

Without Prejudice

CEDAW and the determination of women's rights
in a legal and cultural context

Edited by Meena Shivdas and Sarah Coleman

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COMMONWEALTH
SECRETARIAT

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Abbreviations and acronyms

ADR	Alternative Dispute Resolution
AfCHPR	African Charter on Human and Peoples' Rights
CARICOM	Caribbean Community
CAT	UN Convention Against Torture
CC	Constitutional Court
CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women; also Committee on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
CJ	Chief Justice
CLB	<i>Commonwealth Law Bulletin</i>
CLR	<i>Commonwealth Law Reports</i>
CMJA	Commonwealth Magistrates' and Judges' Association
CSW	Commission on the Status of Women
DCJ	Deputy Chief Justice
DVA	Domestic Violence Act (South Africa)
ECHR	European Convention on Human Rights
FGM	female genital mutilation
FMJ	Federal Ministry of Justice (Lagos)
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
J	Justice
JA	Judge Advocate or Judge of Appeal
JCA	Justice Court of Appeal
JHRLP	<i>Journal of Human Rights Law and Practice</i>
JJA	Juvenile Justice Authority

Abbreviations and acronyms

JP	Justice of the Peace
JSC	Justice Supreme Court
KLR	<i>Kenya Law Reports</i>
KWJA	Kenya Women Judges Association
MMR	maternal mortality rate
NGO	non-governmental organisation
NWLR	<i>Nigeria Weekly Law Reports</i>
OIC	Organisation of the Islamic Conference
OP	Optional Protocol (to CEDAW)
PNG	Papua New Guinea
PoA	The Commonwealth Plan of Action (PoA) for Gender Equality 2005–2015
QC	Queen's Counsel
SADC	Southern African Development Community
SC	Supreme Court
SCA	Supreme Court of Appeal
UDHR	Universal Declaration of Human Rights
UNESCO	UN Educational, Scientific and Cultural Organization
VAW	violence against women
WHO	World Health Organization
WILDAF	Women in Law and Development in Africa

Part I: Background

1. Introduction

*Meena Shivdas, Gender Section, and Sarah Coleman,
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The Commonwealth, with its broadly shared legal heritage – reflected in a political, geographical and culturally diverse landscape – presents both opportunities and challenges for the advancement of women’s rights in judicial and quasi-judicial realms.

CEDAW – the UN Convention on the Elimination of All Forms of Discrimination against Women – is a powerful international human rights instrument that reflects a global determination to achieve gender equality through advancing women’s rights. To date, all Commonwealth member states in Africa, Europe and the Caribbean, along with 82 per cent of member states in the Pacific, have ratified CEDAW.¹

In almost all Commonwealth constitutions that make provision for the protection and promotion of fundamental human rights and freedoms, the following elements are generally to be found:

- The right to life, liberty, security of the person, equality before the law and the protection of the law,
- Freedom of conscience, expression, assembly and association,
- The right to privacy in personal and family life, and
- In nearly all cases, the right to property.

All these rights and freedoms are guaranteed regardless of race, place of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest. However, turning aspiration into reality presents many challenges, particularly in relation to the process of adjudicating on women’s rights in both legal and cultural contexts. The need for addressing cultural and gender stereotyping in the course of judicial and quasi-judicial processes to enable a fair determination of women’s rights is widely recognised.

The Commonwealth Secretariat, through the mandate received under the Plan of Action for Gender Equality 2005–2015, has embarked on a programme to address the fair determination of women’s rights in the context of gender, culture and the law. In order to reconcile customary norms and religious perspectives with more formal judicial processes, national laws and CEDAW, the Secretariat engages in dialogues and

1. Dr Purna Sen (ed.) (2008) *Human Rights in the Commonwealth: A Status Report*. London: Commonwealth Secretariat.

Part I: Background

projects with ministries of gender affairs/women's affairs and justice/law, judges, magistrates, traditional chiefs, religious leaders and women's legal networks.

This publication forms part of the effort to promote dialogue and share information within the Commonwealth and beyond. It identifies the approaches adopted in various Commonwealth jurisdictions to meet the range of cultural and legal challenges relating to the implementation of CEDAW. Also included are Commonwealth declarations in support of CEDAW and information on key initiatives under the gender, culture and the law project.

This practical guide will inform and assist judges, adjudicators, lawyers and activists to advance the implementation of the principles of CEDAW within jurisdictions connected historically by the application of the common law.

2 Thoughts on the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Christine Chinkin, London School of Economics

The story of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) comes out of many decades of women's activism and organising around issues such as the abolition of slavery, suffrage, trafficking, the peace movement and, in many countries of the Commonwealth, nationalism and struggles for independence. However, the move for the adoption of an international treaty dedicated to the elimination of all forms of discrimination against women – to achieve formal (legal) and de facto (real) substantive equality for women with men in all areas of life in recognition of their human rights and fundamental freedoms – was to build upon and strengthen the prohibition of discrimination (including on the basis of sex) contained in the UN Charters – the United Nations Declaration of Human Rights¹ and the 1966 International Covenants.²

Why does CEDAW matter?

I think CEDAW is a revolutionary document for women for reasons both at the time of drafting and in the way it has evolved.

At the time of its adoption, the Covenants did not define discrimination. CEDAW provides a definition of discrimination,³ which closely follows that of the Race Convention.⁴ The definition has been adopted by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights and is now widely accepted as the authoritative international law definition. It covers direct and indirect discrimination (intent and effect), equality of opportunity as well as formal equality, and disadvantageous discrimination that nullifies or impairs enjoyment by women of their human rights.

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1. See United Nations Doc. A/RES/217 (III).
 2. See International Covenant on Civil and Political Rights, available at <http://www2.ohchr.org/english/law/ccpr.htm> [last accessed 10 May 2010] and International Covenant on Economic, Social and Cultural Rights (ICESCR) <http://www2.ohchr.org/english/law/cescr.htm> [last accessed 10 May 2010].
 3. See Article 1, United Nations Doc. A/RES/34/180.
 4. See United Nations Doc. A/RES/2106 (XX).

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CEDAW requires positive action from states and provides a legal basis for temporary special measures, targeted steps to promote equality and to redress historic discrimination. It tackles the idea of cultural stereotyping and prejudice and requires states to take measures to modify social behaviours and the dominant ideology of patriarchy. This is a unique provision in human rights law, with an educative and social engineering function.

CEDAW also encompasses the totality of rights as it takes a comprehensive approach to non-discrimination. It identifies where women suffer from discrimination most and requires appropriate measures for its elimination in the public and the private (family) spheres, regarding civil and political rights and economic, social and cultural rights such as in the fields of education, health and employment. It has a free-standing 'equality before the law' clause. It also identifies the particular position of rural women – a clear link to issues of development.

CEDAW is now close to having universal membership. It was supplemented by the adoption of the Optional Protocol (OP) in 2000, which enhances the monitoring mechanisms by allowing for individual communication and a form of inquiry against structural discrimination. The Protocol also aligned CEDAW with the International Covenant on Civil and Political Rights (ICCPR), the Committee on the Elimination of Racial Discrimination (CERD) and the Convention Against Torture (CAT).

The adoption of the Protocol perhaps indicates the way in which CEDAW has grown in authority since its adoption. In the 1980s, it was called the 'Cinderella treaty', the poor relation in the body of UN human rights treaties, because of the vagueness of its language, its weak monitoring system (which was restricted to state reporting) and its association with the Commission on the Status of Women (CSW) rather than the Commission on Human Rights (CHR). However, some committed members of the CEDAW Committee worked to give effect to it as a living instrument, subject to dynamic and progressive interpretation through General Recommendations, Concluding Comments and jurisprudence under the Optional Protocol. This work, along with a commitment towards gender mainstreaming in the UN, has resulted in the Convention now having a greater authority and weight.

Let us turn to the way the Committee has developed both the Convention and its implementation. First, while the Convention itself does not refer to gender-based violence against women, the Committee clarified in 1992 that such violence is discriminatory of itself, and undermines women's enjoyment of all other rights. Accordingly, it is contrary to women's human rights and states' obligations apply to it. This analysis also assisted in the development of international criminal law where rape and sexual violence have become recognised as war crimes and crimes against humanity.

Second, the Committee has clarified states' obligations as both negative and positive. In particular the Committee has adopted the typology of layered obligation, requiring states to respect, protect and fulfil the obligations of the Convention.

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Third, the Convention is used as a tool for advocacy and lobbying – as demonstrated by women activists across the world. It provides the language of entitlement and a framework for empowerment. There are many examples where states have responded to constructive dialogue with the CEDAW Committee and have changed legislation or administrative practices – for example, with the adoption of domestic violence laws. It is not argued that the Committee's work is the only basis for change, but it offers 'an articulate voice in the form of concluding comments [that has] helped to promote political will and the campaign of gender advocates and women's groups who lobbied the state to initiate reform.'⁵ There are also examples where judges have applied and reinforced the principles of CEDAW (see chapter 12, summaries of case law).

Given the above, in my opinion, the Commonwealth's Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994 (see chapter 11) should be reaffirmed – perhaps reworked – to remind judges of states' obligations under international law and to create what might be called a 'travelling jurisprudence on women's rights that can fertilise domestic law in other jurisdictions'.⁶

Note

Nonetheless, CEDAW is only an effective tool for advocacy where the state has demonstrated the political will to comply with the Convention – a will that is discounted by reservations. This is why it is important that reservations be scrutinised and withdrawn, or at least narrowed and made more specific.

What CEDAW does is to provide a framework and a language which gives a basis for work between states and the Committee through dialogue, advice and examples of good practice to address obstacles and work towards full implementation. This is especially important today, when other challenges threaten to undermine its importance – for example, those of the adverse consequences of globalisation and extremist ideologies. The need to reassert and reaffirm the principles of CEDAW is ever more important for the lives of women throughout the world.

5. Savitri Goonesekere in Hanna Beate Schopp-Schilling and Cees Flinterman (eds.) *The Circle of Empowerment: Twenty-five Years of the UN Committee on the Elimination of Discrimination against Women*. New York: The Feminist Press at CUNY.

6. Ibid.

3. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and realisation of rights: reflections on standard settings and culture

Indira Jaising

This article is drawn from a presentation made to the Commonwealth by Indira Jaising, Additional Solicitor General of India.

Introduction

The articulation of rights and the setting of standards remains the first step towards the realisation of those rights. Whether or not an individual can actualise the right is dependent on the capability of the individual. It must be remembered that law is only a tool of empowerment. For the actualisation of rights, the capabilities approach (developed by Amartya Sen and contextualised in the legal framework by Martha Nussbaum) is extremely appealing as it gives meaning to human rights and provides judicially manageable standards for testing the validity of law and policies.

The capabilities approach is premised on the concept of human dignity. In this approach, the first step is to identify components that indicate the functional capabilities for living a life with dignity – such as life expectancy, bodily health, bodily integrity, reasoning and imagination, emotional well-being etc. Nussbaum **suggests** that a substantive list has to be drawn up of positive freedoms that will improve a person's quality of life. Finally efforts have to be made to ensure an enabling environment, by securing institutional and material conditions that put a person in a position to secure the capability.

States guaranteeing fundamental entitlements to their citizens cannot stop at providing guarantees against state interference in the exercise of the freedoms of their citizens alone,¹ they also have to provide substantial entitlements. Adherence to a formal notion of equality does not take into account historical disadvantages. As Nussbaum asserts, the substantive equality paradigm in turn provides the rationale for affirmative action to promote the capabilities of those who suffer from traditional subordination and deprivation.

1. Such as the rights in the US that are worded as 'State shall not...'

Common minimum standards

To ensure the protection of women's rights obligations of states, international human rights treaties and fundamental rights should be considered a common minimum standard. The debate on whether or not these standards are universal resurfaces when it comes to diverse cultural practices, minority rights and the rights of indigenous communities. While culture itself is not a closed category, the right to conserve one's culture is recognised by most constitutions and international instruments. Most notably, it includes the right to preserve language, religion and practices. Cultural rights reside in collectivities and are intimately linked with questions of self-identity.

Identity itself, both of individuals and of collectivities, is not fixed but evolving: being impacted upon by historical, social and political events. The right to conserve culture, being an inter-generational right, necessarily contains within itself a strong evolutionary element. This necessarily posits an exit option. It is therefore equally necessary to have in place legal regimes that enable women to opt out of cultural frameworks and enter the mainstream of constitutionalism.

Yet there is a seemingly unresolved conflict between the right to equality and non-discrimination based on sex, on the one hand, and the right to preserve culture, on the other. Several cultural practices negatively and disproportionately impact women. They are founded on patriarchal and hierarchal attitudes, and there is a need to transform and abolish them. Examples of this can be seen in *sati* (widow immolation sought to be justified in the name of religion) in India, female genital mutilation (FGM) in several African countries and polygamy in Islamic countries. These practices are not only discriminatory, but are anti-life sustaining. They deny women the right to live with dignity.

CEDAW: reservations and domestication

It is imperative to recognise a set of universal standards that are relevant to all communities, even if the implementation of such standards is done in a culturally sensitive manner. CEDAW is a good starting point in this direction. Article 2 of the CEDAW enjoins states to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.' Article 5 follows this with a commitment to eradicate social and cultural practices that are discriminatory towards women.²

Further, article 16 is an application of the objects and purposes of CEDAW in articles 2 and 5 and stresses the woman's right to equality within marriages and the removal

2. Article 5: '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.'

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of discriminatory practices. **The CEDAW Committee has held that articles 2 and 16 are core provisions of CEDAW.** Hence any reservations made to these articles will be in violation of the core commitments of the Convention.

There is a trend in the legal thinking which holds that such reservations which are contrary to the core commitment of CEDAW must be disregarded and the state held bound in international law to the treaty.

The law reform processes in areas where the right to equality and non-discrimination based on sex conflicts with the right to preserve culture, need to be more inclusive and consultative; yet the goals to be attained must also be clear. In India, an attempt to exclude Muslim women from post-divorce maintenance was fortunately frustrated by the Supreme Court in the *Daniel Latiff*³ judgment, when it held that under the Muslim Women's (Protection of Rights on Divorce) Act, 1986, 'reasonable and fair' provision must be made, failing which, the law would be unconstitutional. This is an example of judicial interpretation of cultural texts in the light of constitutional values, where the constitution itself is seen as a cultural input into the discourse of rights.

Staying alive

Violence respects no culture. It recognises no caste, class, race, age or geographical boundaries. It is a truly cross-cutting issue. Necessarily, therefore, any law addressing domestic violence must also be cross-cutting, culturally neutral and universally applicable. Attempts to frame domestic violence laws point in this direction.

The stranglehold of patriarchy holds many women in violent circumstances in their own homes. These situations are akin to custodial conditions, where the autonomy and bodily integrity of individuals are under threat. Unfortunately, most human rights documents are applicable only against state action, thereby ignoring the plight of almost half the world's population. CEDAW is a progressive document in this regard, as it recognises violations by private actors. The laws pertaining to domestic violence are mostly in the area of criminal law.

Keeping the widespread incidence of domestic violence in mind, there have been moves in certain Commonwealth countries, notably the United Kingdom, to bring a criminal law onto the statute books to address the situation of violence in the home. Such a law is a step towards recognising the need for laws that are gender responsive.

Efforts at gender-responsive legislation have been undertaken in a number of countries in the Commonwealth.⁴ In the Caribbean, the Commonwealth Secretariat and the Caribbean Community have collaborated on the development of a model legislation on

3. (2001) 7 SCC 740.

4. Christina Johnson (2004) Background paper on 'Gender-based violence' for the Commonwealth Human Rights Expert Group Consultation.

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women's human rights that covers various aspects of discrimination against women, including domestic violence, sexual offences, sexual harassment, equal pay, inheritance, citizenship, equality for women in employment and maintenance. Johnson points out that a number of countries have enacted or revised their laws on domestic violence using this model.

Interestingly, in some of these countries, the definition of domestic violence has been broadened to include 'psychological', 'emotional', and 'financial' abuse. Further it also recognises relationships, such as 'visiting' or 'cohabiting', that go beyond the realm of marriage. A judgment of the High Court of South Africa has held that a surviving partner of a life partnership must have the same rights to maintenance as a surviving spouse in the estate of the deceased. Not to have those rights would be to violate the right to equality. This is an example of creative judicial thinking, which recognises that there are no universal norms in living arrangements that can be privileged over others.

In South Africa and a number of other states in Africa, specific legislation has been passed to deal with the issue of domestic violence. Of particular relevance is the Mauritius law, which not only recognises domestic violence as an offence, but also adopts a framework whereby an enabling environment is created for women to take action. This includes the appointment of enforcement officers, who provide holistic support to the victim, right from arranging for transportation to the drafting of affidavits to be presented before the magistrate. The magistrate is also empowered to give protection orders to victims during the pendency of a case.⁵ The importance of protection orders cannot be overemphasised, as is evident from the experiences of women across the world.

In India, as in most Commonwealth countries, provisions relating to domestic violence lie in the realm of criminal laws and civil laws on divorce. Section 498A of the Indian Penal Code, makes cruelty meted out by husbands and their families to women a punishable offence. 'Cruelty' under this clause has been defined to include injuries sustained to the physical and mental health of women. The recognition of 'mental cruelty' makes this provision one of its kind in the world. The Supreme Court in some cases has held that 'cruelty' for the purposes of the constituting offence under the aforementioned section (Section 498A) need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case.⁶

Concluding thoughts

However, merely recognising and providing for the offence does not ensure that women will take recourse in law as they do not, in most circumstances, have support from

5. Ibid.

6. *Gananath Pathak v. State of Orissa* 2002 (2) SCC 619; See also *Pawan Kumar v. State of Haryana* (1998) 3 SCC 309.

Part I: Background

family, friends and relatives. No social security exists for such women: because they have no rights over natal or matrimonial property, taking steps to address a situation of violence often leaves them and their children homeless.

In this context, there is an urgent need for the enactment of a civil law on domestic violence that *inter alia* provides for a right of residence to women in domestic violence situations. The purpose of the civil law would be to restore the woman to a position of equality within the marriage, so as to give her time and the space to decide on what she wants to do with the rest of her life. The absolute precondition for that is to stop the violence promptly.

In this context, the definition of 'violence' has to be provided for exhaustively. Emphasis must be placed on the definition of 'violence against women' as elaborated in CEDAW, the UN Declaration on the Elimination of Violence against Women and the Beijing Platform for Action.

It must be understood that the implementation of human rights norms for women can only be effective if it is in furtherance of preserving and according to women a life of dignity. The role of laws in such matters has to rise above the level of a tool of adjudication to a tool to ensure the provision of justice.

Part II: Towards Gender Equality: Reconciling Culture and the Law

4. Culture, religion and gender: an overview

(The original article, 'Culture, religion, and gender', published in the *International Journal of Constitutional Law*, Volume 1, No. 4, October 2003, pp. 663–715, includes a wider comparative analysis, which includes non-Commonwealth countries.)

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Constitutional law

This article explores the intersection of culture, religion and gender in the context of international and constitutional human rights law. The clash between religious or cultural autonomy and gender equality is a pervasive problem for constitutional law, one that arises in connection with claims of immunity from gender equality provisions on the grounds of cultural or religious freedom. I will describe how the resulting conflict has been addressed in international law and in the decisions of various constitutional courts and propose a theoretical basis for structuring the hierarchy of values to resolve this issue in a constitutional framework of human rights.

Human rights doctrine, as we know it today, is a product of the shift from a religious to secular state culture at the time of the Enlightenment in eighteenth-century Europe. The religious paradigm was replaced by secularism, communitarianism by individualism and status by contract.

It is against this background and after the humanitarian trauma of World War II, that the Universal Declaration of Human Rights¹ was adopted in 1948, representing an undertaking by almost all the countries of the world to establish a basic common standard of human rights. This document expressed a vision of a new global order that guaranteed all individuals basic human rights and prohibited discrimination on grounds of race, religion or sex. The human rights principles of the Declaration, which were later elaborated in a series of human rights conventions, include the right to freedom of religion and conscience and the right to enjoyment of one's culture. At the same time,

1. Universal Declaration of Human Rights (UDHR), Dec. 10, 1948, UN G Res. 217 (III of 1948).

Part II: Towards Gender Equality

these principles include women's right to non-discrimination.² The 1966 International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) both included a clause guaranteeing the enjoyment of the rights under them without discrimination between men and women.³

In 1979, the Convention for Elimination of All Forms of Discrimination against Women⁴ (CEDAW) codified women's right to equality in all spheres of their lives as a global norm. CEDAW introduced not only the right to non-discrimination but also the right to de facto equality for women. It spelled out the way in which states parties had an obligation to guarantee women the equal exercise and enjoyment of human rights, and it imposed on these states the obligation to take all appropriate measures to achieve this without delay. CEDAW has been ratified by 186 countries and, in 2001, the Optional Protocol (OP)⁵ came into force allowing individual women in states parties that ratify the OP to bring communications before the CEDAW Committee. Most countries have now endorsed the principle of equality for women and endowed it with normative universality.

The question I pursue here is what solution is provided under this international regime of human rights and under national constitutions, in cases where equality rights clash with cultural practices or religious norms? Such conflicts arise in the context of almost all religions and traditional cultures, since they rely on norms and social practices formulated or interpreted in a patriarchal context at a time when individual human rights in general, and women's right to equality in particular, had not yet become a global imperative. Barriers to women's rights are not specific to one region or to one religion, but their form and severity does vary among regions and religions. The clash between culture or religion and gender equality rights has become a major issue in the global

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2. Human rights were, from the 1950s, specifically and gradually extended to women through International Labour Organization (ILO) conventions and by consensus among governments, employers, unions in the field of employment and through UNESCO conventions in the field of education.
 3. International Covenant on Civil and Political Rights, Dec. 19 1966, art. 2(1), General Assembly (GA) Res. 2200A (XXI), UN General Assembly Official Records (GAOR), 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966), 999 UN Treaty Series (UNTS) 171, 173 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 3, GA Res. 2200 A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, 5 (entered into force Jan. 3, 1976).
 4. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, GA Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, 1249 UNTS 12 (entered into force Sept. 3, 1981).
 5. Optional Protocol on the Elimination of Discrimination against Women, GA Res. 54/4, annex, 54 UN GAOR Supp. (No. 49) at 5, UN Doc. A/54/49 (Vol. I) (2000) (entered into force Dec. 22, 2000).

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arena. It is probably the most intractable aspect of the confrontation between cultural and religious claims and human rights doctrine.

Both cultural practices and religious norms have been frequently invoked, in international and constitutional law contexts, as a form of defence in order to oppose gender equality claims. In legal discourse, judicial proceedings and academic literature, cultural and religious values are usually raised separately without reference to each other and with differences of approach and emphasis. The concept of the cultural defence is well known, while religious claims, in opposition to human rights standards, are commonly made under the umbrella of freedom of religion. Indeed, in the two international conventions in which the clash is expressly regulated, one relates to culture and the other to religion. CEDAW regulates the conflict between 'cultural patterns of conduct' or 'custom' and gender equality,⁶ whereas the ICCPR regulates possible conflict between 'the freedom to manifest one's religion or beliefs' and 'the fundamental rights and freedoms of others,'⁷ including implicitly the right to gender equality.

I will first define the three constructs – culture, religion and gender – and describe the nature of the conflict between them. I will then analyse current international and constitutional regulation of the clash. Finally, I will critique the current positivist approaches in the context of a theoretical framework for balancing the divergent norms.

Constructs: culture, religion and gender

Although culture, religion and gender are foundational social constructs operating at the basis of social psychology and organisation, the three constructs cannot be placed, separately and equally, on the same level. Culture is a macro-concept, which subsumes religion as an aspect of culture. Culture and with it religion are the sources of the gender construct. Thus, as I will show, religion is derived from culture, and gender is, in turn, derived from both culture and religion.

Culture

Culture is a macro-concept because it is definitive of human society. Anthropologists commonly use the term 'culture' to refer to a society or group in which many or all people live and think in the same ways. Similarly, any group of people who share a common culture – and, in particular, common rules of behaviour and a basic form of social organisation – constitute a society. As Adam Kuper puts it, '[i]n its most general sense culture is simply a way of talking about collective identities'.⁸ Two categories of

6. CEDAW, *supra* note 4, art. 5, 1249 UNTS at p.16.

7. ICCPR, *supra* note 3, art. 18(3), 999 UNTS at p.179.

8. Adam Kuper (1999) *Culture: The Anthropologists' Account*. Harvard: Harvard University Press.

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culture are particularly relevant to my inquiry:⁹ **social culture**, which pertains to people's forms of social organisation – how people interact and organise themselves in groups, and **ideological culture**, which relates to what people think, value, believe and hold as ideals.

The borderlines of a culture will not necessarily be coextensive with the constitutional realm. Within the constitutional realm, different cultures may coexist concurrently. The coexistence of different cultures may be on three different levels. First, there may be a diversity of cultures on the basis of ethnic or religious differences. Hence, within the constitutional realm, there may be a dominant culture and minority subcultures, or there may be a mosaic of subcultures. Second, there may be a diversity of institutional cultures within the constitutional framework. Thus, for instance, even in an ethnically or religiously homogeneous society, the cultural norms may vary at the levels of family, workplace, church and state. There may be different cultural norms in each of these institutional frameworks. Third, beyond the constitutional realm, there is a developing international or global culture, including an international human rights culture, which has been called 'a particular cultural system ... rooted in a secular transnational modernity.'¹⁰ This global culture is on the one hand generated by states and, on the other, is increasingly determinative of the limits of state power and of states' constitutional culture. In this scheme, gender equality may be accepted conceptually in some subcultures while patriarchy prevails in others. I will focus on pockets of patriarchal culture.

As regards the constitutional implications of the clash between cultural and gender equality norms, the widest definition of culture will not be helpful as it includes the gender equality norms themselves. Hence 'cultural patterns of conduct' in CEDAW must be understood as those referring to cultural norms that are at variance with the human rights culture. For these purposes, culture refers to those institutions that maintain the traditional norms that conflict with and resist gender equality. Accordingly, culture will be used here to signify the traditional and the patriarchal.

The practices of patriarchal cultures are, with regard to the treatment of women, necessarily contrary to modern human rights doctrine. However, it is only when these cultures resist and raise a cultural defence that there is a normative clash. Where the patriarchal culture accepts the human rights demand for gender equality, there will be a process of interactive development and not a confrontation. Indeed, there are two differing perceptions of culture. One perception is of culture as a relatively static and

9. See Edward B Tylor (1871) *Primitive Culture*. New York: Brentano. Tylor stated that culture includes socially acquired knowledge, beliefs, art, law, morals, customs and habits.

10. Sally Engle Merry (2003) 'Constructing a Global Law? Violence against Women and the Human Rights System'. *Law and Social Inquiry*, Volume 28, Issue 4, pp. 941–977.

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homogenous system, bounded, isolated and stubbornly resistant.¹¹ The contrasting view regards culture as adaptive, in a state of constant change, rife with internal conflicts and inconsistencies. The kind of culture at issue in the cultural defence claim, and hence in the clash between culture and gender equality, is the static, resistant version. This version of culture – which I shall term traditionalist culture – is the concern of international and constitutional human rights jurisprudence.

Religion

Religion is a part of culture in its wider sense. It might even be said that it is an integral part of culture. Walter Burkert comments that there has never been a society without religion.¹² What exactly constitutes religion remains a conundrum. One classical work on the subject enumerated 48 different definitions.¹³ Usually such definitions include some transcendental belief in or service to the divine.¹⁴ In practice, claims against gender equality have been made largely under one of the monotheistic religions – Judaism, Christianity or Islam – or under Hinduism. In this article, I will concentrate on the monotheisms, which, taken in conjunction, are the world's most widely observed religions and will refer in passing to some constitutional cases decided regarding Hinduism.

The distinctive marks of monotheistic scriptural religions are clear: they have a canonical text with authoritative interpretations and applications, a class of officials to preserve and propagate the faith, a defined legal structure and ethical norms for the regulation of the daily lives of individuals and communities. Religion is, hence, an institutionalised aspect of culture, with bureaucratic institutions that are focal points for economic and political power within the society. These characteristics render religion less amenable to adaptive pressures from without. Change must be wrought within the religious hierarchy of the community and must be shown to conform to the religious dogmas of the written sources. Within secular states, religious sects are 'often a haven against social and cultural change; they preserve ethnic loyalties, the authority of the family and act as a barrier against rationalised education and scientific explanation'.¹⁵

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11. See Jean and John L Comaroff (1991) *Of Revelation and Revolution, Vol 1: Christianity, Colonialism, and Consciousness in South Africa*; (1997) *Of Revelation and Revolution, Vol. 2: The Dialectics of Modernity on a South African Frontier*. Chicago: University of Chicago Press.
 12. Walter Burkert (1996) *Creation of the Sacred: Tracks of Biology in Early Religions*. Harvard: Harvard University Press.
 13. See discussion in Haim Cohn (1997–1998) 'Religious Human Rights'. *Dine Israel*, Volume 19, p. 101.
 14. Nathan Lerner claims that all dictionary definitions of religion incorporate recognition of a supreme being, usually called God. Nathan Lerner (2000) *Religion, Beliefs and International Human Rights*. Maryknoll: Orbis Books.
 15. Richard Fenn (1978) *Toward a Theory of Secularization* at p.36. Storrs, CT: Society for the Scientific Study of Religion.

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The fundamental tenets of monotheistic religions are at odds with the basis of human rights doctrine. Human rights doctrine is humancentric; it is based on the autonomy and responsibility of the individual (individualism) and systemic-rational principles (rationalism).¹⁶ The doctrine takes as its premise the authority of the state (secularism)¹⁷ and as its goal the prevention of abuse of the state's power over the individual. Monotheistic religion, in contrast, is based on the subjection of the individual and the community to the will of God and on a transcendental morality. The confrontation between monotheistic religion and modern human rights is clearly evidenced in the gap between the concept of religious duty and human right;¹⁸ in the clash between the religious prohibition of apostasy or heresy and freedom of speech, conscience, and religion;¹⁹ and, as discussed below, in the patriarchal, religious opposition to women's right to equality. Within some divisions of monotheism as a whole there has been a movement to reform and to close the gap with human rights doctrine, e.g. in Protestantism and Reform Judaism. There are also interpretations of Catholicism²⁰ and Islam,²¹ issued by individual religious leaders, which are more consonant with a human rights approach. However, this hermeneutical endeavour is far from complete in the best of cases, and is demonstratively absent in those cases where the religious community is asserting a defence against human rights claims.²²

Gender

Gender is the social construct of sex. Unlike sexual identity, which results from the differing physiological makeup of men and women, gender identity results from the norms of behaviour imposed on men and women by culture and religion. The story of 'gender' in traditionalist cultures and religions is that of the systematic domination of women by men, of women's exclusion from public power and of their subjection to

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16. See Talcott Parsons (1963) *On the Concept of Influence* 27. Pub. Opinion Q.37.
 17. See Arieli Yehoshua (1999) 'The Theory of Human Rights, its Origin and its Impact on Modern Society', in Daniel Gutwein and Menachem Mautner (eds.) *Mishpat Ve-Historyah* [Law and History] 25 (in Hebrew) at p.44.
 18. Robert Cover (1987) 'Obligation: A Jewish Jurisprudence of the Social Order' at p.5 *Journal of Law and Religion* 65.
 19. See Haim Cohn (2000) 'The Law of Religious Dissidents: a comparative historical survey' at p.34. *Israel Law Review* 39.
 20. Pope John Paul II, Letter to Women, June 29, 1995. Available at http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_29061995_women_en.html [last accessed 29 April 2010]
 21. Martha Nussbaum (1999) *Sex and Social Justice* 86. New York: Oxford University Press.
 22. There is a rich literature on such hermeneutical efforts. See, for example, in Islam, Abdullahi Ahmed An-Na'im (1990) 'Human rights in the Muslim world: socio-political conditions and scriptural imperatives'. *Harvard Human Rights Journal* 3/4, pp.13–52.

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patriarchal power within the family. This is, of course, not surprising, since it was not until the Enlightenment that the human rights basis for the subsequent recognition of women's right to equal citizenship was established and not until the twentieth century that women's right to equality began gradually to gain momentum; the ethos of traditionalist cultures and the monotheistic religions was, of course, developed long before that. Hence, at the start of the twenty-first century, traditionalist culture and religion remain bastions of patriarchal values and practices, and both the cultural defence claim and the claim of religious freedom are employed in an attempt to stem the tide of women's equality.

The interaction between culture, religion and gender

Culture and religion are frequently treated as different categories, and in some ways they are, as noted above. Nevertheless, in the context of the defence against human rights principles, they also have much in common. Religion, as part of culture, must both influence and be influenced by social and ideological culture. However, the flow of influence is not necessarily symmetrical and, indeed, religion forms both theoretically and empirically the core of cultural resistance to human rights and gender equality. Religions, not cultures, have codified custom into binding source books that predate the whole concept of gender equality and have both the legal and the institutional structures to enforce their principles.

In contrast to the claim to religious freedom, the cultural defence is often asserted at a rather abstract level. Thus, it has been argued that the imposition of universal human rights regimes is a Western concept, undermining African or Asian culture,²³ often in the context of post-colonialism,²⁴ or as antithetical to the claims of indigenous peoples.²⁵ It has been observed that, by and large, anthropologists have been ethical relativists²⁶ and their perspective is often used to base claims for non-discrimination against sub-cultures and for the protection of cultural identity – as expressed in language, dress or communal institutions. This view is unproblematic. The problem arises when there

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23. Raimundo Pannikar (1982) 'Is the Notion of Human Rights a Western Concept?' at p.120 *Diogenes*, Volume 30, No. 720, pp.75–102.
 24. Bonny Ibhawoh (2001) 'Cultural Tradition and Human Rights Standards in Conflict' at p.85 in Kirsten Hastrup (ed.) *Legal Cultures and Human Rights: The Challenge of Diversity*. Kluwer Law International.
 25. Inger Sjorslev (2001) 'Copywriting Culture: Indigenous Peoples and Intellectual Rights' in *Legal Cultures and Human Rights: The Challenge of Diversity*, *supra* note 24, at p.3.
 26. Melville Herskovits, an anthropologist, regarded cultural relativism as the 'social discipline that comes of respect for differences – of mutual respect. Emphasis on the worth of many ways of life, not one, is an affirmation of the values in each culture.' Elvin Hatch (1983) *Culture and Morality: The Relativity of Values in Anthropology*. New York: Columbia University Press.

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is an insistence on a cultural defence that demands the preservation of practices infringing human rights.²⁷

Many of the practices, defended in the name of culture, that impinge on human rights are gender specific; they preserve patriarchy at the expense of women's rights. Such practices include: a preference for sons, leading to female infanticide; female genital mutilation (FGM); sale of daughters in marriage, including giving them in forced marriage as child brides; paying to acquire husbands for daughters through the dowry system; patriarchal marriage arrangements, allowing the husband control over land, finances, freedom of movement; husband's right to obedience and power to discipline or commit acts of violence against his wife, including marital rape; family honour killings by the shamed father or brothers of a girl who has been sexually violated, whether with consent or by rape; witch-hunting; compulsory restrictive dress codes; customary division of food, which produces female malnutrition; and restriction of women to the roles of housewives or mothers, without a balanced view of women as autonomous and productive members of civil society.²⁸ Many of these practices have been the subject of criticism in the Concluding Comments on Country Reports by the Committee for Elimination of Discrimination against Women.²⁹

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27. See Martha Nussbaum's fascinating discussion of anti-universalist conversations. Nussbaum, *supra* note 19, at pp.35–39.
28. For a fuller description of these cultural practices, see Christina M Cerna and Jennifer C Wallace (1999) '1 Women and Culture' in Kelly D Askin and Dorean M Koenig (eds.) 623, 630–40 *Women and International Human Rights*. Transnational Publishers Inc. See also Radhika Coomaraswamy, Integration of the Human Rights of Women and the Gender Perspective, Violence against Women, UNCHR E/CN.4/2002/83, pp.70–81 (son preference), pp.12–20 (FGM), pp.55–64 (marriage), pp.45–48 (witch-hunting), pp.38–44 (the pledging of girls for economic and cultural appeasement), pp.21–37 (honour killings), pp.89–95 (practices that violate women's reproductive rights), pp.85–88 (restrictive practices). Available at <http://www.un.org/womenwatch/daw/cedaw/> [last accessed 29 April 2010].
29. Examples from the CEDAW Concluding Comments include: Re. Algeria, 20th session (1999) 91 ('The Committee is seriously concerned by the fact that the Family Code still contains many discriminatory provisions which deny Algerian women their basic rights, such as free consent to marriage, equal rights with fathers, the right to dignity and self-respect and, above all, the elimination of polygamy'); Re. Cameroon, 23rd session (2000) 54 (urging 'the government to review all aspects of this situation and to adopt legislation to prohibit discriminatory cultural practices, in particular those relating to female genital mutilation, levirate, inheritance, early and forced marriage and polygamy'); Re. Democratic Republic of the Congo, 22nd session (2000) 230, 232 (expressing concern 'about the situation of rural women ... Customs and beliefs are most broadly accepted and followed in rural areas, preventing women from inheriting or gaining ownership of land'; also expressing concern about the 'food taboos'); Re. Guinea, 25th session (2001) 122, 138 (expressing 'concern that, despite prohibitions in statutory law, there is wide social acceptance and lack of sanctions for such practices as female genital mutilation, polygamy and

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Of the harmful cultural practices, which have been legitimised and defended, some are geoculturally diffuse, if not universal, and some specific to regions. The most globally pervasive of the harmful cultural practices mentioned above is the stereotyping of women exclusively as mothers and housewives in a way that limits their opportunity to participate in public life, whether political or economic.³⁰ Other patriarchal practices, which were widely prevalent in the past, have been eliminated in some societies but have survived in others, such as allowing the husband control over land, finances or freedom of movement;³¹ a husband's right to obedience and power to discipline or

forced marriage, including levirate and sororate, and discrimination in regard to child custody and inheritance' and that 'customs and beliefs that prevent women from inheriting or gaining ownership of land and property are most broadly accepted in rural areas'); Re. Uganda, 14th session (1995) 332 (noting 'prevalent religious and cultural practices still existing that perpetuated domestic violence and discriminated against women in the field of inheritance'); Re. India, 22nd session (2000) 68 (expressing concern over 'a high incidence of gender-based violence against women, which takes even more extreme forms because of customary practices, such as dowry, sati and the devadasi system'); Re. Jordan, 22nd session (2000) 179 (expressing concern that 'article 340 of the Penal Code ... excuses a man who kills or injures his wife or his female kin caught in the act of adultery'); Re. China, 20th session (1999) 299 (noting 'the discriminatory tradition of son preference, especially regarding family planning, and 'illegal practices of sex-selective abortions, female infanticide and the non-registration and abandonment of female children'); Re. Indonesia, 18th session (1998) 284 (mentioning 'laws which discriminate against women regarding family and marriage, including polygamy, age of marriage, divorce and the requirement that a wife obtain her husband's consent for a passport ... sterilisation or abortion, even when her life is in danger'); Re. Maldives, 24th session (2001) 143 (calling on 'the government to obtain information on the causes of maternal mortality, malnutrition and morbidity and the morality rate of girls under the age of five years, and to develop programmes to address those problems'). Available at <http://www.un.org/womenwatch/daw/cedaw/> [last accessed 29 April 2010].

30. See *ibid.* Re. Georgia, 21st session (1999) 30 (the committee criticises 'the prevalence of stereotyped roles of women in government policies, in the family, in public life based on patterns of behaviour and attitudes that overemphasise the role of women as mothers'); Re. Indonesia, 18th session (1998) 289 (expressed 'great concern about existing social, religious and cultural norms that recognise men as the head of the family and breadwinner and confine women to the roles of wife and mother, which are reflected in various laws, government policies and guidelines').
31. These patriarchal powers were prevalent throughout the world, but they were removed at the end of the nineteenth century in Europe and the United States in married women's property and capacity legislation. They currently remain a part of women's lives in many African, Asian and Latin American cultures, although change is now occurring. See, for instance, the 2000 Reform of Guatemala's Civil Code concerning the rights of married women, Annual Report of the IACHR 2000, OEA/Ser.L/V/II.111, Doc. 20 rev., 16 April 2001, ch III.

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commit acts of violence against his wife, including marital rape;³² and witch-hunting.³³ Some cultural practices that are harmful to women have always been peculiar to certain areas, such as family honour killings;³⁴ FGM;³⁵ and a preference for sons leading to female infanticide.³⁶

Religious norms also impose patriarchal regimes that disadvantage women. It has often been said that the three monotheistic religions recognise the full humanity of woman. Woman was created in *imago dei* (*bezelem*). Yet, notwithstanding acceptance of women's equal personhood as a spiritual matter, monotheistic religions have promulgated patriarchal gender relations. Women have been excluded from the hierarchies of

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32. See Reva B Siegel (1996) *The Rule of Love: wife-beating as prerogative and privacy*, p.105 Yale L.J. 2117. However, the legitimacy of patriarchal spousal violence has gradually been disappearing. In many countries and cultures, there is prohibition of domestic violence. Nevertheless, light sentences for domestic violence by a husband and recognition of a defence of provocation in cases of what are, euphemistically, called 'crimes of passion' continue to give residual expression to cultural tolerance for such forms of violence. In most parts of the Americas and Europe, marital rape has been criminalised. Even now, however, in the majority of countries, criminal law still cannot be invoked for marital rape. See Coomaraswamy, *supra* note 28, p.62.
 33. Persecution of witches was common in sixteenth- and seventeenth-century Europe and up until the Salem Witch Trials in 1692 in the US; it is still a cultural practice found in some Asian and African communities. See Coomaraswamy, *supra* note 28, pp.45–48.
 34. Radhika Coomaraswamy, the UN Special Rapporteur on Violence against Women, in her 2002 report, writes: 'Honour killings are carried out by husbands, fathers, brothers or uncles, sometimes on behalf of tribal councils ... They are then treated as heroes.' She lists the countries in which family honour killings are reported: Egypt, Iran, Jordan, Lebanon, Morocco, Syria, Turkey and Yemen. It should be added that in many of these countries such behaviour is regarded with extreme latitude under the criminal law and either immunity or reduced sentences are prescribed by statute. For instance, Coomaraswamy points out that an attempt to outlaw crimes of honour was stalled in the Pakistani Parliament. Coomaraswamy, *supra* note 28, p.22, 37.
 35. FGM is believed to have started in Egypt about 2,000 years ago. It is practised in many African countries. It entails short- and long-term health hazards, an ongoing cycle of pain in sexual relations and childbirth, and a reduction of women's capacity for sensual pleasure. Although not restricted to Muslim communities, Islamic religious grounds are given for its continuation in some societies. See Coomaraswamy, *supra* note 28, 14. It is sometimes argued that FGM should not be prohibited anymore than male circumcision. See, e.g., Sander L Gilman, *Barbaric Rituals* (1999) in Susan Moller Okin (ed.) *Is Multiculturalism Bad for Women?* 53. Princeton, NJ: Princeton Univ. Press. However, the WHO and other UN bodies have targeted FGM as harmful in ways not attributed to male circumcision.
 36. China is regarded as a major culprit for female infanticide in the wake of its one-child policy. However, while female infanticide is practised in rural areas, it is not condoned by the central authorities. See Carmel Shalev (2001) 'China to CEDAW: An Update on Population Policy', p.23 *Human Rights Quarterly* 119.

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canonical power and subjected to male domination within the family.³⁷ There has been much variety among different monotheistic religions, and among the branches within each of them, concerning the nature of their patriarchal norms and their adaptation to changes in women's roles.

Under most of the monotheistic religious norms, women are not entitled to equality in inheritance, guardianship, custody of children, or division of matrimonial property. In most of the branches of the monotheistic religions, women are not eligible for religious office and, in some, they are limited in their freedom to participate in public life, whether political or economic.

This schematic separation of the norms of cultural and religious patriarchy does not accurately represent the way in which traditionalist cultures and religion actually interact. Although the injurious cultural practices mentioned above are not directly mandated in the documentary sources of religion, there appears to be a correlation between certain cultural practices and the religious environments in which they thrive. A definitive correlation would require careful research, but an example of the symbiosis between the two may be found in the policy of the Islamic Republic of Iran to expand the culture of chastity, impose stricter veiling requirements, and to provide for imprisonment of up to 12 months and flogging of up to 74 lashes for offences relating to the dress code.³⁸ While the requirement of the veil is considered a cultural practice and not a religious norm, it seems clear that these moves by the Iranian government have been made under the aegis of Islamic religious purity.

International human rights law

The clash with which we are dealing is not between culture or religion on one side, and the right to gender equality on the other, but between those norms of culture or religion that inculcate patriarchal values and rely on a claim to cultural tradition or religious freedom in order to perpetuate these patterns of behaviour to the disadvantage

37. Much has been written in defence of the humanism of the Bible's treatment of women in the context of biblical times. See Michael S Berg and Deborah E Lipstadt, *Women in Judaism from the Perspective of Human Rights*, in Martinus Nijhoff (1996) John Witte and Johan D van der Vyver (eds.) *Religious Human Rights in Global Perspectives: Religious Perspectives* 304, 310. Indeed, women were in some respects protected by Biblical law against abuse. However, protections for women were paternalistic, given to them as unequals like those given to slaves or children; thus, for instance, women were given protection against excesses of physical violence by their husbands when exercising the right of chastisement. Such protections enhanced the prospects of health and survival of women, but they did not bestow autonomy or power. The basis remained unchanged: an image of women marked by inferiority and as being of instrumental worth to men rather than having their own intrinsic worth.

38. General Assembly Report of Special Representative of the Commission on Human Rights on the Situation of Human Rights in the Islamic Republic of Iran 15.10.97, A/52/472.

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of women. The conflict with gender equality rights may arise with regard to a majority culture in a constitutional framework or a cultural or religious subgroup within the constitutional society. Patriarchal claims by cultural or religious subgroups may range from negative demands for privacy and non-intervention to positive demands for autonomous control of their own social institutions and active support by the state.³⁹ Deference to any of these could result in an infringement of women's right to equality.

International human rights conventions

International conventions variously protect all three of the human rights discussed here: the right to freedom of religion or belief, including its manifestation individually or in community with others; the right to enjoy one's culture; and the right to gender equality. It seems clear that the protection of religious rights is at a higher level than the protection of cultural rights. The guarantee of freedom of religion is far reaching in its scope, with regard to both the protection of religion in all societal contexts and the protection of all behaviours implicated in the freedom of religion.⁴⁰ The UN Declaration on Intolerance and Discrimination Based on Religion or Belief⁴¹ further details the rights to freedom of thought, conscience, and religion for adults and children, some of which may prove

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39. Jack T Levy establishes a useful typology for the rights claims of subgroups, identifying a range of claims, such as immunity from unfairly burdensome laws; assistance; self-government; external rules limiting freedom of non-members; internal rules limiting the freedom of members; recognition and enforcement of autonomous legal practices; guaranteed representation in government bodies; and symbolic claims. Jack T Levy (1997) 'Classifying Cultural Rights' in Ian Shapiro and Will Kymlicka (eds.) *Ethnicity and Group Rights* 39. New York: New York Univ. Press.
40. Universal Declaration of Human Rights, article 18, states 'Everyone has the right to freedom of thought, conscience and religion; this right includes ... freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.' UDHR, *supra* note 1, art. 18. See also Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, GA res. 36/55, 36 UN GAOR Supp. (No. 51) at 171, UN Doc. A/36/684 (1981) [hereinafter Declaration on Discrimination Based on Religion or Belief]; ICCPR, *supra* note 3, arts. 18, 27, 999 UNTS at 175, 180. On religious freedom in the education of children, see ICESCR, *supra* note 3, arts. 3, 6, 13(3), 999 UNTS at 5, 6, 9; Convention on the Rights of the Child, Nov. 20, 1989, arts. 14, 30, GA Res. 25, annex, UN GAOR, 44th Sess., 61st plen. mtg., Supp. No. 49 at 167, UN Doc. A/44/49 (1989) (entered into force Sept. 2, 1990) [hereinafter Children's Convention]. For discussion, see Natan Lerner (1996) 'Religious Human Rights under the United Nations' in Martinus Nijhoff, John Witte and Johan D van der Vyver (eds.), *Religious Human Rights in Global Perspectives: Religious Perspectives* p.304, 310.
41. Declaration on Discrimination Based on Religion or Belief, *supra* note 40. Although not a treaty, the declaration carries the weight of UN authority and may be seen as stating rules of customary international law. Lerner, *supra*, at p.123.

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at odds with gender equality rights. For instance, the right 'to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief'⁴² may involve exclusion of women from religious leadership. In contrast, the right to enjoy one's culture is primarily concerned with the protection of ethnic, religious and linguistic minorities.⁴³

The clash – between culture and religion on the one hand, and human rights or gender equality on the other – is expressly regulated in two international conventions – CEDAW⁴⁴ and ICCPR.⁴⁵ Article 5(a) of CEDAW imposes a positive obligation on states parties to 'modify ... social and cultural' practices in the case of a clash,⁴⁶ and article 2(f) imposes an obligation to 'modify or abolish ... customs and practices'⁴⁷ that discriminate against women.⁴⁸ Culture, as noted above, is a macro-concept, definitive of human society, and the concept of 'cultural practices' thus subsumes the religious norms of societies. Custom is the way in which the traditionalist cultural norms are sustained in a society. It is clear, then, that article 5(a) and article 2(f) give superior force to the right to gender equality in the case of a clash with cultural practices or customs, including religious norms, thus creating a clear hierarchy of values.

In ICCPR's article 18(3), there is express regulation of any potential conflict between the right to manifest one's religion and the fundamental rights or freedoms of others, including, implicitly, the right to gender equality. The article provides that '[t]he right to manifest one's religion or beliefs ... may be subject only to such limitations as are necessary to protect public safety, order, health, or morals, or the fundamental rights

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42. Declaration on Discrimination Based on Religion or Belief, *supra* note 40, art. 6(g).
 43. ICCPR, *supra* note 3, art. 27, 999 UNTS at 180; Children's Convention, *supra* note 40, art. 30.
 44. CEDAW, *supra* note 4.
 45. ICCPR, *supra* note 3.
 46. CEDAW's article 5 (a) states: 'The parties shall 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 of either of the sexes or on stereotyped roles for men and women.' CEDAW, *supra* note 4, art. 5(a), 1249 UNTS at 16.
 47. Under article 2(f), states parties agree: ' ... to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: to take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'. *Ibid.* art. 2(f), 1249 UNTS at 14.
 48. The effect of article 5(a), combined with article 2(f) of the convention which requires states parties to proceed without delay, is to establish an immediate obligation and not an obligation merely to take steps with a view to achieving progressively the full realisation of rights, as in the CESC. Henry J Steiner and Philip Alston (2nd ed. 2000). *International Human Rights in Context* 179. Oxford: Oxford University Press.

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and freedoms of others.⁴⁹ Article 18(3) thus provides an exception to the right to the freedom to manifest one's religion, should a confrontation materialise with the fundamental rights and freedoms of others, including, by clear implication, the right to gender equality also protected in the ICCPR. CEDAW and the ICCPR thus balance the right to religion and culture with human rights and women's rights. While both conventions recognise the need for balancing, there are significant differences between their formulations. First, the conception of a mandatory hierarchy of values in article 5(a) of CEDAW is not matched by a similar edict in article 18(3). Second, the choice to regulate the clash is with culture, in one convention, and with religion, in the other (further discussed below). Third, there is a difference in wording as regards the protected parties; in CEDAW, the reference is to 'men and women,' while in ICCPR it is to 'others.' The obvious reference in CEDAW is to men and women within the culture; in ICCPR, the primary reference may be to those outside the religion, although, as pointed out, the Human Rights Committee has not adopted a restrictive approach.⁵⁰

In using the construct of culture in CEDAW, the overarching concept under which religion is included, arguably the intention of the drafters was to give the widest possible range of protection to the human rights of women covered by the convention. When creating a clear hierarchical deference to women's human rights, the drafters arguably preferred to use the term 'culture' as a fig leaf for religion, which is a more rigidly defended construct than culture in the human rights treaties, hoping for greater readiness by states to ratify CEDAW. This latter explanation gains weight when the reservations of states parties are analysed; there are at least 20 reservations that clearly indicate that the state party wishes to conserve religious-law principles for either its entire population or for minority communities. These reservations are made primarily under article 16 of the convention dealing with women's rights to equality within the family,⁵¹ yet only four countries⁵² have entered reservations to article 5(a). This indicates that states parties may not have been fully aware of the incorporation of religion within culture.

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and **culture, including religious attitudes** ... States parties

49. ICCPR, *supra* note 3, art. 18(3), 999 UNTS at 177.

50. Human Rights Committee, General Comment 22 on article 18, UN Doc. HRIGEN1Rev.1 at 35 (1994).

51. CEDAW, *supra* note 4, art. 16, 1249 UNTS 17. In many cases, the state party expressly indicates that the reason for the reservation is in order to apply the Sharia. See the reservations of Algeria, Bangladesh, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Mauritius, Morocco, Saudi Arabia, Tunisia and Turkey. A few of the reservations were in order to allow continued application of various different religious laws. See, e.g., reservations of Israel, India and Singapore.

52. India, Niger, Malaysia and New Zealand–Cook Islands.

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should ensure that **traditional, historical, religious or cultural attitudes** are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights ... The rights which persons belonging to minorities enjoy under article 27 of the Covenant **in respect of their language, culture and religion do not authorise** any state, group or person to violate the right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.⁵³

So, like the CEDAW Committee, the Human Rights Committee has rejected the cultural defence and the claim of religious freedom as justifications for discrimination against women.

This overview clearly shows that practices injurious to women are regarded as outlawed under the UN human rights system, whether or not they are claimed to be justified by cultural or religious considerations.

Human rights cases: constitutional and international

The cultural defence and the right to religious freedom have, as said, been raised in opposition to women's claims to gender equality in constitutional courts and international tribunals. The way courts have dealt with the dichotomy depends on many factors and, not least, on the constitutional framework or international treaty jurisdiction. In the following discussion, however, I will not address these important legal issues but will concentrate on the rhetoric and the outcome of the judgments as they relate to the hierarchy of values between culture, religion, and gender. To gauge the level of judicial activism involved, I provide some indication of the statutory provisions impacting on the specific clash of values under discussion. I analyse separately a sample of cases that appear, according to the judicial rhetoric, to be purely cultural, purely religious, or based on a mixture of cultural and religious considerations, in order to begin to assess whether there are significant differences in the way the various categories are treated.⁵⁴ The cases are organised in chronological order, according to subject matter or by country, depending on the analytical context.

A comparative assessment of constitutional cases

The cultural defence

There have been two similarly decided North American cases on discrimination against women regarding their right to membership in tribal minorities. In the Canadian Supreme Court, in 1973, Jeanette Lavell lost her challenge to invalidate Canada's

53. HRC General Comment 28, CCPR/C/21/Rev.1/Add.10, 5, 32 (emphasis added).

54. The cases discussed below are not an exhaustive collection, but rather present a preliminary survey of the way in which the clash between culture, religion and gender equality has been dealt with by courts in different countries and by international tribunals.

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Indian Act.⁵⁵ The Indian Act provided that, unlike a Native man, a Native woman who married a non-Native lost her status as an Indian, as did her children.⁵⁶ In 1985, in the aftermath of a decision of the Human Rights Committee, discussed below, and subsequent to the enactment of the Canadian Charter of Rights and Fundamental Freedoms, the Indian Act was amended and the statutory discrimination against women eliminated. In the United States *Martinez* case, in 1978, the Supreme Court refused to intervene to invalidate a Santa Clara Pueblo Ordinance that imposed similar discriminatory membership rules for tribal members.⁵⁷ Judith Resnik offers an explanation of the decision, namely, 'that membership rules that subordinate women do not threaten federal norms (either because federal law tolerates women holding lesser status than men or because federal law has labelled the issue one of 'private' ordering and non-normative).'⁵⁸ Whatever the real explanation may be, the result is deference to tribal sovereignty (and hence culture) and the denial of the right of the Santa Clara women to equal membership.

Two African court decisions on discrimination against women in their land rights under traditional customary law were decided in diametrically opposed ways. In the *Pastory* case in 1992, the Tanzanian High Court held that the law of customary inheritance, which barred women, unlike their male counterparts, from selling clan land, unconstitutionally discriminated against women.⁵⁹ In invalidating the rule of customary law, Justice Mwalusanya relied on the language of Tanzania's Constitutional Bill of Rights and the ratification of CEDAW. Quoting Julius Nyerere's call for socialist equality – 'If

55. *Canada (Attorney General) v. Lavell*, [1974] SCR 1349.

56. This constituted one of the issues of gender equality in a later constitutional struggle over the drafting of the Canadian Charter. The established male leadership contended that the Charter should not apply to Indian governments because it would undermine their inherent right to self-government and place an emphasis on individual rights not in keeping with traditional Native values. In contrast, the NWAC, the Native Women's Association of Canada, fought for the applicability of the Charter in order to protect themselves against patriarchal dominance. Joyce Green highlights the problem of the silenced voice within autonomous subcultures: 'Native women identify a shared experience of oppression as women within the Native community, together with (instead of only as) the experience of colonial oppression as Aboriginals within the dominant society.' She concludes: '[u]ltimately the process excluded women qua women.' Joyce Green (1993) *Constitutionalising the Patriarchy: Aboriginal women and Aboriginal government*, 4 Constitutional Forum 110.

57. *Santa Clara Pueblo v. Martinez*, 436 US 49 (1978). Under the tribe's rules, the children of female members who married outside the tribe could not retain their membership in the tribe, while the children of male members who married outside the tribe would remain members.

58. Judith Resnik (1989) 'Dependent Sovereigns: Indian Tribes, States and the Federal Courts', 56 University of Chicago Law Review 671.

59. *Ephrahim v. Pastory*, 87 International Law Report 106.

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we want our country to make full and quick progress now, it is essential that our women live on terms of full equality with men,' – he observed: 'From now on females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritance of clan land ... is concerned. It is part of the long road to women's liberation.' In 1999, a similar issue arose in Zimbabwe in the *Magaya* case.⁶⁰ Venia Magaya, the daughter of her deceased father's first wife, claimed ownership of the estate; this was opposed by a son of the father's second wife. The Supreme Court – relying on an exemption for customary law under the constitution and rejecting the binding effect of the international human rights instruments to which Zimbabwe was party – refused to invalidate a customary law rule that gave preference to males in inheritance. Judge Mucchechete held that this customary law rule was part of the fabric of the African socio-political order, at the heart of which lies the family. He said: 'At the head of the family there was a patriarch, or a senior man, who exercised control of the property and lives of women and juniors. It is from this that the status of women is derived. The woman's status is therefore basically the same as that of any junior male in the family'.⁶¹ He added: 'While I am in total agreement with the submission that there is a need to advance gender equality in all spheres of society, I am of the view that great care must be taken when African customary law is under consideration ... I consider it prudent to pursue a pragmatic and gradual change which would win long term acceptance rather than legal revolution initiated by the courts'.⁶²

Religious freedom

The rights of religious groups to regulate family law in accordance with their religious law and in ways that are discriminatory toward women have been examined by courts in India.

In India, with its Hindu majority, the clash between religion and women's right to equality has been examined in relation to the two minority religions (Islam and Christianity). For Hindu women, India follows a system in which personal status laws are determined by the law of the religion of the parties involved but are applied in civil courts. Many of the problems of inequality in Hindu family law were removed by the Hindu Marriage Act.⁶³

In the 1985 *Shah Bano Begum* case, the Supreme Court confirmed a maintenance award for a divorced Muslim woman, allegedly contrary to Sharia law.⁶⁴ The court was composed of five Hindu judges and the case was decided unanimously. On the question

60. *Magaya v. Magaya* [1999] 3 LRC 35 (Zim.).

61. *Ibid.*

62. *Ibid.*

63. CIS Part II (1955) Hindu Marriage Act, New Delhi, 18 May 1955.

64. *Mohammed Ahmed Khan v. Shah Bano Begum* (1985) 2 SCC 556.

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of the religious claims underlying opposition to the maintenance award, Chief Justice Chandrachud was scathing about the inequality wrought by the Muslim personal code: 'Undoubtedly the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all. But is the only price of that privilege the dole of pittance during the period of *iddat*? And is the law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of *iddat*, the mere fact that he has paid something, no matter how little, absolves him forever from the duty of paying adequately so as to enable her to keep her body and soul together?'⁶⁵ The court also found Islamic authority in verses 241 and 242 of the Qur'an for the proposition that there is an obligation to pay maintenance to divorced wives who are unable to maintain themselves.⁶⁶ The ratio of the case was, however, based on the Code of Criminal Procedure, under which a maintenance obligation may be imposed on a person who neglects or refuses to pay maintenance to a wife who is unable to maintain herself. In the aftermath of the *Shah Bano* judgment, the statutory Muslim Personal Law Board campaigned to reverse the ruling. It succeeded on all fronts. The ruling Congress Party introduced legislation to reverse the judgment, and the petitioner waived all her rights under the Supreme Court judgment.⁶⁷

In the *Mary Roy* case in 1986, the Indian Supreme Court considered the constitutionality of the unequal inheritance provisions in the Christian Succession Act of 1916.⁶⁸ The petitioner, a Christian woman resident in Kerala, had claimed that the act infringed women's right to equality in that it provided for a lower inheritance share for women. The Supreme Court avoided the issue of constitutionality, holding that the Indian Succession Act of 1925, which grants equal inheritance rights to men and women, governed Christians in Kerala. According to Martha Nussbaum, the Synod of Christian

65. *Ibid.* at 559.

66. *Cf. Abu Bakar Siddique v. S M A Bakkar*, 38 DLR (AD) (1986). In Bangladesh, in 1986, the High Court ruled on a petition by a mother to retain custody of her son after the age of seven. The Court held that although the principles of Islamic law allowed the woman to be guardian of a male child only until the age of seven, a deviation from this rule would be possible where the child's welfare required it. According to the judge, there was no authoritative ruling on this issue in the Qur'an or the Sunnah, and hence he was within the principles of Islamic law in awarding custody to the mother in this unusual case, where the child was afflicted with a rare disease and the mother, a doctor, was able to take care of his treatment. In that case, the Court was ruling on a Muslim issue in a Muslim state and the decision does not appear to have been opposed by public opinion.

67. Amendments to the code of criminal procedure have strengthened women's right to maintenance in divorces. See III India Code (Act No. 2 of 1974) § 125.

68. *Mary Roy v. State of Kerala*, A.I.R. 1986 SC 1011.

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Churches has supported opposition by the Christian community to the *Mary Roy* decision and has financed the drafting of wills to disinherit female heirs.⁶⁹

In 1995, in *Sarla Mudgal*, the Indian Supreme Court decided in the case of a man who was married in a monogamous Hindu marriage, under the Hindu Marriage Act, and who converted to Islam, only to remarry without dissolving the first marriage, that the second marriage was prohibited.⁷⁰ The court refused to recognise the second marriage as a polygamous marriage under the Muslim law. The court, pointing out that polygamy had been held injurious to public morals in the US, said: '... in the Indian Republic, there is to be only one Nation – the Indian Nation – and no community can claim to be a separate entity on the basis of religion.'⁷¹ In 1997, the Indian Supreme Court handed down a more ambivalent decision on polygamy. In *Ahmedabad Women Action Group*, the court dismissed constitutional challenges by a women's NGO to the Muslim practices of polygamy and triple *talaq* (a form of summary unilateral divorce by the husband) and to provisions of the Hindu Succession Act that discriminated against women.⁷² The court used very different rhetoric from that used only two years earlier: '... a uniform law, though highly desirable, may be counter-productive to the unity and integrity of the nation' and 'polygamy is recognised as a valid institution when a Muslim male marries more than one wife'.⁷³

Cultural-religious claims

In the *Saroj Rani* case, in 1984, the Indian Supreme Court upheld the right of a husband to restitution of conjugal rights, as provided in the Hindu Marriage Act of 1955,⁷⁴ reversing the decision of Justice Choudary in the lower court that restitution of conjugal rights was unconstitutional and was 'a savage and barbarous remedy,

69. Nussbaum, *supra* note 21, at 98. See also Marc Galanter and Jayanth Krishnan, 'Personal Law and Human Rights in India and Israel', 34 *Israel L Rev.* 101 (2000). According to Galanter and Krishnan, the rejection of the decision by the Christian minority group demonstrates concern about losing their identity if they do not keep the established personal law.

70. *Sarla Mudgal v. Union of India* (1995) 3 SCC 635.

71. *Ibid.* at 650. See also K N Chandrasekharan Pillai (1999) 'Women and Criminal Procedure' in Amita Dhanda and Archana Parashar (eds.) *Engendering Law: essays in honour of Lotika Sakar* 161–72. India: Eastern Book Company.

72. *Ahmedabad Women Action Group v. Union of India* (1997) 3 SCC 573.

73. *Ibid.* at 577.

74. *Saroj Rani v. Sudarshan Kumar Chadha* (1984) 4 SCC 90. The Supreme Court overruled *T Sareetha v. T Venata Subbaiah*, AIR 1983 AP 356. Sareetha had been given in marriage by her parents at the age of 16 and, after a few months of marriage, Subbaiah, her husband had left her because of her wish to become an actress. Five years later, after Sareetha had become a famous actress, Subbaiah sued for restitution of conjugal rights.

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violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution ... [making] the unwilling victim's body a soulless and joyless vehicle for bringing into existence another human being'.⁷⁵ Judge Choudary had also held that, although apparently gender neutral, in the context of Hindu culture in which women are not regarded as the social equals of men, conjugal restitution was 'a source of sexual oppression and brutalisation for women at the hands of men'.⁷⁶ The Supreme Court, in reversing this judgment, held that the decree of restitution 'serves a social purpose as an aid to the prevention of break-up of marriage'.⁷⁷ In 1982, the High Court in Bangladesh held the remedy of forcible restitution of conjugal rights unconstitutional since it infringed women's right to equality.⁷⁸ The court did not in its judgment expressly refer to culture or religion, but, nevertheless, indicated that it was overriding traditionalist culture by referring to the remedy of forced restitution as 'outmoded'.

International judicial decisions

Cases on the difficult encounter between religion or culture and human rights can be brought before international tribunals or committees only after the exhaustion of domestic remedies, and, hence, are brought in the wake of decisions by domestic courts.

In 1977, Sandra Lovelace submitted a communication to the UN Human Rights Committee contesting the application to her of the decision by the Canadian Supreme Court regarding Lavell (discussed above) and challenging her loss of Indian status as the result of marrying a non-Indian. The Human Rights Committee held the Indian Act unreasonably deprived Sandra Lovelace of her right to belong to the Indian minority and to live on the Indian reserve.⁷⁹ This was an unjustifiable denial of her right to enjoy her culture under article 27 of the ICCPR.⁸⁰ In an individual opinion, Nejib Bouziri added that the Indian Act also breached article 2 of the ICCPR in that it discriminated between men and women.⁸¹

75. *T Sareetha v. T Venata Subbaiah*, AIR 1983 AP 356, 370.

76. *Ibid.*

77. *Saroj Rani*, (1984) 4 SCC at p.102. The Supreme Court further justified the issuing of the decree on the grounds that a woman who did not wish to return to the marital home could avoid doing so by paying a fine. As Martha Nussbaum has rightly commented, 'the Court did not ask how likely it was that a woman fleeing from an abusive marriage would be able to pay the fine.' Nussbaum, *supra* note 21, at 4.

78. *Nelly Zaman v. GiaSuddin Khan*, 34 DLR 221 (1982).

79. Communication No. 24/1977 (1)-(2), decided July 30, 1981, UN Doc. CCPR/C/OP/2 at 224 (1990).

80. ICCPR, *supra* note 3, art. 27, 999 UNTS at 185.

81. Individual opinion submitted along with Communication No. 24/2977. Available at www.riga.lv/minelres/un/cases/24_1977.htm [last accessed 29 April 2010].

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In 1981, the Human Rights Committee considered a communication in which a Mauritian woman alleged Mauritius immigration law discriminated against women in violation of articles 2(1) and 3 of the ICCPR.⁸² The government of Mauritius had adopted an immigration law providing that if a Mauritian woman married a man from another country, the husband must apply for residence and permission may be refused. If, however, a Mauritian man married a foreign woman, the foreign woman was automatically entitled to residence. The Human Rights Committee held that Mauritius had violated the covenant by discriminating between men and women without adequate justification.

Theoretical framework for constitutional balancing

The purpose of the theoretical examination that follows is to discuss the way in which constitutional norms should, as a matter of constitutional principle, deal with clashes between the right to culture or religion on the one hand, and the right to gender equality on the other.⁸³ Arguably, the very existence of the international human rights norms discussed above should be enough to decide this issue on a normative level. Certainly, for the 170 states parties to CEDAW, this seems compelling; even where states have entered reservations, it is widely considered that these are not valid where they are contrary to the essence of the treaty obligation. This is, however, an argument based on the normative legal standards of universalism and, as such, has been attacked from various political philosophy perspectives. Although the international norms are sufficiently well established to justify an obligation of state compliance, I will briefly analyse – as a supplementary matter – the question of constitutional principle. In order to ascertain the principles that should govern the role of constitutional law in regulating the interaction between religious and equality values, I shall examine the theoretical arguments that support deference to cultural or religious values over universalist values. To the extent that such contentions fail, I argue that we should regard gender equality as a universalist value entitled to dominance in the legal system.

A number of theories of justice have been advanced in support of deference to cultural or religious values. I will examine three. The first, or ‘multiculturalist’ approach, contends that preservation of a community’s autonomy is a sufficiently important value to override equality claims. The second, which I call the ‘consensus’ approach, argues that if cultural or religious values have the sanction of political consensus in a democratic system, then this is enough to legitimate their hegemony. The third, which I label the ‘consent or waiver’ approach, claims that where there is individual consent to cultural or religious values it must be respected.

82. *Shirin Aumeeruddy-Cziffra and 19 other Mauritian Women v. Mauritius*, Communication No. R.9/35, (May 2, 1978), UN Doc. Supp. No. 40 (A/36/40) at 134 (1981).

83. For a fuller exploration of certain aspects of the hierarchy of values, see Frances Raday (1995) ‘Religion, Multiculturalism and Equality – the Israeli case’, *25 Israel Yearbook on Human Rights* 193.

Multiculturalism

Communitarian claims that adherence to the traditions of a particular culture is necessary in order to give value, coherence and a sense of meaning to our lives are used to justify traditionalist cultural or religious hegemony over universalist principles of equality. Alasdair MacIntyre argues that the ethics of tradition, rooted in a particular social order, are the key to sound reasoning about justice.⁸⁴ Normative communitarianism is thus oriented to the preservation of tradition within the culture. Where the communitarian norms are based on religion, traditionalism often means deference to written sources formulated in an era from the sixth century BC (the Old Testament), to the first century AD (the New Testament), to the seventh century AD (the Qur'an).⁸⁵

Two aspects of the communitarian argument – cultural relativism and the preservation of tradition – deserve particular attention in examining the impact of communitarianism on women. First, the cultural relativism implicit in normative communitarianism must displace the value of gender equality as, by definition, traditionalist cultures and religions, in which gender equality is not an accepted norm, are in no way inferior to those social systems in which it is. This communitarian argument is, however, logically flawed. If cultural relativism is taken to its logical conclusion, it undermines not only the value of human rights and gender equality but also the value of communitarianism itself, since communitarianism is also the product of a particular cultural pattern of thinking.⁸⁶ Indeed, taken to extremes, cultural relativism is another name for moral nihilism; if cultural relativism were to be taken as the dominant value basis of a legal system, it would be impossible to justify any moral criticism of the system's norms.⁸⁷ At this level, multiculturalism could not be useful in any attempt to engineer legal policy in a positive legal system.

Alternatively, we could regard cultural relativism merely as a tool that helps us to distinguish ethnocentric from universal standards, so that we will be able to refrain from insisting on ethnocentric values as mandatory on a global scale. This form of multiculturalism would not, I contend, override the value of gender equality. This stems from the fact that gender equality is one of the universally shared ideals of our time⁸⁸ and, hence, its global application is neither ethnocentric nor morally imperialistic. The vast majority

84. Alasdair MacIntyre (1981) *After Virtue: a study in modern theory*. Notre Dame, Ind.: University of Notre Dame Press.

85. Yosef Qaro (c. 1500s) *Shulkan Aruch [Code of Jewish Law]*

86. See Alison Dundes Renteln (1990) *International Human Rights – universalism versus relativism* pp.61–78. CA: Sage Publications, Inc.

87. Clyde Kluckhohn (1995) 'Ethical Relativity: Sic et Non'. *The Journal of Philosophy*, Volume 52, No. 23, pp.663–677. 'Morality differs in every society and is a convenient tenet for socially approved habits'.

88. See discussion of international norms, *supra*.

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of states have ratified CEDAW and few of them have entered wide-ranging reservations for culture or religion. Even in the states with such reservations, there are significant dissenting elements that seek full gender equality, as can be seen from the NGO shadow reports to CEDAW coming out of these countries.

Second, let us take a look at the way in which the preservation of tradition impacts on gender equality. If the preservation of tradition is an aspect of communitarianism, as some of its proponents suggest, then the legitimacy of the claims of communitarianism to override universal principles (such as the right to equality) must stand or fall along with the legitimacy of the claim that traditionalism itself should also override universal principles. There is a whole battery of reasons why traditionalism cannot legitimately be regarded as overriding the principle of equality. Traditional patterns cannot form the dominant foundation for contemporary meaningfulness, except in a static society. It may be that the ethical norms of a society are themselves a factor in determining the dynamism of the society, and it is not inconceivable that a society that believed in traditionalism as an ethical imperative might 'choose' to be static. However, where and when, as an empirical fact, a society does change as a result of environmental or socio-economic developments not dictated by the ethical traditions of the society, a rigid application of traditional norms will produce dissonance. Communitarians do not tell us how we can continue to apply the community's traditional values to changed socio-economic institutions.⁸⁹ A central example demonstrating this dissonance is the clinging to traditionalist patriarchal norms that exclude women from the public sphere in a world where women, in fact, work outside the home and are often responsible for their own and their children's economic survival, in a world where, in fact, they are not 'protected' and 'supported' within the hierarchy of an extended traditional family.

As a matter of political ethics, if traditionalism is allowed to oust egalitarianism, it will be an effective way of continuing to silence any voices that were not instrumental in determining the traditions. As Susan Okin shows, the Aristotelian-Christian traditions chosen by MacIntyre to demonstrate the appeal of his communitarian theory are not women's traditions.⁹⁰ Women were excluded not only from the active process of formulating those traditions but also from inclusion, as full human subjects, in the very

89. In his discussion of the changing meaning of child sacrifices, Peter Winch writes: '... it would be no more open to anyone to propose the rejection of the Second Law of Thermodynamics in physics. My point is not just that no-one would listen to such a proposal but that no-one would understand what was being proposed. What made child sacrifice what it was, was the role it played in the life of the society in which it was practised; there is a *logical* absurdity in supposing that the very same practice could be instituted in our own very different society'. Peter Winch, 'Nature and Convention', in *The Philosophy of Society*, *supra* note 87, at 15–16.

90. See Susan Okin (1989) *Justice, Gender and the Family*, pp.41–62. New York: Basic Books.

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theories of justice developed within those traditions.⁹¹ The same can be said for Judaism and Islam. Women's voices are silenced where traditionalist values are imposed.⁹²

Consensus

If communitarianism does not justify the domination of religious/traditionalist patterns of social organisation in the legal system, might a broad social consensus become a legitimising factor? Michael Walzer has argued that justice is relative to social meanings and a given society is just if its substantive life is lived in a way faithful to the 'shared understandings' of its members.⁹³ This view legitimises the adoption of particularist principles of justice in preference to universalist ones. The process of reaching shared understandings is seen as a dynamic one based on a dialectic of affirmation by the ruling group and the development of dissent by others. Walzer's theory of justice has been criticised in so far as it applies to situations of 'pervasive domination.'⁹⁴ Okin points out that in societies with a caste or gender hierarchy, it is not just or realistic to seek either shared understandings or a dialectic of dissent.⁹⁵ Where there is pervasive inequality, the oppressed are unlikely to acquire either the tools or the opportunity to make themselves heard. Under such circumstances, it cannot be assumed that the oppressed participate in a shared understanding of justice. Rather, there would be two irreconcilable accounts of what is just. Application of a shared understandings theory only could be justified if the dissenters were assured equal opportunity to express their interpretation of the world and to challenge the status quo. The principle and practice of equality are, hence, a prerequisite for the application of the shared understandings theory and the claim for gender equality must be immune to oppression by the dominant shared understanding if the system is to operate in a just fashion.

If the cultural practices or religious convictions of the community condone the unequal treatment of groups within it, at what level should 'shared understanding' be ascertained? If there are slaves, Dalits (treated as untouchables) or women within the community, excluded from equality of opportunity, such subgroups cannot be taken to join in the community's shared understanding, even if it does not formulate its own dissent. The silencing of any such subgroup should pre-empt wholesale deference to community autonomy; such deference to the community's autonomy would defeat

91. See *ibid.*

92. See Jean Bethke Elshtain (second ed. 1993) *Public Man, Private Woman: women in social and political thought*. Princeton: Princeton University Press.

93. Michael Walzer (1983) *Spheres of Justice: a defense of pluralism and equality* 312-13. New York: Basic Books.

94. *Ibid.*

95. Okin, *supra* note 90, at pp.62-73.

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concern for the autonomy of oppressed subgroups within it.⁹⁶ This is true of the subgroup of women in traditionalist cultures and monotheistic religions. Their sharing of the community understanding – where that understanding is based on a patriarchal tradition – cannot be taken for granted, even if they do not express dissent. In the words of Simone de Beauvoir: ‘Now what peculiarly signifies the situation of women is that she – a free and autonomous being like all other human creatures – nevertheless finds herself living in a world where men compel her to assume the status of the Other ... How can independence be recovered in a state of dependency? What circumstances limit women’s liberty and how can they be overcome?’⁹⁷

More recently, in the words of Okin: ‘When the family is founded in law and custom on allegedly natural male dominance and female dependence and subordination, when religions inculcate the same hierarchy and enhance it with the mystical and sacred symbol of a male god, and when the educational system ... establishes as truth and reason the same intellectual bulwarks of patriarchy, the opportunity for competing visions of sexual difference or the questioning of gender is seriously limited’.⁹⁸

The premise to be derived from an analysis of the divide between the cultural and the religious versus equality and human rights is that, in constitutional societies, equality and liberty should be the governing norms – the *Grundnorm* on which the whole system rests, including the right to enjoy one’s culture and religion. Constitutional democracy cannot tolerate enclaves of illiberalism whose inhabitants are deprived of access to human rights guarantees.

Consent

Even if we reject the arguments of multiculturalism and consensus as justifying the imposition on individuals of inegalitarian cultural or religious norms, this will not invalidate direct individual consent to those norms. The autonomy of the individual is the ultimate source of legitimacy. It seems clear that a genuine choice to accept certain cultural practices or religious norms should be accepted as valid even if they are to the disadvantage of the acceptor. This liberty to choose is an essential part of the

96. In John Cook’s words: ‘[Cultural relativism] amounts to the view that the code of any culture really does create moral obligations for its members, that we really are obligated by the code of our culture – *whatever it may be*. In other words, Herskovits’s interpretation turns relativism into an endorsement of tyranny.’ John Cook (1978) *Cultural Relativism as an Ethnocentric Notion* in *The Philosophy of Society*, *supra* note 87, at 289, 296 (emphasis in original).

97. Simone de Beauvoir (1952, 1989) *The Second Sex* (H M Parshley trans. and ed.) at 688–89. Knopf.

98. Okin, *supra* note 90, at p.66.

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freedom of religion and of the right to equal autonomy of the individual.⁹⁹ The need to recognise the autonomy of the individual is a practical as well as a theoretical matter because, in situations of genuine consent, there will be no complaint emanating from women disadvantaged by the patriarchal community nor much opportunity to intervene. However, recognition of individual consent to patriarchy and the concomitant disadvantage as a woman is problematic. Consent cannot be assumed from silence, since subjection to patriarchal authority inherently reduces the capacity for public dissent. Thus, consent is suspect, and it is incumbent on the state to increase the possibility of and to verify the existence of genuine consent by a variety of methods. I shall indicate some of them.

Consent cannot be recognised as effective when inegalitarian norms are so oppressive they undermine, at the outset, the capacity of members of the oppressed group to exercise an autonomous choice to dissent. In such a situation, no consent can be considered genuine. Such oppressive practices can properly be classified as repugnant, and consent will not validate them.¹⁰⁰ In such extreme cases, mandatory legal techniques should be employed to protect individuals from their inegalitarian status.¹⁰¹ Thus, the invalidation of consent may be applied in cases of extreme oppression – examples of which include slavery, coerced marriage, mutilation, including FGM, as well as polygamy, where it forms part of a coercive patriarchal family system.¹⁰²

However, absent repugnant practices, even formal consent is not necessarily evidence of genuine consent in the context of pervasive oppression or discrimination. In such situations, all consent must be suspect, since pervasive oppression seriously diminishes the possibility of dissent and hence the probability of genuine consent. Individuals who consent to the perpetuation of their inequality, within the religious/cultural community to which they belong, often have little real choice but to accept their oppression. Because

99. See Nitya Duclos (1990) 'Lessons of Difference: Feminist Theory on Cultural Diversity', 38. *Buffalo Law Review* 325.

100. See Sebastian Poulter (1987) 'Ethnic Minority Customs, English Law and Human Rights', 36 *International and Comparative Law Quarterly* 589. Indeed, even those writers who regard autonomous choices to forfeit autonomy as irrevocable impose a strict test of voluntariness on consent to such severe forms of self-harm. See Joel Feinberg (1986) *Harm to Self: the moral limits of the criminal law*, 71–87, 118–19. New York: Oxford University Press.

101. Thus, for instance, in the case of polygamy, wives should be released of all marital obligations but their rights to maintenance, property and child custody should be protected.

102. But see Martha Nussbaum (2000) *Women and Human Development: the capabilities approach*, 229–30. New York: Cambridge University Press. Joel Feinberg, in reviewing the writings of John Stuart Mill on the issue of polygamy, concentrates on the impact of the voluntary decision of the woman to marry on her future autonomy, stating: '... but it would be an autonomously chosen life in any case, and to interfere with its choice would be to infringe the chooser's autonomy at the time he makes the choice.' Feinberg, *supra* note 100, at 78.

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of their socio-economic status, their alternatives to acceptance of the group's dictates may be very limited or non-existent. Where individuals are compelled by socio-economic necessity to accept an inferior status, their consent cannot be freely given. Ascertaining that consent is genuine, without negating the right of women to choose cultural diversity at the cost of gender equality, presents a difficult challenge for normative systems. Nevertheless, some measures can negotiate this precarious divide and enhance women's autonomy, thus facilitating their power to give or withhold genuine consent.

States must take *a priori* measures to augment women's autonomy and their power to dissent. Women's ability to withhold consent should be buttressed by provision of an educational and economic infrastructure that will nurture their autonomy and ability to dissent from discriminatory norms or practices. The state, endeavouring to ensure that consent is informed, should insist on the disclosure of options so that all members of society, including girls and women, will be able to make their decisions on the basis of full information. Ensuring women's literacy and free access to information is a primary requirement. Beyond this, compulsory education laws should incorporate a core curriculum requirement that all children be exposed to information regarding fundamental human rights, including the right to gender equality.¹⁰³ However, information alone is not enough. In order to be able to dissent from patriarchal family patterns, women need to have feasible economic options. Socio-economic alternatives to consent must be made available. Thus, the state must provide women with the right to own resources and to inherit property, including land. The state should also provide training to girls and women for income-generating occupations, which will allow women the economic 'luxury' of not remaining totally dependent on patriarchal family support, thereby increasing their ability to dissent.

The state should also scrutinise, *ex posteriori*, individual women's consent to inequality within a strongly patriarchal context and should be able to void it where it is not genuine. If the inequality is not repugnant, the state cannot intervene to void consent unless requested by women to do so. However, acknowledging that consent to inequality is suspect, the state should be highly responsive to women's requests to void their consent. Thus, where women wish to withdraw prior consent to inequality within a traditionalist cultural or religious community, their subsequent dissent should be given full recognition.¹⁰⁴ In legal terms, this would mean that the consent to inequality should

103. *Compare Wisconsin v. Yoder*, 406 US 205 (1972) with *Re State in Interest of Lack*, 283 P. 2d 887 (1955).

104. See Okin, *supra* note 90, at 137. The liberal notion of freedom of religion includes the right of each individual to change his religion at will; people have a basic interest in their capacity to form and to revise their concept of the good. See Will Kymlicka (1993) *Two Models of Pluralism and Tolerance* (unpublished manuscript). This is especially so where the revised concept of the good that is being chosen is the fundamental human right to equality.

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be considered voidable.¹⁰⁵ Since the possibility of legitimising inequality rests primarily on consent, which, in situations of pervasive inequality, is suspect, the voidability of consent is an effective *ex post facto* way of ensuring that women are not being forced to consent. Consent to a patriarchal marriage regime, for instance, will usually be made when a woman is young and dependent on her own traditionalist family; such consent should be voidable at any later stage, if and when the woman finds the terms of her traditionalist marriage unacceptable.

That women rebel against patriarchal standards that disadvantage them in traditionalist societies is an empirical fact. There are two different ways in which women members of traditionalist cultural or religious communities may seek equality: one is the attempt to achieve equal personhood within the community, the other is the attempt to ensure egalitarian alternatives outside the community. The former is a more holistic claim, is more far-reaching, and a state response to the claim carries with it greater potential for intervention in community autonomy.

Equal cultural or religious personhood is the kind of claim made by tribal women, in the United States and Canada, for example, who wished to retain their tribal membership when marrying persons outside the tribe. The claim of women within such groups is absolutely valid – it is an attempt to improve their terms of membership and to bring their communities into line with modern standards of gender equality. However, there is also an apparent anomaly in this claim; on the one hand, it is based on the right to membership, and on the other, on a rejection of the terms of membership as offered. The claim of women for equality within a traditionalist group may transform the *modus vivendi* of the group in a way that conflicts with the wishes of the majority of members of the group, both men and women. Thus, it seems clear that states should be more reluctant to intervene in religious or cultural groups and, for the most part, should not invalidate the community rule *per se*. Thus, individual women's dissent will not necessarily justify state intervention to prohibit the internal norms and practices of traditionalist communities. The justification for intervention should increase with the severity of the discrimination. If the discrimination results in the infringement of women's human dignity, in violence, or in economic injury, intervention is justified. It may not be so where the discrimination is purely functional or ceremonial. Even in cases of functional or ceremonial discrimination, there will be situations in which intervention is justified; for instance, where the claim for equality would be consonant with some authoritative internal interpretation of the group norms or, alternately, where a critical mass of women within the group support the claim for equality. Furthermore, although states should be circumspect in intervening to invalidate functional or ceremonial discrimination, they should be decisive in denying state support, facilities, or subsidies for the discriminatory activities of the traditionalist groups.

105. See FH 22/82, *Beit Yules v. Raviv*, 43(I) PD 441, pp.460–64 (in Hebrew). Consent to inequality may be held contrary to public policy.

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In view of the inhibiting factors regarding intervention and prohibition of discriminatory rules within the religion or culture, and the limited efficacy of denying state facilities or subsidies, the state should fulfil its obligation to provide women with the right to equality by assuring them of a right of exit from the traditionalist community norms that discriminate against them. The claim of women who seek egalitarian alternatives outside the community should be given full recognition and support by the state. In this case, there is no real dilemma. The lack of genuine consent is transparent, and since consent is the only ground on which cultural or religious patriarchy should be deferred to, the predominance of the right to equality is, in this case, patent. In such circumstances, the right to equality entails the provision of a parallel system to which women may turn.¹⁰⁶ Thus, for example, where the culture or the religion allows polygamy, women must have the legal option of non-polygamous marriage. It is incumbent on the state to provide the option of civil marriage regulated on the basis of gender equality; this would limit the monopoly of religious marriage and offer a non-patriarchal alternative. Even where women are already in a polygamous marriage and have 'consented' to it, they must be given the greatest number of viable alternatives possible in leaving it, should they later wish to do so. This would entail special provisions for divorce, maintenance and division of matrimonial property. Similarly, where women are subjected to a discriminatory regime of divorce in their cultural or religious communities, they should be given the alternative of applying for a civil divorce governed by egalitarian family law rules.

There can be no denying that traditionalist cultural and religious ways of life have been an important source of social cohesion and individual solace for many people. There is also no doubt that, in the foreseeable future, these traditions are not going to disappear. Hence, on both an ideological and a pragmatic basis, efforts to achieve equality for women should work, as far as possible, within the constraints of the traditionalist or religious culture as well as outside them.

However, the important condition is that all such efforts should respect cultural diversity only so far. Such respect cannot be at the cost of women's right to choose equality. The role of constitutional law is to give expression to the bottom line of the argument, that '[w]e should refuse to give deference to religion when its practices harm people in the areas covered by the major capabilities.'¹⁰⁷ In my view, there is an argument

106. A right of exit is not itself enough to guarantee the autonomy of dissent. 'The remedy of "exit" – the right of women to leave a religious order – is crucial, but it will not be sufficient when girls have been taught in such a way as to be unable to scrutinise the practices with which they have grown up. People's "preferences" – itself an ambiguous term – need not be respected when they are adaptive to unjust background conditions; in such circumstances it is not even clear whether the relevant preferences are authentically "theirs"'. Cass R Sunstein (1999) *Should Sex Equality Apply to Religious Institutions*, in Susan Moller Okin (ed.) *Is Multiculturalism Bad for Women?* 88. Princeton: Princeton University Press.

107. *Ibid.* at 192.

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to be made – on the basis of freedom – that some female members of a traditionalist culture may have an interest in its preservation. That is the reason why the preferable course is to encourage the reform of cultures and religions in order to accord equality to women who wish to live within them. It is in the event of failure of this course of action – to achieve equal personhood for women within a culture or religion – that the best the state can offer is a right of exit to those who want it.

The guarantee of the right to equality is a first-order preference. The way in which constitutional principles can incorporate sensitivity to cultural and religious difference is not in the formulation of the right but in tolerance regarding the ways of its implementation.¹⁰⁸ The way of implementation can be regarded as a second-order preference. The application of these different levels of basic capability – right and the implementation of a right – can best be understood through concrete examples.

The case of the veil is a pertinent example. First, does the imposition of an obligation to wear the veil limit women's basic capabilities? Does it undermine, in Nussbaum's terms, women's social bases of self-respect and non-humiliation? Does it prevent them being treated as dignified beings whose worth is equal to that of others? And does it violate protection against discrimination on the basis of sex? The answer to these questions is contextual. If men and women were equally obliged to wear covering approximating the veil, none of these limitations on women's basic capabilities would apply. Where, on the other hand, the veil differentiates between men and women and accentuates the subjection of women to patriarchy and their exclusion from public life, the veil may limit women's basic capacities in all these ways. *Ex contra* arguments have been made that Muslim women prefer to wear the veil because it protects them from social embarrassment or sexual harassment. This argument could be taken to support the view that the veil augments women's basic capabilities. However, there are problems with accepting this version of the preference to wear veils or head scarves. One problem lies in assessing the extent to which patriarchal power pre-empts women's freedom to choose not to wear the veil. Another is that the very reasons given for preferring the veil demonstrate a subjection to far deeper and more repugnant norms of patriarchy, such as the implied right of men to sexually harass women who are not protected by veiling. Furthermore, some of the more extreme forms of veiling are an obstruction to communication and must clearly limit women's ability to function in the public sphere, including in business or workplace settings. A different argument is that women prefer not to enter the public sphere but rather to be secluded from it.¹⁰⁹ This argument may be harder to refute on a theoretical level, but there is no empirical proof that its premises are factually correct, and it does not withstand scrutiny in light of the participation of women in the workforce even in rigidly conservative Islamic regimes.

108. Warm appreciation goes to Ofer Malchai, who developed this distinction in his paper for my seminar on Religion, Secularism, and Human Rights, Hebrew University, 2001–2002.

109. Unni Wikan (1982) *Behind the Veil in Arabia: women in Oman* 105. Baltimore: Johns Hopkins University Press.

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Women have the right not to suffer the discriminatory disabling of their capabilities imposed by those forms of veiling that reinforce patriarchal distinctions and impose asymmetrical requirements of modesty on women as compared with men. This is part of their human right to equality. It follows that coercive laws imposing the wearing of the veil are a clear violation of women's human rights. Where the law does not mandate the wearing of the veil, the freedom of women is apparently preserved, and the wearing of the veil appears to be a matter of personal preference and individual consent, which would preclude intervention by the state. However, as already suggested, such consent will be suspect in strongly patriarchal communities. Even where the wearing of the veil is a patriarchal mandate, perpetuating women's inequality, it cannot, generally, be considered repugnant; thus, implementation of the right to equality should concede cultural or religious differences, here, and the state should not intervene to prohibit the veil. Only in situations of repugnance, such as a refusal to provide women with medical care by male doctors because this would involve removal of the veil, does the state have an obligation to intervene and prohibit such manifestations of veiling. Where veiling violates women's right to equality but is not repugnant, the state should, more minimally, provide a right of exit, making sure that women who refuse to wear the veil will be as well protected as possible against any negative repercussions, such as family violence or divorce. It is also incumbent on states to provide human rights education (including gender equality awareness) to boys and girls and so enable them to make an informed choice regarding veiling.

The issue of veiling that has arisen in the courts in France, Turkey and Denmark involves whether girls in the educational system should be allowed to wear the veil. In this case, genuine individual consent to a discriminatory practice or dissent from it may not be feasible where these girls are not yet adult. The question is whether patriarchal family control should be allowed to result in girls being socialised according to the implications of veiling while still attending public educational institutions. Does the practice of veiling conform to the requirement of providing a core education in human rights and gender equality? A mandatory policy that rejects veiling in state educational institutions may provide a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families. Also, for the families, such a policy may send a clear message that the benefits of state education are tied to the obligation to respect women's and girls' rights to equality and freedom. This, indeed, is the message of the Swiss court's decision on veiling by teachers. On the other hand, a prohibition of veiling risks violating the liberal principle of respect for individual autonomy and cultural diversity for parents as well as students. It may also result in traditionalist families not sending their children to the state educational institutions.¹¹⁰

110. See IWRAW Asia-Pacific, *The Need to Monitor the Implementation of Temporary Special Measures* (on file with author). In a lecture delivered to a CEDAW Workshop, 17 August 2002, Shanthy Dairiam gave a perceptive presentation on the need to ensure that enabling measures are in place so that women can access equality-promoting measures, and that there is a need for protection against backlash and unintended adverse effects.

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In this educational context, implementation of the right to equality is a complex matter, and the determination of the way it should be achieved depends on the balance between these two conflicting policy priorities in a specific social environment.

Concluding comment

The intersection between traditionalist culture, religious norms and gender speaks patriarchy. This is amply demonstrated by the empirical evidence and by the fact that the cultural defence or claims of religious freedom are used to oppose women's demands for gender equality. The communitarian arguments of multiculturalist ethics and social consensus, used to justify these 'defences' against gender equality, do not stand scrutiny because they marginalise and silence women's voices in the process of establishing community norms. It is only at the level of the right of individual women to consent to living under patriarchal norms that autonomy must be respected, since it is only at the individual level that the systemic impact of patriarchal authority in the community can be avoided. Consent cannot be taken to validate any practice that denies women the most basic of their human rights and that undermines their very personhood and their capability for dissent; such practices are repugnant and invalid. As for lesser infringements of their human right to equality, women's autonomy must be respected. However, women's individual consent to inequality in a strongly patriarchal environment is suspect. Constitutional authorities cannot remain indifferent to the quality of women's consent, and it is incumbent upon them to establish the conditions for genuine, free and informed consent. This entails putting into place a spectrum of measures to create an educational and economic infrastructure that will augment women's autonomy, indeed, that will offer autonomy as an alternative. Furthermore, women who do dissent must have access to constitutional equality. This might be achieved, in some cases, by enforcing their rights to equal personhood within their communities but, more usually, by allowing them a right of exit into a civil framework that provides them with an optional and egalitarian position in life.

Thus, where there is a clash between cultural practices or religious norms and the right to gender equality, it is the right to gender equality that must have normative hegemony. At the international level, this hierarchy of values has been adopted in international treaties and in decisions of international treaty bodies and tribunals, thereby establishing state obligations. At the constitutional level, this principle is only patchily applied, whether as regards majority or minority cultures or religions. The application depends on political will. Some constitutional courts have attempted to implement gender equality in the face of religious resistance, but such efforts have usually been transient or ineffectual where the government has not supported them. The courts cannot be left with the sole burden of securing the human rights of women. It is the duty of the government to implement gender equality obligations, which derive both from international law and constitutional principle, even where the patriarchal norms or practices to be eliminated are based on claims of culture or religion.

5. Domestication of CEDAW: points to consider for customary laws and practices

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Prefatory survey

Global concern for the improvement of the welfare of women dates back to the 1940s, when the United Nations set up the Commission on the Status of Women (CSW). To its eternal credit, the Commission has been able to highlight the particular disadvantages of women, while its activities have generated many Declarations and Conventions. The CSW meets annually, its recent activities including, among others, the input it made to the 1992 International Human Rights Conference; the 1993 International Year of the World's Indigenous Peoples; the 1994 Population and Development Conference (The Cairo Summit); the 1994 International Year of the Family; and planning the 1995 UN Women's Conference in Beijing.¹

In fulfilment of its standard-setting function, the United Nations has posited norms or standards of human rights that member states should observe. Hence, there exists a considerable corpus of international legislation on human rights, which is essentially promotional in nature.² Only a highlight is presented in this chapter.³

Quite apart from the Universal Declaration of Human Rights (UDHR), 1948, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the following are international instruments on the rights of women, namely:

- the Convention on the Political Rights of Women, 1952,
- the Convention on the Nationality of Married Women, 1957,
- the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, and
- the Declaration on the Elimination of Discrimination Against Women, 1967.⁴

Specialised agencies of the UN have also made considerable progress. Thus, there are:

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1. See R Cook (1993) *Human Rights in Relation to Women's Health*. Geneva: WHO, 193, p.54.
 2. A H Robertson (1997) *Human Rights in the World*. Manchester: Manchester University Press.
 3. See Osita Eze (1984) *Human Rights in Africa: Some Selected Problems*. Lagos: Macmillan in Association with NIIA, p.154
 4. See Osita Eze, loc. cit.

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- the Equal Remuneration Convention, 1951, of the International Labour Organization (ILO),
- the Discrimination (Occupation and Employment) Convention 1958 of the ILO,
- the Convention Against Discrimination in Education and Recommendations thereon, 1960, of the UN Educational, Scientific and Cultural Organization (UNESCO),
- the Recommendation Concerning the Employment of Women with Family Responsibilities, 1965, of the ILO, and
- the Recommendation Concerning the Status of Teachers, 1966, of UNESCO etc.⁵

However, the central and most comprehensive document is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Adopted on 18 December 1979, it is the leading modern instrument on women's equal rights.⁶ It has thus been described as the definitive international legal instrument requiring respect for and observance of the human rights of women.⁷ It entered into force as an international treaty on 3 September 1981, after the twentieth country had ratified it in accordance with the Convention's article 27. CEDAW, it has been asserted, is intended to be effective to liberate women, to maximise their individual and collective potentialities and not merely to allow women to be brought to the same level of protection of rights that men enjoy.⁸

The challenge for this chapter is to demonstrate how customary law norms and practices have militated against the attainment of these potentialities engrained in CEDAW. It, therefore, examines the praxis in selected domestic jurisdictions. As will be seen, tremendous success has been recorded in some countries in the domestication (i.e. bringing into domestic use) of the Convention's provisions. The chapter also identifies normative customs and practices in Nigeria and other jurisdictions which, if modified or even completely abrogated, would lead to the maximisation of the potential of the individual and collective potentialities of women as enunciated in the Convention.

Structure of the Convention

The Convention consists of a preamble and 30 substantive articles. In broad terms, the provisions can be grouped into three different parts in accordance with the matters on which they deal. The first part, covering articles 2–16, contains the Convention's Agenda for equality. This part can be further subdivided into three limbs. The first limb deals with the civil rights and legal status of women. This we find in articles 7, 8, 9, 10, 11, 13, 14, 15 and 16.

5. See Osita Eze, *loc. cit.*

6. See Cook, *op. cit.*, p.2.

7. See Cook, *loc. cit.*

8. See Cook, *ibid.* p.26.

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The second limb adds a novel dimension to international human rights norms. The Convention takes credit as the first international human rights treaty to positivise women's reproductive rights. We find provisions relevant to reproductive rights in articles 4(2), 5, 11(f), 11(2)(a), 11(2)(b), 11(2)(c), 11(2)(d), 12(1) and 12(2). In article 10(h) the Convention mentions family planning. Thus far, it is the only human rights treaty that has incorporated family planning in the education process. In article 16(e) the concept of planned and responsible parenthood is also upheld.

The third limb challenges the classical conception of human rights, a conception that views the state as the only violator of human rights. The conception of human rights as claims against the state pervades the UDHR, ICCPR and the European Convention on Human Rights (ECHR). By recognising culture and tradition as potential violators of women's rights, the Convention espouses the modern trend or approach that clamours for the re-conceptualisation of human rights. Articles 5, 10(c) and the 14th preambular paragraph recognise the influence of culture and tradition as impediments to women's enjoyment of their rights. In particular, article 10(c) enjoins the state parties to eliminate any stereotyped concepts of the roles of men and women at all levels and in all forms of education by encouraging co-education and by the revision of text books and school programmes and the adaptation of teaching methods.

The convention acknowledges the anthropocentric emphasis on women's rights. Thus, the eighth preambular paragraph is concerned that in situations of poverty, women have the least access to food, health, education, training and opportunities for employment and other needs. Indeed, health problems have been identified as part of violence against women. For example, Nigeria has a high maternal mortality rate (MMR). Major causes of maternal mortality include anaemia, haemorrhaging and obstructed labour. It has been suggested that inadequate healthcare facilities are a major cause of maternal deaths, with associated problems including inefficient handling of complications, lack of essential equipment and trained personnel, limited access to maternity facilities and lack of pre-natal care.

The second part of the Convention deals with its implementation. In article 17, the Committee on the Elimination of Discrimination against Women (CEDAW) is established. The other provisions include: the election of members of the Committee, articles 17(2), 17(3) and (4); tenure of members, articles 17(5) and (6); casual vacancies, article 17(7); emolument of members, article 17(8); monitoring of administrative and legislative measures adopted by parties, article 18; and rules of procedure, article 19 and meeting, article 20.

The third part of the Convention contains general provisions, for example: signature of state parties, article 25; depositary of the Convention, article 25; ratification, article 25(3); accession, article 25(4); entry into force, articles 27(1) and (2); reservations, articles 28(1)(2) and (3); disputes resolution through negotiation and arbitration, article 29; and deposit of authentic texts, article 30.

Distinctive features of the Convention

What may be characterised as the distinctive features of the Convention are highlighted below.

The Convention takes pride of place as the only human rights treaty that has catapulted the concerns of women into the main stream of human rights discourse. As Rebecca Cook has noted, it goes beyond the goal of sexual non-discrimination – as required by articles 13(1), 55(c) and 56 of the UN Charter; article 2 of the UDHR; articles 2(1), (3), (4), (23) and (24) of the ICCPR; articles 2(2) and (3) of the ICESCR; article 14 of the ECHR; article 1 of the Inter-American Commission on Human Rights (IACHR); and article 12 of the African Charter on Human and Peoples' Rights (AfCHPR) – to address the disadvantaged positions of women in all areas of their lives.⁹ As opposed to other human rights treaties, CEDAW frames the legal norm as the prohibition of all forms of discrimination against women, as distinct from the narrower sex-neutral norm that requires equal treatment of men and women.¹⁰ The Convention is, thus, the international treaty in which member countries undertake to eliminate all forms of discrimination against women in all spheres of life.

The Convention affirms women's rights to reproductive choice. It is also the only human rights treaty to recognise family planning and responsible parenthood. In this regard, it transcends the narrow definitions provided for in earlier human rights Conventions by confronting the pervasive discrimination against women's reproductive health.

Women's empowerment also receives a boost in the Convention. In article 3, state parties agree to take appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights. Other far-reaching provisions aimed at empowering women are found in article 13(1)(b) – the right to micro-credit in the form of bank loans, mortgages and other forms of financial credit.

Article 14 is also innovative, if not revolutionary. The state parties undertake 'to take into account the particular problems faced by rural women and significant roles which rural women play in the economic survival of their families, including their work in the non-monetised sectors of the economy'. The Convention advocates alternative dispute resolution through negotiation and arbitration.

Nature of the rights in the Convention

Although the liberty-oriented or first generation rights embrace the five broad categories of personal, moral/political, proprietary, procedural and equality rights, respectively, the Convention emphasises only four, the legal status of women receiving the broadest attention.

9. See R Cook, *loc. cit.*

10. Prof. Cook's account of the new frontiers opened by CEDAW is indeed insightful, see *ibid.*

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The agenda for equality is proclaimed in article 2, where state parties condemn discrimination against women in all its forms and agree to pursue by all appropriate means a policy of eliminating discrimination against women. They undertake:

To embody the principle of equality of men and women in their national constitutions or other appropriate legislation.

To adopt appropriate legislative and other measures prohibiting all discrimination against women.

The other subsections amplify the measures. Temporary special measures aimed at facilitating *de facto* equality between men and women shall be embarked upon. These measures shall not constitute discrimination, article 4(1). Article 7 restates the provisions of the Convention on the Political Rights of Women adopted in 1952. Hence, in article 7 women are guaranteed the right to vote, to hold public office and to exercise public functions. This includes the right of representation at international fora, article 8. The 1952 Convention on the Political Rights of Women was based on the desire of the parties to implement the principle of equality of the rights for men and women contained in the Charter of the UN. Article 9 integrates the Convention on the Nationality of Married Women, which was adopted in 1957. Thus, article 9 provides for the statehood of women irrespective of their marital status. The Convention draws attention to the fact that often women's legal status has been linked to marriage, making them dependent on their husband's nationality rather than individuals in their own rights. The 1957 Convention on the Nationality of Married Women had sought to eliminate the consequences of the practice prevalent in many countries by which the nationality of a married woman is to a great extent conditioned by that of the husband. The Convention followed the Hague Convention on certain questions relating to conflict of nationality laws. It thus represents an attempt to evolve a status of the independence of the nationality of the wife from that of the husband, as opposed to the pristine concept of the 'traditional principle of the unity of the family'.¹¹

Article 16 makes elaborate provisions relating to marriage and family relations. In particular, article 16(2) integrates the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1962. The basic theme of the Convention is to ensure that no marriage shall be legally entered into without the free and full consent of both parties. In line with the 1962 Convention, CEDAW, in article 16(2), provides that the betrothal and the marriage of a child shall have no legal effect, and all necessary action shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

The agenda for equality is also carried into the fields of education, employment, economic and social activities. Accordingly, article 10 affirms: women's rights to non-discrimination in education, appropriate measures for equality in the same conditions for career and vocational guidance, article 10(a); access to the same curricular, article

11. See, generally, O Eze, *loc. cit.*

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10(b); opportunities for scholarship and study grants, article 10(d); and continuing education, reducing female students' drop-out rates and organisation of programmes for girls and women who have left school prematurely, article 10(e) and (f). Article 11 also affirms the right to non-discrimination against women in the field of employment in order to ensure: the right to work, article 11(a); the same employment opportunities, including application of the same criteria for selection in matters of employment, article 11(b); the right to free choice of profession and employment, the right to promotion, job security etc., article 11(c); the right to equal remuneration, article 11(d); and social security, article 11(e). Articles 10 and 11 incorporate UNESCO'S Convention Against Discrimination in Education 1960, the ILO Convention on Equal Remuneration of 1961, Discrimination (Employment and Occupation) Convention 1958 and the ILO's Recommendations on Employment (Women with Family Responsibilities) 1965.

Article 13 prohibits discrimination in economic and social activities. Instructively, the situation of rural woman is accorded admirable impetus. Thus, CEDAW, in article 14, enjoins the state parties to take into account the particular problems faced by rural women and the significant roles that they play in the economic survival of their families. Other provisions to enhance the development of rural women are provided for in article 14(2)(a)–(h).

As noted earlier, a distinctive feature of CEDAW is its inclusion of reproductive rights. The 13th preambular paragraph recognises the role of women in procreation and insists that this should not be the basis of discrimination. In article 5, CEDAW advocates a proper understanding of maternity as a social function, demanding fully shared responsibility for child rearing by both sexes, article 5(b).¹² It is thus not surprising that provisions for maternity protection and childcare are shoe-horned into provisions relating to employment in articles 11(2)(a), 11(2)(b), 11(2)(d); 12(1), 12(2), 14(2)(b) and education in article 10(h). Article 16(e) mandates the state parties to evolve family codes, which will in turn safeguard women's rights to take the requisite decisions in reproductive self-determination.

Approaches to the domestication of CEDAW in selected domestic jurisdictions

The provisions of CEDAW have found expression in several municipal enactments. State practice, however, reveals divergences in the legislative techniques employed for the Convention's domestication. In some jurisdictions, the method of transformation by reception has been applied. This involves certain CEDAW provisions being re-enacted as constitutional provisions protecting human rights. Thus re-enacted, those provisions enjoy the immutability which attaches to other fundamental rights provisions of the constitution. Questions of conflict between the CEDAW provisions and the other entrenched provisions of the constitution are thereby eliminated.

12. See, generally, R Cook, *loc. cit.*

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The techniques employed in two jurisdictions may be cited here to illustrate this point. The Constitution of the Republic of Uganda, 1995, guarantees human rights in chapter four. There is clear evidence of the influence of CEDAW in some of these fundamental rights provisions. Articles 21(2) and (3) ordain the non-discrimination norm in very liberal terms. CEDAW's concerns for affirmative action find constitutional expression in article 32(1) and (2). Article 32(1), for instance, of the Ugandan constitution, 1995, provides:

Notwithstanding anything in this constitution, the state shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition, or custom for the purpose of redressing imbalances which exist against them.

In order to operationalise the above affirmative action provision, the constitution obligates parliament to establish an equal opportunities commission. Hence, article 32(2) provides:

Parliament shall make relevant laws, including laws for the establishment of an Equal Opportunities Commission, for the purpose of giving full effect to clause (1) of this article.

Akin to CEDAW, the Ugandan constitution recognises maternity as a social function that should attract special protection. Article 33(3) affords this protection in these terms:

The state shall protect women and their rights, taking into account their unique status and natural maternal functions in society.

Employers of labour are thus under obligation to provide special protection for women during pregnancy and after childbirth. Article 40(4) of the constitution dictates this obligation.

Other provisions that transform CEDAW provisions include article 31(1) (Rights of the Family). Article 31(2) is a revolutionary provision. It mandates parliament to make laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children. Other rights of women are specially consecrated in article 33(1), (2), (3), (4), (5) and (6). In particular, articles 33(5) and (6) almost reproduce CEDAW provisions verbatim. For example:

33(5) without prejudice to article 32 of this constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.

This provision is a clear affirmation of the cogency of the call for the re-characterisation of human rights discourse. For instance, it acknowledges that other non-state actors equally violate human rights. The constitution comes down heavily on customary or traditional practices that derogate from the dignity of womanhood. The provisions are indeed trenchant. They can be found in article 33(6), which provides:

Laws, cultures, customs or traditions which are against the dignity, welfare or interest of woman or which undermine their status, are prohibited by this constitution.

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Socio-economic rights are enacted in gender-neutral terms in article 40.

The Constitution of the Republic of Ghana, 1992, is similar to the Ugandan constitution in domesticating substantial provisions of CEDAW by reception. Instructively, the non-discrimination norm in article 12(2) of the constitution is patterned after article 1 of CEDAW. Hence, it inaugurates the non-discrimination norm in terms of 'gender' as opposed to section 42 of the Nigerian Constitution, which restrictively defines non-discrimination in terms of sex etc. Article 27(1) incorporates both the intent and letters of the CEDAW provisions on the special right to be accorded to women before and after childbirth. The Ghanaian constitution also recognises customary practices as potential violators of women's rights. However, instead of prohibiting customary practices that dehumanise women, the constitution generously accommodates all persons who are likely to be affected by such practices. Accordingly, article 26(2) provides that all customary practices that dehumanise or are injurious to the physical and/or mental well-being of a person are prohibited. In furtherance of the obligation undertaken by government's ratification of CEDAW, the constitution makes other special provisions for the protection of women's rights in article 27(2) and (3). The provisions in respect of property rights of spouses are indeed interesting. Article 22 deals with this as follows:

- 22 (1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.
- (2) Parliaments shall, as soon as practicable after the coming into force of this constitution, enact legislation regulating the property rights of spouses.
- (3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article –
 - a. spouses shall have equal access to property jointly acquired during marriage;
 - b. assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.

Even those CEDAW provisions that have not been specifically re-enacted under the Ghanaian constitution are still justiciable thereunder. In what ranks as the most international law-friendly provision, article 33(5) gives the Ghanaian courts amplitude of authority to enforce all human rights provisions in so far as they are compatible with democratic norms. Article 33(5) provides:

The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

The constitutions of Kenya and Zimbabwe adopt a rather curious approach. Both constitutions approbate and reprobate on the question of gender equality. In Kenya, for instance, Sections 82(1) and (3) of the constitution prohibit sex discrimination. Yet discriminatory practices that are inimical to women's integrity and status cannot be

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challenged. Thus Section 82(4) exempts certain areas from the prohibition against discrimination. The subsection provides:

- (4) Subsection (1) shall not apply to any law so far as that law makes provision –
- (b) with respect to adoption, marriage, divorce and burial, devolution of property on death or other matters of personal law.

Section 23 of the Constitution of Zimbabwe makes similar a provision. There can be no denying the fact that such provisions heighten the tension between women's right to equality and the rights of traditional communities to live according to their traditions.¹³

In the South American jurisdiction, the Constitution of Colombia adopted the Ugandan constitutional technique. The 1991 Colombian constitution, in Article 42, incorporates Article 12 of CEDAW on delivery of healthcare. In the Eritrean constitution of 1997, the preamble and Articles 5 and 7 bear the imprint of the vision of CEDAW. The South African constitution, in Article 187(1), (2) and (3), entrenches an independent commission for gender equality to promote and protect gender-related issues. The principles of CEDAW have also been domesticated in regional conventions. For instance, the State of Sao Paulo and other municipalities evolved a regional equivalent of CEDAW, which goes by the name the Paulista Convention on the Elimination of All Forms of Discrimination against Women.

Elsewhere, CEDAW provisions have been domesticated by reception into various acts of parliaments. In the Australian jurisdiction there is the Sex Discrimination Act, which is patterned on CEDAW. It prohibits discrimination on the grounds of a person's sex, marital status or pregnancy.¹⁴ In 1986, the Human Rights and Equal Opportunities Commission Act, 1986, was enacted in fulfilment of Australia's obligations under the Discrimination (Employment and Occupation) Convention 1958 (ILO III) and the International Covenant on Civil and Political Rights of the Child.¹⁵ The Act established the Human Rights and Equal Opportunities Commission. This Commission is vested with the function of inquiring into alleged infringements of the following enactments: the Sex Discrimination Act, the Racial Discrimination Act and the Disability Discrimination Act. These Acts, respectively, prohibit discrimination on the grounds of sex, race or disability in employment, education etc.¹⁶

The above examples represent constitutional and legislative efforts geared towards the actualisation of CEDAW provisions in domestic law. Unfortunately, not all countries

13. See C G Bowman and A Kuenyehia (2003) *Women and Law in Sub-Saharan Africa*. Accra: Sedco Publishing Ltd., pp.39–40.

14. This writer acknowledges his debt of gratitude to the leading authority on the Women's Convention, Prof. Rebecca Cook for these illuminating examples.

15. See M Kirby (1993) 'Discrimination – the Australian Response' in 19 *Commonwealth Law Bulletin*, No.4, p.1692.

16. *Ibid.* p.1693.

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have benefited from this kind of legislative proactivity. Our survey in another context¹⁷ reveals that the dependency upon the authority of the competent legislature for the performance of treaty obligations has not yielded expected dividends. It cannot be denied that legislative lethargy on this matter is a betrayal of the 'legitimate expectation' that there would be a compliance with treaty obligations.¹⁸ In the face of this lethargy, the judicial evolution of a new trend, a new attitude, towards the application of treaty standards in domestic law must be viewed as a welcome development. Professor Rosalyn Higgins has captured the chequered sequences culminating in this new trend even in the very hotbed of judicial conservatism – the United Kingdom. According to the distinguished publicist:

First, in the 1970s and early 1980s, most judges regarded the European Convention provisions as out of bounds, while a few judges vigorously sought way to make them relevant to their judicial tasks. Then, there was a second period during which it became more generally accepted that unincorporated human rights provisions had a definable, albeit, fairly circumscribed, place in judicial decision-making. And today, we are witnessing a remarkably new trend whereby the issue of non-incorporation is being rendered less and less important.¹⁹

In Commonwealth Australia, the Bangalore judicial colloquium, convened by Bhagwati CJ in collaboration with the Commonwealth Secretariat, was a further impulsion to the evolution of this trend. It has caught on like wild fire, with the trend being noticed in such other jurisdictions as the Caribbean, Zimbabwe and New Zealand.²⁰

Domesticating CEDAW in Nigeria²¹ and other jurisdictions: the challenge of customary law and practices

In the Preface to *Nigeria's Treaties in Force, 1970–1990*,²² it was asserted that:

We have tried in these volumes to provide as comprehensive an index (sic) of all existing treaties **in force**.

17. C C Nweze (2003) 'Recent Trends in the Judicialisation of Treaty Human Rights: Comparative Perspectives', in C C Nweze and Oby Nwankwo (eds.) *Current Themes in the Domestication of Human Rights Norms*. Enugu: FDP, 143, 160.
18. *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1994–1995) 183 Commonwealth Law Reports (CLR) 229. *Abacha v. Fawehinmi* (2000). 6 Nigeria Weekly Law Reports (NWLR) (pt 660) 228.
19. R Higgins (1994–1997) 'The Role of Domestic Courts in the Enforcement of Human Rights in The UK', cited in J Ezeilo, 'Influence of International Human Rights Law on African Municipal Legal Systems', 6 *NIG. JR* 50, 67.
20. See C C Nweze, loc. cit.
21. Culled from C C Nweze, *ibid*.
22. Vol. 2 (1990) Lagos: Federal Ministry of Justice (FMJ), p.v (emphasis supplied).

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CEDAW is published as a treaty in force in the said volume. The inclusion of CEDAW as such a treaty provokes the question: how are treaties domesticated in Nigeria? Do they come into force by the fact of their publication in a volume entitled *Nigeria's Treaties in Force*?

Under the constitutions of Chile, Tunisia, Madagascar etc., the legislative arm of government is actively involved in the process of treaty making. In other words, treaty-making power is shared by the executive and legislature. When the legislature intervenes, the treaty becomes due for implementation following its publication in the *Official Gazette*. The requirement of publication, therefore, is an express constitutional prerequisite for the implementation of a treaty. Unlike the above models, Nigerian practice follows closely that in the United Kingdom. According to Wali JSC in *Ibidapo v. Lufthansa Airlines*:²³

Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law.

The Privy Council in the case of *Higgs and Anor v. Minister of National Security*²⁴ reiterated the English position in these words:

...Treaties formed no part of domestic law unless enacted by the legislature.

At the time of writing, the Nigerian National Assembly was yet to enact CEDAW into domestic law. The net effect is that on a strict legalistic interpretation of section 12 of the 1999 constitution, CEDAW provisions must abide legislative intervention before they can become **direct** sources of rights in Nigeria. But as developments elsewhere, even in the United Kingdom, have shown, the judicial evolution of a new trend, a new attitude, towards the application of treaty standards in domestic law, has made unincorporated treaties, and even universally accepted canons, relevant to judicial tasks.

Happily, in Nigeria, the appellate courts have demonstrated their preparedness to advance the frontiers of the administration of justice in this manner. The decisions in *Oguebie v. Odunwoke*²⁵ and *Aliu Bello v. AG of Oyo State*²⁶ epitomise this attitude. The *Aliu Bello* case dramatises the fecundity of the Latin maxim *ubi jus ibi remedium* ('for every wrong the law provides a remedy'). In that case, the Supreme Court held the maxim to be so fundamental to the administration of justice that where there is no remedy, provided either by the common or by statute, the courts are urged to create one. What is more, the Supreme Court has even shown that the desire to furnish domestic law with meaning and to add content where lacunae exist, has always been a priority. This can be seen in the case of *Oguebie v. Odunwoke* (supra), where the court applied the customary international law doctrine of implied mandate or doctrine

23. (1997) 4 Kenya Law Reports (KLR) (pt. 500) 734, 751.

24. *The Times* of December 1999, cited in *Abacha v. Fawehinmi* (supra) at p.288.

25. (1979) 3-4 Supreme Court (SC) 58.

26. (1986) 12 SC 1.

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of necessity even in the absence of any domestic legislation on the matter. It is thus in employing CEDAW provisions to add content to domestic law that the norms can be indirectly incorporated (although these norms are not directly enforceable, as indicated earlier). Through this device, rights in domestic statutes can be more broadly defined. The same approach prompted the judicial reinvention of the meaning of the provisions of sections 32 and 38 of the 1979 constitution, dealing with the rights to the dignity of the person and movement, respectively. The rewarding gains of this approach were consecrated in *Nemi and Ors v. The State*²⁷ and *Agbakoba v. Director, SSS*²⁸

The domestication option

Article 2(f) of CEDAW adopts an abolitionist language. It enjoins state parties:

To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

This provision, like other revolutionary provisions of CEDAW, has been acknowledged as catapulting the issue of gender to centre stage in the debate about the future of customary laws and of plural systems of law.²⁹ The dividends of such provisions are truly enormous. For instance, they have prompted the emphasis of women's human rights activists to the idea:

of personal autonomy, precisely as a means of addressing the oppression of individual women within the family unit where women's human rights are frequently violated through domestic violence, restrictions on access to resources and in matters of marriage, divorce and property rights. In other words, the human rights of women epitomise questions about the relationship of the individual to the group.³⁰

It is in this context that CEDAW provisions are deployed as 'hangers' in this article to assess normative customs and practices that must either be abolished or, at least, modified to enhance gender equality. This will be done under five broad headings: (1) Gender hierarchy, (2) Access to land/inheritance, (3) Reproductive rights, (4) Domestic violence and (5) Sundry customs.

(1) Gender hierarchy

As noted above, CEDAW employs an abolitionist language in articles 2(f) and 5(a) in mandating governments to abolish or modify customs that discriminate against women.

27. (1994) *Journal of Human Rights Law and Practice* (JHRLP) Vol. 10 Nos. 1–3, 99.

28. (1994) 9 NACR 134.

29. See N Pillay (2002) 'The Advancement of Women's Rights'. Occasional Papers, Paper 16, Centre for Human Rights, University of Pretoria, 3.

30. Diana J Fox (undated) 'Women's Human Rights in Africa: Beyond the Debate over the Universality or Relativity of Human Rights', available at <http://web.africa.ufl.edu/asq/v2/v2i3a2.htm> [accessed 23 April 2010]

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These provisions are particularly germane in Africa, where most customary norms erect a gender hierarchy. Thus in most systems, wives, widows or daughters exercise minimal control over land. Indeed, the prescriptive language of customary jurisprudence in Nigeria is that only men are the rightful persons to determine valid alienation of land.³¹ The decision in the Zimbabwean case of *Magaya v. Magaya*³² equally points to this cultural phenomenon.

In that case, S L Magaya, a Zimbabwean of African descent, died, leaving behind two wives and four children, a house in Harare and some cattle at a communal home outside the city. He died intestate. Venia Magaya was his eldest child and his only daughter. She was born of his first wife. His three sons, Frank, Nakayi and Amidio, were all children of his second wife. Shortly following the death of S L Magaya, Venia Magaya sought heirship of the estate in the local community court. The eldest brother, Frank, declined to seek the inheritance, claiming he would not be able to look after the family, as is required under traditional law. Ms Magaya had been living in the house with her parents until her father's death. With the support of her mother and three other relatives, she received the appointment and title to the house and cattle. Soon thereafter the second son, Nakayi Magaya, applied to cancel this designation. He was proclaimed the rightful heir under customary law. He proceeded to evict his sister from the Harare property.

The African custom defined by the community court was not articulated within the decision, yet its intent is clear: 'Venia is a lady (and) therefore cannot be appointed to (her) father's estate when there is a man'. Ms Magaya appealed to the Supreme Court. Writing for the court, Justice Mucsheteere held that '[w]hat is common and clear from the [texts] is that under the customary law of succession of the above tribes males are preferred to females as heirs'.

The decision was greeted with widespread disapprobation. For example:

Magaya violated both the spirit and letter of a host of international human rights treaties to which Zimbabwe is a party. Most significant among those are [CEDAW, ICESCR, ICCPR]. CEDAW was ratified in 1981 with the explicit purpose of condemning 'discrimination against women in all its forms', thereby extending the basic condemnation of gender discrimination put forth in the Universal Declaration of Human Rights (UDHR). It symbolised the states parties' commitment to eliminating discrimination against women in all its forms, from legal to social and cultural 'prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes'. It called for the modification or abolition of

31. *Usiobaifo v. Usiobaifo* (2005) 3 NWLR (pt.913), 665.

32. See David M Bigge and Amélie von Briesen (2000) 'Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in *Magaya v. Magaya*'. *Harvard Human Rights Journal*, Vol. 13.

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discriminatory 'laws, regulations, customs and practices'. In *Magaya*, however, CEDAW's aims were not met ...³³

The Kenyan Court of Appeal also handed down a decision that perpetuated discrimination against women. In *Otieno v. Ougo*³⁴ what was in issue was the plaintiff's right to bury her late husband. Her contention was that denying her the body of her late husband amounted to discrimination against her as a woman, which was a violation of her human rights. For the defendants, it was contended that under the Luo custom, she had no right to bury her husband and she could not be the head of the family upon her husband's death. The High Court dismissed the case. On appeal, Nyarangi JA held, *inter alia*:

There is nothing repugnant or immoral about ... the above customary [law]...[T]he practices are innocent and are meant to underscore the deep loss to the clan.... The appellants as the deceased's wife has to be considered in the context of all wives married to Luo men irrespective of their lifestyles who become subject to the customary laws.

There is no denying the fact that such customs militate against women's participation in cultural life and economic development. Interestingly, there have been judicial attempts to prune such customs of their debilitating influences. For example, the decision in *Uke & Anor v. Iro*³⁵ represents a gallant judicial attempt to check the erosion of women's rights by customary practices, when the Court of Appeal struck down a Nnewi custom. By Nneato Nnewi custom, a woman cannot give evidence in relation to title to land. Pats-Acholonu JCA (as he then was) held that:

It is an apostasy to say that a woman cannot be sued or cannot be called to give evidence in relation to land subject to customary right of occupancy.

A custom, which strives to deprive a woman of constitutionally guaranteed right, is otiose and offends the provisions that guarantee equal protection under the law.³⁶

His lordship's stance is very commendable. If that custom had any utility in ancient times, it cannot be accommodated in our contemporary society.

(2) Access to land/inheritance

Most systems of customary law manifest an inexplicable irony. On the one hand, there is ample empirical evidence that women are the lifeblood of unpaid agricultural labour, a situation that CEDAW, in articles 14(2) and (h), seeks to remedy. Indeed, article 13(1)(b) pragmatically maps out a wide canvass for empowering women in this regard. On the other hand, notwithstanding the pivotal role of women as the major source of

33. David M Bigge and Amélie von Briesen, loc. cit.

34. Kenya Appeal Reports (1982–88).

35. (2001) 17 WRN 172.

36. Ibid. pp.176–177.

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cheap agricultural labour, most customary law systems seldom concede allodial (inalienable) ownership of land to women. Divorce or the death of their husband effectively erodes their control over land.

Two decisions from Nigeria illustrate this trend. In *Mojekwu v. Mojekwu*³⁷ one of the issues that came before the Enugu Division of the Court of Appeal was the incidence of the 'Oli-Ekpe' custom of Nnewi, by which a surviving brother of a deceased man is, by custom, allowed to inherit the property of his late brother because the surviving wife has no male issue. Niki Tobi JCA, had this to say:

For a custom or customary law to discriminate against a particular sex is to say the least an affront to the Almighty God himself.... I have no difficulty in holding that the 'Oli-Ekpe' custom of Nnewi is repugnant to natural justice, equity and good conscience.

In *Nzekwu & Ors v. Nzekwu & Ors*³⁸ the Supreme Court held that any Onitsha custom that postulates that an Okpala has the right to alienate the property of a deceased man in the lifetime of his widow is a barbarous and uncivilised custom, which should be regarded as repugnant to equity and good conscience and therefore unacceptable.

Instructively, there would appear to be no uniformity in customary practices in Nigeria on women's rights. Thus, it has been asserted that the customary laws of the Yoruba people would appear by means of judicial decisions to have developed beyond the restrictions imposed in other native laws and customs in the country.³⁹ Viewed superficially, this conclusion would appear hasty. Yet, a perusal of judicial responses to customs relating to women's rights would bear out the cogency of the assertion. Instances will illustrate the point being made.

For instance, *Akande v. Oyewole*⁴⁰ is a groundbreaking decision. In extending the rights of female children to property under native law and custom, which was their father's matrilineal inheritance, the decision exposed the exiguity in the socio-anthropological distinctions between matrilineal and patrilineal systems.

In that case, the plaintiff (respondent on appeal) contended that the property in question belonged to his family. The defendant's father was not a member of the plaintiff's family. He was merely allowed to occupy a room in the said family house as a licensee on compassionate grounds. He fled his own family compound after seducing a woman. Upon the death of the defendant's father, he (the defendant) appealed to the plaintiff's family to be allowed the occupation of the room used by his father in his lifetime. This request was not favoured.

37. (1997) 7 NWLR (pt.512), 283.

38. (1989) 2 NWLR (pt.104) 373, 395.

39. A G Karibi-Whyte (1994) 'Succession' in *Law and Family*. Enugu: FDP.

40. (2000) 6 WRN 36.

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The defendant's case was that he was a member of the plaintiff's family because his father's mother was from that family. The land on which his father built the house in dispute was the share of his father's mother out of the plaintiff's family land.

The trial court entered judgment for the plaintiff, hence the appeal. Akintan JCA first restated the long-settled legal position that:

Family property is property which devolves from father to children and grandchildren under native law and custom, and which no individual child or member of the family can dispose of in his or her will, until such property is partitioned and each child or member of family has his or her separate share of the family land, irrespective of allotment. On allotment, the allottee has right to occupy and use the land, but he or she cannot alienate it without the consent of the family. The right of occupancy acquired is however transferable to the allottee's successors. Similarly, although the land does not belong to him, the allottee has ownership of whatever development he superimposes on the land by his personal efforts. But no matter how long an allottee of family land may have stayed on the land or whatever improvement he has carried out on it, the occupancy right granted him cannot ripen into full ownership.⁴¹

Turning to the findings of the trial court, Akintan JCA explained that:

It is clear from the findings of fact made by the learned trial judge that the main reason why he rejected the case put up by the defendant is that the appellant's father could not claim to be a member of [the plaintiff's family]. The learned trial judge's conclusion in that respect was not based on any evidence led to show that inheritance through female issue was not permissible under the relevant customary law. The law is long settled that rights of daughters in property held under native law and custom are well recognised and protected and that the court has jurisdiction to make orders to protect a female's rights, even to the extent of ordering partition.⁴²

His lordship concluded that since the defendant's paternal grandmother was from the plaintiff's family, the defendant's father was also from that family.⁴³ If this latter reasoning is finally endorsed by the Supreme Court as the correct legal position, then it would represent an advancement of the law on the right of female children from the earlier formulation in *Lopez v. Lopez*,⁴⁴ *Lewis v. Bankole*⁴⁵ and *Folami v. Cole*.⁴⁶ It would ultimately prompt a reconfiguration of the anthropological bases of matrilineage and patrilineage! Hence, we anxiously await the reaction of the Supreme Court to this far-reaching decision.

41. See *ibid* p.45, citing *Olanguna v. Ogunsanyo* (1970) 1 ALLNLR 227; *Shelle v. Asajon* (1957) Supreme Court of Nigeria Law Report (SCNLR) 286.

42. *Ibid.* p.47, citing *Lopez v. Lopez* (1924) 5 NLR 56.

43. *Loc. cit.*

44. 5 NLR.

45. (1909) 1 NLR 81.

46. (1990) ANLR 310.

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Be that as it may, the perpetuation of the current of legal reasoning that endorses the recognition by natives 'that daughters have the same rights as sons in the lands of their fathers' is indeed noteworthy. Combe CJ must truly be stirring in his grave.

In *Lopez v. Lopez* (supra), the plaintiffs who were seeking partition of family property were females or children of female children of the original owner. Although the incapacity of females to hold land was not an issue at the trial, the evidence of the chiefs was that although females cannot inherit land, they have the right to stay in the house. Commenting on the opinion of the chiefs, Pennington J said:

The opinion commends itself to me.... And I do not propose to depart from it. A decision that women are entitled to share in the landed property under native law and custom would strike at the very root of native ideas on the subject of family property.⁴⁷

Combe CJ was quick to vacate that reasoning for, on appeal, he first acknowledged that:

In early times, the rights of daughters were not the same as those of the sons ...⁴⁸

But that ancient sentiment must yield its place to a more urbane, if civilised, sociology! Combe CJ thus declared magisterially:

However that may be, females undoubtedly have rights and the court must have jurisdiction to make such order as may be necessary to protect a female enjoyment of her rights.⁴⁹

The above case and that of *Lewis v. Bankole* truly demonstrate the role judicial responses have played in stripping Yoruba customary law of restrictions imposed by other native laws and customs. Yet one sociological factor must not be underrated in this evolutionary process – it is the fact that judicial behaviouralism was at play in those cases. For instance, in *Lewis v. Bankole* (supra), it was evident that the judge, Osborne CJ was considerably influenced by his imperial sociological background. After all, in England, a succession of Queens had admirably held sway over British Colonial suzerainty. Now, listen to His Lordship, Osborne CJ:

Lagos is not the only part of this Majesty's Dominions where the female sex are seeking for greater recognition of her capabilities; and seeing that a wise and great Queen holds sway for long years over the British Empire, there seems no reason why, on the mere ground of sex, a Lagos woman should not be capable of managing the domestic concerns of a family compound ... There is nothing inequitable in this recognition of women's rights.⁵⁰

47. Ibid. p.53 cited in A G Karibi-Whyte, p.50.

48. *Lopez v. Lopez* (supra) at p.54, cited in Karibi-Whyte, p.48.

49. See Combe CJ, in *Lopez* (supra) of p.55, cited in Karibi-Whyte, loc. cit.

50. See *Lewis v. Bankole* (supra) pp.101–102.

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In effect, Osborne CJ held that in Lagos a woman could be head of the family if she is the eldest and the others who are junior to her are females. Here again, we are compelled to set out the judicial reasoning that yielded the above decision, a reasoning dripping with precious insight into sociological jurisprudence:

... and the town of Lagos bears striking testimony to the honour here accorded to women in the names of the square wherein this court house stands, some and one of the principal markets, both called after women of wealth and importance in by gone days...⁵¹

It is a great credit to the judicial sagacity of Osborne CJ that almost 81 years after his redoubtable espousal of women's rights in the above case, the Nigerian Supreme Court has felt itself bound by his compelling logic! In *Folami v. Cole* (supra), the appellants contended that since all the children of their deceased mother were females, the first respondent had to be elected by the other sisters before she could assume the leadership. The first respondent, on her part, contended that by virtue of her being the eldest child of their deceased mother, the headship of the family automatically devolved on her. The High Court and the Court of Appeal found for the respondent, whereupon the appellants further appealed to the Supreme Court, which approvingly adopted the views of Osborne CJ.⁵² The court upheld the judgment of the Court of Appeal, which relied on Osborne CJ's judgment in *Lewis v. Bankole* (supra) alone in upholding the custom that in Lagos a surviving female child could become head of the family if she was the eldest and all the surviving children were females.

In the northern part of Nigeria, it is estimated that adherents of the Islamic faith are predominant. Islam, it is said, is a complete way of life. Our action research reveals that contrary to certain unfounded assumptions, Islam takes a progressive view of women's rights. Judicial decisions have endorsed this trend. Thus, for instance, the pre-Islamic tradition that treated women as objects of inheritance has been completely supplanted as being rooted in ignorance and oppression.⁵³ In *Muhammad v. Mohammed*,⁵⁴ two sisters instituted an action against their brothers at the trial court for their own shares in respect of the estate of their deceased father. The estate as a whole was subject to distribution to all legitimate heirs in accordance with the dictates of Islamic law. Their brothers (defendants) got their own legal shares. They, however, excluded their female sisters (plaintiffs) on the ground that female daughters are not entitled to inheritance. The plaintiffs approached the trial court for assistance to recover the estate and give them their own shares.

51. See *ibid.* p.102.

52. See, particularly, Belgore JSC at pp.315–316.

53. See, per Muntaka-Coomasie JCA in *Muhammad v. Mohammed* (2001) 6 NWLR (pt. 708) 104, 112.

54. *Loc. cit.*

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The trial court found that the parties are half-brothers and sisters. Their late father's estate had not been distributed as required by Islamic law. The court, accordingly, ordered that the estate be distributed among the heirs under Islamic law. This was done. Dissatisfied, the plaintiffs appealed to the Sharia Court of Appeal, which upheld the judgment of the trial court. On further appeal to the Kaduna division of the Court of Appeal, the court dismissed the appeal.

Muntaka-Coomasie JCA who read the judgment of the court, first offered a useful insight into the pre-Islamic status of female children:

Before the advent of Islam, daughters and young sons of deceased person (sic) were not entitled to inheritance. There reasons (sic) were that since infant sons and daughters cannot go to war and secure booty or loot ... they should not be allowed to inherit as heirs. In fact females were themselves object of inheritance.⁵⁵

According to His Lordship, Islam destroyed that arrangement which was based on, and rooted in, ignorance and oppression. On the crucial question of whether female children can partake in the inheritable estate of their deceased father, the learned justice of the Court of Appeal stated the Islamic position, which he held to be the law, thus:

Now daughter (sic) or female heirs are allowed to partake like their male counterparts in a modified manner, namely, a daughter can have as her share, half of what the son will get as his share ...⁵⁶ this is what is popularly known as ILILZAKARI formula. That is to say a male person would get twice of the female share.⁵⁷

His Lordship traced the religious pedigree of this patently discriminatory practice in these words:

The issue of inheritance under Islamic law is sacrosanct. It could be clearly seen that Allah the most High did not leave it in the hands of human beings. He the Almighty undertook to explain its rule, conditions and classification of the heirs and stated same in the Holy Qur'an.⁵⁸ So female heirs constitute Qur'anic heirs, i.e. their shares were specifically entrenched in the Holy Qur'an; therefore nobody or institution can deny them shares which God gave them.⁵⁹

Now, His Lordship endorsed this scriptural formulation without evaluating the rationale for the preferential treatment, which the ILILZAKARI formula accords to male children.

55. See *ibid.* p.112.

56. *Loc. cit.* citing chapter 4 verses 11–14 of the Holy Qur'an.

57. *Loc. cit.*, affirming the concurrent findings of the two lower courts allowing the daughters to inherit the land in dispute.

58. Citing *Suratui Nisa* chapter 4. The Qu'ran.

59. *Loc. cit.*

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The question is whether the sacrosanctity, which the said formula is invested with under the Holy Qur'an, can stand the test of the non-discrimination norm ordained in the Nigerian constitution and other laws. Section 42 of the 1999 constitution provides:

- 42(1) A citizen of Nigeria of a particular community, ethnic group, and place of origin, sex, religion or political opinion shall not by reason only that he is such a person:
- a. be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, place of origin, sex, religion or political opinion are not made subject or
 - b. be accorded either expressly by or in practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, place of origin, sex, religious or political opinions.

It is interesting to note that the derogation provisions in section 45 of the constitution do not extend to the provision of section 42.⁶⁰ The entrenchment of the ILILZAKARI formula in the Holy Qur'an, therefore, cannot justify its discriminatory tendencies.

Above all, Islamic law is part of the received customary law. It is, therefore, a law in force in parts of the country. It comes within the meaning of 'any law in force' in section 42. Thus, any rule of Islamic law that imposes special disabilities or restrictions or accords special privileges or advantages based on sex, is unconstitutional.⁶¹ With due respect to Muntaka-Coomasie JCA, section 42, must per force, vacate the sacrosanctity with which the Holy Qur'an invests the ILILZAKARI formula. In effect, His Lordship ought to have pruned the formula of such interpretations that tended to confer advantages on the male children, namely, the formula which allowed a male person to get twice the female share. That practice cannot find justification either under CEDAW, the African Charter on Human and Peoples' Rights (AfCHPR),⁶² ICESCR⁶³ or ICCPR.⁶⁴

It is true, indeed, that elsewhere in Africa CEDAW provisions have been invoked in cutting down such discriminatory customary practices. Mwalusanya J of the High Court of Tanzania was, perhaps, one of the first judges to uphold women's rights enshrined

60. We are therefore in agreement with the submission that the only derogation from the bar on discrimination that is allowed under the section concerns those in section 42(3), see, O C Okafor (2000) 'The non-discrimination norm as a basis for the legal protection of economic, social and cultural Rights', in E Onyekpere, *Manual on the Judicial Protection of Economic, Social and Cultural Rights*. Lagos: SRI, 145, 147.

61. See B O Nwabueze (1982) *The Presidential Constitution of Nigeria*. London: C Hurst and Co. p.452.

62. Cap 10 LFN, Article 2.

63. Article 2(2).

64. Article 26.

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in CEDAW. In *Ephrahim v. Pastory*,⁶⁵ a woman inherited clan land, which she sold for her sustenance in her old age. The sale was challenged on the ground that under the Haya customary law females have no right to sell clan land. Mwalusanya J voided that rule of customary law as being contrary not only to CEDAW, but also to the UDHR, ICCPR and AfCHPR.

(3) Reproductive rights

The concept of reproductive rights is anchored on people's entitlement to the control of their reproductive choices. This control is only exercisable where they enjoy reproductive autonomy. The implication of this is that reproductive autonomy is an indispensable prerequisite for the effective enjoyment of reproductive rights. Mahmoud F Fathalla, one of the leading authorities on reproductive health rights, captures the import of the nexus between both concepts in admirable and lucid prose:

Reproductive health, therefore, implies that people have the ability to reproduce, to regulate their fertility, and to practice and enjoy their sexual relationships. It further implies that reproduction is carried to a successful outcome through infant and child survival, growth and healthy development. It finally implies that women can go safely through pregnancy and childbirth, that fertility regulation can be achieved without hazards and that people are safe in having sex.⁶⁶

The question is: what is the relevance of this to customary law? The answer is not difficult to find. Many customs effectively denude women of their reproductive autonomy, that is, the ability to control their choices. These customs include child marriages, female genital mutilation (FGM), puberty rites etc.⁶⁷

In Zambia, cultural practices that impede reproductive autonomy have been identified in a study of the links between human rights abuses and HIV transmission to girls.⁶⁸ These include deep-rooted cultural taboos that inhibit parents from discussing sex with their children and so militate against effective sex education. So pervasive are these practices that the government has openly acknowledged that the key underlying cultural factor that makes girls vulnerable to HIV is the subordinate status of women and girls, which deepens their social and economic dependency on men. Indeed, a UN Special Envoy came up with the finding that 'Zambian girls are raised to be obedient and submissive to males and not to assert themselves. In his view, these factors conspire to rob them of autonomy 'to negotiate safe sex and to control their sexual lives and therefore place them at high risk of HIV transmission'.⁶⁹

65. Civil Appeal No. 70 (1989) cited in C G Bowman and A Kuenyehia, op.cit.186.

66. Mahmood Fthalla (1991) 'Reproductive Health: Global Overview', 626 *Annals of the New York Academy of Sciences* 1,1.

67. See C G Bowman and A Kueyehia, op. cit.

68. Human Rights Watch (2003) *Suffering in Silence: The link between human rights abuses and HIV transmission to girls in Zambia*, pp.14 et seq.

69. Ibid.

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There is also another cultural practice in certain parts of southern Africa, including Zambia, known as 'dry sex'. In this practice, girls and women attempt to dry out their vaginas in an effort to provide more pleasurable sex to men. They achieve dryness by using certain herbs and ingredients that reportedly reduce vaginal fluids and increase friction during intercourse. The practice and its health implications were captured in a 1999 report by the Zambian Ministry of Health and the Central Board of Health, which stated thus: 'to enhance male pleasure, a number of women continue to practice dry sex, which can increase vulnerability to infection through exposing genital organs to bruising and laceration'.⁷⁰

This is another cultural practice in Zambia that violates the reproductive rights of women. According to this cultural practice, a widow is under obligation to have sex with another man following the death of her husband. The underlying belief is rooted in the assumption that:

To be purged of the 'evil forces' assumed to have caused the death of a spouse, the widow or widower is 'cleansed' through the act of sexual intercourse with a relative of the deceased.

There can be no denying the health implications of this practice, both for the widow and the cultural agent of the 'cleansing'. Thus, Human Rights Watch discovered that one man who always volunteered in his community to cleanse widows after funerals, is now dead, apparently due to HIV/AIDS.⁷¹

In other jurisdictions, all sorts of customs undermine reproductive autonomy in various ways. In Nigeria, for example, the Supreme Court had occasion, even if unwittingly, of advancing the concept of reproductive self-determination. In *Okonkwo v. Okagbue*⁷² the court held that marriage, in its popular meaning, is a union of a man and a woman: above all, between two living persons. It took the view that, for a marriage to be meaningful, it is necessary for the husband to physically exist so that the marriage can be consummated. In that case, therefore, the court nullified the custom that allowed a woman to be married to a deceased man.

The decision in *Yusufu v. Okhia*⁷³ also concerned a custom that militated against the exercise of reproductive autonomy. Here, the allegation was that a customary marriage between a deceased man and his widow subsisted until the wife performed the funeral rites for her late husband. Where she did not discharge that duty, any relation of the husband could inherit her. Since the widow had not performed the rites, the relations of the deceased wanted to 'inherit' her. However, she refused and instead opted out

70. Ibid. p.19.

71. See ibid p.15.

72. (1994) 9 NWLR (pt.368) 301.

73. (1976) 6 East Central State Law Report (ECSLR).

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of the matrimonial home and had a relationship with the appellant. The respondent, a brother of the deceased, originated an action in the lower court against the appellant for adultery and enticement. The court ruled in his favour, hence, the appeal. The appellate court derided the rule of customary law that permitted an action for adultery and enticement after the death of a man as being repugnant to natural justice.

(4) Domestic violence

As observed earlier, the constitution of Uganda acknowledges that other non-state actors equally violate human rights. The constitution of Ghana is even more explicit. Article 26(2) provides that all customary practices that dehumanise or are injurious to the physical and mental well-being of a person are prohibited. These constitutional provisions made in furtherance of the obligations imposed by CEDAW typify legislative responses to the peculiar kind of social problems engendered by the operation of certain cultural practices. One such practice is domestic violence, which has been identified as a major threat to women's health. International surveys carried out in parts of Africa indicate the following percentages of women who reported one form of violence or another by their male partners:

Tanzania: 60 per cent; Uganda: 46 per cent; Kenya: 42 per cent and Zambia: 40 per cent.... [A] nation wide survey covering 11 major ethnic groups in Ethiopia reported that on average every man beat his wife seven times in six months....A comprehensive survey of a large random sample was carried out throughout Ghana in 1998 which indicated that a large proportion of women had experienced physical abused by a current or recent partner.⁷⁴

The sociological factors that sustain these practices vary from jurisdiction to jurisdiction. It has been reported, for instance, that '[i]n Botswana, Swaziland and Zimbabwe, the right of a man to chastise his wife as a correctional measure is enshrined in both common and customary law'.⁷⁵

There can be no doubt that the constitutional techniques adopted in Ghana and Uganda, as shown above, are worthy of emulation in other jurisdictions, where CEDAW provisions are to be employed as hanger for assessing the impact of customary practices on women's rights.

(5) Sundry customs

There are a host of other customary practices that must be attended to in the process of domesticating CEDAW. It is our fervent hope that religion will not be employed a shield for perpetuating anachronistic attitudes. Two examples may be cited from Nigeria to illustrate this possibility.

74. N Neft and A D Levine (eds.) *Where Women Stand: An International Report on the Status of Women in 140 Countries*, cited in C G Bowman and A Kuenyehia, op. cit. p.455.

75. C G Bowman and A Kuenyehia, loc. cit.

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First, there is an aspect of Islamic law which, notwithstanding its endorsement by a long line of cases, is not free from doubt. The question of who is a competent witness under Islamic law has long been settled by superior authorities.⁷⁶ The general principle of Islamic law relating to claims in civil matters involving both movable and immovable property is that proof is complete by:

- evidence of two unimpeachable male witnesses, or
- evidence of one male witness and two or more unimpeachable female witnesses, or
- evidence of one male or two female witnesses with the claimant's oath in either case.⁷⁷

In effect, whereas under Islamic law a claim is regarded as proved if two unimpeachable male witnesses testified in proof and the court is entitled to enter judgment accordingly,⁷⁸ this is not the case if two unimpeachable female witnesses testify without the evidence of a male witness.⁷⁹ Thus, the unimpeachability of the testimonies of two female witnesses is incapable of inducing credibility in the mind of a judge. Only the additional testimony of a male witness, whether impeachable or not, can render such testimonies cogent and credible. This Islamic procedure has been endorsed by a succession of Supreme Court justices learned in Islamic jurisprudence,⁸⁰ and other eminent and erudite justices of that court, who had the opportunity of deciding matters touching on Islamic jurisprudence.⁸¹

Surprisingly, this crucial procedural matter has never been subjected to the fair hearing standards enunciated in the Nigerian constitution.⁸² The rationale of all binding authorities on this matter is that fair hearing imposes an ambidextrous standard of justice in which the court must be fair to both sides of the conflict.⁸³ It, therefore, does not anticipate a standard of justice that is biased in favour of one party, but prejudices the other. Above all, the right to fair hearing is not a technical doctrine. It is one of substance.⁸⁴ In the exercise of that right, a party to a suit is at liberty to call witnesses if he or she likes.⁸⁵

76. *Jatau v. Mailafuya* (1988) 1 NWLR (pt.535) 682, 690–691; *Jidun v. Abuna* (2000) 14 NWLR (pt.686) 209, 218.

77. *Hada v. Malumfashi* (1993) 3 NWLR (pt. 303) 1.

78. *Nasi v. Haruna* (2002) 2 NWLR (pt.750) 240.

79. *Jidun v. Abuna* (supra).

80. Uthman Mohammed, Belgore, Wali, Kutigi, Onu JJSC.

81. Both Achike and Ayoola JJSC sat on the panel in *Jidun v. Abuna* (supra).

82. Section 36.

83. *Ndu v. State* (1990) 7 NWLR (pt.164) 550, 578; *Ogundoyin v. Adeyemi* (2001) 33 WRN 1.

84. *Ogundoyin* (supra).

85. *Nwanegbo v. Oluwole* (2001) 37 WRN 101.

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In our humble view, therefore, the determination of cases, on such criteria, as not only the quantity of witnesses, but also on the prejudicial criterion of classification of such witnesses into sexes, is not only an affront on the inveterate principles of fair hearing, it offends the inviolable non-discrimination norm of the constitution and CEDAW.

It is hoped that when the opportunity presents itself again, the appellate courts would subject this vital procedural issue to the constitutional touchstone of fair hearing. Such ugly aspects of Islamic law must be redefined to bring them in line with the overall portrait of Islamic jurisprudence as feminist-oriented.⁸⁶

Other aspects of customary laws that have been challenged in the courts are those relating to burial ceremonies and their impact on women's religious freedom. In *Onwo v. Oko*,⁸⁷ the appellant claimed that the respondent forcefully, and against her wishes, shaved her hair, assaulted her grievously and locked her up in a room and removed all her property in order to conform to the tradition of the community of mourning the dead. The appellant, a born again Christian and member of the Assemblies of God Church, claimed that according to her own religion and her faith, she does not mourn the dead. Consequent upon the shaving of her hair forcefully, she originated an application for the enforcement of her fundamental rights. After the leave sought had been granted, and after hearing both sides on the main motion, the trial court dismissed the application on the ground that fundamental rights are not enforceable against a private individual. In allowing the appeal, the Court of Appeal held that where fundamental rights are invaded by ordinary individuals, the victims have rights against the individual perpetrators.⁸⁸

Post scriptum

Notwithstanding that CEDAW has long been ratified in most of the jurisdictions considered above, domestic legislative action for the actualisation of the rights in the convention is yet to be consummated. This is the unfortunate fallout of the noticeable lethargy on the part of the competent legislature. That is why it is heart-warming that through judicial proactivity, CEDAW provisions are gaining incremental endorsement. This poses a challenge to non-governmental organisations (NGOs) and women's rights advocates: to maximise this beneficent judicial attitude by increasingly hybridising their litigation strategies by reference to domestic law, CEDAW and other international human rights instruments.

86. A B Mohammed (undated) 'Protection of Women and Children under Islamic Law', in A U Kalu and Y Osinbaja (eds.) *Women and Children under Nigerian Law*. Lagos: FMJ, nd., 50, 53.

87. (1996) 6 NWLR (pt.456) 584.

88. In *Ojonye v. Adegbudu* (1983) NCLR 429 it was held that a wife was not bound to provide a goat for the traditional burial rites of her husband, because it was inconsistent with her religious belief.

6. Gender, culture and the law: the South African experience

Mokgadi Lucy Mailula, Judge, High Court of South Africa

A body of case law has come into being over the past 14 years which demonstrates the extent to which the South African judiciary has shown respect for gender and cultural rights, and its ability to deal with the tensions between them.

Section 8(1) of the Bill of Rights in the South African Constitution provides that the Bill of Rights applies to all law and binds 'the legislature; the executive; the judiciary and all/organs of state'. Specific provisions in the area of gender, culture and the law are:

- Section 9 of the Bill of Rights in the Constitution of the Republic of South Africa Act, 108 of 1996 ('the Constitution') deals with matters of gender and culture and prohibits unfair discrimination on the basis of various differences. The section embraces a plethora of differences so as to cater for the diversity of people who inhabit the country.
- Section 9 provides that neither the state nor any person may unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- Section 31 of the Constitution was enacted to entrench respect for diverse cultures, religions and languages in South African society. It provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practice their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

In briefly highlighting the following cases, I demonstrate the judiciary's aspiration and intent to advance women's rights in the context of gender, culture and the law.

Women as mothers: recognition of their current socio-economic disadvantages

- In *President of the Republic of South Africa and Another v. Hugo*,¹ the social and economic disadvantages to black people and women in South Africa were

1. 1997(6) BCLR (Butterworths Constitutional Law Reports) 708 (CC).

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highlighted. The court addressed the position of women in society – with emphasis on their roles as mothers and primary caregivers. It noted how this role has been one of the root causes of women's inequality in employment and in society. The fact that fathers were not similarly disadvantaged weighed with the court in arriving at its decision. It held that a presidential order that mothers, but not fathers, of young children, should receive a special remission of sentence was not unfairly discriminatory against gender.

Comment: Ultimately, however, one would discourage this type of decision, because we need to encourage co-parenting and the assumption by both parents of a child of parental responsibilities. And this is precisely why the Children's Act 38 of 2005 was enacted from 1 July 2007. From this date, married fathers of minor children have automatic equal rights and responsibilities towards them, and unmarried fathers have the right to go to court to secure the same joint rights and responsibilities. Co-parenting is one of the fundamental premises of this piece of legislation. What is being recognised is the need for a father to become more involved in the welfare of his child, and the need for the mother to be freed up so that, if she so chooses, she can pursue economic opportunities which will empower her and allow her to become financially independent from her husband or partner.

Women in civil marriages: property and maintenance claims

- The equality principle was applied in the case of *Cary v. Cary*.² In a civil case, the applicant, a wife in the throes of a divorce from her husband, had applied for a contribution from him towards her legal costs in the divorce action. The court found that its discretion was subject to the right of equality before the law among genders, which in turn required equality of arms, or finances, in the divorce action. A contribution to costs beyond the norm was awarded, and effectively empowered the wife to litigate her case on a more equal and fair basis. This case had admirable objectives. However, there is still some way to go, because such costs contributions are often insufficient.

Comment: The marital power that previously vested in a husband, to the exclusion of his wife, has been abolished by the Matrimonial Property Act 69 of 1984. A wife married by antenuptial contract has the power to enter into transactions without the assistance of her husband. Where the parties are married in community of property, they participate equally in the conclusion of major transactions. Unless these claims are excluded by agreement in an antenuptial contract, a married woman generally enjoys proprietary claims against her husband in the event of death or divorce. Maintenance claims also arise, irrespective of how the parties were married. Nonetheless, historically, because the woman has frequently stayed at home to look after the children, she has

2. 1999(8) BCLR 877 (C).

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not been able to financially empower herself during the marriage, so that, on divorce, she lacks the wherewithal to prosecute legal proceedings against her husband.

Women and customary law or religious marriages: property and maintenance claims

- Discrimination on the ground of religion, but impacting upon the female gender in effect, came to the fore in *Amod (born Peer) and Another v. Multilateral Motor Vehicle Accidents Fund*.³ In this case, the beneficiaries of loss of support claims flowing from motor vehicle accidents were held to include spouses married according to Muslim rites.
- In *Daniels v. Campbell NO and Others*,⁴ the exclusion of spouses married according to Muslim rites from maintenance claims under the Maintenance of Surviving Spouses Act 27 of 1990 was found to unfairly discriminate on the basis of religion. In the latter case, the court also took account of the importance of tolerance and respect for diversity. In affording a wide interpretation to the meaning of the word 'spouse', any unfair discrimination on the ground of religion, culture and belief was obviated.

Comment: The result of the findings in *Amod* and *Daniels* was that those most affected by this legislation, namely, women who were normally not the breadwinners in the family, would benefit from its failure to pass constitutional muster. Historically, our law did not recognise maintenance and proprietary claims for women in marriages that were not civilly formalised and registered as such. This had the result that wives in Muslim marriages and customary law marriages, the established norm among a vast number of the black population, were left destitute when their marriage failed. With the Constitution, things have begun to change. The Recognition of Customary Marriages Act 1998 has had the effect that customary law marriages now have the same status as civil marriages. However, marriages according to Muslim rites have not received the same recognition. So, for example, where a husband dies intestate, the children born of the marriage will inherit, to the exclusion of the wife. There is currently case pending on the subject in the Cape High Court.

Women who do not marry, but live with a partner

Comment: Historically, women who did not marry their partners have had no legal recourse against them when their relationships came to an end. In other words, what were termed 'common law wives' would also have no rights of a maintenance or proprietary nature against their partners. A woman who had never married and had instead lived with a man for 25 years, often bearing his children, would have no

3. (1999) 4 All SA 421 fA.

4. 2004(7) BCLR 735.

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personal claim against him other than for maintenance for the children. Once enacted, the Domestic Partnership Bill, which was drawn up in 2005, will effectively address the hardship which flowed from these relationships. This legislation will have the effect that both parties to a domestic partnership will have the same proprietary and maintenance rights as women who marry. These rights are reciprocal, in the sense that men will also be able to enjoy claims against their female partners.

When the Domestic Partnerships Bill comes into law, surviving partners, whether married or unmarried, will enjoy maintenance and property claims against their deceased partners, which constitute first charges against the partner's estate before the will is implemented. On death, minor children, irrespective of sex, enjoy claims for support against their deceased parent. This applies whether or not the child was born of a legal marriage.

Domestic violence against women, both married and unmarried

Comment: Domestic violence against women in South Africa took centre stage with the introduction in 1993 of the Prevention of Family Violence Act, 133 of 1993, succeeded by the Domestic Violence Act (DVA) 116 of 1998, which came into operation on 15 December 1999. In the preamble to the DVA, cognisance is taken of the high incidence of domestic violence in South Africa, that victims of such violence are among the most vulnerable members of society, that domestic violence takes on many forms and that it may be committed in a wide range of relationships. The legislature goes on to state that, in wishing to honour the obligation of the state towards ending violence against women and children, it has had regard to the constitution and the UN Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Rights of the Child.

Thus, in terms of the DVA, people who have simply lived with one another in a common law relationship are entitled to secure protection orders against each other of an interdictory nature to prevent the continuation of conduct amounting to domestic violence.

The definition of 'domestic violence' is far-reaching. It includes physical, sexual emotional, verbal, psychological and economic abuse – intimidation, harassment, stalking, damage to property, entry into the complainant's residence without consent and any other form of controlling behaviour. The 'battered woman' syndrome, in the sense that women can be victims of a severe form of domestic violence, has been recognised by our law. However, there are two cases that, while recognising this fact, had entirely different outcomes.

The case of *S v. Kgafela*,⁵ a black woman had hired an assassin to murder her husband, a senior magistrate. Her husband had taken to drinking in excess over

5. 2003(5) SA 339 SCA (Supreme Court of Appeal).

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weekends and to subjecting her to abuse when inebriated. He had hit her with a *sjambok* (whip) on one occasion and had pointed a firearm at her on another. The accused was 37 years of age and a first offender. The Supreme Court of Appeal was unable to find substantial and compelling circumstances that would have justified a reduction in the life sentence imposed upon the accused by the court of first instance.

Yet, two years later, in the case of *S v. Engelbrecht*,⁶ the court was enjoined to enquire into the reasonableness of the accused's (a white woman) actions to establish whether her defence of justification was sustainable. The court found the accused wife guilty of the murder of her husband. In sentencing, however, the court took account of a long line of cases that had established certain principles applicable to crime committed in circumstances of family violence. The accused was sentenced to detention until the rising of the court. This meant that all she had to do was to wait until the judge adjourned proceedings and then walk out of court. She was free to go.

Comment: A comparison of these two cases reveals some interesting contrasts. Both women were found guilty of murdering their husbands. The court in the first case found domestic violence an inexcusable defence for a black woman. The court in the second case found domestic violence to be a substantial mitigating factor in a case against a white woman. It appears that the black woman came from a poor background, and was not afforded the resources that the white woman had with which to advance expert evidence through psychologists' reports detailing the affects of battery on the wife. The question arises as to why the court in the black woman's case did not take account her socio-economic position and take proactive steps, as it could and should have, to gather the information required to come to a reasoned decision.

Women and succession and the tension between gender and culture

In *Mthembu v. Letsela and Another*,⁷ the issue of gender discrimination within a black culture was aired. Because there had been no customary union between the mother and father of one T, she was illegitimate. In terms of customary law, the house of her deceased father devolved to the father of the deceased. However, according to the same law, even legitimate daughters could not succeed whereas, in the absence of legitimate sons, illegitimate sons could. The Supreme Court of Appeal recognised this rule, holding that, to strike it down would be to 'dismiss an African institution without examining its essential purpose and content'.

The case of *Bhe and Others v. Magistrate, Khayalitsha and Others*⁸ may be contrasted with the finding in *Mthembu*. The Cape High Court found the principle of primogeniture

6. 2005(2) SACR (South African Criminal Law Reports) 41 WLD at p130, para 333.

7. 2000(3) SA 867 SCA.

8. 2004(2) SA 544 (C).

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as set out in the Black Administration Act 38 of 1927 ('the BAA') to discriminate against black women on the basis of race and gender. This was confirmed by the Constitutional Court in its groundbreaking decision in *Bhe and Others v. Magistrate, Khayalitsha and Others*.⁹ In this latter judgment, Langa DCJ as he then was, stated:

'The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centerpiece of the customary law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extramarital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.'

The *Bhe* case has ramifications which reach beyond the facts of the case, in the sense that, here, the court was required to weigh a long-established cultural norm against a gender issue. And the gender issue prevailed because the court accepted that, otherwise, there would be unfair discrimination. I would call this a successful negotiation of culture.

9. 2005(1) BCLR 1 (CC).

7. Scope of regional instruments: a perspective on the Southern and East Africa region

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Background

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been drawn on for the development and adoption of regional Southern and East African instruments relating to eliminating discrimination against women, promoting gender equality and equity and facilitating sustainable and equitable development.

CEDAW has been ratified by all the countries in Southern Africa and in East Africa, except Somalia. However a number of countries have entered reservations to the articles relating to marriage and family life, nationality and to equality before the law. Despite the reservations, CEDAW has been a catalyst for change in many aspects, including women's participation in employment, education, politics and decision-making and reforms of laws to provide better for the rights of women.

Many national constitutions and domestic legislation have also taken their cue from CEDAW and other international instruments. Several shades of gender equality and non-discrimination provisions exist in a number of constitutions, and some progressive pieces of legislation on various aspects of women's human rights are found in this part of the world.

However, the impressive lists of instruments that are recalled, reaffirmed, noted and so on in subsequent instruments do not appear to have brought about commensurate changes in the lives of women of the East and Southern African region.

While significant improvements in the role and status of women are recognised in some spheres of life, such as education and participation in politics, gender equality and equity and a life free from discrimination is still a dream for many. Women and girls in the region continue to face increasingly brutal incidences of gender-based violence, still form the majority among the poorest of the poor and toil on land that they do not own and have no control over. They continue to be vulnerable to infections of HIV and bear the heaviest burden of caring for the sick, even when they are sick themselves.

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Although many of these women would have heard of the instruments from various conferences, seminars, workshops, the media and sometimes friends and family, few know how to claim the rights contained in those instruments, few have the means to do so, many are constrained by the realities of their lives from claiming the rights and many are forced to make painful choices to forfeit the chance to pursue their rights. Yet others are confronted with hostile or uninformed traditional, judicial, religious systems, so they do not benefit from the progressive provisions of those instruments.

Inadequate attention to and erroneous assumptions with regard to the interrelationship between law, culture and gender has led to the limited impact of the plethora of instruments we have at the international, continental and regional levels. It has been observed that there is a lack of connection between law reform and policy formulation on the one hand, and the realities of women's daily lives on the other.

Some obstacles to the implementation of laws and policies have been identified as being based on either customary laws and practices or religious doctrines and practices. The issue of culture is addressed in article 5 (a) of CEDAW, as it provides that: 'State parties shall 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'.

In the 14th paragraph of the preamble of the Convention, the state parties reaffirmed an awareness that, 'a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'.

Gender relations fostered and supported by positive customary laws and practices, gender-sensitive religious practices, and gender-responsive law reform and administration of justice is the aspiration. Due acknowledgement and recognition of the nexus of gender, culture and the law is key to having real, measurable and sustainable changes in women's lives.

The law does not operate in a vacuum and neither is custom and tradition static. This is why The Commonwealth Plan of Action for Gender Equality (2005–2015) 'acknowledges the value of laws and legal mechanisms for advancing women's rights' and also recognises the 'significance of customary laws and practices in the daily lives of women, men and their communities'.

Regional picture

While instruments and programmes at the international level set landmarks and standards for all to follow, **the development of regional instruments** offers an entry point for addressing the nexus between gender, culture and the law. This has, in fact, expanded the scope of human rights and highlighted specific issues like culture, customary laws, traditional and religious doctrines and practices.

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Women activists, government reformers, implementers and other stakeholders have also found that emerging and continuing issues confronting the realisation of women's rights were not adequately covered by CEDAW and other instruments. For example, violence against women and children, HIV and AIDS, and trafficking of women and girls were not major issues at the time the Convention was being drafted. Furthermore, other economic and social developments in the world have exacerbated old problems – like limited access to land and property, the feminisation of poverty, female genital mutilation (FGM) and property grabbing.

African women have also wanted to have issues that are peculiar to Africa addressed by a developed instrument that will really respond to the needs and challenges of African women. The African Charter on Human and People's Rights¹ was found not to be expansive enough to meet all the challenges. Therefore, a decision was made to have an instrument drawn up by African women for African women to expand on the generic provisions in the Charter. After many discussions and negotiations over a number of years, the Organization of African Unity took up the drafting of a protocol to the Charter.

The Protocol to the African Charter on Human and People's Rights, which focuses on the rights of women in Africa, is a milestone as it addresses issues that are missing from international instruments: issues that previously were considered too personal to be part of human rights instruments, yet that actually affect and touch upon the lives of millions. These include the rights and responsibilities of widows, the treatment of the elderly and the right to protect oneself from HIV infection.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa² was finally adopted during the second session of the Summit of Heads of State and Government of the African Union (AU). At the same session of the AU, a momentous step to implement the gender parity rule for the Commission of the African Charter on Human and People's Rights was taken by the election of five female and five male commissioners. The Protocol is a milestone for women's rights in Africa.

For African societies, culture has implications for the rights to property, inheritance, treatment of widows, reproductive health, and rights within marriage and in the family, the development of the girl child, the right to protection during armed conflict, the right to peace, adequate housing, and sustainable environment. The Protocol takes into account the statutory, customary, traditional and religious issues that challenge women's ability to claim and enjoy these fundamental rights and freedoms.

Heads of state and government adopted a Solemn Declaration on Gender Equality in Africa in 2004 in which, among other things, they reaffirmed their commitments to

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1. Ratified by all African states, and adopted in 1981.
 2. Adopted in July 2003 in Maputo, Mozambique. Came into force after 15 instruments of ratification in 2006.

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international instruments, to gender equality in Africa and urged the ratification of the Protocol in the shortest possible time. The expressed wish to have it ratified by all countries is yet to be realised. This process will be facilitated by the fact that the Summit is going to be getting a report on the progress of the ratifications annually.

When the Protocol came into force in 2006, it had been ratified by 17 countries: Benin, Cape Verde, Comoros, Djibouti, The Gambia, Lesotho, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Africa and Togo. More countries have since ratified it, and a campaign to have universal ratification is ongoing.

This is an African document, drawn up by Africans taking into account that culture has some positive elements that should be retained and built on, but also recognising that some negative elements should be prohibited and eliminated. It needs to be implemented and monitored. However, the Protocol will also become a **white elephant** – a good document, but with little or no impact on the lives of the people – unless its contents are known about by women, men, children, traditional leaders and courts, religious leaders and all other stakeholders, and unless it is implemented in full. There is a need for renewed political will that will lead to allocation of adequate resources and time for monitoring and evaluation of the provisions of the Protocol.

Unfortunately, the African Protocol does not contain provisions on how its implementation is to be monitored, and what strategies are to be adopted to make all countries implement it. Some countries have also entered (and had ratified) many reservations. This is an area for further advocacy – to have reservations removed and provide for enforcement mechanisms.

Africa is not homogenous and the various regional economic communities that are the building blocks for the Economic Community of Africa are also looking at issues of gender equality, as they look at all the other aspects of development and integration.

The Southern African Development Community (SADC) has been more deeply involved in this process for a longer time. In 1997, the SADC heads of state and government adopted a Declaration on Gender and Development in which they specifically undertook to review those aspects of culture and tradition that perpetuate discrimination against women, and eliminate them while building on the positive elements in the culture. This was a landmark step, because they were now looking at real issues existing in their countries.

It is critical to note that there has been greater progress in terms of moving towards gender equality in the public domain – employment, participation in politics and decision-making, but the private domain has seen very little movement. The private area is where culture, tradition and religion are strongest, and even legislation is not having much of an impact. This is also the area in which the majority of the people operate. There is a need to move cautiously to avoid making those concerned defensive.

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The SADC Declaration identified positive elements in culture, tradition and religion, and built on them. The SADC Protocol adopted in August 2008, and ratified by 8 of the 14 member states of SADC, has replaced the SADC Declaration with a legally binding instrument addressing the issues that are considered critical to the development of gender equality and the protection and promotion of the rights of women in SADC. However, there still remains the major challenge of ensuring its effective implementation in a manner that recognises and builds upon the positive elements/aspects of culture and tradition.

Way forward

In moving forward with regional instruments, existing instruments at all levels, including national constitutions and positive legislation, need to be simplified, translated into local languages and disseminated as widely as possible, so that the people know what they contain and can use them. Law reform in any country must also be based on taking the positive elements from customary laws and culture, as well as from the statutory or common law.

There are more than enough instruments at all levels. Each subsequent instrument refers to, reaffirms, recommits, recalls previous instruments, but without sufficient assessment of what has or has not been achieved. It is time to put a break to the development of any more instruments and direct energy and resources to the implementation, monitoring and evaluation of existing ones. It will then be possible to fully identify the gaps.

Political will and commitment to implement what governments have ratified is critical, as is the need to emphasise that there are positive elements in African culture and traditions, to publicise those elements and build on them. At the same time, however, it is important to have the courage to discard the negative elements, as the African Protocol provides.

Judicial advocacy is critical in building a legal culture of applying international and regional human rights instruments for the promotion of gender equality and equity.

8. Last but not least: CEDAW and family law

Cassandra Balchin, Musawah¹

The last of the substantive provisions of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW, article 16)² relates to gender equality in marriage and the family. When injustice in marriage and the family is such a pervasive experience for women and girls, why is it that international human rights standards and indeed mainstream human rights organisations apparently relegate family matters to the least of their concerns? What are the prospects for the 'last' to no longer remain 'least'?

The right to gender equality in marriage has been part of human rights standards from the beginning, outlined in the Universal Declaration of Human Rights (article 16),³ reiterated in the two basic human rights Covenants, and to a limited extent amplified in CEDAW – along with a couple of other early Conventions (on the Nationality of Married Women, 1958, and on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962).⁴ Yet, as compared to the elaboration of standards regarding, for example, violence against women, minority rights or indigenous rights, whether by the CEDAW Committee or other human rights treaty bodies, standards on family law have hardly evolved over the past 30 years of CEDAW's history.

At the same time, the concept of 'due diligence' has emerged as a means of ensuring state responsibility for rights violations by non-state actors. However, such creative approaches have been generally limited to criminal matters, overlooking family law. And yet some states are profoundly responsible for the perpetuation of rights violations, by allowing constitutional exceptions to fundamental rights guarantees in the area of family law. Others, by permitting effectively binding alternative dispute resolution (ADR),⁵ have encouraged the privatisation of family law. This often operates in a highly discriminatory

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1. This article was originally published by openDemocracy 18 December 2009. Available at: www.opendemocracy.net/5050/cassandra-balchin/last-but-not-least-cedaw-and-family-law [last accessed 26 April 2010]. The article stems from a longer report by the International Council on Human Rights Policy: 'When Legal Worlds Overlap: Human Rights, State and Non-State Law'. The opinions expressed in this article, however, remain the author's.
 2. See <http://www.un.org/womenwatch/daw/cedaw/> [last accessed 26 April 2010]
 3. See <http://www.un.org/en/documents/udhr/> [last accessed 26 April 2010]
 4. See <http://www2.ohchr.org/english/law/convention.htm> [last accessed 26 April 2010]
 5. See http://en.wikipedia.org/wiki/Alternative_dispute_resolution [last accessed 26 April 2010]

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manner, especially where the ADR may be based on regressive interpretations of religion.

The greatest silence is regarding the discriminations arising out of plural legal orders, where multiple laws – usually defined as ‘religious’ or ‘customary’ and invariably regulating family law – co-exist within the same state. Some treaty bodies, notably CEDAW, have critiqued the **content** of ‘traditional’ laws, but holding states to account for the discriminations arising out of the **structure** of plural family laws is so rare as to be non-existent. Yet there is clear evidence that the structure of plural legal orders works to the advantage of the powerful, who have the resources to ‘forum shop’, and to the disadvantage, for instance, of those who marry across community lines and fall in between the cracks of parallel family laws. There is virtually no recognition of the fact that such family laws not only introduce discrimination between men and women, but between women who are subject to different laws.

The lack of development in the standards relating to family law is reflected in the structures and preoccupations of the major human rights organisations. They may have projects and entire sections devoted to freedom of speech, terrorism or violence against women; may be deeply concerned about minority rights and post-conflict transition. Family law, however, is largely invisible as a global policy issue, even though it is intricately connected with global matters such as nation building, citizenship, religious fundamentalism, reproductive rights and health, and employment. The struggle therefore, for equality in the family and for reform of family law, has largely been left to women’s organisations, both at the national and international levels. But by no means do all of these take on family law.

There is widespread evidence, largely generated by women’s organisations and occasionally by mainstream human rights organisations, of the negative human rights impact of the discriminatory content and structure of family laws across all contexts, North and South, and all religions and ethnicities. A simple web search reveals hundreds of research articles on the plight of the *agunot*, Jewish women unable to secure a divorce valid under Orthodox Halachic criteria and whose children of any subsequent marriage are labelled *mamzer* (illegitimate and forbidden to marry a Jew for ten generations). Women Living Under Muslim Laws (WLUML) conducted 10 years of research into family laws⁶ contributing to the emergence of Musawah,⁷ a global campaign for equality and justice in the Muslim family. The International Council on Human Rights Policy has recently published a report⁸ on plural legal orders that also addresses the rights impact in family law.

6. See <http://www.wluml.org/node/588> [last accessed 26 April 2010]

7. See http://www.musawah.org/national_profiles.asp [last accessed 26 April 2010]

8. See http://www.ichrp.org/en/zoom-in/when_legal_worlds_overlap [last accessed 26 April 2010]

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If the impact on rights is so great, why then the relative silence within the human rights sphere, and the comparative lack of development in the standards as regards family law? Why is there not more widespread global outrage at the fact that 25 states have placed reservations⁹ to CEDAW article 16, which the CEDAW Committee has had to clarify is incompatible with the object and purpose of the Convention and thus impermissible? Writing on sharia, human rights and universal morality, German political scientist Bassam Tibi¹⁰ once commented that family law is an area that state and non-state actors, including human rights organisations, have come to accept as almost exempt from 'the need for globally shared legal frameworks based on cross-cultural foundations'.

The explanation for this situation is complex.

First, anything that is seen to relate to women's rights is highly politicised and often a policy sticking point for state parties. Algeria, Bahrain, Egypt, Lebanon, Thailand and Tunisia maintain reservations, and India a declaration, with respect to article 16 of CEDAW – 'the women's convention' – whereas none have filed reservations to article 23(4) of the ICCPR¹¹ – a 'general' human rights convention – which makes broadly equivalent provisions for equality in family life. Evidently, political preferences rather than religious or cultural imperatives influence state acceptance of human rights standards.

Family law is also highly politicised with states that use the family to shape social control. Ireland's constitution¹² (article 41), for example, privileges a heterosexual, patriarchal model of the family. It even grants the family rights as an institution in itself, distinct from the rights of the individuals within the family. Governments and opposition forces equally use the family as a powerful mobilising symbol. Divorce was such a politically contentious issue in Chile that it was only made legal in 2004. In several countries with secular family laws, from Britain to Senegal to Uzbekistan, a focus of Islamist campaigning has been the demand for some form of state recognition of conservative interpretations of Muslim divorce laws. Hindu fundamentalists have called for a uniform civil code in India (to replace the current parallel family laws) as a means of undermining religious minorities, specifically Muslims.

Second, family is seen as closely related to culture, and the international human rights system, standards, treaty bodies and international NGOs seem to have been largely unable to take a nuanced position regarding culture. In some instances, it appears that the treaty bodies regard culture, tradition and religion as inherently discriminatory,

9. See <http://www.un.org/womenwatch/daw/cedaw/reservations.htm> [last accessed 26 April 2010]

10. See <http://www.jstor.org/pss/762448> [last accessed 26 April 2010]

11. See <http://www2.ohchr.org/english/law/ccpr.htm> [last accessed 26 April 2010]

12. See http://www.servat.unibe.ch/law/icl/ei00000_.html [last accessed 26 April 2010]

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overlooking internal diversities and the changing content of cultures. For example, the CEDAW treaty body has asserted that: 'The application of customary laws in matters of personal status, marriage, divorce and inheritance rights reinforces outdated attitudes concerning the role and status of women'. In contrast to this universalist position, the human rights system in other instances appears prepared to protect culture from criticism no matter what. Two years ago, the Human Rights Council adopted a resolution on combating defamation of religions. Atheists, as well as dissidents within religious communities, fear the resolution could be used to 'effectively place the tenets of religion in a hierarchy above the rights of the individual' and 'be used to silence progressive voices who criticise laws and customs said to be based on religious texts and precepts'.¹³ However, this is an extreme example and more often than not, the human rights system simply frets about how to 'balance' gender equality and the right to culture/religious freedom, as if women cannot possibly have both.

This leads us to the third piece in the puzzle: what some analysts have called the 'gender blind spot' within the human rights system. Legal academic Donna Sullivan wrote nearly two decades ago about 'male domination of policy and law-making processes',¹⁴ which has contributed to the 'inadequate international scrutiny' of the impact of religious laws on women's equality, an impact that is most noticeable in the area of family laws. Despite the passage of several new standards that protect women's rights, the criticism still rings true as regards family laws. More generally, research by AWID (the Association for Women's Rights in Development) has found concern about a religious fundamentalist-led backlash within the international human rights system against women's rights advances.¹⁵ Examples of this backlash include the Organisation of the Islamic Conference (OIC)'s reported efforts to develop an 'Islamic alternative to CEDAW'. Last year, the then UN Special Rapporteur on Violence Against Women, Yaky n Ert rk noted that this needs to be monitored closely by women's rights groups, so that these rights are not subordinated to the 'common good'.¹⁶ Interestingly, the OIC has seen fit to argue the need for a separate convention on women's rights (which would undoubtedly address family laws), but has strongly argued – citing the need to avoid duplication – against a campaign by women's groups for the creation of a Special Rapporteur on laws that discriminate against women.

Fourth, although states and politicians take family law very seriously, in the legal sphere family law is often labelled a 'minor' matter which can, for instance, be left to the jurisdiction of ADR or more loosely regulated legal regimes. The human rights system

13. See <http://www.wluml.org/node/5181> [last accessed 26 April 2010]

14. See http://www1.law.nyu.edu/journals/jilp/issues/24/24_2_Sullivan.html [last accessed 26 April 2010]

15. See <http://www.awid.org/eng/content/view/full/44602> [last accessed 26 April 2010]

16. See <http://www.musawah.org/docs/media/speeches/Keynote%20Address%20by%20Yakin%20Erturk%2014%20February%202009.doc> [last accessed 26 April 2010]

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appears to have absorbed this approach, treating the violation of rights in the criminal sphere as more 'major'. And yet discriminatory divorce and marital property laws can, for example, lead to impoverishment with serious economic, social and even life-threatening consequences for women and children. In part, this approach also stems from the enduring vision of family as a 'private' matter, despite decades of feminist theorising and state actions to the contrary.

So where do we go from here? Although the international human rights system has to date been weak in the area of family law, approaches and opportunities to redress this situation do exist.

In mid-2009, the CEDAW Committee started the process of developing a General Recommendation on the economic consequences of marriage and divorce. This is the first major initiative to set standards in family law¹⁷ for several decades. The Committee heard brief statements from a variety of contexts about the discriminatory outcomes of laws relating to marital property and inheritance. Some highlighted the gap between the theory that men maintain their families and the reality that in today's globalised economies, women share the burden of financial responsibilities. Yet these are issues that cut to the heart of patriarchy across cultures, and developing the General Recommendation will need strong support from human rights organisations if it is to succeed.

Meanwhile, there is evidence that the human rights system can take a nuanced approach to culture. For example, when Sri Lanka reported to CEDAW, the Committee did not sweepingly recommend an end to plural ethno-religious family laws. Instead, it urged the government to take into account recommendations from the 1991 Muslim Personal Law Reform Committee, and seek out best practice from other jurisdictions where law interprets Muslim laws in line with the Convention. Moreover, since human rights are acknowledged as indivisible, there ultimately can be no question of women having to choose between their rights as women and rights to culture.

In 2009, the Human Rights Council created a new Special Procedure Mandate of the Independent Expert on Cultural Rights.¹⁸ The Mandate of the Independent Expert includes identifying best practices in the promotion of cultural rights at the local, national, regional and international levels. The newly appointed independent expert, Farida Shaheed from Pakistan, has a strong background in challenging both the religious fundamentalist and universalist essentialisation of culture, especially in the area of family law. This may offer an opportunity for serious progress in developing a sophisticated analysis of family law within human rights standards.

If it does emerge, this analysis is most likely to be based upon the localised experiences of human rights activists who, like Shaheed, have spent years adapting, moulding and

17. See <http://www.womensenews.org/story/cheers-and-jeers/090906/un-tackles-universal-problem-women-divorce> [last accessed 26 April 2010]

18. See <http://www.wluml.org/node/5564> [last accessed 26 April 2010]

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interpreting human rights standards on family laws in ways that are meaningful on the ground. There are increasing reports from across the world of local courts using the standards in family law cases. For example, a Pakistan High Court referred to fundamental rights guarantees in the constitution and to CEDAW when ruling that a woman could not be forced into marriage.

Family law may appear to be the last concern of the international human rights system, but the extraordinarily high stakes involved – both in terms of its political and symbolic meaning, as well as its impact on people's lives – mean that in the coming decade of CEDAW's existence, family law is unlikely to be its least concern.

A complex relationship: state and non-state legal orders

The search for ways to resolve disputes outside courts and the formal justice system is a universal phenomenon. However, certain presumptions about non-state legal orders need to be questioned.

Non-state legal orders have a complex relationship with the state: while they may conflict, they influence and shape each other in many ways; the line between the state and non-state legal orders is often blurred – in practice or even *de jure*.

In many parts of the world, this blurring of the line between state and non-state is entwined with the history of colonialism. Numerous studies, particularly in Africa and Asia, note how colonial and post-colonial authorities shaped and reinvented 'traditional' authorities to serve political need. Colonial powers, legal administrators in particular, significantly reshaped non-state legal orders' practices. They transplanted them into geographical areas where they did not exist, or into contexts they did not address; they created new 'traditional authorities', even new collective identities, to suit their agendas and purposes.

Many post-colonial states found it convenient in terms of social and political control to preserve the legal orders established under colonialism. In recent times, the reinvention or reintroduction of 'traditional authorities' has often been supported by external forces, such as donors and foreign governments, in situations of post-conflict reconstruction. An emphasis on non-state law is also part of the global process of privatisation, including of law and dispute resolution; this has meant the strengthening of non-state legal orders is not limited to the global South, but is also being increasingly promoted as part of multiculturalism in the North.

The presumption that state and non-state legal orders are necessarily distinct and therefore necessarily clash arises, first, from a tendency to forget that state law and its application does not exist in isolation of the cultural and political preferences of its citizens. Second, this presumption arises from a failure to examine the internally diverse nature of both state and non-state legal orders. At the same time, multiple non-state orders can come into conflict with one another.

The non-state is not necessarily traditional. It may be subject to contemporary influences, and can be created by internally driven processes or because of external facilitation. While the state system may be inadequate, non-state legal orders are not always quicker, cheaper, more

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accessible and inclusive, focused on restorative justice, or more effective in resolving local disputes.

Demand for recognition of non-state legal orders and their incorporation into the formal framework is by no means universal. In many instances, people value state norms and want state institutions to be more active, not less.

Those on the margins of society are also on the margins of legal orders, state or non-state. Thus, rushing to replace state systems that enjoy little legitimacy with non-state mechanisms (or vice versa) may make little difference if 'choices' between state and non-state legal orders leave issues of power unexamined.

Use of both state and non-state systems is also often gendered. The use of non-state legal orders may be a social or economic compulsion, or may be due to the inaccessibility of the state legal order, rather than reflecting a normative or ethical preference. The tendency to confuse facts with aspirations perhaps arises because of a failure to examine in context the reasons why people act as they do.

States engage with non-state legal institutions in ways that deeply challenge the supposed separation between the state and non-state legal orders. Often in practice, state and non-state legal orders may be so intertwined that it is impossible to draw a clear line between what is 'state' and what is 'non-state'. At the same time, however, each may tend to represent itself as different in order to claim distinct legitimacy or challenge the other's authority. In sum, they influence each other through a relationship characterised by a mixture of competition and collaboration. For human rights advocates this complicates the task of determining the responsibilities of different actors and their culpability in case of rights violations, and of making effective recommendations. The central question to be examined in analysing state and non-state legal orders is whose voices are heard when deciding the content of laws and rules, and how these are to be applied in practice.

9. Gender analysis of child support in the Caribbean: legal, socio-economic and cultural issues for consideration

*Roberta Clarke, Tracey Robinson and
Jacqueline Sealy-Burke*

This chapter vividly highlights the extent to which childcare is a feminised responsibility with the expectation that children are the primary responsibility of mothers. Indeed, the great majority of applications made to the courts in the Caribbean are made by mothers. The chapter is based on research undertaken by the authors with support from IDRC and UNICEF and published by the UNIFEM Caribbean Office in 2008 as 'Child Support, Poverty and Gender Equality: Policy Considerations for Reform'.

Background

There is already state investment in the resolution of issues relating to, primarily, financial support to the care of children. This investment is evident in justice processes, including legal aid programmes and in public assistance programmes. However, state involvement is predicated on the assumption and indeed active encouragement that parents carry the main responsibility for the care of children. This position is a historical one, where the state sought to devolve responsibility for the care of families squarely onto the private sphere.

In the Caribbean, this burden is a particularly feminised one as women are the primary caretakers of children, a fact coded into the language of 'female-headed households'. Such households are not usually ones where women are understood as the primary authority figures with the presence of a residential partner. Rather, the singular feature of such households is the absence of a residential adult man living in partnership with the woman head. Single women-headed households now account for almost half of all households in many parts of the Caribbean.

There are few areas where the courts are used more than for resolution of child support disputes. Most people's interactions with the court system, with the concepts of justice and rule of law, are tied up in working out parental obligations for caring for children – be it financial and/or custodial. Yet this is a system attended by deep dissatisfaction. Users of the court system complain about inadequate and discriminatory laws, delays, the low level of awards, inefficient administration, distant and hostile judicial officers and impunity for non-compliance with court orders. These complaints remain

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mostly unaddressed. Law reform in the Caribbean in this area has been at best piecemeal, but more generally absent.

The inadequate legal framework is matched by a social protection system that pays little attention to the needs of single parent, low-income households. Childcare is not only a peculiarly feminised experience in the Caribbean; it is also a privatised responsibility, with only limited experience of the state having a role to support families and children who live in poverty. There is little by way of public assistance or social protection programmes aimed specifically at alleviating the experience of poverty in women's households.

Still, what public assistance programmes exist are perceived by many women as offering an alternative pathway for child support and therefore some measure of economic stability. The role of public assistance in the area of child support is therefore critical. However, research in the region has suggested that public assistance laws and policies make no special allowance for mothers who have exclusive responsibility for the care of their children. The programmes do not address the feminisation of poverty.

Solutions to the poverty of women's households in the Caribbean ought to be informed by an appreciation of the root causes of the economic insecurity of single female-headed households. Men's failure to make regular payments, or hostility to make child support payments at all, is a feature of Caribbean family relations. And there can be no doubt that the intersection of multiple social and economic realities creates a policy challenge. Significant proportions of children do not live in two-parent households. Many people have children with more than one partner, and as a result non-custodial fathers may have children living in more than one household and mothers may have children who do not necessarily share the same father. As Wyss points out 'complicated residential patterns beget complicated income and resource pooling patterns'.¹

Social welfare provision and child support are inextricably linked. Although the two systems do not necessarily work together as an integrated system for the benefit of economically marginalised families, they converge to ensure that the cost of care-giving remains primarily a private matter. In other words, both judicial proceedings and social welfare services underscore private parental responsibility to support dependent children.

For women and men who have children together, the mutual consideration required to meet and treat the best interests of children with sincerity and commitment may not exist because of a possible brief or fragile inter-personal relationship. Complex and fluid partnering dynamics also help to explain the contestation around child support. In the Jamaican context, resource transfers from men to women is in part a transfer of resources from 'babyfathers' to 'babymothers', rather than a transfer from fathers to

1. Brenda Wyss (1999) 'Culture and Gender in Household Economies: The Case of Jamaican Child Support Payments'. *Feminist Economics* 592, pp.1–24.

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children. This is an important distinction, which can help to explain the cessation of support when the intimate relationship between parents ends. Gender-based ambivalences about roles and expectations of women and men for childcare also complicate the efficacy of purely legal solutions.

Fathers of the children of single poor women are also likely to be from a similar social background. High levels of unemployment, casual employment and informal sector employment leave such men with fluctuating incomes, which in any event cannot be attached at source – an enforcement mechanism which features strongly in the jurisdictions discussed above.

Who should be responsible for the care of children? How should the responsibility be apportioned between parents and between parents and the state? These questions are fundamentally linked to women's empowerment and gender equality. To the extent that public policies applied by the courts take for granted and therefore reinforce unequal gendered reality, economically marginalised women and their households will continue to experience deprivation, including poverty transmitted inter-generationally.

Persistent dualities

Historically there was a dual system of family justice in child support matters, with sharp distinctions in the nature of child support proceedings in superior and inferior courts. Access to justice depended to varying degrees in the region on the marital status and class of the parents of children.

Two jurisdictions in relation to child support developed. First, there was the summary court jurisdiction, transferring responsibility for the poorest from the state to families. The summary jurisdiction ultimately focused on giving 'single women' access to the courts for child support, and was premised on women's assumed primary responsibility to care and support their children. By placing limits on 'single men's' right to apply for child support, custody and access in the courts, the law reinforced rather than challenged existing inequalities in the burden of care. These summary proceedings had a strong quasi-criminal flavour, and historically criminal sanctions were imposed on both mothers and fathers who were not in compliance with the law.

In the superior courts, child support was generally secondary relief in adult-centred proceedings, including divorce, separation and spousal support. This superior court matrimonial jurisdiction was ideologically, though not practically, at the centre of family justice, and marital relationships had primacy in the family justice system.

Notwithstanding, this duality has been maintained in most Caribbean countries, even with the passage of status of children legislation. As a result, in most Caribbean countries married persons and their children (and 'unions other than marriage' in Barbados) have simple access to the superior courts for relief, while other families are confined to resolving child support questions in the summary courts.

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Dualities in the legal process persist, even where formal discrimination in the laws has been removed. Proceedings in the lower courts are generally less forensic, with less documentary evidence of means and needs provided to the courts. Record keeping is generally less well organised in the summary courts, making it difficult to track the progress of individual cases over time.

In Trinidad and Tobago, for example, where formal dualities have been removed, in practice the High Court is dominated by child support applications that are ancillary to divorce proceedings. Very few applications are made to the High Court in respect of families not based on a marriage. Magistrates bear much heavier caseloads, despite their complex and multidimensional responsibilities in family matters and the relative dearth of lawyers. With more time to devote to each case, superior court judges are generally more responsive to the needs and concerns of litigants.

Even where law reform has eroded some dualities, as in Trinidad and Tobago, many Caribbean countries have retained overlapping and multiple jurisdictions in child support, with different criteria applying depending on which statute and which provision is invoked. That lack of coherence in the legal principles undermines the goal of equal protection of the law.

Despite improvements in the justice sector, including the Family Court Pilot of Trinidad and Tobago, there is consistent dissatisfaction with:

- Inefficient administration leading to delays (over-burdened courts and service of documents in particular),
- Limited fact finding on means of parties,
- High levels of judicial discretion,
- Significant involvement of non-judicial officers in dispute resolution,
- Low levels of awards,
- Significant non-compliance with court orders, and
- Limited avenues for enforcement (imprisonment still being the primary method, with Attachments of Earnings order little used and unavailable to persons in the informal sector, as well as to public servants in Barbados).

In addition, relations between women and men are often fraught, characterised by anger, resentment and distrust. In many ways, courts are called upon to manage this discord, and this role can overshadow the court's central role of ensuring an equitable sharing of the care responsibilities between parents.

Social protection systems only partially address the needs for resource support by low-income families, particularly those headed by single mothers. One of the most contested issues is the requirement that women use the court system as a pre-condition for qualification for public assistance.

Gendered realities and conflict dominate the legal process

Socio-economic status of applicants

The applicants for child support are overwhelmingly mothers whose income is often lower than that of the fathers against whom orders were being sought.

The menace of domestic violence

Domestic violence is a prominent feature of many intimate relationships in the Caribbean. Applications for protection orders take up a significant part of magisterial time, and the spectre of domestic violence lurks in child support cases. In some instances, there were protection order applications pending between parties in child support proceedings. A review of national assistance in Barbados found a significant number of fathers who were reportedly in jail, many for offences of a violent nature, and in direct interviews with women receiving national assistance the theme of domestic violence also featured highly.

Apart from the violation of personal security, domestic violence in a stark way undermines the capacity of women to physically and financially take care of their children. Additionally, the threat and/or experience of abuse effectively interferes with the ability and will of mothers to demand timely, reliable and fair monetary contributions for the care of children.

In addition, the adverse judgment that child support proceedings are a venue for unseemly and irrelevant post-relationship disputes can make domestic violence and a violent father seem irrelevant to the determination of issues of support, custody and access.

Courts as sites of gender conflict

Strong perceptions about the motives, behaviour and morality of women who initiate child support proceedings and men who are respondents to them influence the character of the proceedings. Child support proceedings are routinely described in ways that suggest gender conflict between women and men, with the courts as a battleground, negotiating the detritus of failed and fragile intimacies. Furthermore, those involved in the administration of child support claim consistently that children do not come first, rather that the latter are subordinated to man–woman conflict.

The initiation of stand-alone child support proceedings in summary courts generates strong hostility and resentment on the part of many men. Many complain that such proceedings are motivated by vindictiveness on the part of the mother, are fundamentally unfair where the father has been providing some support, and that the process makes them feel like a criminal.

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Mothers, on the other hand, say that they are often the recipients of strong reactions of hostility and resentment on the part of fathers, who sometimes make the pursuit of the action difficult by making service difficult, denying paternity or failing to appear in court. Mothers described irregular and inadequate support and the changing and growing needs of the child as major motivations for litigation. Women consistently complained that men who provided adequately during the intimate relationship changed the regularity and quantum of support after the relationship ended.

Once initiated, both men and women describe high levels of dissatisfaction with the court process, but offer very different reasons for their dissatisfaction.

Gender ideologies

It is suggested that better trained judicial officers and social workers are less likely to be guided by dominant ideologies that reinforce gender inequalities.

Negative perceptions about the initiation of child support proceedings by mothers can place a burden on those mothers to overcome deeply entrenched presumptions by proving that they are not being unreasonable.

There is also harsh censure among some judicial officers and social service personnel of men deemed to be deviant fathers, usually described as men who are young and unemployed with 'Rasta hairstyles'. Conversely, considerable effort is made to support and accommodate men who are not deemed hopeless 'lowlifes', and are engaged in activities that are viewed as worthy, progressive ones for 'men' and that will improve their 'future'. For many decision-makers, the 'future' of mothers is little considered in child support proceedings, as theirs is seen as more naturally connected to the raising of children. Men, on the other hand, are assumed to have independent lives that should be facilitated.

In sum, the lives of women are still expected to be centred on their children, yet the legal system puts little value on those relationships of dependency. Men, on the other hand, get rewarded for being attentive to their children. The discourse of independence has also now been impressed on women, so that while the caring work of women is both assumed and discounted, the expectation that they are equal economic providers has gained ascendance.

Embattled enforcement and poor compliance

Compliance with child support orders is weak throughout the Caribbean, and summary courts spend a significant amount of judicial time dealing with arrears. There is wide acceptance that the collections systems in the summary courts are ineffective and that they unnecessarily burden applicants.

It is evident that coercive enforcement mechanisms like imprisonment do little to produce compliance. There are a number of possible explanations for this. First, imprisonment

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does not serve as a deterrent when judicial officers and law enforcement officers fail to use it consistently, or treat it as a last resort and give men, particularly men with some means, second chances to comply with orders. Second, to the extent that the use of imprisonment is viewed by many men and others as unfair and demeaning, especially when they are genuinely unemployed and without resources, it puts the legitimacy of the entire child support system in question and undermines the likelihood of compliance.

Poor collections system

Child support is marked by dual collection systems. Orders made by the High Court are paid pursuant to arrangements agreed to by the parties. It is different in the magisterial jurisdiction, where payments into court are mandatory. This insertion of the state into the payment in and out of court is a source of significant discontent.

The justification for the payment into court requirement is the connection with court-driven enforcement procedures. Non-compliance automatically triggers the issuance of warrants. The advantage of this is that the costs of enforcement are borne by the state, as non-compliance is seen as a contempt of court. However, this requirement of court-connected payments undermines privacy, is time consuming and timeliness of pay out is dependent on court administrative processes.

Uneven use of attachment

Timeliness of meeting payment obligations can be enhanced through the use of attachment processes. However use of this method is uneven for a number of reasons. First, attachment is seen as a possibility only if there is an attachable source of income, as in the case of salaried persons. Therefore, attachment has not been used for self-employed persons or for casually employed or unemployed persons. In addition, it would appear that attachment is not legally possible for certain classes of public officers in certain Caribbean jurisdictions.

Otherwise, attachment is less used than it could be as procedures are complicated. To meet the court order it requires a computation of protected earnings and deductible earnings, rather than a straightforward deduction.

Poor social welfare response to female poverty and dependency

The underlying philosophy of public assistance programming and service delivery is the primacy of familial responsibility for the care and support of its own members. Accordingly, entitlement to cash grants or any other form of assistance is only possible where child support from the father cannot be realised. Applicants are required, therefore, to pursue child support before final consideration is given to a request for public assistance.

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It is at this intersection of public assistance and the courts that women most acutely experience frustration over societal expectations that must carry the burden of care of children. Public assistance grants are not only small, but likely to be withdrawn if the woman makes an application to the courts for child support. The irony, however, is that court awards, particularly those made in the magistrate's court or those made in relation to economically marginalised fathers, are unlikely to take women and children out of poverty. Yet the making of the award reduces eligibility for a grant, so strong is the ideology of the primary role of parents.

There is reluctance in the provision of social welfare to acknowledge that the assumption of childcare responsibilities by women generates economic dependency and vulnerability. Sex discrimination may manifest itself not only in terms of unequal access to available benefits, but also in the very language of the legislation and the application of its provisions.

One of the most disturbing indicators of deeply entrenched discrimination was the head of the household philosophy seen in Trinidad, which evidently translated into a presumption of male household leadership. This triggered a number of programmatic features that were blatantly sexist and inequitable, requiring urgent redress both in terms of policy changes and legal reform.

In Trinidad, the 'deserting father' category of public assistance applicants is riddled with difficulties, and by the very nature of the category has a disproportionately negative impact on women. However, it is important to note that the creation of this category of applicants has also excluded fathers who have custody of their children from applying for public assistance in circumstances where the non-custodial mother has 'deserted', and makes no financial contributions to the support of the children. This is undeniably another manifestation of gender inequity deserving urgent attention.

The exclusion of unemployment as a ground for public assistance in Trinidad seriously prejudices women who are not working because of the burden of caring for families. Barbados does not exclude unemployment, thereby recognising that this is generally a significant factor contributing to poverty, especially given the particular vulnerabilities of women with childcare responsibilities.

The inadequacy of public assistance grants is perceived by not only the recipients, but also by social welfare officers who readily concede that welfare on its own is not a viable option for women with children to support. This assessment of insufficiency also extends to child support payments.

Despite the acknowledged inadequacy of both potential sources of support, the research findings upon which this chapter is based revealed that the possibility of combining both income sources was rarely offered as a solution to easing the many financial stresses experienced by impoverished women and their families. The situation in Trinidad demonstrated that most welfare officers viewed receipt of child support, regardless of its quantum, as an automatic barrier to qualifying for public assistance.

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The treatment of child support and public assistance as mutually exclusive is evidently a serious impediment to realising effective responses to female poverty, and deviates from the main consideration of 'need', which is supposed to be the overriding criterion in determining welfare eligibility.

Realistically, the granting of a child support award through the court often does little to remove that element of 'need', yet it could potentially serve as a useful source of supplementary income. The feature of 'topping up' inadequate child support payments with public assistance grants would therefore be a positive step in the right direction, one that moves towards improving the economic conditions of female caregivers and their families.

Consensus-driven pragmatic resolution of child support disputes

Child support determination is very much shaped by a desire to arrive at a consensus between the parties. In many cases, the court takes the parties into a mediation mode in which the applicant states what she wants and the respondent says what he is willing to pay. Many judicial officers work around these figures, adjusting 'based on all the circumstances of the case', or more crudely splitting the difference between what is asked and what is offered.

There is a strong sense in which women are expected to be reasonable, though factors for assessing the reasonableness of responses or of demands have less to do with evidence of children's needs and parties' abilities than the imperative of quickly reaching a resolution. The need to reach a resolution is one that seems to be driven by concerns over delays, by concerns that consensus will result in higher rates of compliance, by realism about the means of parties, as well as by the need to get through long court lists.

Although the means of the parties is a fundamental ingredient of judicial decision-making in child support cases, less formal evidence of means is available to all the courts than might be expected. Related to this, there is less forensic evaluation, such as evidence given under oath or evidence of proof of income, than one might expect in a legal process. Given the large caseload of magistrates, there is little time for careful fact finding. In the High Court, the situation might be explained by large numbers of consent orders on child support in divorce applications.

The users of the court system directly and indirectly criticise these methods, which from the applicants' side do not adequately respond to children's needs and from the respondents' side fail to properly establish the means of the parties.

Endnote

The extent to which legal frameworks have credibility depends of how closely they match cultural norms or make strong statements about the need to transform dominant

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and harmful cultural norms. The legal system can be understood as having three core components – the substantive (content of the law), administrative (access to justice components) and cultural (the way people feel about the law).

In relation to the cultural, parental responsibility for children is a highly contested area in the Caribbean, with clearly visible schisms between women and men over the nature of this obligation. The extent of non-compliance or uneven contributions to children suggests that legal reform will have to be accompanied by sustained and impressive social communication strategies, which can transform the notion that childcare is the female realm of responsibility and that father contributions are discretionary, to be accomplished with residual income.

There is much sociological literature that speaks to the centrality of women in social reproduction, including the seminal and aptly titled study 'My Mother who Fathered Me'.² These studies document the burden of care, women's survival strategies, the phenomenon of male familial mobility and multiple households. This reality is not an uncontested one. While women-headed households signify to some extent women's relative autonomy, they also carry the higher likelihood of experiencing poverty and the transmission of inter-generational poverty. It is not just the drawing down on resources that social reproduction entails creating the likelihood of poverty, but also the gendered reality of many Caribbean women who work in the lowest paid sectors of the economy.

The care of children necessarily, then, involves something of a struggle between mothers and non-residential fathers to define and attain adequate levels of financial contribution to the care of children. In this struggle, the courts – and particularly the magistrates' courts – are key arbiters of disputes over monetary flows. Significantly, they are also the location of social values about the allocation of responsibility for the care of children.

Stereotypical notions of gender ascribe to women the role of the primary caretaker of children, which in many families means physical, emotional and financial care. Women are expected to get on with the job of childcare, including making the efforts necessary to realise a deeper commitment on the part of fathers to their children. The burden of resolving adequate provision for children rests squarely on women.

The current research clearly establishes that mothers initiate most of the applications for child support. This brings the consequential burden of seeking legal representation (particularly in the High Court) and the costs of doing without it where it is unaffordable. Where it is available, legal aid is heavily relied on by applicants for child support; nonetheless, some applicants find the process of qualifying arduous and complex and never apply for legal aid.

The increased use of DNA testing has reduced the burden on applicants of proving paternity, but applicants still bear the burden of delays in proceedings due to non-service of documents on evasive respondents. The burden is two-fold: the unavailability of support while proceedings are being determined, and the direct costs of multiple visits to court in terms of lost

2. Edith Clarke (1999) *My Mother Who Fathered Me: A Study of the Families in Three Selected Communities of Jamaica*. Kingston: University of the West Indies.

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earnings, absence from work and transportation to and from court. In some jurisdictions, it is also expected that mothers will partly bear the burden of locating elusive and non-responsive fathers.

During child support proceedings women disclose means in larger numbers than men, and therefore carry the burden of proof of need. At the same time, given the emphasis on consensus, in only the rarest of cases will costs be ordered to recompense the applicant for the incurring of unavoidable costs in sorting out issues that are in the best interests of the child.

While the state assumes formal responsibility for enforcement of child support orders in the lower courts, ultimately mothers are put to considerable trouble to realise the child support. In some jurisdictions, like Trinidad and Tobago, the High Court must make a separate order in respect of arrears. Notoriously, due to ineffective collection systems, mothers often make many wasted trips to the courts to find out if the sums awarded have been deposited. The evidence from this study is that female family members (mothers and sisters) of fathers also assume the burden of resolving child support matters, often paying outstanding child support at the moment that the threat of imprisonment looms.

Given the dominance of the ethos of parental responsibility to support dependent children, a further burden is placed on mothers to exhaust the thorny legal process before applying for public assistance, which in most places provides small sums of support.

The difference made by the Trinidad and Tobago Family Court

The Trinidad and Tobago Family court makes a difference to both process and outcome. In general, cases are being decided more quickly, being heard for the most part by one judge, thus facilitating consistency. Judicial officers in the Family Court appear to have the time, temperament, talent and specialised training to properly carry out judicial decision-making.

However, such improvements are much more evident in the High Court jurisdiction. Both the Family Court and the ordinary magistrate's courts are plagued by long lists, delayed service of documents and high number of dismissal of matters and little legal representation. Added to this is an absence of dedicated process servers and consequential reliance on the over-burdened police process branch.

This component of this research suggests that physical improvements in the surroundings of the court, and even the presence of social services within the building, are not in and of themselves dispositive of the problems experienced by users of the magisterial court system. Rather, systemic changes are needed, including those that would allow for a similar reduction in the caseloads of magistrates and greater efficiency in the service of court documents.

10. Women's dignity and rights: situating Pacific experiences

Mere Pulea

Introduction

All Pacific countries are part of the global movement to improve women's rights and to end gender discrimination and violations. Most Pacific countries have ratified key human rights conventions, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The Universal Declaration of Human Rights 1948 (UDHR), which served as a model for the development of most Pacific constitutions, sets out in article 1 that 'All human beings are born free and equal in dignity and rights.' The UDHR gives recognition to the 'inherent dignity' and 'equal and inalienable rights' to all members of the human family as the foundation of freedom, justice and peace in the world.

Dignity therefore provides the rationale to the requirement of respect of persons.¹ It has also been described as 'the shaping principle...'² that reinforces the intrinsic worth and dignity of human beings.

Discrimination against women is incompatible with human dignity. Given the many examples in the Pacific of deep-rooted traditional customs that place women in subordinate positions and practices that prevent women's equal participation with men in political, economic, social and cultural life, there are equally many examples of strategies developed to end unfair treatment and discrimination against women.

There is a great deal to learn from comparative analysis of the directions Pacific countries are taking in relation to gender equality. The following is a review of the attempts and achievements of the legislature and the judiciary.

Non-discrimination on the ground of sex

To gain a fuller sense of the progress made in the last quarter of a century, it would be prudent to begin with the fundamental constitutional principle of equality. The core element of respect for women's human dignity is grounded in this principle. All constitutions give content to the principle of equality by prohibiting any distinction in the

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1. Mette Lebeck (2004) 'What is Dignity?' *Maynooth Philosophical Papers*, Volume 2, pp.59–69, Faculty of Philosophy, National University of Ireland.
 2. Roberto Andorno (2009) 'Human dignity and human rights as a common ground for a global bioethics'. *Journal of Medicine and Philosophy*, Volume 34, Issue 3, p.223–240.

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enjoyment of human rights on such grounds as race, colour, creed or sex. There are, however, qualifications to the anti-discrimination clauses which give preferential treatment to certain classes of persons to ensure equality. For example, the constitutions of Papua New Guinea (PNG), Samoa and Vanuatu³ exempt the making of ‘... laws for the ... protection or advancement of females, children and young persons...’ from its anti-discrimination provisions. Customary law in some countries is also exempt from the ambit of the anti-discrimination clauses.⁴

Most constitutions, except for Kiribati, Tonga and Tuvalu prohibit discrimination on the ground of sex. This issue has been highlighted in the Tuvalu High Court’s decision of *Tepulolo v. Pou*⁵ where the mother of an ex-nuptial child had difficulty in trying to enforce the right to non-discrimination on the ground of sex.⁶

Positioning of customary law in the legal system

Customary law is recognised as an important aspect of our identity, but culture and customary law does not change the law. Law is developed to accommodate culture and customary practices in society.

The law of marriage accommodates both customary as well as civil marriages. Whilst most countries have a single statutory marriage regime, dual marriage regimes are also recognised in Solomon Islands, Vanuatu and Papua New Guinea.⁷ In all three countries, where parties have married under custom and who undergo a civil marriage are bound by the rules of monogamy. This ultimately affects those societies that practice polygamy, as adultery is a matrimonial offence and a ground for divorce.

The constitutions of all Pacific countries, except Tonga, make specific provisions for custom and customary laws to be applied and legislations have been passed providing for its recognition.⁸

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3. PNG Constitution article 55(2); Constitution of Samoa article 15(3)(b); Constitution of Vanuatu article 15(1)(k).
 4. Solomon Islands Constitution s.15(5)(d); Kiribati Constitution s.15; Constitution of Samoa s.15.
 5. Tuvalu Family Appellate Court Case 17/03, 12 January 2005. See pp.63–65, *Pacific Human Right Law Digest* volume 1. Pacific Regional Rights Resource Team (RRRT).
 6. Case details in this volume, see chapter 12.
 7. PNG The Marriage Act 1963 s.3; ‘A native, other than a native who is party to a subsisting marriage ... enters ... into a customary marriage in accordance with the custom prevailing in the tribe or group to which the parties to the marriage or either of them belong or belongs’.
 8. For example, Laws of Kiribati Act 1989, Laws of Tuvalu Act 1987, Customs and Adopted Laws Act 1971 (Nauru). See Kenneth Brown (1999) ‘Customary Law in the Pacific: an endangered species’. *Journal of South Pacific Law*, article 2 of volume 3. See also D E Paterson (1995) ‘South Pacific Customary and Common Law: Their Interrelationship’. *Commonwealth Law Bulletin*, Volume 21, No. 2, pp.660–671.

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Customary rules incorporated in statutes

The law accommodates the preservation of particular customary rules⁹ as discussed earlier in the Tuvalu case which provides for the two-year old child to be transferred to the father and his family in order to inherit land and property. A similar provision is found in Kiribati.¹⁰ Such customary rules incorporated into statute become frozen and can only be altered or amended through an Act of Parliament.

Transfer of child to the father

Whilst the goal of this provision is to confer land inheritance rights on the child, it also automatically transfers custody rights to the father without enquiry or the application of the child welfare principle. Inheritance rights could be transferred without the child changing residence. The reliance on traditional rules and practices, which is protected by this particular law, is a limitation on the liberties, equality of rights and an affront to the dignity of the mother. In addition, the transfer of custody rights to the father and his family is not subject to challenge as to parental fitness; there is a presumption that the biological tie to the father would serve all the child's best interests. These gender-based customary rules, which deny the mother parental responsibilities and rights, violate equality between men and women as parents.

Repugnancy doctrine

The application of customary law is also subject to the repugnancy doctrine as found, for example, in the constitution of Papua New Guinea.¹¹ Through the use of the repugnancy principle, courts are able to restrict, adapt or oust customary rules, as found in the Papua New Guinea case of *Raramu v. Yowe Village Court*¹² which provides an example of this process:

'In this case, the widow Raramu was sentenced by the village court to six months imprisonment for being involved with another man. The issue whether custom which did not approve of widows in a relationship contravened the equality provision of the Papua New Guinea constitution s.55, the court held that the village court erred as the widows behaviour only breached custom which was oppressive to ... women ... and not in keeping with the dignity of mankind and such custom was not codified as law.'

9. Cook Islands Act s.422; Kiribati Magistrates Act 42(2); Nauru Custom and Adopted Laws Act 1971 s.3; Niue Act 1966 s.296; Solomon Islands Islanders Marriage Act Cap.4, Islanders Divorce Act 48; Tuvalu Laws of Tuvalu Act 1987; Vanuatu Constitution articles 45, 49, 72, 93; Samoa Lands and Titles Act 1981; Village Fono Act 1990.

10. See Kiribati Magistrates' Court Act, Cap.52, s.65(2)(i); Tuvalu Native Lands Ordinance Cap.22, s.20.

11. Constitution of PNG Sch.2, 1.1 (2).

12. [1994] PNGLR (PNG Law Reports) 486.

Status of customary law

Constitutions prescribe the status given to customary law in the legal system; for example the Solomon Islands constitution states that customary law will not be applied if it is inconsistent with the constitution or an Act of Parliament¹³ 'or repugnant to the general principles of humanity'.¹⁴

Whilst the two techniques apply constraints to the use of rules of custom that conflict with the law or are repugnant to humanity in the long term, the *Raramu v. Yowe Village Court* case indicates that courts are likely to make changes, as matters arise for judicial determination, to rules of customs that are oppressive to women. Women, more than before, are encouraged to seek redress when substantially affected by male-orientated customs.

Ascertainment of customary law

The constitutions in the Pacific have entrusted the administration of customary law to local specialist courts such as the village courts (PNG), village and island courts and customary land tribunals (Vanuatu), land courts in Niue, Cook Islands and Kiribati; land and titles courts in Samoa; the Lands Committee in Nauru and the Customary Land Appeals Court in Solomon Islands. These courts are presided over by lay justices and in some countries, also local chiefs¹⁵ who are knowledgeable in custom. The jurisdictions of such courts are determined by their particular warrants.

In order to accommodate the body of customs, the first obligation is the ascertainment of customary law. The scheme for ascertainment as prescribed in the constitution¹⁶ is allocated to parliament to provide:

'... for the manner of the ascertainment of relevant rules of custom, and may in particular provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings.'¹⁷

Although parliament has a duty to provide for the manner in which customary law is to be ascertained, according to Weisbrot 'in essence the constitutional scheme has failed to propel customary law to the fore ... and ... experience has pointed to several problem areas including the ... enormous difficulties inherent in ascertaining customary law on a case by case basis and in separating customary rules of law from customary processes ... and in overcoming conflicts between different customary regimes ...'.¹⁸

13. Sch.3(3)(1)(2).

14. PNG Constitution Sch.2.1.

15. Vanuatu s.52.

16. For example, Solomon Islands Constitution Sch.3s.3(3).

17. Vanuatu Constitution s.51.

18. D Weisbrot (1982) 'The Impact of the Papua New Guinea Constitution on the Recognition and Application of Customary Law' in Peter Sack (ed.) *Pacific Constitutions*, pp.271–290. Canberra: Australian National University Press.

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As customary law is an integral part of the justice system, Kenneth Brown believes that 'attempts to institutionalise customary practices by codification tend to produce the same outcome and create a customary code steeped in a rule-centred paradigm. They also entrench regimes that are conservative and reflect the ideology of those who are consulted in the preparation'.¹⁹

Local courts are left to ascertain customary rules on their own and it would be a disservice not to acknowledge the rich source of decisions made on the most controversial issues affecting the rights of women. The codification of reformative principles in local court judgments pertaining to women's customary rights, in the various areas litigated, would provide guidelines in conflict of law situations.

Whilst there are difficulties in codifying customary laws, there are advantages in codification in that common customary rules will be settled and known to all. There are other views, which state that custom will be frozen and it should be left to evolve and change to meet changing circumstance. The advantage of codifying custom is that the need to prove custom in the courts and varying interpretations of custom will be reduced.

WOMEN'S INHERITANCE AND SUCCESSION RIGHTS

Women's inheritance rights to land

The law accommodates customary law that regulates inheritance and succession rights to customary land. Land rights in the Pacific are not uniform as the land holding system is both patrilineal and matrilineal. Customary tenures are not only very diverse, changes to the tenure systems have undergone continual reinterpretation and often the reinterpreted forms are declared as custom.²⁰ However there are some common features:

- Gender, kinship and rules of inheritance are central to the way in which women's rights to land are determined. Whilst there is an assumption that all members of the kin-group have equal rights to land, in practice there are principal and subordinate rights and various types of rights to portions of land where females also receive shares (e.g. Tuvalu,²¹ Kiribati).²² There are many different kinds of

19. K Brown (1999) 'Customary Law in the Pacific: an endangered species'. *Journal of South Pacific Law*, article 2, volume 3.

20. H W Scheffler (1977) in R Crocombe (ed.) *Land Tenure in the Pacific*, p.287. Melbourne, New York, London: Oxford University Press.

21. T Laupena and K Lutelu (1987) 'Providing for the Multitude' in R Crocombe (ed.) *Land Tenure in the Atolls*, p.158. Suva, Fiji: Institute of Pacific Studies, University of the South Pacific.

22. Bernd Lambert (1977) 'The Gilbert Islands: micro-individualism' in R Crocombe (ed.) *Land Tenure in the Pacific*, pp.164-166. Melbourne, New York, London: Oxford University Press.

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tenures which are not equally distributed amongst the family group. The influence of colonial administration in Pacific Islands land registration and land becoming a more marketable commodity have brought about significant adjustments in land tenure systems.

- Women's inheritance rights to land in the Eastern Pacific (Cook Islands and French Polynesia) are more equal to those of men, while those from the Western side of the Pacific have not made much progress.²³ In Cook Islands, women have, over time, through court interventions, gained the same rights in ownership and control over land as men.
- Where Patrilineal inheritance transmits land through the male line and where there are no male heirs, to daughters. Matrilineal inheritance, largely dominant in Micronesia and parts of Melanesia, assures females rights of ownership which are transmitted through the female line to the next female and male beneficiaries. In some societies, where there are no female heirs, land can pass to the sister's daughters or other close female relatives.²⁴ In Tonga, if there are no male heirs, an unmarried daughter may hold land for life or several unmarried daughters may hold land jointly.²⁵ Women who marry and live with their husband's lineage retain their user rights to lands in their natal lineage.
- Widows can be particularly disadvantaged under customary hereditary and tenure rules. Any rights of continued occupancy of the family home and user rights to land are subject to the authority of the deceased husbands' family.

In recent years, progress has been made in some countries where women in urban societies are able to own both freehold and leasehold land in their own right (e.g. Fiji).

Whilst land claims are predominantly through the patrilineal line, the judiciaries in Pacific countries have made closer examination of customs as a consequence of appellate reviews. We now consider a specific context – judicial decisions surrounding women's rights to customary land.

In the Vanuatu case of *James Abel v. Kalram Timothy and Bersi Timothy*²⁶ the magistrate's court ordered transfer of this case to the island court where chiefs knowledgeable in custom would sit and decide the matter.

In this case, the plaintiff claimed ownership of a coconut plantation through his mother. The defendant brothers claimed that there was no surviving patrilineal bloodline and

23. P Sack and E Minchin (eds.) (1986) See Preface, *Land Rights of Pacific Women*. Suva, Fiji: Institute of Pacific Studies, University of the South Pacific.

24. Ibid, p.79, D Kenneth and H Silas 'Vanuatu, Traditional Diversity and Modern Uniformity'.

25. A Maude (1977) 'Tonga Equality Overtaking Privilege' in R Crocombe (ed.) *Land Tenure in the Pacific*, p.113. Melbourne, New York, London: Oxford University Press.

26. Malekula Island Court, Civil Case 34, 2005.

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therefore the land must pass to the fire tribe. The rule of custom is that the matrilineal system will only triumph on the ground that it is proven before the court that there is no surviving male issue of the bloodline. The court decided on the evidence to adjust the custom ownership of the coconut plantation and that the matrilineal system can be followed in cases where there is no surviving male issue.

In the Papua New Guinea case of *Hila v. Eno*,²⁷ the local land court had to decide whether under Motuan custom, the male or female line can succeed to customary land in a patrilineal society. Under custom, ownership land vests in the eldest son through the father and not through a daughter, with the exception where no male child is born to the man, then the first-born female child can inherit the right of succession, ownership and control of the land from her father. In this case, the court awarded the ownership and control of customary land to the next female claimant.

The Supreme Court in Vanuatu went further in the case of *Noel v. Toto*,²⁸ where there was a conflict between constitutional provisions and customary law with respect to land. In this case, the women of a clan sought a share of the income from the land but Toto claimed that it was customary practice to recognise men's rights to land but not those of women. The Supreme Court held:

'... customary practice was discriminatory and that female members of a family had equal rights over land as men ... customary practice of differentiating between male and female was inconsistent with the constitution of Vanuatu which guaranteed equal rights for women [and] ... that the sisters and female descendants of Toto's family were all entitled equally with the male members to the land and a share in the income.'

Laws of succession

Succession practices in this region have traditionally been based on custom, but today there is a mixture of customary rules, introduced statute law and applicable UK legislation. There is no distinctive South Pacific model of succession as statutes and the customary principles of succession are so diverse.²⁹

With respect to testate succession, many countries have enacted their own legislation.

The rights to the inheritance of customary land are still determined by custom but other aspects of the deceased estate are determined by specific laws.

Family provisions are one of the most contested areas of succession law. In most acts, there are family provision schemes which accommodate challenges to the provisions

27. PGLLC 3, DC554, 29 December 2006.

28. 1995 Supreme Court, Luganville, Santo. Case 18, 1994. See *Pacific Human Rights Digest*, p.27. RRRRT.

29. RA Hughes (1999) *Succession Law in the South Pacific*, p.18. Suva, Fiji: Department of International Justice and Applied Legal Studies, University of the South Pacific.

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under the will.³⁰ In such situations, a court will not issue a document of authority unless satisfactory provision has been made for the deceased's spouse and children. Such provisions have been aimed to eliminate discrimination against the surviving spouse, but the family schemes may not be altogether open as to the class of those who might apply and the types of orders sought. There are also some distinctive features.

In **Solomon Islands**, the court may refuse an application under the Family Scheme of the Wills, Probate and Administration Act 1987, on the basis of character and conduct of the applicant.³¹

Under **Fiji's** Inheritance (Family Provision) Act Cap.61 daughters, sons and a parent could apply for family provisions only if they are incapable of maintaining themselves due to mental or physical disabilities. Married daughters are precluded, but it appears that daughters who were previously married but have become single may apply provided they fit the above criteria.

In **Samoa**, the Administration Act 1975 makes provision for family protection whereby relief out of a deceased's estate will be granted if the court is satisfied that the claimants' are insufficiently provided for (s.47).

The **Kiribati**, Gilbert and Phoenix Islands Land Code Cap.61 has well-defined schemes of succession which differ from island to island. The next of kin can be disinherited if he or she has neglected the property owner.

The **Vanuatu** Will's Act Cap.55 limits those who may benefit from the deceased's estate to spouse and children younger than 18 years, provided that adequate provision has not been made for their maintenance.

For **intestate succession**, some countries such as Tonga, Tuvalu, Tokelau and Vanuatu have no local statutory provisions but the constitutional arrangements are that UK law is in principle applicable³² if deemed appropriate to the local circumstances.

The principles of succession under customary law are integral to the existence of the local indigenous communities and kinship relationships, thus practices in this region are underpinned by the rules of patrilineal and matrilineal inheritance and are so diverse that only examples can be highlighted. Women suffer injustices when their husbands die intestate and where succession is based on patrilineal descent (e.g. in Tuvalu)³³ and on the rules of primogeniture.

30. For example, Fiji's Inheritance (Family Provision) Act Cap.61; Vanuatu Wills Act Cap.55.

31. Section 93.

32. R A Hughes (1999) *Succession Law in the South Pacific*, p.17. Suva, Fiji: Department of International Justice and Applied Legal Studies, University of the South Pacific.

33. Ibid p.27.

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In the Solomon Islands case of *Tanavalu v. Tanavulu and Solomon Islands National Provident Fund*,³⁴ the pension fund was paid to the father of the deceased, rather than the widow. The court ruled that this was in accordance with the customary rule of inheritance by patrilineal succession. The widow could not object that the custom was discriminatory as the constitution specifically exempts custom law from the general prohibition on discriminatory laws.

Not only is the widow denied benefits of the pension fund, her welfare and wellbeing would be in serious jeopardy. The contribution she has made in the lifetime of the marriage has no value in the property distribution scheme. The widow's impoverishment is solely due to her gender.

Women who suffer in both urban and rural areas have little knowledge and few resources to pursue their rights to the deceased estate. Given the restrictions placed on women in both law and customary law, reforms that are not discriminatory to women are needed to settle the basis upon which property and assets of the deceased are effectively and efficiently distributed to those who are deemed entitled.

MARRIED WOMEN'S PROPERTY AT THE DISSOLUTION OF MARRIAGE

Customary Rules

The customary rules involved in the distribution of matrimonial property upon divorce are diverse. In all jurisdictions, customary land cannot be regarded as marital property as it is communally owned. Such land is protected from being sold or alienated by both customary and statute law.

The gifting of land during marriage is well established in Kiribati under the Native Land's Act Cap.61 and the Gilbert and Phoenix Islands Land Code. With the approval of the court, gifts of 'one land and one pit' from husband to wife and vice versa during marriage do not revert to the donors.³⁵

Family homes in villages '*provide legitimacy for one's place in the locality, [and] relationship to the village ... and are regarded as family possession.*'³⁶ Today the village family home presents more complex issues at the dissolution of marriage. There is a trend for family homes to be built, renovated and maintained by financial contributions from both husbands and wives. This signals the importance, particularly for a wife, to retain evidence in order to prove separate contributions made at the dissolution of marriage in order to obtain her fair share or be compensated for loss.

34. 1998 SBHC 4, affirmed 1998 SBCA 8.

35. s.17(2)(3).

36. A Ravuvu (1983) *Vaka I Taukei, The Fijian Way of Life*, p.14. Suva, Fiji: Department of International Justice and Applied Legal Studies, University of the South Pacific.

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The only property that could be termed as 'matrimonial property' and divisible under customary law is that personally owned by the parties such as mats, household furniture, utensils and marriage gifts. The separate property that might be claimed by a wife such as personal jewellery must be specifically determined. Under patrilineal rules of inheritance, a wife is dependent upon her husband and her assets and labour are subject to his control. Property disputes and settlement negotiations are family matters. A wife could leave with little marital assets or none at all.

In the Solomon Islands case of *Sasango v. Beliga*,³⁷ evidence was given that under Malaita custom, upon payment of the bride price, a wife had no right to children and to property of her own. The court ordered that there must be formal proof of custom and decided to award the disputed property to the wife, not on any discernible principle of property distribution under customary law but on the basis that the wife was a credible witness.

Statutes

Matrimonial property under local introduced law is the least developed. The division and distribution of matrimonial property is increasingly complex with more women in the workforce and with the acquisition of material wealth.

In response, a number of countries have enacted specific laws on matrimonial property:

- **Cook Islands:** The Cook Islands Matrimonial Property Act 1991–1992 gives recognition to the contributions made by the husband and wife to the marriage partnership and to provide for a just division of matrimonial property between spouses when their marriage ends. The New Zealand Matrimonial Property Act 1976 is also part of the Law of Cook Islands. Native land is exempt from the application of this act.
- **Fiji:** the Family Law Act 2003 makes extensive provision for the distribution of matrimonial property, including homemaker contributions, and gives the court extensive powers to alter interests in property (s.161(1)) and in all circumstances, orders made must be just and equitable (s.161(6)). The presumption of equal contribution is applied which may be rebutted on the facts of the case and the repugnancy principle (s.162(2)).
- **Tuvalu:** The Matrimonial Proceedings Act (Cap.21) gives the court powers to adjust the property rights of the parties to a marriage as considered necessary and desirable and any orders made to divide, transfer or vest property of the parties, 'shall not be unreasonable or inconsistent with any other law or any applicable Tuvaluan custom' (s.13). In order to limit as far as possible the continuing bad effects of the breakdown of a marriage, the court shall use its best endeavours to

37. 1987 SILR 91.

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finally conclude all matters to which this section relates, before the divorce is granted, and as far as practicable by consent.

In some countries where there are no domestic provisions relating to matrimonial property, UK legislation which has not been repealed forms part of the law of the country and will apply. Some examples are:

- **Tonga:** The Divorce Act of Tonga (Cap.29) does not provide for matrimonial property. However under the Matrimonial Causes Act 1973 (UK legislation applying to Tonga), Part II provides for property settlement, adjustment and transfer orders for the parties at the termination of marriage. In making orders, the court takes into account income and future earnings, financial needs, standards of living, age, physical or mental disability and contributions made by each party to the marriage. The Matrimonial Homes Act 1967 (UK Law applying to Tonga) protects a spouse who has no legal or beneficial interest in the matrimonial home against eviction or being excluded from the matrimonial home except with the leave of the court. This is a right of occupation but confers no proprietary interest.
- **Vanuatu:** The Vanuatu Matrimonial Causes Act Cap.192 does not provide for matrimonial property. The Matrimonial Causes Act 1973 and the Matrimonial Homes and Property Act 1973 (UK legislation applying to Vanuatu) empowers the court to settle, adjust and transfer property as considered just.

Traditional roles and fault in property distribution

Under statute law, most Pacific countries still retain the fault grounds for divorce with the exception of Fiji, where marital fault is not a factor in obtaining a divorce on the irretrievable breakdown of marriage. The complete breakdown of marriage as the sole ground for divorce is found in Nauru, Tuvalu and Tonga,³⁸ but marital fault is still to be proved before a divorce can be granted.

The traditional roles of husbands and wives tend to persist in divorce and the distribution of marital property. Central to the fault-based divorce rules is marital misconduct, which still plays a role in determining spousal support, child custody and distribution of marital property. For example in the Fiji case of *Philp v. Tupounia*³⁹ the court took into account the adultery of the wife in making a division of property, which under the new Fiji Family Law Act 2003 would not be a factor.

38. Cook Islands Matrimonial Proceedings Act 1993 (NZ) applying to Cook Islands; Fiji Family Law Act 2003 s.30; Nauru Matrimonial Causes Act 1973 s.3; Tonga, under the Divorce Act Cap.29, s.3 provides for fault grounds but under the Matrimonial Causes Act 1973 (Laws of the United Kingdom applying to Tonga) s.1 provides for the irretrievable breakdown of marriage as the only ground for divorce.

39. Civil Action 92, 1977.

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The issue of fault in the property distribution schemes is complex, particularly where homemaker responsibilities, disproportionately borne by women, are not taken into account. It can be argued that using fault factors in the distribution of marital property produces unfair results, while supporters of the fault factors claim that they serve a legitimate purpose as a spouse should be held accountable and should not be rewarded for marital misconduct.

The division of marital property under the Family Law Act of Fiji is based on financial needs of the parties rather than fault. Homemaker responsibilities, income, property and financial resources are taken into account to determine equitable distribution. Where the law does not provide for the presumption of equal contribution, the courts have applied this principle as found in the Solomon Islands case of *Chow v. Chow*.⁴⁰

In Vanuatu, the Matrimonial Causes Act (Cap.192) contains no power to distribute property but the Court of Appeal's ruling in *Joli v. Joli*⁴¹ has important implications in solving the division of matrimonial property, governed by customary law, through the use of the Matrimonial Causes Act 1973 (UK). Farran⁴² states that the Court of Appeal's use of the UK act to fill the lacunae in the Vanuatu Matrimonial Causes Act '... opens the possibility that a number of parts or sections of UK legislation (which has not been repealed) might be relied on to supplement or fill gaps in existing Vanuatu legislation...'

DOMESTIC VIOLENCE

Violence against women

The law has been slow to move to protect women from domestic violence. Domestic violence is a breach of women's human rights and an affront to their dignity.

Tireless efforts have seen women victims now increasingly turning to the courts for protection. The subordinate role of women in traditional societies and the accepted practice of wife-beating as a form of discipline is common. Women have traditionally been reluctant to come forward due to a lack of financial resources, knowledge and access to legal counsel and courts combined with shame, fear, intimidation and family collusion with abusers – and often a belief that remaining with an abusive husband is in the children's best interests.

In examining the trends in cases with domestic violence issues, several themes emerge, some indicating promising practices whilst others remain problematic.

First, domestic violence case management by law enforcement agencies has been a high priority for action over some years. The development of 'No Drop Policies' was

40. [1991] SBHC 34; High Court Civil Case 248 of 1989.

41. [2003] VUCA 27; Civil Appeal Case 11 of 2003 (7 November 2003).

42. S Farran (2003) 'The Joli Way to Solving Legal Problems: A New Vanuatu Approach?' *Journal of South Pacific Law*, volume 7, issue 2.

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a first major step for the police force to take domestic violence cases seriously. Training provided by various women's groups and regional agencies such as those under the Pacific Prevention of Domestic Violence Programmes (PPDVP), implemented by the New Zealand Police with support from New Zealand Aid and the Pacific Chiefs of Police, have gone a long way to improving police responses to domestic violence.

Second, men's involvement in anti-violence efforts, with encouragement from women's groups, is providing leadership to improving responses to victims of violence. Many more are needed.

Third, training of judicial officers and the legal fraternity by the Regional Rights Resource Team (RRRT), the Pacific Judicial Development Programme (PJDP) and the understanding that their efficacy is directly linked to the victim's ability to stay safe. In 2008, under the PJDP, the training of magistrates in Kiribati piloted safety planning, risk assessments, action plans for victims and making appropriate referrals to counselling services to become an integral part of the courts' intervention practices in domestic violence cases.

Fourth, the issue of domestic violence under national laws remains problematic. There is wide concurrence that national level law reforms are needed as far too many victims of violence are left unprotected and inadequately served. The criminal laws on assault cover all types of assault, such as aggravated assault and assault occasioning grievous bodily harm, but domestic assault is not a separate category of offence under this head of the law.

Assault on a person is a crime and the customary practice of wife-beating is not a defence. Protection orders⁴³ and good behaviour bonds are often too difficult to enforce and are insufficient to deal with the specific issues of violence.

Whilst courts in the Pacific are empowered to hear cases of assault, specific legislation on domestic violence remains a priority. 'Fiji and Vanuatu have specifically targeted domestic violence laws. Papua New Guinea and Marshall Islands have passed legislation dealing with sexual violence.'⁴⁴ Cook Islands enacted legislation in 1994 to provide for separation, occupation and non-molestation orders.

Enacting specific laws for domestic violence is one measure to protect victims. A variety of measures are needed to eliminate domestic violence as some interventions have limited ability to make a difference to the lives of women victims, particularly in serious dysfunctional cases. Courts would need to determine the set of responses that would keep victims safe, as sanctions against abusers in small close-knit communities are difficult to enforce. Victims and their children need a variety of community services, which in some communities are limited or do not exist at all.

43. See Cook Islands Amendment Act 1994 which makes provision for separation and non-molestation orders.

44. I Jalal (23 March 2009) *Fighting Violence Against Women in the Peaceful Pacific Islands* UN Radio. See <http://www.unmultimedia.org/radio/english/detail/71648.html>

INTERNATIONAL HUMAN RIGHTS CONVENTIONS

The ratification of international human rights treaties has significant implications for the administration of justice.

All Pacific countries are parties to:

- The Convention on the Rights of the Child (CRC), and
- With the exception of Nauru and Tonga, all countries are parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),
- Nauru, Papua New Guinea, Samoa and Vanuatu are parties to the International Covenant on Civil and Political Rights (ICCPR), and
- Papua New Guinea and Solomon Islands are parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

These core conventions embed gender equality, human rights and human dignity.

The Bill of Rights in Pacific constitutions is strengthened by international human rights treaties mandating protection against gender discrimination. Treaties will however not be recognised by the courts unless given domestic effect by enabling legislation.

A device available under the 1997 Fiji constitution contained an effective model to overcome the difficulties posed by the lack of enabling domestic legislation and is found in section 43(2) which provides:

‘In interpreting the provisions of this chapter (i.e. the Bill of Rights) the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regards to public international law applicable to the protection of the rights set out in this Chapter’.

The domestication of international human rights treaties has been a slow process in the Pacific and in some cases, the courts have taken the view that if ratified treaties have not been incorporated into domestic law, no account will be taken of them. This is the case in Cook Islands, Kiribati and Tuvalu.

In the Cook Islands case of *R v. Smith*, the High Court held that the ICCPR Convention does not apply because the covenant had not been enacted as part of the law of the Cook Islands and had no legislative effect.

In the Kiribati Case of the *Republic of Kiribati v. Iaokiri*⁴⁵ the High Court held that the CRC did not form part of the laws of Kiribati, unless it was given the force of law there.

In the Tuvalu case of *Tepulolo v. Pou and Attorney General*, the court was of the view that although Tuvalu had ratified the CRC and CEDAW they were not made part of

45. [2004] KIHIC 142; Criminal Case 25 of 2004.

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domestic law and no account could be taken of them in the awarding of the ex-nuptial child to the father.

The three above cases are indicative of the dualist approach in countries which have been influenced by the UK-style legal system. Ratified treaties do not automatically apply unless appropriate national legislation has been passed to give the treaty the force of law domestically.⁴⁶

However, in Samoa, Chief Justice Sapolu applied an international convention to which Samoa was not a party in the child abduction case of *Wagner v. Radke*⁴⁷ and held:

‘Even though Samoa is not a signatory or party to the Hague Convention of Civil Aspects of International Child Abduction of 1980, the court must have regard to the principles and philosophy of the convention in applying common law principles to the case ... and ... as a tool to guide and aid the court, it could use the Conventions’.

Resorting to international human rights conventions as a tool to guide the courts has been used in other jurisdictions, particularly to strike down gender discrimination, even though the convention has not been made part of domestic law. States are obligated to respect and protect human rights and governments are required to put in place domestic measures and legislation compatible with ratified treaty obligations. The effect of the failure to make the convention part of domestic law is that women’s rights do not improve.

The High Court of Australia, in the *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) considered whether ratification of the CRC by the Australian government meant that the executive arm of government had to abide by the principle of the convention. The court held that:

‘... ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention’.

This was the position of the High Court of Australia, despite the fact that enabling legislation had not been passed to incorporate the provisions of the CRC.

‘There is a positive duty which the High Court held existed as compared with the insistence by courts in some Pacific jurisdictions for the passing of domestic legislation to give effect to ratification.’⁴⁸

46. School of Law, University of the South Pacific.

47. [1997] WSSC 2; Supreme Court of Samoa (Misc.) 20701 1997.

48. P I Jalal and J Madraiwiwi (eds.) pp.88-90, *Pacific Human Rights Law Digest* volume 1; RRRT.

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The Chief Justice of New Zealand, The Rt. Hon. Dame Sian Elias, commented in her paper 'Vindicating the Rights of Women'⁴⁹ that:

'... the conditions that promote the observance of human rights within the community lie substantially outside the courts. The law has a part to play – but it is only a part ... we should not however feel discouraged or impatient about the progress in implementing the human rights of women. Nor should we feel that cultural and social diversity blocks their achievement domestically. We are part of the process that may be lengthy. Domestic application of international law standards entails translation and care'.

The question is whether women in the Pacific are able to rely on international human rights conventions and the notion of human dignity to bring about gender equality? The short answer is yes. Ratification of human rights conventions is a major step and signals a promise that women in our diverse communities may enjoy the guarantees of equality, but implementing domestic legislation is necessary to meet this goal.

Conclusion

There is no question that legal pluralism in Pacific countries poses many challenges, but some themes emerge:

- Where domestic law has made inadequate provisions on a particular subject matter, solutions for a fair outcome have been found in received law, as in the Vanuatu case of *Joli v. Joli*.
- The courts in the region have made inroads into correcting discrimination against women in situations where customary law only benefits those of patrilineal descent to land ownership. The trend in court judgments is that women are able to claim land rights in the event the male claimant line is exhausted. Women are able to own land (Kiribati, Nauru, Niue, Cook Islands), freehold and leasehold land in their own right (Fiji) and obtain shares in land (Tuvalu).
- The courts in the Pacific have had many years of interpreting and addressing the conflicts between the constitution, statutes and customary law and they are influential in trying to correct discriminatory practices. Effort is needed to consolidate the principles in court decisions that address violation of women's rights to equality and to build jurisprudence around women's human rights and dignity.
- The ascertainment, harmonisation and codification of customary law continue to be a challenge.
- One of the strongest features that have emerged in the Pacific is the lack of legislative attention paid to the trends in judicial decisions and court responses in

49. S Elias (26 July 2005) Address given at the South Pacific Judicial Conference, Port Vila, Vanuatu.

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cases where litigants try to use ratified international human rights treaties to gain equal rights. The judicial responses, in noting the failure to implement enabling legislation, are all too evident. The effect of this lack of enabling legislation continues to prolong the long-term discriminatory laws and practices that disadvantage women.

A nation's reputation rests on national standards and benchmarks in all sectors. Human resource development benchmarks can only be achieved on the foundations of human rights protection, achieving equality between men and women, respect for diversity and respect for women's dignity.

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Part III: From Aspirations to Entitlements

11. Promoting the human rights of women and girls through developing human rights jurisprudence and advancing the domestication of international human rights standards

Background

In 1988, the Commonwealth Secretariat initiated a series of judicial colloquia to promote the domestic application of internationally and regional agreed human rights norms. Judges at the first colloquium in Bangalore, India, adopted the Bangalore Principles, which call for the creative and consistent development of human rights jurisprudence across the Commonwealth. The principles emphasise the need for practical measures to ensure that international and regional human rights norms, to which many member countries are state parties, are given full effect in national courts. The Bangalore Principles were reaffirmed at subsequent judicial colloquia – Harare, Zimbabwe; Banjul, The Gambia; Abuja, Nigeria; Balliol College, Oxford, UK; and Bloemfontein, South Africa – which focused on different aspects of human rights jurisprudence.

In order to focus on advancing the rights of women and girls through judicial activism, and building on the Bangalore Principles for the development of human rights jurisprudence, the Secretariat organised three regional judicial colloquia between 1994 and 1997. These were held: in Zimbabwe in 1994 for the Africa region, where the Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women was issued; in Hong Kong in 1996 for the Asia and South Pacific region, where the Hong Kong Conclusions on the domestic application of international human rights norms relevant to women's human rights was declared; and in Guyana in 1997 for the Caribbean region, where the Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl-Child was adopted.

The Commonwealth Plan of Action (PoA) for Gender Equality 2005–2015, which was adopted by Ministers Responsible for Women's Affairs in 2004, and which provides the mandate and remit for the Secretariat's work in promoting the rights of women and girls, recognises that women and girls experience different forms of discrimination during their lives and that gender-based biases, inequalities and inequities intensify their disadvantages. To ensure gender justice, the PoA calls for the employment of gender-sensitive laws, customs/practices and mechanisms. The promotion of active dialogue and

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engagement among members of the justice system, religious, cultural, traditional and civil institutions and communities is a key recommendation.

The PoA identifies the addressing of the marginalisation of indigenous women, the combating of trafficking in women and girls, the enactment and implementation of gender-responsive laws, and promotion of human rights standards, particularly, CEDAW, as other key issues for advancing women's rights.

The Gender, Human Rights and Law section of the PoA received the support of law ministers in 2005. Given this endorsement, there is close collaboration between the Gender Section and the Justice Section of the Secretariat to implement the PoA.

In bringing together the Bangalore Principles, the Victoria Falls Declaration, the Hong Kong Conclusions, and the Georgetown Recommendation and Strategies, along with information on key initiatives supported by the Secretariat, this section demonstrates the implementation of the spirit and intent of the declarations and strategies.

Bangalore Principles, 1988

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
4. In most countries whose legal systems are based upon common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.
5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.

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7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
8. However, where national law is clear and inconsistent with the international obligations of the state concerned in common law countries, the national court is obliged to give effect to national law. In such cases, the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation, which is undertaken by a country.
9. It is essential to redress a situation where, by reason of traditional legal training, which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views, it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.
10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

Participants at the Bangalore Colloquium, India, 1988

Australia	Justice Michael D Kirby, CMG
India	Justice P N Bhagwati (Convenor) Justice M P Chandrakanataraj Urs
Malaysia	Tun Mohamed Salleh Bin Abas
Mauritius	Justice Rajsoomer Lallah
Pakistan	Chief Justice Muhammad Haleem
Papua New Guinea	Deputy Chief Justice Sir Mari Kapi
Sri Lanka	Justice P Ramanthan
United Kingdom	Recorder Anthony Lester, QC
United States of America	Judge Ruth Bader Ginsburg
Zimbabwe	Chief Justice E Dumbutshena

Kenya Women Judges Association's initiative on jurisprudence of equality programme

The Kenya Women Judges Association (KWJA), an affiliate of the International Association of Women Judges, promotes jurisprudence of equality through:

- Creating an enabling environment for accessing the courts and responsive justice for all,
- Facilitating skills and knowledge enhancement for judicial officers on human rights and gender, and
- Advocating for equal representation within the judiciary and building solidarity among judicial officers.

The Commonwealth Secretariat has supported the KWJA through a grant to strengthen its jurisprudence of equality programme. This has enabled ongoing development of a comprehensive curriculum on the jurisprudence of equality, which will be piloted. The curriculum will form the basis of KWJA's training of judicial officials in the country. KWJA hopes to advocate for the curriculum's adoption into the syllabus of the judicial training institute of Kenya.

The Association will also develop information and communication materials, which will include compiling good judgments decided in the lower court by judicial officers who have undergone the training on jurisprudence of equality.

Victoria Falls Declaration, 1994

1. The participants reaffirmed the principles stated in Bangalore, amplified in Harare, affirmed in Banjul, confirmed in Abuja, reaffirmed at Balliol, Oxford and reinforced at Bloemfontein. These principles reflect the universality of human rights – inherent in men and women – and the vital duties of an independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. These general principles are applicable in all countries, but the means by which they become applicable may differ.
2. The participants noted that all too often universal human rights are wrongly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. They stressed that civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights.
3. The participants were aware that universal human rights are usually interpreted as applying to regulate the public sphere. Violations of human rights in the private sphere, including the family – the site of much of women's experience of violations – are usually perceived to be outside the reach of the human rights. The participants noted that although the state does not usually directly violate women's rights in the private sphere, it often supports or condones an exploitative family structure through various laws and rules of behaviour which legitimate the authority of male members over the lives of female members of the family and, in any event, the

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state often fails to act to protect women from private violations or tolerates or, indeed, encourages, a structure wherein private violations occur all too frequently.

4. The participants recognised that many of the existing international and regional human rights standards were formulated within a primarily male perspective and with insufficient gender sensitivity, and sometimes fail to provide protection for the gender-specific interests of women. The participants emphasised the urgent need for the formulation of further specific rights for women, particularly in the economic and social field. The participants stressed the vital need for women to be centrally involved in decision-making at all levels.
5. The participants recognised that discrimination against women can be direct or indirect. They noted that indirect discrimination requires particular scrutiny by the judiciary. The participants, further, emphasised the need to ensure not only formal, but also substantive equality for women and, for that purpose, affirmative action may be adopted if necessary.
6. The participants noted that although international human rights are inherent in all human kind, very often such rights are perceived to be owned, only or largely, by men. The participants emphasised, as did the 1993 United Nations World Conference on Human Rights, that the human rights of women are as valuable as the human rights of men.
7. The participants recognised that international human rights instruments, both generally and particularly with reference to women, and their developing jurisprudence enshrine values and principles long recognised as essential to the happiness of humankind. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth. These constitutional guarantees should be interpreted with the generosity appropriate to charters of freedom. Particularly, the known discrimination guarantee should be construed purposively and with a special measure of generosity.
8. The participants agreed that it is essential to promote a culture of respect for internationally and regionally stated human rights norms, and particularly those affecting women. Such norms should be applied in the domestic courts of all nations and given full effect. They ought not to be considered as alien to domestic law in national courts.
9. All Commonwealth governments should be encouraged to ratify the Convention on the Elimination of All Forms of Discrimination against Women. Those governments that have ratified the Convention with reservations, should examine the content of those reservations, with a view to their withdrawal.
10. All Commonwealth governments should ensure that domestic laws are enacted or adjusted to conform to international and regional human rights standards.

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11. The judicial officers in Commonwealth jurisdictions should be guided by the Convention on the Elimination of All Forms of Discrimination against Women when interpreting and applying the provisions of the national constitutions and laws, including the common law and customary law, when making decisions.
12. The participants agreed with the views expressed in the Vienna Declaration and Programme of Action, encouraging the speedy preparation of an optional protocol to enable individual petition under the Convention on the Elimination of All Forms of Discrimination against Women.
13. All Commonwealth governments should subscribe to the principles contained in the Declaration on Violence Against Women, adopted by the UN General Assembly in December 1993. The participants agreed with the Declaration's classification of violence against women as a form of discrimination and violation of human rights.
14. All Commonwealth governments should offer appropriate assistance to the United Nations Special Rapporteur on Violence against Women.
15. There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws. It is crucially important for them to be aware of the provisions of those instruments, which particularly pertain to women.
16. The participants recognised and recommended that gender-sensitised new initiatives in legal education, provision of material for libraries, programmes of continuing judicial discussion and professional training to lawyers and other interest groups in the protection of the human rights of women and better dissemination of information about developments in this field to judges and lawyers should be undertaken for effective implementation of these principles.
17. The participants emphasised the need to translate the international human rights instruments and the African Charter of Human and Peoples' Rights into local languages, in a form accessible to the people and urged the governments to undertake or support that task.
18. The participants were of the view that the governments should mount extensive awareness campaigns through diverse means to disseminate and impart human rights education and encourage and support efforts by non-governmental organisations in this context.
19. The participants acknowledged the important contribution of non-governmental organisations in the dissemination of information about women's human rights and making women aware of those rights. The participants called upon the governments to acknowledge and support the work of non-governmental organisations in the promotion of the human rights of women.

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20. The participants emphasised the need to enable non-governmental organisations to provide *amicus curae* briefs and other legal advice, assistance and representation to women in cases involving human rights issues. The participants also stressed the need to provide free legal aid and advice to women at state cost for enforcement of their human rights.
21. Public interest litigation and other means of access to justice to litigants, especially women, who wish to complain of violations of their rights should be developed. Non-governmental organisations involved in women's issues should also be permitted to bring violations of human rights of women before the courts for redress.
22. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights, and particularly with the expanding material on the protection and promotion of the human rights of women.
23. Closer links and co-operation across national frontiers by the judiciary on the interpretation and application of human rights law should be encouraged.
24. Law schools should be encouraged to develop courses in human rights, which must include a module on the human rights of women.

Reconciling customary laws with statutory laws and international human rights standards

The Commonwealth Approach

The Commonwealth, with its shared histories, including common values of democracy and development, has recognised the importance of laws and legal mechanisms for advancing women's rights through the Plan of Action (PoA) for Gender Equality 2005–2015. The PoA also acknowledges the significance of customary laws and practices in the daily lives of women, men and their communities. Given the entrenched gender biases and discrimination that disadvantage women in the context of culture and the law, the PoA calls for advancing women's rights and interests in the administration of laws, particularly on the reconciliation of customary practices and the law.

The promotion of active dialogues between the national women's machineries, law ministries, the judiciary, traditional chiefs, religious and community leaders, and women's rights' advocates, is a key strategy identified by the PoA. The convening of a series of colloquia on gender, culture and the law speaks to that strategy. The outcomes from the colloquia inform concrete follow-up action in the areas of law reform and administration, and access to justice in both the statutory and customary realms.

The first such colloquium was held in Yaoundé, Cameroon, for the West Africa region in 2006. The second colloquium, for the Asia region, was held in Dhaka, Bangladesh, in 2007, while the third was held for the Southern and East Africa region in Windhoek, Namibia, in 2008. The fourth colloquium was held for the Pacific region in Port Moresby, Papua New Guinea, in early 2010, with the Caribbean colloquium scheduled for 2011.

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Each of the colloquia convened has made concrete recommendations on strengthening of law reform, gender mainstreaming of the administration of laws and customary practices, and facilitating women's access to justice. The Secretariat facilitates work with partners to take forward the recommendations.

In the West Africa region, the Secretariat worked with the Widows Development Organisation (WiDo), a widows' rights group in Enugu, Nigeria, to convene a 'Training of Trainers' workshop that enabled members of the judiciary to dialogue and train traditional and faith leaders to address the sensitive issue of writing wills to ensure the protection of widows' rights to property and money. The Secretariat collaborated with Human Rights Focus, an advocacy group in Cameroon, to work with female and male traditional leaders and the judiciary towards reconciling customary norms and statutory laws governing women's rights to land and their access to justice. Support was also provided to Women in Law and Development in Africa (WILDAF), Ghana chapter, to work towards the implementation of recommendations under gender, human rights and the law theme contained in the PoA 2005–2015. Future plans for the West Africa region include compilation of a handbook in Pidgin for traditional chiefs and grassroots women on land rights and women's access to justice.

For the East Africa region, the Secretariat worked with the Kenya Women Judges Association and convened a colloquium with the judiciary, provincial administration, local chiefs and land disputes tribunal, for the Rift Valley jurisdiction, in Nakuru. The focus on implementation of the Land Disputes Tribunals Act enabled all stakeholders to discuss ways of ensuring women's rights to land given that 98 per cent of the decisions made under this Act by the Land Tribunals are set aside by the courts resulting in delays, obstruction of women's rights to property and their access to justice. The colloquium increased stakeholder understanding of the law, judicial procedures and women's rights, and impressed upon them the importance of their role in facilitating women's access to justice. Subsequently, the Secretariat is working with Umoja Uaso Women's Group in Samburu, Kenya, to conduct legal literacy training among disadvantaged women on their land rights and skills building on craft development for their economic empowerment. Other plans also include a handbook in Kiswahili for traditional chiefs on women's land rights.

In the Asia region, an expert group meeting is planned with the UN Special Rapporteur on Cultural Rights to identify strategies for reconciling customary norms and practices with statutory laws and human rights standards in order to enable the realisation of women's rights. As the drafting of a model regional legislation/instrument on gender equality, with particular focus on trafficking of women, has also been identified as being useful for policy advocacy, the Secretariat will draw on lessons learned from a review of the CARICOM¹ model legislation on gender equality to take forward this recommendation.

1. See text box in this chapter entitled Review of CARICOM model legislation on gender equality.

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Hong Kong Conclusions, 1996

1. Having regard to the central place of the Victoria Falls Declaration on the recognition and enforcement of the human rights of women, the participants in the Hong Kong colloquium of judges, lawyers and law academics from the Commonwealth countries of the Asia/Pacific region, reaffirmed the principles of the Victoria Falls Declaration and expressed their commitment to uphold and implement those principles.
2. Recalling the Declaration on the Elimination of Violence against Women, the discussions at the Commonwealth Heads of Government Meeting in New Zealand in 1995, the Beijing Declaration and Platform for Action and the conclusions of the meeting of Commonwealth Law Ministers in April 1996, the participants expressed their deep concern at the large-scale violence against women and the girl child which is taking place in various forms in most countries of the Commonwealth. Violence against women is a manifestation of historical unequal power relations between women and men, which have led to domination over and discrimination against women and is a social mechanism by which the subordinate position of women is sought to be perpetuated. All Commonwealth governments should condemn violence against women and girls as a violation of fundamental human rights, including the right to personal security and the right to be free from discrimination on the basis of sex. No law, custom, tradition, culture or religious consideration should be invoked to excuse violence against women. Judges and judicial officers at all levels should be gender-sensitive and aware of the need to protect women against violence through a proactive interpretation of the law.
3. The participants expressed particular concern at the many forms of violence against women in the family. This violence is widespread, but frequently goes unnoticed and unrestrained because of oppressive social, cultural or religious traditions and values. These factors have led to the subordination of women and continue to dominate social attitudes because of lack of awareness of the basic human rights of women, as well as their economic dependence on men. It is incumbent on law enforcement agencies, the legal profession and the courts to intervene appropriately in relation to violence in the family and not to allow its perpetuation through indifference or inadequate response.
4. Participants recognised the importance of custom, tradition, culture and religion as a part of individual and group identity. They recognised that these concepts were sometimes interpreted so as to be oppressive to women. They stressed the need to preserve and enhance worthy customs, while at the same time discouraging those that have an adverse impact on women and girls.
5. Participants recognised that a majority of the world's refugees and internally displaced persons are women and children, and that these persons are an especially vulnerable group who are frequently denied their basic human rights

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and subjected to violence and sexual exploitation. The importance of judicial sensitivity to gender-specific violations of human rights in dealing with cases relating to physical or mental abuse or claims to refugee status were underlined.

6. Recalling that the 1995 meeting of Commonwealth Heads of Government in Auckland urged all Commonwealth governments to ratify the Convention on the Elimination of All Forms of Discrimination against Women, and underlining the importance of accession, ratification and implementation of this Convention and other human rights treaties to the advancement at the national level of the human rights of women and the girl child, the participants noted that it would be desirable if all states in the region became parties to and implemented the Convention.
7. The participants noted that many opportunities exist for judges and other judicial officers to draw on the Convention on the Elimination of All Forms of Discrimination against Women and other international human rights instruments, so as to interpret and apply creatively constitutional provisions, legislation, the common law and customary law. In so doing, they drew attention to the wealth of decisions from countries with shared jurisprudential traditions where judges had engaged in such creative interpretation and application. The importance of educating the judiciary and the legal profession with respect to international human rights standards and principles relevant to gender issues was stressed, as well as the need for national judiciaries to carry out studies on gender bias in the judicial process.
8. Participants noted that it was important that the judiciary reflect the population it serves. Accordingly, it encouraged the exploration of ways to ensure a gender balance in the judicial system.
9. Participants identified a number of areas where there are clear violations of the human rights of women, which might be addressed by the utilisation of international norms in domestic decision-making. These included, in particular, discrimination in matters of nationality, citizenship, property and inheritance, which has serious implications for the exercise and enjoyment by women of other fundamental human rights. Participants also encouraged the review of legislation to ensure its consistency with international human rights obligations undertaken by individual countries.
10. Noting the complementarity between the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, participants drew attention to the special vulnerability of the girl child to violations of human rights and identified this as a matter requiring particular judicial attention. They noted that the principle of the best interests of the child could be used to promote the full enjoyment by the girl child of her rights.
11. Participants noted that litigation to advance the human rights of women was limited at both the national and international levels. They emphasised women's limited access to the judicial process to enforce their rights, and they proposed the further

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development of a number of measures to increase women's access to justice, including legal literacy programmes and assisted legal advice and representation. Participants drew attention to the important role that the media could play in creating an awareness of the human rights of women. They suggested that consideration might also be given to encouragement of representative actions and relaxing traditional limitations on *locus standi*. They also supported the adoption of an optional complaints mechanism for the Women's Convention.

Review of CARICOM model legislation on gender equality

The CARICOM model legislation in eight areas, viz., citizenship, domestic violence, equality for women in employment, equal pay, inheritance, maintenance and maintenance orders, sexual harassment and sexual offences, was an initiative of the Women's Affairs Section and the Legal Division of the CARICOM Secretariat. The Commonwealth Secretariat partially funded the project and drafting was carried out between 1989 and 1991. Member governments have successfully used the model legislation as a guide to develop their laws and inform policy arenas. Most notably, the model legislation has informed the Family Law Reform project of the Organization of Eastern Caribbean States (OECS) Secretariat. Non-government organisations, including women's and human rights groups, have also used the model for advocacy.

The Commonwealth Secretariat commissioned a review in 2007 to cover seven areas of the model legislation, as the eighth area of domestic violence has been reviewed by UNIFEM Caribbean and United Nations Economic Commission for Latin America and the Caribbean (UNECLAC). The review enables the Secretariat to assess technical assistance and identify areas for further development. It will also offer insights for a similar initiative proposed for Asia. The review highlighted that while the model laws have influenced specific legislation addressing domestic violence and sexual offences, the existence of the model laws in themselves has not catalysed reform processes. The area of domestic violence legislation is a case in point, where sustained advocacy by women's rights groups has played a key role in bringing about change. The value of advocacy is also reflected by the lack of progress in law reform in areas such as equal pay, where no such sustained lobbying by women's interest groups is evident. The review further demonstrates that long-term advocacy leads to the consideration of reform in legislation on gender equality.

With regard to rapes/sexual offences and sexual harassment, the review shows that while the model laws are fairly comprehensive, clear definition of issues and clarity about procedures would need to be considered for future reforms. In the areas of equality of women in employment and equal pay, the review demonstrates that the definition of discrimination needs to be sharpened and the formal equality addressed in the laws needs to be expanded to include systemic inequalities that may not directly target women at the workplace, but which nonetheless affect women's employment and remuneration. The review noted that in certain Commonwealth jurisdictions, issues such as family responsibilities have been addressed in anti-discrimination legislation. It was further suggested that these model laws have not had much impact in the region, and that work on similar model laws by international agencies would need to be referred to in any reform process.

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On maintenance and maintenance orders, the model laws adopt a modern approach to child and spousal support, with gender equity concerns addressed in the determination of costs. However, implementation of orders has posed problems given such factors as migration, the notion of family in the Caribbean context and reconstitution of family units.

The Expert Group Meeting, which examined the review, noted that the model laws have been useful to guide drafting of specific legislation on gender equality. While the model laws have not had a significant catalysing effect on the law reform agenda, the meeting recognised that in cases where law reform was underway, the model laws helped to shape legal policy. The model laws have been drawn on for injunctive remedies. The need for clear procedures was underscored and any future work on model laws would have to consider model regulations, where necessary, to facilitate implementation of laws.

Georgetown Recommendations and Strategies for Action, 1997

1. The Colloquium reaffirmed the Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women (1994) and the Hong Kong Conclusions (1996) and commended these to states for acceptance and implementation.
2. The Colloquium welcomed the adoption of the Charter of Civil Society for the Caribbean Community by the Conference of Heads of Government at its eighth inter-session meeting in Antigua and Barbuda in February 1997.
3. The Colloquium underlined the fact that the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights, and they must be taken as forming part of mainstream human rights.
4. The Colloquium expressed concern that civil and political rights have received extensive attention within the mainstream human rights discourse while economic, social and cultural rights have been neglected. This has adversely affected women's concerns.
5. Traditional human rights theory primarily focuses on violations perpetrated by the state. This distinction between state responsibility in relation to public and private acts has contributed to a failure to recognise many violations of women's rights as human rights violations.
6. The Colloquium recognised that the fundamental duty of judges to ensure the fair and due administration of justice requires judges to be alert to manifestations of gender discrimination in the law and in the administration of justice, and to take such measures as lay within their power to redress or eliminate any such discrimination. The Colloquium also recognised that the community's understandings of fairness and equality may evolve over time and that judges had both the power

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and responsibility to adapt the common law or interpretations of constitutional provisions to meet the changing circumstances of society. The full enjoyment by women of their human rights could only be realised through the creative interpretation and effective enforcement of these rights by the courts. This can only occur if there is an independent and competent judiciary, which enjoys the confidence of the people it serves.

7. The Colloquium noted with concern that some states in the Commonwealth support or condone an exploitative family structure through various laws and rules of behaviour, which legitimise the authority of the male over the female and fail to protect women from private violations of their rights.
8. The Colloquium emphasised that culture, customary and traditional practices or religion should not be invoked as justification for violations of the fundamental rights and freedoms of women.
9. The Colloquium emphasised the goal of universal ratification of international human rights instruments and relevant international labour conventions, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. It underlined the obligation of states parties to fully and effectively implement their treaty obligations by bringing their constitutions and domestic law and practice into conformity with these human rights commitments. It also urged those states parties which had entered reservations to conventions to consider their withdrawal.
10. The Colloquium emphasised the utility of international human rights norms to domestic litigation, noting that in general there was no constitutional or other bar to referring to international human rights treaties. Among other uses, these norms might in appropriate cases provide a standard that could be used in order to elucidate the meaning of constitutional guarantees.
11. Both the United Nations Declaration on the Elimination of Violence against Women and General Recommendation 19 of the Committee on the Elimination of Discrimination against Women recognised that violence against women takes many forms. These include domestic violence, rape (including rape within marriage), exploitation of girl children (including the disadvantaged), trafficking in women and girls, violence associated with prostitution and with pornography, dowry deaths, violence in the work place and sexual harassment. The personal, economic and social costs of this violence are enormous. States must take effective measures in accordance with the Convention on the Elimination of All Forms of Discrimination against Women, the Declaration on the Elimination of Violence Against Women, and, where applicable, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence. States parties should fulfil their obligations to prevent and eradicate these and other forms of violence against women, as an indispensable part of the process of eliminating gender discrimination.

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12. The Colloquium noted with satisfaction that some countries had enacted legislation addressing domestic violence and other forms of violence against women. The Colloquium recommended that other states in the Commonwealth consider the enactment of similar legislation, and stressed the need for such legislation to be regularly monitored and updated as appropriate.
13. The Colloquium expressed its concern in regard to the commercial sexual exploitation of women and girls, including trafficking for the purposes of prostitution. The Colloquium urged states throughout the Commonwealth to take effective measures to eradicate this phenomenon. These measures could include the enactment of legislation (including appropriate penal provisions), and administrative and other measures such as efforts to rehabilitate and reintegrate into society those subjected to these violations.
14. The Colloquium acknowledged the work that the Commonwealth Secretariat has done in developing publications and training materials relating to human rights, including the human rights of women, and urged the organisation to continue this work.
15. Judges participating in the Colloquium expressed their appreciation for the informative and constructive contribution made to the discussions by representatives of non-governmental organisations and noted the recommendations proposed by them.

Recommendations and strategies for action

The Colloquium adopted the following recommendations and strategies for action:

Information and publicity activities

16. States that become parties to international human rights treaties should publicise that fact widely among their community and ensure that copies of the treaties, reports of the country under the treaty and other relevant documentation (where possible in local languages) are made widely available.
17. The Commonwealth Secretariat should ensure that copies of the Convention on the Elimination of All Forms of Discrimination against Women and Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women (2nd ed. 1996) are made available to the judiciary and to the Bar Association in each state of the Commonwealth.

Access to information and exchange of information

18. The Commonwealth Secretariat, the United Nations and its agencies, and other bodies should explore ways of making available to judges, judicial officers and practitioners access to electronic sources of information on human rights, in particular relating to the human rights of women, and should ensure the availability

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of basic international and comparative materials in libraries accessible to the judiciary and the profession.

19. Judges in the Caribbean and other Commonwealth countries who render decisions in constitutional human rights cases, in cases in which international instruments are invoked or which significantly advance the rights of women under domestic legislation should, as far as possible, send copies of those decisions to: the Commonwealth Secretariat, for inclusion in the *Commonwealth Law Bulletin*; Interights, for inclusion, as appropriate, in the *Commonwealth Human Rights Law Digest*, in the Caribbean, to the CARICOM Secretariat and universities in the region for appropriate publication.
20. The Commonwealth Secretariat and the CARICOM Secretariat should endeavour to ensure that all judges in the Caribbean, as well as in other regions, are provided with access, either in electronic or hard copy format, to the *Commonwealth Human Rights Law Digest*, the *Commonwealth Judicial Journal*, the *Commonwealth Law Bulletin*, and the *Law Reports of the Commonwealth* and regional publications.
21. Judges, practitioners and academics should be encouraged to submit articles and other material for publication in the *Commonwealth Law Bulletin* and *Commonwealth Judicial Journal* and regional publications.
22. The Commonwealth Secretariat and the CARICOM Secretariat should explore ways of developing, either on their own or in conjunction with other suitable bodies or NGOs, a website which would contain human rights and related materials, including material on the gender dimensions of human rights, and which would complement the existing work in this area of bodies such as the United Nations, the ILO and the United Nations High Commissioner for Human Rights.

Judicial studies programmes and continuing legal education on gender issues

23. Gender-sensitive training and information about women's human rights should be provided to the judiciary, lawyers, law-enforcement agencies, court personnel, law students and community leaders. Legal literacy programmes to raise public awareness should also be undertaken.
24. Those bodies involved in judicial education seminars at the international, regional and national level should co-operate in and co-ordinate their activities in order to make best use of limited resources.
25. The Commonwealth Secretariat should explore ways in which the experiences of the two series of Judicial Colloquia on human rights which it had organised might be drawn on in order to ensure that gender issues are fully integrated in any future judicial training in which the Secretariat was involved.

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26. The Commonwealth Secretariat, in liaison with the Commonwealth Magistrates' and Judges' Association (CMJA) and other organisations with expertise in the area, should explore the need for the development of further training materials on international human rights, generally and as they relate specifically to women.

The operation of the legal system and reform of the law

27. The language used in human rights instruments, national legislation and in court proceedings and judgements should be non-sexist, and, as appropriate, gender-neutral language should be employed.
28. Where general or specific reviews of the law are undertaken by Law Reform Commissions or other bodies, the terms of reference of such reviews should ensure that the impact of existing and proposed laws on the human rights of women is fully taken into account in the process of review and reform of the law.

Operation of the courts and the court system

29. States should, where possible, put in place information systems for the production of gender disaggregated data on the operation of the courts for research, policy formulation and for planning timely interventions.
30. Notwithstanding the obligation to ensure a fair trial for all, judges and prosecutors are encouraged to be vigilant about the withdrawal of cases in order to ensure that the legal system fully protects the rights of women and girls.

Support services and programmes

31. States should, where possible, establish a comprehensive legal aid programmes to ensure the availability of legal aid or *pro bono* legal assistance for court and administrative proceedings in which redress for violations of human rights, including those suffered by women and girls, is sought. States should also establish programmes for counselling of women and girls who have suffered violations of rights, as well as special programmes for offenders.
32. States should establish specially trained units in the police force for the investigation of offences by and against women and girls, the functions of which should include counselling for those who have been subject to abuse.

The use of international and regional human rights procedures

33. Lawyers should consider whether more effective use could be made of applicable international and regional complaint procedures to advance women's human rights, in cases in which a remedy was not available within the domestic system. These procedures include the procedures of the Organization of American States, including those of the Inter-American Commission under the American Declaration of the Rights of Man; the American Convention on Human Rights and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against

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Women (Convention of Belém do Pará); the procedures of the Council of Europe under the European Convention on Human Rights; and the procedure under the First Optional Protocol to the International Covenant on Civil and Political Rights, as well as applicable complaints procedures relating to the implementation of international labour conventions.

Enhancement of regional co-operation and exchange of information

34. The Commonwealth Secretariat, the CMJA, and other responsible international, regional or sub-regional agencies, should explore, in close collaboration with the judges of each region and taking into account existing institutions and programmes, the desirability of the establishment of a regional judicial studies institute or programme to facilitate continuing judicial education and the exchange of legal material among the judges of the region.

Progressing the realisation of women's rights

The Secretariat has endeavoured to implement recommendations from the Georgetown Colloquium, which focused on partnership building, compilation of training material, and capacity enhancement towards promoting the rights of women and girls through the mandate and remit of the PoA.

The Secretariat's efforts in the area of gender and human rights build on work carried out in the late 1980s and through to the 1990s. The primary focus during that time was on addressing violence against women (development of the Commonwealth integrated approach to combat violence against women [VAW]), judicial dialogues addressing the human rights of women and the girl child (three key declarations/principles on gender equality, jurisprudence and women's and girls' rights) and development of gender equality legislation (support for the development of model legislation in the areas of citizenship, domestic violence, equality for women in employment, equal pay, inheritance, maintenance and maintenance orders, sexual harassment and sexual offences for the CARICOM region). There was also a focus on CEDAW (a manual for NGOs on report writing). Key manuals and resource material addressing VAW were produced. These focused on police training, curriculum for legal studies, annotated bibliography, regional studies on sexual exploitation of children, use of human rights standards for promoting women's rights and comprehensive manuals to address VAW. Key outputs from this body of work, which provide the basis for current work, are:

- *Integrated Approaches to Eliminate Gender-based Violence* (2003) London: Commonwealth Secretariat.
- *International Women's Rights Cases* (2005) Routledge-Cavendish.
- Building on this body of work, in 2004, an expert group meeting on gender and human rights set out priority issues to be addressed. A publication entitled *Gender and Human Rights* was the main output and it informed the Section on gender, human rights and the law in the Commonwealth Plan of Action for Gender Equality 2005–2015.

12. Realising universal rights in national jurisdictions

MCBAIN V. STATE OF VICTORIA AND OTHERS FEDERAL COURT OF AUSTRALIA, AUSTRALIA¹

Sundberg J
28 July 2000

Discrimination

Marital status – Restriction on fertility treatment unjustified

The applicant, a gynaecologist specialising in reproductive technology, sought a declaration that section 8 of the Infertility Treatment Act 1995² (Vic) (the State Act) was inoperative on the grounds that it was inconsistent with section 22 of the Sex Discrimination Act 1984 (Cth) (SDA).³

In granting the declaration, it was held that:

1. The word 'services' should be given a liberal meaning within the meaning of sections 4⁴ and 22 of the SDA. In this context 'services' include fertility treatment administered by a medical practitioner. Further, given that different treatments are covered by the same legislative scheme, the State Act, subject to the same eligibility requirements and capable of being provided to both sexes they are not exempted by section 32 SDA.⁵

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1. Source: INTERIGHTS, the International Centre for the Legal Protection of Human Rights.
 2. Section 8(1) provides that: 'A woman who undergoes a treatment procedure must – (a) be married and living with her husband on a genuine domestic basis; or (b) be living with a man in a de facto relationship'.
 3. Section 22 provides *inter alia*: (1) 'It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, marital status, pregnancy or potential pregnancy: (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person ...'
 4. Section 4(1) provides *inter alia* that: 'services includes: (d) services of the kind provided by the members of any profession or trade.
 5. Section 32 provides that: 'Nothing in division 1 or 2 applies to or in relation to the provision of services the nature of which is such that they can only be provided to members of one sex'.

Part III: From Aspirations to Entitlements

2. Section 8 of the State Act provides that a woman's marital status, namely her status as a married woman or living in a de facto relationship, is an essential requirement for the availability of treatment. In this regard, section 8 treats unmarried women not living in such a de facto relationship less favourably by refusing them fertility treatment contrary to section 22 of the SDA, which makes it unlawful for a person to refuse to provide a service to another on the ground of the latter's marital status. As the two sections are directly inconsistent, section 8 is inoperative by reason of section 109 of the constitution⁶. Moreover, any provisions in the State Act that are, in part, dependent upon the operation of section 8 are also inoperative to the same extent.
3. Nor is section 8 saved by section 7B⁷ of the SDA on the grounds that to deny an unmarried woman such treatment amounts to direct and not indirect discrimination.

FOR THE APPLICANT: A C ARCHIBALD, QC, AND S MOLONEY

FOR THE FIRST AND SECOND RESPONDENTS: P TATE

FOR THE FOURTH RESPONDENT: D F R BEACH

FOR THE AUSTRALIAN CATHOLIC BISHOPS CONFERENCE AND THE AUSTRALIAN EPISCOPAL CONFERENCE OF THE ROMAN CATHOLIC CHURCH AS AMICUS CURIAE: J G SANTAMARIA, QC

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6. Section 109 provides that: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid'.
 7. Section 7B provides that: '(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances. (2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include: (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and (b) the feasibility of overcoming or mitigating the disadvantage; and (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice'.

WOODALL V. R
COURT OF APPEAL, BARBADOS⁸

Waterman JA

Williams JA

Connell JA (AG)

17 November 2004, 29 November 2005

Criminal law

Trial – Summing-up – Identification – Alibi – Corroboration – Age – Defendant appealing conviction for serious indecency with a minor

The defendant was convicted of committing an act of serious indecency, contrary to Section 12(2) of the Sexual Offences Act, with a 15-year-old boy and was sentenced to 10 years' imprisonment. He appealed both his conviction and sentence. The defendant's defence had been one of alibi. The principal issue for the court was whether it was necessary to direct the jury on identification in circumstances where the complainant and the accused were known to each other and where the defence was one of alibi. The court addressed three of the grounds of appeal **(i) alibi**: whether the trial judge's directions on alibi were adequate; **(ii) identification**: whether the trial judge had erred in law in that his directions on identification were inadequate and confusing and he had failed to tell the jury that an honest and credible witness could be a mistaken witness and to warn the jury about the possible unreliability of the identification evidence; and **(iii) warnings on absence of corroboration and age**: whether the trial judge had failed to warn the jury about the possible unreliability of the evidence of the complainant in view of the absence of corroboration and of his age.

It was held *inter alia* that:

3. The statutory requirement in the Sexual Offences Act to warn the jury that it might be unsafe to find the accused guilty in the absence of corroboration compelled the judge to give a warning where corroboration was absent, even in identity cases. Further, a warning was appropriate, as every element of the charge had to be proved, not only the identity of the offender, but also the ingredients of the offence. For a judge to draw to the jury's attention his or her statutory obligation, without more, as in the instant case, did not constitute giving a proper warning to the jury. The judge, depending on the circumstances, was generally required to go further and to explain the reasons for the warning and the relevance of the warning to the particular facts of the case. The warning in the instant case had not complied with established rules of practice to use clear and simple language that would, without any doubt, convey to the jury that there was a danger of convicting on the complainant's evidence alone. The important consideration was the form of the

8. Source: *The West Indian Reports* (2005) 72 WIR 84

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warning. The aim of any direction to a jury had to be to provide realistic, comprehensible and common sense guidance to enable them to avoid pitfalls and to come to a fair and just conclusion as to the guilt or innocence of the defendant. In the instant case, the judge should have warned the jury that sexual complaints were made for different reasons, and sometimes for no reason at all; that the evidence might be unreliable and of matters that might cause it to be unreliable. He could then have related the evidence to the warning and invited the jury to consider, for example, whether the fact that the complainant was promised a large sum of money, which he did not receive after completion of the test, may have caused him to make false allegations of indecent assault.⁹

FOR THE APPELLANT: A PILGRIM AND A MITCHELL-GITTENS

FOR THE RESPONDENT: MANILA RENEE

9. Per Curiam. In cases where the object of the sexual offence was a woman or girl, some of the older forms of warning on corroboration were disparaging and reinforced false stereotypes. They should no longer be followed and a judge should take into account the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ratified by Barbados on 16 October 1980, which sought to eliminate prejudices and practices based on stereotyping the behaviour of women.

**ROCHES V. WADE as and representing the Managing
Authority of Catholic Public Schools
SUPREME COURT, BELIZE**

Conteh CJ
30 April 2004

Discrimination

Unmarried mother – Dismissal from position as teacher violation of constitutional rights

R, an unmarried mother was released from her duties as a teacher, having failed to comply with the terms of an alleged contract made with the 'Toledo Catholic Schools Management' '**...to live according to Jesus' teaching on marriage and sex...**' R challenged the decision before the Supreme Court, arguing that her dismissal constituted a violation of section 16(2)¹⁰ of the Belize constitution, as it discriminated against her on the grounds of gender. In addition, R also argued that the refusal of the respondent to reinstate her to her position as a teacher after being required to do so by the Chief Education Officer of Belize in accordance with the Education Act – Chapter 36 of the Laws of Belize, Revised Edition 2000, and the Rules¹¹ made thereunder was illegal and in breach of its statutory duty and further constituted a violation of section 15(1)¹² of the Belize constitution, as the refusal to reinstate infringed her right to work.

In granting the applications, it was held that:

1. Belize has been a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) since 7 March 1990 and it ratified same

10. Section 16(2) provides: 'Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person or authority'. Section 16(3) provides: 'In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description'.

11. The Education Rules 2000 (S.I. No. 92 of 2000), Rule 92(1) provide: 'Managing Authorities shall have the authority to prescribe and to enforce regulations and standards governing the dress and conduct of staff, provided that such regulations: (a) are approved by the relevant Regional Council; (b) do not seek to impose restrictions or requirements outside the parameters of generally acceptable behaviour and standards; (c) are clearly stated and made explicitly known to staff in writing; and (d) are not prejudicial to the fundamental rights of the person'.

12. Article 15(1) provides: 'No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business, or otherwise'.

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on 16 May 1990. Article 11, paragraph (2) subparagraph (a) of CEDAW¹³ makes clear that states parties shall *inter alia* take appropriate measures to prohibit dismissal on grounds of pregnancy and discrimination in dismissals on the basis of marital status.

2. Nothing under the Education Act *supra* and its rules conflicts with the provisions of article 11(2)(a) of CEDAW.
3. The refusal of the respondent to reinstate the applicant after being so required to do so by the Chief Education Officer of Belize was in breach of the statutory duties of the respondent and also constituted an infringement of the applicant's constitutional right to work, pursuant to the provisions of section 15(1) of the Belize constitution.

FOR THE APPLICANT: DEAN BARROW WITH MAGALI MARIN YOUNG

FOR THE RESPONDENT: PHILIP ZUNIGA

13. Article 11, paragraph (2)(a) of CEDAW provides: '2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, states parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status'.

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**ATTORNEY GENERAL OF BOTSWANA V. UNITY DOW
COURT OF APPEAL, BOTSWANA¹⁴**

Amissah JP, Aguda, Bizos, Schreiner and Puckrin JJA
3 July 1992

Human Rights

Equality and non-discrimination – Right to freedom of movement – Citizenship – Nationality of children – Denial of citizenship of Botswana to children born to citizen mother married to non-citizen father – Whether discrimination on the ground of sex or violation of mother's freedom of movement

The respondent, Ms Dow, was a citizen of Botswana. On 7 March 1984, she married Mr Peter Nathan Dow, a citizen of the United States of America, who had been resident in Botswana for nearly 14 years. Prior to their marriage, one child was born to them on 29 October 1979, and after their marriage two more children were born, on 26 March 1985 and 26 November 1987 respectively. All three children were born in Botswana. The first child was a citizen of Botswana by virtue of section 21 of the constitution, whereas the two children born during the marriage were not citizens of Botswana pursuant to section 4(1) of the Citizenship Act 1984, which provides as follows:

(1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth: (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

Therefore, by virtue of section 4 of the Citizenship Act, a child who is born to a citizen mother, who is married to a non-citizen father, cannot be a citizen of Botswana. Similarly, section 5(1), which relates to the citizenship of children born outside Botswana, provides as follows:

5(1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth: (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

On 11 June 1991, Ms Dow made an application to the High Court of Botswana, contending that sections 4 and 5 of the Citizenship Act violated her constitutional

14. Source: Emerton *et al.* (eds.) *International Women's Rights Cases*, Routledge-Cavendish Publishing, p.572.

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rights and freedoms, including the right to equal protection of the law irrespective of sex,¹⁵ personal liberty,¹⁶ protection from being subjected to degrading

15. Section 3: Fundamental rights and freedoms of the individual

Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely – (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his or her home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

16. Section 5: Protection of right to personal liberty

- (1) No person shall be deprived of his or her personal liberty save as may be authorized by law in any of the following cases, that is to say – (a) in execution of the sentence or order of a court, whether established for Botswana or some other country, in respect of a criminal offence of which he or she has been convicted; (b) in execution of the order of a court of record punishing him or her for contempt of that or another court; (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him or her by law; (d) for the purpose of bringing him or her before a court in execution of the order of a court; (e) upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under the law in force in Botswana; (f) under the order of a court or with the consent of his or her parent or guardian, date when he or she attains the age of 18 years; (g) for the purpose of preventing the spread of an infectious or contagious disease; (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his or her care or treatment or the protection of the community; (i) for the purpose of preventing the unlawful entry of that person into Botswana, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Botswana, or for the purpose of restricting that person while he or she is being conveyed through Botswana in the course of his or her extradition or removal as a convicted prisoner from one country to another; (j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Botswana or prohibiting him or her from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he or she is permitted to make to any part of Botswana in which, in consequence of any such order, his or her presence would otherwise be unlawful; or (k) for the purpose of ensuring the safety of aircraft in flight.
- (2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he or she understands, of the reasons for his or her arrest or detention.

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treatment,¹⁷ freedom of movement,¹⁸ and protection from discrimination on the basis of sex.¹⁹ Horwitz Ag J granted Ms Dow's application, declaring both sections 4 and 5 of

(3) Any person who is arrested or detained – (a) for the purpose of bringing him or her before a court in execution of the order of a court; or (b) upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under the law in force in Botswana, and who is not released, shall be brought as soon as is reasonably practicable before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him or her, he or she shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or for proceedings preliminary to trial.

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefore from that other person.

17. Section 7: Protection from inhuman treatment

(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.

18. Section 14: Protection of freedom of movement

(1) No person shall be deprived of his or her freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Botswana, the right to reside in any part of Botswana, the right to enter Botswana and immunity from expulsion from Botswana.

(2) Any restriction on a person's freedom of movement that is involved in his or her lawful detention shall not be held to be inconsistent with or in contravention of this section.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision – (a) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or public health or the imposition of restrictions on the acquisition or use by any person of land or other property in Botswana and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society; (b) for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Botswana; (c) for the imposition of restrictions on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen; (d) for the imposition of restrictions upon the movement or residence within Botswana of public officers; or (e)

(4) If any person whose freedom of movement has been restricted by order under such a provision as is referred to in subsection (3)(a) of this section (other than a restriction which

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is applicable to persons generally or to general classes of persons) so requests at any time during the period of that restriction not earlier than six months after the order was made or six months after he or she last made such request, as the case may be, his or her case shall be reviewed by an independent and impartial tribunal presided over by a person, qualified to be enrolled as an advocate in Botswana, appointed by the Chief Justice.

- (5) On any review by a tribunal in pursuance of this section of the case of a person whose freedom of movement has been restricted, the tribunal may make recommendations, concerning the necessity or expediency of continuing the restriction to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

19. **Section 15: Protection from discrimination on the grounds of race, etc.**

- (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision – (a) for the appropriation of public revenues or other public funds; (b) with respect to persons who are not citizens of Botswana; (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not; or (e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.
- (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes reasonable provision with respect to qualifications for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by any law.
- (6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorized to be done by any such provision of law as is referred to in subsection (4) or (5) of this section.
- (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section

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the Citizenship Act *ultra vires* the constitution, on the grounds that they were discriminatory against women.

The Attorney General appealed to the Court of Appeal, contending that neither section 4 nor section 5 denied the respondent any of the rights or protections mentioned above. Particular grounds for appeal included that Horwitz Ag J had erred in holding that section 15 of the constitution prohibited discrimination on the grounds of sex and in holding that the definition of discrimination in section 15(3) did not refer to sex and in holding that the respondent had *locus standi* to bring the action.

In dismissing the appeal, subject to a variation of the declaration of the High Court, it was held that:

1. The very nature of a constitution required that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the constitution; and that where rights and freedoms were conferred on persons by the constitution, derogations from such rights and freedoms should be narrowly or strictly construed.
2. Section 3 of the Constitution of Botswana, which guarantees equal protection of the law irrespective of sex, was not only a substantive provision, but was the key or umbrella provision in Chapter II under which all rights and freedoms protected under the chapter must be subsumed. The rest of the provisions of Chapter II, including section 15, should be construed as expanding on or placing limitations on section 3 and should be construed within the context of that section. A fundamental right or freedom once conferred by the constitution could only be taken away or circumscribed by an express and unambiguous statement in that constitution or by a valid amendment of it. It could not be inferred from the omission of the word 'sex' in the definition of discrimination in section 15(3) that the right to equal protection of the law given in section 3 of the constitution to all persons (irrespective of sex) had, in the case of sex-based differentiation in equality of

may be subjected to any restriction on the rights and freedoms guaranteed by sections 9, 11, 12, 13 and 14 of this Constitution, being such a restriction as is authorized by section 9(2), 11(5), 12(2) 13(2), or 14(3), as the case may be.

- (8) Nothing in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.
- (9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section – (a) if that law was in force immediately before the coming into operation of this Constitution and has continued in force at all times since the coming into operation of this Constitution; or (b) to the extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution.

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treatment, been taken away. The classes or groups mentioned in the definition in section 15(3) were more by way of example than an exclusive itemisation.

3. As provided by section 24 of the Interpretation Act 1984, relevant international treaties and conventions might be referred to as an aid to interpretation. Unless it was impossible to do otherwise, it would be wrong for Botswana's courts to interpret its legislation in a manner which conflicted with the international obligations Botswana had undertaken. This principle added reinforcement to the view that the intention of the framers of the constitution could not have been to permit discrimination purely on the basis of sex.
4. Custom and tradition should *a fortiori* yield to the Constitution of Botswana. A constitutional guarantee could not be overridden by custom. Custom would as far as possible be read so as to conform with the constitution, but where this was impossible, it was custom not the constitution which had to go.
5. The respondent had *locus standi* with respect to her challenge of section 4 of the Citizenship Act 1984. She had substantiated her allegation that the Act circumscribed her freedom of movement given by section 14 of the constitution, having made a case that as a mother her movements are determined by what happens to her children. However, she did not have *locus standi* with respect to section 5 of the Act, as the situation which that section provided for, namely the citizenship of children born outside Botswana, did not apply to the respondent in any of the cases of her children and the possibility of the respondent giving birth at some future date to children abroad was too remote to form a basis for such a challenge.
6. Section 4 of the Citizenship Act 1984 infringed the fundamental rights and freedoms of the respondent conferred by section 3, section 14 and section 15 of the constitution and was *ultra vires*.

Per **Shreiner and Puckrin JJA (dissenting):**

1. Discrimination on the ground of sex was not prohibited by section 15 of the constitution. The idea that the list of descriptions of persons in section 15(3) was not exhaustive had to be rejected. Section 3 was an introductory or explanatory section which did not, by itself, create substantive rights and freedoms, but was in the nature of a preamble or a recital. Section 3 would only become relevant in interpreting section 15(3) if it could be shown that there was some vagueness or ambiguity in section 15(3). The mere absence of mention of sexual discrimination in section 15(3) did not create any such vagueness or ambiguity and a reference to section 3 in order to create one was not permissible.
2. The general injunctions regarding the interpretation of constitutional statutes should not be relied upon as a licence to a court, even when dealing with rights and freedoms, in effect, to alter a provision to avoid a consequence which it considers is not, in view of its assessment of the position in existing society, socially or morally

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desirable, if the meaning is clear. The special approach to interpretation of a constitution applied only where there is an ambiguity or obscurity. If a human rights code did not outlaw discrimination on the ground of sex, the court had no right to declare that it did because, in its view, such a provision was desirable in the atmosphere of the time; it had to be satisfied from the wording of the provision that the legislature intended to prevent such discrimination.

**FORBANG MICHEAL NDENGE V. CECILIA MANKA AND
OTHERS
HIGH COURT OF MEZAM DIVISION, CAMEROON**

Bikelle J

25 January 2010

The applicant sought to evict the respondents from lands registered in his own name in 2008, but formerly owned by his late brother, one Ndenge Lawrence Nde, who had died intestate in 1977. The applicant was the appointed administrator of his brother's estate. The first-named respondent was formerly married to Ndenge Lawrence Nde. There were three children of the marriage namely – Fru Calystus Ndeh, Bih Erica and Chi Evans, the respective second, third and fourth-named respondents. The late Ndenge Lawrence Nde was buried on the land and the properties on the land were all built by him. Following the death of his brother, the applicant entered into a relationship with the first-named respondent and they had a further three children together. All six children live with their mother on the said lands.

The applicant sought an order to evict the respondents from the lands registered in his name, contending that they were tenants with arrears of unpaid rents. A further order was sought restraining the respondents, their agents and assigns from interfering in the land.

In dismissing the application, it was held that:

- (1) A land certificate is an official certification of a real property right that is unassailable, inviolable and final.
- (2) Until a land certificate is withdrawn by the competent minister, the person in whose name the property is registered possesses a real property right.
- (3) In his capacity as administrator of his late brother's estate, the applicant holds the said property on trust for the benefit of the respondents, who have never been tenants of the said lands.
- (4) Having considered equitable principles and having drawn guidance from the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the court decided that the respondents were entitled to occupy the said lands pending a determination of an application to withdraw the land certificate.

FOR THE APPLICANT: SUH FUH BENJAMIN

FOR THE RESPONDENTS: SHU WALTERS

(UNREPORTED)

**ANUJ GARG AND OTHERS V. HOTEL ASSOCIATION OF INDIA AND OTHERS
SUPREME COURT, INDIA²⁰**

Sinha and Singh Bedi JJ
6 December 2007

Equality

Constitutional law – Fundamental rights – Right to equality before the law – Right to freedom from discrimination – Right to employment – Right to privacy

The first respondent was the Hotel Association of India. A large number of young people were taking hotel management graduation courses and passing their examinations at a very young age. Liquor was served in the hotels, not only in bars but also in restaurants. Liquor was also served in rooms as part of room service. Section 30 of the Punjab Excise Act 1914 provided: 'No person who is licensed to sell any liquor or intoxicating drug for consumption on his premises shall, during the hours in which such premises are kept open for business, employ or permit to be employed either with or without remuneration any man under the age of 25 years or any women in any part of such premises in which such liquor or intoxicating drug is consumed by the public'.

The first respondent, with four others, filed a writ petition before the Delhi High Court questioning the validity of the said provision; the court gave judgment, declaring that Section 30 of the Act was *ultra vires* Articles 14–15 and 19(1)(g) of the Constitution of the Republic of India 1950²¹ to the extent that it prohibited the employment of any woman in any part of such premises in which liquor or intoxicating drugs were consumed by the public.

The appellants, citizens of Delhi, appealed to the Supreme Court against the decision. The first respondent cross-appealed, filing a special leave petition questioning the part of the order whereby restrictions had been put on employment of any man below the age of 25 years. The appellants submitted that as nobody had any fundamental right to deal in liquor, being '*res extra commercium*', the state had the right to make a law and/or continue the old law imposing reasonable restrictions on the nature of employment therein. The appellants also contended that the state was acting under its *parens patriae* power to protect young men and women from vulnerable circumstances. The

20. Source: *Law Reports of the Commonwealth* [2008] 1 LRC 771

21. Under the Constitution, article 14 provided for equality before the law; article 15 prohibited, *inter alia*, discrimination on the basis of gender; article 16 provided for equality of opportunity in matters of public employment and article 19, *inter alia*, protected the right to practise any profession or carry on any occupation.

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appellants highlighted examples of the bad effects caused by the sale and consumption of liquor by young men below the age of 25 years and the vulnerability of women while working in bars under the current legislation.

The Supreme Court had to consider whether Section 30 of the 1914 Act was invalid for violation of the Constitution, with the added consideration, apart from the factors highlighted above, of the right to privacy and the need for security and whether or not such protective discrimination was justified and proportionate.

In confirming the order of constitutional invalidity made by the Delhi High Court, it was held that:

[T]he 1914 Act, as a pre-constitutional piece of legislation, was saved by article 372 of the Constitution, but its invalidity could be challenged on the basis of articles 14-15 and 19. Although a statute could have been held to be valid in view of the societal condition at the time of its enactment, it could be declared invalid in terms of subsequent changes in such condition, in both the domestic and the international arena. Changed social psyche and expectations were important factors to be considered in the continuing application of the law. The classical counter to individual rights was the community orientation of rights. However, in the instant case, the individual rights were challenged by a problem of practical import – of enforcement and security. The important jurisprudential tenet involved in the matter was not the prioritisation of rights inter se, but practical implementation issues competing with a right. When discrimination was sought to be made on the purported ground of classification, such classification had to be founded on a rational criteria. The state could not invoke the doctrine of '*res extra commercium*' in the matter of the appointment of eligible persons. The subject matter of the *parens patriae* power had to be adjudged in terms of its necessity and the assessment of any trade-off or adverse impact. Young men and women knew what would be the best offer for them in the service sector. In the age of the internet, they would know all the pros and cons of a profession. It was their lives, subject to constitutional, statutory and social interdicts and a citizen of India should be allowed to live her life on her own terms. If prohibition in the employment of women and of men below 25 years was to be implemented in its letter and spirit, a large section of young graduates who had spent a lot of time, money and energy in obtaining the degree or diploma in hotel management would be deprived of their right to employment under article 16 of the Constitution. The instant matter involved a fundamental tension, difficult to reconcile, between the right to employment and security. Privacy rights prescribed autonomy to choose a profession, whereas security concerns textured the methodology of delivery of that assurance. But it was a reasonable proposition that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee was lost. Women would be as vulnerable without state protection as they would be by the loss of freedom imposed by the impugned Act. The interference prescribed by the state for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society. Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. Instead of prohibiting the employment of women in bars

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altogether, the state should focus on factoring in ways through which unequal consequences of sex differences could be eliminated. It was the state's duty to ensure circumstances of safety which inspired confidence in women to discharge the duty freely, in accordance with the requirements of the profession they chose to follow. Any other policy inference (such as the one embodied under Section 30) from societal conditions would be oppressive to women and contrary to their privacy rights. Legislation with pronounced 'protective discrimination' aims, such as Section 30, potentially served as double-edged swords. A strict scrutiny test should be employed while assessing the implications of the various pieces of legislation. Legislation should not be assessed only on the basis of proposed aims but rather on its implications and effects. The impugned legislation suffered from incurable fixations of stereotyped morality and concepts of gender-based roles. When the restrictions were in force, they could not prevent the bad effects of the sale and consumption of liquor highlighted by the Appellants in their submission. If the restriction went, some such incidents might happen again. But the court could not declare *intra vires* a law which was *ex facie ultra vires* merely on a presupposition that there was a possibility of some incident happening. The High Court was correct to declare Section 30 of the Punjab Excise Act *ultra vires* articles 14–15 and 19(1)(g) of the Constitution. In addition, the state restriction on the employment of young men under the age of 25 where liquor was consumed or sold was also a facet of the right to livelihood and did not stand judicial scrutiny.²²

FOR THE APPELLANTS: A JAITLEY

FOR THE RESPONDENTS: R DUTTA

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22. Per curiam. (i) Domestic courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, when there is no inconsistency between them (*Hariharan v. Reserve Bank of India* [2000] 3 LRC 71 applied); (ii) In South Africa, the Constitutional Court has held that the rules and pre-constitutional legislative provisions of succession in customary law had not been given the space to adapt and to keep pace with changing social conditions and values. Instead, they had, over time, become increasingly out of step with the real values and circumstances of the society they were meant to serve. In that case, the court held that the application of the customary law rules of succession, in circumstances vastly different from their traditional setting, caused much hardship. Therefore, it was decided that the exclusion of women from inheritance on the grounds of gender was a clear violation of the constitutional prohibition against unfair discrimination (*Bhe v. Magistrate of Khayelitsha* [2005] 2 LRC 722 considered).

**C MASILAMANI MUDALIAR AND OTHERS V. IDOL OF SRI SWAMINATHASWAMI THIRUKOIL AND OTHERS
SUPREME COURT, INDIA²³**

K Ramaswamy J, S Saghir Ahmad J, G B Pattanaik J
30 January 1996

Discrimination

Widow entitled to full ownership of property left to provide maintenance

A Hindu man bequeathed certain property to his wife S and his cousin's widow J, for whom he was duty-bound to provide maintenance. The property was to be shared equally by S and J, but not sold during their lifetimes. His will further provided that, should one predecease the other, the survivor would have the right to enjoy the property 'in its entirety' and that it should be held in trust after both their deaths for religious and charitable purposes. After J died, a power of attorney holder appointed by S arranged for the property to be sold to the respondents. This was challenged by the beneficiaries of the trust on the basis that, at the time of sale, S had only limited rights to the property under section 14(2)²⁴ of the Hindu Succession Act. The High Court held that S did not have full ownership of the property. The respondents obtained special leave to appeal to the Supreme Court.

In allowing the appeal, it was held that:

- (1) The constitutional right to equality before the law (article 14)²⁵ acts to eliminate previous 'disabilities' suffered by Hindu women regarding property rights. 'Personal laws', which derive from religious scriptures, are constitutionally void if they confer inferior status on women.

23. Source: INTERIGHTS, the International Centre for the Legal Protection of Human Rights.

24. Section 14(1) provides that: 'Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner'. However, section 14(2) provides that, *inter alia*: 'Nothing contained in subsection (1) shall apply to any property acquired by way of gift, Will or other instrument'.

25. Article 14 provides that: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'.

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- (2) The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) obliges India to prohibit all gender-based discrimination²⁶ and makes specific mention of property issues.²⁷
- (3) The existence of the Protection of Human Rights Act 1993 means that the principles in CEDAW are enforceable in India.
- (4) The state has a constitutional responsibility to take positive measures to ensure that women enjoy economic, social and cultural rights on an equal footing with men.
- (5) Discrimination against women violates the principles of equality and human dignity and is an obstacle to women's participation on equal terms in the political, social, economic and cultural life of India.²⁸
- (6) The Hindu Succession Act is one of a number of Acts designed to eliminate discrimination experienced by women due to the Sastric Law. It must be read in the light of the guarantees of the constitution. Section 14(1) of the Act will transform any limited rights to property of a Hindu woman into full ownership provided such rights accrued under a pre-existing law. This is a question of fact in each case.
- (7) The widow S received her interest in the property in recognition of her pre-existing right to maintenance under Sastric Law, but this was transformed into an absolute right under section 14(1). Accordingly, the exception in section 14(2) of the Act does not apply and the respondents are the absolute owners of the property.

FOR THE APPELLANTS: K R CHOWDHARY, ADVOCATE

FOR THE RESPONDENTS: A V RANGAM, ADVOCATE

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26. Article 2 provides that: 'Discrimination against women in all its forms is condemned and the states parties agree to undertake: ... To ensure that public authorities and institutions shall refrain from engaging in any act or practice of discrimination against women. To ensure that all acts of discrimination against women by persons, organisations or enterprises are eliminated'.
 27. Article 16(1) provides that: 'States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ... h. the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration'.
 28. Valsamma Paul v. Cochin University (1996) 3 SCC 545; [1996] 3 CHRLD 314 applied.

**VISHAKA AND OTHERS V. STATE OF RAJASTHAN AND OTHERS
SUPREME COURT, INDIA²⁹**

Verma CJ, Manohar J, Kirpal J
13 August 1997

Discrimination (sex)

Protection from sexual harassment in the workplace

The petitioners were various social activists and non-governmental organisations concerned with finding suitable methods for the realisation of the true concept of 'gender equality', preventing the sexual harassment of working women in all workplaces through the judicial process and filling the vacuum in existing legislation.

As a result of the brutal gang rape of a publicly employed social worker in a village in Rajasthan, they filed a class action under article 32 of the constitution seeking the court's enforcement of the fundamental rights provisions relating to working women, namely the right to equality,³⁰ the right to practise one's profession³¹ and the right to life.³² Other issues raised by the petition included: the fundamental right to non-discrimination;³³ India's international obligations under articles 11³⁴ and 24³⁵ of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and India's official commitment at the Fourth World Conference on Women in Beijing to, *inter alia*, 'formulate and operationalise a national policy on women which would continuously guide and inform action at every level and in every sector; to set up a Commission for Women's Rights to act as a public defender of women's human rights; [and] to institutionalise a national level mechanism to monitor the implementation of the Platform for Action.'

In disposing of the writ petition with directions, it was held that:

1. The fundamental right to carry on any occupation, trade or profession depends on the availability of a 'safe' working environment. The right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through

29. Source: INTERIGHTS, the International Centre for the Legal Protection of Human Rights.

30. Article 14

31. Article 19 (1)(g)

32. Article 21

33. Article 15

34. 'Take all appropriate measures to eliminate discrimination against women in the field of employment'

35. 'Undertake to adopt all necessary measures at the national level aimed at achieving the full realisation' of the rights recognised in CEDAW.

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suitable legislation and the creation of a mechanism for its enforcement belongs to the legislature and the executive. When, however, instances of sexual harassment resulting in violations of articles 14, 19 and 21 are brought under article 32,³⁶ effective redress requires that some guidelines for the protection of these rights should be laid down to fill the legislative vacuum.

2. In view of the fact that the violation of such fundamental rights is a recurring phenomenon, a writ of *mandamus* needs to be accompanied by directions for prevention if it is to be successful. Any international convention not inconsistent with the fundamental rights guaranteed in the constitution and in harmony with its spirit must be used to construe the meaning and content of the constitutional guarantee and to promote its object; this is now an accepted rule of judicial construction³⁷ and is also implicit from article 51(c)³⁸ and article 253³⁹ read with Entry 14 of the Union List in the seventh Schedule of the constitution.⁴⁰ Article 73 of the constitution also provides that the executive power of the Union is available until parliament enacts legislation to expressly provide measures needed to curb the evil in question.
3. It follows that articles 11 and 24 of CEDAW, relating to sexual harassment in the workplace, and India's commitment at the Fourth World Conference on Women may be relied upon to construe the nature and ambit of the gender equality guarantee and, since the guarantee includes protection from sexual harassment and the right to work with dignity, to formulate preventive guidelines.
4. Both the power of the court under article 32 and the executive power of the Union have to meet the challenge of protecting working women from sexual harassment and making their fundamental rights meaningful. Governance of society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme.

36. **'Remedies for enforcement of rights conferred by this Part –** (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.'

37. *Minister of Immigration and Ethnic Affairs v. Teoh* (1995) 128 ALR 353; [1996] 1 CHRLD 67 (Aus HC) applied and *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746 (Indian SC) followed.

38. **'Promotion of international peace and security –** The State shall endeavour to – foster respect for international law and treaty obligations in the dealings of organized peoples with one another' ...

39. 'Notwithstanding anything in the foregoing provisions of this Chapter, parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.'

40. 'Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.'

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5. In the absence of legislation, the obligation of the court under article 32 must be viewed along with the role of the judiciary envisaged in the 1995 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region, principle 10 of which requires the judiciary: (a) to ensure that all persons are able to live securely under the rule of law; (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and (c) to administer the law impartially among persons and between persons and the state. These principles were accepted by the Chief Justices of Asia and the Pacific as representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary.⁴¹

FOR THE PETITIONERS: MS MEENAKSHI ARORA AND MRS NAINA KAPUR

FOR THE RESPONDENTS: THE SOLICITOR GENERAL

AMICUS CURIAE: SHRI FALI S NARIMAN

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41. The following guidelines and norms are, therefore, to be observed at all workplaces or other institutions for the preservation and enforcement of the right to gender equality of working women:
- The employer or other responsible persons in the workplace or other institution is under a duty to prevent or deter the commission of acts of sexual harassment and to provide procedures for the resolution, settlement or prosecution of such acts by taking all steps required.
 - The definition of sexual harassment includes unwelcome sexually determined behaviour (whether directly or by implication) such as:
 - physical contact and advances,
 - a demand or request for sexual favours,
 - sexually-coloured remarks,
 - showing pornography,
 - any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.
 - All employers or persons in charge of any workplace, whether in the public or private sector, should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation, they should take the following steps:
 - express prohibition of sexual harassment at the workplace should be notified, published and circulated in appropriate ways,
 - the rules/regulations of government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender,
 - as regards private employers, steps should be taken to include these prohibitions in the standing orders under the Industrial employment (Standing Orders) Act 1946,

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- appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.
- Where such conduct amounts to a specific offence under the Indian Penal Code or under any law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. In particular, it should ensure that victims or witnesses are not victimised or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.
- Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.
- Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organisation for the redress of the complaint. Such a complaint mechanism should ensure timely treatment of complaints.
- The above complaint mechanism should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality. The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, the Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them. The employers and person-in-charge will also report on the compliance with these guidelines, including reports of the Complaints Committee, to the government department.
- Employees should be allowed to raise issues of sexual harassment at workers' meetings and in other appropriate fora and it should be affirmatively discussed in employer-employee meetings.
- Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation, when enacted on the subject) in a suitable manner.
- Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.
- The central/state government should consider adopting suitable measures, including legislation, to ensure that these guidelines are also observed by employers in the private sector.
- The court stated that the guidelines are to be treated as law declared by it in accordance with article 141 of the Constitution until the enactment of appropriate legislation and that the guidelines do not prejudice any rights available under the Protection of Human Rights Act 1993.

MUOJEKWO AND OTHERS V. EJIKEME AND OTHERS
COURT OF APPEAL (ENUGU), NIGERIA⁴²

Tobi JC, Olagunju, Fabiyi JJCA
9 December 1999

Inheritance

Customary law affecting rights of female family members inequitable

R died intestate in 1996 without any surviving children. The appellants were R's two great grandsons and his granddaughter, the third appellant. The granddaughter was born to R's daughter V and the great grandsons were born to V's two daughters. The appellants claimed that the Nnewe custom of Nrachi had been performed for V, and accordingly the appellants were entitled to inherit R's property. The Nrachi custom enabled a man to keep one of his daughters perpetually unmarried under his roof in order to raise children, especially males, to succeed him. Any such daughter took the position of a man in the father's house and was entitled to inherit her father's property and any children born to the woman would automatically be part of the father's household and accordingly entitled to inherit. A different custom, Ili-Ekpe, provided that where a man has no surviving male issue, including the daughter in respect of whom Nrachi was performed and her children, the man's brother or his male issue are entitled to inherit.

The respondents, five male members of R's brother's family, claimed that Nrachi was performed for V's sister C, who had died childless, and not V. They contended that when C died, R's family lineage became extinct and they, rather than the appellants, should inherit R's property. The legal action began when the respondents, without the appellants' permission, entered the compound once belonging to R. The appellants laid claim to a statutory right of occupancy over R's estate and requested an injunction restraining the respondents from trespassing.

In allowing the appeal, it was held that:

1. The Nrachi custom compromises the basic tenets of family life, is inequitable and judicially unenforceable. Accordingly, a female child does not need the performance of Nrachi in order to inherit her deceased father's estate.
2. The custom is also repugnant to natural justice, because the children born to a daughter in respect of whom the ceremony is performed are denied the paternity of the natural father.⁴³ The custom of Ili-Ekpe also discriminates against women.⁴⁴

42. Source: INTERIGHTS, the International Centre for the Legal Protection of Human Rights.

43. *Edet v. Essien* (1932) 11 NLR 47 (Nig. DC).

44. *Mojekwu v. Mojekwu* (1979) 7 NWLR (Pt. 512) 283, 304–305 (Nig. CA).

Part III: From Aspirations to Entitlements

3. The fact that the appellants were born out of wedlock was immaterial since Section 39(2) of the 1979 constitution prohibits discrimination on the grounds of circumstances of birth. In this case, the acceptance into R's family of the third appellant and her sister was sufficient acknowledgement of the two daughters by their grandparents to entitle them to full rights of succession to the estate of their grandfather. The appellants had been in possession of R's estate for many years and it would be inequitable to evict them.
4. In determining whether a customary law is repugnant to natural justice or incompatible with any written law, the court applies a standard not derived from principles of English law, but from Nigerian jurisprudence. Lineage refers to a line of descent and one can only talk of its extinction when the line is extinguished. When there are children or grandchildren still alive it is wrong to hold that the lineage is extinct.

FOR THE APPELLANTS: B S NWANKWO

FOR THE RESPONDENTS: O R ULASI

**HUMAIRA MEHMOOD V. SHO NORTH CANTT LAHORE
AND OTHERS
HIGH COURT, PAKISTAN⁴⁵**

Tassaduq Hussain Jilani J
18 February 1999

Human rights – Right to family life – Right to marry – Right to freely choose a spouse and to enter into marriage only with free and full consent – Validity of marriage – Consent requirement

Meaning of consent – Determination of validity of marriage in case of conflicting marriage certificates

Humaira Mehmood secretly married Mehmood Butt on 16 May 1997 and the marriage was registered the same day. Her parents, who had promised her in marriage to her cousin, Moazzam Ghayas Khokhar, when she was a child, were strongly opposed to her marrying Mehmood. When they discovered that the marriage had taken place, they went to extreme lengths to enforce their will on their daughter. Humaira Mehmood was beaten, tortured and taken to a hospital where she was tightly bandaged to immobilise her and detained there for a month. On 3 July 1998 she was forcibly married to her cousin. The marriage was backdated in the marriage register as having taken place on 14 April 1997. In November 1998, Humaira and Mehmood fled to Karachi, where Humaira sought protection in a shelter for women and Mehmood went into hiding. On 4 November 1998 a report was registered with the police claiming that Mehmood had abducted Humaira. This complaint was later cancelled by the police, when it was found to be false. On the basis of a further false complaint, the Punjab police raided the shelter and turned Humaira over to her brother's custody. After a women's rights activist intervened, Humaira was released and the matter was taken up before the Sindh High Court, Karachi, which ordered the police not to arrest Humaira on any charges.

On 25 December 1998, Moazzam Ghayas filed a case with the police that his alleged wife had been abducted by Mehmood and that she had committed adultery with Mehmood. In January 1999, despite the earlier Sindh High Court order, Punjab police arrested Humaira, Mehmood and his mother at Karachi airport, beat them, restrained them and detained them at separate police stations. Their arrests did not appear in the police case diary. Humaira brought a petition before the Lahore High Court, refuting the fact that she had been abducted and requesting the court to quash the charges against herself, her husband and her mother-in-law, which had been brought by Moazzam Ghayas.

45. Source: Emerton *et al.* (eds.) *International Women's Rights Cases*, Routledge-Cavendish, p.184.

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In allowing the petitions it was held that:

1. The court had ample powers in the constitutional jurisdiction to interfere in an investigation where there was material on record to show that the investigation involved malice in law or fact. The High Court would not have ordinarily exercised jurisdiction under article 199 of the constitution to quash the criminal proceedings initiated pursuant to registration of the case but in the face of the bias and the *mala fides* shown by police officials who handled this case, any restraint at this stage from the High Court would not only be unjust but would be tantamount to abdication of the powers vested in the High Court to put a check on state functionaries who abuse their lawful duty to help a particular individual and promote their personal interests.
2. Articles 4 and 25 of the constitution guarantee that everybody shall be treated strictly in accordance with the law and article 35 provides that the state shall protect the marriage, the family, the mother and the child. The court had also to respect the international human rights instruments to which Pakistan was a party. These included the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 16 of which requires state parties to take appropriate measures to eliminate discrimination against women in all matters relating to marriage, including *inter alia* the right freely to choose a spouse and to enter into marriage only with their free and full consent. It was also a party to the Cairo Declaration on Human Rights in Islam, which calls for the protection of marriage and the family.
3. It was a settled proposition of law that in Islam a *sui juris* woman can contract *Nikah* (marriage) of her own free will and *Nikah* performed under coercion is no *Nikah* in law. Where consent to a marriage is in dispute and a challenge made to a *Nikah Nama* (marriage certificate) which relates to a man and a woman who claim to be husband and wife, then the presumption of truth attaches to the *Nikah Nama* which is acknowledged by spouses and not by the intervener. Marriage with a woman during the subsistence of her earlier marriage with some other man is illegal and void. *Prima facie* the *Nikah* of Humaira with Mehmood was valid and no prosecution under the Hudood laws could be initiated without a conclusive finding of a Family Court against the *Nikah* in question. The case registered and proceedings initiated pursuant to it reflected *mala fides*, had no legal effect and were quashed.

FOR THE PETITIONER: MS HINA JILANI

FOR THE RESPONDENT, MALIK MOAZZAM GHAYAS: CH MUHAMMAD HUSSAIN
CHHACHHAR

FOR THE RESPONDENT, MALIK ABBAS KHOKHAR: CH ALI MUHAMMAD

GUMEDE V. PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS
CONSTITUTIONAL COURT, SOUTH AFRICA⁴⁶

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Yacoob J, Van Der Westhuizen J
11 September, 8 December 2008

Equality

Constitutional law – Fundamental rights – Right to equality – Freedom from discrimination – Gender – Customary law – Customary marriage

In 1968, the applicant and the fifth respondent, H, entered into a customary marriage. During the marriage H worked and the applicant maintained the family household and was the primary caregiver to the children of the marriage. The applicant, unlike H, had no means to contribute towards the purchase of the common home.

On 15 November 2000 the Recognition of Customary Marriages Act 1998 came into force. It provided that customary marriages concluded after its commencement ('new' marriages) were ordinarily marriages in community of property (Section 7(1)). The marriage of the applicant and her husband, having been concluded before 15 November 2000, was governed by customary law. In KwaZulu-Natal, where the applicant and her husband were domiciled, customary law was codified in the KwaZulu Act on the Code of Zulu Law 1985 and the Natal Code of Zulu Law. Section 20 of both the 1985 Act and the Natal Code provided that in a customary marriage, the husband was the family head and owner of all family property, which he might use in his exclusive discretion. Section 22 of the Natal Code provided that 'inmates of a *kraal* were in respect of all family matters under the control of and owed obedience to the family head'. In terms of codified customary law in KwaZulu-Natal, a wife in an 'old' customary marriage had no claim to the family property during or upon dissolution of the marriage.

The applicant's marriage to H broke down irretrievably and in January 2003, H instituted court proceedings to end the marriage. H received an occupational pension. The applicant lived off a government pension and occasional financial support received from her children. She received no maintenance contribution from H.

Before a divorce was granted, the applicant approached the High Court with a view to procuring an order invalidating the statutory provisions that regulated the proprietary

46. Source: Law Reports of the Commonwealth [2009] 4 LRC 351.

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consequences of her marriage. She sought to pre-empt the divorce court from relying on legislation she considered unfairly discriminatory to customary law wives. The High Court made an order of constitutional invalidity in relation to Section 7(1) and (2) of the 1998 Act, Section 20 of the 1985 Act and Sections 20 and 22 of the Natal Code. The applicant sought confirmation of the order of constitutional invalidity in terms of Section 167 of the Constitution of the Republic of South Africa 1996. The Women's Legal Centre Trust was admitted as *amicus curiae* and supported the confirmation of the order of constitutional invalidity.

In confirming the order of constitutional invalidity made by the High Court, it was held that:

- (1) The impugned provisions were discriminatory as between wife and husband. Only women in a customary marriage were subject to the unequal proprietary consequences. That discrimination was on the listed ground of gender.
- (2) Within the class of women married under customary law, the legislation differentiated between a woman who was party to an 'old' or pre-recognition customary marriage as against a woman who was a party to a 'new' or post-recognition customary marriage. That differentiation was unfairly discriminatory.
- (3) The consequence of the discrimination created by the 1998 Act was to subject the applicant and other women in KwaZulu-Natal similarly situated, to the proprietary system governed by customary law as codified in the 1985 Act and the Natal Code. The impact of that legal arrangement was that the affected wives in customary marriages were considered incapable or unfit to hold or manage property. They were expressly excluded from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property.
- (4) The marital property system contemplated by the 1985 Act and the Natal Code struck at the very heart of the protection of equality and dignity, which the Constitution affords to all and to women in particular. That marital property system rendered women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent. That was unfair.
- (5) The Constitution itself placed a particular premium on gender equality by providing in Section 9(5) that discrimination based on gender, one of the grounds listed in Section 9(3), was presumed to be unfair. The government bore the burden of justifying the limitation that had been found to exist on the right to equality afforded to the Applicant by the Bill of Rights. It had failed however to furnish justification

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to save the unfair discrimination spawned by the impugned provisions. Accordingly, the provisions concerned were inconsistent with the Constitution and invalid.⁴⁷

FOR THE APPLICANT: G BUDLENDER and E van HUYSSTEEN

FOR THE KWAZULU-NATAL MEMBER OF THE EXECUTIVE COUNCIL FOR TRADITIONAL AND LOCAL GOVERNMENT AFFAIRS AND THE MINISTER OF HOME AFFAIRS: V SONI SC

FOR THE AMICUS CURIAE: S COWEN AND N MANGCULOCKWOOD

47. Per curiam. The adaptation of customary law serves a number of important constitutional purposes. First, this process would ensure that customary law, like statutory law or the common law, is brought into harmony with the supreme law and its values and brought into line with international human rights standards. Second, the adaptation would salvage and free customary law from its stunted and deprived past. And lastly, it would fulfil and reaffirm the historically plural character of the legal system, which now sits under the umbrella of one controlling law – the Constitution. In its desire to find social cohesion, the Constitution protects and celebrates difference. It goes far in guaranteeing cultural, religious and language practices in generous terms, provided that they are not inconsistent with any right in the Bill of Rights. It is a legitimate object to have a flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation.

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EPHRAHIM V. PASTORY AND KAIZILEGE

HIGH COURT, TANZANIA⁴⁸

Mwalusanya J

22 February 1990

Human Rights

Equality and non-discrimination – Sex discrimination – Rights of women to inherit and sell land – Customary law

The first respondent, Holario d/o Pastory, inherited clan land from her father by a valid will. On 24 August 1988, she sold the land to Gervaz s/o Kaizilege, a man who was not a member of her clan. The next day the appellant, Bernard s/o Ephrahim, a nephew of the first respondent, filed a suit in the Kashasha Primary Court seeking a declaration that the sale of the clan land by Ms Pastory to Mr Kaizilege was void under Haya customary law.⁴⁹ Pursuant to Haya customary law, a woman has no power to sell clan land. In general, a woman can inherit clan land only in *usufruct*, that is to say she cannot inherit full ownership of clan land, but only the right to use it during her lifetime according to the Rules Governing the Inheritance of Holdings by Female Heirs (1994) made by the Bukoba Native Authority.⁵⁰ Only if there is no male clan member can she inherit full ownership rights.

The Primary Court held that the sale was void and ordered Ms Pastory to refund the purchase price to Mr Kaizilege. The District Court overturned this decision on appeal, holding that the Bill of Rights 1987, which prohibits discrimination on the grounds of sex, grants equal rights to female and male clan members. The nephew, Mr Ephrahim, appealed to the High Court.

In dismissing the appeal, it was held that:

1. The Constitution of Tanzania, which incorporates the Tanzanian Bill of Rights and the Universal Declaration of Human Rights, prohibits discrimination on the ground of sex. Tanzania had also ratified the Convention on the Elimination of All Forms of Discrimination against Women, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights, all of which prohibit discrimination on the ground of sex. Haya customary law relating to women's property rights to clan land clearly discriminated against women on the

48. Source: Emerton *et al.* (eds.) *International Women's Rights Cases*, Routledge-Cavendish, p.538.

49. As stated in section 20 of the Rules of Inheritance GN No. 436/1963 of the Declaration of Customary Law ('1963 Rules of Inheritance').

50. 'Bukoba Inheritance Rules'.

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ground of sex. This flew in the face of the Bill of Rights, as well as the international conventions to which Tanzania was signatory.

2. Section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984, provides that with effect from March 1988, the courts will construe the existing law, including customary law **'with such modifications, adoptions, qualifications and exceptions as may be necessary to bring it into conformity with the [Bill of Rights]'**. In enacting this provision, there could be no doubt that parliament wanted to do away with all oppressive and unjust laws of the past. It wanted the courts to modify by construction those existing laws that were inconsistent with the Bill of Rights, such that they were in line with the new era.
3. Section 20 of the 1963 Rules of Inheritance barring women from selling clan land was inconsistent with article 13(4) of the Bill of Rights of the Constitution, which bars discrimination on the ground of sex. In accordance with section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984, this provision was now taken to be modified and qualified such that males and females would have equal rights to inherit and sell clan land. Likewise the rules under the Bukoba Inheritance Rules entitling a woman to only usufructuary rights with no power to sell inherited clan land were equally void and of no effect.

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TEPULOLO V. POU
HIGH COURT, TUVALU⁵¹

Ward CJ

24 January 2005

Discrimination

T, an unmarried mother, was denied custody of her child in accordance with section 3 of the Custody of Children Ordinance⁵² ('the Children Ordinance') and section 20 of the Native Lands Ordinance⁵³ ('the Lands Ordinance'). T challenged the decision before the High Court, arguing that the impugned provisions breached section 27⁵⁴ of the constitution on the grounds that, even though gender was not included as a ground of discrimination given that the word 'people' was referred to, the protection should apply to men and women. In addition, T also argued that the impugned provisions, in so far as they discriminated against women on the grounds of gender, also breached

51. Source: *Commonwealth Human Rights Law Digest* [2005] TVHC 1, Case No. 17 of 2003.

52. Section 3 provides: '(1) A court may on application by or on behalf of any person make such order regarding: (a) the custody of any child; and (b) the right of access to the child of his mother or father, as the court thinks fit having regard to the welfare of the child and to the conduct and wishes of the mother and father. (2) Before making a custody order the court shall make full enquiry into all the circumstances and shall call for any evidence or report it may in the interests of justice consider necessary. (3) In exercising jurisdiction under this section the court shall regard the welfare of the child as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father is superior to that of the mother or the claim of the mother is superior to that of the father. (4) A court may at any time on application by or on behalf of any person make an order discharging or varying a custody order. (5) This section is subject to the Native Lands Ordinance'.

53. Section 20 provides *inter alia*: '(1) If in any island a single woman is delivered of a child, the court may summon before it that woman and all other such natives as it may think fit and may enquire into the paternity of the child. (2) Subject to anything to the contrary in the native customary law, the court may make an order regarding the paternity of the child and its future support in one of the following ways – (i) If the father being a native accepts the child as being his, such child shall after reaching the age of two reside with the father or his relations and shall in accordance with native customary law inherit land and property from his father in the same way as the father's legitimate children...'

54. Section 27 defines discrimination as: 'The treatment of different people in different ways wholly or mainly because of their different races, places of origin, political opinions, colours or religious beliefs, in such a way that one such person is for some such reason given more favourable treatment or less favourable treatment than another such person'.

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articles 1,⁵⁵ 2,⁵⁶ 5(a)⁵⁷ and 16(1)(d)⁵⁸ of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and article 3(1)⁵⁹ of the Convention on the Rights of the Child (CRC) and that these international conventions were applicable in domestic law where the existing law was in contravention of any of these conventions and the court made a declaratory order to that effect, or where the meaning of a statute or provision was silent or ambiguous. She also sought a declaration that the proper test to be applied in assessing custody pursuant to the Ordinance was what was in the best interests of the child in accordance with the CRC, irrespective of the gender of the parent.

In refusing, dismissing or declining each declaration, it was held that:

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55. Article 1 provides: 'For the purposes of the present Convention, the term "discrimination against women" shall mean 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, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.
 56. Article 2 provides: 'States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women'.
 57. Article 5(a) provides: 'States parties shall 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 inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.
 58. Article 16(1)(d) provides: 'States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount'.
 59. Article 3(1) provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

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- (1) Section 11⁶⁰ of the constitution makes clear that everyone, whatever their gender, is entitled to the same constitutional fundamental human rights and freedoms contained in the constitution, including freedom from discrimination. However, unequal treatment on the basis of gender is not included in the specific definition of discrimination in section 27 of the constitution. Consequently, since gender does not fall within the scope of section 27, the relevant legislative provisions cannot be in breach for that reason.
- (2) While states parties have obligations to amend their laws where there is conflict with the aims of international conventions, courts do not have the power to correct or amend existing legislation to bring it into line with treaty obligations, nor does the act of accession to an international treaty by the executive change domestic law until parliament passes a law to bring the treaty obligations into effect. International conventions are inapplicable unless laws are passed to implement their provisions. To hold otherwise would give the executive the power to make laws that it does not have. In this instance, the state ratified the CRC on 14 July 1995 and acceded to CEDAW on 4 October 1999. No laws have, it appears, been passed or even considered by parliament specifically to give effect to the obligations placed on the states parties by either convention.
- (3) The aims of an international convention may, however, be relevant in the interpretation of an existing domestic law, but only where there is difficulty in interpretation which requires the court to determine the true construction of the law. Such interpretative difficulties are not present in this case, since there is no conflict between section 3(5) of the Children Ordinance and section 20(2) of the Lands Ordinance and the former is subject to the latter. There is no doubt that section 20 is concerned with the inheritance of native land. Thus, it gives the court power to enquire into the paternity of a child born to an unmarried woman and the purpose of such enquiry is to ensure the child's inheritance is secured. However, it must be borne in mind that, by section 2 of the Lands Ordinance, 'court' means a Lands Court established under section 6 of the Lands Ordinance and so the power to enquire and determine the paternity of the child under section 20 is only given to the Lands Court. It is a special procedure given only to that court to initiate an enquiry into the paternity of a child born out of wedlock and make any necessary provisions for his or her upkeep. However, as in the case of courts implementing the Children Ordinance, the Lands Court must act in the best interests of the child when making an order under section 20 of the Lands Ordinance in relation to inheritance rights.

FOR THE PLAINTIFF: A SEKULA
FOR THE DEFENDANT: E APINELA

60. Section 11 provides: 'Every person in Tuvalu, whatever his race, place of origin, political opinions, colour, religious beliefs or sex is entitled the fundamental human rights and freedoms listed in the subsection and to other rights and freedoms set out in Part II which include freedom from discrimination'.

JOLI V. JOLI
COURT OF APPEAL, VANUATU⁶¹

Lunabek C J, Robertson J, Von Doussa J, Fatiaki J, Saksak, Treston
7 November 2003

Matrimonial jurisdiction

Following a divorce granted to the parties in a magistrate's court, the case was transferred to the Supreme Court on foot of a notice of motion filed by the respondent, including claims in respect of custody and access to children of the marriage and maintenance. Thereafter the parties entered into discussions about a property settlement. A dispute arose over which of their assets should be taken into account. A date was set by the Supreme Court to 'define what are the matrimonial assets for the purposes of a settlement'. The parties sought this ruling so that their negotiation could go forward.

The parties identified particular assets which were the stumbling block in negotiations. Those assets, which included three businesses, two leasehold titles and shares in certain companies, were claimed by the appellant to be his sole assets. All these items of property were in his name alone. He contended that the Supreme Court lacked power to make any order that had the effect of transferring any part of his interest, legal or equitable, to the respondent.

The matter came before the Court of Appeal by way of an appeal against an interlocutory ruling made by Coventry J on 25 March 2003. The Court of Appeal maintained that the issues raised by the appeal were important and in the public interest.

The subject of the appeal is constituted in the following passage taken from the ruling by Coventry J:

'In my judgment there is presumption that all such assets are beneficially owned jointly, no matter whose name they are in or who in fact paid for them, made them or acquired them. That presumption can be rebutted concerning any asset by showing that it was the intention of the parties that at the time of its acquisition or subsequently both intended it should be the sole property of one.'

Coventry J based his finding on concepts of equality between the sexes, which he drew from Article 5⁶² and Article 1 (k)⁶³ of the Constitution of the Republic of Vanuatu and

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61. Sources: Constitution of Vanuatu and [2003] VUCA 27; Civil Appeal Case 11 of 2003 (7 November 2003).
 62. '...all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of ... sex ...'.
 63. Article 1 (k) guarantees 'equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph in so far as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons ...'.

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from the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁶⁴

The appellant complained to the Court of Appeal that the ruling of Coventry J purported to establish in Vanuatu a matrimonial property regime to fill a void in the law, and that however well intentioned the ruling may have been, it is for parliament, not the court, to make new laws of this kind.

The Court of Appeal enquired as to what if any law was to be applied in Vanuatu concerning matrimonial property and to determine if in reality there is a void which the ruling under appeal sought to fill.⁶⁵ Due to the relevant course of legal history in Vanuatu, both parties accepted the application of the 1973 English Act⁶⁶ following

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64. Under the Convention, article 5(1) requires state 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 other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles of men and women'. Article 16 of the Convention states: '1. States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ... (c) The same rights and responsibilities during marriage and its dissolution ... (h) The same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration'.
 65. Immediately before the Day of Independence on 30 July 1980, laws which applied in Vanuatu included statutes of general application in force in England on 1 January 1976 as well as the principles of the English common law and equity. Under the terms of the Anglo French Protocol of 1914, those laws would not have applied to French citizens and 'optants' to the French legal system. Their rights were governed by French law under the parallel legal system then in force. At independence, laws in force immediately beforehand were continued in operation by Article 95 of the Constitution, which provides: '(1) Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day as if they had been made in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution. (2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom. (3) Custom law shall continue to have effect as part of the law of the Republic of Vanuatu'.
 66. Part II of the 1973 English Act contains provisions dealing with financial relief for both parties to a marriage and for any children of the family. The provisions empower the court to make property adjustment orders in connection with divorce proceedings. Property adjustment orders are defined in Section 21 as orders dealing with the property rights available under Section 24 for the purpose of adjusting the financial position of the parties to a marriage

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independence. However, Counsel for the appellant contended that the 1973 English Act ceased to have any application in Vanuatu after the Matrimonial Causes Act [CAP 192] came into force on 15 September 1986, pursuant to the provisions of Article 95 (2) and within the meaning of 'otherwise provided'. The respondent contended however that the enactment of CAP 192 only rendered inapplicable those provisions in the 1973 English Act that dealt specifically with the aspects of matrimonial law covered by CAP 192.⁶⁷

In allowing the appeal, it was held that:

- (1) Parts I and II of CAP 192 make comprehensive provision for decrees of nullity of marriage and divorce which replace Part I of the 1973 English Act as the Law of Vanuatu.

and any children of the family on or after the grant of a decree of divorce, nullity of marriage or judicial separation. Section 24 provides: '(1) on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say – (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child, such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion; (b) an order that a settlement of such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion; (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any antenuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage; (d) an order extinguishing or reducing the interest of either of the parties to the marriage under such settlement; subject however, in the case of an order under paragraph (a) above, to the restrictions imposed by Section 29 (1) and (3) below on the making of orders for a transfer of property in favour of children who have attained the age of eighteen. (2) The court may make an order under subsection (1)(c) above notwithstanding that there are no children of the family. (3) Without prejudice to the power to give a direction under Section 30 below for the settlement of an instrument by conveyancing counsel, where an order is made under this section on or after granting a decree of divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute.'

67. The scope of the provisions in CAP 192 are more restricted. Part I deals with nullity of marriage. Part II provides for the dissolution of marriage. Part III makes provisions for alimony and maintenance in the case of divorce and nullity of marriage and for the custody and maintenance of children. Part IV contains supplementary provisions which empower the court to award damages to a Petitioner in a divorce on the ground of adultery.

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- (2) Part III of CAP 192 replaces all those provisions of the 1973 English Act which deal with topics addressed in Sections 14⁶⁸ and 15⁶⁹.
- (3) Section 14 cannot be construed as containing a power to adjust proprietary interests as part of a property settlement, as it does not operate as a comprehensive code for all ancillary property matters that arise in connection with decrees of nullity or dissolution of the marriage under Parts I and II of the 1973 English Act to bring about a division or settlement of property between the parties to the former marriage.
- (4) The 1973 English Act, save in so far as its application has been overtaken by the provisions of CAP 192, is a law which applies in Vanuatu in accordance with the provisions of Article 95 (2)⁷⁰ and will continue to be so until Parliament otherwise provides.
- (5) The Supreme Court had the power to make an order to adjust the proprietary interest of the husband in the assets which were identified as his sole property.
- (6) A law applied in Vanuatu already makes provision for the manner in which the power to adjust proprietary interests between the parties is to be exercised.⁷¹

68. Section 14 makes broad provision for the payment of weekly, monthly or annual sums for maintenance and support of a wife, yet does not purport to deal with the division of property between the parties of the former marriage.

69. Under Section 15 of CAP 192 the court may from time to time, either before or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children of the marriage.

70. See note 65, *supra*.

71. Section 25(1) of the 1973 English Act provides as follows: 'It shall be the duty of the court in deciding whether to exercise its powers under Section 23(1) (a), (b) or (c) or 24 above in relation to a party to the marriage and if so, in what manner, to have regard to all circumstances of the case including the following matters, that is to say – (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; (c) the standard of living enjoyed by the family before the breakdown of the marriage; (d) the age of each party to the marriage and the duration of the marriage; (e) any physical or mental disability of either of the parties to the marriage; (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring; and so to exercise those powers as to place the parties, so far as it is practicable and having regard to their conduct, and just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other'.

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- (7) There is no presumption of law in Vanuatu that matrimonial assets are beneficially owned jointly, no matter whose name they are in and who paid for them.

FOR THE APPELLANT: JURIS OZOLS

FOR THE RESPONDENT: GARY BLAKE

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**LONGWE V. INTERCONTINENTAL HOTELS
HIGH COURT, ZAMBIA⁷²**

Musumali J
4 November 1992

Discrimination

Sex discrimination

Freedom of movement

Freedom of association – Whether rule barring unaccompanied women from a public place a violation of freedom of movement or association

L was refused entry to a hotel bar on the grounds that no unaccompanied women could be permitted entry. The hotel management had introduced this rule in an attempt to stop frequent disturbances, which they claimed were caused by women not accompanied by men and which instigated a series of complaints by hotel residents and male patrons alike, alleging that women were soliciting. Unaccompanied women were allowed in all other areas of the hotel.

L instituted proceedings, claiming that the hotel's refusal to allow her to enter the bar, a public place, was a violation of her right to freedom of movement and her right to be free from sex and marital status discrimination under articles 22⁷³ and 23⁷⁴ of the

72. Source: Emerton *et al.* (eds.) *International Women's Rights and Cases*, Routledge-Cavendish Publishing, 2005.

73. Article 22(1) provides: 'Subject to the other provisions of this article and except in accordance with any other written law, no citizen shall be deprived of his freedom of movement, and for the purposes of this article freedom of movement means – (a) the right to move freely throughout Zambia...'

74. Article 23 provides: (1) Subject to clauses (4) (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect. (2) Subject to clauses (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. (3) In this article the expression 'discriminatory' means, affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by ... sex ... marital status ... whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. (4) Clause (1) shall not apply to any law so far as that law makes provision – ... (e) whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and the special circumstances pertaining to those persons or to persons of any other description, is reasonably justifiable in a democratic society ... (6) Clause (2) shall not apply to anything which is expressly or by necessary implication

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Constitution of Zambia. The court also considered her case under article 21⁷⁵ (freedom of association). L argued that, even if the hotel were to be considered private premises, it was still required to observe these constitutional provisions. L claimed that her constitutional rights were also reinforced by Zambia's international obligations under the Convention on the Elimination of All Forms of Discrimination against Women⁷⁶ (CEDAW) and the African Charter on Human Rights and People's Rights⁷⁷, as well as the 1988 Bangalore Principles⁷⁸.

authorised to be done by any such provision or law as is referred to in clause (4) or (5). (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision whereby persons of any such description as is mentioned in Clause (3) may be subjected to any restriction on the rights and freedoms guaranteed by articles 21 and 22, being such a restriction as is authorised by clause (2) of article 21 or clause (3) of article 22, as the case may be ...'.

75. Article 21 provides: (1) 'Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons ... (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision: (a) that is reasonably required in the interests of ... public morality ... (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons ... and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society'.
76. Article 1 provides: 'Discrimination is 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, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. Article 2 provides that: 'Discrimination against women in all its forms is condemned and the states parties agree to undertake: ... To ensure that public authorities and institutions shall refrain from engaging in any act or practice of discrimination against women. To ensure that all acts of discrimination against women by persons, organisations or enterprises are eliminated'.
77. Article 2 provides that: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as ... sex ... or other status'. Article 3 provides that: '1. Every individual shall be equal before the law, 2. Every individual shall be entitled to equal protection of the law'.
78. Section 1 provides that: 'Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments'. Section 2 provides that: 'These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms'. Section 3 provides that: 'There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to the judges and lawyers generally'.

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In granting the applications, it was held that:

- (1) Article 11 of the constitution⁷⁹ confers on every resident of Zambia, whether a citizen or not, a right to be protected by the law. Therefore a person who felt that his or her rights had been infringed was entitled to seek an appropriate order before the courts.
- (2) The provisions of the constitution were intended to apply to everybody, public and private, unless the context dictated otherwise.
- (3) L was discriminated against because she was a female who was not accompanied by a male. A male who was not accompanied by a female could move around the hotel freely and enter the bar. This constituted blatant discrimination against females on the basis of their sex by the hotel.
- (4) Article 23 of the constitution allows derogations from its provisions in respect of acts authorised by an act of parliament or principles of law or delegated legislation. The discriminatory rule in question was not such an act of parliament, statutory instrument or a rule of law. Therefore none of the permitted derogations applied and the discrimination in question did not fall under article 23. The hotel's rule breached article 21 concerning freedom of assembly and association and article 22 concerning freedom of movement. The rule denied women the freedom to go wherever and to associate with whomever they wished.
- (5) The ratification of international treaties and conventions by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of those documents. Judicial notice should be taken of such willingness when formulating its decision.
- (6) The Bangalore Principles should not, as a general rule, be accorded the same status as international human rights instruments.

FOR THE PETITIONER: MRS MUSHOTA

FOR THE RESPONDENT: MR MALILA

79. Article 11 provides that: 'It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this part, to each and all of the following, namely: (a) ... the protection of the law, (b) freedom of ... assembly movement and association ... and the provisions of this article shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest'.

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13. CEDAW and the Committee: personal reflections

*Savitri Goonesekera, former member,
CEDAW Committee*

My first article relating to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was written in the 1980s after my country, Sri Lanka, ratified the Convention in 1981. I recall that I could hardly find informative publications on the Convention, especially in the context of issues relating to women's human rights in the developing countries of Asia and Africa. CEDAW did not feature prominently in the Third World Conference on Women, which I attended in Nairobi in 1985.

Today the CEDAW Convention and its Committee have acquired a clear status and relevance as the global and universal benchmark and norm-setting flag bearer on women's rights and women's issues. The commitment, professionalism and independence of the CEDAW experts and the capacity of the CEDAW Committee to earn the respect of both governments and women's groups has helped the Convention to be ratified by 186 countries, almost reaching the status of universal ratification by member states of the United Nations.

The complaints and inquiry procedure to CEDAW, the Optional Protocol (2000), has been ratified by more than 50 per cent of these state parties. The Committee has pronounced its views on several individual complaints and conducted one inquiry under the Optional Protocol. It has also adopted 26 General Recommendations, which have interpreted the meaning of equality, developing it beyond the traditional meaning of equality before the law and equal protection of the law, incorporating in national constitutional and international human rights jurisprudence influenced by Anglo-American law. This has enabled the Committee to address the complexities and nuances of gender-based discrimination that impacts negatively on women, addressing issues such as gender-based violence, exploitation in migration for employment, and the gender discrimination dimensions of conflict and disaster. All these are aspects not specifically dealt with in the Convention. These developments, in my experience, have made CEDAW norms more relevant to women in non-Western political economic and social systems. They have facilitated new understanding and incorporation of women's human rights in the national constitutions of different countries, as well as the regional human right systems in Europe and Latin America. The most recent Women's Rights Protocol to the African Charter on Human Rights has been inspired by CEDAW.

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The recent proposal for a Regional Asian Convention must build on these instruments, and cannot and should not undermine the global consensus achieved so far through the CEDAW process, in the name of 'Asian Values'. My own experience on the Committee, reviewing reports of state parties for four years, demonstrated the reality that gender-based discrimination is a universal experience, in one form or another, in all countries of the world. Manifestations were both similar and different, posing the always-common problems of integrating CEDAW standards nationally and implementing them, creating effective enforcement mechanisms and resourcing the implementation of women's human rights. The CEDAW Committee's Concluding Comments on State Party Reports highlight the commonalities of the issues, the spaces for change and the importance of peer leanings in implementing CEDAW, especially in the many countries that share a common legal tradition of Islamic law or English Common Law or Civil Law, as part of their colonial history.

My CEDAW experience also demonstrated the rich contribution and enormous dynamism of women's movements and women's scholarship, in our understanding and response to gender-based discrimination in diverse cultures. The CEDAW Committee's willingness to adopt a universalist approach, to rely on scholarships on women's rights and insist on the participation of women's groups in the CEDAW process through the acceptance of shadow reports, has strengthened their own work. This has also helped states parties to the Convention to recognise women as partners in achieving progress on gender equality at the national level, legitimising their participation in an international procedure traditionally considered the exclusive preserve of governments. CEDAW reviews confirm the pioneering and dynamic contribution of feminist scholars and groups and individual activists who have established regional organisations such as International Women's Rights Action Watch (IWRAP) Asia Pacific, the Asia Pacific Forum on Women, Law and Development (APWLD) and Women in Law and Development in Africa (WILDAF). All of them have helped to make gender equality a central pillar of development, and the human rights discourse.

We marked 30 years of CEDAW in December 2009. However, an anniversary is also a time to reflect and take stock of the continuing and common challenges and gaps in implementing CEDAW. It is also important to recognise and respond to forces undermining achievement of many decades. Religious fundamentalism or political agendas that challenge democratic governance based on universal human rights norms, as well as exploitative market forces that only stress economic efficiency, can reinforce the abuse of family and state power that has denied women in all societies equality and life chances.

14. CEDAW: reflections on the framework in the context of culture

*Farida Shaheed*¹

In Pakistan, CEDAW's adoption went unnoticed: 1979 was a traumatic year marked by a military dictatorship hanging the elected Prime Minister. In September 1981, when CEDAW came into force, I was engrossed in mobilising the women's rights lobby, Women's Action Forum, to mount collective resistance to the military's misogynistic campaign. Until 1988 and the return of democracy, the need to counter daily threats to rights within the country consumed all time and energies. Even afterwards, only a few activists were engaged in the UN system processes. It was not until 1993–94, in the build up to Fourth World Conference on Women, that some of us started pressing the government to sign CEDAW.

A major concern was accession without either blanket reservations with reference to 'Islam' or 'Sharia' – as made by numerous Muslim majority states by then – or reservations on the first four foundational articles. We succeeded: Pakistan signed CEDAW prior to the 1995 Conference and ratified on 11 March 1996.² In 1994, I prepared a first training module on CEDAW for grassroots women and have been fully engaged with CEDAW since then.

To me, in some ways CEDAW is both a rights and development agenda. This duality resonates deeply since my organisation (Shirkat Gah – Women's Resource Centre) has always maintained that rights and development are two sides of the same coin, the one incomplete without the other. In engaging with people, I find it very useful to remind people of CEDAW's genesis to dispel the popular misperception in many countries that CEDAW is a 'Western' agenda. This is especially relevant for policy-makers in Pakistan where, despite ratification, even senior government officials are reluctant to fully embrace CEDAW and its obligations. Of particular significance is the 1967 Declaration on the Elimination of All Forms of Discrimination against Women, prepared by the Commission on the Status of Women following a 1963 request sponsored by

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1. Ms Farida Shaheed is the first UN Special Rapporteur on Cultural Rights. The views expressed herein are those of Ms Shaheed and do not necessarily reflect the views of the United Nations.
 2. There is one reservation (on a procedural clause) and a general declaration that refers to the constitution and not to religion.

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22 countries.³ The vast majority of sponsors were developing countries, the remainder, excepting Austria, from Eastern Europe. I believe that these particular countries made the request because they understood that discrimination against women is a major obstacle to development.

As the first UN Independent Expert in the Field of Cultural Rights, I am mandated, among other responsibilities, to integrate a gender perspective into my work. CEDAW and the special mechanism addressing violence against women are very important in this regard. My personal experience of working for women's rights in Pakistan and in other cultural contexts confirms the concerns about cultural justifications being used to deny women rights, articulated by previous Special Rapporteurs on violence against women. Article 5 of CEDAW is particularly relevant, calling upon states to 'take all appropriate measures to modify the social and cultural patterns of conduct of men and women', so as to eliminate prejudices, customary and all other practices that encourage discrimination and a notion 'of the inferiority or the superiority of either of the sexes'. The complex issue of culture, customs and rights is an old one: in 1954 the UN General Assembly recognised that women were 'subject to ancient laws, customs and practices' inconsistent with the Universal Declaration of Human Rights, and called on governments to abolish such practices. The 1967 Declaration reiterated the need to change public opinion and to abolish existing customs, as well as laws that discriminated against women.

In my new mandate, I hope to promote an understanding that cultures are not static but constantly evolving, reflecting people's new experiences and thinking; and that cultural rights include the right of women and marginalised groups not to participate in community customs, as well as to challenge the existing normative rules. I plan to focus, for example, on the contribution of women and girls to the cultural development of communities they belong to, including their contribution to the development of common values of those communities, which is pivotal to the implementation of their cultural rights. In this regard, I look forward to working with the CEDAW Committee, in ways that can help further develop the understanding of cultural rights as well as obligations under CEDAW.

3. UN General Assembly A/5606 15 November 1963. The countries co-sponsoring this resolution were: Afghanistan, Algeria, Argentina, Austria, Cameroon, Chile, Columbia, Czechoslovakia, Gabon, Guinea, Indonesia, Iran, Mali, Mexico, Mongolia, Morocco, Pakistan, Panama, the Philippines, Poland, Togo and Venezuela.

15. Reflections on CEDAW

*Radhika Coomaraswamy*¹

The adoption of CEDAW in 1979 was the culmination of activism on the part of women from all over the world. Women fighting for equality before the law, women struggling for justice for rural women, women workers fighting for benefits, women challenging inequality in the family, united to bring forth this Convention that would create an international normative framework for the protection of the rights of women.

CEDAW has also adapted to new developments and important trends as they have evolved over the years. At the time CEDAW was drafted, violence against women was still a taboo subject for nation states. By the 1990s, the discourse had changed, and the CEDAW Committee acted swiftly to adopt a General Recommendation. This has since become the basis for reporting on violence against women.

The CEDAW Committee is strong and active, with powerful members who question member states with the diligence of true independent experts. They draft comprehensive and useful conclusions and recommendations that form the basis for much of the follow-up within the nation state concerned.

CEDAW has also spawned activist NGOs and scholars who watch the formal, governmental process with close attention and who submit shadow reports to the Committee so as to ensure that it has access to all the important information. This enables the Committee to do its work objectively and impartially.

An anniversary is a time for celebration, but also a time to reflect on what needs to be done. CEDAW puts forward the ideal of equal and empowered women with all the rights and freedoms available to men. For many throughout the world this is still only an ideal, perhaps a far away dream. But the Convention and its activist Committee is seeking to make this dream a reality by engaging constructively with national governments, questioning their political will and by making recommendations for future action. By creating a universal standard it strives to help women everywhere lead true and meaningful lives.

Nonetheless, the challenges are also manifold. How do we struggle against relativist tendencies that have begun to challenge this universal standard? How do we implement

1. Ms Radhika Coomaraswamy is currently the Special Representative of the Secretary-General for Children and Armed Conflict and former Special Rapporteur on Violence Against Women. The views expressed herein are those of Ms Coomaraswamy and do not necessarily reflect the views of the United Nations.

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the practical and concrete programmes that will bring true changes in the lives of women? How do we approach some of the social, economic, political and ideological structures of power that still resist transformation in the lives of women? These are hard questions, which are for the CEDAW Committee and also beyond the CEDAW Committee. Yet, the action that CEDAW has given us and the hard work of so many women in different parts of the world will bear fruit if we continue to work toward the universal standards set out in the Convention.

16. Endnote

*Meena Shivdas, Gender Section, and Sarah Coleman,
Justice Section, Commonwealth Secretariat*

By bringing together critical analyses of recent efforts towards the realisation of women's rights within legal and cultural contexts, this publication situates the progress and the challenges in advancing gender equality throughout the Commonwealth.

The volume presents substantive articles on current regional developments, Commonwealth principles and guidelines¹ for promoting and implementing CEDAW throughout its 54 member countries and practical examples provided by way of summaries of relevant case law. It is hoped that the global aspirations articulated in this publication for the full implementation of women's rights will assist practitioners, especially judges, magistrates and lawyers, in their vital role in supporting the implementation of CEDAW across the Commonwealth.

A comprehensive approach to understanding the importance of the Convention is provided by both the section on case law, which illustrates the practical application of CEDAW provisions at the national level, and by the inclusion of non-state entities' perspectives on its implementation. Non-state actors are important in the promotion and protection of human rights generally and in the implementation of CEDAW specifically. Examples of how the courts have, over the years, managed those customary or cultural practices that are discriminatory and inconsistent with CEDAW and/or national constitutions are pertinent in guiding or assisting other practitioners involved with similar issues.

It is hoped that a timely overview of international efforts to further the protection of women's rights is provided by the various analyses and personal reflections on CEDAW implementation and by the examples of how customs and practices may be reconciled with statutory legislation and international human rights standards.

It is hoped further that this publication will provide valuable inspiration for all members of Commonwealth judiciaries, as they continue in their efforts to interpret and apply constitutional guarantees purposively and with the generosity appropriate to charters of freedom to ensure the full protection of women's human rights.

1. Bangalore Principles, 1988; Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994; Hong Kong Conclusions, 1996; and the Georgetown Recommendations and Strategies for Action, 1997.

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Key Commonwealth issues of concern that necessitate the interpretation of women's rights within the context of national laws and customary norms include land rights, marital property rights, child custody and maintenance, and the right to personal safety and security.

The Commonwealth Secretariat is committed to assisting member countries in the development and furtherance of legal norms for the protection of women's rights and in the promotion and implementation of CEDAW throughout its 54 national jurisdictions.

CEDAW – the UN Convention on the Elimination of All Forms of Discrimination against Women – is a powerful international human rights instrument that reflects a global determination to achieve gender equality. Turning aspiration into reality presents many challenges, particularly in relation to the process of adjudicating on women’s rights in both legal and cultural contexts.

This book looks at the range of cultural and legal challenges relating to the implementation of CEDAW, and the individual approaches adopted in various jurisdictions and contexts across the Commonwealth. Commonwealth declarations in support of CEDAW and initiatives from numerous Commonwealth countries are brought together here to support continuing efforts to address these issues.

This practical guide will inform and assist judges, adjudicators, lawyers and activists to advance the implementation of the principles of CEDAW within jurisdictions connected historically by the application of the common law.



Commonwealth Secretariat

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