

Economic Consequences of Marriage and Its Dissolution: Applying a Universal Equality Norm in a Fragmented Universe

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Inequality in the family is the most damaging of all forces in women's lives. It is overtly preserved by religious, customary, and state laws that formally enshrine discrimination against women and is perpetuated by de facto lack of access to nominally protective systems and remedies. International law and its implementation mechanisms provide an arena for confronting resistance to gender equality in the family, calling states to account at the highest level as well as providing a platform for domestic advocacy. CEDAW and the jurisprudence of its monitoring body, the Committee on the Elimination of Discrimination against Women, clearly state the paramount value of protecting the individual human rights of family members rather than maintaining family "protection" and privacy at the expense of the women within it. By ratifying, States theoretically commit themselves to this progressive position. However, the politics of state and community identity make for a more complex picture that includes multiple, sometimes overlapping, levels of acceptance and rejection. Taking as a case study the current initiative to adopt a new General Recommendation to address the economic consequences of family relations and their dissolution, this Article draws on the CEDAW Convention and the CEDAW Committee's work to suggest a practical application of international standards to address the tangle of legal systems and identity that have disadvantaged women for centuries. Placing this initiative within the context of multiple family law regimes and the multicultural debate, the right to exit and the concept of freedom to associate and to disassociate are emphasized

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as crucial in confronting the phenomenon of discriminatory identity-based family legal regimes. The Article concludes with an illustration of the harmonization process required by the CEDAW Convention, taking the new General Recommendation as a model approach for meeting the international equality norms while preserving community or State identity.

INTRODUCTION

Inequality in the family is the most damaging of all forces in women's lives. It is a foundation of all other forms of discrimination and is the most difficult aspect of discrimination to address, both because of the intimate nature of family relations and because it is based on frequently unspoken traditional attitudes and stereotypes that define family roles. Family inequality is overtly preserved by religious, customary, and state laws that formally enshrine discrimination against women and is perpetuated by *de facto* lack of access to nominally protective systems and remedies.

International law and its implementation mechanisms provide an arena for confronting resistance to gender equality in the family, calling states to account at the highest level as well as providing a platform for domestic advocacy. The international norm of equality between women and men is embodied in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹ With 187 ratifications as of July 2011, CEDAW has become a near-universal standard for evaluating state law and policy relating to all aspects of discrimination against women. Article 16 of the Convention outlines the specific norms of equality in the family, including consent to marriage, shared responsibilities during marriage, custody and guardianship, property, and dissolution of marriage. Two other articles are essential to the implementation of Article 16: the principles stated in Article 15 — equal legal capacity and equality before the law, and States parties' obligation under Article 5 to eliminate traditional attitudes, customs, and stereotypes that perpetuate discrimination, and that have a particularly deep impact on family relations.² These interrelated provisions provide a unique and comprehensive

1 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979).

2 The content of Articles 15 and 16 was included in Article 6 of the Declaration on the Elimination of All Forms of Discrimination against Women (DEDAW), G.A. Res. 2263 (XXII), U.N. GAOR, 22d Sess., U.N. Doc. A/RES/2263 (Nov. 7, 1967). The Committee confirms this linkage in Committee on the Elimination of All

framework for approaching the question of equality in the family in light of the political and personal pressures borne by families and by women within them.

This role of the state in protecting women within the family is particularly problematic for many observers because it breaks the presumptive legal and social privacy barriers that have historically surrounded families, regardless of how “family” is defined. In both Northern and Southern societies, the “ideology of the family,” which in fact stood for a steadfast noninterventionist approach that prevented any entry into the assumed privacy of the family, even for purposes of protecting individuals, has dominated.³

CEDAW and the jurisprudence of its monitoring body, the Committee on the Elimination of Discrimination against Women, clearly state the paramount value of protecting the individual human rights of family members rather than maintaining family “protection” and privacy at the expense of the women within it. CEDAW posits that equality between women and men strengthens families. By ratifying, States theoretically commit themselves to this progressive position. However, the politics of state and community identity make for a more complex picture that includes multiple, sometimes overlapping, levels of acceptance and rejection.

Taking as a case study the current initiative to adopt a new General Recommendation to address the economic consequences of family relations and their dissolution, we draw on the CEDAW Convention and the CEDAW Committee’s work to suggest a practical application of international standards to address the tangle of legal systems and identity that have disadvantaged women for centuries. In Parts I and II we explain the rationale for the new General Recommendation within the existing international normative framework. In Part III we place this initiative within the context of multiple family law regimes, and expand on its multifaceted dimensions, leading to the discussion of multiculturalism and its application to the current exercise in Part IV. After examining in Part V some of the suggestions made in the literature to confront the phenomenon of discriminatory identity-based family legal regimes, we proceed to show in Part VI how the international norm steps into this minefield, and how the harmonization requirement under the

Forms of Discrimination against Women (CEDAW), *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13th Sess., ¶¶ 25, 26, U.N. Doc. A/49/38 (1994) [hereinafter CEDAW, *General Recommendation No. 21*].

3 See, e.g., SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* (1991); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1 (1992); Martha Minow, “*Forming Underneath Everything that Grows*”: *Toward a History of Family Law*, 1985 *WIS. L. REV.* 819; Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 *U. MICH. J.L. REFORM* 835 (1984-1985); Lee Teitelbaum, *Family History and Family Law*, 1985 *WIS. L. REV.* 1135 (1985).

CEDAW Convention is to be met, taking the new General Recommendation as a model approach for meeting the international equality norms while preserving community or State identity.

I. CEDAW'S GENERAL RECOMMENDATION ON ECONOMICS OF FAMILY RELATIONS

Economic inequality between women and men is a fundamental fact in every country in the world. Women now comprise seventy percent of the world's poorest people and have done so for decades. Even where they are not deeply impoverished, unequal access to financial resources limits women's negotiating power within families as well as their life choices. Women's economic capacity is a critical factor in their decision to enter or leave marriage, if they are allowed to decide at all, and in their ability to leave violent relationships.

An examination of the Committee's record and the reports of States parties indicates that laws relating to women's ownership and management of property, at all stages of marriage and at its dissolution, have changed very slowly. Some of the states with the greatest inequality have not addressed property ownership, management, and inheritance issues for decades. Others have addressed the issues only formally, without examination of women's *de facto* economic situation. The states that have made the least progress towards *de facto* and *de jure* equality in the family are largely in the global South; most have a colonial history, and their family laws are bound to ethnic, indigenous, and religious communities. Many recognize multiple family law systems, and some of them do not provide for civil marriage.

To promote States parties' attention to these issues — emphasizing that it is time to deal with them — the CEDAW Committee decided in 2009 to adopt a general recommendation on economic equality in the family. Article 21 of the CEDAW Convention empowers the Committee to make suggestions and general recommendations based on the examination of reports and information received from States parties. General recommendations are addressed to States parties and usually elaborate the Committee's view of the obligations assumed under the Convention. Together with the Concluding Observations issued to each State party after reporting to the Committee, and its decisions under the Optional Protocol to CEDAW, they provide normative statements for application of the Convention to particular issues.

In 1994, the Committee adopted General Recommendation No. 21, which elaborated upon many aspects of Article 16 as well as its relationship to Articles 9 (nationality) and 15 (equality before the law, legal capacity, and

choice of domicile).⁴ The General Recommendation touched upon property issues, clearly stating that existing discriminatory norms and practices must be eradicated,⁵ but it did not suggest a framework for new provisions. Since that time the Committee's record on dealing with family law has been uneven, largely due to lack of deep family law expertise among the Committee members and lack of detail in the State party reporting.

For the first twenty years of its existence, the Committee also did not forcefully address the issue of reservations to Article 16, which largely cite either the prerogatives of the "communities" within the State party as to personal status law or, specifically, Sharia. States parties were not questioned closely even about the rationale for their reservations.⁶ The record therefore remains uneven as to all but a few very basic issues such as age of marriage, polygamy, and, more recently, the negative impact of multiple legal systems.⁷

The new General Recommendation is designed to provide clarity on the issues to both States parties and Committee members, articulating with specificity the discrimination that results in women's economic inequality

4 CEDAW, *General Recommendation No. 21*, *supra* note 2.

5 *Id.* ¶¶ 38-41.

6 *See generally* MARSHA A. FREEMAN, RESERVATIONS TO CEDAW: AN ANALYSIS FOR UNICEF (2009); Hanna Beate Schoepp-Schilling, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: Unresolved Issue or (No) New Developments?*, in RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME: CONFLICT, HARMONY OR RECONCILIATION 3 (Ineta Ziemele ed., 2004); Treaty-specific Reporting Guidelines, CEDAW, Rep. to the G.A., U.N. Doc. A/63/38, pt. I, 78-83 Annex I (2008) (requiring explanation for retention of reservations).

7 For example, in its twenty-third session (June 2000), in which seven States parties reported, only two of the Concluding Observations (Cuba and Romania) mentioned issues pertaining to the economic aspects of marriage and its dissolution. Indeed, among the reporting States in that session, only Cameroon had addressed any of these questions, reporting alarmingly discriminatory property laws, of which there was no specific mention in the Committee's Concluding Observations. *See* CEDAW, Concluding Comments: Cameroon, U.N. Doc. A/55/38, 23d Sess., ¶ 32 (2000):

According to articles 1421 and 1428 of the Civil Code, women were not fully entitled to use, enjoy or sell their property, although those rights were stipulated in the Constitution. In this context, article 1421 granted the husband the right to administer communal property, thereby giving him the right to sell or mortgage the couple's property without the wife's consent. Articles 108 and 215 of the Civil Code granted the husband the sole right to determine the family domicile, and article 361 of the Penal Code defined the crime of adultery in terms more favourable to men than women.

as well as dealing explicitly with the problem of multiple legal systems. It is intended to

serve as a guide for States parties in achieving an egalitarian legal regime under which the economic benefits of marriage and the costs and economic consequences of marital breakdown are equally borne by men and women. It will establish the norm for evaluating States parties' implementation of the CEDAW Convention with respect to economic equality in the family.⁸

To comprehend the ambitious scope of this initiative, the legal situation and the status of CEDAW implementation must be explicated.

II. THE LEGAL FRAMEWORK

The Convention in Article 16 establishes a comprehensive and unequivocal standard of equality between women and men in all family relationships. States parties are obligated to eliminate discrimination against women at all stages of the marriage or partnership relationship, from betrothal through dissolution by divorce or death. Article 16 is remarkable in its reach, extending beyond marriage to “family relations,” and stating principles of equality as to issues that had historically been left to management behind the closed doors of the household, without intervention by the state. While child marriage and consent to marriage have been on the international agenda since the 1950s⁹ — to minimal effect until the last decade¹⁰ — most of the other issues

8 Concept Note on the General Recommendation on Economic Consequences of Marriage and its Dissolution, CEDAW/C/2009/II/WP.2, ¶ 11 (2009).

9 G.A. Res. 843 (IX) (Dec. 17, 1954), declares that States

should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded.

The first treaty to address this issue was the U.N. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Nov. 7, 1962, 521 U.N.T.S. 231, followed by DEDAW, *supra* note 2.

10 CEDAW, *General Recommendation No. 21*, *supra* note 2, ¶ 36, states unequivocally that the minimum age of marriage should be eighteen and that it should be the same for females and males. It consistently cites States parties for permitting early marriage and for failing to adopt the same age of marriage for females and males, *see, e.g.*, CEDAW, Concluding Comments: Burkina

articulated in Article 16 were first stated in the Convention¹¹ and remain a ground of struggle for many women and, apparently, for many States parties.

The basic statement of the norm is found in Article 16(1)(c): “[States parties shall ensure] the same rights and responsibilities during marriage and at its dissolution.” Subsequent provisions of the article specify the areas of rights and responsibilities: childrearing (including custody if the parents do not live together); number and spacing of children; guardianship and similar forms of authority; and choice of family name and profession or occupation. Article 16(1)(h) adds “ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.” This last provision was somewhat contested during the drafting of the Convention, with respect to whether it should refer specifically to inheritance. The Working Groups (drafting bodies) of both the Commission on the Status of Women and the General Assembly Third Committee did not devote much time to discussing the other property rights. The 1967 Declaration on the Elimination of All Forms of Discrimination against Women (DEDAW), the predecessor to the Convention, had referred to equal inheritance rights;¹² the Convention does not include them. The *travaux préparatoires* (preparatory works) indicate that the objections were raised solely by Islamic states,¹³ foreshadowing the pattern of reservations to the Convention and particularly to Article 16.

Faso, U.N. Doc. A/60/38, pt. 2, ¶¶ 339-340 (2005); CEDAW, Concluding Comments: Samoa, U.N. Doc. A/60/38, pt. 1, ¶¶ 60-61 (2005); CEDAW, Concluding Comments: France, U.N. Doc. A/58/38, pt. 2, ¶¶ 267-268 (2003); CEDAW, Concluding Comments: Guatemala, U.N. Doc. A/57/38, pt. 3, ¶¶ 196-197, Exceptional Session (2002); CEDAW, Concluding Comments: Mexico, U.N. Doc. A/57/38, pt. 3, ¶¶ 449-450, Exceptional Session (2002); CEDAW, Concluding Observations: Armenia, CEDAW/C/ARM/CO/4/Rev.1, ¶ 14 (2009); CEDAW, Concluding Comments: Venezuela, CEDAW/C/VEN/CO/6, ¶ 34 (2006); CEDAW, Concluding Comments: Saudi Arabia, CEDAW/C/SAU/CO/2, ¶¶ 35-36 (2008); CEDAW, Concluding Observations: Yemen, CEDAW/C/YEM/CO/6, ¶ 31 (2008); CEDAW, Concluding Comments: Peru, U.N. Doc. A/57/38, pt. 3, ¶ 489, Exceptional Session (2002); CEDAW, Concluding Observations: Timor Leste, CEDAW/C/TLS/CO/1, ¶ 35 (2009); *see also* UNICEF, *EARLY MARRIAGE: A HARMFUL TRADITIONAL PRACTICE* (2005), available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf.

11 DEDAW, *supra* note 2, arts. 5, 6 (citing equality in the family in broad outline but lacking the specificity of the Convention and, of course, not including a monitoring mechanism).

12 DEDAW, *supra* note 2, art. 6.

13 United Nations, Report of the Working Group of the Whole on the Drafting of

A. Reservations to Article 16

States parties may enter reservations to provisions of an international treaty upon ratification or accession.¹⁴ The Vienna Convention on the Law of Treaties states that reservations that are “contrary to the object and purpose” of a treaty are not permitted, but it offers no definition of “contrary to the object or purpose.”¹⁵ Reservations indicate that a State Party does not undertake the obligation to comply with the reserved provisions; some reservations provide a brief explanation, but most do not. The treaty-monitoring bodies usually question the States parties on the rationale for the reservations and their intent to withdraw them.¹⁶ The Committee has become increasingly insistent on this subject, and its latest reporting guidelines, adopted in 2008, require States parties to “report on the interpretation and the effect” of reservations and on “any reservations or declarations they may have lodged with regard to similar obligations in other human rights treaties.”¹⁷

Article 16 is the most reserved substantive article in the Convention. The reservations are remarkable for their content as well. In General Recommendation 21 the Committee

noted with alarm the number of States parties which have entered reservations to the whole or part of article 16, . . . claiming that compliance may conflict with a commonly held vision of the family based, inter alia, on cultural or religious beliefs or on the country’s economic or political status. . . . Many of these countries hold a belief in the patriarchal structure of a family which places a father, husband or son in a favourable position. In some countries where fundamentalist or other extremist views or economic hardship have encouraged a return to old values and traditions, women’s place in the family has deteriorated sharply.¹⁸

The Article 16 reservations fall into several categories. Some clearly reject its premises on the basis of conflict with religious law.¹⁹ Three States parties

the Convention on the Elimination of Discrimination against Women, U.N. Doc. A/34/60 ¶¶ 234, 252, 253 (Mar. 2 1979).

14 Vienna Convention on the Law of Treaties, art. 19, Jan. 27, 1980, 155 U.N.T.S. 331.

15 *Id.* art. 19(c).

16 FREEMAN, *supra* note 6, at 3-4; Schoepp-Schilling, *supra* note 6.

17 CEDAW Rep. on its 41 Sess., U.N. Doc. A/63/38, Annex, at 78-83 (2008).

18 CEDAW, *General Recommendation No. 21*, *supra* note 2, ¶¶ 41, 42.

19 For example, Egypt, ratified Sept. 18, 1981; Algeria, acceded May 22, 1996; Saudi Arabia, ratified Sept. 7, 2000. For a full history and updates see *United*

reserved Article 16 on the ground that matters relating to personal status are reserved to their “communities” — essentially carving out discriminatory family law as an exception to nondiscrimination provisions in those States parties’ respective constitutions or basic laws.²⁰ Others reserved specific provisions, indicating some attention to the particularities of inequality in the family.²¹ Several States parties have entered a general reservation to the entire Convention, indicating that the state’s religious law or its constitution is deemed superior to the norms of the treaty.²² As of December 31, 2010, thirty-four States parties have reserved specifically all or part of Article 16. Others, as the Committee has noted, have not reserved but perpetuate “certain laws” that “do not actually conform to the provisions of the Convention.”²³

General Recommendation 21 urges States parties to “resolutely discourage any notions of inequality of women and men which are affirmed by laws, or by religious or private law or by custom, and progress to the stage where reservations, particularly to article 16, will [be] withdrawn.”²⁴ In 1998, in its statement for the fiftieth anniversary of the Universal Declaration of Human Rights, the Committee stated that it considers Articles 2 and 16 “to be core provisions of the Convention . . . central to the objects and purpose of the Convention,” and that reservations to Article 16 are impermissible.²⁵

The Committee regularly engages States parties in a discussion of reservations during the constructive dialogue and urges them to withdraw them. Withdrawal of reservations indicates that a State party has made changes to eliminate discrimination in some or all aspects of its family law. States parties may also modify a reservation without entirely withdrawing it. Modification may be the result of legal changes, or it may indicate only that the State party has more carefully examined its laws and practices and determined that the original reservation was unnecessarily broad. Several States parties have modified reservations to Article 16.²⁶ Morocco significantly

Nations Treaty Collection (UNTC), UNITED NATIONS, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Sept. 2, 2011).

20 India, ratified July 9, 1993; Israel, ratified Oct. 3, 1991; Singapore, acceded Oct. 5, 1995. *See id.*

21 For example, Malaysia, acceded July 5, 1995; Libyan Arab Jamahiriya, ratified May 16, 1989; Bangladesh, acceded Nov. 6, 1984. *See id.*

22 For example, Tunisia, ratified Sept. 20, 1985; Brunei Darussalam, acceded May 24, 2006. *See id.*

23 CEDAW, *General Recommendation No. 21*, *supra* note 2, ¶ 45.

24 *Id.* ¶ 44.

25 CEDAW, Rep. on its 19th Sess., U.N. Doc. A/53/38/Rev.1, at 47-50 (1998).

26 Malaysia, partial withdrawal/modification, Feb. 6, 1998; Libyan Arab Jamahiriya,

modified its family law (Moudawana) in 2004 and announced in 2006 that it would withdraw its reservation,²⁷ but did not do so until April 2011.

The Committee's consistent position that Article 16 reservations are contrary to the object and purpose of the treaty underscores its determination that equality in the family is essential to women's full enjoyment of their human rights.

B. Implementation of the Property-Related Provisions of Article 16

Implementation of Article 16 is fraught with legal and political complexities. Matters as apparently simple as marriage registration, one of the subjects of the first international treaty that related specifically to women's human rights, have yet to be universally addressed.²⁸ The Committee's current focus on economic issues reaches the most concrete expression of inequality in the family and of the power relationships between family members across generations as well as between spouses or *de facto* partners. The economic issues appear at every stage of family formation, from the inception of relationships to dissolution through divorce or death.

Marriage formation frequently involves economic exchange between the parties or their families as a matter of custom, such as exchange of gifts or paying for betrothal and wedding celebrations, or as a requirement to formalize the relationship. The Committee has noted that a requirement of economic exchange, particularly in the context of arranged marriages, is a violation of women's right to freely choose a spouse under Convention Article 16(1)(a).²⁹

modification, July 5, 1995; France, partial withdrawals, Mar. 26, 1984 & Dec. 22, 2003. See *UNTC*, *supra* note 19.

27 CEDAW, Concluding Comments: Morocco, CEDAW/C/MAR/CO/4, ¶¶ 14-15 (2008); *UNTC*, *supra* note 19.

28 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *supra* note 9; CEDAW, Concluding Observations: India, A/55/38, 22nd Session ¶ 62 (2000); CEDAW, Concluding Observations: Syria, CEDAW/C/SYR/CO/1 ¶ 34 (2007); CEDAW, Concluding Observations: Yemen, C/YEM/CO/6 ¶ 31 (2009); CEDAW, Concluding Observations: Azerbaijan, CEDAW/C/AZE/CO/4 ¶¶ 39-40 (2009).

29 CEDAW, Concluding Comments: Uganda, U.N. Doc. A/57/38, pt. III, Exceptional Session, ¶¶ 153-154 (2002); CEDAW, Concluding Comments: India, CEDAW/C/IND/CO/3, ¶ 26 (2007) (alluding to the same concern expressed in prior reviews); see also CEDAW, *General Recommendation No. 21*, *supra* note 2, ¶ 16.

Polygamy is also a violation of the Convention on a fundamental level,³⁰ expressing a basic imbalance of power between the spouses and frequently involving lack of consent.³¹ In most — if not all — customary systems, polygamy is an integral element of property regimes in which the concept of marital property does not exist: Women have no recognized right to manage property during marriage, and they do not receive any of the accumulated assets — even those that accumulate through their efforts — upon a dissolution through death or divorce.³² In Islamic systems, there is no concept of marital property to be divided, and all wives have inheritance rights, generally limited to a percentage share to be allocated in relation to the share of children and collaterals.³³

Management of property during a marriage is problematic if the husband is designated head of household by law or custom, resulting in women having no legal or *de facto* power in financial decision-making. In addition to this fundamental power imbalance, which contravenes the Convention,³⁴ such situations can result in considerable practical hardship if the husband is absent for any period of time, leaving the wife to manage the household without legal authority as to finances.

30 CEDAW, *General Recommendation No. 21*, *supra* note 2, ¶ 14; CEDAW, Concluding Observations: South Africa, U.N. Doc. A/53/38, ¶ 115 (1998); CEDAW, Concluding Observations: Cape Verde, CEDAW/C/CPV/CO/6, ¶¶ 33-34 (2006); CEDAW, Concluding Observations: Ghana, CEDAW/C/GHA/CO/5, ¶¶ 35-36 (2006); CEDAW, Concluding Observations: Kyrgyzstan, CEDAW/C/KGZ/CO/3, ¶¶ 21-22 (2008); CEDAW, Concluding Observations: Tajikistan, CEDAW/C/TJK/CO/3, ¶¶ 35-36 (2007).

31 CEDAW, Concluding Observations: United Republic of Tanzania, CEDAW/C/TZA/CO/6, ¶¶ 146-147 (2008) (noting inadequacy of Law of Marriage Act, 1971 as to these issues; anything short of abolition would be inadequate).

32 *See generally* FAREDA BANDA, *WOMEN, LAW AND HUMAN RIGHTS* (2005); Marsha A. Freeman, *Measuring Equality: Women's Legal Capacity in Five Commonwealth Countries*, 5 *BERKELEY WOMEN'S L.J.* 110, 110-21 (1989-1990).

33 *See, e.g.*, LYNN WELCHMAN, *WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY* 89 (2007) (noting lack of a joint conjugal property regime); Robert V. Makaramba, *The Secular State and the State of Islamic Law in Tanzania*, in *MUSLIM FAMILY IN SUB-SAHARAN AFRICA: COLONIAL LEGACIES AND POST-COLONIAL CHALLENGES* 273, 288 (S. Jeppie, E. Moosa & R. Roberts, eds., 2010) (noting that Tanzania Law of Marriage Act, 1971, abrogated the separate property regime of Islamic law).

34 CEDAW, Concluding Comments: Guinea, CEDAW/C/GIN/CO/6, ¶ 44 (2007); CEDAW, Concluding Observations: Cameroon, CEDAW/C/CMR/CO/3, ¶ 46 (2009).

Many women do not experience the consequences of economic inequality in their marital or partnership relationship until the relationship dissolves through divorce or death of the partner. The core issue with respect to women's economic equality upon divorce or separation is whether they share equally in property accumulated during the marriage.³⁵ The core issue with respect to death is whether women have the right to inherit and, if so, whether that right is equal to that of a surviving male husband or partner.³⁶ The specific issues vary considerably from state to state. A fundamental question, still at issue in some states, is recognition of women's legal capacity to own and manage property.

A second essential question in the divorce context is whether the state provides for joint or community property, either by designation or by default. Other issues include the definition of marital property available for division between the spouses and recognition of nonfinancial contribution to marital property, including loss of economic opportunity and financial or nonfinancial investment in development of a husband's economic activity.

Some legal systems exclude from any marital claims property — usually land — that is held by a family or clan. While this policy may make economic sense in terms of preventing infinite subdivision,³⁷ a wife could invest many years of labor in improving the land and buildings on it and be left with nothing if she divorces or if her husband dies.³⁸ Where individuals marry according to ethnic or indigenous custom that does not recognize women's capacity to own and manage property, women cannot claim an interest in any property that is accumulated during the marriage, regardless of their contribution. This clearly contravenes the Convention.³⁹ States should provide for recognized legal capacity and a system of compensation in these circumstances.

35 CEDAW, Concluding Comments: Lebanon, CEDAW/C/LBN/CO/2, ¶¶ 44-45 (2008); CEDAW, Concluding Comments: India, CEDAW/C/IND/CO/3, ¶¶ 54-55 (2007); CEDAW, Concluding Comments: Turkey, CEDAW/C/TUR/CC/4-5, ¶¶ 25-26 (2005) (suggesting that joint property ownership law should be retroactive).

36 *E.g.*, CEDAW, Concluding Comments: Kenya, CEDAW/C/KEN/CO/6, ¶¶ 41-44 (2007) (indicating that the Succession Act, (1979) (Kenya) provides widows with a life estate in nonagricultural property, which ceases if they remarry; surviving husbands inherit outright); *see also infra* Section VI.A.

37 Where identity or ethnic politics reign, this makes political sense as well, reinforcing the power structure that delivers votes en bloc.

38 CEDAW, Concluding Comments: Kenya, *supra* note 36, ¶¶ 17-18; CEDAW, Concluding Comments: Uganda, A/57/38, pt. 3, Exceptional Sess., ¶¶ 153-54 (2002); *see also infra* Section VI.A.

39 CEDAW, Concluding Comments: Uganda, U.N. Doc. A/57/38, pt. 3, Exceptional

Similarly, where a legal regime provides only for separate property, such as under Islamic law, a wife may suffer double economic injustice. She may contribute financially to the support of the household and its increase in value, and her traditional household duties may prevent her from significantly increasing her separate property — but the payments due her upon divorce are unlikely to equal half the wealth accumulated by the household during the marriage.

A comprehensive definition of marital property includes all property that is accumulated during the marriage, including real estate, household goods, savings and investments, interest in pensions or retirement accounts, businesses, and increase in value of non-marital property.⁴⁰ Division of this property on the basis of title or relative financial contribution usually favors the husband; the Committee has recommended that these unequal results be remedied by recognizing nonfinancial contribution to marital property.⁴¹ The Committee has also recommended that States parties recognize the contribution to marital property that consists of a wife's financial and household support of a husband's education, which is her investment in the development of his "human capital."⁴² This does not have to be measured in cash terms, but as an equal contribution to the ultimate growth of the marital estate. Consistent recognition of nonfinancial contributions to the marital estate also would resolve the discretionary, and frequently discriminatory, application of laws that provide for "equitable" property distribution.

The Committee has not clearly addressed issues specific to inheritance by widows, frequently conflating inheritance *by* widows with inheritance *of* widows. Many of the Committee's concluding observations relating to the situation of widows refer disapprovingly to "widow inheritance," the custom of requiring levirate marriage in order for a widow to remain on the family property and to be supported by the late husband's family or clan.⁴³ Since

Sess., ¶¶ 153-154 (2002); CEDAW, Concluding Comments: Samoa, U.N. Doc. A/60/38, pt. 1, ¶¶ 60-61 (2005); CEDAW, Concluding Comments: Albania, U.N. Doc. A/58/38, pt. 1, ¶¶ 68-69 (2003); CEDAW, Concluding Comments: Malawi, CEDAW/C/MWI/CO/5, ¶¶ 34-35 (2005); CEDAW, Concluding Comments: Kenya, *supra* note 36, ¶¶ 41-42.

40 Non-marital property is that owned individually by a spouse prior to the marriage or acquired as an individual inheritance or gift.

41 CEDAW, Concluding Comments: Guyana, U.N. Doc. A/60/38, ¶¶ 289-290 (2005).

42 CEDAW, Concluding Observations: Slovenia, CEDAW/C/SVN/CO/4, ¶¶ 33-34 (2008).

43 *E.g.*, CEDAW, Concluding Observations: Ethiopia, U.N. Doc. A/59/38, pt. 1, ¶¶ 251-252 (2004).

the children (in patrilineal cultures) belong to the father's family, a widow would have to leave them behind if she tries to manage her life outside the requirements of the clan and therefore as a practical matter may have little choice other than to marry a brother-in-law in order to stay with her children.

In some communities, the concept of clan or family ownership is extended beyond clan land to exclude widow(s) from inheritance of *any* property. This can result in the late husband's family descending on the widow(s), including those who live in urban areas, and claiming all the property accumulated during the marriage, including such items as houses and businesses that are not on clan land, home furnishings, cars, and bank accounts. This "property-grabbing," the graphic term used by advocates and cited by the Committee, is a fundamental violation of Article 16.⁴⁴

III. MULTIPLE FAMILY LAW REGIMES AS AN EQUALITY ISSUE

A. State-Sanctioned Identity-Based Personal Status Law

In many states personal status law (family law) that is specifically based on discriminatory religious law or ethnic custom is recognized by the state to determine women's access to property, whether through marriage or descent, as well as their legal capacity to manage it. The same personal status law also determines their rights to property upon dissolution of relationships by death or divorce, including inheritance from family members in addition to spouses. Even where personal status matters are regulated by a uniform civil law, the system may well reflect discriminatory religious or cultural traditions of the majority population. CEDAW requires close examination of these systems to eliminate the discrimination that results from incorporating traditional assumptions and stereotypes about women's roles into presumably "modern" laws.

Some States parties constitutionally recognize a state religion;⁴⁵ others, such as Singapore, India, Israel, and Malaysia, reserve personal status law to the various communities within the state and extend state recognition to them; and some multiple-system states, such as Israel and Malaysia,

44 CEDAW, Concluding Observations: Malawi, CEDAW/C/MWI/CO/6, ¶¶ 42-43 (2010).

45 *See, e.g.*, CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept., 1971, as amended, May 22, 1980, art. 2 (providing that Islam is the state religion and the "principal source of legislation"); CONSTITUTION OF TUNISIA art. 1 (1959) (Islam is the state religion); FEDERAL CONSTITUTION OF MALAYSIA art. 3 (1957) (Islam is the state religion).

do not provide for civil marriage and divorce. India recognizes six family law systems, Israel fourteen, Lebanon eighteen, and Kenya five.⁴⁶ Many of these multiple-system regimes, and those that declare a state religion, reflect a postcolonial political statement underscoring the centrality of ethnic, religious, or indigenous identities that were either denied or treated as inferior by colonial authorities.⁴⁷ British Commonwealth states in Africa adopted constitutions at independence that provide for equality under the law and before the law and/or prohibit discrimination, but exempt personal status law from the discrimination prohibition.⁴⁸ This exemption allows for continued acceptance of discriminatory customary practices with no constitutional recourse.⁴⁹ The Indian constitution provides for the establishment of a uniform civil code, but Indian political history is fraught with communalism issues that militate against accomplishing this goal; current resistance is related to the rise of Hindu nationalism that non-Hindus fear would result in a uniform

46 CEDAW, Responses to the List of Issues and Questions with Regard to Consideration of the Seventh Periodic Report: Kenya, CEDAW/C/Q/7, Add. 1, ¶ 5 (2010).

47 Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 487 (2002).

48 *E.g.*, CONSTITUTION, sec. 82(3) (1963) (Kenya) (as amended in 2008) prohibits discrimination on the basis of “race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex” (“sex” added by the 1997 amendment); however, section 82(4)(b) of the constitution states that the provision does not apply “with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.” The 1963 constitution was replaced in 2010, and this exclusion finally was eliminated, but the government has dragged its feet on family law reform for decades, currently stalling the unified Marriage Bill, (2007) (Kenya) and the Matrimonial Property Bill, (2007) (Kenya), and has not put forward a reformed family law bill as of March 2011 despite assurances to the Committee that the bills could be enacted readily under the new constitution, *see* CEDAW, Concluding Observations: Kenya, CEDAW/C/KEN/CO/7, ¶¶ 11-12 (2011); Responses to the List of Issues and Questions with Regard to Consideration of the Seventh Periodic Report: Kenya, *supra* note 46, Add. 1, ¶¶ 4-5.

49 This phenomenon dies hard. Kenya has adopted a new constitution with clear guarantees of equality, but when the Committee in its 2011 consideration of the Kenya report asked the Kenyan delegation about the continuing customary polygamous marriages, or the maintenance of the discriminatory *Khadi* courts, the answer was that all this is acceptable under the *new* Constitution, even if not under the Convention. CEDAW, Summary Record: Kenya, CEDAW/C/SR 964, ¶¶ 52, 55, 60 (2011).

Hindu-based rather than neutral code.⁵⁰ In other states, constitutions, laws, or treaties protecting the sovereign rights of indigenous peoples, which allow them to establish their own family law systems,⁵¹ present a similar obstacle to eliminating discrimination against women in those communities.

While a number of states have adopted new constitutions or amendments that provide more clearly for equality between women and men and eliminate the special protection of discriminatory customary law and practice, many discriminatory laws remain in place.⁵² Even a relatively recent constitution, reflecting local realities and demands, may offer state sanction for discriminatory identity-based personal status laws. For example, the new constitution of Kenya, adopted in 2010, exempts Islamic family law from its equal protection provision,⁵³ and the constitution of South Africa allows for multiple marriage systems.⁵⁴

B. Non-State-Sanctioned Personal Status Laws

The consequences of discriminatory religious and customary law and practice may prevail within families even in states that recognize only civil marriage. Many states, under the rubric of recognizing the right to freedom of religion and belief, place few limitations on individual choice to marry according to religious law or ethnic custom, but legally recognize only civil marriage. Parties may undertake two marriage ceremonies (or, in some states, religious or community authorities may be empowered to solemnize civil marriage⁵⁵).

50 SIOBHAN MULLALLY, GENDER, CULTURE AND HUMAN RIGHTS: RECLAIMING UNIVERSALISM 194 (2006).

51 For example, Canada, Australia, New Zealand, United States, and Bolivia.

52 *See, e.g.*, CEDAW, Concluding Comments: Gambia, CEDAW/C/GMB/CO/1-3, ¶¶ 19, 20 (2005) (indicating that the new constitution kept the old discrimination language); CEDAW, Concluding Comments: Zambia, U.N. Doc. A/57/38, pt. II, ¶¶ 230-231 (2002); CEDAW, Concluding Observations: Botswana, CEDAW/C/BOT/CO/3, ¶ 11 (2010).

53 CONSTITUTION, art. 27 (2010) (Kenya) (prohibiting discrimination, including on grounds of sex); *id.* art. 24(4) (“The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance”).

54 CONSTITUTION OF SOUTH AFRICA, ch. 2, § 15, 1996 (preserving multiple marriage systems); *id.* ch. 12, §§ 211, 212 (recognizing the role of traditional leaders and the continuation of customary law).

55 For example, in the United States state statutes provide for certain religious authorities to perform marriages, *see, e.g.*, Minn. Stat. §§ 517.04 (ordained clergy

The spouses may choose to live according to a marital regime other than the state-sanctioned civil marriage.⁵⁶ The state has little leverage in regulating the discriminatory aspects of the private marital regime if the parties maintain the marriage or divorce according to that regime.⁵⁷

Many laws and customs in private regimes are unwritten, with knowledge limited to a few (generally male) elders or other authorities, or if written are subject to interpretation by a select group of (again generally male) authorities. Implementation is often delegated to or claimed by religious or customary tribunals, yet again generally male. Such tribunals perpetuate discrimination, contrary to all international standards.⁵⁸

C. Multiple Family Law Regimes Across the World

The most comprehensive examination of multiple legal regimes from the perspective of international human rights law is Cassandra Balchin's report for the International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law*.⁵⁹ The report is an exhaustive analysis of what Balchin calls "plural legal orders," which parallel what is usually referred to as legal pluralism — the coexistence within one social unit of differing normative arrangements to which the subjects attribute the force of law regardless of whether they are recognized by the state.⁶⁰ Balchin is careful to show that the phenomenon of "non-state legal orders"

may perform marriages), 517.05, 517.18 (2010) (Quakers and Baha'i may be married according to their customs; Muslims, Hindus, and Native Americans may be married by persons chosen according to their respective traditions; notably, elders or shamans of the large Hmong community in Minnesota are not included in this statute).

56 See INT'L COUNCIL ON HUM. RTS. POL'Y, *WHEN LEGAL WORLDS OVERLAP: HUMAN RIGHTS, STATE AND NON-STATE LAW* (2009), available at http://www.ichrp.org/files/reports/50/135_report_en.pdf (a report written by Cassandra Balchin, referring to this phenomenon as "non-state legal order(s)").

57 Where divorce is only recognized if obtained through a civil action, the parties presumably could stipulate between themselves a property division according to the non-state regime.

58 CEDAW, Concluding Comments: Zambia, U.N. Doc. A/57/38, pt. II, ¶¶ 230-231 (2002); CEDAW, Concluding Comments: Malawi, CEDAW/C/MWI/CO/5, ¶¶ 17-18 (2005); Concluding Comments: Pakistan, CEDAW/C/PAK/CO/3, ¶¶ 24-25 (2007).

59 INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 56.

60 Anne Griffiths, *Legal Protection*, in AN INTRODUCTION TO LAW AND SOCIAL THEORY 289 (Reza Banakar & Max Travers eds., 2002); Ruth Halperin-Kaddari,

is universal. Non-state legal orders are “norms and institutions that tend to claim to draw their moral authority from contemporary to traditional culture or customs, or religious beliefs, ideas and practices, rather than from the political authority of the state.”⁶¹ She discusses cases as diverse as the South African street committees of the 1980s or the Peruvian *rondas campesinas* forums of “social cleansing and vigilantism” to the Mozambique “community authorities” or the Kyrgyzstan *aksakal* adjudicators.⁶² Similarly, cases in which “the state legal order is plural” are also widespread and not limited to one part of the globe. Rather, postcolonial countries, countries with large indigenous populations, as well as federalist countries, all share some form of plural state legal order.⁶³

Since our framework is narrower than Balchin’s, it offers a somewhat finer tuning. As we address only plural family law regimes, this inevitably leads to a focus on identity-based legal systems;⁶⁴ the connection between those regimes and systems is discussed in the next Part. Consequently, our project has a geographical cast, distinguishing between mostly postcolonial sub-Saharan African, Middle Eastern/North African and Asian states in which the plural personal status laws are state-sanctioned, and the largely Northern states in which the personal status laws invoked by immigrant communities are non-state sanctioned. Notably, the latter side of this division is where most of the multicultural debate has been occurring, addressing such issues as *Shari’ah* arbitration councils in Britain, private religious arbitration in Canada, according rights to women married in plural marriages in Britain or in New Zealand, and recognition of traditional marriages in Australia.⁶⁵

Expressions of Legal Pluralism in Israel, in JEWISH FAMILY LAW IN THE STATE OF ISRAEL 185, 210-12 (Michael D.A. Freeman ed., 2002).

61 INT’L COUNCIL ON HUM. RTS. POL’Y, *supra* note 56, at 43.

62 *Id.* at 44-49; *see also id.* at 3. These are types of non-state adjudication and dispute resolution mechanisms, of which the level of formality, traditional characteristics, community relations and relationship with the state vary.

63 *Id.* at 3.

64 These may correspond with what Balchin terms the “traditional” sources of legal norms, *see id.* at 4.

65 *See, e.g.,* Samia Bano, *Islamic Family Arbitration, Justice and Human Rights in Britain*, 2007 LAW, SOC. JUST. & GLOBAL DEV. J., http://www.gp.warwick.ac.uk/elj/lgd/2007_1/bano; Erich Kolig, *A Gordian Knot of Rights and Duties: New Zealand’s Muslims and Multiculturalism*, 8 NEW ZEALAND J. ASIAN STUD. 45 (2006); Dominic McGoldrick, *Multiculturalism and Its Discontents*, 5 HUM. RTS. L. REV. 27, 28 (2005); Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573 (2008). For the most recent statement of the Australian Government

The term “multiculturalism” is itself a contested concept with multiple meanings.⁶⁶ Our reference to the multicultural debate alludes to the tensions between the concept of cultural diversity and the right to freedom of religion that may lead to a duty to recognize and respect diverse forms of religious practice and expression, on the one hand, and the right to gender equality, on the other, which may be breached by sex-discriminatory, religious or customary traditional practices.⁶⁷ In this context, arguments have been made, in the name of multiculturalism, for allowing the operation of non-state-sanctioned personal status laws and systems of adjudication, many of which are severely discriminatory against women.⁶⁸ The degree of allowance may range from unacknowledged tolerance to full recognition and perhaps even support for enforcement, as in fact occurs if religious arbitration is legally binding. As also noted by Balchin, this issue is especially current in Northern multicultural contexts.⁶⁹ The multicultural discourse, then, is the framework within which the operation of non-state-sanctioned personal status laws is often analyzed.

Moreover, it also seems that the multicultural debate with respect to multiple family law regimes as a whole has been mostly confined to the context of non-state-sanctioned systems, i.e., the “Northern experience,” generally ignoring the context of state-sanctioned family law regimes which is mostly experienced in the Middle East, Africa and Asia. It is this absence in the conversation to which we now turn, by first expanding on the underlying themes of tradition and identity shared in both contexts, and then offering our take on the (ignored) concretization of the multicultural debate occurring within the CEDAW process.

on multicultural policy, see *Australia's Multicultural Policy*, AUSTRALIAN GOVERNMENT, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP, <http://www.immi.gov.au/living-in-australia/a-multicultural-australia/multicultural-policy/>, launched in February 2011 (last visited Nov. 4, 2011).

66 McGoldrick, *supra* note 65.

67 SUSAN MOLLER OKIN ET AL., IS MULTICULTURALISM BAD FOR WOMEN? (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999); SIOBHAN MULLALLY, GENDER, CULTURAL AND HUMAN RIGHTS (2006).

68 Cf. INT'L CTR. FOR HUM. RTS. & DEMOCRATIC DEV., BEHIND CLOSED DOORS: HOW FAITH-BASED ARBITRATION SHUTS OUT WOMEN'S RIGHTS IN CANADA AND ABROAD (2005), available at <http://www.dd-rd.ca/english/commdoc/publications/women/arbifaith.htm>; Shachar, *supra* note 65 (offering a model for state regulation of religious arbitration).

69 INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 56, at 101.

IV. THE CEDAW COMMITTEE'S GENERAL RECOMMENDATION AND THE MULTICULTURAL DEBATE

While the constitutions of most Northern states define the basic unit of society as the individual citizen, in traditional societies the family remains the basic social unit around which community is organized.⁷⁰ In non-state societies, such as a tribe or clan, the family functions as the “gatekeeper” of society,⁷¹ and the rules encompassed in their systems of family law fulfill a task similar to that of citizenship law for a state.⁷² This is often referred to as the demarcating function of family law.⁷³

For both states and non-state traditional communities, the family serves as the place where heritage is transmitted and where group identity is preserved and continued. Personal status law is often formulated and presented as the foundation of a state's or a community's identity on both the formal and the symbolic level. Within this body of laws, which includes marriage, divorce, custody and guardianship of children, maintenance, adoption, inheritance, succession, property and land rights,⁷⁴ the core is the rights and roles of women in the family. As a result, personal status law, and particularly its rules of marriage eligibility and divorce, is central to traditional societies' preservation of identity, whether as communities or as states. With few exceptions, in countries where the legal system recognizes the rule of personal law, it is primarily in the sphere of family matters.⁷⁵ Areas such as commerce and penal law are invariably governed by modern legal codes, frequently held over or adapted from a colonial era.⁷⁶ Family matters have thus become the central — more often than not the only — carriers of communities' identities.

While family matters may be labeled as “minor,” hence justifying their relegation to the private or communal sphere to be governed by religion or custom, the exact opposite is true. Family matters, because of their crucial

70 Cf. FAREDA BANDA, *WOMEN, LAW AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE* (2005); Joseph Suad, *Gendering Citizenship in the Middle East*, in *GENDER AND CITIZENSHIP IN THE MIDDLE EAST* 3, 22 (Joseph Suad ed., 2000) (specifically referring to Middle Eastern states).

71 AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* 46 (2001).

72 *Id.* at 45.

73 *Id.* at 51-54.

74 *Id.* at 63 n.224; FREEMAN, *supra* note 6, at 8.

75 FREEMAN, *supra* note 6; INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 56, at 63, 66.

76 FREEMAN, *supra* note 6. Recent exceptions are Pakistan and Nigeria, which allow the application of Muslim laws in penal matters as well as in family law.

role in constructing collective identity, have become contested areas of control for state and non-state actors alike. Thus, states' or communities' insistence on preserving their discriminatory personal status laws is as much a matter of politics as it is of culture and religion. "State recognition of demands for distinct family laws therefore needs to be seen less as a minor concession for the sake of national stability, and more as a conscious political strategy that has profound human rights implications."⁷⁷

As discussed previously, personal status law is also a key to women's power, place and role in the community. In fact, personal status law goes to the very core of women's equality. In other words, personal status law is where the heart of the community's identity and the heart of equality for women converge. Women are thus the "bearers of the collective" not just in the physical sense of the term,⁷⁸ but in that they also bear the cost of carrying the collective's identity, paying with their own equality rights.⁷⁹ The preservation of the community's identity is bought at the expense of women's equality. Gender discrimination is thus comfortably maintained through personal status laws, customary laws and plural legal orders, justified by the need to preserve identity, whether of minority groups within the political entity of the state or of the national state itself.

The "comfortable" situation of maintaining gender discrimination relates to a growing body of research concerned with the relatively limited and weak setting of human rights standards regarding family laws.⁸⁰ To some, it

77 INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 56, at 67.

78 Nira Yuval Davis, *The Bearers of the Collective: Women and Religious Legislation in Israel*, 4 FEMINIST REV. 15 (1980).

79 See Ruth Halperin-Kaddari & Yaacov Yadgar, *Between Universal Feminism and Particular Nationalism: Politics, Religion and Gender (In)Equality in Israel*, 31 THIRD WORLD Q. 905 (2010) (demonstrating the formal legal sense of women as the bearers of the collective, in transmitting religious affiliation and hence citizenship rights in Israel).

80 *Contra* Masha Antokolskaia, *Human Rights as a Basis for the Harmonization of Family Law*, in HARMONIZATION OF FAMILY LAW IN EUROPE: A HISTORICAL PERSPECTIVE 29 (Masha Antokolskaia ed., 2006); Ann Laquer Estin, *Human Rights, Pluralism, and Family Law*, in HARMONIZATION OF FAMILY LAW IN EUROPE: A HISTORICAL PERSPECTIVE, *supra*, at 211, 212 (arguing that "[i]nternational law articulates a broad set of normative standards for family law"); Lynn D. Wardle, *The Symbolic Relationship Between Human Rights and Family Law*, in HARMONIZATION OF FAMILY LAW IN EUROPE: A HISTORICAL PERSPECTIVE, *supra*, at 973. A careful reading of these analyses concludes that while they indeed address international standards relating to family law and legal disputes, they focus on the content of the local laws rather than on whether those laws meet

appears as though there is a consensus around the exemption of family law from a globally shared legal framework based on cross-cultural foundations,⁸¹ in complete contrast to all other legal areas implicating human rights issues. Indeed, the normative human rights framework here is somewhat confusing. While CEDAW's Article 16, together with the Committee's General Recommendation 21, have attempted to establish a comprehensive framework for gender equality in family law, not only has this framework left quite a few areas unattended, but the overall acceptance of this international standard is also alarmingly low. The reservations regime, providing states with the opportunity to insist on retention of religious and customary laws, allows for expression of this low level of acceptance, and the nature of accountability under the human rights treaty system allows for silent noncompliance. In other words, international law substantively defines the standards, but international law procedures provide opportunities to undercut commitment to the standards, sometimes to the extent of questioning their existence.

Taking this back to the debate of multiculturalism versus human rights discussed above,⁸² some interesting observations emerge. As explained there, the conventional construction of the multiculturalism debate has been within the framework of non-state-sanctioned multiple family law regimes. In fact, it was originally constructed within the political unit of the state, as an internal conflict between the state entity that is committed to human rights and minority *nomie* communities within it demanding respect and autonomy for their culture and legal tradition.⁸³ This is clearly seen in the pioneering works of Will Kymlicka,⁸⁴ who consistently addresses minority

international human rights standards relating to this area. Furthermore, much of their analysis is limited to European standards. Both these points are best reflected in Wardle's article.

81 INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 56, at 65, and the sources cited in footnote 231 therein.

82 *See supra* text accompanying note 67; *see also* INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 56; Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices*, 19 HUM. RTS. DISCOURSE 101 (2006); Estin, *supra* note 80; Valentin M. Moghadem, *Revolution, Religion and Gender Politics: Iran and Compared*, 10 J. WOMEN'S HIST. 172 (1999); Gila Stopler, *Contextualizing Multiculturalism: A Three Dimensional Examination of Multicultural Claims*, 1 LAW & ETHICS HUM. RTS. 310 (2007).

83 *See* Robert M. Cover, *The Supreme Court 1982 Term, Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (introducing the concept of *nomie* communities, namely minority communities that generate sets of group-sanctioned norms of behavior that differ from those encoded in state law).

84 WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989) [hereinafter

groups within the state, attempting to form a liberal approach towards such non-liberal groups. Kymlicka's multicultural liberalism seeks to construct special cultural rights, translating into a right to be protected, for traditional minority groups as part of an overall liberal theory of equality.⁸⁵ Most of the ensuing literature follows this construction, which is in fact set from a Western liberal democratic state perspective.

This is but one setting of the multicultural debate, which can be termed the subnational setting. We argue that the multicultural debate has expanded to the international sphere and to the CEDAW process, with the Convention's provisions on family law⁸⁶ and the work of the Committee as the arena for the concrete realization, and to some extent the resolution, of this debate.⁸⁷ The near-universal ratification of the Convention would lead to the conclusion that the human rights and equality side of the debate has triumphed.⁸⁸ On the other hand, the significant number of reservations to Article 16 and the overall inadequate level of implementation can be taken as evidence that the multicultural side of the debate still carries weight and the issue is not yet fully settled. In other words, the multicultural debate is constructed in the international sphere as a global conflict between "like-minded" countries committed to international human rights and those that decline complete adherence and ask for respect in the name of multiculturalism. Notably, this is usually done by using the same analysis and arguments that were developed within the traditional subnational multicultural discourse, but without distinguishing between them or acknowledging the substantive differences between the two settings. Only rarely can one find clear reference to what can be called the two distinct settings of the multicultural debate.⁸⁹

KYMLICKA, LIBERALISM]; WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995).

85 Kymlicka's theory leads to offering linguistic and educational rights to cultural minorities and in some cases goes as far as arguing for self-governance, including legal and judicial autonomy for those who may be regarded as national minorities, see KYMLICKA, LIBERALISM, *supra* note 84, at 147.

86 CEDAW, *supra* note 1, arts. 2, 5, 9, 15, 16.

87 See ECONOMIC AND SOCIAL COUNCIL, *STUDY ON FREEDOM OF RELIGION OR BELIEF AND THE STATUS OF WOMEN IN THE LIGHT OF RELIGION AND TRADITIONS* (2009), available at http://www.wunrn.com/un_study/english.pdf (positing the Convention as a clear reflection of the conflict, particularly paragraph 64, where the reservations and their effect are discussed).

88 *Id.* (clarifying the decision on the side of women's rights (i.e., human rights)).

89 See, e.g., Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in OKIN ET AL., *supra* note 67, at 7, 18 (referring to the "literature on subnational multicultural issues" and suggesting a similar line of thinking in the "international arena").

There is, however, at least one conceptual problem with borrowing the arguments from the subnational multicultural debate to apply to its international construction. If we take international law seriously, then we must recognize that by becoming a party to a human rights convention the State has formally accepted the substantive norms and ideas contained in that instrument. Thus, there is grave inconsistency in a State party's argument about its right to maintain its own culture, allowing for such practices as polygamy, child marriage or disciplining "stray" girls,⁹⁰ as beyond the understanding and scrutiny of the Committee and therefore immune from intervention. By using the language used in the subnational multicultural setting, these states ignore their general commitments to the gender equality norms of the Convention. These situations are conceptually and practically different from the conventional construction of the national multicultural debate, in which the minority group within the State has not expressed any similar acceptance of human rights norms.

This inconsistency is a direct result of the reservations regime and the accountability issues in the human rights system. Reservations permit the duality of full commitment on the one hand and at least partial neutralization of the substance of the commitment on the other. In addition, the system's reliance on dialogue and "soft" forms of pressure allows a great deal of space for noncompliance without practical consequence. A state's declared or undeclared resistance to certain commitments, through reservations or silent noncompliance, therefore looks very much like the position of subnational groups that claim a right to opt out of state scrutiny, and the two settings of the multicultural debate thus become much more similar.⁹¹

90 This was the case, for example, during the constructive dialogues held with Saudi Arabia in 2008 on its combined initial and second periodic reports, as reflected in CEDAW, Summary Record: Saudi Arabia, CEDAW/C/SR.815 (2008); or with the Libyan Arab Jamahiriya in 2009 on its second periodic report and combined third, fourth and fifth periodic reports, CEDAW, Summary Record: Libyan Arab Jamahiriya, CEDAW/C/SR.878 (2009).

91 An apt demonstration of this can be seen in the defensive-aggressive rhetoric used by Mr. Al Hussein, head of the delegation of Saudi Arabia, in the very beginning of his opening statement upon introduction of the combined initial and second periodic reports of Saudi Arabia to the CEDAW Committee, *see* CEDAW, Summary Record: Saudi Arabia, CEDAW/C/SR.815 (2008).

V. EQUALITY AND CHOICE

All systems that protect identity-based legal orders, whether by enshrining them in state law or ignoring them as “private,” are highly problematic in terms of protecting women from discrimination. States that formally provide for multiple marriage systems without overarching equality norms as to consent, child marriage, polygamy, property rights including inheritance, child custody, and grounds and procedures for divorce, perpetuate discrimination against women in the name of preserving religious or community identity. The result is the same in states that require civil marriage, or provide for state registration of religious and customary marriage, but do not regulate property relations during marriage and at its dissolution by death or divorce, leaving the consequences to be determined by community or religious law. Such systems guarantee that the forms of discrimination inherent in the private regimes will continue without accountability by either community or state.

This is not to suggest that women are universally unwilling participants; they may make a determination that living according to a discriminatory regime provides a net benefit.⁹² However, when the human rights framework to which 187 states are obligated under the CEDAW Convention is applied, serious questions arise as to the constraints on women’s choices, the consequences of choosing not to live according to community law or expectations, and how the state will meet its obligation to promote *de jure* and *de facto* equality and protect against discrimination. The state has substantial influence on the scope and nature of the choices available to women, as the legal framework within which women make their choices is a matter of state regulation. International norms also have a significant role, obligating states to eliminate discriminatory family law despite their reluctance to do so.

In undertaking to produce a general recommendation on economic equality in the family, the CEDAW Committee takes on a task of norm-setting that is essentially uncharted territory. The multiculturalism discussion has become an industry, but practical guidance is scarce for states in which most individuals identify with a community or where the civil system is weakly organized, rarely used, or nonexistent.

In a cogent overview, Siobhan Mullally lays out the elements of a possible response to the problem, expanding on Seyla Benhabib’s evocation of “core moral principles”: egalitarian reciprocity, voluntary self-ascription, freedom

92 ANNE PHILLIPS, MULTICULTURALISM WITHOUT CULTURE 138-39 (2007) (describing the potentially high financial and psychological cost of exit, and the possibility that a culture may have provided little preparation for life outside it).

of exit and association.⁹³ The positive heart of Mullally's analysis is its focus on freedom of association. "Right of exit" is a possibility only when a space exists into which a woman can exit. In societies that offer no alternative space — one is either a Hindu, or a Muslim, or a Kikuyu — a woman without any such identity cannot exist. When an individual holds her community identity at the center of her being despite its abuses, exit may not be a realistic option. At this point freedom of association, in its most practical sense, becomes crucial. Women must be free either to associate with the tradition as given, or to disassociate from it but remain within the community.⁹⁴

Anne Phillips refers to this as having a "voice."⁹⁵ Since culture is a living thing, constantly changing, silencing women's voices in the name of "preserving" the community's culture deadens the culture. Change from within allows women to retain an identity that means a great deal to them while providing room for them to breathe. The approach is not far-fetched. As of 2010, at least three international networks are working on changes in Islamic law.⁹⁶ The African Feminist Forum was first convened in 2006, with a primary aim "to contribute profoundly to the building of institutions within the African women's movement that live up to the promise of African feminism both internally and externally."⁹⁷ Modern Orthodox Jewish women in Israel

93 SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 131-32 (2002); MULLALLY, *supra* note 50, at 81.

94 MULLALLY, *supra* note 50, at 58.

95 PHILLIPS, *supra* note 92, at 139, 154-57 (2007) ("Voice matters as well as exit. The right to leave has to be complemented by the right to stay").

96 Women Living Under Muslim Laws, established in 1984, has supported women's efforts to reshape Islamic law throughout the Muslim world as well as in states where Muslims are a minority. Women's Learning Partnership is an international network that focuses on leadership for change in the Muslim world. Musawah is a relatively new network, based in Malaysia, that seeks change through reinterpretation, basing its advocacy on careful research, *see* MUSAWAH, *CEDAW AND MUSLIM FAMILY LAWS: IN SEARCH OF COMMON GROUND* (2011), available at http://www.islamopediaonline.org/sites/default/files/cedaw_and_muslim_family_laws.pdf. The 2004 changes in the Moroccan Moudawana resulted from a long-term effort by civil society, including forming a collective across the Maghreb, to place Islamic law within the framework of the CEDAW Convention — on which the King could act when he was ready to do so, *see* FREEMAN, *supra* note 6, at 19-22.

97 L. Muthoni Wanyeki, *The African Feminist Forum: Beginnings*, *ISIS* (Aug. 31, 2007, 7:37 PM), http://www.isiswomen.org/index.php?option=com_content&task=view&id=780&Itemid=80.

and the United States are also creating egalitarian spaces while remaining true to their tradition.

Freedom of association, of disassociation, and of voice are informal, the product of cultural dynamic and not of law. As to legal structures, truly practical suggestions are hard to come by. Ayelet Shachar posits a system of overlapping jurisdictions, “joint governance,” which proposes the possibility for expanding the jurisdictional autonomy of religious and cultural minorities, while formulating legal-institutional solutions to the problem of sanctioned in-group rights violations.⁹⁸ This is to be done by means of “transformative accommodation,” namely the establishment of structures of authority which require the state and the group to coordinate their exercise of power, while at the same time ensuring that no group member is left without fundamental legal rights and social resources.⁹⁹ This, however, bears little resemblance to attainable reality and ignores the fundamental rights issues inherent in the retention of even partial jurisdiction by communities. Assigning to communities the sole right to determine membership preserves their ability to discriminate at the most basic level by controlling choice of spouse. To suggest that communities will behave competitively to keep members is a leap of faith, given that any number of communities will prefer to remain small and pure rather than to be flexible and growing.

Shachar describes Egypt’s adoption of a new divorce law in 2000 as a progressive leap designed to make life easier for Muslim women and therefore as illustrative of her theory that communities will adapt to maintain membership. However, there is less to the new law than meets the eye. It is designated as *kuhl* divorce, but it eliminates the *kuhl* standard requirement of the husband’s consent. This should make divorce more accessible — but the price women must pay is enormous. In traditional *kuhl* the wife is the moving party and gives up her *mahr* (payment of a sum from husband to wife promised at the time of marriage, sometimes given later, during the marriage), which she would be given if he divorced her by *talaq*. However, the wife receives post-divorce maintenance during the three months of *iddat* as she would in any divorce. Under the new law, the wife can petition on her own, without the husband’s consent, as in *kuhl*, but she must give back the *mahr* and give up any other payments, including the post-divorce maintenance normally paid during the three months of *iddat*, which can be considerable.¹⁰⁰ If she cannot maintain herself, she is to be given an award through the Bank Nasser.

98 SHACHAR, *supra* note 71, at 5-8.

99 *Id.* at 117-45.

100 Dr. Freeman is grateful to Prof. Ann Elizabeth Mayer of the University of Pennsylvania for clarifying this in a telephone interview on March, 2011.

In the event, the procedure is far from a guarantee of instant equality. Women's generally low economic status — compounded by the negative financial consequences of *kuhl* — and social pressure, sometimes from their own families, create considerable obstacles.¹⁰¹ Moreover, the minimal nature of this change is illustrated by the government's failure to withdraw any part of its reservation to CEDAW Article 16 (equality in the family, including in matters relating to divorce), while it did deem a change in its nationality law sufficiently meaningful to allow for withdrawal of its reservation to that Convention article.¹⁰²

Shachar's example of Islamic courts in Malaysia calling on custom (*adat*) in applying the family law¹⁰³ also fails to address the real problem. It illustrates a level of judicial creativity, but it also underscores the high level of judicial discretion — or unpredictability — on which women must rely in the absence of an equality guarantee.

Catharine MacKinnon has outlined a system in which community members would have the right to choose a civil alternative for any aspect of their community's law that they experience as discriminatory, a somewhat more practical approach providing for a clear "right of exit."¹⁰⁴ However, implementation would be massively complex and, as she acknowledges, places the onus on women to pursue the remedy rather than requiring communities to deal directly with inequality in their prescribed way of life. This suggestion also requires the state to enact a comprehensive civil family law, which for many states is apparently beyond their political capacity.

In states in which most individuals identify with a community, either by law or by choice, women who wish to retain their community identity without accepting all its limitations have little leverage unless they organize to develop it, frequently against great resistance and sometimes involving danger to themselves. Such closed systems do not offer a possibility of "exit" in any practical sense. The ultimate price of exit may well be death — "honor killing" in the unfortunate vernacular. States' offers of protection, such as the Jordanian practice of holding in indefinite protective detention women who defy their family¹⁰⁵ or the Libyan homes for young women who, in the

101 See Nathalie Bernard-Maugiron & Baudouin Dupret, *Breaking Up the Family: Divorce in Egyptian Law and Practice*, 6 J. WOMEN MIDDLE E. & ISLAMIC WORLD 52, 58-59, 70-74 (2008).

102 Egypt withdrew its reservation to CEDAW Article 9(2) in January 2008.

103 SHACHAR, *supra* note 71, at 132-33.

104 Catharine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and Personal Laws*, 4 INT'L J. CONST. L. 181 (2006).

105 CEDAW, Concluding Comments: Jordan, CEDAW/C/JOR/CO/4, ¶¶ 25, 26 (2007) (expressing concern about holding women in danger of "honor killing" or

words of the Director of Women's Affairs, are having "problems in their family,"¹⁰⁶ are hardly an adequate response because of their restrictions upon the women's liberty. Leadership at the lowest and highest levels of government is necessary to support flexibility of discourse and, ultimately, evolution within communities.

One of the hallmarks of a living culture, including a religious culture, is change. Belief systems may remain unchanged at their core, but the forms of their expression, including rules of behavior, evolve with history as circumstances change. Radhika Coomaraswamy describes the dynamic that allows for change as "democracy, not in the narrow sense of western representative government, but democracy in a more inchoate sense of the need to include people of all groups and communities in a process of participation and decision-making."¹⁰⁷ This idea parallels what Mullally refers to as "freedom of association" and its converse, the "freedom to disassociate" within the group — to challenge rules and behaviors as a member of the group who is affected by them.¹⁰⁸ Participation in internal challenge requires courage; education and in some cases the availability of legal assistance are critical. As a component of the obligation to promote and protect women's human rights, states have an obligation to protect the exercise of internal dissent. Functioning institutions, even imperfect ones, are essential: a judicial process, even if slow and ill-educated; local and national legislative systems that provide a forum for voices to be heard; and some form of media, including social media, that is not government controlled.

VI. HARMONIZING COMMUNITY LAW WITH CEDAW: LEGAL AND POLITICAL CHALLENGES

Whether by requiring that all marriages be undertaken according to a civil statutory scheme or requiring that the right to nondiscrimination be protected regardless of the form of marriage, States parties to CEDAW have an obligation to provide for equality between the partners.¹⁰⁹ No state that

other extreme violence in protective custody without a mechanism for release).

106 Interview by Dr. Marsha A. Freeman with Huda ben Amir, Minister in Charge of Women's Affairs, in Tripoli, Libya (Jan. 12, 2010); *see also* CEDAW, Concluding Observations: Libyan Arab Jamahiriya, ¶¶ 23, 24 (2009) (expressing concern about the possibility of young women being held in such "rehabilitation facilities" against their will).

107 Coomaraswamy, *supra* note 47, at 511.

108 MULLALLY, *supra* note 50, at 85, 212.

109 CEDAW, Concluding Comments: Republic of Congo, U.N. Doc. A/58/38, ¶¶

recognizes multiple legal systems has yet succeeded in fully meeting this standard.

The CEDAW Committee has recommended to many States parties that they “harmonize” their personal status system with the provisions of the Convention, but it has not offered concrete suggestions as to the content of a “harmonized” system. The harmonization of customary and religious law with CEDAW is a legal and political tangle that few States parties seem willing to face. Very few states have attempted either to organize their systems under a single state-sanctioned scheme — the “unified” comprehensive approach — or to establish a standard of equality applicable to marriages in all the separate systems — the “piecemeal” approach.

A. The Comprehensive Approach

One very early postcolonial effort to unify systems in a progressive framework was that of Tanzania, which has 120 ethnic groups and a minority Muslim population. The Law of Marriage Act (LMA) was adopted in 1971;¹¹⁰ it remains unique in its scope and ambition, although it should be revisited to deal with polygamy and to clarify certain property distribution issues.¹¹¹ The LMA adopted the language of a model marriage law that was developed in post-independence Kenya.¹¹² It requires registration of all

160-161 (2003); CEDAW, Concluding Observations: Lebanon, CEDAW/C/LBN/CO/3, ¶¶ 18-19 (2008) (referring to CEDAW/C/LBN/CO/2 (2005) on the same subject); CEDAW, Concluding Comments: Malaysia, CEDAW/C/MYS/CO/2, ¶¶ 13-14 (2006); CEDAW, Concluding Comments: Philippines, CEDAW/C/PHI/CO/6, ¶¶ 11-12 (2006); CEDAW, Concluding Comments: Kenya, CEDAW/C/KEN/CO/6, ¶¶ 43-44 (2007); CEDAW, Concluding Comments: Greece, CEDAW/C/GRC/CO/6, ¶¶ 33-34 (2007); CEDAW, Concluding Observations: Canada, CEDAW/C/CAN/CO/7 (2008); CEDAW, Concluding Observations: United Republic of Tanzania, CEDAW/C/TZA/CO/6, ¶¶ 146-147 (2008); CEDAW, Concluding Observations: Myanmar, CEDAW/C/MMR/CO/3, ¶ 47 (2008).

110 Law of Marriage Act (1971) (Tanz.), available at [www.tanzanet.org/downloads/laws/the_law_of_marriage_act_1971_\(5_1971\).pdf](http://www.tanzanet.org/downloads/laws/the_law_of_marriage_act_1971_(5_1971).pdf).

111 CEDAW, Concluding Observations: United Republic of Tanzania, CEDAW/C/TZA/CO/6 ¶¶ 146-147 (2008) (noting preservation of polygamy); see also Mark J. Calaguas, Cristina M. Drost & Edward R. Fluet, *Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania*, 16 COLUM. J. GENDER & L. 471, 500, 504 (2007) (describing difficulties in achieving equality in marital property distribution under section 114, especially in polygamous marriages).

112 See REPUBLIC OF KENYA, REPORT OF THE COMMISSION ON THE LAW OF MARRIAGE

marriages¹¹³ and the granting of all divorces in a civil court proceeding, equitable property division,¹¹⁴ and custody awards according to the best interest of the child,¹¹⁵ while allowing scope for community customs and religious practice. It does not prohibit bridewealth but does prohibit its requirement as an element of customary marriage,¹¹⁶ allows polygamy but adds restrictions on the taking of additional wives,¹¹⁷ and requires that marriages be declared at the outset as either monogamous or potentially polygamous.¹¹⁸ It preserves a role for traditional leaders and Islamic councils to attempt reconciliation according to tradition, but requires that divorces be granted by a civil court, which also rules on property division.¹¹⁹

Application of the LMA has been uneven, because of both lack of popular understanding and sheer resistance to changing a deeply patriarchal and frequently overtly misogynist way of life. Both factors could be attributed as much to state failure to educate the public and promote the law as to failings of individuals and communities.¹²⁰ The CEDAW Committee has indicated that the law is helpful but should be revisited to abolish polygamy.¹²¹

An effort to adopt a harmonized family law in Uganda has stalled for decades. Despite a clear prohibition of sex discrimination in the Ugandan Constitution, the bill has encountered resistance from members of Parliament on the predictable grounds of identity and tradition. It also stalled for some

AND DIVORCE (1968). The Commission prepared the report during a two-year period. It distributed questionnaires to organizations and individuals and held public meetings in twenty-one localities throughout the country. The proposed Law of Matrimony Act was tabled in Parliament and never adopted; Tanzania adopted the Act in its entirety for application in its mainland (Tanganyika).

113 Law of Marriage Act §§ 42-52.

114 *Id.* § 114.

115 *Id.* §§ 108(c), 125(2).

116 *Id.*

117 *Id.* §§ 18, 20, 21.

118 *Id.* §§ 9-11. Monogamous marriages cannot be converted to polygamous marriages, but potentially polygamous marriages may be converted to monogamous marriages if the husband has only one wife.

119 *Id.* §§ 12, 101, 102.

120 Calaguas, Drost & Fluet, *supra* note 111, at 533.

121 CEDAW, Concluding Observations: United Republic of Tanzania, *supra* note 111. In 1994 the Law Reform Commission suggested several changes that would have clarified some of the issues that were problematic, including property management; the proposal did not include abolishing polygamy, *see* Calaguas, Drost & Fluet, *supra* note 111, at 12-14 (discussing LAW REFORM COMMISSION OF TANZANIA, INQUIRY AND REPORT ON THE LAW OF MARRIAGE ACT, 1971 (1994)). The changes were not adopted.

time because of opposition by the Muslim community, which succeeded in eliminating application of the proposed law to Muslim marriage.¹²²

While Kenya failed to adopt the model marriage and divorce act that was drafted in 1969,¹²³ it has adopted a Succession Act that was produced in a parallel process at the same time as the Marriage Act.¹²⁴ Parliament adopted the Law of Succession Act in 1971 and delayed its coming into force for ten years to allow for public education as to its content and enforcement.¹²⁵ The law has proven controversial and, like the Tanzania LMA, difficult to implement because of poor education and cultural resistance. The law as originally adopted applies across the board to all individuals and families regardless of religion or ethnicity.¹²⁶ It provides for widows to inherit a life estate in the property owned by the husband or by both of them,¹²⁷ for widows

122 For a comprehensive account of the sorry history and status of the issues through June 2005, see VANESSA VON STRUENSEE, *THE DOMESTIC RELATIONS BILL IN UGANDA: POTENTIAL FOR ADDRESSING POLYGAMY, BRIDE PRICE, COHABITATION, MARITAL RAPE, WIDOW INHERITANCE, AND FEMALE GENITAL MUTILATION* (2005) (on file with authors). A Domestic Relations Bill was first mooted in 1988. The most recent attempt was in 2003. The Muslim community vociferously opposed its inclusion in the 2003 bill and obtained exemption, resulting in a separate Administration of Muslim Personal Law Bill 2008. The entire package continues to languish as the President, various members of Parliament, civil society organizations and coalitions, and religious leaders maintain extreme differences as to the role of women, the status and content of custom, and the application of the 1995 Constitution — which prohibits sex discrimination, see Will Ross, *Ugandan 'polygamy' bill protest*, BBC NEWS (Mar. 29, 2005), <http://news.bbc.co.uk/2/hi/africa/4931067.stm>; Hon. Sheila Kawamara Mishambi (East African Legislative Assembly), *Response to President Yoweri Museveni's Views on the Reform of the Domestic Relations Bill by Hon. Sheila Kawamara Mishambi, Member, East African Legislative Assembly*, WOMEN OF UGANDA NETWORK (Apr. 17, 2003), <http://www.wougnet.org/Alerts/drbrresponseSKM.html>.

123 REPUBLIC OF KENYA, *supra* note 112.

124 REPUBLIC OF KENYA, *REPORT OF THE COMMISSION ON THE LAW OF SUCCESSION* (1968).

125 Law of Succession Act, (1972) Cap. 160 (Kenya).

126 The Kenya Succession Act excludes from its ambit certain clan-held lands and livestock, to which customary law continues to apply: agricultural property and livestock as designated in an attached Schedule, as well as any other such property subsequently gazetted by the Attorney General, *see id.* §§ 32, 33. In 1994, thirteen years after its effective date, the Muslim community in Kenya managed to remove itself from application of the harmonized Succession Act, *see id.* § 2(3).

127 *Id.* § 35(1).

to be preferred as administrators of the estate,¹²⁸ and for daughters and sons to inherit equally.¹²⁹ It is a grand statement of equality for its time, essentially sweeping away the limitations of custom and granting women legal capacity to own and manage property, including women in polygamous marriages.¹³⁰ A level of discrimination remains, however, in that widows only have a life estate with power of appointment to the children and lose the life estate if they marry again, while widowers inherit outright with no limitation as to remarriage.¹³¹

The level of resistance to the law was exhibited in the famous *Otieno case*.¹³² Wambui Otieno was the widow of a well-known lawyer who died intestate in 1986. She wished to bury her husband at their farm near Nairobi. Wambui is Kikuyu; her late husband was Luo (the cross-ethnic marriage made headlines in 1963). The husband's clan sued for possession of his body for burial in western Kenya. Wambui relied on the terms of the new Succession Act, claiming that it extended her rights as widow to possession of her husband's body. The High Court ruled in her favor, but the Court of Appeals held that the statute was to be read restrictively as it derogated from custom protected under the constitution.¹³³ Fifteen years after Wambui Otieno's battle made the Succession Act known to the Kenyan public, its significance as a statement of equality was underscored by a landmark case that invoked the CEDAW Convention in support of the law's provisions.¹³⁴

Kenya adopted a new constitution in 2010, under which adoption of a unified egalitarian family code and amendment of the Succession Act should be mandatory.¹³⁵ However, given historical political resistance to equality laws,

128 *Id.* § 66(a).

129 *Id.* § 38. The Act does not define "child," but consistently refers to children without differentiating between male and female, REPUBLIC OF KENYA, *supra* note 124, ¶¶ 135-138; *see also id.* at 41-43 (Recommendation No. 43, indicating clearly that daughters and sons are treated equally under the Act).

130 Law of Succession Act § 40.

131 *Id.* § 35(1).

132 *Otieno v. Ougo*, (1987) 1 K.L.R. 948 (C.A.K.) (Kenya).

133 The Otieno case was highly politicized as a question of whether Kenya could be considered a modern state, rising above tribalism (the public reaction set Luo against Kikuyu) and recognizing a woman's right to manage her family in the event of a husband's death. In a private conversation with Dr. Freeman in 1989, Wambui Otieno described standing in the doorway of her home with a machete, protecting it from her husband's relatives who attempted to claim it and throw her out the day after her husband died.

134 *Rono v. Rono*, (2008) 1 K.L.R. 803 (C.A.K.) (Kenya).

135 CONSTITUTION, art. 27 (2010) (Kenya) (nondiscrimination); *id.* art. 45 (equality

additional litigation, unfortunately a piecemeal solution, may be required.

Another example of the unified approach is the new family law of Fiji, which has historically been divided between Asian and indigenous communities with their own family laws. Family law reform began in 1995, when Fiji acceded to the Convention, but was stalled by a civilian uprising in 2000. Supporters' arguments were bolstered by the constitution then in force,¹³⁶ which specifically prohibited discrimination on the basis of gender in article 38(2), and also recognized "public international law applicable to the protection of the rights" in the bill of rights as a guide to constitutional interpretation in article 43(2).¹³⁷ Advocates had to overcome considerable political resistance and used the results of a 2002 CEDAW Committee review to support their advocacy. The reformed family law, adopted in 2003, included property division taking into account nonfinancial as well as financial contributions; a presumption of equal contribution; and enforceable post-marital maintenance from either spouse, depending on relative circumstances.¹³⁸ In addition, the age of marriage was raised to eighteen years for both men and women by the Marriage Act (Amendment) Decree of 2009. As is frequently the case, however, patriarchal attitudes remain an obstacle to full implementation.¹³⁹

B. The Piecemeal Approach

More cautious attempts to address customary and religious personal status laws through a piecemeal approach have their own pitfalls. For example, South Africa has addressed the property issues of customary marriage and divorce, which were urgent matters after the end of apartheid,¹⁴⁰ but has hesitated to deal with the political difficulties of drafting legislation to recognize Muslim and Hindu marriages. The Recognition of Customary Marriages Act was adopted in 1998 after much study and controversy.¹⁴¹ The law is a compromise between constitutional and international equality norms and the post-apartheid

in the family). However, the Muslim community managed to exclude itself from these provisions in the application of personal law (marriage, divorce, inheritance), *id.* art. 24(4).

136 The 1997 constitution was suspended in 2009.

137 CONSTITUTION OF FIJI (1997)

138 State Party Report: Fiji, CEDAW/C/FJI/2-4, ¶¶ 336, 352, 353 (2010).

139 CEDAW, Concluding Observations: Fiji, CEDAW/C/FJI/CO/4, ¶¶ 20, 21, 38, 39 (2010).

140 Urgent because customary marriage had not been recognized formally in the former regime, and politically fraught because of the equality issues relating to polygamy; the effort took four years.

141 Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

politics of identity,¹⁴² it preserves polygamy but regularizes the taking of additional wives,¹⁴³ and provides for property rights of all the wives.¹⁴⁴ South Africa also has a civil marriage act.¹⁴⁵

However, because the practices of the sizeable Muslim and Hindu communities are covered by neither law, women in these communities are unprotected as to state recognition of their marriages. The resulting hardship cases have landed in the courts, which have ruled as a matter of equity that surviving partners may be recognized as spouses for purposes of inheritance or damages for death of the partner.¹⁴⁶ This case-by-case result is far from a solution, but the adoption of a law recognizing Muslim marriage has been paralyzed by controversy over the degree to which the law should impose only a minimal registration recognition or full state sanction for the traditional provisions of Muslim marriage.¹⁴⁷ No law has yet been offered to deal with registration of Hindu marriage.

C. Meeting International Equality Norms While Preserving Identity: A Model Approach

To date no state with historically state-sanctioned multiple legal systems has completely solved the problem of providing fully for equality in the family while protecting women's ability to maintain community identity to the

142 See SOUTH AFRICAN LAW COMMISSION, PROJECT 90: THE HARMONIZATION OF THE COMMON LAW AND THE INDIGENOUS LAW: REPORT ON CUSTOMARY MARRIAGES (1998).

143 Recognition of Customary Marriages Act § 6(7).

144 *Id.* §§ 6, 7.

145 Marriage Act 25 of 1961, amended through 1992 (S. Afr.) (consolidating and amending the laws relating to the solemnization of marriages and matters incidental thereto). Clergy may solemnize civil marriages, but the marriage must be registered as a civil marriage.

146 *Daniels v. Campbell* 2004 (7) BCLR 735 (CC) (S. Afr.) (inheritance); *Amod v. Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA) (S. Afr.) (accidental death, insurance benefits).

147 See RASHIDA MANJOO, THE RECOGNITION OF MUSLIM PERSONAL LAWS IN SOUTH AFRICA: IMPLICATIONS FOR WOMEN'S HUMAN RIGHTS (2007), available at http://www.law.harvard.edu/programs/hrp/documents/Manjoo_RashidaWP.pdf. In January 2011, the government tabled a bill that enshrines the discriminatory elements of Islamic law in detail, thereby precluding evolution toward equality. An alternative supported by the constitutionally established Gender Equality Commission would have provided state sanction only for registration, allowing for evolution and reinterpretation as advocated by Muslim feminists in other countries, see, e.g., MUSAWAH, *supra* note 96.

extent they wish. The CEDAW Committee in its general recommendation on economic consequences of family relationships must address this problem in a pragmatic manner, adopting language that can and will be used as guidance for all States parties in reforming their family law to meet their obligations under the Convention. The Committee recognizes the issues of political will and traditional attitudes as obstacles to meeting these obligations; it has been citing them for thirty years. At the same time, it has seen sufficient movement to warrant some hope that, at least in some quarters, States parties and civil society can position the discussion as a matter of harmonization of, rather than conflict between, equality norms and identity needs.

The key to the effort is to eliminate the family position of women as a marker of community identity and instead provide them the means of choosing the way they wish to express that identity. The state must establish an identity-neutral, equality-based format for recognition of marriage and requirements for divorce. Individuals may choose to observe the requirements of non-state legal systems, whether or not they are egalitarian, but the state should have no role in enforcing them. If the state does not enshrine the details of a religious or customary system by statute, the system has room to evolve informally, as cultures do, and individuals have scope for negotiating change from within, by exercising the right to voice. The state has a duty to protect the exercise of voice, or the freedom to disassociate, by providing recognition of civil marriage and divorce, and it also has the duty to physically protect those whose exercise of disassociation places them in physical danger, for example, of harassment by community members or of murder in the name of honor.

A law that meets all the requirements of the Convention and allows scope for identity therefore would include:

A. Civil marriage and civil grant of divorce are required in order to be recognized by the state. All marriages must be registered. Failure to register does not make a marriage invalid; the marriage may be proven by other means prescribed by the state.¹⁴⁸ Any ritual, religious law or custom that limits choice of spouse and consent to marriage is prohibited. Polygamy is prohibited. The state may prescribe appropriate limitations on choice of spouse such as consanguinity.

B. The same minimum age of marriage of eighteen years is prescribed for women and men.

C. Religious and customary marriages may be performed but are not recognized by the state. The officiant in such marriages may be designated by

148 The provision for alternative means of proving marriage protects women in situations in which poverty, illiteracy, and lack of infrastructure make registration difficult.

the state to perform a civil marriage as well, after fulfilling state requirements for such designation, and may do so at the same time as the religious or customary marriage. Discriminatory rituals and various forms of payment or exchange are not required for valid marriage and are not enshrined in state law.

D. Procedures to obtain a divorce and grounds for divorce are the same for women and men and are stated in legislation. Any other negotiations pertaining to dissolution of the marriage, including community-based reconciliation procedures, are optional to the parties and are not required in order to obtain a divorce. All divorces must be registered.

E. A regime of equal rights to acquire, own, manage, and dispose of property during marriage, equal division of marital property upon dissolution, and equal rights of husband and wife to inherit must be enacted and is the norm for all families and individuals. Parties may negotiate other arrangements as to marital property by private contract; the state must ensure that such contracts are entered into freely and with full disclosure by both parties.

VII. CONCLUSION: HUMAN RIGHTS OBLIGATIONS OF STATES PARTIES TO CEDAW: MULTICULTURALISM IS NOT A DEBATE

States that are parties to CEDAW — all 187 of them — are bound by the obligation to enact the norm of nondiscrimination against women in their constitutions, laws and policies. Those that have reserved all or part of Article 16, on equality in the family, are nonetheless obligated under it because the reservation is incompatible with the object and purpose of the treaty. The convergence of the international issues of preserving religious and customary law as politically central to the state and the internally focused claiming of community identity within a state in the name of multiculturalism lies at the point called “discrimination against women in the name of identity.” Whether a state claims that its entire cultural and religious identity rests on the maintenance of customary and religious laws and practices or maintains the policy of preserving “community identities” within the state through personal status laws, the political choice is a violation of human rights standards — identity politics of the most crass nature, using women’s status as a political marker.¹⁴⁹

The CEDAW Committee’s current project of a General Recommendation on the Economic Consequences of Marriage and de Facto Relationships and Their Dissolution meets this issue head on. The economic status of women

149 MULLALLY, *supra* note 50, at 84 (referring to this as a form of trafficking in women).

in the family is dictated in the first instance by the laws that apply to them within the family relationship. From the most basic issue of women's legal capacity under ethnic custom to the complexities of property division in the most economically developed states, family law, with all its cultural baggage, determines their economic wellbeing.

The General Recommendation will include an approach to applying the international nondiscrimination norm uniformly in all systems. This requires language that acknowledges the individual and community need to retain identity while mandating uniform requirements for marriage, divorce or separation, inheritance, and other aspects of personal status law that will protect women from discriminatory consequences. Certain matters, such as minimum age of marriage, abolishing the requirement of bridewealth or dowry, prohibiting polygamy, and registration of marriage are undisputed standards that the Committee adopted in its 1994 General Recommendation on Articles 9, 15, and 16, but which many States parties still do not observe. The Committee at this point must resolve the more difficult question of prescribing a framework for economic relationships within the family that States parties will not reject out of hand as impossible in their (political) circumstances and that provides a clear path to equality for women in all communities.