommendation and explained that polygamy was ‘one of the secular aspects of the culture of Burkina Faso, its elimination would require an awareness-raising campaign; otherwise it would force people to practise it illegally.’²⁰ The second N4 response was provided by Tanzania who noted the recommendations ‘on the basis of the enjoyment of cultural and religious rights.’²¹

From this discussion, it can be observed that suggestions to enact legislative reforms to prohibit polygamous marriages were not well received by the states under review, as only 1 state accepted, and 3 states noted the recommendations. In fact, two of these recommendations were challenged on the basis of cultural or religious justification for the existence of such marriages.

Recommendation 3: Ensure domestic laws are in compliance with international human rights law on polygamy

Under the third category the observer states recommended that the state under review should ensure that the domestic legislation was in compliance with the international human rights law in relation to polygamy. A typical example under this category is when Slovenia issued a recommendation under this category to Ghana ‘to effectively implement measures aimed at eliminating polygamy and bring the norms in line with the CEDAW in the shortest time possible’.²²

¹⁹ UNHRC ‘Report of the Human Rights Council on its twelfth session’ (25 February 2010) A/HRC/12/50, para 221.

²⁰ UNHRC ‘Report of the Human Rights Council on its tenth session’ (9 November 2009) A/HRC/10/29, para 577.

²¹ UNHRC ‘Report of the Human Rights Council on its nineteenth session’ (24 May 2013) A/HRC/19/2, para 376.

²² UNHRC ‘Ghana’ (29 May 2008) A/HRC/8/36, para 50.

In total, 3 observer states were each issued with recommendations under this category. Of these, Israel was the only state that accepted the recommendation and provided an A2 response, as it outlined the domestic action that was already being undertaken in relation to polygamy. The delegate stated that it ‘agreed to adopt the recommendation...on polygamy, and had recently reinstructed the Qaddi’s of the sharia courts to refer every suspected case of polygamy to the police.’²³

The other two states under review provided very similar responses that are summarised as an N4 response. First, the delegate of Ghana did not accept the recommendation and explained that polygamous marriages, that are based on custom or faith, ‘were in conformity with the customs and traditions of Ghana’.²⁴ In the second example, the delegate of Libya noted the recommendation under this category because it was ‘in conflict with the Islamic religion and the customs, cultural specificities and principles of the Libyan people’.²⁵ In this way, not only did the delegates of Ghana and Libya justify polygamous marriages on the basis of the traditional value belief systems of the state, but also, the delegates drew upon religious particularities of the state as a justification for not accepting the recommendation to eliminate polygamy, and comply with its international obligations. In this way, the states under review are expressly challenged the universality of international norms against polygamy as interpreted by the treaty jurisprudence.

Recommendation 4: Adopt measures to eliminate polygamy

Under the fourth category, observer states issued recommendations that can be described as being more generic in nature. This is because the observer states made suggestions to adopt measures with the aim of eliminating polygamy, without any references to the states’ domestic legislations, or its international human rights obligations. A typical example is during the review of Kyrgyzstan when Lithuania and Uruguay²⁶ issued a recommendation to ‘take additional actions to eliminate...polygamy’.²⁷ There were a total of three states that were issued with recommendations of this nature.

²³ UNHRC ‘Report of the Human Rights Council on its tenth session’ (9 November 2009) A/HRC/10/29, para 460.

²⁴ UNHRC ‘Report of the Human Rights Council on its eighth session’ (1 September 2008) A/HRC/8/52, para 663.

²⁵ UNHRC ‘Report of the Human Rights Council on its nineteenth session’ (24 May 2013) A/HRC/19/2, para 38.

²⁶ UNHRC ‘Kyrgyzstan’ (16 June 2010) A/HRC/15/2, para 76.62.

²⁷ Ibid, para 76.77.

In response to recommendation under this fourth category, two states under review accepted the recommendations, whilst one state noted it. The delegates of Kyrgyzstan and Mauritania accepted the recommendations and provided an A1 response.²⁸ By comparison, the delegate of Senegal noted the recommendations and provided an N4 response as it noted the recommendation and insisted that the observer states ‘should take into account the particularities of the Muslim religion which explains the existence of polygamy.’²⁹ Thus, the delegate of Senegal expressly challenged the suggested reforms in relation to polygamy on the basis of the religious particularities of the states, which justified the existence of polygamous marriages.

5.2.3. Discussion on the Findings of Polygamy in the first cycle of the UPR process

From the discussions held on polygamy in the first cycle of the UPR process, it emerged that there are two significant positions that were adopted by states, which help to answer the research question of this study.

The first significant position was adopted by the states of Norway, France and Argentina, in their capacity as observer states. The states issued recommendations that expressly declared polygamous marriages as a harmful traditional practice, before suggesting the elimination of such marriages. I argue that the position adopted by these 3 states during the review of polygamous marriages resonates with the strict universalist position. Supporters of the strict universalist position insist that universal implementation of international human rights laws should transcend any cultural boundaries and particularities.³⁰ Similarly, from the statements made by the observer states, it can be inferred that any deviations from women’s rights protection against polygamous marriages under international human rights norms will not be accepted, despite such marriages being based on beliefs that are embedded in the traditions of the state under review.

²⁸ UNHRC ‘Mauritania’ (4 January 2011) A/HRC/16/17, para 92.

²⁹ UNHRC ‘Senegal’ (3 March 2009) A/HRC/11/24, para 54.

³⁰ R Sloane, ‘Outrelativising Relativism: A Liberal Defence of the Universality of International Human Rights’ (2001) 34 Vanderbilt Journal of Transnational Law 527, 553.

The second significant position adopted by states during the discussions of polygamy emerged in the nature of responses to recommendations provided by Burkina Faso, Chile, Ghana, Libya and Senegal. All 5 states under review provided N4 responses, as they expressly challenged reforms to polygamy on cultural and/or religious grounds. The positions adopted by the 5 states in response to the recommendations strongly resonated with the strict cultural relativist position. This is because one of the core beliefs of strict cultural relativism is that any standard or moral value judgments should be validated on the basis of the social and cultural context from which they derive.³¹ Therefore, it is implicit from the responses of the five states under review that as polygamy is validated according to internal cultural values, it has priority over any external moral or legal standards that declare polygamy to be contrary to international human rights norms.

At this point, it is important to discuss the context in which 4 out of 5 states under review that introduced arguments from a strict cultural relativist position. The states of Ghana, Libya, Tanzania and Burkina Faso all delayed their comments affiliating with a strict cultural relativist position until the HRC plenary session. This is significant because the HRC plenary sessions are subject to considerable time restraints, and as such, in comparison to the interactive dialogue session, the observer states in the HRC session are substantially restricted in issuing statements due to time constraints. This means that the 5 states under review were able to introduce arguments from a strict cultural relativists' position in relation to polygamy on a platform where the states may not be held fully accountable for their positions due to the time constraints of the HRC plenary sessions. In this way, it can be argued that the states have exploited one of the weaknesses of the modalities of the UPR process to avoid being scrutinised on their potentially contentious responses on the issue of polygamy. Second, it is notable that the strict cultural relativist position was exercised by the states under review in response to three categories of recommendations: to reform laws on polygamy, international compliance on polygamy and those that were more generic in nature. This shows that the states under review were willing to challenge the suggested reforms on polygamous marriages regardless of the nature of the recommendations issued to them.

³¹ See G Binder, 'Cultural Relativism and Cultural Imperialism in International Human Rights Law' (1999) 5 Buffalo Human Rights Law Review 214.

The implications of some states adopting positions that affiliate with the strict universalist and cultural relativist positions is that the discussion on polygamy during some states reviews become oversimplified. The analysis of the scholar Ann-Belinda Pries can be enlisted here who explains that the paradox between strict forms of universality and cultural relativity of human rights is based on ‘culture’ being ‘implicitly or explicitly conceptualized as a static, homogeneous, and bounded entity’.³² This analysis is evident in the discussions held in the UPR process by the two groups of states that adopted positions that resonated with strict universalist and strict cultural relativist positions. For instance, the observer states that issued recommendations under the first category, expressly recognised the relationship between culture and polygamy, before suggesting to eliminate it. From the nature of the recommendations, it can be implied that the cultural values and beliefs, that condone polygamous marriages, should also be eliminated. In this way, I argue that the observer states adopted a strict conceptualisation of culture, which is static and resistant to change as the observer states failed to consider if, and how, the cultural norms that condone such marriages can be reformed. Similarly, it is suggested that the states under review used the same rigid interpretation of culture to defend the existence of polygamy, without acknowledging the possibility that the cultural and religious particularities that may underpin such marriages may be subject to reforms.

The problem with the observer states and states under review that have adopted such strict conceptualisations of culture during discussions of polygamy is that ‘the debates, therefore, remain caught in various outdated approaches to ‘cultural contact’ within which a rigid “us” and “them” dichotomy is constantly reproduced, and from which there seems to be no apparent escape’.³³ Consequently, in between the strict opposite positions of the debate ‘it is as if larger, more important questions are lurking under the surface, but they remained unexplored and somewhat blocked.’³⁴ This oversight of complex unexplored issues is evident in the dialogue on polygamy in the review process. For instance, the observer states that criticised polygamy as a harmful traditional practice seem to overlook the possibility that some individuals sympathetic to polygamous marriages often hold deeply embedded views that such marriages are

³² Ann- Belinda Preis, ‘Human Rights as a Cultural Practice: An Anthropological Critique’ (1996) 18 Human Rights Quarterly 286, 295.

³³ Ibid 289.

³⁴ Robert Ulin, ‘Revisiting Cultural Relativism: Old prospects for a new cultural critique (2007) 80 Anthropological Quarterly 803.

legitimised by the Quran.³⁵ Others sympathetic to polygamous marriages often strongly hold the conviction that polygamous marriages are a function of socio-political alliances and a source of prestige, power and influence.³⁶ Such sympathies towards polygamous marriages that are based on cultural and religious norms are developed and reaffirmed over a period of time.³⁷ In this way, suggestions by observer states to simply eliminate polygamous marriages, and implicitly the cultural and religious justifications that underpin them, gives reasons to suggest that the states have overlooked the nature and significance of culture.³⁸ Thus, the suggestion to precipitously eliminate such deeply held cultural beliefs, as suggested by some states, seems to indicate that states have overlooked the complicated nature of polygamous marriages.

In a similar way, when the 5 states under review expressly justified polygamous marriages on cultural and religious grounds, the state representatives overlooked more complex issues in relation to the claimed cultural and/or religious justifications for polygamous marriages. These include: gender inequalities in the apparent consent obtained in polygamous marriages, the concern of women being unfaithful to their religion,³⁹ the possible patriarchal interpretations of Islamic norms,⁴⁰ and the possibility of suppression and marginalisation of the voices of women in such marriage structures.⁴¹ More importantly, when polygamous marriages are justified on religious grounds, questions remain as to how the religious beliefs of the woman are determined and whether the state imposes the institutionalised religious beliefs on polygamy on women that are subject to such marriages.⁴² It is striking to note that none of these inherently complex issues in relation to polygamy and culture were raised by the states under review that justified the existence of such marriages in the UPR process.

³⁵ Javaid Rehman, 'The Sharia, Islamic family laws and international human rights law: examining the theory and practice of polygamy and talaq' (2007) 21 International Journal of Law, Policy and the Family 108, 115.

³⁶ Fidelis Nkomazana, 'Polygamy and Women within the Cultural Context in Botswana' (2006) 92 Scriptura 265, 269.

³⁷ See, C Geertz, *Interpretations of Cultures* (Basic Books, 1973) 49.

³⁸ An-Na'im, 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' in *Human Rights in Africa: Cross Cultural Perspectives* in (An- Na'im and Deng (eds) (Brookings Institution, 1990) 333.

³⁹ Michèle Alexandre, 'Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?' (2007) 18 Hastings Women's L.J. 3, 5.

⁴⁰ Amira Mashour, 'Islamic Law and Gender Equality – Could there be a common ground?: A study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' (n 6) 564-568, See also Michèle Alexandre, 'Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?' (n 39) 12-13

⁴¹ Fidelis Nkomazana, 'Polygamy and Women within the Cultural Context in Botswana' (n **Error! Bookmark not defined.**) 275.

⁴² F Raday, 'Culture, religion, and gender' (2003) 1 International Journal of Constitutional Law 663, 672-678.

Overall, in between observer states adopting a position resonating with the strict universalist position by criticising the states under review, and states under review adopting a position from a strict cultural relativist perspective by justifying such marriages on cultural grounds, it can be suggested that deeper underlying issues in relation to polygamy were not even raised, far from being addressed, by states in the UPR process.

5.3. Women's Rights to Inheritance in the UPR process

5.3.1. Contextualising the issue of Women's Rights to Inheritance

For the purposes of this investigation, women's rights in relation to inheritance refers to those instances when women are denied, or restricted, the right to own or control the disposition of land through succession laws. Whilst there is no specific human right norm in relation to inheritance, the human rights treaty bodies have interpreted the denial or restriction of women's rights to inheritance as a violation of the principles of equality and non-discrimination, which are embedded in numerous international human rights documents.⁴³ Providing further clarification in relation to the possible justifications of inequality between men and women, the Committee on the Women's Convention has stated on a number of occasions that 'any law or custom that grants men a right to a greater share of property' is discriminatory and should be eliminated.⁴⁴

Despite the jurisprudence of the human rights treaty bodies, some state laws continue to deny or restrict women from acquiring land through succession.⁴⁵ A disagreement

⁴³ See U Charter of the United Nations (adopted 17 December 1963, entered into force 31 August 1965) UNTS XVI; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), article 2(1) and 26; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 220A, article 3.

⁴⁴ See also UN Committee on the Elimination of Discrimination Against Women, 'CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)' (1999) A/54/38/Rev.1, chap. I, para 28. See also UN Human Rights Committee, 'CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)' (29 March 2000) CCPR/C/21/Rev.1/Add.10; UN Office of the High Commissioner for Human Rights, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik' (16 December 2011) A/HRC/19/53, para 55.

⁴⁵ UN Office of the High Commissioner for Human Rights, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik' (16 December 2011) A/HRC/19/53, para 55.

between states in relation to women's rights and inheritance was voiced in the UPR process, as a total of 10 (out of 24) states under review did not accept recommendations to eliminate inheritance laws that discriminated against women. In those states where unequal inheritance laws continue to exist, cultural values and customary law often dictate the access and inheritance of land, which excludes women from property ownership and inheriting land.⁴⁶ In some instances, the justification of such inequality is based on the culturally held belief that women are expected to subsume their identity to the husband after marriage, and as a result, only the husband's name is placed on the title deed of the land.⁴⁷ In other instances, traditional interpretations of sharia norms are used to justify men receiving a greater proportion of inheritance than their female counterparts.⁴⁸ The relationship between inheritance laws and culture, whereby women's rights to inheritance laws may be denied or restricted based on cultural and religious norms is one of the primary reasons why this issue has been selected as a focus for this investigation. The aim of this section is to assess whether states adopt a cultural relativist position to justify unequal domestic inheritance laws during discussions held on inheritance in the first cycle.

5.3.2. Findings on the issue of Inheritance in the UPR process

5.3.2.1 An Overview of the Findings on Inheritance

During the first cycle of the review process, a total of 38 recommendations were issued to 24 states under review on the issue of women's rights to inheritance. The states that have received and issued recommendations on inheritance are categorised according to regional groups and depicted in figure 5.4 and 5.5 respectively.

⁴⁶ S M Burns, *Women across cultures* (2nd edn, McGraw Hill 2005); Abby Morrow Richardson, 'Women's Inheritance Rights in Africa: The Need Intergrate Cultural Understanding and Legal Reform' (2004) 11 Human Rights Brief 19.

⁴⁷ Ibid.

⁴⁸ Niaz Shah, 'Women's Human Rights in the Koran: An Interpretative Approach' (2006) 28 Human Rights Quarterly 868, 897; UN Committee on the Elimination of Discrimination Against Women, 'Concluding observations of the Committee on the Elimination of Discrimination against Women : Libyan Arab Jamahiriya' (6 February 2009) CEDAW/C/LBY/CO/5, para 17.

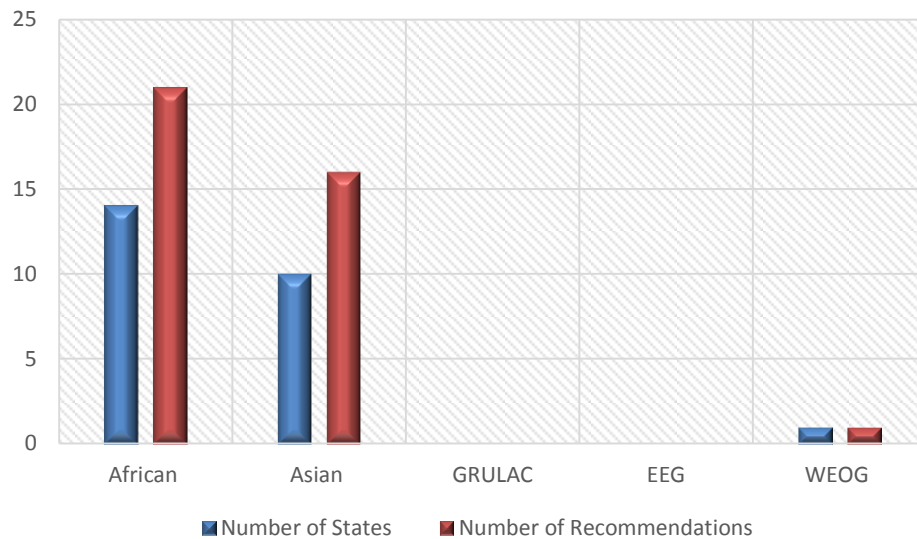


Figure 5.4 States under review that received recommendations on inheritance

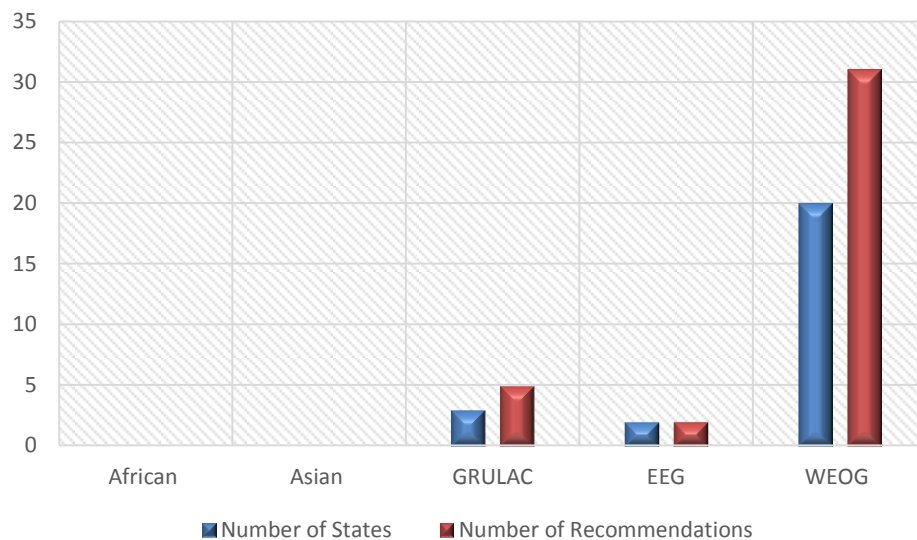


Figure 5.5 States under review that issued recommendations on inheritance

From the graphs, two immediate findings become apparent. First, whilst states belonging to the African and Asian groups have been issued with the highest number of recommendations on inheritance, no states from either group issued any recommendations on inheritance. This pattern is similar to the findings on the issue of polygamy, where states from the African and Asian group did not issue any recommendations to other states within the same group, despite the states from within the two groups themselves receiving the highest number of recommendations. Second, it is noticeable that Greece was the only state that was issued with a recommendation on inheritance within the WEOG; however, the states from within that group issued the

majority of the recommendations made on inheritance in the first cycle. Therefore, the states from the African and Asian groups, which received the highest recommendations, issued no recommendations on inheritance. Whereas the states GRULAC, EEG and WEOG in total issued the majority of the recommendations, but received the lowest number on inheritance.

In response to the 38 recommendations that were issued on inheritance laws, 19 recommendations were accepted, whereas the other 19 recommendations were noted by the states under review. The states that accepted and noted recommendations on inheritance have been categorised according to regional groups, and presented in table 5.5 and 5.6 respectively.

Table 5.5 Recommendations on inheritance that were accepted

ACCEPTED	Regional Groups	No. of States	No. of Recommendations
	African	9	14
	Asian	3	4
	GRULAC	0	0
	EEG	0	0
	WEOG	1	1

Table 5.6 Recommendations on inheritance that were noted

NOTED	Regional Groups	No. of States	No. of Recommendations
	African	4	7
	Asian	7	12
	GRULAC	0	0
	EEG	0	0
	WEOG	0	0

Table 5.5 and 5.6 show that the majority of the recommendations issued to states from within the African group were accepted, as only 7 out of a total 21 recommendations issued were noted. In contrast, from table 5.5 it can be observed that only 4 of the total 16 recommendations issued to Asian states on inheritance laws were accepted. Thus, from these preliminary findings, it can be observed that, at least formally, the disagreement in relation to the regulation of women's rights to inheritance was largely concentrated amongst the reviews of states belonging to the Asian group. The section below focuses on a more detailed examination of the nature of the discourse held amongst states on the issue of inheritance laws in the first cycle.

5.3.2.2 Nature of the dialogue on Inheritance in the UPR process

The nature of the recommendations issued in relation to women's rights to inheritance has been divided into 4 categories, which are summarised in table 5.7. The nature of the responses issued by the states under review are divided into 6 categories, which have been summarised in table 5.8.

Table 5.7 Categories of recommendations on inheritance

Recommendation	Summary of the nature of the recommendations/statements
1	Tackle impediments women face when cultural/religious norms are applied to inheritance laws.
2	Enact/reform domestic laws to guarantee women's equal rights to inheritance.
3	Enact/reform domestic laws to comply with international norms on inheritance
4	Generic recommendations to enact measures to ensure equality on inheritance

Table 5.8 Categories of responses on inheritance

Category	Summary of responses made by the state under review
A1	No further comments
A2	Laws to protect women's rights to inheritance already in place/will be implemented/under review
N1	No further comments
N2	Suggested reforms contrary to domestic law/constitution on inheritance
N3	Laws addressing inheritance are already in place
N4	Reforms challenged on cultural and/or religious grounds

In figure 5.6 below, I have provided a pictorial account of the nature of the discussions held amongst states in the UPR process using the letters and numbers of the categories. Towards the left of figure 5.6, I have represented the nature of the recommendations issued. The nature of the responses made in relation to each recommendation is provided towards the right of the figure.

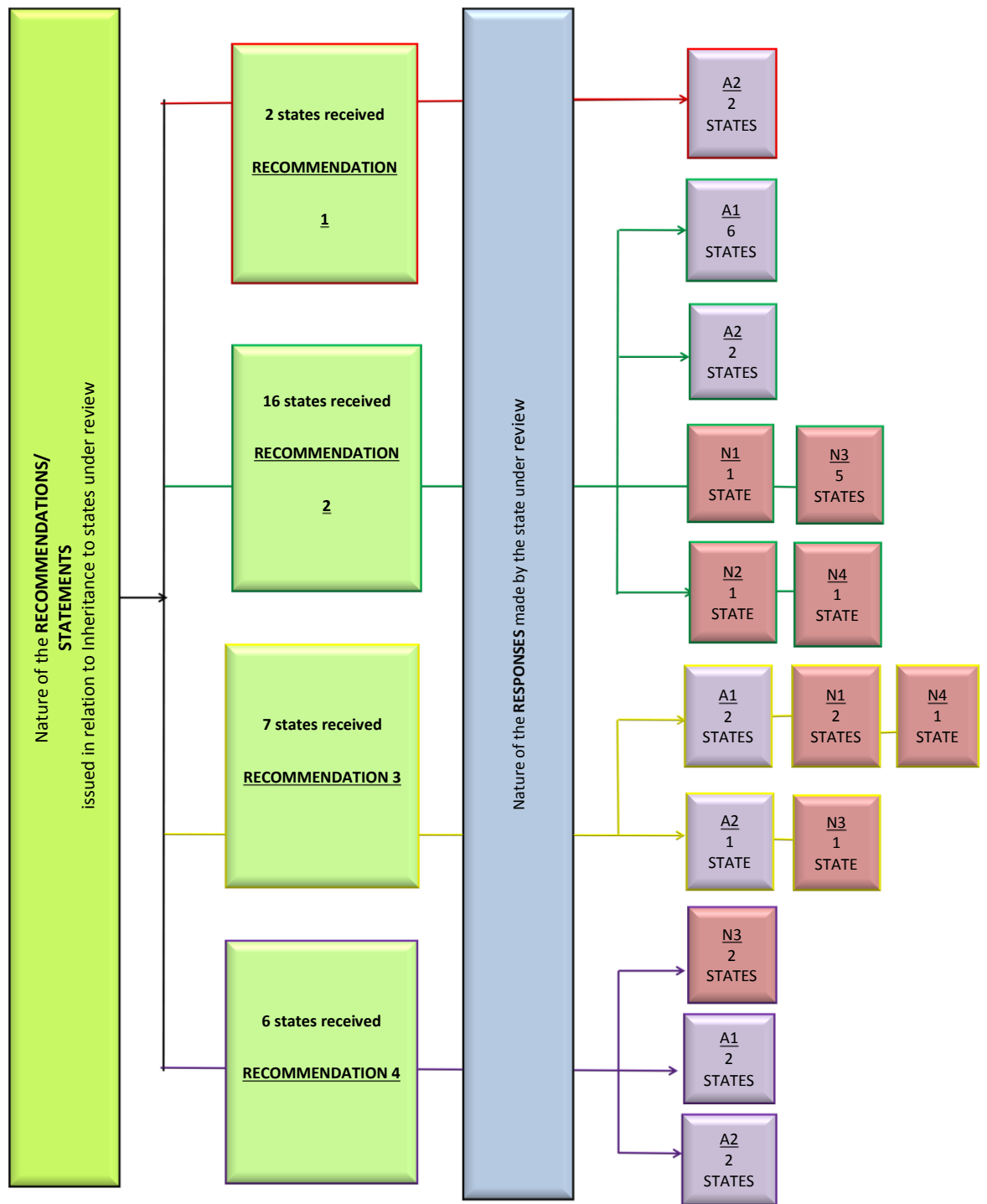


Figure 5.6. Nature of the dialogue held amongst states on the issue of inheritance

Recommendation 1: Tackle impediments women face when religious/cultural norms are applied to inheritance law

Under this category of recommendations, observer states during the state reviews focused on the barriers women face in acquiring property when certain religious and cultural norms influence the regulation of inheritance law. The observer states suggested that the states under review undertake appropriate actions to combat the impediments that women face in relation to acquiring property through succession law when such religious and cultural norms are applied. Greece and Madagascar were the only two states that were issued with recommendations under this category. First, during the review of Greece, the delegate of the Netherlands issued a recommendation to ‘take action with regard to the impediments that Muslim minority women may face...when sharia law is applied on family and inheritance law matters.’⁴⁹ Second, Madagascar was issued a recommendation by the Chilean delegate who suggested ‘to continue to adopt legislation to eliminate...cultural stereotypes that discriminate against women, especially...in the areas of inheritance.’⁵⁰

In response to the recommendations under this category, both states issued comments that were categorised as A2 responses. The delegate of Greece accepted the recommendation and added that ‘sharia law may be applied...for the members of the Muslim minority on certain matters of...inheritance law to the extent that its rules are not in conflict with...the Greek legal and constitutional order.’⁵¹ The delegate of Madagascar accepted the recommendation and stated that it ‘welcomes the invitation to adopt specific legislative measures to combat discriminatory acts against women’.⁵²

The responses by both Greece and Madagascar show that, at least formally, the states accepted that action should be taken to address religious and cultural barriers that impede women’s right to inheritance. However, what is striking is that the responses issued by both states have focused entirely on the domestic legislation that is already in place, or will be implemented, to address the religious and cultural barriers in relation to inheritance.

⁴⁹ UNHRC ‘Report of the Working Group on the Universal Periodic Review: Greece’ (11 July 2011) A/HRC/18/13, para 83.22.

⁵⁰ UNHRC ‘Madagascar’ (26 March 2010) A/HRC/14/13, para 25.

⁵¹ UNHRC ‘Report of the Working Group on the Universal Periodic Review: Greece’ (11 July 2011) A/HRC/18/13, para 15.

⁵² Ibid para 15.

Recommendation 2: Enact/amend/repeal domestic laws to ensure women's rights to inheritance

The central focus of the recommendations issued under this category is that the observer states' suggestions were to enact or reform domestic legislation to guarantee women's rights to inheritance. A typical example of a recommendation under this category is the Netherland's recommendation to Algeria to update 'legislation regarding the situation of women, such as the Family code in the areas of... inheritance.'⁵³ In total 16 states were issued with recommendations of this nature, and this therefore was the most popular form of recommendation issued on inheritance in the first cycle.

In terms of the responses to such recommendations, 8 states accepted the recommendations; 6 of which were accepted without any further response. The two states that did provide additional statements were Burundi⁵⁴ and Liechtenstein,⁵⁵ who provided A2 responses as they insisted that the current laws in the area of inheritance were being reviewed in the domestic context.

On the other hand, a total of 8 states under review noted the recommendations. Gambia was the only state that provided an N1 response, as the delegate did not provide any additional comments.⁵⁶ Algeria provided an N2 response, as it justified not accepting the recommendation on the basis that suggested reforms to inheritance laws were contrary to the domestic constitution.⁵⁷ Adopting a different position, a total of 5 states under review justified their non-acceptance of recommendations on the basis that domestic laws in relation to inheritance either did not exist, or that they were under review, and as such, the suggested recommendations under this category was considered as being misguided or redundant. This was categorised as an N3 response which was issued by: Chad, Kiribati,⁵⁸ Lebanon, Timor Leste⁵⁹ and Tonga.⁶⁰ A typical example of this response was when Chad noted the recommendation as being 'simply redundant, as they referred to matters on which legislative measures had already been taken.'⁶¹ What is notable here is that neither Chad, Tonga or Timor Leste expressly

⁵³ UNHRC 'Algeria' (23 May 2008) A/HRC/8/29, para 63.

⁵⁴ UNHRC 'Burundi' (8 January 2009) A/HRC/10/71, para 41.

⁵⁵ UNHRC 'Liechtenstein' (7 January 2009) A/HRC/10/77, para 34.

⁵⁶ UNHRC 'Gambia' (24 March 2010) A/HRC/14/6, para 38.

⁵⁷ UNHRC 'Report of the Human Rights Council on its eighth session' (1 September 2008) A/HRC/8/52, para 501.

⁵⁸ UNHRC 'Kiribati, Addendum' (30 September 2010) A/HRC/15/3/Add.1, para 18.

⁵⁹ UNHRC 'Timor-Leste, Addendum' (15 March 2012) A/HRC/19/17/Add.1, page 3.

⁶⁰ UNHRC 'Report of the Human Rights Council on its nineteenth session' (24 May 2013) A/HRC/19/2, para 553.

⁶¹ UNHRC 'Report of the Human Rights Council on its twelfth session' (25 February 2010) A/HRC/12/50, para 444.

denied the fact that discriminatory practices in relation to inheritance existed in the state. Instead, the responses of the three states focused entirely on denying that the domestic laws in relation to inheritance were discriminatory.

The delegate of the Solomon Islands adopted a different position as the state initially accepted the recommendation, without any further explanations. Surprisingly, in direct contradiction to its official position on the recommendation, the state at the HRC plenary session provided that it was ‘not ready to change the property and inheritance law.’ The delegate stated that “most of the perceived inconsistencies with internationally accepted standards of... inheritance were due to long defined customary norms.”⁶² In this way, the delegate provided an N4 response, as it justified the differences between domestic laws and international norms on the basis that the inheritance laws on the land were regulated by long standing customary norms, which interpret inheritance laws differently.

Overall, when issued with a recommendation under this category, half of the states accepted, whilst the other half noted the recommendations. For instance, a total of 7 states provided no additional comments in their responses. In addition, 7 states referred to existing laws already in place in relation to women’s rights to inheritance. Two states challenged the reforms on constitutional and cultural grounds. This shows that no states under review when issued with a recommendation of this nature agreed to any substantial commitments in the responses during state reviews.

Recommendation 3: Compliance with international obligations on women’s rights to inheritance

The third category of recommendations focused on encouraging reforms to domestic laws on inheritance to comply with the state under reviews’ international obligations. A typical example of a recommendation under this category was issued by Switzerland who suggested that ‘Burundi take the necessary steps to amend...the law governing inheritance, to bring them into conformity with the principles of non-discrimination as set out in the Convention on the Elimination of All Forms of Discrimination against

⁶² UNHRC ‘Report of the Human Rights Council on its eighteenth session’ (18 November 2011) A/HRC/18/2, para 379.

Women'.⁶³ In total 7 states under review were issued with recommendations of this nature.

In response, a total of 4 states noted the recommendations under this category, and 3 states accepted. Of the 3 states that accepted the recommendation, the states of Guinea⁶⁴ and Maldives⁶⁵ provided an A1 response as it accepted the recommendation without any further comments. On the other hand, the delegate of Burundi provided an A2 response, as the delegate insisted that reforms to the domestic laws on inheritance were already in place.⁶⁶

The 4 states that noted the recommendation under this category provided three different responses. The delegates of Gambia⁶⁷ and Yemen⁶⁸ provided an N1 response, as they did not provide any further explanations for their position. On the other hand, the delegate of Lebanon noted the recommendations and provided an N3 response, stating that six draft laws were already in place to eliminate discriminatory provisions from domestic legislation'.⁶⁹

The delegate of Libya's response was the most significant for the purposes of this investigation, which was categorised as an N4 response. To provide some background, the domestic codes of Libya are based on a traditional interpretation of sharia, which provides that whilst women may inherit land from family members, their share is generally smaller than that of men.⁷⁰ During its review, Libya was issued with a recommendation by Mexico that it should, 'in line with the recommendations of the Committee on the Elimination of Discrimination against Women, adopt a national plan to...guarantee equality between men and women...with regard...[to] inheritance.'⁷¹ In response, the delegate of Libya formally noted the recommendation. Interestingly, later on at the HRC plenary session, the delegate stated that 'Libya accepts this recommendation from the delegation of Mexico but without prejudice to the provisions

⁶³ UNHRC 'Burundi' (8 January 2009) A/HRC/10/71, para 35.

⁶⁴ UNHRC 'Equatorial Guinea' (4 January 2010) A/HRC/13/16, para 71.40.

⁶⁵ UNHRC 'Maldives' (4 January 2011) A/HRC/16/7, para 100.23.

⁶⁶ UNHRC 'Burundi' (8 January 2009) A/HRC/10/71, para 4.

⁶⁷ UNHRC 'Gambia' (24 March 2010) A/HRC/14/6, para 100.3.

⁶⁸ UNHRC 'Yemen' (5 June 2009) A/HRC/12/13, para 94.2.

⁶⁹ UNHRC 'Report of the Human Rights Council on its sixteenth session' (14 November 2011) A/HRC/16/2, para 553.

⁷⁰ Niaz Shah, 'Women's Human Rights in the Koran: An Interpretative Approach' (n 48) 897; UN Committee on the Elimination of Discrimination Against Women, 'Concluding observations of the Committee on the Elimination of Discrimination against Women : Libyan Arab Jamahiriya' (6 February 2009) CEDAW/C/LBY/CO/5, para 17.

⁷¹ UNHRC 'Libyan Arab Jamahiriya' (4 January 2011) A/HRC/16/15, para 95.8.

of the sharia on...inheritance.’⁷² It explained that matters of inheritance ‘have been regulated by Islam for 1,400 years. These are matters on which there is complete consensus.’⁷³ From this response, it can be observed that the delegate of Libya expressly challenged the universality of the equality provisions under CEDAW on inheritance as the delegate only accepted the recommendation subject to the religious norms of Libya, which govern the provisions of inheritance.

From the discussions above, it can be observed that some states expressly challenged the universality of women’s rights to inheritance laws, as more states noted the recommendations under this category than accepted them. Further, the states of Libya raised an express challenge to the suggestions to comply with international norms on inheritance based on religious norms. In addition, those states that accepted the recommendations reaffirmed that measures were already in place to ensure compliance, rather than agree on any additional commitments as a result of being reviewed on international compliance on women’s rights to inheritance.

Recommendation 4: Implement measures to ensure equality and non-discrimination in relation to inheritance

Observer states under the fourth category of recommendations suggested that the state under review should implement reforms to ensure that women are guaranteed equality and protected against discrimination in relation to inheritance laws. Observer states did not provide any specific details on how the provisions of equality and non-discrimination should be implemented in practice, nor make any references to the state’s international human rights obligations in relation to women’s rights to inheritance. For this reason, this category of recommendation is described as being more generic in nature. A typical example of a recommendation under this category is when Hungary issued a recommendation to Ghana to ‘take proactive measures to ensure the equality of women in all matters related to property inheritance.’⁷⁴

A total of 6 states were issued with recommendations under this category. In response, 4 states accepted, of which the delegates of Ghana and Congo issued an A1 response, as

⁷² Ibid para 57.

⁷³ UNHRC ‘Libya, Addendum’ (22 February 2012) A/HRC/16/15/Add.1, page 3.

⁷⁴ UNHRC ‘Ghana’ (29 May 2008) A/HRC/8/36, para 22.

no comments were provided. The delegates of Lesotho⁷⁵ and Liechtenstein⁷⁶ provided an A2 response, as both delegates insisted that the current laws in the area were being reviewed, and the drafts of amended laws on inheritance were being submitted to the relevant domestic legislative bodies.

The states of United Arab Emirates (UAE) and Samoa were the only two states that did not accept recommendations under this category, and issued statements that are categorised as an N3 response. The delegates of UAE⁷⁷ and Samoa⁷⁸ explained that the recommendations were noted because they were misguided as domestic provisions already guaranteed women's rights to equality and non-discrimination in relation to inheritance.

Overall, when states were issued with recommendations to guarantee equality and non-discrimination in relation to inheritance laws, there was no commitment that was agreed by the states under review in response. Instead, the states under review provided that current laws were being reviewed or that such guarantees were already protected in relation to inheritance by the state.

5.3.3. Discussion on the Findings of Inheritance in the first cycle of the UPR process

There are two significant findings that emerged from the analysis of the data, which provide a useful insight as to the significance of cultural relativism when the issue of inheritance was the focus of discussions in the first cycle of state reviews.

First, it emerged that 16 states, out of the total 24, during discussions in the UPR process focused on the enactment, or reform, of domestic legal provisions on inheritance in the discussions held during state reviews. The overwhelming focus on domestic laws on inheritance leads one to question whether the discussions of more complex issues, which may explain the persistence of unequal treatment of women on the issue, has been restricted from the discussions on the issue of inheritance. For instance, Askin and Koeing argue that the lack of legal protection for women is not

⁷⁵ UNHRC 'Report of the Human Rights Council on its fifteenth session' (31 October 2011) A/HRC/15/60, para 391.

⁷⁶ UNHRC 'Liechtenstein' (7 January 2009) A/HRC/10/77, para 36.

⁷⁷ UNHRC 'United Arab Emirates' (12 January 2009) A/HRC/10/75, para 89.

⁷⁸ UNHRC 'Samoa' (11 July 2011) A/HRC/18/14, para 15.

always the sole reason why women are denied access to inheritance.⁷⁹ The authors use the examples of India, Nigeria, Palestine and Kenya, where whilst domestic laws guarantee women legal rights to inherit land, the customary, religious and cultural norms of those societies continue to deny women equal rights to inheriting land.⁸⁰ As Abby Morrow Richardson explains, there is often a disconnection between the official domestic policy on the issue of inheritance, and the actual practice.⁸¹ As such, it is argued that simply enacting or reforming statutory legislation on inheritance is unlikely to have any practical effect in the great majority of the population, which is governed by customary law based on culture and traditional values.⁸²

Contrary to the analysis in the literature, which raises concerns on the inconsistency between legal protection of women's rights on inheritance and actual practice, the focus of the majority of the discourse undertaken in the UPR process has been on the enactment, reform or implementation of domestic laws on inheritance. The states in the review process seemed to overlook the potential discrepancy between the protection provided by domestic laws in the state in question, and the reasons why some women continue to be discriminated against in relation to inheritance. For instance, even if laws are in place to ensure the equality of women in relation to inheritance rights, in some cases, women often voluntarily renounce their rights in favour of their male siblings, as demanding or retaining their share would disrupt the kinship, which is likely to leave the woman deprived of support and assistance from siblings.⁸³ In other instances, where religious norms such as the sharia law have an influence on the regulation of inheritance, women do not voice their concerns at the risk of being labelled as unfaithful to their religion.⁸⁴ In this way, cultural and social factors often deter women from exercising their rights to inheritance; therefore, any statutory provisions that govern women's rights to inheritance are frequently unpopular and not complied with.⁸⁵

⁷⁹ L Farha, 'Women and Housing' in Kelly D Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Volume 1, Transnational Publishers Inc 1999) 512-513.

⁸⁰ *Ibid.*

⁸¹ Abby Morrow Richardson, 'Women's Inheritance Rights in Africa: The Need Intergrate Cultural Understanding and Legal Reform' (2004) 11 Human Rights Brief 19.

⁸² *Ibid.*

⁸³ L Farha, 'Women and Housing' (n 79) 512.

⁸⁴ Azizah Yahia al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights' (1997) 12 Am. U. J. Int'l L. & Pol'y (1997) 1,3.

⁸⁵ Abby Morrow Richardson, 'Women's Inheritance Rights in Africa: The Need Intergrate Cultural Understanding and Legal Reform' (n 81) 22.

The implications of some states focusing entirely on the domestic legal provisions in relation to women's rights to inheritance is that it has resulted in a largely surface level and subdued dialogue amongst states on inheritance. For instance, 9 states out of the total 23 states issued with recommendations in relation to domestic laws provided no explanations for their adopted positions on inheritance. Another 10 states insisted that domestic laws were already in place, or being reformed, in relation to inheritance. From this, it can be stated that the outcome of the majority of the discussions on domestic legal reforms was unfruitful. In this way, not only were the key issues in relation to inheritance being side-lined, but the states under review were not compelled to adopt rigorous reforms to ensure equality between women and men on matters of inheritance.

The second significant finding that emerged was that states adopted positions, which implicitly or explicitly indicated a challenge to the universality of women's rights to inheritance. For instance, it is notable that all the states under review that noted the recommendations on inheritance did so in relation to all recommendations, regardless of the nature of the recommendations. This is significant because it is common for states to change their responses depending on the nature of the recommendations issued. In the context of inheritance, it can be observed that all states under review that noted recommendations on inheritance did not accept any form of recommendations on the issue regardless of the category the recommendation fell under. I argue that this categorical refusal to accept any recommendations on inheritance by 11 states under review, together with the comments made by states, indicates that state representatives implicitly challenged the universality of women's rights to equal inheritance.

Going further, the representatives of Libya⁸⁶ and the Solomon Islands⁸⁷ issued a more direct challenge to the universality of women's equal right to inheritance as they issued N4 responses. The states have used the domestic religious customary norms to challenge the suggested recommendation to reform domestic laws on inheritance. Thus, it is clear from the statements issued that both states under review perceive their international human rights obligations in relation to inheritance laws to be contingent to the religious or customary norms of the state under review. The explanations provided by both states indicate they adopted a strict cultural relativist position in the discussions

⁸⁶ UNHRC 'Libya, Addendum' (22 February 2012) A/HRC/16/15/Add.1, page 3

⁸⁷ UNHRC 'Report of the Human Rights Council on its eighteenth session' (18 November 2011) A/HRC/18/2, para 379.

on inheritance, which uses local and cultural traditions to determine the existence and scope of international human rights norms.⁸⁸

Amongst the various criticisms that can be raised in relation to the theoretical underpinning of the strict cultural relativist position, one particular criticism is applicable in relation to the positions adopted by Libya and Solomon Islands during the review process. One of the most profound criticisms of using culture as the sole factor of challenging the validity of international human rights norms is that the construction of 'culture' that is often used by some political leaders is not a representation of the entire society⁸⁹ and is often 'misemployed' to veil non-cultural politics within a state.⁹⁰ On the nature of culture, An'Na-im writes that one defining feature of culture is that it consists of a constantly contested political struggle between those who want to legitimise their power and those that want to challenge the status quo to address grievances.⁹¹ He describes this as the 'politics of culture'.⁹² In this way, when culture is used as a sole factor to challenge the universality of human rights, such a position from a strict cultural relativist perspective is open to the critique of overlooking the politics and power imbalances within a culture itself. In the context of the UPR process, the positions of the Solomon Islands and Libya give reason to question whether the voices of those women that are deprived of equal rights to inheritance are accurately represented by the state representatives who claim an interpretation of sharia and customary norms should limit women's rights to equal inheritance.

The implications of states adopting a strict cultural relativist position has been that the discussions on women's rights to inheritance during the reviews of Libya and the Solomon Islands have been brought to a close. This is because observer states have failed to hold the two states to account when the representatives introduced arguments from a strict cultural relativist position in relation to inheritance. This is problematic because the central tenet of the UPR process is for it to encourage states to engage in a cooperative dialogue on potentially controversial human rights issues. However, the

⁸⁸ F R Tesón, 'International Human Rights and Cultural Relativism' (1984 – 1985) 25 Virginia Journal of International Law 869, 870-871. See also T Higgins T, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 Harvard Women's Law Journal 89,95.

⁸⁹ Catherine Powell, 'Introduction: Locating Culture, Identity, and Human Rights' (1999) 30 Columbia Human Rights Law Review 211.

⁹⁰ R Mushkat, 'Culture and International Law: Universalism and Relativism' (2002) 6 Singapore Journal of International and Comparative Law 1032.

⁹¹ Ibid.

⁹² A An-Naim, 'State responsibility Under International Human Rights Law to Change Religious and Customary Law' in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 173.

lack of observer states' responses to hold those states that challenge universal norms on inheritance to account defies one of the fundamental objectives of the UPR process to promote universal human rights norms based on a constructive dialogue on potentially controversial human rights issues.

Drawing on the two fundamental findings of this section together, it becomes apparent that there are grounds to question whether a fruitful and engaging dialogue was undertaken between states when the issue of inheritance was discussed in the first cycle. This is because the states' positions during the discussions on women's rights to inheritance has resulted in the discussions being oversimplified and restricted to the legal provisions in place to protect women's rights and overlooked the potential cultural and religious norms that impeded women from accessing women's rights. In addition, the defence to such barriers by admittedly a small number of states was not held to account during their reviews.

5.4. Protection of Women's Rights against Early and Forced Marriages in the UPR Process

5.4.1. Contextualising the issue of Forced and Early Marriages

For the purposes of this section, the term forced marriage is defined as 'a marriage that takes place without the free or valid consent of one or both of the partners and involves either physical or emotional duress.'⁹³ The term 'early marriage' is considered as a specific form of forced marriage as minors are deemed incapable of giving informed consent.⁹⁴ Early and forced marriages of women have been the subject of international human rights regulation since the 1960s. For example, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages⁹⁵ and CEDAW⁹⁶

⁹³ Cheryl Thomas, 'Forced and Early Marriage: A Focus on Central and Eastern Europe and Former Soviet Union Countries with selected Laws from Other Countries' EGM/GPLHP/2009/EP.08 (United Nations Economic Commission for Africa, 2009)

⁹⁴ UN General Assembly, '*Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*' (7 November 1962), para 1, Article 1 and 2.

⁹⁵ Ibid.

⁹⁶ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS, Article 16 (b) CEDAW.

both state that a marriage must be between ‘men and women of full age’, ‘with the free and full consent of the intending spouses and ensure that both parties receive equal rights and protections.’⁹⁷ More recently the HRC, on the 2nd July 2015, has adopted its first substantive resolution on child marriage, which recognised such marriages as a violation of human rights.⁹⁸ Providing further clarity in response to any possible justifications of such marriages, General Recommendation 29 on Article 16 issued in 2013 by the Committee on the Women’s Convention stated that any inequalities between men and women in the marriage institution that are justified on traditional or cultural norms, are contrary to the principles of CEDAW.⁹⁹

There is no single reason for the continuance of forced and early marriages, which are often a result of a combination of social, economic and cultural factors.¹⁰⁰ Gender stereotypes and cultural norms in relation to women’s role in society, sexuality and virginity contribute to forced and early marriages of women in some communities.¹⁰¹ In places where such marriages are practised, communities talk of a culturally conceptualised notion of ‘shame’ that will be imposed on the family of the female child or woman should she become pregnant out of wedlock.¹⁰² The ‘fear that a daughter who was married late would lose her virginity before marriage, and thus disgrace her family’ means some girls are forced into an early marriage.¹⁰³ It is because of this inherent relationship between culture and forced and early marriages, whereby the culturally conceptualised notion of ‘shame’ is often used to justify forced and early marriages, that this issue was selected as a focus for this investigation. In light of the often cultural justifications for such marriages, in the next section, I provide the findings of this investigation when I examined the extent to which cultural relativist arguments were introduced by states, when member states’ records were reviewed in the first cycle of the UPR process.

⁹⁷ See UN Human Rights Committee (HRC), ‘CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses’ (27 July 1990) para 4,6,8.

⁹⁸ UNHRC, ‘Strengthening efforts to prevent and eliminate child, early and forced marriage: challenges, achievements, best practices and implementation gaps’ (25th September 2013) A/HRC/24/L.34/Rev.1.

⁹⁹ UN Committee on the Elimination of Discrimination Against Women, ‘*General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*’ (30 October 2013) CEDAW/C/GC/29, para 2.

¹⁰⁰ Anne Bunting, ‘Theorizing Women’s Cultural Diversity in Feminist International Human Rights Strategies’ (1993) 20 *Journal of Law and Society* 6, 24.

¹⁰¹ *Ibid* 29.

¹⁰² *Ibid* 26.

¹⁰³ H G Dagne ‘Early Marriages in Northern Ethiopia’ (1994) 4 *Reproductive health matters* (1994) 35.

5.4.2. Findings on the issue of Protecting Women's Rights against Forced and Early Marriage in the UPR process

5.4.2.1. An Overview of the Findings on Forced and Early Marriage

During the first cycle of the review process, a total of 31 recommendations were issued to 23 states under review on forced and early marriages. I have presented the data on states receiving and issuing recommendations on such marriages in figure 5.7 and 5.8, respectively.

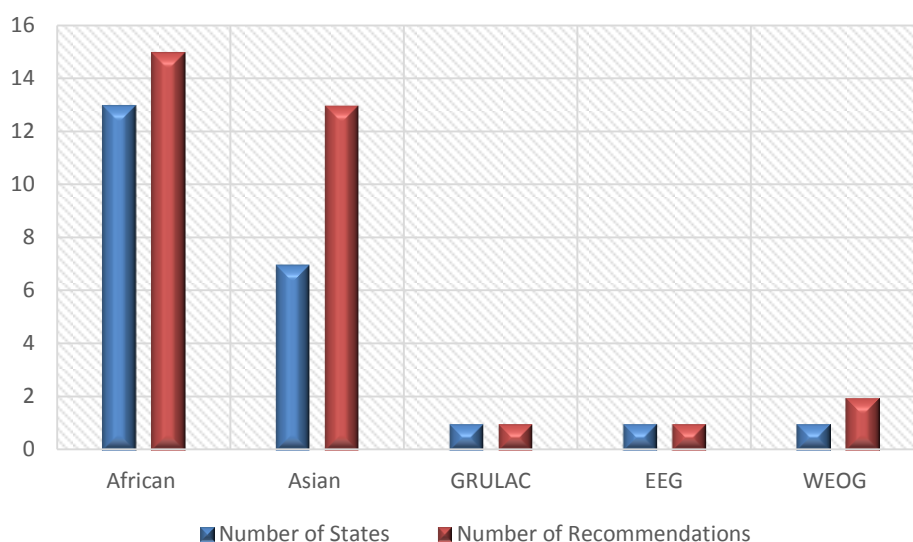


Figure 5.7 States under review that received recommendations on forced and early marriage

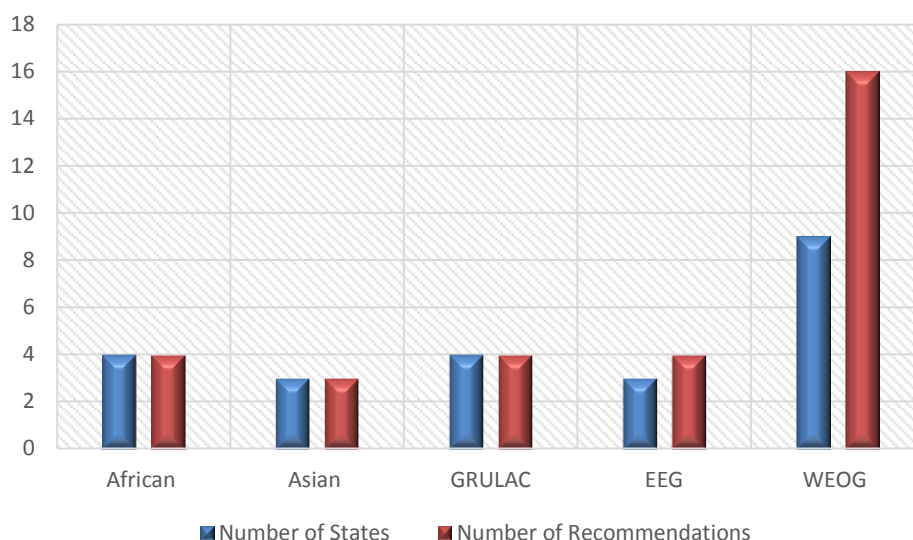


Figure 5.8 Observer states issuing recommendations on forced and early marriage

Looking at figure 5.7 and 5.8 together, two fundamental findings emerge. First, figure 5.7 shows that the majority of the recommendations in relation to marriages were received by states belonging to the African and Asian group, which is in line with the pattern that emerged during the investigation of polygamy and inheritance. However, what is unique about the findings on the issue of forced and early marriage is that states from all 5 regional groups received recommendations on the issue, albeit in small numbers. This phenomenon can be compared to the findings in relation to polygamy and inheritance, where no states belonging to the GRULAC or EEG group received any recommendations. The second interesting finding can be observed from figure 5.8, as for the first time in the investigation for this chapter, states from the African and Asian groups have issued recommendations during state reviews. By comparison, no African or Asian states have issued any recommendations in relation to polygamy and inheritance. Thus, marriage is the only issue examined in this chapter where member states from all 5 regional groups have received recommendations on the issue. From this preliminary finding, it can be stated that the concerns in relation to forced and early marriage were discussed by a more geographically diverse group of states, than the issues of polygamy and inheritance.

In response, to the 31 recommendations that were issued, a total of 25 recommendations were accepted, whilst 6 were noted. I have depicted details of the accepted and noted recommendations by states in table 5.9 and 5.10, respectively.

Table 5.9 Recommendations on forced and early marriage that were accepted

ACCEPTED	Regional Groups	No. of States	No. of Recommendations
	African	9	10
	Asian	5	11
	GRULAC	1	1
	EEG	1	1
	WEOG	1	2

Table 5.10 Recommendations on forced and early marriage were noted

NOTED	Regional Groups	No. of States	No. of Recommendations
	African	4	5
	Asian	2	2
	GRULAC	0	0
	EEG	0	0
	WEOG	0	0

As table 5.9 shows, the majority of the recommendations issued to states belonging to the African and Asian groups were accepted. Argentina was the only state from the GRULAC region that noted a recommendation on marriage. Apart from this one exception, the states from the GRULAC, EEG and WEOG all accepted recommendations on early and forced marriage. From this preliminary analysis it can be observed that only states from the African and Asian groups raised concerns about the nature of the recommendations issued to them on forced and early marriages.

5.4.2.2. Nature of the dialogue on Forced and Early Marriage in the UPR process

The nature of the recommendations issued in relation to forced and early marriage have been divided into 4 categories and summarised in the table below. The responses received to these recommendations were varied, and as such have been divided into a total of 7 categories. I have summarised the categories of recommendations and responses in table 5.11 and 5.12, respectively.

Table 5.11 Categories of recommendations on forced and early marriage

Recommendation	Summary of the nature of the recommendations/statements
1	Forced and early marriages are harmful cultural practices that are required to be eliminated.
2	Enact or reform domestic legislation on forced and early marriages
3	To engage local/religious/community leaders to discourage forced and early marriages
4	Generic suggestions to address forced and early marriages.

Table 5.12. Categories of responses on forced and early marriage

Category	Summary of responses made by the state under review
A1	Accepted recommendations without any further comments.
A2	Review the state legislation on forced and early marriages.
A3	Domestic laws on forced and early marriages were already in place.
A4	Changes to be brought about through incremental reforms and constructive dialogue.
A5	Shedding light on reasons why forced and early marriages continue to be practiced.
N1	Noted recommendations without any further comments.
N2	Law protecting women from forced and early marriages are already in place.
N3	Incremental reforms to discourage forced and early marriage were already in place.
N4	No harmful practices existed in the state.

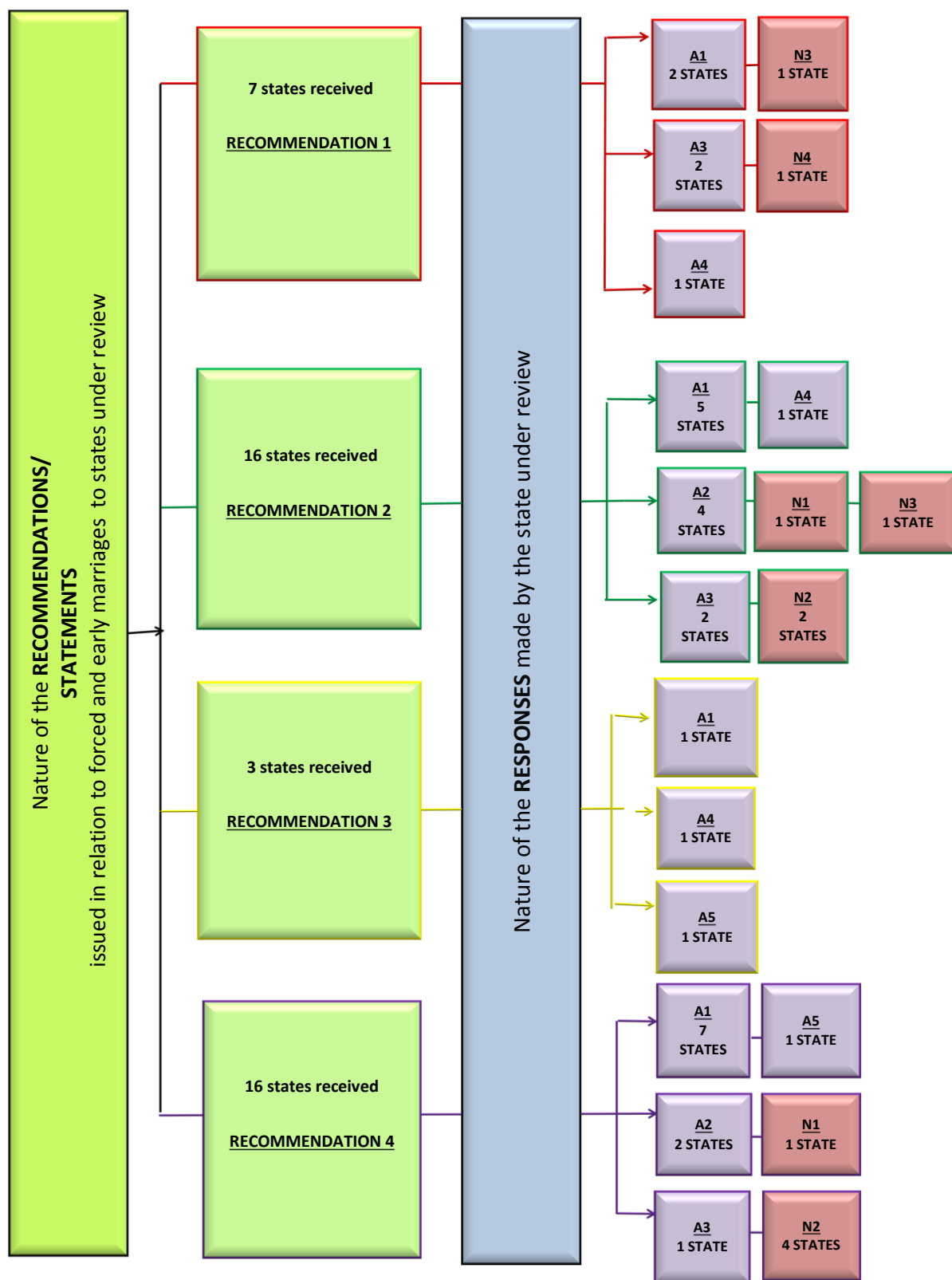


Figure 5.9 Nature of the dialogue held amongst states on the issue of forced early and forced marriages

Recommendation 1: Forced and early marriages are harmful cultural practices that are required to be eliminated

Observer states issuing recommendations under the first category expressly drew a link between the existence of forced and early marriages, and values embedded in the traditions and culture of the state under review, before recommending that actions needed to be implemented to bring such marriages to an end. A typical example of a statement issued under this category was during the review of Gambia when Slovenia, whilst commending the enactment of the Children's Act 2005, 'noted with concern that social and cultural norms hindered its implementation...as early and forced marriage...remained widespread.'¹⁰⁴ A total of 7 states received recommendations under this category.

In response, five states accepted recommendation under this category, of which Mauritania and Togo provided an A1 response, as both states provided no comments for their position. The states of Sierra Leone¹⁰⁵ and Bangladesh, whilst accepted the recommendations, provided an A3 response as they insisted that domestic laws were in place that prohibited such marriages. For example, Bangladesh responded that 'early marriages...are prohibited [and] have been made a punishable offence under Child Marriage Restraint Act, 1929'.¹⁰⁶ On the other hand, Guinea Bissau 'emphasized that the fight against practices, such as early and forced marriage, in a society such as in Guinea-Bissau should be conducted gradually, through awareness-raising campaigns, sensitization and continuous dialogue with the targeted sectors of the population before legislative measures sanctioning these practices could be taken.'¹⁰⁷ The delegate of Guinea Bissau therefore provided an A4 response as it stated that reforms to attitudes in relation to forced and early marriage required incremental reforms through constructive dialogue with those that sympathise with the practice.

The two states under review that did not accept recommendations under this category both provided explanations for their positions. For example, the delegate of Gambia, in response to a recommendation by Slovenia, insisted that the 'Children's Act prohibits child marriage. In addition, the Government uses community child protection

¹⁰⁴ UNHRC 'Gambia' (24 March 2010) A/HRC/14/6, para 44.

¹⁰⁵ UNHRC 'Sierra Leone' (11 July 2011) A/HRC/18/10, para 10.

¹⁰⁶ UNHRC 'Sierra Leone Addendum' (13 September 2011) A/HRC/18/10/Add.1, page 3.

¹⁰⁷ UNHRC 'Report of the Human Rights Council on its fifteenth session' (31 October 2011) A/HRC/15/60, para 676.

committees to educate communities about this issue and encourage them to abandon harmful practices such as early and forced marriage'.¹⁰⁸ Thus, Gambia provided an N3 response on the basis that incremental reforms to discourage the practice were already in place. The second state that noted a recommendation under this category was Botswana, who provided an N4 response as the delegate insisted that 'there are no traditions harmful to the rights of women'.¹⁰⁹ The response by Botswana centres on the state's interpretation of 'harmful'. One of two interpretations can be given to this response. First, either that forced and early marriages, which were labelled as harmful by Argentina who issued the recommendation, did not exist in the state. Or, second that Botswana did not consider forced and early marriages as harmful in nature.

From the dialogue above, what is notable is that whilst the states under review may differ in their official positions to the recommendation, the content of their explanations was very similar. For instance, whilst Guinea accepted and Gambia noted the recommendation under this category, an examination of their comments reveals that both states similarly emphasised the importance of incremental reforms to discourage sympathetic attitudes towards forced and early marriages. Another pattern that was observed was in relation to the noted recommendations; both Gambia and Botswana in their comments implicitly stated that it did not accept the nature of the recommendations that were issued, rather than the content of addressing forced and early marriages per se. For instance, Botswana denied the existence of traditional harmful practices, whilst the delegate of Gambia explained that more incremental methods of reforms were suitable for addressing such marriages. Overall, in terms of the responses to the recommendations under this category, the majority of the states focused on expressing the law and policies that were already in place in the domestic context to address such marriages.

Recommendation 2: Enact or reform domestic legislation on forced and early marriages

The recommendations listed under the second category issued by observer states focused on the suggestions to enact or reform domestic legislation to ensure that women and girls were protected from early and forced marriages. A typical example of a

¹⁰⁸ UNHRC 'Gambia' (24 March 2010) A/HRC/14/6, para 18.

¹⁰⁹ UNHRC 'Report of the Human Rights Council on its tenth session' (9 November 2009) A/HRC/10/29, page 4.

recommendation issued under this category was issued to Sudan by Slovenia to ‘pass legislation at the federal level to prohibit...early forced marriages, and ensure that such legislation is enforced in practice.’¹¹⁰

A total of 16 states received recommendations under this category. Of these, 12 states under review accepted. The states of Afghanistan, Benin, Kyrgyzstan, Mauritania and Sudan accepted the recommendations without any further response, and therefore provided an A1 response. On the other hand, the delegates of El Salvador,¹¹¹ Azerbaijan,¹¹² Yemen¹¹³ and Japan¹¹⁴ accepted the recommendations and provided an A2 response as the state delegates explained the state will review domestic legislation on forced and early marriages.

A different response was provided by the states of Iran and Bangladesh,¹¹⁵ who insisted that laws were already in place which prohibited such marriages, and therefore, were categorised as A3 responses. For example, Iran highlighted its ‘legislative achievements regarding women’s rights and family issues, including laws to combat... forced marriage.’¹¹⁶ The state of Guinea Bissau provided an A4 response, as it explained that incremental reforms to address such marriages needed to be implemented ‘before legislative measures sanctioning these practices could be taken.’¹¹⁷ Therefore, whilst officially Guinea Bissau accepted the recommendation to implement domestic laws to prevent forced and early marriages, the comments by the delegate clearly indicated that laws will not be implemented in relation to forced marriages.

On the other hand, 4 states under review noted recommendations that were issued under this category. The delegate of Trinidad and Tobago provided an N1 response, as the recommendation was noted without providing any further comments. The delegates of Mali and Gabon,¹¹⁸ issued an N2 response on the basis that laws protecting women from such marriages were already in place. For instance, Mali stated that “the current Marriage and Guardianship Code provided that marriage must be based on mutual

¹¹⁰ UNHRC ‘Sudan’ (11 July 2011) A/HRC/18/16, para 83.107.

¹¹¹ UNHRC ‘El Salvador’ (18 March 2010) A/HRC/14/5, para 76.

¹¹² UNHRC ‘Azerbaijan’ (6 March 2009) A/HRC/11/20, para 61.

¹¹³ UNHRC ‘Yemen: Addendum’ (23 September 2009) A/HRC/12/13/Add.1, page 2.

¹¹⁴ UNHRC ‘Japan’ (30 May 2008) A/HRC/8/44, para 7.

¹¹⁵ UNHRC ‘Bangladesh: Addendum’ (9 June 2009) A/HRC/11/18/Add.1, page 3.

¹¹⁶ UNHRC ‘Iran’ (15 March 2010) A/HRC/14/12, para 65.

¹¹⁷ UNHRC ‘Report of the Human Rights Council on its fifteenth session’ (31 October 2011) A/HRC/15/60, para 676.

¹¹⁸ UNHRC ‘Report of the Human Rights Council on its eighth session’ (1 September 2008) A/HRC/8/52, para 642.

consent, and set a minimum age of 18 for boys and 15 for girls.”¹¹⁹ On the other hand, the delegate of Gambia provided an N3 response, as it insisted that existing laws already prohibit early marriages.¹²⁰

Overall, one may be optimistic that the majority of the recommendations under this category were accepted. However, a detailed examination of the statements accompanying them indicates otherwise. A total of 6 states issued an A1 or N1 response meaning that it is difficult to establish how and when, and indeed if, legislation will be put in place as states under review provided no additional comments. A total of 10 states expressly stated in their comments that reforms to domestic laws, or that legislative provisions, were already in place to prohibit forced and early marriages. This shows that all the states that were issued with a recommendation under this category either remained silent in response, or resorted to highlighting the laws and policies already put in place in the states under review to protect women against forced and early marriages. Therefore, it can be observed that no states under review that were issued with recommendations under this category accepted actions to improve the situation on such marriages in the domestic context as a result of this dialogue and review in the UPR process.

Recommendation 3: To engage local/religious/community leaders to discourage forced and early marriages

The essence of the recommendations issued under this category was to engage local community and religious leaders in a dialogue to help reform and change attitudes that condone such marriages through public awareness campaigns. The states of Afghanistan, Liberia¹²¹ and Timor Leste received recommendations under this category. For example, during the review of Afghanistan, the delegate of the United States suggested to ‘launch public information campaigns and work with religious leaders to raise awareness of the legal rights for women...including the legal age of marriage.’¹²² In another example, referring to the law protecting women against forced and early marriage, Germany recommended that Timor Leste continue ‘raising awareness of this law to public officials, to local community leaders and by citizenship educations; and

¹¹⁹ UNHRC ‘Mali’ (13 June 2008) A/HRC/8/50, para 55.

¹²⁰ UNHRC ‘Report of the Working Group on the Universal Periodic Review: Gambia’ (24 March 2010) A/HRC/14/6, para 18.

¹²¹ UNHRC ‘Liberia’ (4 January 2011) A/HRC/16/3, para 77.33.

¹²² UNHRC ‘Afghanistan’ (20 July 2009) A/HRC/12/9, para 35.

additionally to discourage cultural practice and violate women's rights, such as forced and early marriage.'¹²³

In response to the recommendations of this nature, the delegate of Afghanistan provided an A1 response. On the other hand, Liberia accepted the recommendation and stated that 'victims of...forced marriage...had been ostracised by their communities and families, whilst perpetrators had gone unpunished. Fearing such stigmatization, victims have often chosen not to report crimes.'¹²⁴ Liberia's response is striking because it was the first time in the investigation under this chapter that a state had attempted to explain the possible reasons why victims of forced and early marriages may not report or implement their right that may well be protected under domestic legislation. Liberia's comments shed light on the complex dilemma that women face when they are subject to forced and early marriages in reporting such marriages. Timor Leste responded by accepting the recommendation issued by Germany and stated that the 'advancement of economic conditions especially those of women, would soon allow for gradual change in attitudes, resulting in the decrease of early marriages'.¹²⁵ Here, Timor Leste provided an A4 response to the recommendation, as the delegate highlighted that incremental reforms expected to take place to discourage attitudes in favour of early and forced marriages are due to the economic development.

From the dialogue set out above, it can be observed that all the recommendations under this category were well received by the states under review and were accepted. Two of the states under review responded with a comment, which indicated that the states under review concurred with the observer states that the reforms in relation to forced and early marriages should be undertaken by engaging in a dialogue with leaders at local level to gradually reform attitudes in relation to the practice.

Recommendation 4: Generic suggestions to address forced and early marriages

Under this category, observer states issued recommendations that can be described as generic in nature. This is because states simply identified forced and early marriages as an area of concern, before suggesting the issues be addressed by implementing

¹²³ UNHRC 'Timor-Leste' (3 January 2012) A/HRC/19/17, para 78.15.

¹²⁴ UNHRC 'Liberia' (4 January 2011) A/HRC/16/3, para 48.

¹²⁵ UNHRC 'Timor-Leste' (3 January 2012) A/HRC/19/17, para 23.

measures. These observer states did not make any direct references to any legislative provisions or any international norms when issuing these recommendations. A typical example of this recommendation was issued to Pakistan where the delegate of Switzerland recommended Pakistan do ‘everything possible to prevent early and forced marriage.’¹²⁶ A total of 16 states in the first cycle were issued with a recommendation under this category.

In response, 11 states accepted the recommendations issued under this category. A total of 7 states provided an A1 response. The states of Niger¹²⁷ and Yemen¹²⁸ provided an A2 response as they stated that reviews of the domestic laws on forced and early marriages were either already in place, or soon to be undertaken. The delegate of Sierra Leone insisted that ‘legislation had been passed to mandate the age of consent at 18 years’, which is categorised as an A3 response.¹²⁹ The delegate of Liberia’s response to the recommendation is categorised as A5.¹³⁰

On the other hand, a total of 5 states under review refused to accept recommendations under this category. The United Arab Emirates provided an N1 response. The states of Chad¹³¹, Oman,¹³² Bahrain¹³³ and Gambia¹³⁴ provided responses in line with an N2 response, as the states noted the recommendations and insisted that domestic laws were already in place to protect women from forced and early marriage.

Overall, the responses to the recommendations under this category by the states under review were subdued as half of the states when issued with recommendations under this category failed to provide an explanation for their position. Thus, for nearly half of the states that were issued with recommendations under this category, there was no concrete action that was agreed as a result of the UPR process to address the marriages in the domestic context.

¹²⁶ UNHRC ‘Pakistan’ (4 June 2008) A/HRC/8/42, para 43.

¹²⁷ UNHRC ‘Niger’ (25 March 2011) A/HRC/17/15, para 49.

¹²⁸ UNHRC ‘Report of the Human Rights Council on its twelfth session’ (25 February 2010) A/HRC/12/50, page 2.

¹²⁹ UNHRC ‘Sierra Leone’ (11 July 2011) A/HRC/18/10, para 8.

¹³⁰ UNHRC ‘Liberia’ (4 January 2011) A/HRC/16/3, para 48.

¹³¹ UNHRC ‘Report of the Human Rights Council on its twelfth session’ (25 February 2010) A/HRC/12/50, para 444.

¹³² UNHRC ‘Report of the Working Group on the Universal Periodic Review: Chad’ (5 October 2009) A/HRC/12/5, para 18.

¹³³ UNHRC ‘Report of the Working Group on the Universal Periodic Review: Bahrain’ (22 May 2008) A/HRC/8/19, para 59.

¹³⁴ UNHRC ‘Report of the Working Group on the Universal Periodic Review: Gambia’ (24 March 2010) A/HRC/14/6, para 18.

5.4.3. Discussion on the findings of Forced and Early Marriage in the first cycle of the UPR process

Bringing the categories of recommendations and responses together, it can be observed that there were three fundamental aspects to the discussions held amongst states on forced and early marriages in the first cycle of the review process. First, 7 observer states instigated discussions by implicitly suggesting that some cultural and traditional values continued to condone such marriages. Second, a total of 16 observer states engaged in discussions on forced marriages by focussing on the domestic legislation in place to protect women from forced and early marriages. Third, 16 observer states issued recommendations on more general terms as suggestions were made to encourage actions to address such marriages.

A common theme that emerged in all three aspects of discussions on forced and early marriages is that some observer states, and states under review, took the position that the best method to bring forced and early marriage to an end was by implementing policies and strategies to gradually reform attitudes that were sympathetic to forced and early marriages. For instance, 8 states¹³⁵ adopted a position that reforms should be undertaken in relation individual attitudes towards forced and early marriages through ‘awareness-raising campaigns, sensitization’,¹³⁶ ‘public information campaigns’,¹³⁷ ‘raising awareness with public officials’¹³⁸ and ‘citizenship education’.¹³⁹ The nature of these reforms were also vocalised by states under review that responded with an A4, A5 and N3 response, as the statements focused on implementing incremental reforms to attitudes that are sympathetic towards forced and early marriages. I argue that this position adopted by the states in the discussions of marriages affiliates with the moderate cultural relativist position. This is because the suggested long term reforms in relation to such marriages indicate that the states recognise that sympathetic attitudes towards such marriages are deeply engraved in the belief systems of societies, and therefore require long term reform policies and strategies. In light of this, it is difficult to deny the significant role culture plays in influencing any moral, political or

¹³⁵ Gambia; Guinea; Liberia; Germany; Timor Leste; Norway; Afghanistan and the United States.

¹³⁶ UNHRC ‘Report of the Human Rights Council on its fifteenth session’ (31 October 2011) A/HRC/15/60, para 676.

¹³⁷ UNHRC ‘Report of the Working Group on the Universal Periodic Review: Afghanistan’ (20 July 2009) A/HRC/12/9, para 18.

¹³⁸ UNHRC ‘Timor-Leste’ (3 January 2012) A/HRC/19/17, paragraph 78.15.

¹³⁹ Ibid.

ideological developments, that occur over a period of time, for the collective and individual human behaviour in any particular society.¹⁴⁰ Therefore, the suggestion to undertake incremental reform to change attitudes towards the practices indicates that the selected states are not only implicitly recognising the inherent association between forced and early marriage and culture, but suggesting culturally legitimate reforms of such attitudes to bring them into compliance with international norms.¹⁴¹ Culturally legitimate reforms ensure that human rights standards reflect the values emanated from within cultures, thereby not perceived to have been imposed by others.¹⁴²

The suggestion that some of these states adopted a position that affiliates with the moderate cultural relativist position can further be supported by the specific reforms suggested by 4 of the states. In addition to the statements described above, the states of Guinea Bissau, United States, Germany and Norway all discussed that forced and early marriages should be addressed by engaging in a constructive dialogue with targeted ‘sectors of the population’¹⁴³ ‘involving local level’ participation,¹⁴⁴ and to work with ‘religious leaders’¹⁴⁵ and ‘local community leaders’¹⁴⁶ In this way, states encouraged a constructive dialogue within the local communities and religious leaders with the aim to discourage sympathetic attitudes to forced and early marriages. This position resonates with An-Na’im’s suggestion of engaging an internal cultural discourse as a means to enhancing the legitimacy of international human rights norms.¹⁴⁷ The aim of an internal discourse is to reform certain values and beliefs that exist in a culture that are inconsistent with human rights law and to bring them in line with current international human rights standards.¹⁴⁸ Such reforms of cultural beliefs are undertaken from within the culture itself, according to the beliefs embedded in the cultural and religious texts,

¹⁴⁰ A An-Na’im, ‘Problems and Prospects of Universal Cultural Legitimacy for Human Rights’ in An-Na’im and Deng (eds), *Human Rights in Africa: Cross Cultural Perspectives* in, (Brookings Institution, 1990) 333.

¹⁴¹ Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) 49.

¹⁴² An-Na’im, ‘Conclusion’ in Abdullahi Ahmed An-Na’im (eds) *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, 1995) 431.

¹⁴³ UNHRC ‘Report of the Human Rights Council on its fifteenth session’ (31 October 2011) A/HRC/15/60, para 676.

¹⁴⁴ UNHRC ‘Liberia’ (4 January 2011) A/HRC/16/3, paragraph 77.33.

¹⁴⁵ UNHRC ‘Report of the Working Group on the Universal Periodic Review: Afghanistan’ (20 July 2009) A/HRC/12/9, para 35.

¹⁴⁶ UNHRC ‘Report of the Working Group on the Universal Periodic Review: Timor-Leste’ (3 January 2012) A/HRC/19/17, para 78.15.

¹⁴⁷ A An-Na’im, ‘State responsibility Under International Human Rights Law to Change Religious and Customary Law’ in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 174.

¹⁴⁸ A An-Na’im, ‘Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights’ in Claude E Welch, Jr. and Virginia A. Leary (eds) *Asian Perspectives on Human Rights* (Westview Press, 1990) 46-48.

to ensure that the international human rights norms in question are accepted as binding.¹⁴⁹ In this way, the aim is to promote cultural legitimacy of international human rights standards, which means that the norms derive their authority from internal validity of the culture itself.¹⁵⁰ These suggestions made by authors to further the cultural legitimacy of rights are present in the essence of the suggestions made by some states in the discussions of forced and early marriages.

The implications of some states exercising a position that affiliates with a moderate cultural relativist position has been that some states have shed light on the complex nature of forced and early marriages, and have begun discussing methods to discourage any sympathetic attitudes towards them in some of the discussions held in the UPR process. This can be most profoundly seen when compared with the essence of the recommendations under the first category of recommendations and the third category. States under both categories of recommendations drew a link between forced and early marriages and culture. However, the nature of the recommendations under the first category suggested to eliminate the traditional practice of forced marriages. In response, states under review simply reaffirmed the laws that were already in place to address such marriages.

In contrast to the first category of recommendations, the states under the third category issued recommendations from a moderate cultural relativist perspective, as the observer states that recognised the inherent relationship between culture and forced and early marriages suggested incremental reforms to discourage sympathetic attitudes towards such marriages. The nature of this recommendation instigated a more fruitful dialogue on the issue. This is because the states under review in their responses discussed complex issues as to why women do not report such marriages despite laws being enacted against them, whilst other states responded with a form of internal discourse that was being undertaken at national level to help discourage such marriages. Thus, for the first time in this investigation for this chapter, states have adopted a position during discussions which aims to undertake reforms to any potential cultural justifications for forced and early marriages, with the ultimate aim to discourage such marriages. In this way, by introducing a moderate cultural relativist position into the discussions, the

¹⁴⁹ A An-Na'im, 'Toward an Islamic Hermeneutics for Human Rights' in Abdullahi Ahmed An-Na'im, Jerald D Gort, Henry Jansen and Hendrik M Vroom (eds), *Human Rights and Religious Values: An Uneasy Relationship?* (William B. Eerdmans Publishing Company, 1995).

¹⁵⁰ A An-Na'im, 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' (n 140) 336.

states began to engage in a more fruitful dialogue and move away from the surface discussions on the issue, which focus largely on either criticising the cultural nature of the practice or domestic laws enacted to address the issue.

5.5. Conclusion

This chapter presented the findings of the nature of the discussions held amongst states on three issues under the category of women's rights under private and family law, with the aim of gaining a better understanding how the UPR process operates through the positions adopted by states during state reviews. In meeting this aim, I assessed the extent to which states in the discussions held in the review process introduced positions from a cultural relativist perspective when discussing polygamy, inheritance and forced and early marriages.

The study has identified that states adopted the positions that affiliated with strict universalism during the discussions of *all* three issues in the first cycle. For instance, the first category of recommendations issued on polygamy, inheritance and forced and early marriages all expressly identified the cultural association with the issue, before suggesting to eliminate the practice. In response to being issued with recommendations of a strict universalist nature, the states under review have responded either by emphasising the existing laws already in place, or by remaining silent. This means that when states under review were issued with recommendations whereby the observer states adopted a strict universalist position in relation to the three issues, the states under review responded in a highly subdued and defensive manner. Further, it is notable that no states under review agreed to any commitments as a result of being suggested recommendations from a strict universalist position on the three issues. This means, when the states adopted a strict universalist position in the discussions of the three issues in the first cycle, the outcome of such discussions has, to a large extent, been unfruitful.

This investigation has also found that when the issues of polygamy and inheritance were being discussed, some states under review adopted a position which resonated with a strict cultural relativist position. This shows that when some states under review did not adhere to the international standards on inheritance and polygamy, the UPR process was used to directly challenge the universality of international human rights

norms on the two issues. A significant point to note from the findings was that in *all* the cases that the states adopted a strict cultural relativist position, it was voiced in the HRC plenary session, as opposed to the interactive dialogue session. The implication of this is that due to the heavy time restraints, observer states were not able to hold states fully accountable or scrutinise the strict cultural relativist positions adopted by some states under review.

It was interesting to note that the nature of the discussions held on forced and early marriages differed from the state discussions on inheritance and polygamy. For instance, no states under review challenged the universality of the norms in relation to such marriages from a cultural relativist perspective. In addition, it was only during the discussions on forced and early marriages that there was evidence of states issuing statements which could be interpreted as a moderate cultural relativist position. This is because states issued statements which recognised the significance of incremental reforms and public awareness campaigns to discourage sympathetic attitudes towards such marriages. Further, states adopting aspects of moderate cultural relativist positions also shed light on the complex nature of the issue as states emphasised the importance of engaging in a constructive dialogue with religious and local leaders to help discourage deeply engraved sympathies towards the practice.

The nature of these discussions in relation to forced and early marriages can be contrasted with polygamy and inheritance, where the discussions focused solely on eliminating the practice by enacting laws against it. There was no evidence of states adopting a moderate cultural relativist position in the discussions of reforms and concerns raised in relation to inheritance and polygamy. From this, it can be seen that when states adopted a position that affiliated with the moderate cultural relativist position in the discussions on forced marriages, it resulted in a shift away from a surface level discussion on the issue during state reviews. Instead the discussions drew the complex nature of the issue to the centre of discussions as states recognised the need undertake wide ranging reforms to help eliminate forced and early marriages.

In contrast, when the states failed to appreciate the moderate cultural relativist positions in the discussions on polygamy and inheritance, states failed to draw the cultural and religious impediments to the centre of the discussions in the UPR process with the aim of suggesting culturally legitimate reforms. Instead, where there was evidence of a strict

universalist or strict cultural relativist position being adopted by states, the discussions focused largely on a superficial level, where it focused on the laws to be implemented in the area and states under review responded by insisting that the laws were already in place. This overwhelming focus on the domestic legislation in relation to inheritance resulted in a lack of fruitful dialogue, and instead acted as a veil from discussing and suggesting reforms in relation to cultural and religious influences on inheritance. Thus, the findings of this chapter confirms the theoretical critique of the polarised debate between strict universalism and strict cultural relativism, and the beneficial outcome of the moderate cultural relativist perspective.

In conclusion, the findings of this research reveals that states adopted positions that resonated with the strict universalist position during the discussions of all three issues. By contrast, the positions of strict cultural relativism were evident during the discussions on polygamy and inheritance, but not for forced and early marriages. In fact, it was only during the discussions of forced and early marriages that states adopted positions that resonated with the moderate cultural relativist position. The implication of this has been that whilst the discussions held on inheritance and polygamy have been less productive, the issue of forced and early marriages showed some evidence of a more fruitful and productive discourse between states.

Chapter 6

Violence against Women

6.1 Introduction

In this chapter, I will present and discuss the findings of the exploration on the nature of discussions held amongst states on the issue of violence against women in the first cycle of the review process. Of the total 3702 recommendations issued in relation to women's rights, the issue of violence against women was the subject of 312 recommendations. This means that the issue of violence against women was the most frequently cited issue of concern during state reviews examined for the purposes of this investigation.

Violence against women was a central rallying point in the struggle that waged over two decades for the recognition of women's rights as human rights.¹ In 1993, the General Assembly unanimously passed The Declaration on the Elimination of Violence against Women, which unequivocally articulated standards and principles against violence against women.² Despite the repeated declarations at international level,³ women continue to be subjected to violence.⁴ One possible reason for this is that violence against women is often inherent in the patriarchal traditions and culture.⁵ Therefore, whilst it cannot be denied that the phenomenon of violence against women is global, its manifestations are often particularised within a community by the values embedded in particularities of culture.⁶ For example, wide ranging factors such as son preference, gender differences in nutrition and education, dowry and virginity testing all contribute to the patriarchal culture that perpetuates or contributes to the toleration of

¹ Radhika Coomaraswamy and Lisa Kois, 'Violence against Women' in Kelly D Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Volume 1, Transnational Publishers Inc 1999) 178.

² UN General Assembly, 'Declaration on the Elimination of Violence against Women' (20 December 1993) A/RES/48/104.

³ UN Committee on the Elimination of Discrimination Against Women, 'CEDAW General Recommendation No. 19: Violence against women (1992) para 11. See also UN Human Rights Committee (HRC) 'CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)' (29 March 2000) CCPR/C/21/Rev.1/Add.10 para 32; UN General Assembly, 'In-depth study on all forms of violence against women : report of the Secretary-General' (6 July 2006) A/61/122/Add.1 para 80.

⁴ <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> accessed 31st August 2014.

⁵ Radhika Coomaraswamy and Lisa Kois, 'Violence against Women' (n 1)190.

⁶ Ibid 179.

violence against women.⁷ This inherent relationship between violence against women and culture, forms one of the reasons why it has been selected as the focus for exploring whether, and to what extent, states adopt a cultural relativist position during states' reviews.

Under the category of violence against women, three specific forms of violence against women are the focus of this investigation: honour killing, marital rape and domestic violence. Each of the three issues will be discussed under three separate section, each of which will follow the same structure. I begin the first sections by introducing the issue and outlining the relevant international human rights laws. In the second section, I present the findings of the investigation by presenting the nature of the discussions held on the issue in the first cycle of the review process. This is followed by a discussion on the findings on the issue. The aim of this section is to answer the research question of this thesis using the theoretical framework previously outlined.

6.2. Women's Rights protection against Honour Killing as discussed in the UPR process

6.2.1 Contextualising Women's Rights protection against Honour Killing

For the purposes of this investigation, the term honour killing is interpreted as the homicide of a woman, by one or more members of her immediate or extended family, usually male, because she is believed to have defiled the honour of the family.⁸ Whilst there is no international human rights norm that directly addresses the crime of honour killing, treaty body jurisprudence has made it clear that states should ensure that women are protected against it, and should implement legislation to remove the defence of honour to a murder of a female victim.⁹ In 2001, the UN General Assembly issued its

⁷ Radhika Coomaraswamy and Lisa Kois, 'Violence against Women' (n 1)190; See also C Watts and C Zimmerman, 'Violence against Women: Global Scope and Magnitude' (2002) 359 *Lancet* 1232; Lisa Aronson Fontes and Kathy A McCloskey, 'Cultural Issues in Violence against Women' in C.M Renzetti, J L Edleson and R K Bergen (eds) *Sourcebook on Violence against Women* (2nd edition, Sage Publications) 162-164.

⁸ P Werbner, 'Veiled interventions in pure space: Honour, shame and embodied struggles among Muslims' (2007) 24 *Theory Culture Society* 161.. See also Aysan Sev'er and Gökçeçiçek Yurdakul, 'Culture of Honor, Culture of Change: A Feminist Analysis of Honor and Killings in Rural Turkey' (2001) 7 *Violence Against Women* 964, 965.

⁹ UN Committee on the Elimination of Discrimination Against Women, 'CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session' (1992) A/47/38 para 24 (r) (ii); UNGA 'Working towards the elimination of crimes against women committed in the name of honour' (July 2002) A/57/169 para 34. UN Human Rights Committee (HRC) 'CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and

first resolution on honour killing, which called upon states to intensify legislative and social efforts to prevent and eliminate honour based killing.¹⁰ Further clarification has been provided in 2012, when a Special Rapporteur on violence against women stated that customs, traditions or religious values should not be invoked to avoid member states' obligations to eliminate the crime of honour killings.¹¹

In the UPR process a total of 20, out of the total 27, recommendations issued on honour killings were accepted by the states under review. However, despite this apparent formal consensus amongst the majority of states to ensure the protection of women against honour killing, there is evidence to suggest that women continue to be subject to such killings.¹² Honour killings can be distinguished from other forms of homicide as the very act of the homicide, and the motivation of the perpetrators, is often justified using a culturally conceptualised definition of honour.¹³ The notion of honour is used to control women's behaviour such as fidelity in a marriage, restrictions on pre-marital or extramarital relationships with men, and ensuring she meets the maternal and wifely obligations.¹⁴ If a woman fails to comply with the culturally defined rules of women's general or sexual behaviour, then she is perceived to have damaged the honour of the family or the community, and thus, the perceived remedy is for a male relative to kill the female victim to protect the family's honour.¹⁵ This inherent relationship between honour killing and culture, whereby a culturally conceptualised notion of 'honour' is used to justify such killings, is the primary reason why honour killing has been selected as the focus for this investigation.

Women' (29 March 2000) CCPR/C/21/Rev.1/Add.10. U.N. Doc. para 31; UN General Assembly, 'Working towards the elimination of crimes against women and girls committed in the name of honour' (10 February 2005) A/RES/59/165.

¹⁰ UN General Assembly Resolution 'Working towards the elimination of crimes against women committed in the name of honour' (2001) A/RES/55/66, para 4.

¹¹ UNGA, 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' (2012) A/HRC/20/16, para 87; UN Committee on the Elimination of Discrimination Against Women, 'CEDAW General Recommendation No. 19: Violence against women' (1992) para 11.

¹² UNGA 'Working towards the elimination of crimes against women committed in the name of honour' (July 2002) A/57/169, para 3-7. See also, Phyllis Chelser, 'Worldwide trends in honour killings' (2010) Middle East Quarterly 3, 10 <<https://www.unfpa.org/swp/2000/english/ch03.html>> accessed 31st August 2015.

¹³ See G M Kressel, 'Soricide/filiacide: Homicide for family honour' (1981) 22 Current Anthropology 141-158; Purna Sen, "'Crimes of honour", value and meaning' in Lynn Welchman and Sara Hossain (eds), *'Honour': Crimes, Paradigms, and Violence against Women* (Zedbooks 2005) 46.

¹⁴ Purna Sen, "'Crimes of honour", value and meaning' (n 13) 47. UN Commission on Human Rights, 'Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women' (31 January 2002) E/CN.4/2002/83, para 18

¹⁵ Recep Dogan, 'Different cultural understandings of honor that inspire killing: An enquiry into the defendant's perspective' Homicide Studies (2014) 12 <<http://hsx.sagepub.com/content/early/2014/03/12/1088767914526717>> accessed 31st August 2015.

The above discussion provides a brief introduction as to the nature and justifications for honour killings against women. The aim of this section was to assess whether, and to what extent, states adopt positions that affiliate with the cultural relativist perspective when honour killings were the subject of the discussions during state reviews in the UPR process.

6.2.2. Findings on Honour Killing as discussed in the UPR process

6.2.1.1 An Overview of the Findings on Honour Killing

In the first cycle of the UPR process, 27 recommendations were issued on honour killing during the reviews of 11 member states. I have categorised the states that received and issued recommendations on the issue according to regional groups in figure 6.1 and 6.2, respectively.

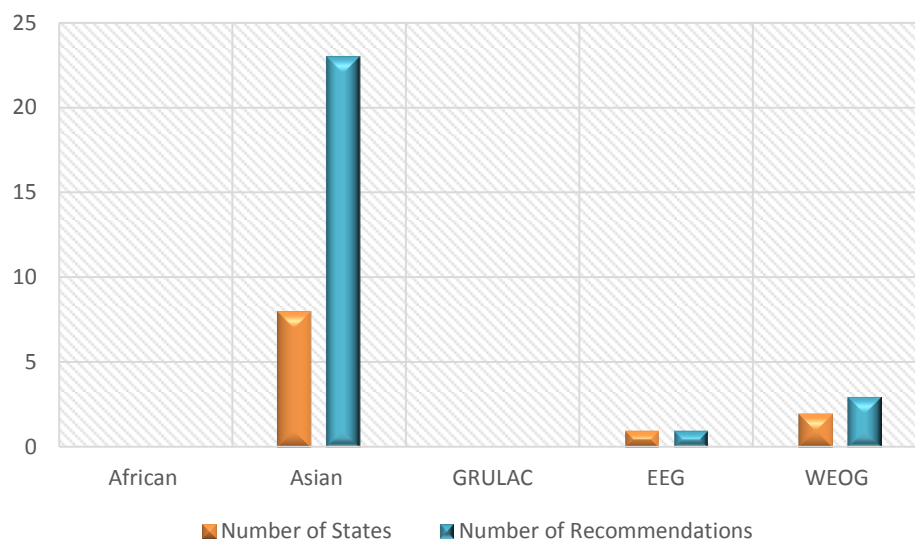


Figure 6.1. States under review that received recommendations on honour killing

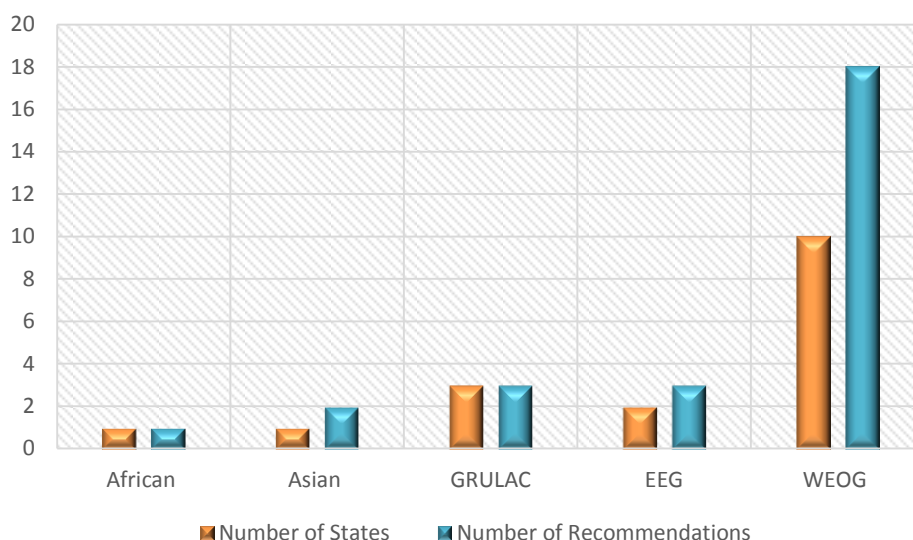


Figure 6.2. States under review that issued recommendations on honour killing

Looking at figure 6.1 and 6.2, there are two main points that can be noted. First, honour killing was predominantly raised during the reviews of the Asian group. However, states belonging to the Asian group itself issued one of the smallest numbers of recommendations. Second, states belonging to the African, GRULAC, EEG and WEOG all issued more recommendations than they received. In fact, honour killing was the only issue examined in this chapter whereby states from the African group received no recommendations.

A total of 27 recommendations were issued to states on honour killing. Of these, a total of 20 were accepted, and 7 were noted by the states under review. I have presented the states that accepted and noted the recommendations on honour killing in table 6.1 and 6.2, respectively.

Table 6.1 Recommendations on honour killings that were accepted

ACCEPTED	Regional Groups	No. of States	No. of Recommendations
	African	0	0
	Asian	3	16
	GRULAC	0	0
	EEG	1	1
	WEOG	2	3

Table 6.2 Recommendations on honour killing that were noted

NOTED	Regional Groups	No. of States	No. of Recommendations
	African	0	0
	Asian	5	7
	GRULAC	0	0
	EEG	0	0
	WEOG	0	0

Table 6.1 and 6.2 show that states belonging to the EEG and the WEOG all accepted the recommendations on honour killing. States belonging to the Asian group were the only states that noted the recommendations on honour killing. Thus, from this preliminary analysis, it can be observed that the disagreement in relation to the recommendations issued in relation to honour killing focused entirely in relation to states belonging to the Asian group. In the section below, I undertake a more detailed

analysis of the positions adopted by states when the issue of honour killing was the focus of discussions in the first cycle of the UPR process.

6.2.1.2. Nature of the dialogue on Honour Killing in the UPR process

The nature of the 27 recommendations that were issued to states on honour killing can be divided into 4 categories. I have summarised these categories in table 6.3.

Table 6.3 Categories of recommendations on honour killing

Recommendation	Summary of the nature of the recommendations/statements
1	Enact or Reform Laws on honour killing
2	Increase efficiency in the investigation and protection of the crime
3	Implement awareness-raising campaigns to eliminate honour killing
4	Recommendations of a generic nature

The nature of the responses made by the states under review when issued with a recommendation on honour killing can be divided into 6 categories, which have been summarised in table 6.4. The categories A1- A3 represent the positions adopted by the states under review when the recommendation was accepted, whilst the categories of N1- N3 summarise those positions when the recommendations were not accepted.

Table 6.4 Categories of responses on honour killing

Category	Summary of responses made by the state under review
A1	No further comments
A2	Laws have been amended/currently in place to prohibit honour killing
A3	No practice of ‘honour killing’ exist in the state
N1	No further comments
N2	Laws under review/already have been amended
N3	The recommendations were highly political in nature

In figure 6.3, I have provided a pictorial account of the nature of discourse held amongst states on honour killing. Following this, I will provide a detailed analysis of the discussions on honour killing held during state reviews in the first cycle of the UPR process.

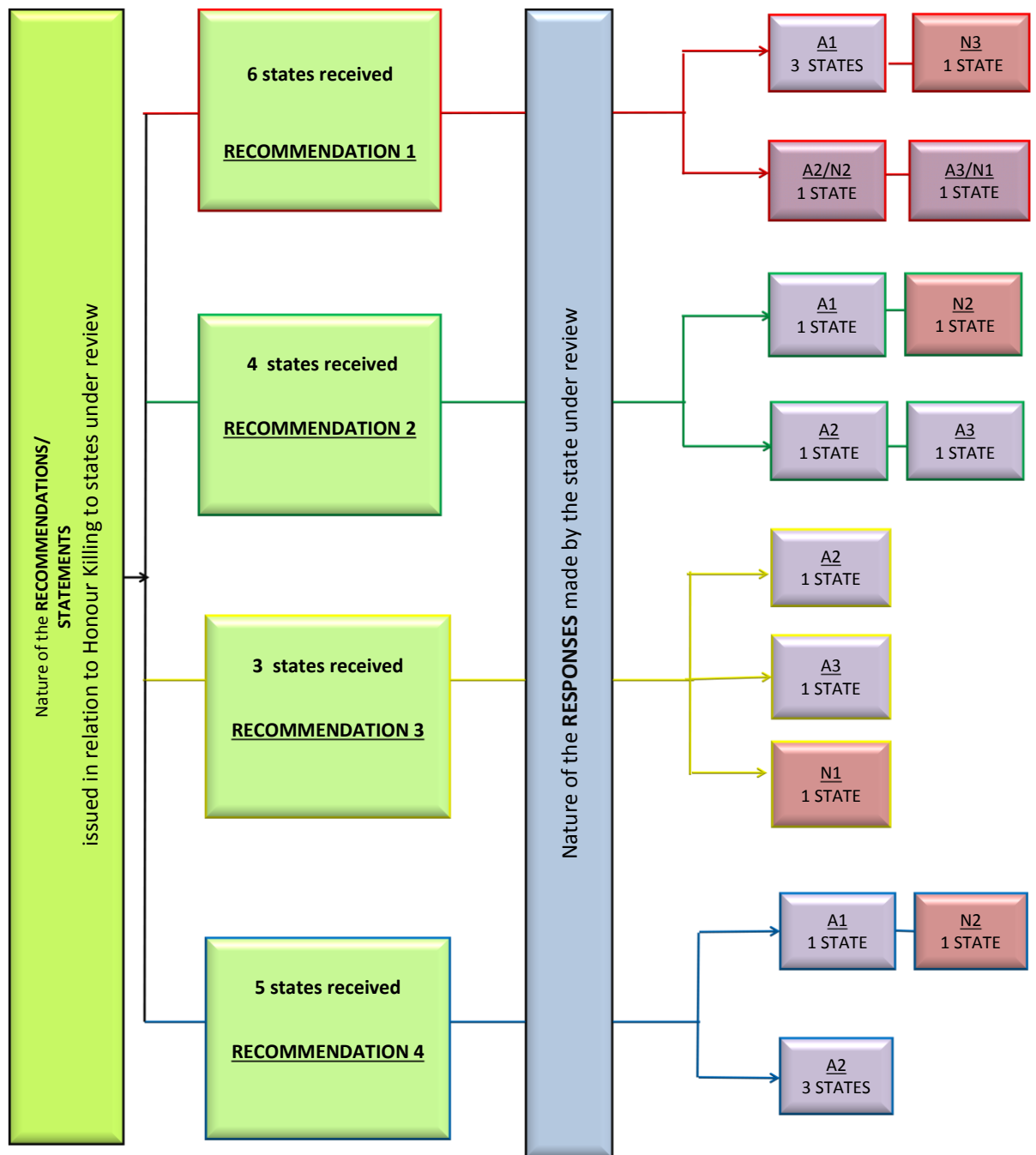


Figure 6.3. Nature of the dialogue held amongst states on the issue of honour killing

Recommendation 1: Enact or Reform Law on Honour Killings

Under this category of recommendations, observer states suggested that states under review should enact or reform domestic legislation to ensure that women are adequately protected against the crime of honour killings. An example of a recommendation issued under this category was when Austria suggested that Afghanistan should ‘enact legislation...to protect and promote women’s rights...especially with regard to...honour killings.’¹⁶ Some of the recommendations under this category were more detailed in nature, and required the states under review to make more specific reforms in relation to the crime. For example, Syria was issued with a recommendation by Canada to ‘remove mitigating factors from the punishment of “honour-crimes” against women’.¹⁷

A total of 6 states were issued with recommendations under this category. Of these, the states of Afghanistan, Yemen and Lebanon accepted the recommendation, but provided no further comments, therefore providing an A1 response.

On the other hand, the delegates of Jordan and Iraq adopted a slightly different position when responding to recommendations under this category. In the case of Iraq, it noted the recommendation by Spain to ‘amend the 128 Criminal Code which identifies the commission of an offence with honourable motive as a mitigating excuse’. The delegate of Iraq provided an N2 response, as the state explained that the ‘ministry was working towards the abolition of article 128 of the Penal Code, on mitigating factors for ‘honour crimes.’¹⁸ However, when Iraq was issued with a recommendation by Italy of a similar nature, this was accepted with an A2 response as it stated that laws had already been amended.¹⁹ Adopting a slightly different response, Jordan accepted the recommendation issued by Slovenia²⁰ and provided an A3 response, as it suggested that ‘concerning honor crimes, the law has been amended and that there is no such thing as “honour crimes” in Jordanian law.’²¹ The delegate continued that ‘criminal acts committed in the heat of passion are also declining owing to a collective effort’.²² However, when Italy issued a very similar recommendation under this category, Jordan noted it without any further explanations, and therefore provided an N1 response. This is surprising

¹⁶ UNHRC ‘Afghanistan’ (20 July 2009) A/HRC/12/9, para 39.

¹⁷ UNHRC ‘Syrian Arab Republic’ (24 January 2012) A/HRC/19/11, para 104.8

¹⁸ UNHRC ‘Iraq’ (15 March 2010) A/HRC/14/14, para 47.

¹⁹ Ibid, para 48.

²⁰ UNHRC ‘Jordan’ (3 March 2009) A/HRC/11/29, para 77.

²¹ Ibid. para 56.

²² Ibid

considering that the essence of the recommendations issued by Slovenia and Italy was the same, which was to ensure that perpetrators of honour killing did not benefit from a reduced penalty.

On the other hand, the delegate of Syria noted the recommendation issued to it under this category and provided an N3 response. The state explained that ‘the [recommendations] were not motivated by cooperation with a view to promoting and protecting human rights but by a desire to accuse and condemn Syria.’²³ In this way, whilst the Syrian delegate did not provide a direct explanation as to why a recommendation under honour killing was rejected, it provided a more general explanation for all the recommendations that were noted and insisted that the suggested reforms were political in nature.

Overall, it can be observed that the responses to recommendations issued under this category were either subdued or defensive. This is because the comments issued by the states under review either explained that the amendments to the domestic laws in relation to the issue had already been carried out, or that the crime of honour killing did not exist in the state.

Recommendation 2: Increase efficiency in the investigation and prosecution of the crime

Under this category of recommendation, the observer states insisted that the state under review should implement measures to ensure that perpetrators of honour killings were investigated and prosecuted appropriately. A typical example of a recommendation under this category was issued during the review of Albania, when Austria stated that it should ensure ‘effective investigation and prosecution of honour killings.’²⁴ In total, 4 states under review were issued with a recommendation of this nature.

In response, three states accepted the recommendations. The delegate of Albania provided an A1 response, as it accepted the recommendation without any further response. The delegate of Jordan also accepted the recommendation and provided an A3 response, as it stated that the law has been amended and that ‘honour killings’ do

²³ UNHRC ‘Report of the Working Group on the Universal Periodic Review Syrian Arab Republic: Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review’ (6 March 2012) A/HRC/19/11/Add.1, page 2.

²⁴ UNHRC ‘Report of the Working Group on the Universal Periodic Review: Albania’ (4 January 2010) A/HRC/13/6, para 21.

not exist.²⁵ When Iraq was issued with a recommendation under this category by Chile²⁶, it stated that laws had already been reformed in relation to honour killings.²⁷

Pakistan was the only state that noted a recommendation under this category. At the HRC plenary session, the delegate of Pakistan stated that reforms had been undertaken in relation to the issue as ‘the 2004 Criminal Law Act declared honor killings as ‘murder’.²⁸ In this way, the delegate of Pakistan noted the recommendation on the basis that reforms to the domestic law had already been undertaken, and therefore provided an N3 response. The statement issued by Pakistan states that honour killings were classified as ‘murder’ under domestic laws and therefore followed the same prosecution and investigation methods. It is notable here that Pakistan’s statement was strikingly similar to Jordan’s response, as both states have detached the ‘honour’ in the crime of ‘honour killing’, and instead classified such killings as an alternative form of homicide under domestic laws.

Overall, it can be observed that 3 out of 4 states that received recommendations under this category accepted the recommendations. Further, despite adopting different official positions, 2 out of 3 states in their responses insisted that laws in relation to honour killing were already in place.

Recommendation 3: Implement awareness-raising campaigns to eliminate honour killing

The essence of the recommendations issued under this category focused on implementing awareness-raising campaigns with the aim of eliminating honour killing. A typical example of a recommendation issued under this category was when Spain issued a recommendation to Iraq to ‘carry out an awareness raising campaign’ against killings ‘for reasons of honor’.²⁹

A total of 3 states under review were issued with a recommendation under this category. The delegate of Jordan accepted this recommendation and provided an A3 response, insisting that honour killings did not occur in the state.³⁰ Adopting a slightly

²⁵ UNHRC ‘Jordan’ (3 March 2009) A/HRC/11/29, para 56.

²⁶ UNHRC ‘Iraq’ (15 March 2010) A/HRC/14/14, para 71.

²⁷ UNHRC ‘Iraq’ (15 March 2010) A/HRC/14/14, para 48.

²⁸ UNHRC ‘Pakistan. Addendum’ (25 August 2008) A/HRC/8/42/Add.1, para 15.

²⁹ UNHRC ‘Iraq’ (15 March 2010) A/HRC/14/14, para 11.

³⁰ UNHRC ‘Jordan’ (3 March 2009) A/HRC/11/29, 56.

different position, when Turkey was issued with a recommendation under this category, it accepted the recommendation and stated that ‘honour killings were punished by aggravated life sentences.’³¹ In this way, Turkey highlighted the laws that were already in place to punish the perpetrators of the crime, and thus provided an A2 response. On the other hand, Iraq provided an N1 response as it noted the recommendation without any further comments.

Recommendation 4: Recommendations of a generic nature

Under this category of recommendations, observer states issued recommendations that simply raised the concern of honour killings, and suggested that the states should implement measures to eliminate such killings without providing any details as to the reform process. A typical example of a recommendation under this category is when Canada suggested that Oman should ‘put in place appropriate mechanisms to ensure effective protection of women exposed to...crimes in the name of honour’.³²

In response, 5 states under review were issued with a recommendation under this category. A total of 4 states accepted recommendations under this category. The delegate of Sweden accepted the recommendation and provided no additional explanations, thus providing an A1 response. The states of Pakistan,³³ Iraq³⁴ and Turkey³⁵ all accepted the recommendations under this category and all provided an A2 response as they referred to the legal provisions that were already in place to address the practice. On the other hand, Oman was the only state that noted a recommendation, and provided an N2 response, stating that in Omani society ‘such acts of violence were punishable under the Criminal Code and that appropriate remedies existed in the courts.’³⁶

Overall, it can be observed that when states were issued with a recommendation of a generic nature, 4 out of 5 responses by the states focused largely on the laws that were already in place to address honour killings. In this way, there was no substantial outcome from the states being reviewed in the UPR process when issued with recommendations under this category in relation to honour killing.

³¹ UNHRC ‘Turkey’ (17 June 2010) A/HRC/15/13, para 39.

³² UNHRC ‘Oman’ (24 March 2011) A/HRC/17/7, para 90.36.

³³ UNHRC ‘Pakistan. Addendum’ (25 August 2008) A/HRC/8/42/Add.1, para 15.

³⁴ UNHRC ‘Iraq’ (15 March 2010) A/HRC/14/14, para 48.

³⁵ UNHRC ‘Turkey’ (17 June 2010) A/HRC/15/13, para 49.

³⁶ UNHRC ‘Oman’ (24 March 2011) A/HRC/17/7, para 39.

6.2.3. Discussion on the findings of Honour Killing held in the first cycle of the UPR process

The fundamental finding that emerged from the discussions held in the first cycle was that states adopted a position which indicated a lack of appreciation of the cultural conceptualisation of honour killings. The majority of the discussions on honour killing focused on the domestic legislation that was in place against such killings. For instance, of the 11 observer states that issued recommendations on honour killing, 6 states focused entirely on making suggestions to enact or amend legal provisions against honour killing. Similarly, 9 out of the total 11 states under review responded to recommendations on honour killing by providing details of the legislative provisions in place to protect women against honour killing. In this way, the majority of the discussions held amongst states focused on the domestic legal provisions in relation to honour killings.

The primary focus on enacting legislative provisions against honour killings has been criticised by An-Na'im. He writes that a focus on legislation and prosecution of perpetrators in addressing honour killings is limited to being 'reactive to violations that have already been committed by the action or omission of officials of the state, rather than proactive to pre-empt their happening in the first place.'³⁷ To the contrary, he suggests that legislative provisions against honour killing should be one amongst many strategies and policies in place to prevent the crime from occurring in the first place.³⁸ However, contrary to these suggestions in the literature, the findings of the investigation for honour killings show that the majority of the discussions held amongst states have focused entirely on the legislative response to honour killings.

The implications of states' focus on legislative matters in relation to honour killing during reviews is that it tends to restrict discussions on the fundamental reasons why such killings are undertaken in the first place. For instance, it is clear that honour killings can be distinguished from other forms of homicide on the basis that perpetrators' motivation to kill is fundamentally based on the female victim defiling the family honour through her actions.³⁹ Further, the very notion of honour is culturally

³⁷ Abdullahi Ahmed An-Na'im, 'The role of "community discourse" in combating "crimes of honour": preliminary assessment and prospects' in Lynn Welchman and Sara Hossain (eds), *"Honour": Crimes, Paradigms, and Violence against Women* (Zed Books, 2005) 70, 71.

³⁸ Ibid 71.

³⁹ See G M Kressel, 'Sororicide/filiacide: Homicide for family honour' (1981) 22 *Current Anthropology* 141-158.

conceptualised so as to exercise control over a woman's sexuality and behaviour.⁴⁰ However, no states during the discussions on honour killing expressly recognised this inherent association between culture and the reasons why perpetrators undertake killings of female victims. In addition, no states raised the culturally conceptualised notion of honour that underpins the motivation and justification of the crime, as an area that required attention and implementation of reforms to prevent the practice from occurring in the first place.⁴¹ In fact, it is notable that Jordan⁴² and Pakistan⁴³ during their reviews went to the extent of explaining that honour killings were classified as 'murder' or killings 'due to heat of passion' in the domestic legislative provisions. In this way, both states expressly underplayed the gravity of the culturally conceptualised notion of 'honour' in such killings, which often motivates the perpetrators of such crimes. In a more implicit form, the states of Oman and Turkey insisted that existing laws can be used to address the crime of honour killing. In this way, states have, explicitly or implicitly, detached the honour from honour killing during state reviews by explaining that such crimes are addressed using other more generic homicide laws.

The lack of reference to the culturally conceptualised notion of 'honour' is problematic as it indicates that there is little discussion amongst states to implement reforms to discourage attitudes that motivate the perpetrators to undertake the crime in the first place. For instance, An-Na'im explains that no strategy for combating the crime of honour killing can be sustained over a period of time 'without the consent and cooperation of the communities in question', and in fact, purely coercive messages to prevent and punish the crime may be counterproductive and futile.⁴⁴ For this reason, An-Na'im suggests a community discourse approach as a method to transform family and community attitudes in relation to the crime of honour killings.⁴⁵ This is carried out by engaging in a clear strategic approach to address the difficulties surrounding the issue of honour killing by implementing appropriate local plans and policies amongst

⁴⁰ Recep Dogan, 'Different cultural understandings of honor that inspire killing: An enquiry into the defendant's perspective' *Homicide Studies* (2014) 12 <<http://hsx.sagepub.com/content/early/2014/03/12/1088767914526717>> accessed 31st August 2015.

⁴¹ See also C Watts and C Zimmerman, 'Violence against Women: Global Scope and Magnitude' (2002) 359 *Lancet* 1232; Lisa Aronson Fontes and Kathy A McCloskey, 'Cultural Issues in Violence against Women' in C.M Renzetti, J L Edleson and R K Bergen (eds) *Sourcebook on Violence against Women* (2nd edition, Sage Publications) 162-164.

⁴² UNHRC 'Report of the Working Group on the Universal Periodic Review: Jordan' (3 March 2009) A/HRC/11/29, para 56.

⁴³ UNHRC 'Pakistan. Addendum' (25 August 2008) A/HRC/8/42/Add.1, para 15.

⁴⁴ Abdullahi Ahmed An-Na'im, 'The role of "community discourse" in combating "crimes of honour": preliminary assessment and prospects' (n37) 73.

⁴⁵ *Ibid* 72.

various actors of the community to change and to combat this crime.⁴⁶ The local individuals already have the necessary access, knowledge and credibility to engage in an internal discourse about the issue of honour killing.⁴⁷

However, contrary to the suggestions of An-Na'im, the findings of the discussions on honour killing in the UPR process reveal that observer states have largely overlooked the significance of implementing reform strategies to change the attitudes that may contribute to the continuance of females being subject to honour killing. In fact, recommendations issued under category 3 were the only form of suggestions that did not centre on the legislations, investigation and prosecution of honour killing. The delegates of Spain, Mexico and the Czech Republic issued recommendations that encouraged states to engage in an awareness-raising campaign against killings based on honour. This was the only instance whereby observer states adopted positions during state reviews which indicated a recognition that some values and beliefs adopted by communities contributed to perpetuating the crime of honour killings against women. However, it is notable that the states of Iraq, Jordan and Turkey, who were issued with recommendations under the third category, all responded by focusing on the legal aspect of honour killings.

Overall, it can be observed that the majority of the discussions held on honour killing focused on the domestic legal provisions in place to ensure perpetrators of the crime were appropriately punished. As discussed above, I argue that the implication of this has been that states have implicitly, and occasionally explicitly, detached the cultural significance of honour from the crime of honour killing. This lack of appreciation of the cultural significance of the crime has resulted in the underlying motivation of the crime, based on a culturally conceptualised notion of honour, not being addressed during state reviews.⁴⁸ In this way, the lack of appreciation of the moderate cultural relativist position amongst states on the issue of honour killing has resulted in the discussions being restricted to providing legislative responses, rather than discouraging and reforming the cultural attitudes that motivates such crimes in the first place.

⁴⁶ Ibid 74.

⁴⁷ Ibid 76.

⁴⁸ UN Commission on Human Rights, 'Integration of the Human Rights of Women and the Gender Perspective Violence Against Women Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy' (March 1999) E/CN.4/1999/68, para 18.

6.3. Women's Rights protection against Marital Rape as discussed in the UPR process

6.3.1 Contextualising Women's Rights protection against Marital Rape

For the purposes of this investigation, marital rape is defined as any unwanted intercourse or penetration (vaginal, anal or oral) that is obtained by coercion, threat of force, or when the wife is unable to consent.⁴⁹ Whilst there is no international human rights norm that directly addresses marital rape, the issue has been addressed through jurisprudence on sexual violence against women.⁵⁰ For instance, the Committee on the Women's Convention in its General Recommendation 12 has confirmed that state parties should take measures to prevent sexual violence against women, which includes marital rape.⁵¹ Providing further clarification, UN treaty bodies and the Committee on the Women's Convention have stated that traditional and cultural attitudes should not be invoked to avoid obligations to eliminate sexual violence against women.⁵²

Despite the repeated declarations at international level of state obligations to protect women from marital rape, there was evidence of a disagreement amongst states during reviews on how, and indeed if, protection against marital rape should be provided. For instance, in the UPR process 17 of the total 44 recommendations were noted by states under review. The perception of marital rape being considered as a lesser crime, or in the worst case no crime at all, is often grounded in the notion that the consent of the wife to any sexual contact is presumed.⁵³ The First World Report on Violence and Health by the World Health Organisation notes that in a number of societies, 'women, as well as men, regard marriage as entailing the obligation on women to be sexually

⁴⁹ R K Bergen, *Wife rape: Understanding the response of survivors and service providers* (SAGE Publications, 1996) 11-36; M Pagelow, 'Adult victims of domestic violence' (1992) 7 *Journal of Interpersonal Violence*, 87.

⁵⁰ UN Committee on the Elimination of Discrimination Against Women, 'CEDAW General Recommendation No. 12: Violence against women' (1989); UN Committee on the Elimination of Discrimination Against Women, 'CEDAW General Recommendation No. 19, Violence against women' (1992), para 24 (b).

⁵¹ UN Committee on the Elimination of Discrimination Against Women, 'CEDAW General Recommendation No. 19, Violence against women' (1992), para 24 (e); UN General Assembly, 'Eliminating rape and other forms of sexual violence in all their manifestations, including in conflict and related situations : report of the Secretary-General' (4 August 2008) A/63/216, para 4.

⁵² UN Committee on the Elimination of Discrimination Against Women, 'CEDAW General Recommendation No. 19, Violence against women' (1992), para 24 6(b) (e); See also, UNGA, 'Report of the Fourth World Conference on Women, Beijing' (4-15 September 1995) Sales No. E.96.IV.13, para. 124 (a), article 4.

⁵³ See L R Eskow, L.R, 'The ultimate weapon? Demythologizing spousal rape and reconceptualizing its prosecution' (1996) 48 *Stanford Law Review* 677.

available virtually without limit.’⁵⁴ Therefore, the presumption of the wife’s consent is often influenced by cultural norms, social conditions and rules that determine the attitudes in relation to sex in a given society, which ultimately mould the structure of the sexual behaviour of men towards women and the acceptability of sexual violence within a marriage.⁵⁵ This inherent association between culture and marital rape, whereby aspects of cultural attitudes and socialisation contribute to the perpetuation and tolerance of marital rape, is one of the primary reasons why the issue of marital rape has been selected as the focus for this investigation.

The brief introduction above provides an indication of how values and attitudes that are embedded in culture often contribute to influencing the perpetuation and tolerance of marital rape. The primary aim of this section is to assess whether, and to what extent, states introduce arguments from a cultural relativist position in the discussions on marital rape during state reviews.

6.3.2. Findings on Marital Rape as discussed in the UPR process

6.3.2.1. An Overview of the Findings on Marital Rape

During the first cycle of the UPR process, concerns in relation to marital rape were raised during the reviews of 29 member states. A total of 44 recommendations were issued to states on marital rape. In figure 6.4, I have categorised the states that received recommendations on marital rape according to regional groups. Figure 6.5 shows the number of states that issued recommendations on marital rape according to regional groups.

⁵⁴ See Peggy Reeves Sanday, ‘The Socio-Cultural Context of Rape: A Cross-Cultural Study’ (1981) 37 *Journal of Social Issues* 5; C Renzetti, J Edleson, Jeffrey, and R K Bergen, *Sourcebook on Violence Against Women* (2nd edn, Sage Publications 2010) 155.

⁵⁵ Owen D. Jones, ‘Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention’ (1999) 87 *Cal. L.R.* 827, 840 (1999). See also Peggy Reeves Sanday, ‘The Socio-Cultural Context of Rape: A Cross-Cultural Study’ (1981) 37 *Journal of Social Issues* 5; C Renzetti, J Edleson, Jeffrey, and R K Bergen, *Sourcebook on Violence Against Women* (2nd edn, Sage Publications 2010) 155.

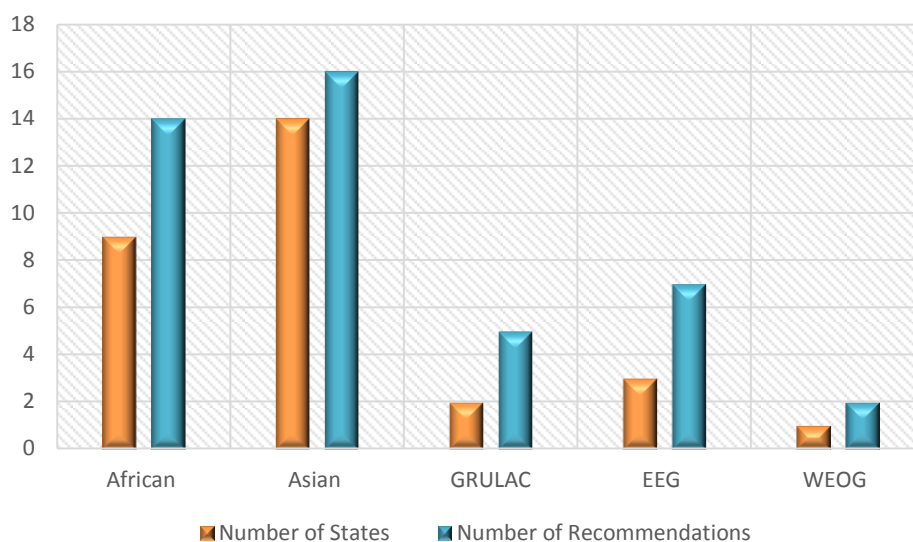


Figure 6.4 States under review that received recommendations on marital rape

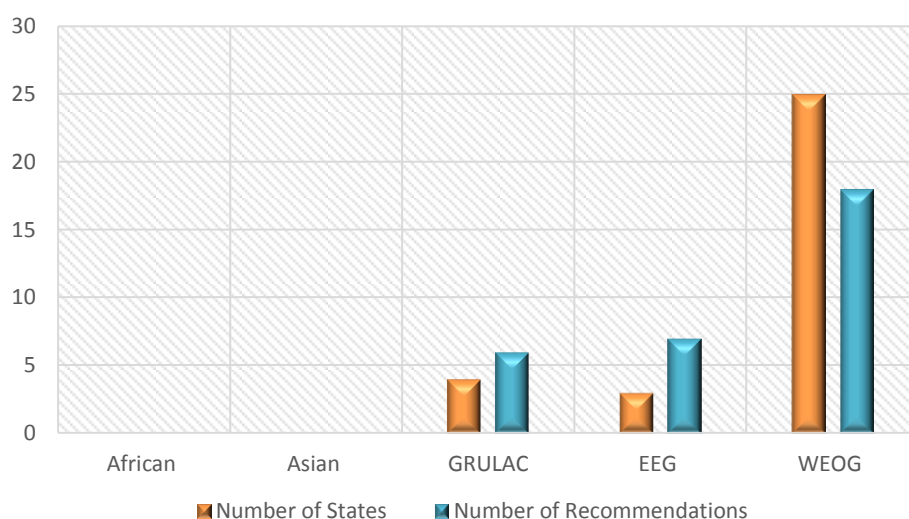


Figure 6.5 Observer states that issued recommendations on marital rape

The first point that can be noted from figure 6.4 and 6.5 is that recommendations on marital rape were issued to states from all 5 regional groups of the UN. However, states belonging to the African, Asian and GRULAC groups all received more recommendations on marital rape than they issued. In fact, no states from the African and Asian groups issued any recommendations on the issue, despite the states from the two groups receiving the highest number of recommendations. On the other hand, states belonging to the EEG and WEOG issued more recommendations on marital rape than they were themselves subject to.

In response to the 44 recommendations that were issued to states on marital rape, a total of 27 recommendations were accepted, and 17 were noted by the states under review. I have presented data on the states that accepted and noted recommendations in table 6.5 and 6.6, respectively. I have categorised the states according to regional groups.

Table 6.5 Recommendations on marital rape that were accepted

ACCEPTED	Regional Groups	No. of States	No. of Recommendations
	African	6	11
	Asian	7	7
	GRULAC	1	2
	EEG	2	5
	WEOG	1	2

Table 6.6 Recommendations on marital rape that were noted

NOTED	Regional Groups	No. of States	No. of Recommendations
	African	3	3
	Asian	7	9
	GRULAC	1	3
	EEG	1	2
	WEOG	0	0

From table 6.5 and 6.6, it can be observed that aside from the states belonging to the WEOG, states from all the other 4 regional groups noted recommendations issued on marital rape. The tables show that whilst recommendations on marital rape were largely issued to states belonging to the African group, the majority of them accepted the recommendations. Disagreement in relation to the recommendations issued on marital rape was largely expressed by states from the Asian group, as over half of the recommendations issued were noted by states. In the sections below, I undertake a more detailed analysis of the nature of positions adopted by states when the issue of marital rape was raised during state reviews.

6.3.2.2. Nature of the dialogue on Marital Rape as discussed in the UPR process

The 44 recommendations that were issued by observer states on marital rape can be divided into 2 categories. I have summarised each category in table 6.7 below.

Table 6.7 Categories of recommendations on marital rape

Recommendation	Summary of the nature of the recommendations/statements
1	Enact/amend/reform legislation so that marital rape is a crime
2	Generic Recommendations on marital rape

The nature of the responses provided by the states under review when issued with recommendations on marital rape can be divided into a total of 8 categories, which have been summarised in table 6.8 below.

Table 6.8 Categories of responses on marital rape

Category	Summary of responses made by the state under review
A1	No further comments
A2	Domestic laws against marital rape are already in place
A3	Marital rape does not exist
N1	No further comments
N2	Domestic laws already prohibit rape
N3	Prohibiting marital rape is contrary to the constitution
N4	Prohibiting marital rape is contrary to the culture/traditions of the state
N5	Domestic law does not recognise marital rape

In figure 6.6, I provide a pictorial account of the nature of discussions held between states on marital rape using the letters and numbers of the categories as provided in table 6.7 and 6.8 above.

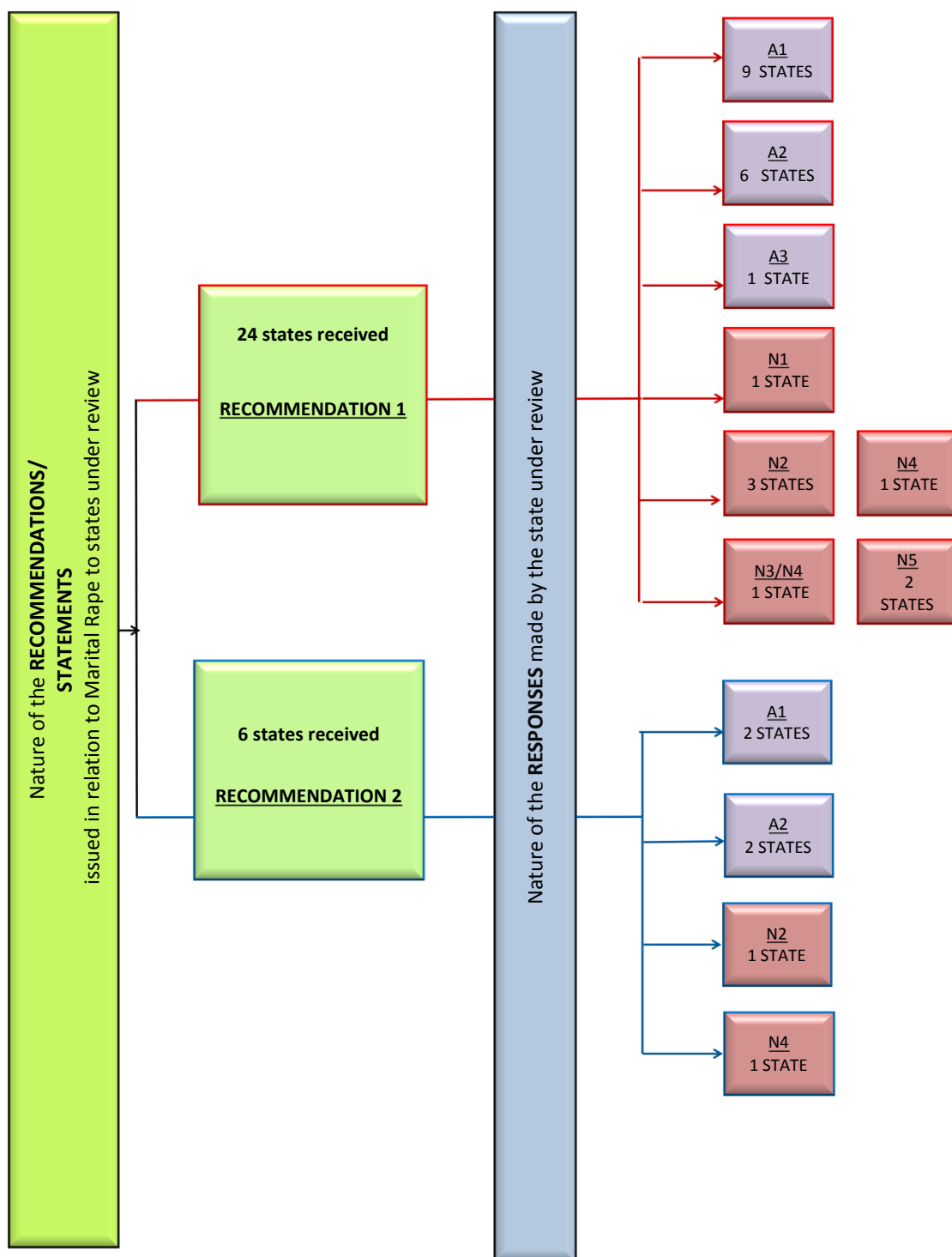


Figure 6.6 Nature of the dialogue held amongst states on the issue of marital rape.

Recommendation 1: Enact/amend/reform legislation so that marital rape is a crime under domestic law

Under the first category of recommendations, observer states suggested that states under review should enact or undertake reforms of domestic laws on marital rape. A typical example of this recommendation was during the review of the United Arab Emirates (UAE) when the delegate of Slovenia issued a recommendation to ensure ‘legislative sanctioning of marital rape’.⁵⁶ In other cases, observer states suggested reforms to domestic laws so as to ensure that perpetrators of the crime were not granted any form of reduction in penalties. A typical example of this is when the delegate of Belgium issued a recommendation to Denmark ‘to remove from the penal code...any references to marital relations between victims and perpetrators of offences, in order to ensure that there is no impunity in cases of marital rape’.⁵⁷ In total, 26 states under review were issued with recommendations to enact or reform laws so that the crime of marital rape was criminalised, or perpetrators punished without immunity.

In response, a total of 16 states accepted and 10 states noted the recommendations. Of those states that accepted, a total of 9 states accepted without any further comments, therefore providing an A1 response. These include: Guinea,⁵⁸ Laos,⁵⁹ Madagascar,⁶⁰ Pakistan,⁶¹ Congo,⁶² Togo,⁶³ Tuvalu,⁶⁴ Uruguay⁶⁵ and the Solomon Islands.⁶⁶ On the other hand, 6 states provided an A2 response, whereby the state under review explained that domestic legal provisions criminalising marital rape were already in place. A typical example of this response was provided by Hungary in response to a recommendation by the Netherlands who stated that ‘spousal rape is punishable since 1997’.⁶⁷

⁵⁶ UNHRC ‘United Arab Emirates’ (12 January 2009) A/HRC/10/75, para 74(c)

⁵⁷ UNHRC ‘Denmark’ (11 July 2011) A/HRC/18/4, para 106.36.

⁵⁸ UNHRC ‘Hungary’ (11 July 2011) A/HRC/18/17, para 73.39

⁵⁹ UNHRC ‘Slovenia’ (15 March 2010) A/HRC/14/15, para 98.23.

⁶⁰ UNHRC ‘The Netherlands’ (13 May 2008) A/HRC/8/31, para 41.

⁶¹ UNHRC ‘Canada’ (3 March 2009) A/HRC/11/17, para 23.

⁶² UNHRC ‘Report of the Working Group on the Universal Periodic Review: The Netherlands’ (13 May 2008) A/HRC/8/31, para 18.

⁶³ UNHRC ‘Brazil’ (22 May 2008) A/HRC/8/27, para 100.61

⁶⁴ UNHRC ‘France’ (3 June 2008) A/HRC/8/47, para 44.

⁶⁵ UNHRC ‘Portugal’ (4 January 2010) A/HRC/13/10, para 61.

⁶⁶ UNHRC ‘United States of America’ (4 January 2011) A/HRC/16/11, para 80.3.

⁶⁷ UNHRC ‘Report of the Working Group on the Universal Periodic Review: Hungary, Addendum Views: on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review’ (14 September 2011) A/HRC/18/17/Add.1, page 4.

Adopting a slightly different position, the delegate of Yemen in its response stated ‘what the recommendation calls “spousal rape” does not exist.’ It then went on to state that ‘all marriages are concluded based on consent between the two partners, and a wife who wishes to separate from her husband on her own motion is entitled to file for divorce and for dissolution of the marriage in accordance with the Islamic sharia and the applicable Personal Status Act.’⁶⁸ In this way, whilst Yemen had accepted the recommendation, the state refused to accept the notion of ‘spousal rape’. The responding statement that emphasised the option for women to file for divorce, gives reason to suggest that Yemen was indicating that it does not *recognise* the possibility of marital rape, rather than challenging its existence. From this response, it can be implied that Yemen will only recognise rape once the marriage has been dissolved, and not within a marriage. This shows that whilst Yemen accepted the recommendation to enact laws against marital rape, a closer examination of the state’s explanation during the dialogue reveals that its position is contrary to its official position. In addition, it is notable that this potentially controversial explanation in response to this recommendation was provided in the HRC plenary session, rather than at the interactive dialogue stage, where Yemen had officially accepted the recommendation.

On the other hand, of the 10 states that noted the recommendation, the state of Mauritius provided an N1 response. The states of Kuwait,⁶⁹ Eritrea and Malaysia⁷⁰ all noted the recommendations issued to them and provided an N2 response, as they explained that domestic laws in relation to rape already existed. A typical example of this response was provided by Eritrea who stated that ‘the delegation did not believe that rape was a widespread problem either. Criminal provisions relating to rape and sexual abuse are severe.’⁷¹ What is notable is that all three states under review, in their responses, made references to existing domestic laws on rape, rather than directly address the recommendation to adopt specific legislation to criminalise marital rape. In this way, the 3 states under review noted the recommendations on the grounds that existing generic laws in relation to rape already existed.

⁶⁸ UNHRC ‘Yemen: Addendum’ (23 September 2009) A/HRC/12/13/Add.1, page 4.

⁶⁹ UNHRC ‘Kuwait’ (16 June 2010) A/HRC/15/15, para 78.

⁷⁰ UNHRC ‘Malaysia’ (3 March 2009) A/HRC/11/30, page 5.

⁷¹ UNHRC ‘Eritrea’ (4 January 2010) A/HRC/13/2, para 51.

When the delegate of the United Arab Emirates (UAE) was issued with a recommendation to criminalise marital rape, it provided a combined N3/N4 response.⁷² At the HRC plenary session, it stated that it rejected a number of recommendations, which included marital rape, because it perceived ‘the working group report as being in direct contradiction with the Constitution, religious code, traditional values and national interest, and hence did not enjoy the country’s support’.⁷³ In this way, the delegate challenged the reforms to domestic laws to criminalise marital rape as it was contrary to the Constitution and the traditional values and religious norms of the country. On the other hand, providing an N4 response, the delegate of Brunei Darussalam stated that ‘with regard to sexual-related matters...[the state] re-iterated that the core value of Brunei Darussalam society was the family institution. Tradition and cultural factors also played an important role.’⁷⁴ From this statement it can be observed that the delegate of Brunei Darussalam emphasised the significant role traditional and cultural factors played in relation to the underlying foundations of the basic unit of society.

Adopting a slightly different position, the states of Singapore and the Bahamas provided an N5 response, as both explicitly or implicitly stated that marital rape was not recognized in the domestic laws of the state, and on this basis, noted the recommendations. For example, the delegate of the Bahamas stated that:

Bahamian law does not recognize marital rape if a marriage subsists and the couple cohabit in a marital home. Bahamian law recognizes rape as a crime where a married couple are separated but not where the marriage has not been dissolved.⁷⁵

Therefore, rather than explain why the Bahamas refused to enact legislation criminalizing marital rape, it noted the recommendations and expressly stated that domestic laws do not recognize marital rape. In a more implicit manner, the state of Singapore in its response noted the recommendation to criminalize marital rape and explained that ‘changes had recently been made to the Penal Code to protect women whose marriages were on the verge of breakdown or had broken down.’⁷⁶ This statement indicates that the state of Singapore provides protection for victims where the

⁷² UNHRC ‘United Arab Emirates’ (12 January 2009), para 74 (c).

⁷³ UNHRC ‘Report of the Human Rights Council on its tenth session’ (9 November 2009) A/HRC/10/29, para 429.

⁷⁴ UNHRC ‘Brunei Darussalam’ (4 January 2010) A/HRC/13/14, para 84.

⁷⁵ UNHRC ‘Bahamas’ (7 January 2009) A/HRC/10/70, para 9.

⁷⁶ UNHRC ‘Singapore’ (11 July 2011) A/HRC/18/1, para 48.

marriage has broken down. However, that state continues to deny protection against victims of marital rape where the commitment within a marriage has not been questioned.

Overall, it can be observed that when the issue of marital rape was raised during state reviews, the nature of the majority of the recommendations was in relation to domestic legal protection to ensure marital rape was prohibited. In response, whilst the majority of the states accepted the recommendations, there was reason to question this apparent consensus amongst states. This is because 10 out of 24 states accepted the recommendations with an A1 response. The implications of this are that it is not possible to assess when and how the laws will be implemented. In addition, a total of 6 states insisted that laws were already in place to criminalise marital rape, whilst Yemen's response indicated that the state did not recognise marital rape. This shows that whilst the majority of the states accepted the recommendation on marital rape, there were no concrete outcomes from the state reviews on marital rape, as no states agreed to adopt reforms as a result of concerns on marital rape being raised during the review. On the other hand, those states that noted the recommendations used the notion of traditions and culture to challenge the suggested reforms, and in the case of the Bahamas and Singapore, simply asserted that domestic laws did not recognise marital rape.

Recommendation 2: Generic Recommendations

The second category of recommendations can be described as more generic in nature. This is because the observer states suggested that the states under review should undertake measures to address marital rape, without any specific details of how this task should be undertaken. In other words, no references were made to international obligations or reforms to domestic laws when issuing suggestions of reforms on marital rape. A typical example of this recommendation was when the United Kingdom issued a recommendation to Armenia 'to step up its efforts to protect women and girls from sexual violence in marriage'.⁷⁷ A total of 6 states were issued with a recommendation of this nature.

⁷⁷ UNHRC 'United Republic of Tanzania' (8 December 2011) A/HRC/19/4, para 85.62 and 86.36.

In response, 4 states accepted the recommendation, whilst 2 states noted them. Of those states that accepted the recommendation, Guinea and Somalia provided an A1 response, as neither provided an explanation for the position adopted. The states of Armenia and Hungary⁷⁸ provided an A2 response, as they insisted that current laws already prohibited marital rape. For example, the state of Armenia insisted that ‘all types of violence...including marital rape...are considered criminal offenses in the Criminal Code of Armenia and are punishable by law.’⁷⁹

On the other hand, the states of Tanzania and Oman noted the recommendations under this category. The delegate of Oman issued an N2 response, as it stated that cases of ‘sexual violence are prohibited by legislation currently in force in Oman and are classified as criminal offences under the Omani Criminal Code.’⁸⁰ On the other hand, the delegate of Tanzania, during the interactive dialogue stage, began by providing a similar response as it insisted that ‘Penal Code Cap 16 of the laws and the Sexual Offences Special Provisions Act criminalizes ...rape.’⁸¹ However, at the HRC plenary session, the delegate provided that:

Tanzania did not accept any importation of the concept of marital rape embedded therein. Because of the diverse opinions and issues, the question of introducing marital rape for married couples requires a wider and culturally sensitive debate.⁸²

Therefore, at the HRC plenary session, the delegate expressly stated that it noted any importation of marital rape in its general laws against rape. Therefore, Tanzania used the notion of culturally embedded values of the state to challenge suggestions to provide protection against marital rape for women. In this way, the delegate provided an N4 response.

Overall, it can be observed that 3 out of the 6 states that were issued with a recommendation under this category referred to existing laws already in place to protect women from marital rape. Moreover, the state of Tanzania used culture as a foundation to challenge the suggested reforms to offer protection against marital rape for women.

⁷⁸ UNHRC ‘Hungary’ (11 July 2011) A/HRC/18/17, page 4.

⁷⁹ UNHRC ‘Armenia: Addendum Views’ (13 September 2010) A/HRC/15/9/Add.1, para 21.

⁸⁰ UNHRC ‘Oman, Addendum’ (3 June 2011) A/HRC/17/7/Add.1, page 6.

⁸¹ UNHRC ‘United Republic of Tanzania: Addendum’ (12 March 2012) A/HRC/19/4/Add.1.

⁸² UNHRC ‘Report of the Human Rights Council on its nineteenth session’ (24 May 2013) A/HRC/19/2, para 382.

6.3.3. Discussion on the findings of Marital Rape in the first cycle of the UPR process

There are two fundamental findings that emerged from the nature of discussions held on marital rape. The first finding was that states under review were willing to challenge the international human rights standards on marital rape during their reviews, albeit on different grounds. The first form of challenge was expressed by the states UAE, Brunei Darussalam and Tanzania, who all noted the recommendations to criminalise marital rape or adopt measures to provide protection against it. In all three responses, the states drew upon cultural and traditional factors to challenge the suggested reforms to provide protection against marital rape for women. For instance, the delegate of the UAE stated that the acceptance of the recommendation is in direct contradiction to the cultural values of the state and therefore noted the recommendation.⁸³ Similarly, the delegates of Brunei Darussalam⁸⁴ and Tanzania⁸⁵ explained that they could not accept the recommendations as cultural and traditional values of the state played an important role in regulating marital rape. In this way, the states challenged the international human rights standards on marital rape on the basis that culture and traditional values of the states do not comply with embedding marital rape as a criminal offence. I argue that the positions adopted by the three states resonate with the strict cultural relativist position, as states have used the cultural norms of the state to assess the validity of international standards on marital rape. Thus, the states challenged the universality of international standards on marital rape by expressly introducing arguments from a strict cultural relativist perspective.

The second form of challenge was expressed by Yemen, Singapore and the Bahamas, who expressly or implicitly challenged reforms to amend domestic legislative provisions to recognise marital rape. Whilst the official position between the three states differed, the essence of the responses provided was remarkably similar. All three states, implicitly⁸⁶ or explicitly,⁸⁷ did not recognise marital rape. The responses by the three states make it clear that whilst rape is protected outside the institution of marriage, rape within marriage is not protected. The positions of 3 states expressed in the UPR

⁸³ UNHRC 'Report of the Human Rights Council on its tenth session' (9 November 2009) A/HRC/10/29 para 429.

⁸⁴ UNHRC 'Brunei Darussalam' (4 January 2010) A/HRC/13/14, para 84.

⁸⁵ UNHRC 'United Republic of Tanzania, Addendum' (12 March 2012) A/HRC/19/4/Add.1, paragraph 382.

⁸⁶ UNHRC 'Yemen' (5 June 2009) A/HRC/12/13, para 48.

⁸⁷ UNHRC 'Bahamas' (7 January 2009) A/HRC/10/70, para 9.

process can be explained by using the highly criticised public and private distinction in relation to providing women's rights protection.⁸⁸ Traditionally, the public sphere includes those issues and concerns where the government has responsibility to take action; in contrast, the government refrains from interfering with issues in the private sphere.⁸⁹ The artificial divide between the public and private sphere has been criticised for denying protection by the state against the violations and oppressions women suffer in the private sphere.⁹⁰ In the UPR process, the Bahamas, Singapore and Yemen have implicitly adopted the public and private framework to deny protection for victims that are subject to marital rape. This is because protection against rape is only provided if it is undertaken outside the marriage institution, but not within it.

The fundamental implication of states challenging reforms to recognise marital rape on the grounds of cultural relativism and national sovereignty was linked to the fact that no observer states held the states under review to account for their positions. In addition, aside from the delegates of Yemen and the UAE, the 5 other states that made express challenges to the reforms on marital rape during the interactive dialogue sessions. This means that observer states did have an opportunity to hold the states accountable for their statements, as opposed to the UAE and Yemen, who made such challenges in the HRC plenary session, where observer states were subject to time constraints. The problem with this is that the 5 states under review have challenged the international norms on marital rape on an international forum such as the UPR process, without any ramifications. In addition, for the 5 states that challenged reforms to recognise marital rape, there were no agreed commitments to improve the rights of women in relation to marital rape which emanated from the UPR process. This is problematic because it undermines one of the fundamental objectives of the UPR process, which is to promote universality of international human rights norms by protecting and furthering the international human rights norms through the monitoring of states' human rights records. This gives an indication as to the nature of the UPR process as observer states

⁸⁸ Hilary Charlesworth, 'Human Rights as Men's Rights' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspective* (Routledge 1995) 106-110. See also section 2.3.4.

⁸⁹ Berta Esperanza Hernandez-Truyol, 'Human Rights through a Gendered Lens: Emergence, Evolution, Revolution' in Kelly D Askin and Doreen M Koenig (eds) *Women and International Human Rights Law* (Volume 1, Transnational Publishers Inc, 1999) 32.

⁹⁰ Lucinda Joy Peach, 'Are Women Human? The Promise and Perils of "Women's Rights as Human Rights"' in Lynda Bell, Andrew Nathan and Ilan Peleg (eds) *Negotiating Culture and Human Rights* (Columbia University Press, 2001) 159.

seem to remain subdued when the universality of norms in relation to marital rape were challenged.

The second significant finding that emerged from the discussions held on marital rape was that the majority of the discussions held in relation to marital rape focused on the domestic legal provisions in relation to marital rape. For instance, 24 states under review (out of the total 30) received recommendations to enact domestic legal provisions to ensure protection was provided by the states under review. When responding to recommendations, 12 (out of the 29) states under review simply pointed to the existing legal provisions on marital rape during their state reviews. The problem with the nature of the positions adopted by states, which focused entirely on the legislative provisions on marital rape, is that states have not agreed any additional policies or programme of action that is to be adopted to prevent the crime of marital rape from occurring in the first place.

It was striking to note, that no observer states in their recommendations sought to initiate discussions on reforms to be undertaken to tackle the presumptions of woman's consent to sexuality within a marriage, which is often influenced by deeply embedded cultural and societal norms that determine the sexual behaviour of men towards women within the marriage institution.⁹¹ However, no observer states made suggestions to implement policies and strategies through a form of constructive community dialogue within the society to help discourage such attitudes that perpetuate the presumption of consent of women's sexual activity within a marriage.⁹² From the nature of discussions on marital rape, I argue that there was clearly a lack of appreciation of the moderate cultural relativist position by the states.⁹³ The implication of this is that the cultural norms and attitudes that perpetuate the tolerance of marital rape were not brought to the centre of discussions. This meant that there were no suggestions made to tackle the cultural influences on the tolerance and perpetuation of marital rape during state reviews.

Overall, the discussion reveals that states have expressly or implicitly challenged the international standards on marital rape during their state reviews in the UPR process.

⁹¹ Peggy Reeves Sanday, 'The Socio-Cultural Context of Rape: A Cross-Cultural Study' (1981) 37 *Journal of Social Issues* 5. See n 53 and n 54 above.

⁹² A An-Na'im, 'Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights' in Claude E Welch, Jr. and Virginia A. Leary (eds), *Asian Perspectives on Human Rights* (Westview Press 1990) 46-48.

⁹³ Abdullahi An-Na'im, 'The Rights of Women in International Law in the Muslim Context' (1987) 9 *Whither Law Review* 515.

The most striking finding of this section was that some states implicitly utilised the relationship between culture and marital rape as a foundation to challenge reforms on marital rape. On the other hand, this very association of the influence of culture on marital rape was not used by the observer states to suggest reforms to discourage attitudes that tolerate and perpetuate marital rape. Instead, the suggestions of reforms issued to states under review largely focused on the legislative reforms in relation to marital rape.

6.4. Women's Rights against Domestic Violence as discussed in the UPR process

6.4.1. Contextualising Women's Rights against Domestic Violence

For the purposes of this study, domestic violence is defined 'as the use of force or threats of force by a husband or boyfriend for the purpose of coercing and intimidating a woman into submission. The violence can take the form of pushing, hitting, choking, slapping, kicking, burning or stabbing.'⁹⁴ Whilst protection against domestic violence is not directly mentioned in a specific international human rights norm, treaty jurisprudence and resolutions issued by bodies at the UN have over the years repeatedly declared domestic violence as a violation of women's rights.⁹⁵ For example, the General Assembly adopted its first resolution on domestic violence in 1990, which encourages states to 'develop and implement policies, measures and strategies, within and outside the criminal justice system, to respond to the problem of domestic violence.'⁹⁶ Further clarification was provided under article 4 of the Declaration against Elimination of Violence against Women, which provides that member states 'should condemn violence

⁹⁴ United Nations Centre for Social Development and Humanitarian Affairs, 'Strategies for Confronting Domestic Violence: A Resource Material 7' (1993) UN Doc. ST/CSDHA/20.

⁹⁵ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant) (11 August 2000) E/C.12/2000/4, para 27; UN Committee Against Torture, 'General Comment No. 2: Implementation of Article 2 by States Parties' (24 January 2008) CAT/C/GC/2 para 18; UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 19: Violence against women' (1992), para 9.

⁹⁶ UN General Assembly, 'Domestic violence' (14 December 1990) A/RES/45/114; UN General Assembly, 'Declaration on the Elimination of Violence against Women' (20 December 1993) A/RES/48/104, para 6.

against women and should not invoke any custom, tradition or religious consideration to avoid their obligations'.⁹⁷

Despite the repeated declarations by bodies at the UN that domestic violence against women was a violation of international human rights standards, women continue to be subject to such violence in the home.⁹⁸ The persistence of domestic violence often holds its roots in the artificial divide in the public and private sphere, the latter of which is often considered to be of a private concern of the family, which is more prone to be dictated by social and cultural norms.⁹⁹ At its worst, domestic violence is often perpetuated through deeply held cultural norms whereby women are perceived as 'wayward creatures who require chastisement for their own or society's good'.¹⁰⁰ In some instances, the toleration of domestic violence against women in the home stems 'from a dominant focus on male self-identity, using violence against women to define and differentiate men from the inferior 'other'...who forgives the man for inflicting violence and terror on his wife.'¹⁰¹ This relationship between culture and domestic violence, whereby aspects of cultural norms and attitudes contribute to the perpetuation or tolerance of such violence, is one of the primary reasons why it has been selected as the focus for this study.

With this brief introduction on the relationship between culture and domestic violence, the aim of this section is to assess whether, and to what extent, states introduce arguments from a cultural relativist perspective when discussions are held on domestic violence during state reviews.

⁹⁷ Ibid. See also UN Committee on the Elimination of Discrimination Against Women, 'CEDAW General Recommendation No. 19: Violence against women' (1992).

⁹⁸ <<http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>> 31st August 2014.

⁹⁹ Barbara Burston, Nata Duvvury and Nisha Varia, Justice, 'Change and Human Rights: International research and responses to domestic violence' (International Center for research and women and the centre for development and population activities, 2002). See further section 2.3.4.

¹⁰⁰ Joan Fitzpatrick, 'The use of International Human Rights norms to combat violence against women' in Rebecca Cook (eds) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 562.

¹⁰¹ Ibid.

6.4.2. Findings on Domestic Violence as discussed in the UPR process

6.4.2.1. An Overview of the Findings on Domestic Violence

In the first cycle of the UPR process, the issue of domestic violence was raised during the review of 109 member states, who received 241 recommendations. I have categorised the states that received and issued recommendations on domestic violence in figure 6.7 and 6.8, respectively.

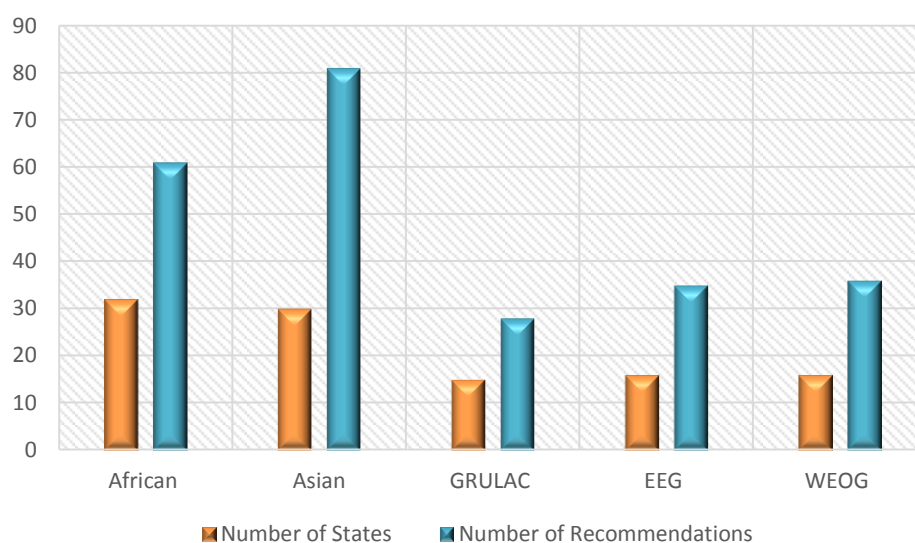


Figure 6.7. States under review that received recommendations on domestic violence

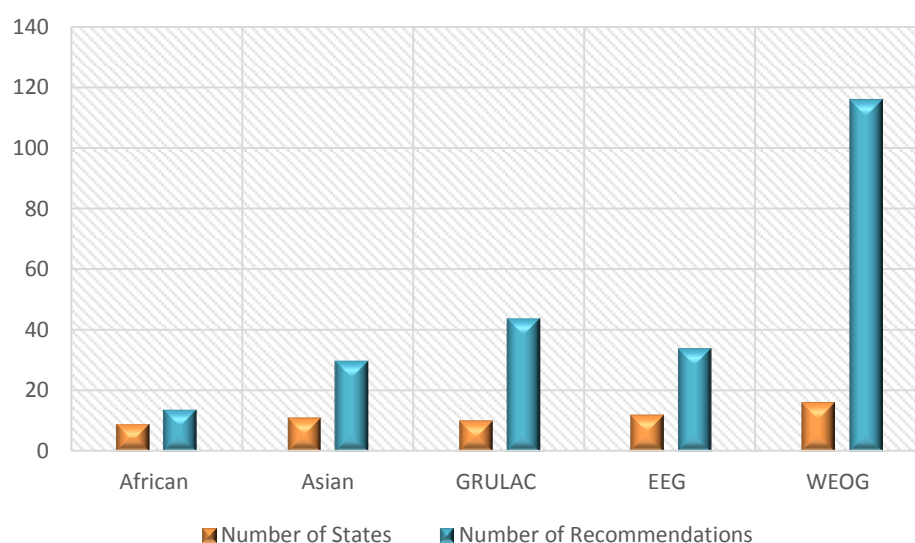


Figure 6.8. Observer states that issued recommendations on domestic violence

Figures 6.7 and 6.8 show that recommendations issued and received on domestic violence were geographically dispersed across states to all 5 regional groups. It is notable that states from the African and Asian groups received more recommendations on domestic violence than they issued. On the other hand, states belonging to GRULAC, EEG and WEOG all issued more recommendations than they received on domestic violence.

In response to the 241 recommendations, a total of 219 were accepted by states under review, and 22 were noted. I have presented the states that accepted and noted the recommendations according to regional groups in the table 6.9 and 6.10, respectively.

Table 6.9 Recommendations on domestic violence that were accepted

ACCEPTED	Regional Groups	No. of States	No. of Recommendations
	African	26	52
	Asian	25	71
	GRULAC	13	28
	EEG	14	33
	WEOG	14	35

Table 6.10 Recommendations on domestic violence that were noted

NOTED	Regional Groups	No. of States	No. of Recommendations
	African	7	9
	Asian	7	10
	GRULAC	0	0
	EEG	2	2
	WEOG	1	1

From table 6.9, it can be observed that despite the issue of domestic violence being the subject of the highest number of recommendations, the majority of the recommendations were accepted. Of those recommendations that were not accepted, table 6.10 shows that these were noted by states from the African and Asian groups. In the sections below, I will undertake a detailed analysis of the nature of discussions held during state reviews when the issue of domestic violence was raised.

6.4.2.2. Nature of the dialogue on Domestic Violence as discussed in the UPR process

The nature of the 241 recommendations issued on domestic violence can be divided into 6 different categories. I have summarised the nature of these categories in table 6.11.

Table 6.11 Categories of recommendations on domestic violence

Recommendation	Summary of the nature of the recommendations/statements
1	Enact/Implement/Reform laws to protect women from domestic violence
2	Ensure compliance with international human rights norms
3	Ensure victims are supported
4	Effective investigation and prosecution of domestic violence
5	Effective awareness raising campaigns
6	Discourage cultural beliefs/norms that may perpetuate domestic violence

The nature of the responses issued by the states under review on domestic violence were divided into 8 categories, and summarised in the table 6.12.

Table 6.12 Categories of responses on domestic violence

Category	Summary of responses made by the state under review
A1	No further comments
A2	Laws already implemented/under review to tackle domestic violence
A3	Domestic Violence victim support in place
A4	Policies in place to ensure effective investigation and prosecution of perpetrators
A5	Awareness raising campaigns
N1	No further comments
N2	Laws to address domestic violence already in place/under review
N3	Domestic Violence victim support in place

In figure 6.9, I have provided a pictorial account of the nature of discussions held between states using the summary of categories listed in table 6.11 and 6.12.

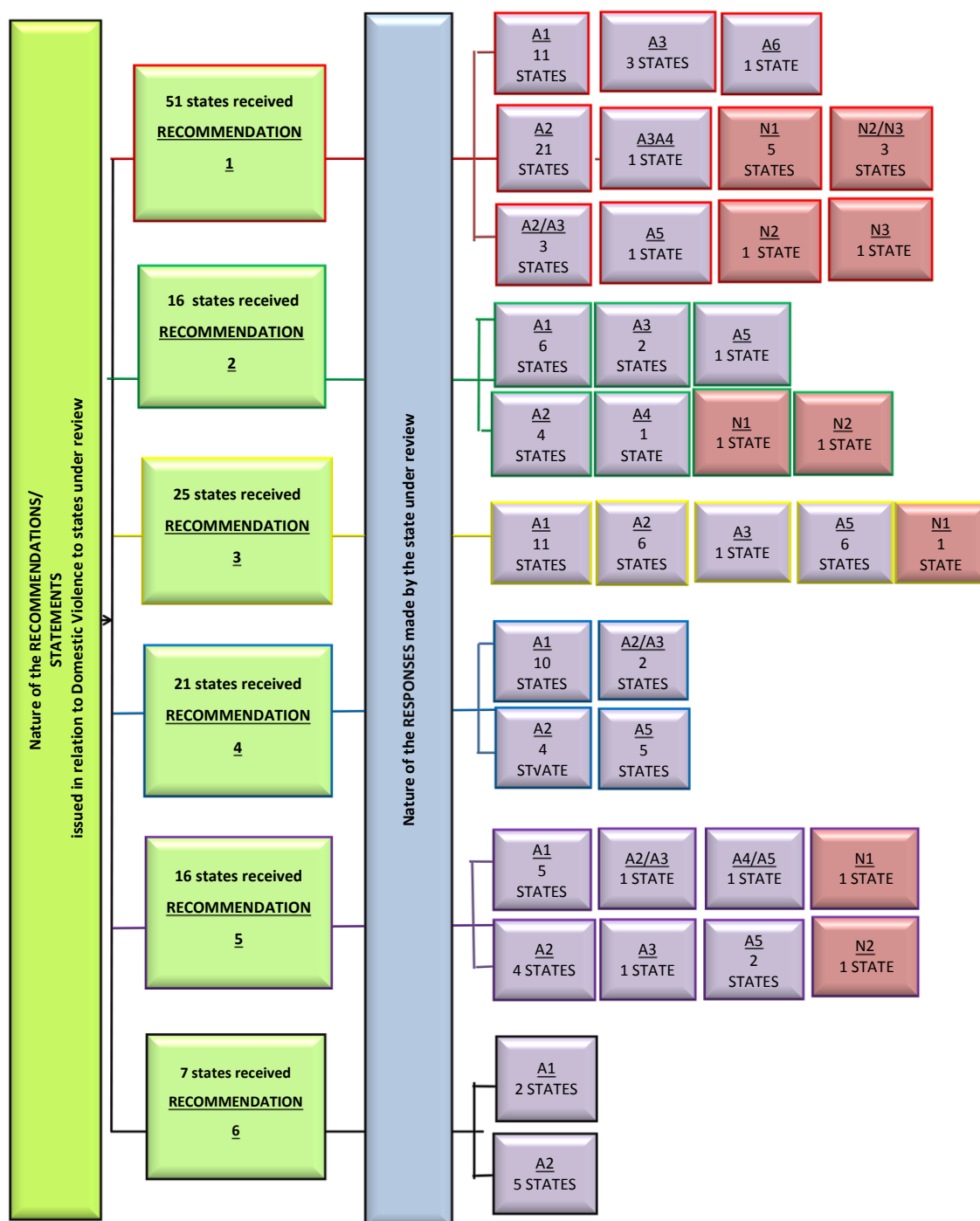


Figure 6.9. Nature of the dialogue held amongst states on the issue of domestic violence

Recommendation 1: Enact/Implement/Reform laws to protect women from domestic violence

Under the first category of recommendations, the observer states suggested that domestic laws should be enacted or reformed to provide legislative protection for women that are subject to domestic violence. A typical example of a recommendation under this category was when Australia issued a recommendation to Micronesia to ‘pass laws at the national and state level to address domestic violence’.¹⁰² A total of 51 states were issued with a recommendation under this category.

In response, a total of 41 states accepted the recommendations when issued under this category. Of these, 10 states under review accepted the recommendations without any further response, thereby providing an A1 response.¹⁰³ A total of 21 states¹⁰⁴ provided an A2 response as they insisted that laws were already in place to protect women from domestic violence. A typical example of a response under this category is when Canada noted that ‘domestic violence is not a separate offence in the Criminal Code, but is covered under existing criminal offences.’¹⁰⁵ The states of Albania, Sao Tome Principe¹⁰⁶ and Kazakhstan¹⁰⁷ insisted that laws were already in place to protect women against domestic violence. In addition, they also highlighted the policies that were in place to support the victims of such violence, and therefore provided an A2/A3 response. For instance, Albania stated that ‘the Ministry of Labor, Social Affairs and Equal Opportunities is seeking to build the capacity of local authorities to set up programmes for sheltering victims of domestic violence.’¹⁰⁸

On the other hand, the delegate of Portugal provided an A3/A4 response, as it stated that as well as ‘additional measures to protect women victims of domestic violence’, it had implemented ‘programmes to avoid repeated offending by aggressors’ through ‘electronic means of surveillance on perpetrators of domestic violence’.¹⁰⁹ Embracing different approach, the delegate of Micronesia insisted that ‘the government was keen

¹⁰² UNHRC ‘Federated States of Micronesia’ (4 January 2011) A/HRC/16/16, para 61.26.

¹⁰³ Chile; Myanmar; Tanzania; Togo; Spain; Slovenia; Brazil; Liberia; Libya; Nepal; Nicaragua

¹⁰⁴ Fiji; Ireland; Papa New Guinea; Canada; Equatorial Guinea; Lebanon; Madagascar; Maldives; Solomon Islands; Bahamas; Bhutan; Madagascar; Maldives; Marshall Islands; Moldova; Montenegro; Oman; Samoa; St Lucia; Suriname; Ukraine.

¹⁰⁵ UNHRC ‘Canada’ (3 March 2009) A/HRC/11/17, para 36.

¹⁰⁶ UNHRC ‘Sao Tome and Principe’ (16 March 2011) A/HRC/17/13, para 60.

¹⁰⁷ UNHRC ‘Kazakhstan’ (23 March 2010) A/HRC/14/10, para 92.

¹⁰⁸ UNHRC ‘Albania’ (4 January 2010) A/HRC/13/6, para 48.

¹⁰⁹ UNHRC ‘Portugal’ (4 January 2010) A/HRC/13/10, para 93.

to carry out activities to increase awareness and understanding of the issue.’¹¹⁰ Adopting a slightly different approach, Saint Kitts and Nevis responded to recommendations under this category by stating that ‘there was a need for social transformation on an even deeper level that necessitated not only an examination of the root causes of that evil but also a cultural re-education of built healthy relationships...between the sexes’.¹¹¹ In this way, the delegate provided an A6 response as the state recognised that reforms to cultural norms and deeply embedded attitudes in relation to the two sexes are required to address domestic violence.

On the other hand, a total of 10 states noted the recommendations. Of these, the states of Syria, Burkina Faso, Burundi, DPR Korea and Georgia provided an N1 response, as no further comments were provided. The states of Gambia provided an N2 response, as it noted the recommendation on the basis that the ‘Women’s Bill 2009...had an entire section dealing with measures and strategies to eradicate gender based violence’.¹¹² The state of Kuwait provided an N3 response as it explained that the issue of domestic violence was being addressed, as actions undertaken by the ‘social police authority, the family counselling authority, the domestic violence center and the minors’ protection authority’ were already in place.¹¹³

A slightly different approach was put forward by the states of Kiribati,¹¹⁴ Seychelles,¹¹⁵ Mali, who provided a combined response of N2 and N3, as all three states challenged the suggested reforms to enact legal provisions against domestic violence. The states insisted that laws were already in place addressing domestic violence, and policies to provide support to the women subject to such violence were already in place. For example, the delegate of Mali stated that the ‘Malian Criminal Code punishes all forms of violence, including domestic violence.’ Other activities implemented ‘range from the creation of mechanisms for action, victim support and information’.¹¹⁶

Overall, from the discussions, it became apparent that of the 51 states that were issued with a recommendation under this category, no state under review agreed to implement laws against domestic violence as a form of action emanating from the state being

¹¹⁰ UNHRC ‘Federated States of Micronesia’ (4 January 2011) A/HRC/16/16, para 37.

¹¹¹ UNHRC ‘Saint Kitts and Nevis’ (15 March 2011) A/HRC/17/12, para 16.

¹¹² UNHRC ‘Report of the Human Rights Council on its fourteenth session’ (23 October 2012) A/HRC/14/37, para 592.

¹¹³ UNHRC ‘Kuwait’ (16 June 2010) A/HRC/15/15, para 62.

¹¹⁴ UNHRC ‘Kiribati’ (17 June 2010) A/HRC/15/3, para 41.

¹¹⁵ UNHRC ‘Seychelles’ (11 July 2011) A/HRC/18/7, para 71.

¹¹⁶ UNHRC ‘Mali: Addendum’ (25 August 2008) A/HRC/8/50/Add.1, page 3.

reviewed in the UPR process. Instead, 16 states provided no further comments in response to a recommendation under this category. A total of 22 states suggested that laws against domestic violence already existed, and a further 13 states provided details of other non legislative measures that were already implemented in the state under review. Therefore, a closer examination of the responses issued by states indicates that there are grounds to question the apparent consensus amongst states who largely accepted recommendations under this category.

Recommendation 2: Ensure domestic laws/policies are in compliance with international human rights norms

Observer states issuing recommendations under the second category centred on the suggestions that the state should ensure that it adequately protected women's rights against domestic violence to ensure compliance with its international human rights obligations. For example, Canada was issued with a recommendation by Syria to 'take necessary measures to end...domestic violence...and implement CEDAW and the Human Rights Committee recommendations in this context'.¹¹⁷ A total of 16 states were issued with a recommendation of this nature.

In response, 14 states accepted the recommendations, and 2 states noted the recommendations issued under this category. Of those that accepted, the states of Canada, Guinea Bissau, Tanzania, Samoa, El Salvador and Guinea all accepted the recommendations without any further comments, and therefore provided an A1 response. The states of Hungary,¹¹⁸ Papua New Guinea,¹¹⁹ Kazakhstan,¹²⁰ and Maldives¹²¹ provided an A2 response, as they insisted that laws in relation to domestic violence already existed in the state under review.

Adopting a slightly different position, the delegates of Tajikistan¹²² and Nauru¹²³ provided an A3 response, as they insisted that support for victims of domestic violence was already established. Further, the state of Slovenia provided an A4 response to the recommendation and explained that 'since such crimes often remained hidden, activities

¹¹⁷ UNHRC 'Syrian Arab Republic' (24 January 2012) A/HRC/19/11, para 36.

¹¹⁸ UNHRC 'Hungary' (11 July 2011) A/HRC/18/17, para 21.

¹¹⁹ UNHRC 'Papua New Guinea' (11 July 2011) A/HRC/18/18, para 40.

¹²⁰ UNHRC 'Kazakhstan' (23 March 2010) A/HRC/14/10, para 65.

¹²¹ UNHRC 'Maldives' (4 January 2011) A/HRC/16/7, para 66.

¹²² UNHRC 'Tajikistan' (12 December 2011) A/HRC/19/3, para 36.

¹²³ UNHRC 'Nauru' (8 March 2011) A/HRC/17/3, para 36.

were aimed at better detection, reporting and awareness-raising. The number of detected cases was increasing as the result of efforts to improve detection and prevention.¹²⁴ On the other hand, the delegate of Liechtenstein provided an A5 response, as it highlighted the ‘awareness-raising projects on the issue of domestic violence’ that were being implemented by the state to ‘to break stereotypes’.¹²⁵

There were only two states under review that noted the recommendations issued under this category. The first is the state of Burkina Faso, who provided an N1 response. On the other hand, the delegate of Argentina noted the recommendation and explained that ‘in December 2006, the project to create the office of domestic violence within the framework of the judiciary’ was begun.¹²⁶ Thus, as these plans were in place, the delegate of Argentina noted the recommendation and provided an N2 response.

Overall, it can be seen that when states are issued with recommendations to comply with international human rights norms on domestic violence, they often refer to existing laws that are already in place. In this way, the states under review have not made commitments to take additional measures in relation to domestic violence as a result of being reviewed in the UPR process.

Recommendation 3: Ensure victims of domestic violence are supported

The focus of the third category of recommendations that were issued by observer states was to ensure that the states under review had implemented measures and policies to provide protection and support to the victims of domestic violence. A typical example of a recommendation under this category was when France issued a recommendation to Cape Verde to ‘promote the establishment of places to care for and provide assistance to women victims of domestic violence’.¹²⁷ A total of 26 states were issued with a recommendation under this category.

In response, 25 states accepted, whilst only 1 state noted the recommendations under this category. Of those that accepted, a total of 11 states¹²⁸ did not provide any further comments, and therefore issued an A1 response. A total of 7 states¹²⁹ under review

¹²⁴ UNHRC ‘Slovenia’ (15 March 2010) A/HRC/14/15, para 44.

¹²⁵ UNHRC ‘Liechtenstein’ (7 January 2009) A/HRC/10/77, para 37.

¹²⁶ UNHRC ‘Argentina’ (13 May 2008) A/HRC/8/34, para 17.

¹²⁷ UNHRC ‘Cape Verde’ (12 January 2009) A/HRC/10/81, para 48.

¹²⁸ Canada; Spain; Angola; Argentina; Belarus; Bhutan; Comoros; Kuwait; Panama; Rwanda and Russia.

¹²⁹ Equatorial Guinea; Moldova; Kyrgyzstan; Madagascar; Palau; Switzerland; Costa Rica.

provided an A2 response, insisting that laws were already implemented. Further, the delegate of Russia provided an A3 response as it stated that ‘social rehabilitation programmes and services were developed for domestic violence victims.’¹³⁰ On the other hand, the states of Cape Verde,¹³¹ Croatia,¹³² Denmark,¹³³ Iceland,¹³⁴ Vanuatu¹³⁵ and Cyprus provided an A5 response. Here, the states under review provided that awareness campaigns against domestic violence were being implemented. For example, the delegate of Cyprus stated that ‘campaigns on violence against women and children were conducted annually by the competent authorities, including to deter and prevent domestic violence and to challenge societal attitudes.’¹³⁶

Overall, the only state that noted a recommendation under this category was Oman, who provided an N1 response as no further comments were made. The remaining states under review that were issued with a recommendation under this category accepted. However, nearly half of the states failed to provide any additional comments when accepting the recommendation. A total of 6 states pointed to the laws already in place, whilst one state provided details of victim support already being implemented. The most notable difference of the responses to recommendations 1 and 2 was that a total of 5 states under review focused their responses on the awareness raising campaigns that were in place to reform attitudes in relation to domestic violence. This shows that when states under review are subject to less legislative-focused recommendations to reform domestic violence, it instigates responses that provides details of the non legislative provisions in place and an increased focus on awareness raising campaigns against such violence.

Recommendation 4: Effective investigation and prosecution of domestic violence

Observer states that issued recommendations under this category suggested that the states should implement laws and polices to ensure effective investigation and/or prosecution of domestic violence. A typical example of a recommendation under this category was when France suggested that the Marshall Islands should ‘implement a

¹³⁰ UNHRC ‘Russian Federation’ (3 March 2009) A/HRC/11/19, para 67.

¹³¹ UNHRC ‘Cape Verde’ (12 January 2009) A/HRC/10/81, para 48.

¹³² UNHRC ‘Croatia’ (4 January 2011) A/HRC/16/13, para 91.

¹³³ UNHRC ‘Denmark’ (11 July 2011) A/HRC/18/4, para 58.

¹³⁴ UNHRC ‘Iceland’ (16 December 2011) A/HRC/19/13, para 39-41

¹³⁵ UNHRC ‘Vanuatu’ (4 June 2009) A/HRC/12/14, para 30.

¹³⁶ UNHRC ‘Cyprus’ (4 January 2010) A/HRC/13/7, para 78.

system to counter domestic violence against women, and ensure that the perpetrators of such violence are prosecuted and appropriately punished.’¹³⁷ A total of 21 states were issued with a recommendation under this category.

In response, all 21 states accepted the recommendations; however, the nature of the responses differed. A total of 10 states under review¹³⁸ provided an A1 response. A total of 6 states provided an A2 response insisting that laws against the practices were already in place. These were the Maldives, Oman, Uganda, and Austria. Adopting a slightly different approach, the states of Albania¹³⁹ and Kazakhstan,¹⁴⁰ who provided an A2/A3 response as they made reference to their domestic laws, and also provided details of the support that was available to victims of domestic violence.

On the other hand, a total of 5 states under review provided an A5 response. Here, the states made references to the awareness-raising campaigns and public education programmes that were in place to reform such deeply held views that contributed to perpetuating domestic violence. For instance, when issued with a recommendation under this category the delegate of Mongolia stated that ‘the Government had continued to work to address those problems, including through the public awareness campaign, to shape a culture of intolerance towards domestic violence.’¹⁴¹

Overall, it can be observed that there was a unanimous acceptance by the states under review of the recommendations issued under this category. However, nearly half of these states accepted the recommendations without any further comments. What can be observed here is that all the comments issued by the states did not directly address the recommendations issued to the state on implementing an effective prosecution and investigation of the crime. The states under reviews’ responses focused on the various laws and policies implementation that the state was already undertaking in relation to domestic violence, rather than actually addressing the recommendation that was suggested.

¹³⁷ UNHRC ‘Marshall Islands, Addendum’ (4 March 2011) A/HRC/16/12/Add, page 2.

¹³⁸ Syria; Chile; Togo; Burundi; Libya; Nicaragua; El Salvador; Spain; Belarus; Dominica.

¹³⁹ UNHRC ‘Albania’ (4 January 2010) A/HRC/13/6, para 48.

¹⁴⁰ UNHRC ‘Kazakhstan’ (23 March 2010) A/HRC/14/10, para 65.

¹⁴¹ UNHRC ‘Mongolia’ (4 January 2011) A/HRC/16/5, para 52.

Recommendation 5: Implement awareness-raising campaigns against domestic violence

The essence of the recommendations issued under this category is that states under review were required to engage in civil society movements, women's groups and other relevant stakeholder groups to raise public awareness against domestic violence. A typical example of recommendation issued under this category was when Norway issued a recommendation to Georgia to 'give a prominent role to civil society- not least women's organizations- in efforts to address domestic violence...and place focus on strengthening public awareness.'¹⁴² A total of 17 states were issued with a recommendation under this category.

In response, a total of 14 states accepted, whilst 2 states noted the recommendations. Of the states that did accept the recommendations, the states of Angola, Comoros, Liberia, Slovenia and Tanzania all accepted the recommendations without any further response, and therefore provided an A1 response. On the other hand, Iceland, Malawi, Moldova and Timor Leste insisted that laws in the states already protected women from domestic violence, therefore provided an A2 response. Adopting a slightly different approach, the delegate of Albania provided a combined A2 and A3 response, as the state insisted that laws were already in place to protect against such violence, as well as programmes to aid sheltering for victims. On the other hand, the delegate of Norway provided an A3 response stating that 'legal aid was provided to victims of domestic violence also before any complaint was made to the police.'¹⁴³

New Zealand provided a different response, and issued a combined A4/A5 response. The delegate began by stating that it had 'reviewed to strengthen police powers and responses to family violence incidents' and the 'government has recently launched a Campaign for Action on Family Violence, which aims to stimulate change in the way people think and act about domestic violence'.¹⁴⁴ The states of Iraq¹⁴⁵ and Vanuatu¹⁴⁶ provided an A5 response, as they insisted public awareness campaigns against the crime of domestic violence were implemented in the state.

¹⁴² UNHRC 'Georgia' (16 March 2011) A/HRC/17/11, para 54.

¹⁴³ UNHRC 'Norway' (4 January 2010) A/HRC/13/5, para 98.

¹⁴⁴ UNHRC 'New Zealand, Addendum' (7 July 2009) A/HRC/12/8/Add.1, page 6.

¹⁴⁵ UNHRC 'Iraq' (15 March 2010) A/HRC/14/14, para 46-48.

¹⁴⁶ UNHRC 'Vanuatu' (4 June 2009) A/HRC/12/14, para 30.

Only 2 states noted recommendations under this category. First, the delegate of Georgia provided an N1 response, as it failed to provide an explanation for its position. Second, the delegate of Malawi provided an A2 response, as it insisted that laws protecting women from domestic violence were already in place.

Overall, in response to recommendations issued under this category, a total of 6 states did not provide any further comments with their recommendations. Further, the 6 states in their responses provided details of the existing laws and policies to protect victims of domestic violence. In addition, 3 states under review issued responses of a similar nature to the recommendations, and gave details of public awareness campaigns that were already in place to discourage attitudes and beliefs amongst society that may contribute to the tolerance in relation to domestic violence against women. From this, it can be observed that whilst the majority of the recommendations of this nature were accepted by the states under review, the responses of the states on how they tackle domestic violence through the policies and laws in place varied between states.

Recommendation 6: Discourage cultural beliefs/norms that may perpetuate domestic violence

The essence of the recommendations that were issued under this category was that states were required to implement policies and practices with the aim of discouraging cultural attitudes and stereotypes that perpetuate domestic violence. The states under review were suggested to implement strategies involving the civil society, and other local stakeholders, to instigate a dialogue with the aim to discourage attitudes that contribute to the tolerance of domestic violence. The nature of these suggestions is usually accompanied with the suggestion to implement and enact laws on domestic violence. A typical example of a recommendation issued under this category was by Germany, who suggested that Timor-Leste should ‘effectively implement the Law against Domestic Violence by raising awareness of this law to public officials, to local community leaders and by citizenship education, and additionally discourage cultural practices that violate women's rights’.¹⁴⁷ In another example, Brazil issued a recommendation to Guinea to combat domestic violence against women ‘through the prevention of certain abusive socio-cultural practice’.

¹⁴⁷ UNHRC ‘Timor-Leste’ (3 January 2012) A/HRC/19/17, para 62.

A total of 7 states under review were issued with a recommendation under this category, and all 7 accepted the recommendation. Of these, the state of Guinea and Togo accepted the recommendation without any further comments. The states of Madagascar, Timor-Leste, the Maldives, Ukraine and Malawi all provided an A2 response, as they highlighted the state's legal provisions that were in place to protect women from domestic violence. For example, the delegate of Timor-Leste stated that 'it referred to the recent promulgation of the Law on Domestic Violence and mentioned actions taken, including budgetary, to ensure the implementation of the law.'¹⁴⁸

The states that issued recommendations under this category implicitly recognised that the issue of domestic violence cannot be addressed through legislative provisions alone. Instead, an implementation of strategies was required whereby local and religious leaders are involved to help discourage those attitudes that perpetuate domestic violence against women. In response, all the states accepted these recommendations, however, the comments accompanying the official stance were arguably subdued and defensive. For instance, 2 states accepted the recommendations without any further comments, whilst the other 5 states made references to the existing legislative provisions in place to help eradicate domestic violence and offer support to victims. Therefore, whilst the observer states issued recommendations of a preventative nature, the responses by states under this category focused on actions implemented to ensure perpetrators were punished after the violence had been carried out.

6.4.2. Discussion on the findings of Domestic Violence in the first cycle of the UPR process

From the 241 recommendations, a total of 219 were accepted by the states under review. An examination of the discussions held amongst states reveals that even when states noted the recommendations, no states under review implicitly or explicitly challenged the universality of international human rights norms in relation to domestic violence. More specifically, no states under review challenged the recommendations on domestic violence on the basis of national sovereignty or from a strict cultural relativist perspective. From this, there are strong grounds to suggest there is at least a formal consensus amongst states to provide protection against domestic violence against women. From all the women's rights issues that were examined for the purposes of this

¹⁴⁸ Ibid 50.

investigation, the greatest number of states participated in the discussions on domestic violence. Based on this, one may have expected that there would be a variety of different positions adopted by states, resulting in the discussions on domestic violence to be relatively varied. However, the findings reveal that the dialogue held amongst states can be divided into 2 main forms.

First, the majority of the discussions held amongst states in the first cycle focused on three main issues in relation to domestic violence. For example, in 113 instances observer states issued recommendations to states under review either to implement legislative provisions to protect women from domestic violence, appropriately punish perpetrators or provide victim support to those women subject to such violence. Similarly, in 74 instances states under review when responding to recommendations, made comment with references to existing laws and policies in relation to the prosecution of perpetrators and support provided to victims. In this way, the essence of the discussions between observer states and states under review was on the measures that were in place once the crime had been committed. Whilst a focus entirely on ensuring measures are in place for addressing violence when it has already been carried out is problematic in itself, the more pertinent problem here is that the discussions between states on domestic violence can be described as static and mechanical. This is because observer states instigated discussions on laws and policies that were in place to ensure adequate protection once such violence had been carried out against the victim. This instigated a response by most states under review, who restated that laws and policies were already established in the domestic context to ensure appropriate measures were in place once the violence had been committed. The implication of this is that the states under review that provided such defensive responses failed to agree or commit to any actions or reforms as a result of being reviewed in the UPR process. For this reason, it can be argued that the fundamental objective of the UPR process to promote universality of human rights through a constructive dialogue can be questioned as the majority of the discussions held on domestic violence can be described as reporting existing policies and laws against domestic violence, rather than discussions on the issue and how further protection can be provided against domestic violence against women.

The second form of discussions on domestic violence was engaged in by a minority of states. Some states adopted positions which indicated a recognition that attitudes and beliefs embedded in the cultural norms may contribute to perpetuating or tolerance of domestic violence. For instance, 7 observer states under the 6th category recognised this link between culture and domestic violence and suggested policies and reforms to be implemented to help discourage cultural norms that may contribute to domestic violence. Similarly, observer states issuing recommendations under the 5th category focused on suggesting incremental reforms, such as awareness-raising campaigns against domestic violence by engaging with relevant stakeholder groups. In this way, observer states suggested to engage in public awareness campaigns and engage local community leaders to help discourage cultural practices to help implement laws against domestic violence. Similarly, 15 states under review provided an A5 response when issued with recommendations. The essence of these responses was that the states insisted that campaigns had been implemented to help raise awareness against domestic violence. I argue that observer states issuing recommendations under categories 5 and 6, and states under review issuing responses under category A5 have adopted positions that resonate with aspects of the moderate cultural relativist position for two main reasons.¹⁴⁹ The first is because the moderate cultural relativist position places emphasis on the significance of culture to an individual's perception and outlook of the world which has developed over a period of time.¹⁵⁰ Moreover, any reforms of negative attitudes must be undertaken in a gradual manner over a period of time, rather than expected to be precipitously eliminated. In this way, the minority of states in the UPR process recognised the significance of incremental reforms to prevent domestic violence in the first place. This was suggested by engaging in awareness campaigns and engaging in a dialogue with relevant stakeholders to help to discourage any cultural practices that may perpetuate domestic violence.

The second reason why I argue that the minority of state positions resonate with the moderate cultural relativist position is the one of the core beliefs of moderate cultural relativism is that reforms must be suggested in a culturally legitimate manner. One method of doing this is to encourage in an internal dialogue, within the culture itself, to

¹⁴⁹ K Schooley, 'Cultural Sovereignty, Islam, and Human Rights- Toward a Communitarian Revision'(1994-1995) 25 Cumberland Law Review 651, 682. See further 2.3.3.3.

¹⁵⁰ See, C Geertz, *Interpretations of Cultures* (Basic Books, 1973) 49; An-Na'im A, 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' in *Human Rights in Africa: Cross Cultural Perspectives* in An-Na'im and Deng (eds) (Brookings Institution 1990) 333.

reinterpret certain values that are inconsistent with human rights law, to bring them into compliance with the current international human rights standards.¹⁵¹ The fundamental aspect is that the internal dialogue must be undertaken by individual actors and groups within the culture itself to avoid the appearance of ‘dictation by others’.¹⁵² The nature of these suggestions is reflected in the statements made by some states during the discussions of domestic violence, who suggested that awareness-raising campaigns and constructive dialogue with relevant stakeholders must be carried out within the culture itself. In this way, the nature of the positions adopted by both observer states and states under review suggests that some state positions indicated an affiliation with the moderate cultural relativist position.

The implications of the minority of states that showed evidence of the moderate cultural relativist position in the discussions of domestic violence are two fold. First, there is a recognition amongst states, albeit in small number, that there is a need to prevent domestic violence from occurring in the first place. In order to do this, deterrence through legislative measures is not enough. Therefore, what is required is that the individual and collective group attitudes that may perpetuate and tolerate domestic violence needs to be reformed.¹⁵³ In this way, by states adopting the moderate cultural relativist position, the discussions on domestic violence focused on the need to reform attitudes within societies, that are unconsciously embedded through cultural norms, to prevent domestic violence in the first place. In addition, by adopting aspects of the moderate cultural relativist position, there was evidence of the discussions being moved away from merely ensuring that appropriate laws and polices were in place to ensure victims were supported and perpetrators punished, to moving towards focusing on methods to prevent such violence from occurring in the first place. In this way, it can be argued that when states in the UPR process adopted aspects from a moderate cultural relativist position, the dialogue on domestic violence was more fruitful. This is because states focus on preventing such violence from occurring in the first place. In addition,

¹⁵¹ A An-Na'im, 'State responsibility Under International Human Rights Law to Change Religious and Customary Law' in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 175.

¹⁵² Abdullahi An-Na'im, 'The Rights of Women in International Law in the Muslim Context' (1987) 9 *Whitter Law Review* 515.

¹⁵³ Joan Fitzpatrick, 'The use of International Human Rights norms to combat violence against women' in Rebecca Cook (eds) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 562; Barbara Burston, Nata Duvvury and Nisha Varia, Justice, 'Change and Human Rights: International research and responses to domestic violence' (International Center for research and women and the centre for development and population activities, 2002).

states raised the concern that aspects of cultural norms may perpetuate domestic violence, and therefore actions were required to be taken to discourage such attitudes. However, such reforms must be suggested in a culturally legitimate manner, if they are to be accepted as valid.¹⁵⁴

Overall, the majority of the recommendations issued in relation to violence were accepted, therefore indicating at least a formal consensus to the elimination of domestic violence. However, an analysis of the discussions held on the issue revealed that the majority of the states simply focused on the laws and policies that were to be implemented to ensure perpetrators were punished and victims acquired the necessary support. In other words, the focus was on addressing the aftermath of such violence. In addition, the responses by states under review simply reiterated the detail of laws and policies that were already in place to address domestic violence. On the other hand, there was evidence of a minority of states adopting a position that resonated with aspects of the moderate cultural relativist position. Both observer states and states under review recognised the importance of preventing domestic violence in the first place by encouraging a form of internal discourse to discourage cultural norms and practices that may perpetuate domestic violence. In conclusion, there was no evidence of states adopting a strict universalist or a strict cultural relativist position during the discussions on domestic violence. However, despite the lack of polarisation between universalism and relativism on the issue, there was a clear lack of states engaging in fruitful dialogue. This is because discussions largely focused on implementing laws and policies to address such violence once it had already been committed. Despite this, there is some evidence that a minority of states did engage in a more fruitful dialogue when states adopted a position affiliating with the moderate cultural relativist position by addressing the reforms that needed to be undertaken to discourage cultural norms against domestic violence.

6.5. Conclusion

In this chapter, I presented the findings on the nature of discussions held when the issue of violence against women was discussed during state reviews in the UPR process. More specifically, the exploration focused on the manner in which states adopted

¹⁵⁴ An-Na'im A, 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' in *Human Rights in Africa: Cross Cultural Perspectives* in An- Na'im and Deng (eds) (Brookings Institution 1990) 321.

positions and attitudes during discussions on the issue to gain a fuller insight as to how the UPR process operates. In meeting this aim, I assessed whether, and to what extent, states introduced positions from a cultural relativist perspective when discussing the issues of honour killing, marital rape and domestic violence.

The exploration for this part of the investigation revealed that the express assertion of universalistic nature of violence against women was stagnated. This is because this investigation found that no observer made any reference to international human rights norms when issuing recommendations during the reviews of states on the issue of marital rape and honour killings. This means that when the two issues were discussed during state reviews, no express reference was made to any international human rights norms. On the other hand, when the issue of domestic violence was raised, a total of 14 member states were issued with recommendations to comply with the international human rights norms on the issue.

The findings of this investigation also revealed that the universality of international human rights norms was expressly challenged in relation to marital rape. The states under review adopted positions which challenged the reforms suggested on marital rape on the grounds of national sovereignty, and from a strict cultural relativist perspective. Unfortunately, neither of these positions were held accountable for by the observer states in any counter statements, despite evidence of some of these challenges being raised during the interactive dialogue stage, and not the time restrictive HRC plenary session. By contrast, no express challenges to reforms were made from a cultural relativist perspective on the issue of honour killings or domestic violence. What is interesting to note here is that in both honour killings and domestic violence there were no observer states that issued recommendations that made express reference to culture and suggestions to eliminate it.

Aside from the issue of marital rape, no other states expressly adopted positions which affiliates with aspects of the strict cultural relativist position. In addition, as noted above there was no evidence of observer states issuing recommendations from a strict universalist position. Therefore, in the absence of polarised positions between universalism and relativism, together with the large number of states participating in the debates on violence against women, one would have presumed that there was room for a fruitful dialogue on issues of violence against women during state reviews. However,

this was not evident in the discussions held. For instance, in relation to honour killings, states have expressly and implicitly detached the cultural influences that underpin honour killings. This has resulted in states underappreciating the reasons why such killings are carried out in the first place whereby the underlying motivation of the crime is the culturally conceptualised notion of honour, and the underlying reason to control the women's behaviour and sexuality is not raised in discussions during state reviews.¹⁵⁵ In relation to marital rape, the lack of appreciation of the moderate cultural relativist position meant that states did not appreciate the presumptions held on the women's consent to sexual activity in marriage which is influenced by cultural norms. Instead, the focus of discussions in relation to honour killings and marital rape was on implementing legal provisions against both issues. For this reason, a lack of moderate cultural relativist positions by states has meant that discussions have been restricted to legal provisions to deal with the perpetrators of such crimes rather than discussing the core issues at stake. By contrast, in relation to domestic violence, there was some evidence of the appreciation of moderate cultural relativist positions by both states under review and observer states. This means that there was some evidence of discussions on reforming cultural norms and attitudes that contribute to perpetuating or tolerating domestic violence. However, this formed the minority of discussions. This is because, like the discussions on honour killing and marital rape, the states focused on the laws and policies in place to ensure perpetrators were punished and victims protected. Thereby the focus was on implementing laws once the crime had been committed.

In conclusion, the findings of this exploration reveal that the universalist assertions in relation to violence against women were stagnated. There were no states that expressly adopted a strict universalist position. In addition despite a specific declaration on violence against women, and numerous reiterations of the issue in treaty jurisprudence,¹⁵⁶ it was striking to note that there were no references to international norms in relation to marital rape and honour killing during state reviews. Also, there was evidence of some states adopting positions that resonated with a strict cultural relativist challenge in relation to marital rape, but not honour killing and domestic violence. Finally, whilst the moderate cultural relativist position was recognised in a minority of state reviews in relation to domestic violence, no such evidence of states

¹⁵⁵ UN Commission on Human Rights, 'Report of the Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy' (21 January 1999) E/CN.4/1999/68/Add.3, page 7 para 18.

adopting attitudes that resonate with the moderate cultural relativist position was evident in marital rape and honour killing. Therefore, overall, there was a lack of fruitful discussions in all three issues in the first cycle of the UPR process.

CONCLUSION

The name of the human rights monitoring mechanism itself, the Universal Periodic Review process, provides an indication of its inherent universalistic tendencies. In the first chapter of this thesis, I explained how the claim of universality of the UPR process is based on two fundamental grounds. The first is the universal applicability of the process, which aims to review the human rights records of all UN member states, once every four years, under the same standardised uniform process. At the time of writing, the first cycle of state reviews is complete, and the second cycle of state reviews has commenced. The full participation by states to date gives grounds to suggest that the aim of ‘universal applicability’ of the UPR process has so far been fulfilled.¹ The second claim of universality of the UPR process is the embedded normative claim of universalism that is evident in the work and operation of the review process. This claim of universalism was the focus of this investigation. The normative claim of universalism is primarily embedded through the enlisting of a comprehensive set of international human rights obligations by incorporating the UN Charter and the UDHR as part of the framework from which states will be reviewed, despite states not having ratified some treaties and conventions. The embedded form of normative universalism becomes more profound when it is coupled with one of the fundamental objectives of the UPR process which is to ‘promote the universality’ of all human rights.²

The primary aim of this investigation was to question the normative claim of universalism that is embedded in the work and operation of the UPR process. I did this by using the most profound and significant challenge to universalism, the theories of cultural relativism. In meeting this aim, the research question that guided this investigation was to assess whether, and to what extent, states introduced arguments from a cultural relativist perspective during the interactive dialogue stage. Guided by the theoretical framework of this investigation, I selected women’s rights as the broad category of focus for this investigation. This is primarily because first, women’s rights were the most frequently raised substantive human rights issue in the first cycle of the review process. Second, the inherent relationship between women and culture means

¹ UN General Assembly, ‘Human Rights Council’ (15 March 2006) A/RES/60/251, para. 5(e).

² UNHRC ‘Res 5/1 Institution-building of the United Nations Human Rights Council’ (18 June 2007) Annex A/HRC/RES/5/1 para. 3 (a).

that issues and concerns of women are more susceptible to the challenge of universality from a cultural relativist perspective.³ In addition, using justified methodological choices, I confined the focus of this investigation further to three women's rights categories. The first category was women's right to health, which consisted of the issues of FGM, abortion and access to health care services. The second category was women's rights under private and family law, which included the issues of polygamy, inheritance and forced and early marriage. Violence against women was the third category, which included the issues of honour killing, marital rape and domestic violence. By undertaking a sustained examination of the discussions held between states, I gained a unique insight into how the UPR process operates through the positions and attitudes adopted by states participating in the reviews when the selected women's rights issues were the focus of discussions.

Reaffirming a degree of universality for most women's rights issues

The findings of this investigation reveal that observer states, when undertaking state reviews, adopted positions that were comparable to the normative universalist perspective during the discussions of all the issues, aside from honour killing and marital rape. However, the degree of universalism that was evident in the positions adopted by observer states varied depending on the particular women's rights issue that was discussed. For example, during the discussions of domestic violence, abortion, access to health care services and forced and early marriages, some observer states made express reference to the relevant international human rights laws and suggested that the state under review complied with its international obligations in relation to the particular issue.

By comparison, when the issues of FGM, polygamy and inheritance were the focus of discussions during state reviews, there was evidence of some observer states adopting positions that were comparable with the strict universalist perspective. This is because, whilst the observer states expressly recognised that the issues were subject to be influenced and informed by cultural norms, the states insisted that the practices in relation to the issues should be eliminated. Therefore, similar to the strict universalist position, states whilst recognising the existence of cultural diversity, insisted that the universal implementation of international human rights law should transcend any

³ See section 2.4.2. The Relationship between Women and Culture.

cultural boundaries and particularities.⁴ In fact, it is argued that as the observer states expressly referred to cultural particularities before suggesting to eliminate the practice, it gives reason to imply that the observer states suggested that the cultural norms that condone such practices should also be eliminated.

This investigation found that when states under review were issued with a recommendation by observer states that adopted aspects of the strict universalist position, it was notable that all the responses by the states under review were subdued and defensive. This has been discussed as being problematic primarily because it is contrary to one of the fundamental objectives of the UPR process, which is to engage in a cooperative and constructive discussion on human rights issues with the aim of improving and promoting human rights protection in the states.⁵ However the subdued responses to recommendations from a strict universalist position means that the lack of response largely meant that there was no concrete outcome or commitment that was expressly agreed by the state under review as a result of the discussions on FGM, inheritance and polygamy in the UPR process.

One of the most striking findings of this investigation was that when the issues of honour killing and marital rape were being discussed during state reviews, observer states refrained from expressly referring to international human rights norms when suggesting recommendations to the state under review. Therefore, no observer states expressly adopted positions that were comparable to either normative universalism or the strict form of universalism. In the first instance, one may explain this on the lack of a specific international human rights norm in relation to marital rape and honour killing which may have influenced the lack of reference by observer states during state reviews. However, this explanation can be questioned as the issues of inheritance, polygamy and FGM also lack any specific international human rights norms; despite this, observer states still adopted strict universalist positions when reviewing states' records. Whilst it cannot be concluded with any degree of certainty as to why states refrained from adopting an express normative universalist position when reviewing states on honour killing and marital rape, it is clear that states are more sensitive to expressly raising the universal nature of women's rights against honour killing and marital rape during state reviews than any other women's rights issues examined. This

⁴ R Sloane, 'Outrelativising Relativism: A Liberal Defence of the Universality of International Human Rights' (2001) 34 *Vanderbilt Journal of Transnational Law* 527, 553. See further section 2.2

⁵ A/HRC/RES/5/1, Annex 1 para 4.

shows that despite the universalist claim of the UPR process to promote the universality of all human rights, some observer state evidently refrained from expressing this normative claim of universalism when two of the women's rights issues were the focus of discussions during state reviews.

From the discussions above, it can be observed that despite the normative universalism embedded in the UPR process through its central objective of promoting the universality of all human rights, the discussions held amongst states in relation to the three women's rights categories give grounds to suggest that the degree of universalism that is adopted in the observer states positions when undertaking the state reviews varies depending on the issue that is the focus of discussions.

A challenge to the embedded universalism of the UPR process from a cultural relativist perspective

The findings of this investigation also reveal that an express challenge to the normative universalism embedded in the work and operation of the UPR process was evident during discussions held in the state reviews. A challenge to the universalistic claims of the UPR process was made on two grounds. The first challenge was based on the grounds of national sovereignty,⁶ and the other was based on the strict cultural relativist perspective; the latter was the focus of this investigation. For instance, during the discussions of polygamy, the states of Burkina Faso, Chile, Tanzania, Ghana and Libya used religious and cultural norms to justify the continuance of polygamous marriages. The universality of women's rights to equality in relation to inheritance was also challenged by the Solomon Islands and Libya on the basis that inheritance norms were governed by established traditional and religious practice. In addition, reforms in relation to marital rape were challenged by the United Arab Emirates and Brunei Darussalam. In more implicit terms, Mali and Liberia challenged the reforms concerning FGM on the basis that the practice was deeply embedded in culture, and therefore the states could not accept the suggested reforms.

The practical significance of states adopting a position that resonates with the strict cultural relativist position has profound implications for the operation of the UPR

⁶ Challenge to the universality of international norms based on national sovereignty was made in the issues of abortion by the Holy See in its capacity as the observer states. In relation to abortion, by the 5 states under review. Also, in relation to marital rape by Singapore, Tanzania and Yemen.

process. To begin with, in the majority of instances, when states did adopt a position that reflected aspects of the strict cultural relativist position, it was notable that no observer states held any state to account when the suggested reforms on the selected women's rights issues were challenged from a strict cultural relativist position. In this way, when states under review challenged the suggested reforms to comply with international human rights laws in relation to the women's rights issues, no observer issued counter statements to hold the state to account for the challenge. This resounding silence on the part of the observer states when strict cultural relativist positions were introduced during discussions is profound. This is because not only does the position adopted by observer states pose a serious challenge to the universalist nature of the international human rights norms in relation to women's rights issues, but also to the claim of universalism that is embedded in the foundations of the review process. In addition, this challenge from a strict cultural relativist position to the universalist aim of the UPR process and the universality of the women's rights international human rights norms were expressly raised on an international platform such as the UPR process, without any challenge from other states. Further, the lack of response by observer states when a challenge from a strict cultural relativist position was introduced means that the line of discussions on the three women's rights issues was drawn to a close. This fractures one of the most fundamental objectives of the review process which is to engage in a constructive and cooperative dialogue on the human rights issues with the aim of promoting universal human rights.

Overall, it can be observed that when states challenge the universality of women's rights protection in relation to the selected issues from the strict cultural relativist perspective, the peer states that hold the responsibility of promoting the universality of human rights failed to respond to hold the state to account for their challenge. In this way, it can be observed that where the universality of women's rights protection was challenged in the review process by the state under review, there is no evidence to suggest that the states in the UPR process will uphold the normative universal values of the review process and take action to meet its objective to improve human rights protection for women on the ground.⁷

⁷ UNHRC 'Res 5/1 Institution-building of the United Nations Human Rights Council' (18 June 2007) Annex A/HRC/RES/5/1 para. 3 (a).

In summary, so far it has been shown how the embedded universality of the UPR process has been expressed in various forms by observer states during state reviews, with some states adopting a position that resonates with the strict universalist position. More fundamentally, the findings of this investigation reveal that the universalist claims of the UPR process have also been challenged by the states under review, who introduced arguments from a strict cultural relativist position to challenge reforms in relation to some women's rights issues. The criticism of international human rights discourse being held between the polarised positions of universalism and relativism is not a new phenomenon and has been widely criticised in the literature.⁸ However, the implications of women's rights issues being discussed amongst the polarised extremes of universalism and relativism is profoundly evident in the discussions held between some states in the first cycle of reviews.

The most significant implication is that when states adopted positions that affiliated with the strict universalist and strict cultural relativist positions, the findings show that the nature of the discussions on the particular issues have largely been oversimplified. The reason for the oversimplified discussions can chiefly be explained because at the core of both strict universalism and strict cultural relativism, the observer states and states under review have, explicitly or implicitly, presumed the traditional conceptualisation of culture.⁹ This is the belief that culture is a static, homogenous and bounded entity which cannot be influenced by any norms or beliefs external to the culture itself.¹⁰ This interpretation of culture is evident in the position adopted by observer states which affiliate with the strict universalist position during the discussions of the issues. Here, 3 states failed to consider if, and how, the cultural norms that influence the sympathetic attitudes towards the practice can be reformed and reinterpreted in a manner that would be accepted by the states under review. Instead, suggestions were simply made to eliminate the practice, and implicitly, the underlying cultural justification for the practice. In a similar way, those states under review that challenged the reforms from a strict cultural relativist position can be subject to the same analysis. For instance, the states under review also adopted a traditional conceptualisation of culture to defend or explain the continuance of the women's rights

⁸ Marie-Benedicte Dembour 'Following the movement of a pendulum: between universalism and relativism' in Jane Cowan, Marie-Benedicte Dembour and Richard Wilson (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 58. See also section 2.3.3.3

⁹ X Li, *Ethics, Human Rights and Culture: Beyond Relativism and Culture* (Palgrave Macmillan 2006) 9. See further 2.3.1.

¹⁰ Ibid.

issues, in the absence of considering the possibility of the contentious nature of cultural norms, and more fundamentally, the possibility of culture being influenced to change and reform.

It has been argued earlier in the thesis that the presumption of a traditional conceptualisation of culture leads the discussions, in relation to the relevant women's rights issues, to be 'caught in various outdated approaches to 'cultural contact' within which a rigid "us" and "them" dichotomy is constantly reproduced, and from which there seems to be no apparent escape'.¹¹ In this way, adopting a strict form of universalism and cultural relativism often means that more important issues remain unexplored and somewhat blocked.¹² For instance, when observer states adopted a position from a strict universalist perspective, the suggestion by the observer states to simply eliminate the practice shows that the states have underappreciated the complex role that cultural norms play in the continuance of the practice, which have been developed and reaffirmed over a period of time.¹³

In a similar way, when the strict cultural relativist position was exercised by states under review in relation to women's rights issues, this position overlooked the 'politics of culture' itself, whereby cultural norms, values and representation are subject to a constantly contested political struggle between those who want to legitimise their power and those that want to challenge the status quo to address grievances.¹⁴ In this way, states that have introduced arguments from a strict cultural relativist position veil pertinent issues such as: who represents the claimed cultural beliefs, the internal politics of the culture, the representation of the voices and concerns of those women whose rights are violated.

This shows the implications of discussions undertaken by states when the strict universalist and strict cultural relativist positions are adopted in isolation of each other. Some states during the discussions of women's rights issues adopted two polarised positions; one which used culture as a basis of criticism when adopting a strict universalist position, and the other using culture to justify the rejection of reforms in

¹¹ Ann-Belinda Pries, 'Human Rights as a Cultural Practice: An Anthropological Critique' (1996) 19 *Human Rights Quarterly* 289. See also C Geertz, *Interpretations of Cultures* (Basic Books, 1973) 49

¹² Ann-Belinda Pries, 'Human Rights as a Cultural Practice: An Anthropological Critique' (1996) 19 *Human Rights Quarterly* 289, 293-4. See also, Robert Ulin, 'Revisiting Cultural Relativism: Old prospects for a new cultural critique' (2007) 80 *Anthropological Quarterly* 803.

¹³ An-Na'im, 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' in *Human Rights in Africa: Cross Cultural Perspectives* in (An- Na'im and Deng (eds) (Brookings Institution, 1990) 333.

¹⁴ *Ibid.*

relation to women's rights issues. These polarised positions restricted deeper underlying issues in relation to the cultural influences of the practice from being brought to the centre of discussions during state reviews. For this reason, I argue that where states adopted the extreme polarised positions of universalism and relativism, the reviews of the states were conducted at a surface level, as complex issues that question the foundations of the strict universalist and cultural relativist position were simply ignored when the positions were introduced during the discussions.

The marginalisation of contentious and controversial issues being discussed in the UPR process is unfortunate. This is because the cooperative and discursive nature of the UPR process provides a unique platform to engage in controversial issues in relation to human rights. The findings of this investigation questions one of the early optimisms of the review process: the opportunity it provides for raising contentious issues in relation to human rights.¹⁵ In fact, the missed opportunity of engaging in a fruitful dialogue become more evident in light of the implications of the final set of findings of this investigation, which reveals some evidence of states adopting positions of a middle ground between universalism and relativism.

A middle ground between strict universalism and a strict cultural relativist perspective

The findings of this investigation reveal that the positions adopted by some were closely associated with the moderate cultural relativist position. This was evident in both the positions of the observer states and states under review during the discussions of FGM, forced and early marriages, domestic violence and honour killing. The states during the discussions began by, expressly or implicitly, recognising the relationship between the women's rights issue in question and the culture. The states then moved on to show an appreciation of reforms which affiliated with An-Na'im's suggestion of engaging in an internal dialogue, within the culture itself, to help discourage the cultural attitudes towards the practice which are inconsistent with international human rights norms. It was evident from the statements that the ultimate aim was to suggest reforms to protect women's rights issues in a manner that would be accepted by the communities and societies that hold views contrary to the protection of women's rights

¹⁵ Frederick Cowell and Angelina Milon, 'Decriminalisation of Sexual Orientation through the Universal Periodic Review' (2012) 12 Human Rights Law Review 341, 346.

in relation to the particular issues. In this way, the essence of the states' positions were comparable to the core beliefs of the moderate cultural relativist position, which is to ensure that the current formulation of rights is more acceptable and better implemented in various cultures, by ensuring that the reforms are suggested in a culturally legitimate manner.¹⁶

What becomes apparent from the discussions held amongst states that adopted positions that resonated with the moderate cultural relativist position is that the states adopted a modern conceptualisation of culture. This is a belief that culture has porous boundaries and its values and norms are subject to influence and reforms over a period of time.¹⁷ This is reflected in the positions adopted by states that affiliated with the moderate cultural relativist position because whilst the states recognised that the women's rights issues may be inherently associated with culture, the states appreciated that reforms to the cultural attitudes can be undertaken in a gradual and incremental manner. This indicates that states adopting a position that affiliates with the moderate cultural relativist position have shown an understanding of the nature of culture itself whereby values and norms that justify cultural practice are developed over a period of time, and thus cannot be eliminated in a precipitous manner.¹⁸

The implications of states adopting positions that affiliate with the moderate cultural relativist positions have been that aspects of the discussions on FGM, forced and early marriages, domestic violence and honour killing were evidently more fruitful. This is primarily because states have recognised the relationship between culture and the women's rights issue and have then shown an appreciation of implementing reforms to help discourage cultural norms and attitudes that may perpetuate violation of women's rights in relation to the women's rights issues. This has often resulted in more core issues in relation to the reasons behind the continued violations of women's rights issues being drawn to the centre of discussions. Issues such as cultural barriers and norms that women may face when seeking protection of their rights in relation to these issues were drawn to the centre of discussions. This can be contrasted with the use of culture by the strict universalist and strict cultural relativist position, whereby states

¹⁶ 'Problems and Prospects of Universal Cultural Legitimacy for Human Rights' in *Human Rights in Africa: Cross Cultural Perspectives* in An-Na'im and Deng (eds), (Brookings Institution 1990) 332.

¹⁷ Sally Engle Merry, 'Human Rights Law and the Demonization of Culture (And Anthropology along the way) (2003) 26 PoLAR 55, 67.

¹⁸ A An-Na'im, 'Toward a Cross Culture Approach to Defining International Standards of Human Right: The Meaning of Cruel, Inhuman or Degrading Treatment' in Abdullahi An-Naim (ed), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1995) 23.

used the notion of culture to either criticise or challenge reforms in relation to women's rights issues, and where discussions were largely oversimplified.

Wider ramifications of challenging the universality of the UPR process

Overall, in answering the research question of this investigation, it was clear that the embedded normative universalist claims of the UPR process were evident during the discussions of the majority of women's rights issues examined for this investigation. More fundamentally, the findings reveal during the discussions of selected women's rights issues, there was evidence that states adopted positions that expressly or implicitly challenged the normative universalists claim of the UPR process. Some of these challenges were expressed in a manner that affiliated with the strict cultural relativist position. Further, some states also adopted positions that resonated with the moderate cultural relativist position. There are two main conclusions that can be drawn from the findings of this thesis.

First, the innovative and ambitious nature of the UPR process is primarily based on its egalitarian principles, whereby the aim of the review is to treat all states equally using highly formal and rigid procedures. However, the peer review nature of the review process means that there will be a unique composition of state participants that will undertake the review for each member state being reviewed in the UPR process. This in turn means that the nature of discussions during the interactive dialogue stage, that form the focus of all state reviews, will change and adapt depending on the states participating in the reviews and, more importantly, the human rights issue being discussed. Naturally, this means that the extent to which the embedded universalist claim of promoting all human rights norm is met will vary not only between state reviews, but also, within the lines of dialogue in relation to the specific human rights issue itself. In the same way, the extent of the challenge from a degree of cultural relativism will similarly vary depending on the state being reviewed and the human rights issue at stake. Consequently, despite the universalist claims that are embedded in the fundamental aim of the UPR process of promoting universality of all human rights norms, and, indeed, in the name of the process itself, the findings of this project give reason to question the overarching universalist aims and principles on the basis that the nature of each state review is unique in nature as it will be formed depending on the participants of the state review and the human rights issues discussed.

The second conclusion of this investigation emanates from the challenge of cultural relativism that was evident in the discussions held on women's rights during state reviews. As discussed in the first chapter of this thesis, the challenge posed by the theories of cultural relativism to the universality of human rights is a significant one due to the similarities of the theoretical foundations of both studies. The findings of this project not only add weight to the significance of the cultural relativist critique of international human rights law, but the context in which the cultural relativist perspective was raised shows how profound the theory is in practice. For instance, states adopted the strictest form of cultural relativism to challenge the universality of human rights on an international human rights platform at the UN in a process which repeatedly asserts its aim of promoting the universality of all human rights. In addition, the strict cultural relativist position was raised in a setting where one may have anticipated that state representatives would have exercised a diplomatic attitude in light of the international and political pressure that it imposed on the UPR process due to its inherent political nature. Therefore, despite the repeated assertion of the universalist aims of the UPR process, and the review process being subject to an international spotlight, it was striking to note that states expressly challenged reforms to comply with international women's rights on an international platform such as the UPR process, rather than remain silent on the issue. This gives reason to suggest that some states perceive the UPR process to be more than a monitoring mechanism, and more of a platform to express the discontent with some international human rights norms in relation to women's rights issues.

Leading from the express challenge from a strict cultural relativist position on the platform of the UPR process, what was also striking to note was that the states themselves were not held accountable for their challenge to the universality of international women's rights. This silence by the observer states in response to an implicit or explicit challenge to the universality of human rights norms from a strict cultural relativist perspective gives reason to question whether the states participating in the reviews are committed to promoting the universality of all human rights, as provided in the founding resolution of the review process. More fundamentally, if a challenge from a strict cultural relativist position is expressed in a sustained manner in the second cycle and beyond, and the observer states remain silent and refrain from holding the state to account, then this could result in having wider ramifications to the

universality of women's rights protection. This is primarily because an unchecked challenge to the universality of women's rights on an international platform such as the UPR process, may in fact undermine the universality of the particular women's rights obligations when raised on different platforms, whether that be on UN treaty bodies, advocated by NGOs or in the national jurisprudence.

These conclusions provide a significant contribution to enhancing the understanding of how the UPR process operates in practice by providing a unique insight into of the manner in which discussions are undertaken during state reviews. Whilst these conclusions can be significantly grounded on the findings of this project, what cannot be overlooked is that one of the obvious limitations of this study is that it focuses on only 9 out of the 52 human rights issues that were raised in the first cycle of the UPR process. It cannot be denied that the UPR process is a huge mechanism that produces numerous documents, and as a result, a full understanding of the UPR process is not the work of one project, but rather an ongoing project of research in itself.

Nevertheless, the findings of this investigation are significant because they provide reasons to suggest that there is a serious and significant challenge being raised to the universalist claim of the UPR process from a cultural relativist perspective during state reviews in the first cycle of the process. It has been argued in the literature that the outcomes of the UPR process can potentially be significant enough to be considered as contributing to the international human rights law itself. However, if such gravity and importance is given to those outcomes where states show evidence of consensus on international human rights protection, then similar grave concern should be raised when states challenge the universality of international human rights norms on the UPR process. On this basis, it seems essential to undertake further exploration of the UPR process with a particular focus on the universalist claim of the review process, and the significant and serious challenge raised by states from a cultural relativist perspective to the universality of other international human rights norms. If nothing else, this is particularly necessary as a sustained and unchecked challenge to the universality of international human rights norms on an international platform like the UPR process could potentially have wider ramifications for the international human rights infrastructure itself. Such research seems particularly apt as the second cycle of this innovative review process comes to completion in the latter half of next year.

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