8. Last but not least: CEDAW and family law

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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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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]

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 laws[6] 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 report[8] on plural legal orders that also addresses the rights impact in family law.

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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]

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 reservations[9] 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 Tibi[10] 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 ICCPR[11] – 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 constitution[12] (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]

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, Yakýn Ertürk 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%by%20Yakin%20Erturk%2014%20February%202009.doc [last accessed 26 April 2010]

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 law[17] 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]

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

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.