

**women's rights
human rights**

international feminist perspectives

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may result in inferior nutrition, medical care, and education for female children), place women and girls at risk of violence. Eliminating the structural inequality that reinforces gender-based violence thus requires steps to ensure the underlying rights and to end discrimination with regard to those rights.

Notes

1. See, e.g., *Universal Declaration of Human Rights* (Universal Declaration), arts. 12, 16(3), G.A. Res. 217, UN Doc. A/810, at 71 (1948); *International Covenant on Civil and Political Rights*, (ICCPR), arts. 17(1), 23(1), December 16, 1966, 999 U.N.T.S. 171.
2. Women's Convention, G.A. Res. 34/180, December 18, 1979, UN GAOR, 34th Sess., Supp. No. 46, UN Doc. A/34/46 (1979).
3. See generally, *Declaration, Reservations, Observations and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination Against Women: Note by the Secretary-General*, UN Doc. CEDAW/SP/1992/2 (1992).
4. See, Universal Declaration, *supra* n. 1, art. 16(1); ICCPR, *supra* n. 1, art. 24(4).
5. *Convention on the Rights of the Child*, G.A. Res. 44/25, 44 UN GAOR, Supp. (No. 49), UN Doc. A/44/49, art. 19.
6. See, e.g., *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, December 10, 1984, U.N. GAOR, 39th Sess., Supp. (No. 51), UN Doc. A/39/51, art. 1(1).
7. Women's Convention, *supra* n. 2, arts. 1, 2(c) and (f), and 5.
8. *Idem*, art. 5.
9. For the text of general recommendation No. 19, see UN Doc. HRI/GEN/1, p. 74 (1992).
10. *Idem*, p. 75.
11. For discussion of the scope of duties under human-rights treaties and customary law to prevent, investigate, and punish violations of the integrity of the person, see Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human-Rights Violations of a Prior Regime*, *Yale Law Journal* 100: 2537, 2566-73 (1991).
12. *Velasquez Rodriguez v. Honduras*, Inter-American Court H.R. (ser. C) No. 4, Judgment of July 29, 1988.
13. *Idem*, paras. 172, 174.
14. See Restatement (Third) of the Foreign Relations Law of the United States (1987).
15. G.A. Res. 48/104 of December 20, 1993. For the text as adopted, see UN Doc. A/C.3/48/L.5 (1993).
16. *Idem*, Preamble, para. 12.

State Discriminatory Family Law and Customary Abuses

Julie Mertus

The mythical haven of the nuclear family plays an important role in many societies; this unit, characterized by a legally married adult man and woman accompanied by children, floats in a separate, "private" sphere informed by religion, culture, and tradition, free from governmental interference.¹ Under the cloak of the separate sphere ideology, states maintain that they are incapable of dealing with domestic violence, child brides, and other inequities in marriage. The private life of the family must be respected, the state argues, and government must stay out. Yet, "far from being an enclave, the family is vulnerable to the state, and the laws and social policies that impinge upon it undermine the notion of separate spheres."² The state, however, only intrudes upon family life to the extent that such interventions serve larger political and social goals.

The State's Interest in Family Law

Family law, while not the only factor, is an important mechanism through which the state can maintain or disrupt existing family arrangements and influence women's ability to participate fully in the social and political spheres. Women's obligations in societies are often defined in terms of their obligations in the family. By prescribing women's role in society—as reproducer, producer, or a combination of the two—and by regulating women's access to wealth—particularly the rights to property ownership and inheritance—family laws profoundly affect women's social and economic status, influencing everything from women's access to education and health care to their rates of fertility and mortality.

When increased participation of women in economic and political activity would advance desired economic change, the state often promotes family reforms in order to reduce the control of families over women and to induce women into the labor force.³ By contrast, where political and economic developments indicate that the state would benefit from higher fertility rates and low rates of women's participation in the formal labor sector, the state tightens social and legal policies toward women, further limiting their function to reproduction and related familial duties.⁴ The unifying factor here is an instrumentalist approach toward women and the family—one that supports only the images of women that strengthen state goals.

Family law is complicated in many regions by the potential application of contradictory religious and/or customary laws and civil laws.⁵ At times, states may refrain from redressing inequalities between religious law and civil legislation on the grounds that such restraint best respects culture and tradition and/or is most consistent with the state's secular ideology.⁶ But states sometimes directly advance a religious legal code when doing so is deemed necessary and/or desirable, repressing the internal contradictions and interpretive difficulties usually present in religious law.⁷

Types of State Interventions

"Human rights norms postulate the right of everyone to marry and to found a family . . ." but, at the outset, nearly all states restrict access to legally sanctioned family life through marriage regulation, defining acceptable and unacceptable forms of union and the social and political cost of unacceptable unions. Often, states further regulate the composition of the family through laws pertaining to reproductive freedom, including access to contraception, abortion, artificial insemination, and through economic inducements to bear—or not bear—children.

Family laws also often regulate rights and responsibilities within family units by, for example, specifying the responsibilities of family members to each other and respective rights upon dissolution (through divorce, death, abandonment, or migration). The content of these laws varies widely in different places, as Valentine Moghadam notes:

In many cases female family members are understood, if not legally required, to be care providers (to children, to in-laws, and to parents).

In other cases, a father is legally required to provide for his family. In yet other cases there are social policies creating extra-family supports: day care, homes for the aged or infirm, nursing help, and so on. There may or may not be legal codes pertaining to domestic violence, child abuse, wife battering, or spousal rape.⁹

However constructed throughout the world, family laws and practices tend to perpetuate a patriarchal structure in which women are subordinated to men and in which male economic and decision-making powers are enhanced. In contemporary China and Korea, for example, the social systems foster patriarchy by institutionalizing women's economic and social dependence on men. A woman's worth is measured largely in relation to the man to whom she is appended, be he a father, a husband, or a son.¹⁰ As in many societies, the women and girl children of the family are perceived as having little or no value and, as such, are the last to receive medical care, food, and education.¹¹

Across cultures, the social organization of tribes or communal groups is usually based on blood ties through the male kin, and women have been subordinated through restrictive codes of behavior, gender segregation, and ideologies linking family honor to female virtue.¹² Men have been granted the right to make all important decisions for women, unilaterally determining when they shall marry and divorce, when and how often they shall bear children, and whether they shall be educated and permitted to work outside the home. To varying degrees, all societies employ legal measures and social practices designed to protect the superior position of men.

A Look at Selected Problem Areas

While a comprehensive summary of all family issues raising potential human rights concerns is beyond the scope of this essay, the following survey illustrates the global scope and varied nature of many of these concerns.

Consent to Marriage and Divorce

In many countries, marriages are still arranged by families, without the woman's consent. In Ethiopia, for example, women are used without their consent as a means of barter in a practice known as "exchange

marriage," a system whereby a man who wishes to marry arranges with another man to exchange sisters.¹³ In many Mediterranean countries, by law and by practice, women have little or no choice of mate. Likewise, families in several regions of the world promote "cousin marriages"—usually the union of second or third cousins—in order to safeguard control over property. The Maleki interpretation of Islamic law, prevalent in Northern Africa, for instance, favors arranged marriages within the extended patrilineal kin group.¹⁴

Through various devices, states may also restrict women's right to remarry. For example, Article 987 of the Civil Code in the Republic of China provides that "after the dissolution of her first marriage, a woman is prohibited to remarry within six months, unless within that period she has already given birth to a child."¹⁵ Similarly, in many countries throughout the world, men have a unilateral right to divorce, while women's right to divorce, if it exists at all, is dependent upon the husband's consent.¹⁶

Marital Age

Families that arrange marriages for their girl children often do so before the girls reach puberty. In addition to the question of whether these young girls can and do consent to such marriages, this practice also raises the problem of early birth rates, which frequently are coupled with early marriages. Girls between the ages of 11 and 13 who give birth when they are not fully mature can suffer permanent injury to their health, and their maternal mortality rate is three times greater than that of the 20–24 year age group.¹⁷ To combat this danger, many countries have enacted marital age laws. In some Middle Eastern countries, for example, the legal age of marriage is fifteen, higher in countries like Syria, Bangladesh, and Tunis.¹⁸ A novel approach to the marital age problem is found in Syria, Jordan, and Morocco, where laws specify the minimum gap in ages between spouses. For example, Jordanian law proscribes marriages between women under the age of 18 and men more than 20 years older.¹⁹ Despite the host of legal reforms addressing marital age, families in many countries continue to marry off their daughters at a young age.

Polygamy

While the laws of some countries in which polygamy is considered acceptable allow women to use their marital contracts to restrict their

husbands' right to take additional wives, in most cases the decision ultimately rests with the husband.²⁰ Today, as one commentator has noted, polygamy is increasingly becoming a class phenomenon:

Only a rich man can permit himself such a commitment. . . . As for the middle classes, they live mainly in towns, and urban living conditions have led them increasingly to adopt the nuclear family structure. What limitations there are on polygamy thus seem to flow more from economic conditions than from any reforming zeal aimed at reducing the inequalities suffered by women.²¹

Thus, polygamy continues to be practiced wherever men can afford it.

Instead of prohibiting polygamy outright, some countries attempt to regulate it.²² In Bangladesh, for example, husbands who wish to take on additional wives must notify the Arbitration Council under the *Muslim Family Laws Ordinance*.²³ Yet few men obey the law, rendering these provisions and other legal mechanisms far from effective. And in Ethiopia, where the civil code explicitly forbids polygamy, polygamy is nevertheless practiced among both Christians and Muslims.²⁴

Marriage Payments

The age-old practice of giving marriage payments of cash or kind at the time of marriage has been prevalent in numerous cultures, from Portugal and Spain (where such systems no longer exist) to India, Africa, and the Middle East (where they continue to function).²⁵ Cross-culturally, three systems are most prevalent: (1) dowry—property brought to the marriage, provided by the family of the bride; (2) dower—property brought to the marriage, provided by the family of the groom; and (3) bridewealth—property offered by the family of the groom to the family of the bride.²⁶

Marriage payments were originally intended as a source of economic security for women in case of divorce or other emergency, as they were generally intended to be held for the woman's use upon dissolution of the marriage. In practice, however, the male kin exercise control over the dower. Thus, marriage payments often actually work against women's interests: the very idea that women carry a price advances the notion that women are property to be bought and sold.

Dowry Murders

Recently, a spate of vicious dowry murders have occurred among Hindu families in India. Husbands feel justified in killing their wives when the wives' families fail to deliver material goods as a continuing dowry payment.²⁷

The demands of in-laws, which sometimes escalate after marriage, leaves [*sic*] newly married daughters virtual hostages against payments by their parents. The young women are harassed by the in-laws with whom they must live, and are neglected by their own parents if they complain. Both families collude in the murders; one to find a new more lucrative hostage; the other to be free from harassment and expense.²⁸

Many families do not accept the practice. Still, family members who try to press charges after a dowry murder have been beset by a host of legal difficulties from being ignored or scorned during the investigatory stage, to being prevented or dissuaded from presenting effective testimony.²⁹

Various forms of violence are associated with dowry in Bangladesh as well.³⁰ In response, Bangladesh passed the *Dowry Prohibition Act* in 1980, making the giving of property or any other valuable security upon marriage an offense punishable by imprisonment and/or fine. In addition, the Bangladesh *Cruelty to Women Ordinance* of 1983 provides for capital punishment of a husband and his family for murdering or attempting to murder a woman to obtain a dowry.³¹ Still, husbands may ignore both laws with impunity as it is difficult to prosecute a case successfully under their provisions.³²

Domestic Violence

Domestic violence, like rape, is seriously underreported, but available statistics hint at the magnitude of the problem. Seventy percent of all crimes reported to the police in Peru are of women beaten by their partners.³³ In Japan, wife beating is the second most frequent cause of divorce initiated by women.³⁴ In Brazil, until 1991 wife killings were considered to be noncriminal "honor killings"; in just one year, nearly eight hundred husbands killed their wives.³⁵ Similarly, in Colombia, until 1980 a husband legally could kill his wife for committing

adultery.³⁶ In the United States, the Federal Bureau of Investigation has estimated that a woman is beaten every eighteen seconds.³⁷ And in most regions of the world, including many states in the United States, husbands are free to rape their wives without fear of legal reprisal.³⁸

Child Custody

The laws of many regions of the world grant the father the right to custody and control over the children. For instance, under *shari'a*, which (to varying degrees) regulates family law in Muslim countries, even when children live with their mother, fathers are considered the legal guardians and maintainers.³⁹ Women lose custody of their children altogether when the boys are seven and girls are nine, or when boys reach puberty or girls reach a marriageable age. In contrast, custody decisions in some U.S. courts have been made on the assumption that custody and control of children should be granted to the so-called biological mother, thus forcing the father or guardian of the children to prove that the best interests of the children mandate an alternative placement. At the same time, U.S. courts have held that a "nonbiological parent" who is nevertheless a "psychological parent" cannot even make a case for visitation rights.⁴⁰

Citizenship

The area of citizenship is one in which a great conflict exists between religious and customary law, on the one hand, and civil law, on the other. In Sri Lanka, for example, while civil laws grant women equal access to citizenship, religious laws may assign a woman (and her children) citizenship only on the basis of the husband's status.⁴¹ Another problem, typical of many countries, is found in Gabon, where a woman must renounce her citizenship upon marrying a foreigner; if she is subsequently divorced, she cannot regain her original Gabonese citizenship.⁴²

International and domestic courts have at times been receptive to women's challenges to discriminatory citizenship provisions. In 1992 in Botswana, Unity Dow, a Botswana national married to an American, successfully challenged a Botswana law declaring that a father's nationality determines children's citizenship. In 1984, at the request of Costa Rica, the Inter-American Court on Human Rights issued an advisory