

IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES

NO. 6

**THE RIGHT TO DECIDE IF,
WHEN AND WHOM TO MARRY:
Obligations of the state under CEDAW
and other international human rights instruments**

International Women's Rights Action Watch Asia Pacific



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ABBREVIATIONS

CEDAW Committee	Committee on the Elimination of all Forms of Discrimination against Women
CEDAW Convention	Convention on the Elimination of All Forms of Discrimination against Women
CERD Committee	Committee on the Elimination of Racial Discrimination
CESCR Committee	Committee on Economic, Social and Cultural Rights
CRC Committee	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights

I. Introduction

The scope and extent of state accountability and the combating of any perpetration of impunity must be the context within which discussions on state obligation under treaty law operate.

This paper will highlight the undertakings assumed by the state as embodied in human rights treaty provisions and elaborated upon by general comments or recommendations, concluding comments or observations, and jurisprudence of the different treaty bodies. Although the right to decide if, when and whom to marry is applicable to both men and women, this paper will focus on women. It will also concentrate primarily on the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention). However, state obligation under other human rights treaties will be discussed as well.

It is hoped that this discussion will invite a sharing of expertise on how national mechanisms and interventions can be crafted to ensure compliance with treaty law. Furthermore, this paper also seeks to provide a foundation for identifying more responsive strategies and a plan of action at both national and international levels to hold the state accountable for violations of its obligations.

II. International human rights conventions and the right to decide if, when and whom to marry

Under international law, when a state signs a treaty, it signals its intention to become bound by its provisions and must refrain from acts that would defeat its object and purpose. However, when it chooses to ratify such a treaty, it becomes bound to the treaty and is then considered a State party. It is accountable and responsible for compliance with all of this treaty's obligations, unless it communicates a reservation.¹ The extent of a state's obligation varies according to the provisions of a particular treaty.

¹ Article 2 of the Vienna Convention on the Law of Treaties defines reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.

The state obligation to guarantee the right to decide if, when and whom to marry is found in many human rights instruments. Article 16 of the Universal Declaration of Human Rights (UDHR)² expresses that “men and women of full age, without any limitation due to race, nationality or religion, [...] have the right to marry and to found a family”. It also provides that they are entitled to equal rights in marriage, and that marriage shall be entered into only with the free and full consent of the intending spouses.

This is reiterated in Article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962, 1964). This explicitly says that, “no marriage shall be legally entered into without the full and free consent of both parties”. Further, Article 2 expresses that “States parties [...] shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses”.

These undertakings are echoed explicitly in other human rights instruments:

- Article 23 of the International Covenant on Civil and Political Rights (ICCPR) with Article 3;³
- Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) with Article 3;⁴
- Article 5(d)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);⁵ and
- Article 16(1) and 16(2) of the CEDAW Convention.

² Although the Universal Declaration of Human Rights is not a treaty, it is given high regard, especially since it is considered as the foundation instrument for other human rights treaties. Several of its provisions have also attained the status of international custom.

³ Article 23(2): “The right of men and women of marriageable age to marry and found a family shall be recognised”; Article 23(3): “No marriage shall be entered into without the free and full consent of the intending spouses”; and Article 3: “The States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”.

⁴ Article 10 expresses that “[...] Marriage must be entered into with the free consent of the intending spouses” while Article 3 provides that “States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”.

⁵ Article 5: “In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and eliminate racial discrimination in all its forms and guarantee the right of everyone without distinction as to race, colour, national or ethnic origin to equality before the law notably in the following rights: [...] (d) Other civil rights, in particular: [...] (iv) right to marriage and choice of spouse”.

All these instruments guarantee: (a) The right to enter into marriage after free and full consent; (b) the right to freely choose a spouse; and (c) the right not to be discriminated against in the enjoyment or exercise of these rights (hence the term equal right or same right as prefixes to the right to marry provisions in the conventions). The rights named in (a) and (b) are often abbreviated as the right to decide if, when and whom to marry. The Convention the Rights of the Child (CRC) also affords protection of the right to decide if, when and whom to marry even though there are no explicit guarantees stated.

III. CEDAW and the right to decide if, when and whom to marry

As mentioned, the specific state obligation on right to decide if, when and whom to marry is found in Article 16(1)(a) and (b) and Article 16(2) of the CEDAW Convention. This provides for the following:

- (1) The State shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure on a basis of equality of men and women:
 - (a) The same right to enter into marriage;
 - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

[...]

- (2) The betrothal and marriage of a child shall have no legal effect and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

State obligation and CEDAW: General undertakings

The specific obligations in Article 16(1) and 16(2) of the CEDAW Convention must be viewed not in isolation but in consideration of the general undertakings of the state as embodied in Articles 2, 3, 4, 5 and 24. These articles contain the following principles:

- (i) Obligation of means and results

In ratifying the CEDAW Convention, a state undertakes an obligation of means and an obligation of results. On obligation of means, a State party is bound to

take specific measures. The seven subsections of Article 2 illustrate that a state is required to take specific *means* to ensure compliance with this convention. The state's obligation however, does not stop with the establishment or adoption of measures. It must also ensure that the measures chosen must actually *result* in the elimination of all forms of discrimination against women. This is what is meant by the obligation of results.⁶

This two-fold obligation is therefore a guarantee not just of rights but also of their realisation. It guarantees that women are given not only equality of means and resources or only equality of access; it further ensures that equality, both at the *de jure* and *de facto* level, results from a state's interventions.

(ii) Eliminate discrimination in all its forms, by all appropriate means and without delay

A state has an obligation to eliminate discrimination *in all its forms*. This undertaking requires an understanding of discrimination and equality by all states. Article 1 of the CEDAW Convention defines discrimination against women as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

It is evident, especially in the use of the phrase “effect or purpose”, that this covers direct and indirect discrimination and envisions not formal equality but substantive equality. Gender-neutral laws must be subject to reform if their effects discriminate against women.

Article 2 further obligates states to pursue “by all appropriate means” a policy of eliminating discrimination against women. In identifying and implementing measures, a state must guarantee that the measures are appropriate. The burden of proving the appropriateness of each intervention rests upon the state. Therefore, States parties' reports must indicate not only the measures taken but also the basis on which they are considered the most “appropriate” under the circumstances.⁷

⁶ For more discussion on CEDAW and the obligation of means and results, see Cook, Rebecca J. 1994. “State accountability under the Convention on the Elimination of All Forms of Discrimination against Women”. In Rebecca J. Cook (ed.). *Human Rights of Women: National and International Perspectives*. pp231-32.

⁷ *ibid.* p231.

The phrase “without delay” in Article 2 highlights the immediate need to undertake measures to ensure equality. A State party in complying with its obligations under the CEDAW Convention must have specific timeframes and goals. The lack of resources, the low level of development, economic crises, the occurrence of natural calamities, transition in governments, the imposition of sanctions and changes in the political structure of governance cannot be used to justify failure to perform obligations under the convention. In these difficult situations, there is an even greater need to ensure that women are not discriminated against. The state must monitor and address the impact of such circumstances on women, especially those belonging to disadvantaged groups.⁸

(iii) Who is the State party?

When we speak of state obligation, which organ of the state are we holding accountable? The nature of the undertakings in the CEDAW Convention envisions obligations to be carried out by all organs of the state. It encompasses executive, legislative and judicial organs as well as every constituent unit of the state. All organs of the state must thus work together for the fulfilment of the obligations under this treaty.

In terms of accountability, therefore, a state is liable for conduct comprising an action or omission that is attributable to it.⁹ Furthermore, it cannot avoid its responsibility by claiming inconsistency of treaty provisions with domestic laws. Specifically, the Vienna Convention on the Law of Treaties says that internal divisions of power cannot be invoked as a defence for non-compliance with treaty law. It also emphasises that a State party may not invoke the provisions of its internal laws as justification for its failure to perform a treaty.¹⁰

⁸ IWRAP Asia Pacific. Background paper presented at the Day of General Discussion on the Proposed General Recommendation on Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. 21 July 2004. New York, USA. See < http://www.iwraw-ap.org/news_gr26.htm>.

⁹ Article 2 of the Draft Articles on State Responsibility say that: “There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Conduct constitutes a breach of an international obligation of the State”.

¹⁰ Article 27 of the Vienna Convention on the Law of Treaties. Note also Article 46(1) which provides that: “States parties cannot invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent, unless that violation was manifest and concerned a rule of its internal law of fundamental importance”.

It is obvious that state obligation required in the CEDAW Convention applies to all state organs, even in cases of separation of powers, federalism, decentralisation or existence of autonomous regions. Consequently:

- In a federal or decentralised system, the state is responsible for acts and omissions of its constituent units and their officials;
- Where there is separation of powers, the executive, legislative and judicial branches must all ensure compliance with the CEDAW Convention;
- A state is liable for judicial decisions which violate the provisions of the CEDAW Convention; and
- In terms of domestic implementation, whether or not a treaty has been incorporated into domestic law is not a defence for non-compliance. A state is liable for failure of its legislature to incorporate the treaty into its national legal framework.

(iv) Positive and negative obligations

A State party to the CEDAW Convention is required to fulfil both positive and negative obligations. It is required to ensure non-interference in the exercise of the rights in this treaty (negative obligation). At the same time, it is mandated to adopt measures designed to achieved *de facto* equality as well as the full development and advancement of women (positive obligation).¹¹ A state can thus be held accountable for both acts or omissions on its part.

(v) Non-state or private actors

Generally, individuals and non-state actors are not individually accountable under international law for their acts or omissions. The CEDAW Convention, however, holds them accountable through the state by requiring the latter to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.¹² In this regard, appropriate measures include to:

- Prevent and deter private acts of discrimination;
- Investigate acts of discrimination;
- Provide for remedies, redress, compensation or sanctions; and
- Negate their consequences and ensure non-repetition of the violation.

¹¹ Article 3.

¹² Article 2(e).

Furthermore, a state may be held liable when the violation by private actors is of a pervasive or persistent character showing complicity of or tolerance by the state of such breach of the convention. Hence, private action can lead to state accountability, not due to the act itself, but because of the lack of due diligence to prevent or address the violation as required by the convention.¹³

(vi) Customs and practices

Article 2(f) and Article 5(a) of the CEDAW Convention obligate all States parties to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. They recognise that many forms of exploitation are linked to cultural, religious and family conditions and this linkage has intensified women's marginalisation and oppression. The two articles are interrelated and it is interesting to note that some states' reservations relate only to Article 5(a) and not Article 2(f) and vice versa. This simply means that they still have the obligation to modify and abolish discriminatory customs and practices.

The CEDAW Committee¹⁴ emphasises the importance of Article 2(f) and Article 5(a) in its General Recommendation¹⁵ 21 by stating that while most countries report that their national constitutions and laws comply with the convention, their customs, traditions and lack of implementation violate the treaty. It highlights that the convention, over other treaties and declarations, "goes further by recognising the importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they play in restricting the exercise of basic rights by women".¹⁶

¹³ Cook. *op. cit.* pp236-239.

¹⁴ The CEDAW Committee was established to monitor States parties compliance with their obligations under the CEDAW Convention, and to ensure its implementation. It is composed of 23 independent experts from different geographical regions and serving in their personal capacity.

¹⁵ General recommendations are authoritative statements by the CEDAW Committee, on the meaning of the provisions in the CEDAW Convention with respect to the rights of women and the obligations of states parties. General recommendations are also referred to as General Comments in several other treaty bodies.

¹⁶ CEDAW. General Recommendation 21 (1994). para. 3

(vii) Temporary special measures

Article 4(1) of the CEDAW Convention stipulates that:

Adoption by States of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination [...] but shall in no way entail, as a consequence, the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

From this, we can define temporary special measures as: (a) positive steps, (b) directly undertaken or sponsored by the state, (c) in favour of women, (d) which are aimed at accelerating substantive equality,¹⁷ and (e) which are of a temporary nature. The CEDAW Committee has expressed in its General Recommendation 25¹⁸ that temporary special measures are not exceptions to the norm of discrimination but rather are part of a necessary strategy towards achievement of *de facto* or substantive equality. It addresses the effects of past discrimination and therefore aims to level the playing field.

Although the language of Article 4(1) appears to be merely permissive, the CEDAW Committee has gone as far as saying that temporary special measures are necessary and thus its obligatory nature surfaces. In other words, even if states are given a margin of discretion to choose the appropriate measures to ensure equality, by saying that temporary special measures are necessary, the CEDAW Committee has succeeded in shifting the onus in favour of such measures.¹⁹

Examples of temporary special measures include outreach or support programmes; allocation or reallocation of resources; preferential treatment;

¹⁷ This listing is based on elements identified in “Background paper on the proposed General Recommendation on Article 4.1 of CEDAW. Towards the progressive interpretation of temporary special measures under the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)”. By IRAW Asia Pacific and the Human Rights Clinic, Columbia University Law School. May 2002; and Frances Raday. “Systematizing the application of different types of temporary special measures under Article 4 of CEDAW”. In Ineke Boerefijn. *Temporary Special Measures*. (2003) pp36-37.

¹⁸ CEDAW. General Recommendation 25 on Article 4(1) (Temporary Special Measures). (2004).

¹⁹ Rea A. Chiongson. “Temporary special measures”. Paper presented at the Regional Consultation on Women’s Right to Participate in Political and Public Life. Organised by IRAW Asia Pacific and hosted by APIK. 9-12 December 2004. Jakarta, Indonesia.

targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems.²⁰

Elaborating on the right to decide if, when and whom to marry

Aside from the general undertakings mentioned so far, it is also important to consider statements made by the CEDAW Committee through its Concluding Comments²¹ and General Recommendations which constitute further elucidation on the right to decide if, when and whom to marry.

(i) Minimum age

In relation to child and early marriages, the CEDAW Committee in its General Recommendation 21 says that Article 16(2) and the CRC preclude States parties from permitting or giving validity to a marriage between persons who have not yet attained the age of 18 for both men and women. It further says that marriage should not be permitted before they attain their full maturity and capacity to act. It rejects any marriage before the minimum age (i.e. 18), stating that early marriage not only affects health and impedes a girl's education but also limits the development of her skills and independence, and reduces access to employment.²² This interpretation must be read into a state's obligations under Article 16(2) as well.

(ii) Differential ages for marriage

The CEDAW Committee also calls for the abolition of differential marriage ages. It requires states to provide *de jure* equality in this regard.²³

(iii) Betrothal of girls

CEDAW General Recommendation 21 explicitly states that the betrothal of girls or undertakings by family members on their behalf contravenes a woman's

²⁰ CEDAW. General Recommendation No. 25 (2004). para. 22.

²¹ After the CEDAW Committee has conducted a constructive dialogue and considered the report of a State party, it produces a review in the form of "Concluding Comments", also known as "Concluding Observations" by other treaty bodies. This highlights accomplishments, shortcomings and obstacles that a reporting State party has faced in its implementation of the CEDAW Convention. It also identifies areas of concern and suggests recommendations for further action.

²² *ibid.*

²³ *ibid.*

right to freely choose her spouse. Even so, the CEDAW Committee has not yet provided a minimum age for betrothals. Such action in this field would definitely impact heavily on the non-legal but socially binding arrangements of marriage done before a girl reaches the age of majority.

(iv) Registration of marriage

The CEDAW Committee continuously reiterates that registration of marriage is important to ensure compliance with provisions of the convention, especially on child and early marriage.²⁴ This includes the registration of all customary marriages too.²⁵ In its Concluding Comments on India in 2000, for example, the Committee stated that a comprehensive and compulsory system of registration of births and marriages had not yet been established. This hinders the effective implementation of laws that protect women from forced or early marriage.

(v) Reservations to Article 16 and Article 2

The CEDAW Committee considers reservations to Article 16 and Article 2 as inconsistent with the object and purpose of the convention. General Recommendation 20 states that reservations to both articles perpetuate the myth of women's inferiority and reinforce the inequalities in the lives of millions of women. Here the Committee holds that Article 2 is central to the object and purpose of the CEDAW Convention. Neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the convention. It also states that reservations to Article 16, whether lodged for national, traditional, religious or cultural reasons, are impermissible. It then proceeds to urge all States parties to gradually progress to a stage where each country will withdraw its reservations.

In a report to the General Assembly, the CEDAW Committee provided the options available to states in cases of reservations to either of these articles. A state may, after examining the finding in good faith: (a) maintain its reservations; (b) withdraw these; (c) regularise its situation by replacing its impermissible reservation with a permissible one; or (d) renounce being a party to the treaty.²⁶

²⁴ *ibid.*

²⁵ Concluding Comments of the Committee on the Elimination of All Forms of Discrimination against Women on Namibia. A/52/38/Rev.1. 1997. p87 . para. 125.

²⁶ Report of the Committee on the Elimination of All Forms of Discrimination against Women. A/53/38/Rev.1. 53rd session. 1998.

It is hoped that CEDAW Committee's comments will urge States parties to assess the justifications for its reservations and modify or withdraw them as soon as possible.

Notwithstanding the above, the Committee continues to monitor a State party's reserved articles, particularly Article 16. In fact, in their CEDAW reports, States parties are obliged to indicate the stage that has been reached in the country's progress in removing all reservations to the CEDAW Convention, in particular reservations to Article 16. They also have to set-out whether their laws comply with Article 16 where by reason of religious or private law or custom, compliance with the law and with the convention is impeded.²⁷

(vi) Gender-based violence

CEDAW General Recommendation 19 defines gender-based violence as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men, including rights under Article 16. It is violence that is directed against a woman because she is a woman or that affects women disproportionately. Although General Recommendation 19 only explicitly identifies forced marriage as a form of gender-based violence, violations of the right to decide if, when and whom to marry are obviously a form of such violence too.

IV. Consolidating recommendations

A number of recommendations made in the context of violence against women are useful in providing guidelines for crafting specific strategies for the promotion, protection and fulfilment of the right to decide if, when and whom to marry. These recommendations are:

(i) CEDAW General Recommendation 19

General Recommendation 19 on gender-based violence, which also incorporates several suggestions from the Declaration on the Elimination of Violence Against Women²⁸ recommends, among others, the following:

²⁷ CEDAW. General Recommendation 21 (1994). para. 48(b).

²⁸ A/RES/48/104. 20 December 1993.

- States parties must take all legal and other measures that are necessary to provide adequate protection of women against gender-based violence. These include:
 - Effective legal measures (e.g. penal sanctions, civil remedies, compensatory provisions to protect women against all kinds of violence, effective complaints procedures and remedies);
 - Preventive measures (e.g. public information and education programmes to change attitudes concerning the roles and status of men and women); and
 - Protective measures (e.g. refuges, counselling, rehabilitation and support services for women who are victims of violence or at risk of violence, and trained health workers).
- Gender-sensitivity training for judicial and law enforcement officers and other public officials is essential for the effective implementation of the CEDAW Convention.
- Education and public information programmes to help eliminate prejudices that hinder women's equality must be introduced. In this light, the CEDAW Committee, through its Concluding Comments, has expressed concern at the persistence of traditional customs and practices and urged the government to work with NGOs and the media in changing attitudes through information and awareness-raising campaigns, the teaching of the CEDAW Convention in schools and the translation of this treaty into local languages so as to accelerate women's enjoyment of their human rights.²⁹

The Committee even suggested that an action plan be developed, especially on a public awareness campaign targeted at both women and men, with the support of civil society and social partners, to eliminate the gap between statutory law and social customs and practices, especially with regards to family law.³⁰

²⁹ Concluding Comments of the Committee on the Elimination of All Forms of Discrimination against Women on Democratic Republic of Congo. A/55/38. 2000. p23 . para. 216.

³⁰ Concluding Comments of the Committee on the Elimination of All Forms of Discrimination against Women on Guinea. A/56/38. 2001. p58. para. 123.

- States parties should take appropriate and effective measures to overcome all forms of gender-based violence whether committed by public or private acts.
- States parties should encourage the compilation of statistics and research on the extent, causes and effects of violence and on the effectiveness of measures to prevent and deal with violence. It should also identify the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of violence they result.

Here it is quite interesting to draw parallels with initiatives concerning gross violations of human rights in relation to torture, disappearances, extrajudicial killings and mass killings that have been perpetrated by the military in authoritarian regimes. In cases where prosecution is difficult because of a very fragile democracy, the creation of truth commissions saw the need to collect stories and compile them for future criminal procedures and to provide remedies to victims. It also establishes the practice of violations, hence victims need not prove the political context at that certain point in time as references can be made by courts and international tribunals to the truth commissions reports. What the truth commissions have undeniably established is the importance of data gathering and its future uses to combat impunity.

(ii) The Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children³¹

The foregoing recommendations can be considered with the Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children. The Plan of Action recommends, among others:

- A survey and review of school curricula and textbooks should be undertaken with a view to eliminating prejudices against women;
- Courses on the ill effects of traditional practices should be included in training programmes for medical and paramedical personnel;

³¹ Prepared by the Second UN Regional Seminar on Traditional Practices Affecting the Health of Women and Children. Colombo, Sri Lanka. 4-8 July 1994. E/CN.4/Sub.2/1994/10/Add.1 and Corr.1. Adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 1994/30 of 26 August 1994. para. 3.

- Instructions on harmful effects of such practices should be included in health and sex education programmes;
 - Topics relating to traditional practices should be introduced in literacy campaigns;
 - The media should be mobilised to raise public awareness to cultivate a social attitude and climate against such practices. On the other hand, the state should regulate depiction of any form of violence against women in the media;
 - The state should make provisions to increase vocational training, retraining and apprenticeship programmes for young women to empower them economically, including reservations for women in existing training institutions;
 - Cooperation with religious institutions and their leaders is required to eliminate the practice;
 - The minimum age for marriage must be 18 years of age;
 - Governments should promote and set-up independent, autonomous and vigilant institutions to monitor and inquire into violations of women's rights; and
 - NGOs must be active in mobilising all efforts including bringing all available information on systematic and massive violence against women and children to the attention of the United Nations and awareness-raising.
- (iii) The United Nations Special Rapporteur on Violence Against Women in her report on Violence against Women, its Causes and Consequences (Cultural practices in the family that are violent towards women)³² also listed recommendations to take note of. These include the following:
- States should refer to the Declaration on the Elimination of Violence against Women to provide effective guidelines for eradicating violence against women;

³² E/CN.4/2002/83. 31 January 2002. pp33-34. paras. 121, 124-127 and 132.

- States should exercise due diligence to prevent, investigate and punish acts of violence against women by the state or private actors;
- States should develop strong and effective penal, civil and administrative sanctions in domestic legislation to punish violence in the family and to provide redress for women victims;
- National plans of action must be developed to eradicate violence in the family, especially those related to cultural practices through health and education programmes at the grassroots level;
- The development of social services and shelters, training of public officials, data collection and statistics on the pervasiveness of cultural practices that are violent towards women, and measures in the field of education to modify these social and cultural practices must be a priority; and
- States must also recognise the role of women's groups and give them the necessary support.

In addition to the recommendations enumerated above, a General Recommendation on Article 5(a) or Article 2(f) in relation to Article 16 will also be very helpful in creating conceptual clarity and in forming a united front on the right to decide if, when and whom to marry.

V. Other human rights treaties and the right to decide if, when and whom to marry

Other treaty bodies have also elaborated on the right to decide if, when and whom to marry. Their interpretations of the relevant treaty provisions are important, especially in line with pursuing parallel or alternative strategies to CEDAW.

International Covenant on Civil and Political Rights (ICCPR)

The guarantee on the right to decide if, when and whom to marry is found in Article 23 which provides for the right of men and women of marriageable age to marry and found a family. It also states that no marriage shall be entered into without free and full consent of the intending spouses. In addition, Article 3 ensures equality in the enjoyment of Article 23.

The right is further complemented by Article 2 of the ICCPR which mandates that States parties *respect and ensure* to all individuals within its territory and subject to its jurisdiction, all the rights in this covenant. The obligation to ensure is especially very comprehensive because it requires that States parties take all necessary steps to enable every person to enjoy the rights in this covenant. States parties must not only adopt measures of protection but also positive measures in all areas so as to achieve the effective and equal empowerment of women. These include the removal of obstacles, education of the population, and adjustment of domestic legislation.³³

The Human Rights Committee's General Comment 28 elaborates on the obligation of the state in terms of equality of rights between men and women.³⁴ Provisions relevant to the right to decide if, when and whom to marry are the following:

- Inequality in the enjoyment of rights by women is deeply embedded in tradition, history, and culture including religious attitudes. States parties should ensure that traditional, historical, religious and cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all covenant rights;
- Violations to free and full consent to marriage, including: (a) laws which allow the rapist to have his criminal responsibility extinguished or mitigated if he marries the victim; (b) restrictions on remarriage as compared to men; and (c) restrictions by law or practice that prevent the marriage of a woman of a particular religion with a man who professes no or different religion. Further, a minimum age should be set by the state on the basis of equal criteria with men. It is also stated that polygamy violates the dignity of women;
- Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, religion, political or other opinion, national or social origin, property, birth or other status. The state should address the ways in which any instances of discrimination on other grounds affect women in a particular way and include information on measures taken to counter these effects;

³³ Human Rights Committee. General Comment 28. para. 3.

³⁴ The Human Rights Committee monitors the implementation by States parties of the ICCPR, and produces General Comments which are authoritative interpretations of this covenant.

- The rights that persons belonging to minorities enjoy under Article 27³⁵ of the ICCPR in respect of their language, culture and religion do not authorise any violations to the right to equal enjoyment by women of any covenant rights, including the right to equal protection.

General Comment 28 signals that equality is a priority for the ICCPR. This overturns the disquiet brought about by its focus on minority rights over gender discrimination in the 1981 Lovelace case.³⁶ Moreover, its statement on balancing Article 27 with other rights is also important especially in light of the debates on how women's right to equality must be balanced with minority rights.³⁷

In its Concluding Observations, the Human Rights Committee reaffirms its concerns and recommendations in relation to the right to decide if, when and whom to marry. This includes:

- The enforcement of personal laws based on religion violates the right of women to equality before the law and non-discrimination. Efforts towards ensuring the enjoyment of rights by women without

³⁵ Article 27 states: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right...to enjoy their own culture, to profess and practice their own religion or to use their own language".

³⁶ *Sandra Lovelace v. Canada*. Communication No. R.6/24, UN Doc. Supp. No. 40 (A/36/40) at 166 (1981).

³⁷ Several suggestions have been made on how to resolve the culture and religion versus equality debate. This is because regardless of the international legal status of the right to decide if, when and whom to marry, the practical realities are different. These suggestions include: (1) With reference to children, as the CRC is the most popular treaty in terms of ratification and acceptance, targeting interventions through this convention may be useful. Note that Article 24(3) of the CRC obligates states to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. However, the CRC cannot cover instances where women are past the age of majority. (2) The second suggestion is to follow the example of the ICESCR on having a minimum core obligation, that is, a number of rights which must be immediately granted while work is being done towards progressive realisation of other rights. Thus, strategically, severe forms of violations will be identified and prioritised without losing sight of the greater framework, for instance, the identification of hazardous forms of child labour in the campaign against child labour. (3) Opening up more options or choices was also identified as a way of resolving the debate. Under this suggestion, one may choose whether s/he prefers to be covered by international standards or by her/his personal laws. In all these suggestions, there are many pros and cons. For more discussions, see Radhika Coomaraswamy, "Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women". 34 *George Washington International Law Review*. pp483-513.

discrimination should be strengthened, and personal laws that are fully compatible with the covenant should be enacted;³⁸

- Early marriage and the statutory difference in the minimum age of girls and boys for marriage should be prohibited by legislation. States are urged to adopt measures to prevent and eliminate prevailing social attitudes and cultural and religious practices hampering the realisation of human rights by women;³⁹
- Legal provisions exempting a rapist from any penalty if he marries the victim is violative of state obligation;⁴⁰
- The practices of having a woman's consent mediated by a guardian, and of providing recourse to the courts to override any prohibition within the family on a woman's choice of a husband, is still violative of covenant rights. All legal provisions hindering a woman's free choice of spouse and rules differentiating between a man and a woman's right to marry must be repealed;⁴¹
- Steps should be taken particularly through education to overcome certain traditions and customs, such as forced marriages, which are incompatible with the equal rights of women;⁴² and
- Although there are measures to outlaw child marriages, legislative measures are not sufficient. Measures designed to change attitudes that allow for such practices should be taken. The Human Rights Committee has further expressed the need for national legislation to outlaw the practice of *devadasi*.⁴³

³⁸ Concluding Observations of the Human Rights Committee on India. A/52/40. 1997. p69. para. 432.

³⁹ Concluding Observations of the Human Rights Committee on Zimbabwe. A/53/40. 1998. p35. para. 214; Israel. A/53/40. 1998. p48. para. 325; Venezuela. A/56/40. 2001. p52. para. 77(18).

⁴⁰ Concluding Observations of the Human Rights Committee on Guatemala. A/56/40. 2001. p97. para. 85(24).

⁴¹ Concluding Observations of the Human Rights Committee on Sudan. CCPR/C/79/Add.85.1998. para. 11.

⁴² Concluding Observations of the Human Rights Committee on Nigeria. A/51/40. 1996. p42. para. 296.

⁴³ Concluding Observations of the Human Rights Committee on India. CCPR/C/79/Add.81. 1997. paras. 16 and 32. *Devadasi* refers to the practice where parents marry off their daughter(s) to a deity or a temple.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR provides in Article 10 that marriage must be entered into with the free consent of the intending spouses while Article 3 mandates that States parties must ensure the equal enjoyment of the covenant rights.

In the Concluding Comments of the Committee on Economic, Social and Cultural Rights (CESCR),⁴⁴ the following points, among others, have been raised:

- Difference in marriageable age is violative of Article 10;⁴⁵
- The practice of early marriage has a negative impact on the right to health, education and work.⁴⁶ The CESCR, like other treaty bodies, recommends that the legal minimum age for marriage for boys and girls be raised to 18;⁴⁷ and
- The state is urged to prohibit customary practices that violate the rights of women, and to take active measures to combat such practices and beliefs by all means, including educational programmes. State action should focus on forced marriages, among others.⁴⁸

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The guarantee on the right to decide if, when and whom to marry is found in Article 5(d)(iv) of ICERD. This mandates that States parties undertake to eliminate racial discrimination, and to guarantee without distinction as to race, colour, national or ethnic origin, the right to marriage and choice of spouse.

⁴⁴ This is the expert body that monitors the implementation of the ICESCR by its States parties.

⁴⁵ Concluding Observations of the Committee on Economic, Social and Cultural Rights on Suriname. E/1996/22. 1995. p38. para. 159.

⁴⁶ Concluding Observations of the Committee on Economic, Social and Cultural Rights on Sri Lanka. E/1999/22. 1999. p22. para 73.

⁴⁷ Concluding Observations of the Committee on Economic, Social and Cultural Rights on France. E/2002/22 2001. p124. para. 876.

⁴⁸ Concluding Observations of the Committee on Economic, Social and Cultural Rights on Cameroon. E/2000/22. 1999. p60. para. 347; Benin. E/C.12/1/Add.78. 1999. para. 32.

Convention on the Rights of the Child (CRC)

The CRC has numerous provisions that can be used to guarantee the protection of the child from violations on the right to decide if, when and whom to marry as well as to ensure the development of the child. It is important to highlight:

- Article 2 which provides that the state shall take all appropriate measures to ensure that a child is protected from discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members;
- Article 3 which emphasises that in all actions concerning children, the best interest of the child shall be the primary consideration; and
- Article 24 which says that the state shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

The Concluding Comments of the Committee on the Rights of the Child (the CRC Committee)⁴⁹ shows specific interpretation of the convention's mandate:

- Differential age of marriage violates the convention.⁵⁰ A State party must ensure that boys and girls are treated equally and the CRC Committee recommends that legal age for marriage be fixed at 18 for both;⁵¹
- Harmful practices include early marriages and betrothals of children. As such, campaigns should be developed and pursued with a view to changing attitudes to non-acceptance of these harmful practices;⁵²

⁴⁹ This is the body of independent experts that monitors the implementation of the CRC by its States parties.

⁵⁰ Concluding Observations of the Committee on the Rights of the Child on Micronesia. CRC/C/73. 1998. p22. para. 118; Dominican Republic. CRC/C/103. 2001. p94. para. 501; Guinea-Bissau. CRC/C/15/Add. 177. 2002. p6. para. 19(a).

⁵¹ Concluding Observations of the Committee on the Rights of the Child on Monaco. CRC/C/108. 2001. p99. para. 506; Gambia. CRC/C/111. 2001. p93. para. 422(b).

⁵² Concluding Observations of the Committee on the Rights of the Child on Nigeria. CRC/C/57. 1996. p15. para. 89.

- In relation to early marriages, all appropriate measures including legal measures, awareness-raising campaigns with a view to changing attitudes, as well as counselling and reproductive health education, should be taken to prevent and combat this traditional practice which is harmful to the health and well-being of girls and the development of the family;⁵³
- States parties should ensure that marriages are registered;⁵⁴ and
- In relation to the persistence of discriminatory social attitudes and harmful traditional practices towards girls in India, including early and forced marriages and religion-based laws which perpetuate gender inequality, the CRC Committee has urged the need for the continuation of comprehensive public education campaigns to prevent and combat gender discrimination. It has also called for the mobilisation of political, religious and community leaders to support efforts to eradicate traditional practices and attitudes which discriminate against girls.⁵⁵

VI. Conclusion

This paper has shown that there are various treaties and pronouncements on the right to decide if, when and whom to marry. Standards do exist at the international level. The question that perpetually comes to our minds is that of impunity, that is, why despite these standards do violations still exist and why do the perpetrators go unpunished? A review of state obligation gives us a first step in our search for accountability. Hopefully, women's human rights advocates will be able to utilise the norms presented here to draft concrete and more responsive strategies that can enable women and girls to enjoy their right to decide if, when and whom to marry.

⁵³ Concluding Observations of the Committee on the Rights of the Child on Kuwait. CRC/C/80. 1998. p34. para. 146.

⁵⁴ Concluding Observations of the Committee on the Rights of the Child on Congo. CRC/C/108. 2001. p38. para. 190.

⁵⁵ Concluding Observations of the Committee on the Rights of the Child on India. CRC/C/94. 2000. p14. paras. 64 and 65.

ANNEX

CEDAW General Recommendation No. 21 Equality in marriage and family relations

1. The Convention on the Elimination of All Forms of Discrimination against Women (General Assembly resolution 34/180, annex) affirms the equality of human rights for women and men in society and in the family. The Convention has an important place among international treaties concerned with human rights.
2. Other conventions and declarations also confer great significance on the family and woman's status within it. These include the Universal Declaration of Human Rights (General Assembly resolution 217/A (III)), the International Covenant on Civil and Political Rights (resolution 2200 A (XXI), annex), the Convention on the Nationality of Married Women (resolution 1040 (XI), annex), the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (resolution 1763 A (XVII), annex) and the subsequent Recommendation thereon (resolution 2018 (XX)) and the Nairobi Forward-looking Strategies for the Advancement of Women.
3. The Convention on the Elimination of All Forms of Discrimination against Women recalls the inalienable rights of women which are already embodied in the above-mentioned conventions and declarations, but it goes further by recognizing the importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they play in restricting the exercise of basic rights by women.

Background

4. The year 1994 has been designated by the General Assembly in its resolution 44/82 as the International Year of the Family. The Committee wishes to take the opportunity to stress the significance of compliance with women's basic rights within the family as one of the measures which will support and encourage the national celebrations that will take place.

5. Having chosen in this way to mark the International Year of the Family, the Committee wishes to analyse three articles in the Convention that have special significance for the status of women in the family:

Article 9

1. States parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States parties shall grant women equal rights with men with respect to the nationality of their children.

Comment

6. Nationality is critical to full participation in society. In general, States confer nationality on those who are born in that country. Nationality can also be acquired by reason of settlement or granted for humanitarian reasons such as statelessness. Without status as nationals or citizens, women are deprived of the right to vote or to stand for public office and may be denied access to public benefits and a choice of residence. Nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality.

Article 15

1. States parties shall accord to women equality with men before the law.
2. States parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Comment

7. When a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband's or a male relative's concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner and precludes her from the legal management of her own business or from entering into any other form of contract. Such restrictions seriously limit the woman's ability to provide for herself and her dependants.
8. A woman's right to bring litigation is limited in some countries by law or by her access to legal advice and her ability to seek redress from the courts. In others, her status as a witness or her evidence is accorded less respect or weight than that of a man. Such laws or customs limit the woman's right effectively to pursue or retain her equal share of property and diminish her standing as an independent, responsible and valued member of her community. When countries limit a woman's legal capacity by their laws, or permit individuals or institutions to do the same, they are denying women their rights to be equal with men and restricting women's ability to provide for themselves and their dependants.
9. Domicile is a concept in common law countries referring to the country in which a person intends to reside and to whose jurisdiction she will submit. Domicile is originally acquired by a child through its parents but, in adulthood, denotes the country in which a person normally resides and in which she intends to reside permanently. As in the case of nationality, the examination of States parties' reports demonstrates that a woman will not always be permitted at law to choose her own domicile. Domicile, like nationality, should be capable of change at will by an adult woman regardless of her marital status. Any restrictions on a woman's right to choose a domicile on the same basis as a man may limit her access to the courts in the country in which she lives or prevent her from entering and leaving a country freely and in her own right.
10. Migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them.

Article 16

1. States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
 - (a) The same right to enter into marriage;
 - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
 - (c) The same rights and responsibilities during marriage and at its dissolution;
 - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
 - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
 - (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
 - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
 - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Comment

Public and private life

11. Historically, human activity in public and private life has been viewed differently and regulated accordingly. In all societies women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior.
12. As such activities are invaluable for the survival of society, there can be no justification for applying different and discriminatory laws or customs

to them. Reports of States parties disclose that there are still countries where de jure equality does not exist. Women are thereby prevented from having equal access to resources and from enjoying equality of status in the family and society. Even where de jure equality exists, all societies assign different roles, which are regarded as inferior, to women. In this way, principles of justice and equality contained in particular in article 16 and also in articles 2, 5 and 24 of the Convention are being violated.

Various forms of family

13. The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires.

Polygamous marriages

14. States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.

Article 16 (1)(a) and (b)

15. While most countries report that national constitutions and laws comply with the Convention, custom, tradition and failure to enforce these laws in reality contravene the Convention.
16. A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties' reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Other countries allow a woman's marriage to be arranged for payment or preferment and in others women's poverty forces them to marry foreign nationals for financial security. Subject to reasonable restrictions based for example on a woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced at law.

Article 16 (1)(c)

17. An examination of States parties' reports discloses that many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of common law principles, religious or customary law, rather than by complying with the principles contained in the Convention. These variations in law and practice relating to marriage have wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage. Such limitations often result in the husband being accorded the status of head of household and primary decision-maker and therefore contravene the provisions of the Convention.
18. Moreover, generally a de facto union is not given legal protection at all. Women living in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law. Such women should share equal rights and responsibilities with men for the care and raising of dependent children or family members.

Article 16 (1)(d) and (f)

19. As provided in article 5 (b), most States recognize the shared responsibility of parents for the care, protection and maintenance of children. The principle that "the best interests of the child shall be the paramount consideration" has been included in the Convention on the Rights of the Child (General Assembly resolution 44/25, annex) and seems now to be universally accepted. However, in practice, some countries do not observe the principle of granting the parents of children equal status, particularly when they are not married. The children of such unions do not always enjoy the same status as those born in wedlock and, where the mothers are divorced or living apart, many fathers fail to share the responsibility of care, protection and maintenance of their children.
20. The shared rights and responsibilities enunciated in the Convention should be enforced at law and as appropriate through legal concepts of guardianship, wardship, trusteeship and adoption. States parties should ensure that by their laws both parents, regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children.

Article 16 (1)(e)

21. The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of

work on women. The number and spacing of their children have a similar impact on women's lives and also affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children.

22. Some reports disclose coercive practices which have serious consequences for women, such as forced pregnancies, abortions or sterilization. Decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government. In order to make an informed decision about safe and reliable contraceptive measures, women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services, as provided in article 10 (h) of the Convention.
23. There is general agreement that where there are freely available appropriate measures for the voluntary regulation of fertility, the health, development and well-being of all members of the family improves. Moreover, such services improve the general quality of life and health of the population, and the voluntary regulation of population growth helps preserve the environment and achieve sustainable economic and social development.

Article 16 (1)(g)

24. A stable family is one which is based on principles of equity, justice and individual fulfilment for each member. Each partner must therefore have the right to choose a profession or employment that is best suited to his or her abilities, qualifications and aspirations, as provided in article 11 (a) and (c) of the Convention. Moreover, each partner should have the right to choose his or her name, thereby preserving individuality and identity in the community and distinguishing that person from other members of society. When by law or custom a woman is obliged to change her name on marriage or at its dissolution, she is denied these rights.

Article 16 (1)(h)

25. The rights provided in this article overlap with and complement those in article 15 (2) in which an obligation is placed on States to give women equal rights to enter into and conclude contracts and to administer property.
26. Article 15 (1) guarantees women equality with men before the law. The right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.

27. In countries that are undergoing a programme of agrarian reform or redistribution of land among groups of different ethnic origins, the right of women, regardless of marital status, to share such redistributed land on equal terms with men should be carefully observed.
28. In most countries, a significant proportion of the women are single or divorced and many have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.
29. All of these rights should be guaranteed regardless of a woman's marital status.

Marital property

30. There are countries that do not acknowledge that right of women to own an equal share of the property with the husband during a marriage or de facto relationship and when that marriage or relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.
31. Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man. In many States, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it.
32. In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight.

33. In many countries, property accumulated during a de facto relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged.

Inheritance

34. Reports of States parties should include comment on the legal or customary provisions relating to inheritance laws as they affect the status of women as provided in the Convention and in Economic and Social Council resolution 884D (XXXIV), in which the Council recommended that States ensure that men and women in the same degree of relationship to a deceased are entitled to equal shares in the estate and to equal rank in the order of succession. That provision has not been generally implemented.
35. There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.

Article 16 (2)

36. In the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, held at Vienna from 14 to 25 June 1993, States are urged to repeal existing laws and regulations and to remove customs and practices which discriminate against and cause harm to the girl child. Article 16 (2) and the provisions of the Convention on the Rights of the Child preclude States parties from permitting or giving validity to a marriage between persons who have not attained their majority. In the context of the Convention on the Rights of the Child, "a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier". Notwithstanding this definition, and bearing in mind the provisions of the Vienna Declaration, the Committee considers that the minimum age for marriage should be 18 years for both man and woman. When men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before

they have attained full maturity and capacity to act. According to the World Health Organization, when minors, particularly girls, marry and have children, their health can be adversely affected and their education is impeded. As a result their economic autonomy is restricted.

37. This not only affects women personally but also limits the development of their skills and independence and reduces access to employment, thereby detrimentally affecting their families and communities.
38. Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, these provisions should be abolished. In other countries, the betrothal of girls or undertakings by family members on their behalf is permitted. Such measures contravene not only the Convention, but also a women's right freely to choose her partner.
39. States parties should also require the registration of all marriages whether contracted civilly or according to custom or religious law. The State can thereby ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children.

Recommendations

Violence against women

40. In considering the place of women in family life, the Committee wishes to stress that the provisions of general recommendation 19 (eleventh session) concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men. States parties are urged to comply with that general recommendation to ensure that, in both public and family life, women will be free of the gender-based violence that so seriously impedes their rights and freedoms as individuals.

Reservations

41. The Committee has noted with alarm the number of States parties which have entered reservations to the whole or part of article 16, especially when

a reservation has also been entered to article 2, 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.

42. 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 hardships have encouraged a return to old values and traditions, women's place in the family has deteriorated sharply. In others, where it has been recognized that a modern society depends for its economic advance and for the general good of the community on involving all adults equally, regardless of gender, these taboos and reactionary or extremist ideas have progressively been discouraged.
43. Consistent with articles 2, 3 and 24 in particular, the Committee requires that all States parties gradually progress to a stage where, by its resolute discouragement of notions of the inequality of women in the home, each country will withdraw its reservation, in particular to articles 9, 15 and 16 of the Convention.
44. States parties should 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.
45. The Committee noted, on the basis of its examination of initial and subsequent periodic reports, that in some States parties to the Convention that had ratified or acceded without reservation, certain laws, especially those dealing with family, do not actually conform to the provisions of the Convention.
46. Their laws still contain many measures which discriminate against women based on norms, customs and socio-cultural prejudices. These States, because of their specific situation regarding these articles, make it difficult for the Committee to evaluate and understand the status of women.
47. The Committee, in particular on the basis of articles 1 and 2 of the Convention, requests that those States parties make the necessary efforts to examine the de facto situation relating to the issues and to introduce the required measures in their national legislations still containing provisions discriminatory to women.

Reports

48. Assisted by the comments in the present general recommendation, in their reports States parties should:
- (a) Indicate the stage that has been reached in the country's progress to removal of all reservations to the Convention, in particular reservations to article 16;
 - (b) Set out whether their laws comply with the principles of articles 9, 15 and 16 and where, by reason of religious or private law or custom, compliance with the law or with the Convention is impeded.

Legislation

49. States parties should, where necessary to comply with the Convention, in particular in order to comply with articles 9, 15 and 16, enact and enforce legislation.

Encouraging compliance with the Convention

50. Assisted by the comments in the present general recommendation, and as required by articles 2, 3 and 24, States parties should introduce measures directed at encouraging full compliance with the principles of the Convention, particularly where religious or private law or custom conflict with those principles.

Source: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>

