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ARTICLE

Latinas, Culture and Human Rights: A Model for Making Change, Saving Soul

Berta Esperanza Hernández-Truyol*

INTRODUCTION

This essay, to be included in the 30th anniversary celebration of the Women's Rights Law Reporter, provides an overview of progress achieved for women in the Americas by virtue of the use of the human rights model to further women's rights and attain betterment of their lives. Specifically, this work reviews the location of Latinas both within and outside the United States; fronteras. As women of color within larger U.S. society and as women within their comunidad Latina, Latinas experience different multifaceted subordinations. A human rights model that recognizes the multidimensional nature of gendered racial discrimination and of racialized gender discrimination can serve to improve the lives of Latinas as well as non-Latina women worldwide.

In order to develop this theme, this work first explores the limitations as well as the promises of the human rights structure. Specifically, in Part I, this essay analyzes existing international protections on the basis of race and sex and explores the cultural dimensions of both race and sex-based oppressions. Part II reviews the protections offered to women by the regional Inter-American system, many of which replicate the protections afforded by the international model. Part III explores the impact that the Inter-American system of protections has had on effecting positive change for women in the laws of many states in the Americas. After providing a general overview of the significance of and need for change, this segment analyzes case law, executive initiatives and codes, and domestic constitutional changes to demonstrate the positive effect that sex and race protections afforded by the international and regional systems have on the lives of Latinas. It also enumerates certain areas where further attention to Latinas' location is necessary. Finally, Part III elucidates that, notwithstanding many advancements, there remain multiple locations

*Levin, Mabie & Levin Professor of Law, University of Florida Levin College of Law. This work is, as all writings tend to be, a development and expansion of prior ideas. Four particular works are important to mention. One is Law, Culture, and Equality: Human Rights' Influence on Domestic Norms: The Case of Women in the Americas, 13 FLA. J. INT'L L. 33 (2001), which is an edited transcription of a presentation made in connection with the conference on Legal & Policy Issues in the Americas. Another is the essay that came from a presentation at a symposium in 1997 on Conceptualizing Violence: Present and Future Developments in International Law at Albany Law School of Union University. A third is Women's Rights as Human Rights – Rules Realities and the Role of Culture: A Formula for Reform, 21 BROOKLYN J. INT'L L. 605 (1996) where I began a serious exploration of culture. The last is an unpublished paper drafted in connection with a Ford Foundations sponsored forum on women in the Americas. Many thanks to the editors of the Rutgers' Women's Rights Law Reporter for inviting me to participate in this historic edition. Last, but by no means least, mil gracias to Kristy Armada (U.F. Law '02) and Shelbi Day (U.F. Law '02) for invaluable research, editing and writing assistance.
of oppression and inequality, conditions with respect to which true equality for Latinas is but an aspiration.

Following this factual presentation of Latinas' realities, this work sets out a proposal for reform that is applicable not only to Latinas both inside and outside United States fronteras, but also to women worldwide. Within that proposal are two major suggestions. First, it urges the use of an expanded anti-violence paradigm that rejects as violence against women any acts – public or private – that result in the subjugation of women or their continued existence as second class citizens. Second, it sets out a series of inquiries to guide the analysis of whether any project or proposal will effectively work against the interest of full equality for women. This work concludes that, while there is much work yet to be done to eradicate women's unequal location in their myriad societies and communities, the human rights idea provides much cause for celebration and hope.

I. LATINAS AND THE HUMAN RIGHTS IDEA

The issues of race, gender, and culture are salient considerations in exploring the human rights dimension to an analysis of Latinas' location in societies and in using the model to advance that position. Latinas, inside and outside the United States, must operate within a complex system of culturally derived racialization and sexualization. Within majority communities, Latinas are racial "others," subordinated because their racialized ethnic origins separate them from the normative standards of personhood. Moreover, within their own communities, whether inside or outside the United States, Latinas become second class because of their sex, a deeply-imbedded cultural trope that is definitional of women's worth and particularized roles. Both locally and abroad, women's distance from normal can be exacerbated if they are racial (and sexual) others within their own communities.

An interrogation of the possible interventions that human rights norms can afford Latinas, requires a scrutinization of the available instruments that afford useful strategies for the progressive development of women in the Americas. Specifically, a consideration of the utility of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and various regional documents that address issues pertinent to women in the Americas is necessary.

A. Varied Conceptions of Race, Ethnicity, and National Origin

An examination of CERD reveals some striking features. Although from its name this is anything but apparent, CERD is not solely a race convention; indeed, it provides:

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

This definition both presents and depicts the problem in talking about race and ethnicity: CERD defines ethnicity as, and therefore conflates it with, race. Therefore, in most places in the Americas, race and ethnicity are different classifications.

2. Id. at 892.
5. See infra Part II.
6. See CERD, supra note 3.
7. Id. at art. 1.
8. See generally Borders (En)Gendered, supra note 1, at 904 (noting that, for example, Latinas/os raised outside of the United States regard race and ethnicity as "plainly different items").
To be sure, there can exist inter-ethnic racial conflicts and inter-racial ethnic conflicts, which are all but obscured if race and ethnicity are rendered synonymous categories. Beyond collapsing race and ethnicity, CERD conflates race with color, descent, and national origin. These, too, are matters related to, indeed interdependent with, but separate from race or ethnicity.

Such racialization-of-differences paradigm is the predominant view of difference within the United States - where national and ethnic identities are considered racial differences. The translation of this local idiomsyncreasy to a global definition unearths the hegemonic underpinnings of international norms. Moreover, this inaccurate definition, disseminated and adopted world-wide as law, reinforces a one-axis approach to analysis of identity rather than the more accurate multidimensionality perspective. Indeed, a multidimensionality perspective is much more realistic in the context of the human condition and our daily existence.

Beyond the incoherent definition of race in CERD, it is also important to understand that different cultural groups have different understandings of the concept of race. One brief but poignant example effectively crystallizes the divergent dominant and silenced social constructions of race. Inherently, the Latina/o and the United States constructions of race “are polar opposites.” Indeed, in the United States, the central, essential, axiomatic paradigm that courts religiously accept, believe in, and impose is the “one drop” rule. This model dictates that, regardless of phenotype, one drop of black blood makes a person black. Under this logic, there is no amount of “whitening” that can render one white, normatively speaking. As Gunnar Myrdal has articulately described, the “Negro race” is defined in America by the white people. It is defined in terms of parentage. Everybody having a known trace of Negro blood in his veins – no matter how far back it was acquired – is classified as a Negro. No amount of white ancestry, except one hundred percent, will permit entrance to the white race.

To be sure, case law adopts this approach: “[W]hite persons” within the meaning of the statute are members of the Caucasian race, as Caucasian is defined in the understanding of the mass of men. The term excludes . . . American Indians. . . . Nor is the range of the exclusion limited to persons of the full blood. . . . [M]en are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less, the governing test always . . . being that of common understanding.

In stark contrast to this historically derived United States social construction of race is the caribeño/a social construction that subscribes to the notion of blanqueamiento (whitening) – ironically a “one drop” rule of sorts. Pursuant to this version, however, the paradigm is reversed: “one drop of white blood starts you on the [desirable] route to . . . whiteness.”

It is noteworthy, however, that while Latinas/os and Anglas/os differ on their respective constructions of race, they agree on the favored race: white. From the Latina/o lens, this represents the colonized internalization “of the colonizer’s predilection” for whiteness as reflected in the Spaniards’ carry-over to the New World.

9. One example of this is the recent conflict in Rwanda between the Hutu and Tutsi people. See generally PAUL J. MAGNARELLA, JUSTICE IN AFRICA: RWANDA’S GENOCIDE, ITS COURTS, AND THE UN CRIMINAL TUEBIL (2000) (describing the background of the conflict in Rwanda between the Hutu and Tutsi people); Mark Huband, Rwanda—The Genocide, in CRIME OF WAR: WHAT THE PUBLIC SHOULD KNOW 312-315 (Roy Gutman & David Rieff eds., 1999) (depicting the mass genocide that took place in 1994 in Rwanda when the Hutus attempted to exterminate the Tutsis).

10. CERD, supra note 3, at art. 1.


13. See generally Borders (En)Gendered, supra note 1, at 897.

14. See GUNNAR MYRDAL, AN AMERICAN DILEMMA 113 (2d ed. 1962).

15. Id.

16. Id.


18. IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27 (1996) (describing the court constructed definition of “white” through a process of negation, systematically identifying who was non-White”).

of their racial biases as represented by the "expulsion of Jews and Arabs from Spain." During colonization, to ensure "purity of blood," the Spaniards established a complex system of racial categorizations that included the prohibition of public office holders from having a "taint of Indian, Jewish, or Arabic blood." These categorizations survive today, albeit in an informal fashion, in the South, Central, Latin Americas, and the caribe and form the basis of unstated, buried, complex forms of racisms that while rather different from those existing in the United States nevertheless prevail and pervade all social locations.

These differences in social construction of race/ethnicity between the majority and Latinas/os result in peculiar outcomes that are only explicable by the dramatically divergent cultural racial perspectives. In fact, statistical reports reveal that approximately 95% of Latinas/os identify themselves as white notwithstanding the "fact [that] most [Latinas/os] [are] racially mixed, including combinations of European White, African Black, and American Indian ... ." Contrast to this Latina/o self-identification, if one considers the United States construction of race, it is an impossibility for 95% of Latinas/os to be classified as white. Nevertheless, this is the Latinas/os' own truth.

Significantly, international human rights norms which protect against discrimination on the bases of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" should easily be able to negotiate racial and ethnic paradigms that differ from each other based on cultural perceptions. However, CERD's version, by collapsing myriad different categories into "race" appears to impose one particular racial interpretation – one that comports to the dominant view within the United States.

The different bases and histories of racisms, as well as the different forms in which racial/ethnic prejudice manifests itself in different societies, suggest that it would be appropriate first to deconstruct and then to reconstruct the definition of racial discrimination contained in CERD. This would allow inquiries that can lead to understandings of their origins and current manifestations of socialized views in diverse cultural settings. Indeed, a reconstructed paradigm that allows global discourses across cultures would embrace different peoples’ varied realities and would permit the attainment of better human understandings and harmony. Only then will equality be attainable. To be sure, only such process will permit the eradication of the ethnic and racial subordination that Latinas/os experience within the United States, and the gender based subordination Latinas experience within their own communities – both within and outside of the borderlands of the United States.

Thus, as a beginning point to urge a human rights model for progress for Latinas in the Americas, we need to re-imagine CERD in a global fashion. The covenant must not only continue to protect Latinas against discrimination on the basis of race, but it also must protect the other covered categories as phenomena and possible sites of oppressions that are different from, or simply confounded by, race.

For all Latinas/os, regardless of whether they are raised within or outside the United States fronteras, their identity narratives are "based upon [their] ethnic/national origin/social/cultural identity." However, while "[f]or the Latinas/os outside the United States, this is the dominant" "normative" paradigm, for those

20. Id. at 900-01.
22. Gerardo Marin & Barbara Van Oss Marin, Research with Hispanic Populations 2 (1991). Marin notes that the label "Hispanic" is not universally accepted and that "'Hispanic' as an ethnic label is the product of a decision by the Office of Management and Budget" to categorize people "of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race."
24. See Borders (En)Gendered, supra note 1, at 895.
raised within the United States this paradigm loses normativity as it is subordinated to the United States' dominant racial paradigms.25 Thus the serendipitous geographic location of Latinas/os defines their racial/ethnic self-identification as valid or aberrant. The instruments that we use to protect these multiple interdependent and indivisible categories, as well as the interpretive process in their application, need the fluidity and flexibility not to essentialize and to permit the mapping of these different geographies regardless of location. Indeed, the documents need to validate, rather than negate, multicultural legitimacy.

B. The Omission of Sex as an Element of Discrimination

Another reality is that CERD does not at all consider sex in the context of racial discrimination. This observation regards both race and issues of sex/gender. Indeed, CERD's preamble is a prime example of why we have to insist upon a new construction of these documents that consciously and methodically considers sex. In its preamble, the Race Convention makes reference to the non-discrimination principles of the United Nations' Charter as well as the Universal Declaration,26 both of which include sex. Yet, CERD then continues by providing

for the entitlement of rights and freedoms therein "without distinction of any kind, in particular as to race, colour, or national origin"27 excluding sex. This is both significant and tragic because there are documented gendered dimensions of racial discriminations.

It is important to explore both the successes of international instruments as tools for women's progress and emancipation as well as the erasure of sex from both international and regional instruments, even in contexts that particularly affect women. It also is necessary to address the inescapable gendered dimensions of racial discrimination – particularly a definition that conflates ethnicity, descent, national and ethnic origin. For example, it is necessary to explore the complex nature of cultural protections to recognize that culture can be both a tool of the oppressor to decimate tradition and a weapon of tradition to decimate women.

Sadly, our world is replete with present day examples of gendered tragedies – from honor killings in India28 and Brazil,29 to de jure disenfranchisement of women in some states30 and de facto denial of suffrage to the poor in virtually every state;31 from segregation (as varied as the Taliban's assault on women in Afghanistan,32 job apartheid worldwide,33 and the Black/White wealth disparities in the U.S.)34 to blatant sex

25. Id. at 894-95.
26. CERD, supra note 3, at preamble.
27. Id.
28. See U.S. DEP'T OF STATE, 103d CONG., 2d SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993 1350 (Comm. Print 1994) [hereinafter COUNTRY REPORTS] explaining that in the typical dowry dispute [in India], a groom's family will harass a woman they believe has not provided sufficient dowry . . . . [This] harassment [sometimes] ends in the woman's death, which family members often try to pass off as a suicide or kitchen accident . . . . Government figures show a total of 4,785 dowry deaths in 1992 . . . . Nonetheless, convictions [in dowry death cases] are rare.
30. See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT (1995) at 29-71 [hereinafter UNHDR 1995].
and gender discrimination and stereotyping; from physical violence to economic assaults; from rape for ethnic cleansing to rape for sport.

In reviewing the realities of women’s lives worldwide in the context of international human rights, two distressing facts surface. First, the rules are, at best, imperfect and, at worst, venal in effecting women’s exclusion — silencing women’s voices, rendering women invisible, relegating women to second-class citizenship.\(^{35}\) Second, women simply do not universally enjoy human rights, as the examples above demonstrate.

To be sure, this is as true in the West as in the East; in the North as in the South. Regardless of the indicators used – employment, economics, education, personal autonomy, political participation, health, or personal security (meaning freedom from all types of violence), all concerns purportedly protected by international human rights documents - women remain a subordinated class.\(^{36}\) Notwithstanding our legal rights, “the universal [reality] is that women are routinely subjected to torture, starvation, terrorism, humiliation, mutilation, rape, . . . health risks [(maternity and otherwise related)], economic duress, and sexual exploitation, simply because of [our] sex.”\(^{37}\) Our ethnicity, color, race, and national or social origins are often aggravating factors.

It is significant that women have made phenomenal strides in crossing race, color, class, culture, religion, and language borderlands in order to promote and protect women’s rights and address their concerns. At the 1993 Human Rights Conference in Austria, women from all walks of life united to put women at the center of a human rights meeting that originally did not even include women in its agenda.\(^{38}\) An exciting momentum was created that could not be stopped and women from all corners of the world continued this gender-based coalition in Cairo, Rio de Janeiro, Vienna, and Beijing.\(^{39}\)

A great achievement in promoting the full citizenship of women is CEDAW, which by focusing on all ranges of gender issues – from the public to the private, from the economic to the cultural, from the social to the political, from the family to the government – not only recognizes the need for, but also reinforces, the indivisibility construct.\(^{40}\) CEDAW embraces women as the complex, multidimensional beings they are. It takes a holistic approach towards women from all walks of life attaining full personhood by recognizing the importance not only of civil and political rights but also of social, economic, cultural, and solidarity rights.\(^{41}\) This treaty, along with other gender specific documents\(^{42}\) and perspectives recently embraced by the global community as well as the recognition of the need for gender perspectives in general documents (such as the International Criminal Court statute), are (can be) the foundation for making women’s equality an accessible reality. Regrettably, however, CEDAW’s failing is that it does not integrate race into its gender-centered construct, a vacuum that paral-

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\(^{38}\) Julie Mertus & Pamela Goldberg, A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct, 26 N. Y. U. J. INT’L L. & POL. 201, 202 (1994) (noting that the Vienna Declaration "marks a milestone in the efforts to gain recognition of women’s human rights").

\(^{39}\) See Women’s Rights As Human Rights, supra note 37, at 617-18.

\(^{40}\) See, e.g., CEDAW, supra note 4, at art. 1 (defining “discrimination against women” as “any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”). The document asserts that States should take whatever measures necessary so that women are guaranteed full and equal rights – political, social, economic, cultural, and civil – as those enjoyed by men. Id. at art 3.

\(^{41}\) See, e.g., CEDAW, supra note 4, at art. 1.

lcls the failure of CERD to integrate gender into race-centered construct.43

These realities reflect the urgent need to restructure and reinvigorate the human rights vision by making interdependence and indivisibility an actuality in human rights analysis and in all human rights documents. There are several examples of locations where the interdependence focus would enrich the discourses. For instance, in Article 20, the ICCPR provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."44 However, Article 20 does not include a prohibition against incitement to discrimination or violence on the grounds of sex, although sex is one of the categories in the general anti-discrimination clause as well as a basis upon which much violence is experienced.45 Similarly, it is noteworthy that article 13 of the Economic Covenant which provides that "education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms . . . [and] shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups . . . " omits sex from the specifically enumerated grounds for promotion of tolerance through education.46 Significantly, the need for better educational opportunities for women and female children as a means of attaining equality is emphasized in the documents that emerged from the Vienna,47 Cairo,48 Copenhagen,49 and Beijing50 conferences.

Regional documents are similarly flawed. The American Convention (Article 13(5)) has a provision almost identical to the above-described Article 20 of the ICCPR.51 Additionally, the African Charter excludes sex from its Article 12(5) prohibition against mass expulsions, a gendered exclusion that is particularly tragic because women and their children comprise 70-80% of the world’s refugees.52

So, while in theory international and regional documents, without exception, include non-discrimination principles, including sex, at their core, sex is frequently forgotten. This is of particular concern to women of color whose multidimensionality crosses the borders of sex, race, ethnicity, and national origin on a daily basis.

C. The Creation of a Gendered Underclass

Of particular concern to women of the Americas are the normative gendered cultural standards that conspire with sex to create a gendered underclass—a group of olvidadas. To be sure, it is not an easy task to talk about culture when the group being scrutinized is one as diverse as Latinas/os.53 Indeed, this group has internally distinct and varied languages, migration, education, emancipation, and political histories.54 “Roots within the territory now known

43. See generally CEDAW, supra note 4; CERD, supra note 3.
44. ICCPR, supra note 23, at art. 20.
45. Id.
53. In another article, I explore what could be labeled identity themes within the Latina/o community by expounding on the demographic diversity and multidimensionality of identity of Latinas/os contexts. I emphasize that boundaries, limits, and understandings of a varied and diverse community, such as Latinas/os, is far from fixed or easily explained. Building Bridges I, supra note 12, at 369; see also Kevin R. Johnson, “Melting Pot” or “Ring Fire”? Assimilation and the Mexican-American Experience, 85 Cal. L. Rev. 1259 (1997); Berta Esperanza Hernández-Truyol, Invisible Identities: Culture Clashes, Confused Constructs and Reality Checks, 2 Harv. Latino L. Rev. 199, 200-05 (1997) [hereinafter La Familia Latina].
54. Building Bridges I, supra note 12, at 386-87.
as the United States are varied, the language of home is not easily predictable, racial composition is best described as mestizaje – although within the U.S. borderlands Latinas/os cannot be white because they are Latina/o.

Yet, while recognizing the diversities that exist between and among the panethnic groups collectively catalogued under the umbrella of the Latina/o label, it is inescapable that the group does indeed share many cultural commonalities. Many of these converge around the importance of family and firm notions about appropriate sex and gender roles – two interconnected foundations of cultural oppression for Latinas. Throughout the Americas – North, South, Central and the Caribbean – women are considered an “other” from the male norm. They are constructed by the dominant sex as the second sex, all in comparison to the created norm.

Latinas, because of cultural tropes, face additional burdens. In North America, for normativas the axis for sex-subordination is the isolatable single trait of sex. In terms of race, ethnicity, national origin, and language, Anglas are the gendered reflection of the normativo (except, of course, women who also are sexual minorities). For women of the other Americas, the situation is more complicated because the deployment of animus can also be based upon the combination of their sex and their color, accent, appearance, ethnicity, class, and/or national origin. This model is grounded on the cultural expectancies that conspire with gendered oppressions to create standards for and interpretations of sex that subordinate women. Not only do women of color experience the sexism, classism, ethnocentrism, nativism, and racism of the majority culture, they must also contend with the sexism, racism, and classism within their own culture. The dominant culture’s gendered borders render all women less than full citizens simply because of their sex. The cultural gendered borders create for women of color a gendered underclass within her own comunidad.

As an example of the impact of cultural norms on Latinas, it is interesting to examine the role of family in defining women’s location in society. “La familia is of sacrosanct importance in the cultura Latina.” It also is the site initially and continuously responsible for the creation, construction, and constitution of gendered identities.

Our families operate on the extended family model in which abuelas y abuelos are respected and revered, tíos y tíos are effectively second sets of parents, and primas/os are like additional hermanas/os. This big tent is where we first learn about appropriate and proper conduct, including sex roles, from several generations. These generationally unchanging molds in turn become proof of the correctness of the point, about our proper and befitting places; what conduct is suitable and acceptable; and what comportments and performances constitute cosas feas (ugly things).

Inevitably bridging the diversities among Latinas/os, these learnings and knowledges about fitting demeanor are universally and uniformly gendered and sexualized. La cultura Latina rigorously and authoritatively defines, delineates, and enforces gender

55. Berta Esperanza Hernández-Truyol, Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex, 53 U. MIAMI L. REV. 811, 815 (1999) [hereinafter Latina Multidimensionality]; see also Gloria Anzaldúa, Haciendo Caras, una Entrada, in MAKING SOUL/HACIENDO CARAS x-vxvi (Gloria Anzaldúa ed., 1990) (noting that in "mestizaje theories we create new categories for those of us left out or pushed out of the existing ones");

56. Borders (En)Gendered, supra note 1, at 882, 898.


58. See Berta Esperanza Hernández-Truyol, Mujeres De Las Americas – Race, Gender, Ethnicity and Interdependent International Human Rights 16 (unpublished manuscript, on file with author).


60. See Latina Multidimensionality, supra note 55, at 816.

61. See Borders (En)gendered, supra note 1, at 915.
identities. These *fronteras* are then used as a tool of oppression and pressure to marginalize those *mujeres* (and *hombres*) who do not conform to culturally accepted (and acceptable) designations of gender and sex roles and norms.  

Frequently, strong religious ties in many communities of color also aggravate women's gender subordination. For example, in the *cultura Latina* the Latina's identity is developed in the context of the "ideal" woman fabricated in the mold of the Virgin Mary, a construct called *Marianismo* that glorifies Latinas as "strong, long-suffering women who have endured and kept *la cultura Latina* and the family intact."  

*Marianismo* is about living in the shadow of all your men - father, boyfriend, son, husband, brother - and your family. Self-sacrifice is lauded. (Mind you, these cultural proscriptions have broad socio-economic consequences: Latinas are the poorest of any demographic group in the United States.)  

Denial of personhood becomes a virtue instead of a human rights violation.  

D. Nuevas Teorías: Protection from Harmful Cultural Norms  

Women of the Americas provide an interesting twist to the international universalist versus relativist debate. Women of color, whose strongest source of support often comes from community, family, and church are caught in the conundrum that these institutions also dictate cultural norms that are complicit in their oppression and subordination. Thus, ironically, the concept of culture protected in the international sphere, can be used both to subordinate non-dominant cultures in the name of law or to perpetuate women's subordination in the name of cultural tradition.

In this context, our *nuevas teorías* must promote the concept of a benevolent, non-discriminatory, non-subordinating respect for women across cultures. A new paradigm, while embracing and being sensitive to cultural differences, must simultaneously reject oppressive aspects of culture, particularly sex-subordinating or sex-marginalizing practices or beliefs. The project must confront both the internal and external components of the sources of oppression for women of color.

International human rights documents provide a model for such an approach. While treaties consistently address culture as a basis upon which protections must be afforded, not one cites to *cultura* as the grounds upon which other protected rights may be abridged. For example CEDAW at article 2(f) mandates States Parties to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women." In fact, the Women's Convention goes so far as to require States Parties to take all appropriate measures . . . to modify the *social and cultural patterns of conduct* of men and women, with a view to achieving the elimination of prejudices and *customary and all other practices* which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Another significant example of the way international instruments seek to protect women from harmful cultural norms is found in the African Charter on the Rights and Welfare of the African Child which expressly balances cultural rights and pretexts to disempower or harm persons simply because of their sex. The Charter requires member states of the Organization of African Unity to "abolish customs and practices harmful to the welfare, normal growth and development of the child, and in particular . . . those customs and practices discriminatory to the child on the grounds of *sex* or other status." Similarly, The Convention on the Rights
of the Child requires State Parties to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”

These examples show that there are dire social, political, civil, and cultural consequences to being a woman of color. Considering the above-enumerated observations about Latina/o cultural tropes, culture, in addition to sex and race, becomes an important focus for a discussion of equality and human rights with respect to women in the Americas. Human rights norms expressly protect culture and cultural expressions as well as equality and non-discrimination. These protections are extended to minority cultures living within a dominant culture as well as to cultural dissenters within their own cultural settings. Cultural protections are especially significant in human rights analyses because they were crafted with the knowledge and understanding that implicitly recognizes that ethnic minorities are particularly vulnerable to a tyrannical majority’s whims in denying rights – be this majority the so-called normative community or the empowered within a minority community. To be sure, such concerns and consideration should extend to all women within any culture as well as to minority women within their minority culture. The section that follows reviews the InterAmerican system to ascertain its potential for enhancing the lives of women in the Americas.

II. THE INTER-AMERICAN SYSTEM

A review of the instruments that comprise the InterAmerican system and the protections offered therefrom reveal the impact of regional human rights norms on women. The InterAmerican human rights system, the first fully functioning human rights system in peripheral states, has crafted numerous innovative approaches to protect and ensure human rights, including the rights of women. There are two principal normative instruments of the InterAmerican human rights system, both of which expressly prohibit sex discrimination and, indeed, mandate sex equality. One is the American Declaration on the Rights and Duties of Man, which sets forth the human rights of member states to the Charter of the Organiza-


69. Id. at art. 24(3).

70. Universal Declaration, supra note 23, at art. 27 (stating that “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”); ICCPR, supra note 23, at art. 27 (asserting that “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”); Economic Covenant, supra note 46, at art. 1(1) (directing that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their . . . cultural development.”); see generally Rodolfo Piza, Coordination of the Mechanisms for the Protection of Human Rights in American Convention with Those Established by the United Nations, 30 Am. U. L. Rev. 167 (1980) (delineating the parallels between the American Convention and United Nations human rights instruments).

71. See ICCPR, supra note 23, at art. 2(1) (requiring that “[e]ach State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . sex . . .”), and at art. 26 (mandating that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex . . .”); see also Economic Covenant, supra note 46, at pt. II, art. 2(2) (requiring that “States Parties to the present Covenant undertake to guarantee that the rights enunciated . . . will be exercised without discrimination of any kind as to . . . sex”), and at art. 3 (articulating the obligation of “State Parties . . . to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the . . . Covenant”), and at art. 7 (guaranteeing women “conditions of work not inferior to those enjoyed by men, with equal pay for equal work”).

72. Women’s Rights As Human Rights, supra note 37, at 650.

73. Id. at 650; Borders (En)Gendered, supra note 1, at 911.

74. This section of the paper is based upon a presentation made at the first Legal and Policy Issues in the Americas Conference sponsored by the University of Florida Levin College of Law, an edited transcript of which will appear as Berta Esperanza Hernández-Truyol, Law Culture and Equality – Human Rights’ Influence on Domestic Norms: The Case of Women in the Americas, 13 Fla. J. Int’l L. __ (forthcoming 2001).

75. See American Convention, supra note 51, at art. 1. Interpretation and enforcement of the American Convention of Human Rights is carried out by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.

76. See Convention of Belém do Pará, supra note 42.

77. See American Declaration on Rights and Duties of Man, adopted by the Ninth International Conference of American States, reprinted in 1 The Inter-American System, pt. II, at 5 (F. V. García-Amador ed., 1983) (establishing a set of thirty-eight articles that delineate American states’ recognition of the need to protect the essential rights of (wo)men) [hereinafter American Declaration].
tion of American States (OAS). Significantly, the American Declaration parallels the Universal Declaration of Human Rights, at least significant parts of which are considered to be customary law. Thus, those parts of the American Declaration that reflect the principles accepted as customary law in the Universal Declaration also can be understood as a statement of customary international law.

The second significant regional instrument is the American Convention on Human Rights (also known as the Pact of San José) which is binding on its signatories. The American Convention parallels both the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights in the international sphere. This double tracking is significant because this one instrument contains protections of both so-called first generation civil and political rights as well as second generation social, economic, and cultural rights.

To strengthen this normative framework, specifically in the protection and promotion of the rights of women, the General Assembly of the OAS adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, known popularly as the Convention of Belém do Pará. This recent convention, which entered into force only in March of 1995, already has 27 state parties and, as such, is the most widely ratified law in the Inter-American system.

Belém do Pará represents a re-envisioning of Inter-American human rights law to apply in a gender-specific way. Its adoption reflects a powerful consensus concerning the need to eradicate gender violence. Significantly, the principles of nondiscrimination against and equal protection of women that Belém do Pará embraces are foundational to the constitutive instruments of the human rights system – both the international system generally and the Inter-American system specifically. It is important to note, however, that this innovative treaty defines discrimination against women broadly and includes differences in treatment on the basis of sex which disadvantage women.

Concerning sex- and gender-based discrimination, Belém do Pará thus is unique. It recognizes that violence against women is a manifestation of women’s historically unequal power location – in both the public and the private


79. See Universal Declaration, supra note 23, at art. 4; see generally Piza, supra note 70 (delineating the parallels between the American Convention and United Nations human rights instruments).

80. See Filartiga v. Pena-Irala, 630 F.2d 876, 883 n.80 (2d Cir. 1980); see also Berta Esperanza Hernández-Truyol, Reconciling Rights In Collision, in IMMIGRANTS RIGHTS, 15TH ANNUAL CONF., 275, 279 (Juan F. Pérez ed., 1997).

81. See American Convention, supra note 51, at art. 1 (declaring that “[t]he States [will] ensure to all persons . . . the free and full exercise . . . without any discrimination for reasons of race, color, sex, language . . . ”); see generally, Christina M. Cerna, International Law and the Protection of Human Rights in the Inter-American System, 19 Hous. J. Int’l L. 731 (Spring 1997) (discussing the compulsory jurisdiction of the Inter-American Court of Human Rights for violations committed by the seventeen countries who are signatories to the convention). Compulsory jurisdiction of the court is binding on Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad, Tobago, Uruguay and Venezuela.

82. See ICCPR, supra note 23, at art. 2.

83. See Economic Covenant, supra note 46, at art. 2.


85. Convention of Belém do Pará, supra note 42.

86. See Convention of Belém do Pará, supra note 42, at art. 4 (stating that Belém do Pará recognizes that violence against women constitutes a violation of human rights, and states that every woman has the “right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments . . . [such as] (a) the right to have her rights respected . . . (f) the right to equal protection before the law and of the law”).

87. See generally Vienna Declaration, supra note 47; Social Summit, supra note 49; ICCPR, supra note 23; American Convention, supra note 75.

88. See Convention of Belém do Pará, supra note 42, at art. 2 defining, by treaty, violence against women as that which:

(a) . . . occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse; (b) . . . occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and (c) . . . is perpetrated or condoned by the state or its agents regardless of where it occurs.
societies" and in all societies—vis à vis men. Belém do Pará defines violence against women as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere." This articulation of violence is grounded on well-established and universally recognized rights to life, physical and mental integrity, personal liberty, dignity, and equal protection of the laws. Indeed, the exercise and enjoyment of these rights is nullified by violence against women. Very significantly, the right of women to be free from violence includes "the right of women to be valued and educated free of stereotyped patterns of behavior [as well as of] social and cultural practices based on concepts of inferiority or subordination.

It is noteworthy that in analyzing human rights regimes as tools that will allow the promotion of equality of women within their own countries, both international and regional human rights systems are designed to be subsidiary to national systems. As such, both the procedural and the substantive elements of the human rights projects are important. Procedurally, although the Inter-American system indeed provides a right of individual petition (although only state parties can ultimately appear before the Inter-American court), even the Commission procedures are only available once all state processes are exhausted. Of course, there are exceptions for the cases where the individual state's processes lack due process, access to state processes has been denied, and so forth.

As the following parts will show, the Inter-American system has had a significant impact in effecting progresses for women in the Americas not only within the regional sphere, but also with respect to women's location within their individual societies. The Inter-American system has been instrumental in placing women's rights on the social agenda both regionally and locally and in instituting regional and local reforms aimed at advancing the legal, social, political, and economic status of women. However, as the Inter-American Commission's report shows, and this essay will address, de jure discrimination continues to exist, particularly with respect to family matters and administration of property.

89. Id. at art. 3 (stating "[e]very woman has the right to be free from violence in both the public and private spheres").
90. Id. at art. 1.
91. See id. at art. 4(a); American Declaration, supra note 77, at art. 1; American Convention, supra note 51, at art. 4; Universal Declaration, supra note 23, at art. 3; ICCPR, supra note 23, at art. 6.
92. Convention of Belém do Pará, supra note 42, at arts. 4(b); American Declaration, supra note 77, at art. 11, 17; American Convention, supra note 51, at art. 5; Universal Declaration, supra note 23, at art. 5; ICCPR, supra note 23, at art. 7.
93. Convention of Belém do Pará, supra note 42, at art. 4(c); American Declaration, supra note 77, at art. 1; American Convention, supra note 51, at art. 7; Universal Declaration, supra note 23, at art. 3; ICCPR, supra note 23, at art. 9.
94. Convention of Belém do Pará, supra note 42, at art. 4(e); Universal Declaration, supra note 23, at art. 1; ICCPR, supra note 23, at art. 10; American Convention, supra note 51, at art. 5.
95. Convention of Belém do Pará, supra note 42, at art. 4(f); American Declaration, supra note 77, at art. 2; American Convention, supra note 51, at arts. 3, 24; Universal Declaration, supra note 23, at arts. 6, 7; ICCPR, supra note 23, at arts. 3, 14, 16, 26, 27.
96. Convention of Belém do Pará, supra note 42, at art. 6(b); American Declaration, supra note 77, at art. 12; Universal Declaration, supra note 23, at art. 27.
97. See generally Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 178-79 (1953) (discussing the "local remedies rule" which requires exhaustion of local remedies before relief can be sought in an international tribunal).
98. American Convention, supra note 51, at art. 44 (granting to "any person or group of persons, or any nongovernmental entity legally recognized in one of [sic] more member states . . . the right to file" petitions containing denunciations or complaints of violation . . .").
99. Id. at art. 61 (allowing "only the States Parties and the Commission . . . the right to submit a case to the Court," to be heard once the procedural requirements of Articles 48 and 50 of the American Convention are satisfied).
100. Id. at art. 46(1)(a) (providing that the remedies under domestic law must be pursued and exhausted in accordance with generally recognized principles of international law").
101. Id. at art. 46(2) (providing for prayer for relief before the Inter-American Court when: "(a) the domestic legislation of the state concerned does not afford due process of law . . . ; (b) the party alleging a violation . . . has been denied access to the remedies under domestic law or has been prevented from exhausting them . . .").
103. Id. at IV (concluding that "certain countries possess, in greater or lesser measure, laws that restrict and/or discriminate against the civil rights of women in marriage with respect to family matters and administration of property.

...
III. THE IMPACT OF THE HUMAN RIGHTS SYSTEM ON DOMESTIC NORMS

This section explores the impact of the regional norms discussed above on the domestic laws of the States within the system. This analysis reveals two realities at tension with each other. One is that the regional system of laws has affected and influenced local norms – at the executive, constitutional, and code levels – so as to better the condition of women. The other is that with respect to women and women’s real conditions, not only are more changes in order to promote their full citizenship, but not all the de jure changes have translated to actual changes in women’s lives.

A. The General Environment

The influence of regional (and international) norms on the local equality paradigms under which Latinas operate both within and outside the United States borders, is significant in the context of the pervasive gender roles and the role of familia in the cultura Latina. It is important to contemplate what women’s equality can mean within the cultura Latina – a plainly hetero-patriarchal culture that has subordinated (and continues to subordinate) women, often in the name of tradition and culture – in the context of a human rights framework that both mandates equality and non discrimination, on the one hand, and the protection of culture on the other.

In his work El Laberinto de la Soledad, Octavio Paz captured the Latinos’ conception of womanhood:

Como casi todos los pueblos, los mexicanos consideran a la mujer como un instrumento, ya que los deseos del hombre, ya de los fines que le asignan la ley, la sociedad o la moral. Fines, hay que decirlo, sobre los que nunca se le ha pedido su consentimiento y en cuya realización participa sólo pasivamente, en tanto que “depositaria” de ciertos valores. Prostíbuta, diosa, gran señora, amante, la mujer transmite o conserva, pero no crea los valores y energías que le confían la naturaleza o la sociedad. En un mundo hecho a la imagen de los hombres, la mujer es sólo un reflejo de la voluntad y querer masculinos. Pasiva, se convierte en diosa, ser que encarna los elementos estables y antiguos del universo; la tierra, madre y virgen; activa, es siempre función, medio, canal. La feminidad nunca es un fin en sí mismo, como lo es la hombría.105

Without a doubt, societies can debate the proper location of women in society as a whole, and in the cultura Latina specifically. But if Octavio Paz’s description of woman and womanhood is an accurate cultural description, it is not possible to construe it as one that values equality. Rather, it is based on the culture’s sex role stereotyping – a practice explicitly prohibited by Belém do Pará and at least impliedly proscribed by the regional and international instruments forbidding sex discrimination and mandating sex equality.107 If Paz’s observations are accurate, the question becomes whether in América Latina there can be movement towards a different way of seeing a group – here women – that can reconcile traditional cultural views of sex/gender with equality. Accordingly, regional and international norms give cause for optimism. The Inter-American human rights system has already effected immense changes in legal and social real life environments for wo-

105. OCTAVIO PAZ, EL LABERINTO DE LA SOLEDAD [the Labyrinth of Loneliness and Solitude] 171 (1997). Author's translation: "Like just about all peoples, Mexicans consider woman as an instrument; since men’s desires, the roles assigned by law, society and morality. Roles, one must say, about which her consent has never been asked and in realization of which she participates only passively as the depository of certain values. Prostitute, goddess, lady, lover, woman transmits or preserves, but never creates, the values and energies that are offered to her by nature or society. In the world created in the image of men, woman is only a reflection of men. Passive she becomes a goddess, a person who embodies the stable ancient elements of the universe; earth, mother, and virgin; active she is always a vessel, means, conduit. Femininity is never an end in itself as manhood.”
106. Convention of Belém do Pará, supra note 42, at art. 8(b).
107. See, e.g., Universal Declaration, supra note 23, art. 27; ICCPR, supra note 23, art. 3.
men, both in the region as a whole and within specific countries, notwithstanding some daunting challenges that remain.

Beyond the substantive challenges, another challenge is one of resources. The Inter-American Commission is responsible for oversight and enforcement of the human rights norms in the entire OAS system. "The Commission's tasks are rendered even more difficult by the social and economic heterogeneity of the Americas, the intermittent civil strife that still afflicts many countries, the terrorism and narcotics traffic that compound existing human rights problems and present special human rights problems of their own, and the sporadic coups." Interestingly, the suspension of constitutional order in particular states does not impair the Commission's jurisdiction. Rather, "constitutional order itself is a requirement of the American Convention as well as a precondition for the fulfillment of many other rights set out therein."

In all cases, and notwithstanding these difficulties, below I provide examples of the successes of the human rights system in addressing issues of sex/gender equality and non-discrimination. First, I describe several significant cases; next, I list numerous government initiatives that establish agencies that address sex/gender issues within the national context; and finally, I describe some changes effected in several States' constitutions and codes that reflect those nations' efforts at promoting women's equality. Thus, the following subsections elucidate the ways in which the regional systems have intersected with local laws to change the latter into more women-friendly models, changes that have translated into progress for women throughout the Americas.

B. Cases

This section will review three cases from different jurisdictions that show specific ways in which the regional law has affected the local laws. Significantly, the three cases show the diverse settings in which the human rights influence can intervene to promote the interests and rights of women.

In 1983, the State of Costa Rica asked the Inter-American Court for an advisory opinion on "the compatibility of several proposed amendments to [the Constitution of Costa Rica] concerning nationality and naturalization" with the gender equality mandate of the human rights system. One of the amendments on which Costa Rica sought the court's advice "would have given a foreign woman who married a Costa Rican [man] special consideration in obtaining citizenship, but provided no corresponding consideration for a foreign man marrying a Costa Rican woman."

In the face of such patent disparity in treatment based on sex, the court concluded that such a provision was not compatible with equality requirements. In its holding, the court articulated the following standard as a guidepost to ascertain whether a distinction based on sex is in contravention of the human rights standards: "a distinction in treatment is discriminatory if it 'has no objective and reasonable justification.'" The Court determined that [allowing a] preference for according a husband's nationality on his wife" but not the reciprocal preference for according a wife's nationality on her husband "was based on the historical," I suggest patriarchal and cultural, "practice of conferring authority within marriage and the family upon the husband/father." As such, the court deemed the practice to be "an outgrowth of conjugal

108. The Commission's oversight and enforcement obligations span thirty-four countries with a combined population of more than 600 million human beings. Yet, to carry out these tasks, "the Commission has only seven members, a staff of ten lawyers, a secretarial staff of seven, and an annual budget of less than $1.6 million." W. Michael Reisman, Practical Matters for Consideration in the Establishment of a Regional Human Rights Mechanism: Lessons From The Inter-American Experience, S.T. LOUIS-WARSAW TRANSATLANTIC L.J. 89, 93 (1995).


110. Reisman, supra note 108, at 93.

111. Id.

112. Report, supra note 102, at IB2.

113. Id.

114. Advisory Opinion on the Proposed Amendments to the naturalization provisions of the Political Constitution of Costa Rica (OC-4/84), reprinted in 5 HUM. RTS. L.J. 161, 176 (1984). This decision did not result from an adversarial process, but from a request by the government of Costa Rica for an advisory opinion.

115. Report, supra note 102, at IB2.

116. Id.
inequality,”117 that “could not be justified, and was incompatible with the right to equal protection generally (Article 24),118 and [in particular] with the requirement that States ‘take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities . . . [in] marriage’ (Article 17).”119 Thus, in this advisory opinion the court effectively made enormous strides in breaking down, at the legal level, unequal positions of women—effectively a second-class citizenship of women—within la familia.

Another significant ruling was delivered in the case of Raquel Martín de Mejía, adopted in March of 1995.120 In this case, Martín de Mejía, a political activist, sought to hold Perú responsible for an alleged rape committed, after his arrest, by Peruvian military officials against his wife.121 Specifically, the case “addressed the question of rape as torture under the American Convention and under the Convention to Prevent and Punish Torture.”122

Perú contested Martín de Mejía’s claim, but never responded to the complaint.123 In analyzing the facts before it, “[t]he Commission took into account that the region of the country in question had been under a state of emergency and [under] military control at the time” of the alleged occurrence.124 The Commission also considered that “the practice of rape by members of the security forces in such areas had been extensively documented and reported on by intergovernmental and non-governmental groups. On the basis of the petitioners’ claims and [the] other [available factual] reports, measured against the criteria of ‘consistency, credibility and specificity,’ the Commission presumed” the truth of the facts alleged.125

In its ruling on the rape, “the Commission determined that each of the three elements set forth in the Inter-American Convention to Prevent and Punish Torture had been met.”126 That is, the Commission found that the rape was “(1) ‘an intentional act through which physical and mental pain and suffering is inflicted on a person;’ (2) ‘committed with a purpose;’ (3) ‘[by] a public official or by a private person acting at the instigation of the former,’”127 “[T]he Commission characterized sexual abuse generally as ‘a deliberate outrage’ to the dignity of women.”128 This case is significant because the Commission’s decision that rape is torture made it plain that women’s bodies are not war booty, and that the violation of women’s physical and mental spaces will not be tolerated. Unlike Paz’s insinuations, the Commission’s ruling establishes that women too have dignity, solely on their own rights.

One final noteworthy case that bears mention is the Case of X and Y.129 “In October of 1996, the Commission adopted its final report on [this case], which concerned a practice in Argentina of routinely requiring that female family members wishing to have personal contact visits with an inmate undergo vaginal inspections.”130 “A petition [was] filed with the Commission in December of 1989, alleging that the wife of an inmate and their thirteen year old daughter had been subjected to such inspections without regard for whether there were special circumstances to warrant the extraordinary measures.”131

117. Id. (footnote omitted).
118. American Convention, supra note 51, at art. 24 (declaring “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law”).
119. Report, supra note 102, at IB2; American Convention, supra note 51, at art. 17(2) (noting “[t]he right of men and women of marriageable age to marry and raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention”).
120. Raquel Martín de Mejía v. Peru, Case 10.970, Inter-Am. C.H.R. 157, OEA/ser. L/VII 91, doc. 7 rev. (1996). Mejia was never seen again. Initially, Martín de Mejía lodged a complaint before the commission alleging Perú’s violation of the American Convention for the disappearance of her husband. The case referenced here, however, is the result of a claim she later initiated charging Peru for violations of her human rights. Her husband’s disappearance was addressed in a separate proceeding. Id.
121. Id., supra note 102, at IB2.
122. Id.
123. Id.
124. Id.
125. Id.
126. Id.
127. Id.
128. Id.
130. Id.
131. Id.
Ms. X had filed a writ of amparo demanding that the inspections cease. At the national level, the Argentina court of first instance rejected the writ. Thereafter, however, the writ was accepted on appeal by the intermediate court; it then was "rejected by the Supreme Court of Argentina on the [grounds] that the inspections were not flagrantly arbitrary under the terms of the . . . amparo" laws.

It was the holding of the Supreme Court of Argentina that was challenged at the regional level. The Commission viewed the events dramatically differently than the State's highest court. In balancing the interests of those subject to searches against the State's interest in security, the Commission characterized "a vaginal search [as] more than a restrictive measure as it involves the invasion of a woman's body." Consequently, the balancing of interests involved" must hold the government 'to a higher standard.' The Commission concluded that, with respect to Ms. Y, who was 13 years old, "it is evident that the vaginal inspection was an absolutely inadequate and unreasonable method." This case builds on the Martin de Mejia case in creating a jurisprudence of respect for women's bodies, dignity, and privacy. By setting up a stringent standard, even in the context of practices pursuant to local criminal law enforcement efforts, the Commission raises the bar against sex-discrimination and eschews any contemplation that the commodification of women is an acceptable practice in any social context.

C. Executive Initiatives

As shown above, case law has effected changes in member States' practices that affect women. Regional and international norms that require States to adopt legislative or other measures to give effect to internationally protected rights or freedoms also have resulted in changes in State laws. Following (this subsection) are some examples of government initiatives, such as the creation of agencies and State passage of laws (next subsection) that have been implemented to comply with international standards specifically concerning the rights of women.

For instance, several Latin American countries have created policies that are aimed at promoting women's equality and full participation in society. The goals of these policies are to eliminate any kind of discrimination against women and to assure both liberty and equality of rights for women including their participation in the country's political, economic, and social cultural activities. Some countries are concentrating their efforts on formulating and
coordinating policies to improve the plight of women by focusing on promoting and coordinating training programs with a gender perspective. The purpose of these policies is to design standards and goals that promote the attainment of gender equality. One of the active plans is to create institutions that guarantee equality of opportunity. In essence, by setting up mechanisms to achieve equality, countries are working towards a common goal of implementing gender policy nationwide.

Additionally, Latin American countries have focused on integrating health promotion plans for women. These plans are aimed to promote programs that guarantee protection of and guidance for victims of aggression and work towards prevention of violence against women. For example, between 1984 and 1987, the Argentine government "created, within . . . the country's Executive Branch the Sub-secretariat of Women, [an entity that reports] to the Ministry of Health and Social Action; the Directorate of Women, [which reports] to the Ministry of Foreign Affairs and Worship; and the Women's Health and Development Program, which falls under the Ministry of Health and Social Action." Also, "[in] Uruguay, a Technical Office to support Victims of Family Violence has . . . function[ed] under the Ministry of the Interior since 1992 . . . for the integration and development of the rights of women in national policies."

Moreover, Latin American countries are creating programs to implement and subsequently provide advice on gender analysis with respect to public policies and legislative reforms. The countries created task forces that prepared "draft[ ] reforms to the Civil Code as well as draft legislation to amend the Electoral and Political Party Act." Moreover, projects have been initiated for the technical and political support for women and judicial reform.

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142. In 1991 Chile created the National Women's Services. See Servicio Nacional de la Mujer, available at http://www.sernam.cl/quees.htm ("Su misión es colaborar con el Poder Ejecutivo en el diseño y coordinación de políticas públicas que pongan fin a los niveles de discriminación que afectan a las mujeres en los ámbitos familiar, social, económico, político y cultural."


144. In 1993 Bolivia established the Directorate of Gender and Family Matters. The Directorate was attached to the Vice Ministry of Gender, Generational and Family Matters. See Report, supra note 102, at IIIA.


146. In Colombia, the National Directorate for Women's Equity to the Presidential Council for Women's Equity was created. Women embraced the effort and were vocal when President Pastrana was deemed not to have met the govern-
There are also governmental programs designed to support the involvement of nongovernmental organizations and the community in this sphere.¹⁵³

D. Codes and Constitutions

Similar to the changes to the executive institutions’ structures, internal legal changes – changes to the constitutions and civil codes – have been implemented in countries to protect the civil and political rights of women. Countries have taken measures to amend their previous Civil Code provisions covering paternal authority¹⁵⁴ and filiations so as to give mothers equal rights with fathers.¹⁵⁵ Also, countries have taken steps forward “in order to give both spouses equal standing before the law.”¹⁵⁶

Finally, the countries are evolving in the direction of guaranteeing equality before the law without discrimination¹⁵⁷ and with respect to rights and obligations.¹⁵⁸ For example, some countries have changed their laws so as to grant women full agency with respect to their legal capacity.¹⁵⁹ This is a major move away from classifying women with minors.¹⁶⁰ Thus, states are beginning to recognize in their constitutions the human personality and judicial capacity of all individuals without discrimination based on sex.¹⁶¹

¹⁵³. Id.
¹⁵⁴. See id., at IIIB1. Argentinian law recognizes that parental authority encompasses the overall duties and rights of parents over children; see also Civil Code of Argentina, tit. III, art. 264. In particular, the authority is expressed as: (1) [for a married couple] authority shall be jointly exercised by both parents, if “they are not separated or divorced or [if] their marriage” is not void. It shall be presumed that acts independently done by one of the spouses are consented to and authorized by both parents, unless the causes foreseen within Article 264 are present or where expressed opposition exists; (2) in cases of separated and divorced parents or parents whose marriage has been nullified, the parental authority belongs to either the father or the mother who legally exercises custody, without prejudicing the other parent’s rights to have adequate communication with the child and have supervision of the child’s education; (3) if one parent is dead, absent with presumption of death or has had her/his parental authority deprived, the parental authority shall be exercised by the other parent; (4) in the cases of children born outside of wedlock, but formally recognized by only one of the parents, the parental authority shall be exercised by the parent whom recognized the child; and (5) in cases of children born outside of wedlock but formally recognized by both parents, the parental authority shall be jointly exercised if the parents live together; otherwise, parental authority shall be exercised by the parent who has custody of the child, whether by conventional agreement or judicial decree. Id.
¹⁵⁵. See, e.g., Argentina Law 23, 264, art. 240, adopted in 1985 (stating that “[f]iliation can take place by nature or adoption. Filiation by nature can be matrimonial or extramatrimonial. Matrimonial and extramatrimonial filiation as well as filiation under full adoption, produce the same effects in accordance with the provisions of this Code.”).
¹⁵⁶. For example, in 1987 Argentina amended its family law regime to make men and women equal before the law. See Report, supra note 102, at IIIB1.
The plain trend in Latin American countries is to prohibit discrimination of any kind against women. For instance, married women are no longer deemed incompetent but rather can now claim equal rights and obligations. Also, a number of constitutions now recognize women’s full legal capacity “to contract, administer, and dispose of assets of the conjugal union.” The movement to view men and women as having equal legal capacity also applies to the administration and organization of the family, a significant matter considering the importance of *familia in comunidades Latinas*. Therefore, the overall tendency and direction of legal transformations is to accept men’s and women’s positions as equal.

Despite Latin America’s significant strides towards legal equality, however, women remain, legally, second class citizens in many respects. For example, “the Civil Code [of Guatemala] establishes that spouses have equal capacity in certain respects to acquire, administer, and dispose of the assets of the conjugal union.” Nonetheless, that very same code then grants head of the household status to the husband, and establishes limitations on women who pursue activities outside the home.

To be sure, as was discussed above, in some Latin America states women enjoy the same legal capacity as men with respect to acquiring, administering, and disposing of assets, and entering into contract relations. Yet, even some of these countries then turn around and impose differences in the case of married women who revert to limited capacity status. Other instances of differences also persist. For example, notwithstanding the Dominican Republic’s Civil Code’s recognition of women’s full legal capacity, as late as 1998 it also imposed limitations on women such as prohibiting women from owning plots of land—a law that is in the process of being amended by a new agrarian law.

As these examples show, there have been many advances in national systems for women—even against the weight of culture and tradition—that are attributable to the larger international and regional human rights umbrellas. As has been shown, these advances have been achieved through both regional case law and internal legal reform that is often based on regional human rights mandates. However, the reality also indicates that problems persist in the region regarding full equality for women. The remaining difficulties are generally found in the following areas:

- Restrictions on the exercise of a profession or on work by women insofar as the authorization of the husband is required [(Bolivia, Guatemala, Panama, Peru and the Dominican Republic)];

without distinction of his/her race, sex, language, religion, political opinion or any kind of opinion, origin, economic, social or any other condition.”]. Also, “[i]n Belize women enjoy full capacity to acquire, administer, and dispose of property and to assume rights and obligations.” Berta Esperanza Hernández-Truyol, *Law Culture, And Equality-Human Rights’ Influence On Domestic Norms: The Case of Women In The Americas*, 13 FLA J. INT’L L. 33, 48 (2000).

162. *Compare* Constitution and Civil Code of Colombia; Constitution of Colombia, tit. I, art. 43, available at http://www.georgetown.edu/pdba/Constitutions/colombia-civil.htm (last visited Aug. 18, 2000) (stating “[i]a mujer y el hombre tienen iguales derechos y oportunidades. La mujer no podrá ser sometida a ninguna clase de discriminación. Durante el embarazo y despues del parto gozará de especial asistencia y protección del Estado, y recibirá de éste subsidio alimentario si entonces estuviere desempleado o desamparada.” *author’s translation*: “Women and men have equal right and opportunities. Women shall not be subject to any type of discrimination during pregnancy and after child birth she will enjoy special assistance and protection from the state and shall receive from the state a food subsidy if she is unemployed or without means.”).


164. Established by the Civil Code for the Federal District. *Report, supra note 102, at IIIB.

165. Mexico also recognizes gender equality in its Constitution. *See Constitution of Mexico, ch. 1, art. 4, available at http://www.georgetown.edu/pdba/Constitutions/Mexico/mexico.html (last visited Sept. 23, 2001) (stating that “[e]l varón y la mujer son iguales ante la ley,” and “[f]oda persona tiene derecho de estar libre, responsable e informada sobre el numero y el espacimiento de sus hijos” *author’s translation*: “men and women are equal before the law,” and “all persons have the right to decide in a free, responsible and informed manner, on the number and spacing of their children”).


167. *See Report, supra note 102, at IIIB.

168. *See id. at IIIB (offering Jamaica as an illustration of the variations of some countries’ treatment of women with regard to different issues).*

169. *See id. at IIIB1f.*
Differences between men and women with respect to the authorization to contract marriage (Bolivia, Brazil), or to remarry (Mexico, Costa Rica);

Inequality between men and women in acquiring, administering, and disposing of assets of the conjugal union [(Argentina gives husbands preferences over assets whose origin cannot be determined; Chile grants the husband, in certain cases, the right to administer the assets of the union as well as those of his wife; Brazil does not recognize a married woman's equal capacity with her husband to administer certain assets)];

Differences between men and women with respect to parental authority [(in Chile, the father exercises parental authority which is conferred upon the mother only in his absence)];

Classification of women with minors in labor legislation [(Bolivia, Costa Rica, Ecuador, and Guatemala)];

Restrictions on a woman's right to property [(the Dominican Republic's Constitution restricts campesinas from owning plots of land)];

Differen[t] . . . treatment [of] women and men with respect to certain criminal offenses [(El Salvador and Venezuela treat men and women differently regarding adultery)].

Differential between men and women in the Inter-American system, much in acquiring, administering, and disposing of assets of the conjugal union [(Argentina gives husbands preferences over assets whose origin cannot be determined; Chile grants the husband, in certain cases, the right to administer the assets of the union as well as those of his wife; Brazil does not recognize a married woman's equal capacity with her husband to administer certain assets)];

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Beyond the specific laws that we have explored, women in the Inter-American system, much like women worldwide, remain second-class citizens in the economic realm. For example, notwithstanding the principles of equality and non-discrimination, huge income gaps remain between men and women in most of the countries in the region. In Costa Rica, as of 1990, the average monthly salary of women was 82% that of men; in rural areas, 60% of the women earned less than the minimum wage; and 34% earned half that amount. In Brazil, income earned by women was 54% that of men; and in Uruguay, as in the United States, women earn 75% of men's income.

As the examples in this section reveal, innumerable progressive changes for women have resulted from the human rights regime in the Inter-American system. Nonetheless, serious problems of inequality persist. The next section proposes locations and approaches, based on human rights considerations, structures, and protections, that can be of great utility in the ongoing quest for women's equality.

IV. A MODEST PROPOSAL FOR REFORM

In seeking to map strategies to render full equality for women a reality, it is first important to study what approaches have generated success in the historical movements for sex equality. One strategy that stands out as fruitful in the equality mission is the anti-violence paradigm. The value of this approach was evidenced in the international realm during the 1993 Human Rights Conference when an anti-violence campaign united women from around the world in the condemnation of violence against women. The usefulness of the anti-violence approach is evident on the regional level in the example of Belém do Pará which denounces both public and private violence and, as was shown above, has had an impact on local laws. As I have suggested, perhaps the next move is to accept the reality of economic violence.

Economic violence is an actuality for women of color worldwide. Beyond the information specifically provided with respect to Latin America, data establishes that the feminization of poverty is a global phenomenon. Imagine, in this era of globalization, the effect of a free market that exploits and undervalues women's

170. Id. at IIIB1a-g.
171. Id. at IIID.
172. Id.
173. Id.
174. I will not comment here on the evident psychological downside of the violence paradigm; its reinforcement of the women-as-victim model. Yet it is important as the theories are developed not only to embrace those that effectively attain results, but also to critique their less than wholesome underpinnings.
175. See Mertus & Goldberg, supra note 38, at 201.
176. Convention of Belém do Pará, supra note 42, at art. 3.
177. See Berta Esperanza Hernández-Truyol, Sex, Culture, and Rights: A Reconceptualization of Violence for the Twenty-First Century. 60 ALB. L. REV. 7 (1997) (making and developing for the first time the ideas presented here with respect to the utility of economic violence being considered violence against women in the same manner as physical violence).
services as well as people of color’s services for those who are both of color and female.

One example of how to develop, expand, and transform the existing landscape in order more effectively to work towards gender equality is the proposed conception of “violence” to include economic violence. Such an anti-violence philosophy transcends the normative idea of violence, i.e., the use of physical force. Instead, the reconceived notion locates and recognizes the idea of violence within a broader framework that reflects women’s true conditions in society. Such an ideological shift includes in the notion of violence against women, as does the Belém do Pará model, any psychological, social, or political subordination of women, male dominant (and female subservient) cultural and traditional practices, and women’s economic marginalization and subjugation.

This new model of violence is more comprehensive, expansive, and realistic than the narrow physical violence paradigm that only finds outrage and injustice when “A hits B” — be it with sex, a fist, a bat, or a gun; be it at war, at home, at work, or in the streets. The expanded idea incorporates a gender-inclusive perspective on violence that aims at eradicating all practices that assault women and deny them their personhood, their equality. This includes truly abusive, although not directly physically intrusive events, that have shattering effects on all women’s lives by perpetuating their subordinated status and entrenching their second-class existence.

It is significant that the United Nations has recognized that in everyday life women suffer economic duress by receiving a disproportionately smaller share of credit and because women’s work remains “unrecognized and undervalued.” Beyond being foreclosed from jobs in the public and private sectors, women suffer direct economic violations by virtue of systems that prohibit them from inheriting and owning property. Women are also injured by structures that routinely deny them access to education and directly exclude them from the economic realm by foreclosing them from various and sundry occupations or by making the man the head of the household.

Examples of economic violence against women abound. In some countries around the world, such as Bolivia, Guatemala, Panama, Peru, and the Dominican Republic, women need their husband’s permission before they can pursue remunerated employment. Worldwide, just as they do in Costa Rica, Brazil, Uruguay, and in the U.S., women earn less than men, even in the same occupations. Worldwide, as throughout the Americas, women’s labor— their home-making and child-rearing—is excluded from traditional and official definitions of work and is thus unpaid and undervalued. Worldwide, as even in Cuba where equality is constitutionally mandated and equal sharing of household duties is part of the marriage commitment, women who work outside of the home still carry the burden of working inside the home.

This economic violence, like physical violence, often is confounded by culture. For example, in Botswana, Lesotho, Namibia, and Swaziland — not unlike in Chile, Argentina, and Brazil — married women are under guardianship of their husbands and have no right to manage property.

Re/constructing the notion of violence to include all practices against women — particularly racialized, ethnicized, gendered, cultural practices — that deprive them of social, political, physical, mental, and economic well-being will make equality possible. Creative methodologies are, therefore, necessary to transform the current paradigms.

In crafting nuevas teorías and methodologies, it is imperative that a model for change has the goal of promoting equality and full understanding of the issues and needs of women of color. These considerations must be sympathetic to the complex geography of women of color’s lives— both inside their cultural communities and as part of sometimes (often) hostile majority communities. Thus it is necessary to

179. See id. at ch. 2, 37.
180. Id. at ch. 2, 43; see also infra IIID (discussing disparities in treatment of women and men by the law in Latin America).
181. Id. at ch. 2, 34-44.
182. Report, supra note 102, at IIIB1a.
183. Id. at IIID.
184. See UNHDR 1995, supra note 30, at ch. 2.
186. Report, supra note 102, at IIIB1c.
avoid imposing subjugating, culture-essentialist perspectives and outcomes. The tools afforded by the human rights construct must be interpreted and applied creatively and expansively so as to develop, expand, and transform their potential for protecting women of color.

In this vein, I propose a methodology for just such an expanded and transformed reading of norms. I also have designed a blueprint for analysis in any situation in which we deal with women of color—whether it be gathering or interpreting data, applying or interpreting norms, designing projects, or drafting documents. The model developed effects much needed reform in the international human rights arena to render the women of the Americas (and around the world) visible and raise women’s voices—all women’s voices.

In order to remedy the gendered and racialized deficiencies in the existing rules, as well as to bridge the schism between the non-discrimination and substantive entitlement rules and the realities of the mujeres de las Américas, this model creates a multidisciplinary and multidimensional framework. It demands that the following inquiries be part of the foundational data at every stage of any process:

- the race question
- the ethnicity question
- the nationality question
- the social origin question
- the color question
- the descent question
- the gender question
- the women’s question
- the culture question

Each question must be considered as separate from, but in the context of and indivisible from, the other questions. Each query interroges whether there are classification-specific implications of the project, norm, proposed norm, interpretation, investigation, fact gathering, methodology being scrutinized—particularly when it appears to be neutral or objective. The women’s question, for example, requires that there be a non-essentialist, multidimensional, evaluation of the impact of the process on any and all women, considering intersections with race, class, religion, national origin, ethnicity, descent, gender, sexuality. This inquiry addresses the conflation of sex/gender and all other aspects of a woman’s personhood, the indivisibility and interdependence of women’s complex identities. Such analysis will ensure that identified causal links between gender and a particular outcome are accurate and relevant to the issue being considered. It will account for the multiplicity of coexisting factors that reflect the multidimensionality of women’s lives.

The common thread of each inquiry, of course, is to ensure that women’s particular locations are considered in the evaluation of their condition; that women’s needs are met and their rights are respected and fulfilled worldwide. In this regard, there has to be an acceptance that in order to raise women’s voices, a process of communication that includes women is necessary. Regardless of who the ultimate decision-maker is—in the project, regarding a norm, concerning the language of a rule—the process of conducting the project, gathering the data, articulating or drafting a norm, must include and integrate the views of those who are the subjects and the objects of the process, from whom expectations are being generated by the process. Women’s perspectives must be part of these deliberations. The ultimate legitimacy of the process itself will depend upon the consent of the people and the recognition and acceptance of the opinion of the people.

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This leads to the logical need for women’s participation in any process, participation that must be holistic. We must participate as both the inquired and the inquirers, permitting discourse on the translations and interpretations from women’s perspectives. Specifically with respect to culture, in light of it being a factor that can be a tool of imperialism by the majority community to the detriment of women in minority communities, or a tool of gender oppression within minority communities, a balancing test is in order. To evaluate any perceived or claimed cultural conflict between a practice and women’s human rights to equality and non-discrimination, one must first obtain information about the cultural practice. The interrogation of the practice must take place from both an insider’s (a proponent of the practice) and an outsider’s (one claiming the practice effects a deprivation of human rights) perspective. Where cultural practices are concerned, it is important, on the one hand, to protect traditions from the improper imposition of outsiders’ ideologies. On the other hand, culture must not be used as a pretext to shield norms that perpetuate women’s subordination.

In examining a cultural practice that appears to disadvantage only women, or to have a disproportionately burdensome or deleterious impact on women, the cost of violating the human rights norm must be weighed against the benefit of the cultural practice. In order to ascertain whether the cultural practice has a harmful impact on women, the following inquiries will provide insightful information.

- What is the origin and value of the cultural practice?
- What is its level of significance to the culture and within the community?
- What is its level of intrusion on a protected individual right?
- How significant is the human rights norm to the international community?
- What is the nature of the practice being challenged?
- Who is challenging the practice (an insider or an outsider or an oppressed person within the insider community whose status others her)?
- What are the challenger’s motives in opposing the practice?
- What are the claimed harmful outcomes of the practice?

It is beyond dispute that a broad range of cultural practices exist. An analysis of these must be sensitive to their significance and consequences – issues that will be brought out by the listed questions. These questions can also further the potential for equality of women in the Americas and worldwide by piercing a cultural veil of pretext that creates barriers for women’s full personhood. Such inquiries would reveal that there is no sound reason to keep women from working at jobs they can do, managing families that they run, owning land that they plow, deciding on their own what job to hold, or disciplining children that they raise.

CONCLUSION

The human rights system can be of great value to the pursuit of equality for women. This work has shown how the regional system has been a key factor in transforming the location of women in the Americas, although work remains to be done. This work also has proposed a two-part model as a means of further developing, expanding and transforming the human rights idea to further women’s equality. One part, as a matter of substance, incorporates economic deprivation into the anti-violence paradigm. The other part, as a matter of procedure, engages in a multi-layered systematic inquiry into the underlying sources of women’s oppression. The inquiries are intended to methodically unearth the locations of women’s subordination in order to fashion procedures that will serve to eradicate women’s second-class status. The goal is that the inquiries eventually will lead to a multidimensional and culturally sensitive perspective that allows for the development, expansion, and transformation of women’s human rights. Following this inclusive methodology provides the starting point to ensuring that women of the Americas attain their full personhood potential in this global environment.

189. See Women’s Rights as Human Rights, supra note 37, at 672.