PROJECT ON A MECHANISM TO ADDRESS LAWS THAT DISCRIMINATE AGAINST WOMEN

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Executive Summary

The aim of the project was to examine the advisability of creating a new mechanism to address laws that discriminate against women. The terms of reference specified two key objectives. The first was to overview existing UN mechanisms to ascertain the extent to which they addressed the issue of discriminatory laws. This involved interviewing UN human rights and agency officials working in both Geneva and New York[1] and also reviewing the reports and jurisprudence of human rights committees and special procedure mechanisms. The second was to try to get national data on laws that discriminate against women. This was to be done by means of a questionnaire. On the basis of the data gathered, the consultant was required to advise on whether a special mechanism addressing discriminatory laws was needed.

Divided into six parts, the report begins with a consideration of the concept of equality. It is now accepted that a formal model of equality based on “reversing the sexes and comparing them” will no longer suffice. Instead there needs to be a substantive approach. The Committee on the Elimination of all forms of Discrimination against Women (CEDAW) has noted that this requires States to monitor through measurable indicators, the impact of laws, policies and action plans and to evaluate progress achieved towards the practical realization of women’s substantive equality with men. In order to achieve this, it may be necessary for States to consider putting into place temporary special measures. These have been used to increase women’s participation in decision making bodies. Also considered in the report is the importance of adopting an intersectional approach that recognises the experiences of those who face multiple forms of discrimination simultaneously.

The report assesses how reservations entered by States parties when ratifying human rights treaties have impacted upon the attainment of equality and specifically women’s ability to enjoy their rights. The fact that some reservations entrench legal discrimination against women calls into question the commitment of States parties to the principle of non-discrimination.

Part B of the report is a consideration of regional human rights systems. In line with the United Nations human rights instruments, they all appear to uphold the principle of non-discrimination including on grounds of sex and also provide for equality before the law. However, there appears to be, in some jurisdictions, instances where international commitments are made subject to domestic laws.

Part C focuses on the work of human rights treaty bodies and special procedures mechanisms. An assessment is made of treaty bodies’ jurisprudence as it pertains to laws that discriminate against women. It would appear that after the 1993 Vienna World Conference on Human Rights, greater attention has been paid to women’s rights in interaction with States parties and also in general comments produced by treaty bodies. Although most of the communications sent to those treaty bodies with a communication mechanism are sent by men, there is evidence to show that issues that impact directly upon women’s enjoyment of their rights have also been addressed, and that there is now greater use of the individual communications procedure of the Committee on the Elimination of Discrimination against Women.

[1] In New York, interviews were also arranged with three not-for-profit organizations.

Analyses of the work done by special procedure mandate holders shows that there has, over the years, been greater attention paid to issues affecting the enjoyment by women of their rights. This may reflect the fact that some mandates now specify that mandate holders look at issues pertaining to women/gender in their work. While some have identified (discriminatory) laws affecting women's ability to enjoy their rights, many more have focused on the de facto situation of women painting a picture of exclusion. Nevertheless, it remains true to say that with some notable exceptions, a consistent focus on the rights of women has, at times been missing.

Part D of the report is an analysis of the questionnaire responses focusing on the laws identified as discriminating against women. There is clear evidence that even those States whose constitutions guarantee equality before the law (the majority) have laws that discriminate against women. Personal status laws were identified as the most problematic. Discriminatory provisions were found in laws enshrining a lower age of marriage for girls than boys and, in some cases, sanctioning child marriage, paternal power vis-à-vis decisions concerning the child which was often linked to marital power over the wife, discrimination in nationality and citizenship laws, different grounds for divorce and discriminatory property division on death and divorce. Even procedural laws were sometimes found to be discriminatory privileging male witnesses over female ones. Discriminatory practices and provisions were also identified in employment law and criminal law.

The penultimate part of the report (Part E) canvasses the arguments put forward by interviewees and questionnaire respondents for and against the appointment of a Special Rapporteur on laws that discriminate against women. From the questionnaire responses, the vast majority of those addressing the advisability of a Special Rapporteur on laws that discriminate against women were in favour of the creation of such a mechanism. Those who were opposed or sceptical about the need for the creation of new mechanism argued the following in outline:

i) that the creation of new mechanism would result in duplication;
ii) it would take away from the work of CEDAW;
iii) other committees would stop focusing on women's rights issues;
iv) that there was already a Special Rapporteur dealing with violence against women;
v) that a focus on *de jure* discrimination was not helpful.

These arguments were considered in turn. Those in favour of the creation of a separate mechanism argued that CEDAW and a new Special Rapporteur on laws that discriminate against women should be seen as complementary mechanisms. The Special Rapporteur could assist CEDAW by following up on its (and indeed other committees) concluding observations vis-à-vis laws that discriminate against women. Indeed it was noted that CEDAW could issue instructions to the Special Rapporteur about States that needed following up and that the two would have a symbiotic, co-operative relationship. The Special Rapporteur could maintain an on going dialogue with States parties and undertake thematic surveys as well as sharing data on good practice. It was also noted that there were examples of other treaty bodies having "duplicated" special procedure mechanism, and that these operated without undue overlap.

While the work undertaken by the Special Rapporteur on violence against women is crucial, not all violations occurring to women were violence related. Some respondents also noted that although a focus on de jure laws would not solve all the problems facing women, it would be an important step in the right direction. At the very least laws that apply to everybody should not be discriminatory. Discrimination cannot be stopped overnight. Laws reflect the government position on women's rights. States should therefore repeal or amend laws that discriminate against women.

The final recommendation of this report is that consideration should be given to the appointment of a Special Rapporteur on laws that discriminate against women whose mandate should mirror those of existing special procedure mechanisms. If the UN is to maintain its credibility and not be dismissed as a mere talking shop, then it will have to ensure that the failure to meet what should be a simple pledge, the removal of laws that discriminate against women made in conference documents in 1995 (Beijing), reviewed in 2000 (Beijing+5) and which remained unfulfilled a decade later in 2005 (Beijing +10), is dealt with as a matter of urgency.

In addition to the impressive work already being done within the human rights monitoring system, particularly by CEDAW, and also the work of special procedures, the time may well have come to have a focal point to address this very important conference pledge whose fulfilment underpins a great deal of UN policy and work, not least in the delivery of the Millennium Development Goals. Addressing the 51st session of the Commission on the Status of Women (2007), the President of the Human Rights Council noted:

> "…I believe that the commitment to the human rights of women and the girl child undertaken in Beijing has been strengthened with the reform of the UN human rights system. At the World Summit of 2005, the Heads of State and Government recognized Human Rights as one of the pillars of the United Nations and reaffirmed their commitment to uphold the rights of women, gender equality and the empowerment of women.
>
> Within this framework, the Commission and the Council have an important role in order for the United Nations to undertake integrated and coordinated strategies for the effective promotion and protection of the rights of women and the girl child."

The time for action has come.

INTRODUCTION

The founding document of the UN, The UN Charter provides in its preamble that there is a need "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women."[2]The Universal Declaration of Human Rights (UDHR) which followed and which forms the basis of bills of rights of many national constitutions was equally clear providing in article 1 that, "All human beings are born free and equal in dignity and rights". Article 2 speaks of the entitlement of all persons to the enjoyment of the rights contained within the Declaration "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The two instruments coming out of the UDHR, the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic Social and Cultural Rights, 1966 (ICESCR) also so provide.[3] This International Bill of Rights guarantees equal protection before the law to all.

Instruments tackling specific elements of discrimination include the 1967 Declaration on the Elimination of All Forms of Discrimination against Women,[4] which predated to the Women's Convention otherwise known as Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[5] Other international instruments including, the Convention on the Rights of the Child, 1989,[6] the Migrant Workers Convention, 1990[7] and the Convention on the Rights of Persons with Disabilities, 2006 (Disabilities Rights Convention)[8] provide for non-discrimination and equality before the law. The latter goes further making special provision for the rights of disabled women.[9]

[2] See also articles 1(3) and 55 (c) of the United Nations Charter.
[3] The International Covenant on Civil and Political Rights, 1966 (ICCPR), 999 UNTS 171, articles 2, 3 and 26. The International Covenant Economic, Social and Cultural Rights, 1966 (IESCR), 993 UNTS 3, articles 2 and 3.
[4] UN Declaration on the Elimination of all Forms of Discrimination against Women, GA Res. 22263 (XX11) of 7 November 1967.
[5] Convention on the Elimination of all Forms of Discrimination against Women, 1979, 34 UN GAOR Supp. No. 46, 193, UN Doc. A34/46.
[6] Convention on the Rights of the Child, adopted by GA Resolution 44/25 of 20 November 1989.
[7] International Convention on the Protection of all Migrant Workers and Members of their Families, A/RES/45/158, art. 7.
[8] Convention on the Rights of Persons with Disabilities, A/61/611, preamble paras. a, h and p and art. 2, 3 (b) and (g) and 5.
[9] Convention on the Rights of Persons with Disabilities, art. 6.

The ratification by most States of at least one of the above listed human rights instruments, suggests that there is universal acceptance of the norm of equality. However, the reality is somewhat different. The principle of non-discrimination is often not respected, frequently in the area of women's rights.[10] The clearest manifestation of this is in the continued existence of laws that directly discriminate against women, despite clear international legal obligations requiring States to abolish, amend or repeal laws that discriminate against women on the basis of sex.[11] This is compounded by lack of implementation of laws which promote women's equality and the absence of institutional mechanisms to promote the human rights of women.

History of the Project

In 1995, at the Fourth World Conference on Women in Beijing, Governments undertook to 'revoke any remaining laws that discriminate on the basis of sex.'[12] In 2000, at the Special Session of the General Assembly to review the Beijing Platform for Action, the outcome of the World Conference, States set 2005 as the target for removing discriminatory legislation against women. In 2005, the Commission on the Status of Women (CSW) reviewed the commitments that had been undertaken at the Fourth World Conference, recalling the pledge to revoke remaining discriminatory laws, it expressed concern that 'legislative and regulatory gaps, as well as lack of implementation and enforcement of legislation and regulations, perpetuate *de jure* as well as *de facto* inequality and discrimination, and in a few cases, new laws discriminating against women have been introduced.' It decided to consider 'the advisability of the appointment of a special rapporteur on laws that discriminate against women, bearing in mind the existing mechanisms with a view to avoid duplication …'[13]

The Office of the High Commissioner for Human Rights (OHCHR) was requested to submit its views to the 50th (2006) session of CSW on the implications of the creation

[10] D. Otto "'Gender Comment': Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?" 14 (2002) *Canadian Journal of Women's Law* 1.
[11] CEDAW, art. 2
[12] Beijing Declaration and Platform for Action, 1995, reproduced in (1996) 35 *International Legal Materials* 404, para. 232 (d).
[13] E/CN.6/2005/11, Final Report of the 49th Session of the CSW, Resolution 49/3 on the Advisability of the appointment of a special rapporteur on laws that discriminate against women.

of a position of special rapporteur on laws that discriminate against women. It complied with this request in December 2005.[14] CSW took note of the report containing OHCHR's and other views and asked for further 'views on ways and means that could best complement the work of the existing mechanisms and enhance the Commission's capacity with respect to discriminatory laws,' for consideration at its 51st (2007) session. OHCHR responded on 10 October 2006 that while its views contained in the afore-mentioned report were unchanged, certain developments such as the review of the Special Procedures had to be taken into account. OHCHR suggested that a decision on the usefulness and viability of a special rapporteur be deferred to CSW 52nd session (2008) in order to incorporate and build on the review's outcome. To further assist the process, OHCHR offered to prepare an analytical report on the compatibility of such a mandate with the existing mechanisms, identifying how the existing mechanisms have addressed *de jure* discrimination against women and the resulting protection gaps. This paper was accordingly prepared.

The paper has two key objectives: to overview of existing UN mechanisms to ascertain the extent to which they addressed the issue of discriminatory laws.[15] This involved interviewing UN human rights and agency officials working in both Geneva and New York[16] and also reviewing the reports and jurisprudence of human rights committees and special procedure mechanisms. The second was to collect national data on laws that discriminate against women. This was to be done by means of a questionnaire which was sent, by electronic mail, to a number of agencies around the world.[17]

Structure

Following this introduction is Part A which examines the twin concepts of non discrimination and equality as they have developed in UN jurisprudence. Part B of the report is an overview of regional instruments and their interpretation. The report then moves on, in Part C, to look at mainstreaming within the UN. It first considers in brief

[14] E/CN.6/2006/8 (13 December 2005). See also E/CN.6/2007/8 (13 December 2006).
[15] The terms of reference are attached as Appendix A.
[16] In New York, interviews were also arranged with three not for profit organisations: Center for Reproductive Rights, Equality Now and Human Rights Watch.
[17] A more detailed methodology section can be found in Appendix B, while the questionnaire can be found in Appendix C. A list of questionnaire recipients is in Appendix D.

the work of treaty bodies in the area of discriminatory laws. Here the consensus seems to be that with the exception of CEDAW human rights committee did not, until the Vienna Conference 1993, pay much attention to women's rights.[18] Thereafter the mandates of existing Special Rapporteurs and their work on women's rights are examined.

Part D of the report analyses the data from the questionnaires. It also includes information already produced by Equality Now which first gathered information on discriminatory laws and which has lobbied for the creation of a Special Rapporteur on laws that discriminate against women and filed communications with the CSW on the issue.[19] This part of the report does not purport to be comprehensive in its coverage. A survey of the laws of 192 States in the time given and with the resources at hand was clearly impossible. It should therefore be seen as a snapshot and not as designed to focus on some States when others which have equally problematic laws are not mentioned. **While every effort has been made to verify the information provided by correspondents, any mistakes remain those of the consultant and not of the United Nations.** The penultimate part of the report (E) considers the arguments for and against the advisability of appointing a Special Rapporteur on laws that discriminate against women before making concluding recommendations in Part F.

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[18] R. Johnstone "Feminist Influences on the United Nations Human Rights Treaty Bodies" (2006) 28 *Human Rights Quarterly* 148, 175. But see Human Rights Council A/HRC/4/104, 15 February 2007, paras. 14-20.

[19] Commission on the Status of Women Report of the forty-ninth session (28 February -11 and 22 March 2005), E/2005/27-E/CN.6/2005/11. Chapter 3 paras. 1 and 5(3). Equality Now *Words and Deeds: Holding Governments Accountable in the Beijing + 10 Review Process,* Women's Action 16.5, update March 2004. See letters from Equality Now to CSW on communications on the status of women, 19 August, 2004, 31 August 2005. J. Neuwirth "Inequality before the Law: Holding States Accountable for sex Discriminatory laws under the Convention on the Elimination of all forms of Discrimination against Women through the Beijing Platform for Action" (2005) 18 *Harvard Human Rights Journal* 20. Equality Now Annual Report 2005, 5-7. Equality Now "Words and Deeds: Holding Governments Accountable in the Beijing +10 Process" Women's Action 16.9 – update February 2007.

PART A – NON-DISCRIMINATION AND EQUALITY

The principles of equality and non-discrimination form the basis of all human rights instruments and cut across all the rights found within human rights treaties influencing both the interpretation and enjoyment of rights.[20] Article 1 of CEDAW provides a definition of discrimination against women on the basis of sex.

> **"**For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment and 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." [21]

Article 2 highlights that the State is responsible for violations of rights within both the public and private sphere regardless of whether those violations are committed by State or non State actors.[22] Article 1 of CEDAW includes both direct and indirect discrimination[23] and requires States parties to ensure equality of opportunity and result, thus taking it beyond the formal (liberal) model of equality which Mackinnon argues simply requires a reversal and comparison of the sexes. [24] Mackinnon argues that by relying on a false premise, namely that the playing field is level for both men and women, a formal model of equality fails to take into account socio-structural inequalities which result in women not being able to enjoy their rights on an equal

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[20] W. Vandenhole *Non Discrimination and Equality in the view of the UN Human Rights Treaty* Bodies (Antwerp, Intersentia, 2005). CESCR general comment 16 on equal rights of men and women in the enjoyment of economic, social and cultural rights, E/C.12/2005/4, 11 August 2005, paras. 2, 3, 10 and 22. Human Rights Committee general comment 18 on Non Discrimination, CCPR/C/21.Rev.1.Add1, para. 1. The ICCPR also has the free standing article 26 which "does not merely duplicate the guarantee already provided for in article 2 but provides in itself and autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on states parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant." Human Rights Committee general comment 18 para. 12.

[21] It is noteworthy that both the CESCR and the Human Rights Committee have adopted the definition of discrimination found in article 1 of the Women's Convention, which provision was modelled on the definition of discrimination found in Article 1 of the Race Convention. CESCR general comment 16 para. 11**,** Human Rights Committee general comment 18 para. 6. Finally see Disability Convention art. 2.

[22] CEDAW general recommendation 19 on violence against women, A/47/38, para. 9.

[23] For definitions of direct and indirect discrimination see CESCR general comment 16, paras. 12 and 13.

[24] C. Mackinnon *Towards a Feminist Theory of the State* (Boston, Harvard University Press, 1989) 217. See generally C. Mackinnon *Sex Equality* (Westgroup, 2001)**.**

basis with men.[25] True equality is not simply about reversing the sexes and comparing, nor is it simply about passing laws that appear on the face of them to be gender neutral. Indeed some "gender neutral laws" may constitute discrimination against women for example if a State fails to provide services needed exclusively by women, not least in the provision of reproductive services.[26] An example of direct discrimination against women was highlighted in the 2006 CESCR concluding observations to the Mexican report where the Committee censured the State for the practice in the textile industry produce whereby women were required to provide medical certificates proving that they were not pregnant in order to be hired or to avoid being fired.[27] By way of contrast, Chile in its fifth report to the Human Rights Committee detailed how it had amended its labour law to prohibit the "making a woman's access to employment, mobility, promotion or contract renewal dependent on her not being pregnant."[28] Identified as equally problematic by CEDAW and constituting discrimination against the girl child is the requirement in some States that pregnant girls be excluded from school, but interestingly not the boys responsible.[29] This damages the life chances of the girl whose right to education is curtailed unnecessarily.

In its general recommendation 25, CEDAW calls for a comprehensive understanding of equality:

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[25] *Ibid* (1989).

[26] CESCR general comment 16 para. 18. CEDAW general recommendation 24 on Health, A/54/38/Rev.1, paras. 14 and 31 (b), (c) and (e), and see also Centre for Reproductive Right (CRR) and University of Toronto International Programme on Reproductive and Sexual Health Law *Bringing Rights to Bear: An Analysis of the Work of the UN Treaty Monitoring Bodies on Reproductive and Sexual Rights* (New York, CRR and University of Toronto, 2002), 145-148. R. Cook and B Dickens "Human Rights Dynamics of Abortion Law Reform" (2003) 25 *Human Rights Quarterly* 1. Center for Reproductive Rights *Women of the World: Laws and Policies Affecting their Reproductive Lives: East and South Asia* (NY, CRR, 2005). CRR *Women of the World: South Asia* (NY, CRR, 2004), CRR *Legal Grounds: Reproductive and Sexual Rights in African Commonwealth Countries* (NY, CRR, 2005). Interview L. Katzive, Center for Reproductive Rights, New York, 9 March 2007. Email response on questionnaire received from Professor R. Cook, 14 April 2007. *Paulina Del Carmen Ramirez Jacinto /Mexico*, (Friendly Settlement) 9 March 2007, Inter-American Commission Petition 161-02, Report No. 21/07, paras. 13, 19 and 26. Human Rights Committee *Llantoy Huaman v. Peru,* Communication No. 1153/2003, CCPR/C/85/D/1153/2003 (2005).

[27] CESCR Concluding Observations: Mexico, E/C12/CO/MEX/4 (17 May 2006), para. 15. Human Rights Committee general comment 28, para. 20.

[28] Act No. 20.005 of March 2005, amending the Labour Code. Chile, Fifth periodic report, CCPR/C/CHL/5, para. 58 (e).

[29] See CEDAW Concluding Observations: Togo, CEDAW/C/TGO/CO/3, paras. 24-25. See also *Student Representative Council of Molepolole College of Education v. Attorney General* [1995] (3) LRC 447. *Mfolo and Others v. Minister of Education* Bophuthatswana [1992] (3) LRC 181. *Mandizvidza v. Chaduka NO, Morgenster College and the Minister of Higher Education* 1999 (2) ZLR 375 (H).

"In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's *de facto* equality with men… In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between men and women must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming under-representation of women and a redistribution of resources and power between men and women."[30]

Substantive equality demands that consideration be given to the ways in which the different roles and position of men and women in society, generally known as gender, impact upon women's ability to claim and enjoy their human rights.[31] It also requires States: "to monitor, through measurable indicators, the impact of laws, policies and action plans and to evaluate progress achieved towards the practical realization of women's substantive equality with men."[32]

The principle of non-discrimination on the basis of sex is an immediate and not a progressive obligation.[33] The Human Rights Committee has noted that the principle should be guaranteed, including during states of emergency while any public emergency derogations should show that they are non discriminatory.[34]

One of the ways advanced for mitigating inequality or accelerating women's equality is by using temporary special measures, provided for in article 4 of CEDAW. Human

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[30] See also CEDAW General Recommendation No. 25 on Temporary Special Measures, CEDAW/C/2004/WP.1/Rev.1, para. 8. Montreal Principles on Women's Economic, Social and Cultural Rights (2004) 26 *Human Rights Quarterly* 760 at 768 para. 9. See also CESCR General Comment 16 on equality between men and women, para. 7 and 8. S Fredman "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) 21 *South African Journal on Human Rights* 163, at 165-166. CESCR general comment 16, para. 14

[31] This is recognised in part by the inclusion within both the Millennium Declaration and the Millennium Development Goals (MDGs) of gender equality as essential to the realisation of the objectives of the Millennium Declaration. United Nations Millennium Declaration (8 September 2000), GA Res. 55/2. See also S. Ali *Gender and Human Rights in Islam and International Law* (The Hague, Kluwer, 2000) 85, 88.

[32] Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined second and third periodic report of Azerbaijan (CEDAW/C/AZE/2-3) at its 765th and 766th meetings, on 23 January 2007 CEDAW/C/AZE/CO/3, para. 14

[33] CESCR general comment 3 on the Nature of States Parties Obligations, UN Doc E/1991/23, para, 2. CESCR general comment 16, paras. 16 and 40; CESCR general comment 13 on the Right to Education, E/C.12/1999/10, 10 December 1999, para. 31.

[34] Human Rights Committee general comment 18, para. 2; Human Rights Committee general comment 28, para. 7.

rights law provides for the principle of non-discrimination to be derogated from in the use of such measures.[35] This is on the understanding that the measures will be dismantled once the position between men and women has been achieved.[36] In order to avoid a reversal of gains made, it is equally important that temporary special measures are not dismantled prematurely.

In the European case of *Kalanke v. Freie Hansestadt Bremen*[37] the court identified three different aims of temporary special measures or positive action:

"A first model aims to remove, not discrimination in the legal sense, but a condition of disadvantage which characterises women's presence in the employment market. In this case, the objective is to eliminate the causes of the fewer employment and career opportunities which (still) beset female employment…A second model of positive action may be discerned in actions designed to foster balance between family and career responsibilities and a better distribution of those responsibilities between the two sexes…A third model of positive action is that of action as a remedy for the persistent effects of historical discrimination of legal significance; in this case, the action takes on a compensatory nature, with the result that preferential treatment in favour of disadvantaged categories is legitimised, in particular through systems of quotas and goals."[38]

It is further noted that that while the use of temporary special measures *appears* to be discriminatory, it is only by deviating from the principle of equal treatment that true equality can be achieved:

"In the final analysis, what is involved is only discrimination in appearance in so far as it authorises or requires different treatment in favour of women and in order to protect them with a view to attaining substantive and not formal equality, which would in contrast be the negation of equality."[39]

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[35] Human Rights Committee general comment 18, para. 20; Human Rights Committee general comment 28, para. 3; CESCR general comment 16, paras. 15, 35 and 36. CESCR general comment 13 para. 32. CEDAW general recommendation 23, para. 15. CEDAW general recommendation 25.

[36] CEDAW art. 4 (1), CEDAW general comments 4 and 25. CERD art 1 (4), CERD general comment 14 on the Definition of Discrimination, HRI/GEN/1/Rev. 3, para.2. Human Rights Committee general comment 18, para. 10, Human Rights Committee general comment 28, para. 3. CESCR general comment 16 paras. 15 , 35 and 36. Disability Convention art 5 (4).

[37] *Kalanke v. Freie Hansestadt Bremen,* Case No.: C-450/93, reproduced in R. Emerton, K. Adams, A. Byrnes and J. Connors *International Women's Rights Cases* (London, Cavendish, 2005), 158.

[38] *Ibid,* para. 9 (Emerton et al. pp.168-9).

[39] *Ibid,* para. 17 (Emerton et al p. 172). The court held that the use of positive action contravened the Equal Treatment Directive. U. O'Hare "Positive Action before the European Court of Justice-Case C-450/93 *Kalannke v. Freie Hansestadt* Bremen" 1996 Web J. of Current Legal Issues available at http://webjcli.ncl.ac.uk/1996/issue21/ohare2.html. *Marschall v. Land Nordrhein-Westfalen,* Case 409/95, 1997 ECR 1-6363. See also *EFTA Surveillance Authority v. The Kingdom of Norway,* CASE E-1/02, 24 January 2003.

To date temporary special measures have generally been used to accelerate women's participation in public bodies especially the legislature, and.[40] have been particularly successful in Latin America.[41] Indeed it is notable that those States with over thirty per cent[42] participation of women within their legislatures have generally used temporary special measures to boost female participation.[43] In 2004, Argentina was commended by CEDAW:

"The Committee commends the State party for its measures to increase the participation of women in public life in the renewal process of the country. It particularly welcomes the fact that two women judges have been appointed to the Supreme Court of Justice, and that women now constitute 41.67 per cent of senators, 33 per cent of members of Parliament and 27 per cent of deputies in the provincial legislatures. It also welcomes the fact that, further to the adoption of National Law No. 25.674 and Decree No. 514/2003, known as the Law on Trade Union Quotas, a woman is now part of the presiding body of the confederation of labour."[44]

These developments notwithstanding, the lack of equality in participation remains a global problem with the European Committee on Equal Opportunities for Women and Men noting:

"The under-representation of women in elected office hinders the full development of democracy in most of the Council of Europe's member States. I recall that the Assembly has invited the member States to set a target of 40% as the minimum level of representation of women in parliament and other elected assemblies by the year 2020. At present, only Sweden has reached that critical mass of 40% of women in parliament. There are 22 countries with between 20% And 40% of women in parliament (Finland, Norway, Denmark, the Netherlands, Spain, Belgium, Iceland,

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[40] CEDAW general recommendation 5 on Temporary Special Measures, UN Doc A/43/38; CEDAW general recommendation 8 on the Implementation of article 8 of the Convention, UN Doc. A43/38; CEDAW general comment 23 on women in public life, UN Doc A/52/38/Rev. 1, at 61, para. 15; CEDAW general comment 25, Beijing Declaration and Platform for Action, para. 192.

[41] UN DAW "Equal participation of women and men in decision making processes, with particular emphasis on political participation and leadership" Expert Group meeting, Addis Ababa, 24-27 October 2005. United Nations *The Millennium Development Goals Report* 2006 (New York, UN, 2006), 9. Quotas are said to have been used successfully in the Arab World. UNDP *Arab Development Report 2005* (UNDP, New York, 2006), 205-206**.**

[42] While 30%-35% is clearly not equal, this is the figure that has been deemed to constitute "critical mass" where women are said to be able to make a difference. See CEDAW general recommendation 23, para. 16.

[43] IDEA and Stockholm University Global Database of Quotas for Women: A Joint Project, available at www.quotaproject.org. Decision on Mainstreaming Gender and Women's Issues in the African Union, CM/Dec. 683. S. Tamale "Towards Legitimate Governance in Africa: The Case of Affirmative Action and Parliamentary Politics in Uganda" in E. Quashigah, O Okafor (eds) *Legitimated Governance in Africa* (Hague, Kluwer International, 1999), 235.

[44] Concluding observations to the fifth periodic report of Argentina (CEDAW/C/ARG/5/Add.1), 16 July 2004, CEDAW, A/59/38 part II (2004), para. 368.

Austria and Germany have more than 30% of women MPs), 16 countries have between 10 and 20% and 7 Council of Europe member States have fewer than 10% of women in their parliaments."[45]

The Equal Opportunities Commission in the UK has noted that at the current rate of progress it will take 200 years before the Westminster Parliament has equal representation of men and women.[46]

Sometimes women are not even put up for election, so that while identifying that women constituted 48% of the electorate, Yemen, in its report to the Human Rights Committee noted that of the 1369 candidates nominated to stand for election, only **11** were women.[47] This situation seems to cry out for the use of temporary special measures. In its shadow report to CEDAW in June 2006, the European Roma Rights Centre and Romani CRISS requested that representations be made to amend the electoral laws to include a quota system for women and minorities. The report noted: "In the present government, there are only three female ministers and just 13.3% of the secretaries and deputy secretaries of state are women; there are no Roma ministers in the Romanian government and only one male Roma Member of the Parliament."[48]

This was picked up by CEDAW in its questioning of the State and also in its concluding observations to the Romanian report where it noted:

"The Committee urges the State party to take a holistic approach to eliminating the multiple and intersecting forms of discrimination that Roma women face to accelerate the achievement of their de facto equality through the co-ordination of all agencies working on the Roma, non discrimination and gender equality issues. It urges the State party to implement targeted measures, within specific timetables, in all areas and to monitor their implementation."[49]

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[45] Council of Europe Parliamentary Assembly, Committee on Equal Opportunities for Women and Men, Doc. 11220, 30 March 2007, para. 4. See also para. 3 urging States to provide for temporary special measures in their Constitutions. In 2005, the Human Rights Committee urged Korea and Bosnia and Herzegovina to use temporary special measures to try to redress the gender imbalance in public sphere participation of women. Human Rights Council Concluding Observations, Korea, 28 November 2005, CCPR/C/KOR/CO/3, paras. 10 and 70. Human Rights Committee Concluding Observations Bosnia and Herzegovina, 22 November 2006, CCPR.BIH/CO/1, para. 11.

[46] Equal Opportunities Commission *The Gender Agenda: The Unfinished Revolution* (London, Equal Opportunities Commission, 2007), Press release dated 24 July 2007 available at: http://www.eoc.org.uk/Default.aspx?page=20563

[47] Yemen, Fourth periodic report, CCPR/C/YEM/2004/4, at 5.

[48] European Roma Rights Centre and Romani CRISS, Shadow Report to CEDAW, 35th Session, 15 May to 2 June 2006.

[49] CEDAW Concluding Observations: Romania, CEDAW/C.ROM/CO/6, 2 June 2006, para. 27. See also paras. 26 and 19.

On occasion States have used temporary special measures to try to address historical disadvantage experienced by certain groups hence India's (constitutional) provision for the use of reservations for Dalit groups and women.[50] Similarly section 13(3) of the Nepalese Interim constitution of 2007 has a proviso to its widely drawn non discrimination provision to the effect that:

"Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of the interests of women, Dalit, indigenous ethnic tribes, Madeshi, or peasants, labourers or those who belong to a class which is economically, socially or culturally backward and children, the aged, disabled and those who are physically or mentally incapacitated."[51]

The importance of women's participation in peace making and post-conflict societies was recognised by the adoption of Security Council Resolution 1325 on Women, Peace and Security, which resolution has been incorporated into the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, 2003 (African Protocol for Women).[52]

According to Professor Elizabeth Evatt, in Australia there is an Equal Opportunity for Women in the Workplace Act 1999 (the EOWW Act). She notes that there is an agency that works with employers who are required to report on the measures that they have taken and also in the balance of employment at their workplace.[53] In March 2007, Spain adopted the Organic Law 3/2007 designed to "guarantee equal opportunities and equal treatment" not least by requiring companies employing more than 250 people to set up specific equality schemes defined as: "an ordered set of measures…geared towards achieving equal treatment and opportunities for women and men in companies and towards eradicating gender discrimination."[54]

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[50] Constitution of India s.15 (3) (women). However, for criticism of the special provisions clause see CRR *Litigating Reproductive Rights: Using Public Interest Litigation and International law to Promote Gender Justice in India* (NY, CRR, 2006), 45.

[51] See also Interim Constitution of Nepal 2007, art. 35(14), from UN NEPAL questionnaire response part A:1 and part C:1.

[52] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003. Assembly /AU/Dec 14 (II), art. 10.

[53] E. Evatt, response to OHCHR questionnaire part C:2, May 2007. Professor Evatt is a former chairperson of CEDAW who was writing in her personal capacity.

[54] Art 4(1) Organic Law 3/2007 as cited by Professor Theresa Piconto Novales, Zaragoza, Spain – narrative response to questionnaire at p. 6, May 2007.

Given the role of judges in deciding if particular laws discriminate against women, also important must be a consideration of the use of temporary special measures to increase the number of women judges, particularly in the higher courts.[55] In *Guido Jacobs v. Belgium,*[56] the use of temporary special measures to appoint judicial officers was challenged by an unsuccessful male candidate who argued that the lack of women applicants for public service appointments showed that they did not fulfil the criteria (were not good enough). Finding against him, the Human Rights Committee countered that the fact that few women had applied for the positions, should not be seen as pointing to women's inadequacy or inability to fill roles, but rather as reflecting the pervasive and on going discrimination that they suffer. This justified the use of temporary special measures. [57] The participation of women judges can have a significant impact on both the construction and interpretation of law so that of the *Akayesu*[58] case it is noted;

"The only woman judge on the ICTR, was instrumental in questioning witnesses and evoking testimony of gross sexual violence…eventually leading to the defendant's conviction for genocide due to those acts, the first time an international tribunal held that rape and sexual violence can constitute genocide…Judge Pillay observed recently 'Who interprets the law is at least as important as who makes the law, if not more so…I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defence, witness protection and judiciary."[59]

Equally important is for closer attention to be paid to the participation of women within international bodies including the United Nations. Figures for women's participation on human rights committee bodies showed that at the end of elections in 2004, women represented: "36.5 per cent of members of treaty bodies. However, women are over represented on treaty bodies examining issues related to women and children (CEDAW and CRC) and represent less than 14 per cent of the 74 members of the other five treaty bodies."[60] Similarly a survey of special procedures mandate

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[55] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human Rights, 1998, OAU/LEG/AFCHPR/PROT (III), art. 12 (2). African Protocol on Women's Rights, art. 8 (e).
[56] *Guido Jacobs v Belgium,* Communication No 943/2000, CCPR/C/81/D/943/2000.
[57] *Ibid,* paras. 9:4, 9:5. See also CEDAW general recommendation 25.
[58] *In the Case of Akayesu,* Case No. ICTR-96-4-T.
[59] N. Lasslop "Understanding the Impact of Women Members in Parliament on Peace, Security and Decision Making" ACCORD *Conflict Trends,* Issue 1, 2007 32, 35.
[60] E/CN.4/2005/68, 10 January 2005, para. 45. See also R. Johnstone (2006).

holders showed that women represented 26.4 per cent of mandate holders.[61] It is unsatisfactory that the body responsible for standard setting and encouraging member States to use temporary special measures to improve the situation of women is itself failing. This numerical inequality is unfortunate not least because the UN analysis of the work undertaken by those women who are appointed shows: “Similar to treaty bodies, experts appointed to carry out mandates of the Commission on Human Rights tend to devote more attention to women’s human rights and gender mainstreaming when these are consistent with their personal experience and background.”[62]

Provision has also been made, in both international human rights law and national legislation, for women to receive “special protection” during pregnancy and while lactating.[63] While this is an attempt to recognise biological differences between men and women which render the application of a formal model of equality inappropriate, Mackinnon has challenged the special protection rule arguing that it reinforces the idea that men are the “norm” or the standard against women must be measured. Maternity and reproductive differences make women “unlike” men by reinforcing their distance from the male “norm” hence the need for “special protection.”[64] Moreover, the apparent privileging of women’s maternal roles post delivery may in fact reinforce rather than challenge gender stereotypes. Making, by law or policy, women primarily responsible for the care for young children, can constitute discrimination against both men and women.[65] An example of this is the South African case of *Hugo.* [66] On his election to the Presidency of South Africa, Nelson Mandela granted an amnesty permitting the release of certain categories of female prisoners who had children under the age of 12 years old, the reasoning being, the children needed their mothers. The appellant, a male prisoner within the amnesty category of prisoner, challenged this as constituting discrimination against him on the grounds of sex. Although the Constitutional Court dismissed his appeal noting that the amnesty merely reflected the status quo, that is that women bore the primary

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[61] E/CN.3/2005/68, para. 38.
[62] *Ibid,* para. 58.
[63] See CESCR, art. 10 (2); ICCPR, art. 6 (5); Human Rights Committee general comment 18, para. 8; CEDAW, art. 4 (2), 5 (b), 11 (1) (f), 11 (2) (a) and 12 (2); CRC 24 (1), 24 (2) (a) and (d). CEDAW general recommendation 24, para. 28.
[64] C. Mackinnon (1989), 220 and 225-6.
[65] *Petrovic v. Austria,* European Court of Human Rights, Application No. 20458/92, Judgment of 27 March 1998. See also *Hugo v. The President of South Africa,* 1997 (4) SA 1 (CC).
[66] *Hugo v. The President of the Republic of South Africa,* 1997 (4) SA 1.

responsibility of looking after children and to ignore this would in itself be discriminatory, in a dissenting judgment Kriegler JA noted that the majority decision merely reinforced, rather than challenged gender stereotyping.[67]

Intersectionality

Linked to the issue of substantive equality must be the recognition that women are not a homogenous group.[68] Their heterogeneity requires us to take into account the fact that women do not experience discrimination in the same way.[69] Women are separated by age[70], caste[71], class, race[72], religion, disability[73], indigeneity[74], minority status[75] including sexual orientation[76] and multiple other factors. This demands that we take a holistic look at the way societies are organized and the differential impact of discrimination on the various groups within it. This last point has been termed

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[67] *Ibid.*

[68] E. Spelman *Inessential Woman: Problems of Exclusion in Feminist Thought* (London, Women's Press, 1990); K. Bhavanani (ed.) *Feminism and Race* (Oxford, OUP, 2001). Human Rights Committee general comment 28, para. 30.

[69] United Nations Declaration on the Elimination of Violence against Women, 20 December 1993, GA Res. 48/104, preamble. OAS Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994, reproduced in (1994) 33 *International Legal Materials* 1535, art. 9. African Protocol on Women's Rights, 2003, arts. 22-24.

[70] CESCR general comment 6 on Economic, Social and Cultural Rights of Older Persons, 8 December 1995, E/1996/22. CEDAW general comment 24 on Health, UN Doc A.54/38/Rev.1, para. 6.

[71] C. Bob "'Dalit Rights are Human Rights': Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue" (2007) 29 *Human Rights Quarterly,* 167. CERD general comment 29, article 1, paragraph 1 of the Convention (descent), 01 November 2002, paras. 11-13.

[72] The CESCR raised the issue of racial discrimination against black people with Libya in its concluding observations. CESCR Concluding Observations Libya Arab Jamahiriya, E/C/12/LYB/CO/2, 25 January 2006, para. 12.

[73] Convention on the Rights of People with Disabilities, art. 6, Beijing Declaration and Platform for Action para. 232 (p)/ CEDAW general comment 18 on Disabled Women, UN Doc. A/46/38, CESCR general comment 5 on Persons with Disabilities, 26 April 2001, E/1995/22, para. 19**.** CRC general comment 9 on the Rights of children with disabilities, CRC/C/GC/9, 29 September 2006.

[74] CERD general comment 23 on Indigenous Peoples, 18 August 1997, A/52/18, annex V. UN Declaration on the Rights of Indigenous Persons, Human Rights Council Resolution 2006/2, June 29 2006, in UN Doc. A/HRC/1/L.10 (annexe). Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi Tribal Populations in Independent Countries, ILO Convention No. 107, 328 UNTS (1957). Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169, Reprinted in *ILM* 1382 (1989). P. Thornberry *Indigenous Peoples and Human Rights* (Manchester, Manchester University Press, 2002). *The Mayagna (Sumo) Awas Tigni Community v. Nicaragua,* Judgment 31 August 2001, Inter-American Court of Human Rights, Ser.C No 79 (2001).

[75] UNOHCHR "Meeting the Challenges of Discrimination against Women from Minority Groups", Statement on the occasion of International Women's Day, 8th March 2006, by Gay McDougall, UN Independent Expert on Minority issues. CERD general comment 27 Discrimination against Roma, 16 August 2000, A/55/18, annex V. Human Rights Committee general comment 28, para. 32. Center for Reproductive Rights (CRR) *Forced Sterilisation and other Assaults on Roma: Reproductive Freedom in Slovakia* (New York, CRR, 2003). *Ginova & Ors v. Slovakia,* European Court on Human Rights, Case No. 15966/04.

[76] CRR and University of Toronto (2002), 211-215. *Toonen v. Australia,* Communication No. 488/1992, UN Doc CCPR/C/50/D/488, (Human Rights Committee, 1994).

"intersectionality" – a process by which one recognizes that certain groups may suffer multiple forms of discrimination simultaneously. [77]

The consequences of discrimination are different for those who suffer single issue discrimination than for those who suffer from intersectional discrimination.[78] There has over time been greater normative recognition given to the principle of intersectional discrimination.[79] The Race Committee has in its general comment 25 on gender related dimensions of racial discrimination[80]devised a four point "intersectionality questionnaire" which is helpful in considering how people are differentially impacted by gender based discrimination. It requires one to consider:

i) The form a violation takes;
ii) The circumstances in which a violation occurs;
iii) The consequences of a violation;
iv) The availability and accessibility of remedies and complaint mechanisms.[81]

Questionnaire respondents furnished many examples of intersectional discrimination. Writing about the situation in Spain, a questionnaire respondent reported:

"In Spain certain groups of women are more vulnerable than others to the various forms of discrimination. In this regard, it should be pointed out that in issues such as gender violence, difficult access to housing, the right to education and training, equal access to the women's welfare measures and policies provided by the Spanish institutions, equal opportunities in the occupational sphere, equal wages, etc. are twice as difficult for some particular groups of women, such as rural women, undocumented migrant women, Gypsy women or disabled women."[82]

Another example of intersectional discrimination and its effects was highlighted the issue of equal pay in England and Wales. The questionnaire respondent noted that

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[77] K Crenshaw "Demarginalisng the Intersection of Race and Sex" (1989) U. Chi Legal F. 139, K. Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour" (1991) Stanford Law Journal 1241,1244 n.

[78] F. Banda and C. Chinkin *Gender, Minorities and Indigenous Peoples* (London, Minority Rights Group, 2004). CESCR general comment 16, para 5.

[79] UN Report of the World Conference against Racism, Racial Discrimination and Related Intolerance, 2001, UN Doc A/CONF.189/12.

[80] CERD General Comment 25 on Gender Related Dimensions of Racial Discrimination, UN Doc. A/55/18, Annex V. Human Rights Committee general comment 28, para.30.

[81] CERD General Comment 25 on Gender Related Dimensions of Racial Discrimination, para. 5.

[82] T.Piconto Novales, questionnaire response : p.2 narrative response.

research undertaken by the Equal Opportunities Commission (EOC) showed that ethnic minority women in the workplace experienced disadvantage. The research[83]that she refers to revealed, in part, that while the 'average' discrepancy in pay between men and women was 17% (with (white) men earning more), Pakistani women experienced a 28% differential in pay. This suggests that, in addition to the 'gender deficit' of 17%, there is an additional 11% which is 'unaccounted for,' or put differently, can be accounted for in part, by factoring discrimination based on race and religion."[84] While the gap between the pay of white women and men held steady at 17%, the research showed that in the 24-54 age group, the full time hourly pay gap "increases for Indian (15 per cent), Black African (23 per cent) and Black Caribbean (13%) women."[85] This shows that one cannot lump all minorities into one group who are all discriminated against because of a combination of sex and race differentiation.[86] Other reasons for the pay differentials may include different working patterns. There is also the fact that women are sometimes found in caring and service sectors which may command lower wages. Moreover, it is telling that the research also revealed differences in pay between white men (the highest earners) and men from other ethnic groups, with Indian men experiencing the lowest pay differentials and Bangladeshi men the highest pay differential of a 39 per cent deficit vis a vis full time wages for white men. [87]Again this highlights the importance of an intersectional approach to examining discrimination; the causes for the pay inequality may reveal different pressure points for seemingly "alike" groups and may therefore call for different responses or interventions.

A major challenge that is thrown up by intersectional discrimination is the perceived tension between rights of minorities and respect for culture[88] and other human rights principles, not least non discrimination.[89] Minorities or indigenous people may argue that they have the right to practise and to enjoy their right to culture without external

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[83] L. Platt *Pay Gaps: The Position of Ethnic Minority Women and Men* (London, Equal Opportunities Commission, 2006) v, 43.
[84] A. Stewart, questionnaire response Part A:6, April 2007.
[85] *Ibid,* vi.
[86] *Ibid,* 20.
[87] *Ibid,* 43.
[88] ICCPR, art. 27; CRC, art. 31. See also *Lovelace v. Canada,* Communication No R. 6/24/1977, Human Rights Committee, views of the Committee, 30 July 1981, UN Doc A/36/40, Supp 40.
[89] UNDP *Human Development Report 2004: Cultural Liberty in Today's Diverse World* (New York, UNDP, 2004).

interference. While, technically all rights are subject to the filter of non discrimination,[90] the situation is more complex for as a UN official noted "Human rights mechanisms find it difficult to interfere with non State structures."[91]

Notwithstanding what appear to be clear normative commitments to achieving equality between the sexes, the practice of States parties, indicates that there is still a equivocation over the principle of non-discrimination based on sex. States, and some academic writers, sometimes seek to invoke national, cultural or religious justifications for the non-implementation of equality, claiming that the local interpretation of the norm is at variance with the international. Often this starts with a challenge to the notion of "sameness". During the drafting of CEDAW for example, the Moroccan representative argued for a change in the wording of the provision "men and women have the same rights and responsibilities during and after the dissolution of marriage" because as drafted the provision: "Failed to take account a fact which was a matter of common sense, namely, that men and women, in order to be truly equal, did not need to be treated as being the same, which would be contrary to nature."[92] Preferred in some quarters is the equivalence or complementarity model which holds that men and women are "complements" of each other.[93] Of this "dual sex" construction of sex difference, Nzegwu notes:

"In a dual-sex context, where individuals are valued for the skills they bring to community building and the role they play in developing the culture, gender identity is differently constructed. Identity is not abstractly construed in terms of sameness, but concretely defined in terms of the worth of social duties and responsibilities. Because gender equality implies comparable worth, women and men are complements, whose duties, though different, are socially comparable."[94]

The difficulty of course is in the different economic and social value placed on the roles that men and women play. Additionally, sometimes both sexes are denied the

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[90] Human Rights Committee general comment 28, para. 32. Human Rights Committee general comment 23 on the rights of minorities (1994), ref paras. 4 and 6:2. K Knop *Diversity and Self Determination in International Law* (Cambridge, Cambridge University Press, 2002), 360-372.

[91] Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2002/83, at 3.

[92] L. Rehof *Guide to the Travaux Preparatoires of the United Nations Convention on the Elimination of all Forms of Discrimination against Women* (Dordrecht, Nijhoff, 1993), 147. See also the reservations made to CEDAW art 16 by Iraq and Morocco.

[93] L. Welchman *Women and Muslim Family Laws in Arab States* (Amsterdam, Amsterdam University Press, 2007), 35 and 38-39.

[94] N. Nzegwu "Gender Equality in Dual-Sex System: The Case of Onitsha" (2001) 1 *Jenda: a Journal of Culture and African Women's Studies* available at: http://www.jendajournal.com.

opportunity to take on roles including in the domestic or public spheres that do not conform to the gender roles imposed upon them reinforcing stereotyping and denying them valuable opportunities to work.[95]

State equivocation over the principle of equality can most clearly be seen when looking at the reservations entered to human rights instruments.

Reservations

International human rights law permits a State to enter reservations[96] to a treaty provided that the reservation is not incompatible with the objects and purpose of the treaty.[97] The object and purpose of CEDAW, whose construction of discrimination is accepted as the base line standard for other treaty monitoring bodies, is that States parties move progressively towards the elimination of discrimination against women. [98] Reservations threatening the achievement of this goal are contrary to the object and purpose of the Convention. Despite this, there is a clear link between reservations made to CEDAW (and other instruments) and the areas where discrimination against women continues to prevail, not least in family and nationality laws. States have entered a large number of reservations to CEDAW, in particular reservations which are broad and imprecise.[99] This had led scholars to query whether the principle of sex discrimination can really be considered to be part of customary international law as is asserted by some scholars,[100] as States parties from all geographic regions, and

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[95] World Bank *Middle East and North Africa Development Report: Gender and Development in the Middle East and North Africa* (Washington, World Bank, 2004), 13, 21 and 93-127, (hereafter MENA Development Report, 2004). A. Abusharaf "Women in Islamic Communities: The Quest for Gender Justice Research" (2006) 28 *HRQ* 714.

[96] Although states sometimes seek to pass off reservations as interpretive declarations or "understandings", it is clear from the objections made by other states that there is little in practice to distinguish them in their effect. Human Rights Committee general comment 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc CCPR/C/21/Rev1/Add6 (1994), para. 3; *Bellilos v. Switzerland* (1988), ECHR Series A, vol. 132**;** Statement on Reservations to the Convention on the Elimination of all Forms of Discrimination against Women by the Committee on the Elimination of Discrimination against Women, reproduced in UN, IWRAW, Commonwealth Secretariat *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of all Forms of Discrimination against* Women (London, Commonwealth Secretariat, 2000) 90, at para. 4 (hereafter CEDAW statement on reservations, 2000).

[97] Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, art. 19; CEDAW, art. 28 (2).

[98] R. Cook "Reservations to the Convention on the Elimination of all Forms of Discrimination against Women" (1990) 30 *Virginia Journal of International Law* 643.

[99] H. Steiner and P. Alston *International Human Rights in Context: Law, Politics, Morals* (Oxford, Clarendon, 2000), 180. S. Engle Merry (2006), 80-81.

[100] S. Ali *Gender and Human Rights in Islam and International Law* (The Hague, Kluwer, 2000).

different religious and legal systems continue to enter reservations limiting women's enjoyment of their rights.

CEDAW has frequently addressed reservations and has identified reservations to articles 2 (State obligations), 9 (nationality), 15 (equality and freedom of movement), 16 (marriage and family relations) as contrary to the object and purpose of the Convention, and therefore impermissible,[101] In general comment 21 CEDAW urged: "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."[102]

As the analysis of the responses to the questionnaire will later show, many of the laws that discriminate against women are in these areas (article 9 – nationality; article 15 – equality before the law; and article 16 – marriage and family relations).
CEDAW has also noted that States that, while not entering reservations, have laws and customs that are discriminatory towards women, thus making it "difficult for the Committee to evaluate and understand the status of women."[103] The Constitutions of Botswana, Zambia and Zimbabwe[104] exclude customary personal laws from the reach of the non-discrimination provision, meaning in effect that discrimination against women in personal status law is permitted.

States frequently give as the reason for their reservations, their constitution, [105] national law, custom and religion[106] despite the fact that the Vienna Convention on the Law of Treaties, 1969 provides that "a party may not invoke the provisions of its

[101] See CEDAW general recommendation No. 21, paras. 41, 43, 44 and 48. CEDAW statement on reservations (2000) identifies articles 2 and 16 as the core provisions. See para. 6, Arab Development Report (2006), 191 *et seq.*
[102] CEDAW general recommendation 21, para. 49. See also S. Engle Merry (2006), 81.
[103] CEDAW general recommendation 21, para. 46.
[104] See Constitution of Botswana, 30 September 1966, s. 15 (4); Constitution of Zambia, 1991 (Act No.1 of 1991), s.23 94 (c); Constitution of Zimbabwe, 1979 as amended (Zimbabwe Constitution Order SI 1979/1600 of the United Kingdom), art. 23 (3).
[105] See for example Monaco general reservation to CEDAW; Pakistan reservation to art. 2 of CEDAW; and the "understanding" of art. 2 of the ICCPR entered into by the United States of America and the objections of other states (Finland) thereto. See also reservation of Bangladesh to arts. 2 and 3 of the CESCR. Available at: http://www.hri.ca/forthereCord1998/documentation/reservations/cescr.htm.
[106] C. Chinkin "Reservations and Objections to the Convention on the Elimination of all Forms of Discrimination against Women" in J. Gardner (ed) *Human Rights as General Norms and a State's Right to Opt Out* (London, British Institute of International and Comparative Law, 1997), 64; J. Connors "The Women's Convention in the Muslim World" in J. Gardner (ed) (1997). A.E Mayer *Islam and Human Rights* (Boulder, Westview), 125**;** UNDP *Arab Development Report 2005,* 179-182.

internal law as justification for its failure to perform a treaty."[107] Moreover, the reservations ignore treaty obligations requiring States to change or repeal discriminatory laws.[108] Reservations are often general in nature thus making their scope and reach difficult to ascertain.[109]

In 2002 the Special Rapporteur on Religion produced a comprehensive report identifying the myriad ways in which religions and more precisely, the interpretation of religious tenets was used to rationalise and legitimise discrimination against women in both practice and law.[110] The use of reservations played a key role in the legal disenfranchisement of women.

The Special Rapporteur on Freedom of Religion and belief also notes that:

"varying interpretations of the same religion shows an urgent need for less ambiguous rules and principles. The issue is extremely delicate, but that should by no means deter us from confronting it. On the contrary, I believe that the longer we postpone tackling it, the greater the risk of embedding gender inequalities in the field of human rights."[111]

The Children's Rights Convention is also subject to a large number of reservations[112] based on culture, national law and religion.[113] Using the life cycle model[114], one can see how qualifying the enjoyment by the girl child of her rights is merely a pre-cursor to gender based discrimination faced by older women. With this in mind, human

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[107] Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, art. 27. *Specific Human Rights Issues: Reservations to Human Rights Treaties,* Final Working Paper submitted by F. Hampson, E/CN.4/Sub.2/2004/42, 19 July 2004, para. 56.

[108] See for example CEDAW, arts. 2 (a) – (c) and 3.

[109] Human Rights Committee general comment 24, para. 1.

[110] Droits Civils et Politiques et, notamment: Intolérance Religieuse. Rapport soumis par M. Abdelfattah Amor, Rapporteur spécial, conformément a la résolution 2001/42 de la Commission des droits de l'homme. Additif: Etude sure la liberté de religion ou de conviction et la condition de la femme au regard de la religion et des traditions, E/CN.4/2002/73/Add. 2, 5 avril 2002 (hereafter Special Rapporteur on religion, 2002). UNDP *Arab Development Report 2005,* at 145-147. See also Council of Europe, Parliamentary Assembly, Committee on Equal Opportunities for Women and Men "Women and Religion in Europe" Doc. 10670, 16 September 2005.

[111] A. Jahangir, United Nations Special Rapporteur on Freedom of Religion or Belief, speech given at the Parliamentary Assembly of the Council of Europe. Available at: http://assembly.coe.int/Main.asp?link=/Documents/Records/2005/E/0510041000E.htm#5t.

[112] For reservations to the CRC see http://www.ohchr.org/english/law/crc-reserve.htm. See for example Afghanistan, Botswana, Bosnia Herzogovina, Canada, China, Croatia, Egypt, Holy See, Jordan, Indonesia, Iran, Kiribati (culture), Iraq, Kuwait, Malaysia, Maldives, Mali, Mauritania, Monaco (nationality), Morocco, Oman, Poland (custom, Qatar, Saudi-Arabia, Singapore, Slovenia, Syria, Thailand, Tunisia and United Arab Emirates.

[113] K. Hashemi "Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation" (2007) 29 *HRQ* 194. See also Special Rapporteur on Religion (2002), para. 74.

[114] CEDAW general recommendation 24, para.2.

rights committees and the children's agency UNICEF have all noted the "discrimination connection" between denial of education on grounds of sex, early and forced marriage, premature child birth and violence against women.[115]

Challenging reservations is difficult,[116] With the exception of the Race Convention which includes a regime to address impermissible reservations,[117] the validity of reservations is governed by the Vienna Convention on the Law of Treaties. There is a limited number of States which object to reservations which they consider contrary to the object and purpose of the treaty. Objecting to another State party's reservation may help to highlight a problem, but short of proclaiming that the convention will not come into force *inter-partes*, an objection has little discernible effect in (deterring) the making of reservations by those States which are determined to do so.[118] Moreover, Chinkin notes reluctance on the part of some States to object to reservations made by other States parties because to do so might be perceived as an "unfriendly act."[119] However, there is a group of States, which is prepared to object to those reservations that they perceive to be contrary the object and purpose of treaties. In 2007**,** CEDAW congratulated the Netherlands for its willingness to challenge reservations that were incompatible with the objects and purpose of the Convention.[120]

Attempts by the Human Rights Committee to take a robust approach to reservations, claiming competence to decide on the compatibility of reservations with Covenant provisions and severing those that it found to be incompatible with the object and

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[115] Plan International *Because I am a* Girl (London, Plan, 2007). UNICEF *Progress for Children: a Report Card on Gender Parity and Primary* Education, No. 2, April 2005. UNICEF *The State of the World's Children 2006: Excluded and Invisible* (New York, UNICEF, 2006), 8, 22 and 44-47. UNICEF *The State of the World's Children 2007: Women and Children, the Double Dividend of Gender* Equality (NY, UNICEF, 2007). CRC general comment 4 on Adolescent health and development in the context of the CRC, UN Doc. CRC/GC/2003/4 (2003, paras. 20 and 24. Human Rights Committee general comment 19, article 23, UN Doc. HRI/GEN/1/Rev.1, at 28, 1994, para. 4. CESCR general comment 16, paras. 27 and 30. Human Rights Committee general comment 28, paras. 23 and 28.

[116] Vienna Declaration and Platform for Action, 1993 (II), para. 39. Beijing Platform for Action, para. 230 (c); Asian Forum for Human Rights and Development "Asian governments must ratify treaties, remove reservations, report and remedy rights violations", Statement issued to mark human rights day, Sunday 10 December 2006, available at http://www.forum-asia.org.

[117] CERD, art. 20 (2).

[118] B. Clark "The Vienna Reservations regime and the Convention on Discrimination against Women" (1991) 85 *AJIL* 281.

[119] C. Chinkin (1997), 64 and 76.

[120] CEDAW Concluding Observations to the Report of the Netherlands, UN Doc. CEDAW/C/NLD/CO/4 (2007), para. 7

purpose of the Covenant[121] have met with resistance.[122] Other treaty bodies have tried to grapple with the plethora of reservations by issuing general comments[123] and by engaging with States during the reporting phase.[124] While there has been some success in persuading some to uplift or modify their reservations,[125] but there is still much to be done.[126]

The Special Rapporteur appointed to look into the matter of reservations by the International Law Commission has yet to reach a conclusive decision on how (incompatible) reservations should be dealt with.[127]

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[121] Human Rights Committee general comment 24. The Committee notes that its approach is in keeping with the European approach. R. Baratta "Should Invalid Reservations to Human Rights Treaties be Disregarded?" (2000) 11 *European Journal of International Law* 413. M. Scheinin "Reservations to the International Covenant on Civil and Political Rights and Its Optional Protocols-Reflections and State Practice", undated article found on the internet.

[122] See *Observations by the Governments of the United States and the United Kingdom on General Comment 24 Relating to Reservations,* (1995) GAOR, UN Doc. A/50/40, Annex VI. A. Boyle and C. Chinkin *The Making of International Law* (Oxford, OUP, 2007), 191-194.

[123] CEDAW general comment 4 on Reservations, UN Doc A/42/38; CEDAW general recommendation No. 20 on reservations to the Convention, UN Doc A/47/38. CEDAW general recommendation No. 21, paras. 41-45 and 48. CEDAW's statement on reservations (1998).

[124] CEDAW Guidelines Regarding the Form and Content of Initial Reports of States Parties provide that states that have entered reservations should say why the reservation is necessary, the effect of the reservation on national law and policy and the plans, including a timetable for uplifting the reservations. General reservations are considered to be incompatible with the object and purpose of the Convention. See UN Doc CEDAW/C/7/Rev.3, para. 8.

[125] States uplifting or modifying their reservations entered include, but are not limited to, Lesotho, Malaysia, Mauritius, Malawi and Turkey.

[126] CEDAW statement on reservations (1998), paras. 11 and 19.

[127] A. Boyle and C. Chinkin (2007), 193.

PART B – REGIONAL HUMAN RIGHTS INITIATIVES

Running parallel to the UN norm making process, have been regional initiatives to create instruments that reflect the cultural historical values of the various regions.

The European Convention on Human Rights

The oldest of these is the European Convention on Human Rights, 1950.[128] Although containing a non-discrimination provision in article 14, the treaty requires an allegation of discrimination on listed grounds (which include sex) to be brought in conjunction with another Convention provision. The test for discrimination was enunciated in the *Belgian Linguistic case*[129]:

"The principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measures under consideration, regard being had to principles which normally prevail in democratic societies. A difference in treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[130]"

An examination of European case law seems to show that claims of discrimination on grounds of sex are not made solely, or exclusively, by women, with a number of cases appear to be brought by men[131] complaining, mainly, of distinctions in social security law or regulations about entitlements to benefits.[132] For women, marriage (status) seems to be an important factor in discrimination cases.[133] Also notable is the case of *MC v. Bulgaria*[134] where a young woman had been raped but her case had not been prosecuted because of a finding that she had not resisted. Alleging violations of

[128] European Convention on Human Rights, ETS No. 5, 213 UNTS 222.
[129] *Belgian Linguistic Case (No. 2) (1968),* I EHRR, 252.
[130] *Ibid,* 284.
[131] *Karlheinz Schmidt v. Germany,* European Court of Human Rights, Application No. 13580/88, Judgment of 18 July 1994.
[132] *Van Raalte v. the Netherlands,* European Court of Human Rights, Application No. 20060/92, Judgment of 21 February 1997; *Petrovic v. Austria,* European Court of Human Rights, Application No. 20458/92, Judgment of 27 March 1998; Willis *v. United Kingdom,* European Court of Human Rights, Application No. 36042/97, Judgment of 11 June 2002.
[133] *Abdulaziz, Cabales, and Balkandali v. United Kingdom,* European Court of Human Rights, Application Nos. 9214/80, 9473/81, 9474/81, Judgment of 28 May 1985*; Marcx v. Belgium* (1979), EHRR 330B. *Schuler-Zgaggen v.* Switzerland, Judgment of the ECtHR, 24 June 1993; *Wessels-Bergervoet v. Netherlands,* Application No. 34462/97, Judgment of 4 June 2002. (The latter is a benefits case).
[134] *MC v. Bulgaria,* Judgement of the European Court of Human Rights, 4 December 2003. See also *Aydin v. Turkey,* (1998) 3 Butterworths Human Rights Cases, 300.

articles 3, 8 (1), 13 and 14 of the Convention, MC noted that Bulgarian law did not provide effective protection against rape as only cases where the victim had actively resisted were prosecuted. There had also been a failure by authorities to properly investigate the allegations made. The Court held that there was indeed a positive obligation under articles 3 and 8 requiring Bulgaria to enact criminal law proceedings which effectively punished rape regardless of the behaviour of the victim. It was the absence of consent that was crucial and not the failure to resist the assault. Moreover, the State was under an obligation to investigate allegations of rape thoroughly and also to prosecute.

More recent is the case of *Tysiac v Poland*.[135] A woman had been advised by her doctor not to proceed with pregnancy because of a risk to her health. She had sought, but had been denied an abortion. She sued alleging that there had been a breach of her rights under articles 3, 13 and 8 read with 14 of the ECHR. The court found for her and ruled that States had a duty to ensure access to abortion where it was legal. In June 2007, the Polish government announced that it would be appealing the decision, [136] thus calling into question the assertion made by one of the delegates that attended the CEDAW session at which Poland presented its report in January 2007, concerning reproductive rights:

"abortion was legal for women in cases of rape and when the pregnant woman's health was in danger. All women had the right to reproductive services. Under the conscience clause, doctors could refuse to perform an abortion. However, if all doctors in a hospital refused to do so, the hospital was required to have a contract with another health care facility willing to perform the procedure. All doctors were obliged to perform abortions for women whose health was seriously imperilled by the pregnancy. In such cases, the conscience clause could not be invoked as reason for refusing to perform the procedure. In all the circumstances doctors were subject to the Penal Code's provisions concerning abortion rights and the Professional Conduct Code."[137]

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[135] *Tysiac v. Poland,* ECHR Application no. 5410/03, 20 March 2007.
[136] Center for Reproductive Rights "Poland appeals Tysiac", available at: http://www.reproductiverights.org/ww_europe.html#polandappeals.
[137] UN Department of Information "Progress made in mainstreaming gender equality into Poland's national legislation, women's anti-discrimination committee told", *General Assembly WOM/1591.*

In the decision of the ECHR in *Leyla Sahin v.Turkey*[138] the ban on the wearing of headscarves by Muslim women in public (University) was upheld by the majority. This decision contrasted with that of the Human Rights Committee in *Hudoyberganova v. Uzbekistan*[139] in which the Committee found that restrictions on a woman's right to wear the *hijab* in public or private constituted a violation of article 18 (2) of the ICCPR prohibiting coercion that would impair an individual's freedom to have or adopt a religion.[140] The difference in approach between the regional court and the international committee raises interesting questions about standards and interpretation of human rights norms.[141]

In 2000 the Council of Europe adopted Protocol 12 to the European Convention.[142] It reads into the Convention a free-standing equality provision, the equivalent of article 26 of the ICCPR, guaranteeing the enjoyment of rights "set forth by law without discrimination on any ground…"[143]

The Inter-American system

The American Convention on Human Rights**,** 1969[144] proscribes discrimination on the basis of sex[145] and guarantees equality before the law.[146] If national law is not in line with the Convention, then "States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative and other measures as may be necessary to give effect to those rights or freedoms.[147]"
The Additional Protocol to the American Convention on Human Rights in the area of

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[138] *Leyla Sahin v. Turkey,* ECHR Application no. 44774/98, judgment 29 June 2004. D. McGoldrick *Human Rights and Religion: The Islamic* Headscarf Debate (Oxford, Hart, 2006). Special Rapporteur on Freedom of Religion and Belief, Asma Jahangir *Civil and Political Rights including the question of religious intolerance,* E/CN.4/2006/5, 9 January 2006, paras. 41 and 43-50.
[139] *Hudoyberganova v. Uzebekistan* (931/2000), ICCPR, A/60/40 vol. II (5 November 2004).
[140] *Ibid,* para.6.2.
[141] In *Rahime Kayhan v. Turkey,* CEDAW Communication no. 8/2005. A complaint made to CEDAW on the same issue was held to be inadmissible due to the author's non exhaustion of domestic remedies. She had brought a claim on the basis of freedom of religion to the Turkish courts but claimed violation of the non discrimination provisions in CEDAW. Interestingly Turkey noted that the matter had already been heard in the ECHR in the *Sahin* case.
[142] Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome**.**
[143] Protocol 12, art. 1(1).
[144] American Convention on Human Rights, 1969, 1144 UNTS 123. See also the American Declaration of the Rights and Duties of Man, OAS Res. XXX, adopted by the Ninth International Conference of American States, 1948, art. II.
[145] *Ibid,* art. 1(1).
[146] *Ibid,* art. 24.
[147] *Ibid,* art. 2.

Economic, Social and Cultural Rights, 1988 (Protocol of San Salvador) also guarantees freedom from discrimination.[148] The State's obligation to enact domestic legislation in line with the Protocol is also repeated.[149] Moreover, the San Salvador Protocol recognises that different groups may require additional protection hence there are separate provisions for children, the elderly and persons with disabilities.[150]

There has since 1994, been a Special Rapporteur on the Rights of Women whose initial remit included analysing the compliance of member States laws and practices complied with the provisions on non discrimination on grounds of sex and equality provisions of the American Declaration and also the Convention on Human Rights. Thereafter, the Rapporteur has been tasked with receiving communications and also "supporting the investigation of broader issues affecting the rights of women in specific countries of the region through on site visits and country reports."[151]

Jurisprudence from the OAS on discrimination against women has included consideration of nationality laws,[152] violence against women and[153] reproductive rights issues.[154] The Inter-American system has also been responsible for the leading decision on State responsibility for the actions of non State actors, [155]which has impacted significantly on the understanding of State duty to prevent and punish violence against women in the private sphere. The *Velasquez* case established the principle of due diligence:

"An illegal act which violates human rights and which is initially not directly imputable to a State (for example because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility

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[148] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988, OAS Treaty Series 69, art. 3.
[149] *Ibid,* art. 2.
[150] *Ibid,* arts. 17-19.
[151] Inter American Commission on Human Rights "Special Rapporteurship on the Rights of Women of the Inter-American Commission on Human Rights: Background and Mandate", downloaded from http:///www.cidh/oas.org/women/mandate.htm.
[152] *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Inter American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Ser A No. 4.
[153] *Mejia Egocheaga v Peru* (1997), 1 Butterworths Human Rights Cases 229.
[154] *Maria Mestanza Chavez v. Peru,* Case 12.191, Rept No. 71/03, Inter. American Court on Human Rights, OEA/Ser.L/V/II.118**.** Doc 70 rev.2 at 668 (2003), *Paulina Del Carmen Ramirez Jacinto v Mexico* (Friendly settlement), Report No. 21/07 No. 21/07, Petition 161-02, 9 March 2007.
[155] *Velasquez Rodriguez Case (Honduras)* (1994).

of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[156]

In *Velasquez* it was further noted that the State's duties included:

"The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[157]

In 1994 the Organisation of American States adopted the first human rights treaty focusing on violence against women. The provisions of the Convention de Belem do Para[158] warrant closer examination. The preamble notes that violence against women constitutes a violation of their fundamental rights, while article 1 defines violence as: "…any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere."

The Convention then follows the UN Declaration on the Elimination of Violence against Women, 1993 (DEVAW)[159] identifying the loci of violence as family, community and State[160] before listing the human rights norms that are violated when violence occurs.[161] The duties of the State under the Convention are listed in articles 7 and 8. Article 7 of the Convention requires that States parties: "take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations…"[162] Crucially the Convention recognises intersectional discrimination.[163] Despite the 1994 Convention, the Inter American Commission of Women has noted that States have not always met their obligations:

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[156] *Ibid,* para 172. See also Special Rapporteur on Violence against Women "The Due Diligence Standard as a Tool for the Elimination of Violence against Women", E/CN.4/2006/61, 20 January 2006.
[157] *Velasquez Rodriguez,* para. 174. See also *Myrna Mack Chang v. Guatemala,* judgements of the 25 November 2003, Inter-American. Court on Human Rights, (Ser.C) No 101 (2003).
[158] Inter American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 9 June 1994 , 33 *International Legal Materials* (1994) 960.
[159] DEVAW, art. 2.
[160] Convention *Belem do Para*, art 2
[161] *Ibid,* art 3.
[162] *Ibid,* art. 7 (e). See also arts. 7(a), (c) (f) (g) and (h).
[163] *Ibid,* art. 9.

"That although efforts are being made throughout the Hemisphere to prevent, punish and eradicate violence against women, it continues to exist on a scale making it imperative to continue to implement strategies designed to free the women of the Americas of this scourge."[164]

Ten years after the adoption of the Convention, Amnesty International echoed this call and noted that the situation of women in the region had not improved significantly because States parties were failing to fulfil their duties under the Convention.[165] Amnesty noted that research had shown:

"…that in some countries in the region as many as 70% of women have suffered some form of gender-based violence. What is more up to 2003, an average of around 80% of states in the Continent had not outlawed sexual abuse within marriage."[166]

These shortcomings were highlighted in the decision of the Inter American court in *Fernandez v. Brazil*.[167] This case involved a man who shot his wife when she was asleep. He had been violent towards her in the past. The author brought a claim before the Inter American Commission in which she alleged failure to guarantee equal protection before the law and to ensure due process under the American Convention on Human Rights, 1969. She also alleged that the State had failed to fulfil its duties under article 7 of the Convention de Belem do Para.[168] Upholding the complainant's claims, the Inter American Commission noted that although Brazil had made changes to its constitution and institutions to make them more responsive to claims such as those brought by the complainant,[169] those policies had not translated into effective practice on the ground. Evidence was produced showing that in cases of domestic violence against women, only one per cent of complaints made to the specialised police stations (designed to deal with claims of violence against women) were

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[164] Inter –American Commission of Women, XXXIX Assembly of Delegates, "Strategic Action to be Taken to Implement the Objectives of the Convention of Belem do Para, OEA/Ser.L/II.2.29 CIM/doc.69/98 rev. 1, Washington D.C., 18 November 1998, preamble.
[165] Amnesty International "Tenth Anniversary of the Convention of Belem do Para: Time for Action", Press release 08/06/2004. Downloaded from: http://news.amnesty.org/mavp/news.nsf/print/ENGACT770632004.
[166] *Ibid* (C.f. Beijing + 5 Outcome Document Section D para 14).
[167] *Fernandez v. Brazil,* Case No. 12.051, of the Inter American Commission on Human Rights, decided on 16 April 2001, reproduced in: R Emerton, K Adams, A Byrnes & J Connors (eds.) (2005), 740.
[168] She also claimed that the state had violated arts. 3, 4 and 5 of the Convention. *Ibid,* para. 51 at 755 in Emerton *et al*.
[169] *Ibid,* para. 50 at 754-5.

actually investigated.[170] Moreover research showing that only two per cent of complaints made about domestic violence led to conviction of the accused.[171] In making a finding for the complainant, the Commission identified a violation by the State of article 7 of the Convention of Belem do Para and articles 8 and 25 of the American Convention; "both in relation to article 1:1 of the Convention, as a result of its own failure to act and tolerance of the violence inflicted." Before making a list of comprehensive recommendations,[172] the Commission identified the effects of Brazil's failure to investigate and punish those who perpetrate violence against women:

"Given the fact that the violence suffered by Maria de Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfil the obligation to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts."

The African System

The African Charter on Human and Peoples' Rights, 1981[173], contains a non discrimination provision covering sex,[174] an equal protection before the law provision[175] and most importantly, the injunction that the State shall ensure "the elimination of *every* (my emphasis) discrimination against women."[176] In *Legal Resources Foundation v. Zambia*[177]the African Commission, adopted the Human Rights Committee definition of equality from general comment 18 noting:

"The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to other citizens. The right

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[170] Ibid, para. 49 at 754. Statistics appeared to show that women experienced violence disproportionately to men and that women were 30 times more likely to be murdered by husbands than husbands by wives (see para. 47 at 753).
[171] *Ibid,* para. 49 at 754.
[172] *Ibid,* para. 61 at 758-9.
[173] African Charter on Human and Peoples' Rights, 1981 OAU Doc. CAB/LEG/67/3 rev.
[174] Article 2.
[175] Article 3.
[176] Article 18(3). This provision is reserved by Egypt on the basis of potential incompatibility with the Shariah. Egypt is the only reserving state. See C. Heyns (2004) vol. 1 at. 52, 53 and 58-9.
[177] *Legal Resources Foundation v. Zambia,* Communication 211/98, Decision of the African Commission on Human and Peoples' Rights, 29th Ordinary Session, April/May 2001.

to equality is important for a second reason. Equality or lack of it, affects the capacity of one to enjoy many other rights."[178]

Despite this the African Commission which is tasked with receiving State reports, individual complaints and with investigating "grave and systematic" breaches of human rights, has not in its 21 year history ever heard a complaint pertaining to discrimination against women in violation of the itemised provisions. Clearly this cannot be because the rights of African women are universally respected and upheld on the continent. Rather it may reflect the fact that those bringing complaints on behalf of people focus on violations of public sphere rights and rights affecting mainly men or communities in general. The dearth of cases also speaks to general ignorance of the possibility of bringing such claims and the lack of expertise amongst women's NGOs about this avenue of redress. Nevertheless, in its consideration of State reports, the Commission has identified discriminatory laws and cultural practices as impeding women's ability to enjoy their rights.

The African Charter on the Rights and Welfare of the Child, 1990 (ACRWC) [179] is suitably robust in its demand that principles of non discrimination and equal protection before the law should prevail.[180] It is alive to the impact of harmful social and cultural practices on the ability of children to enjoy their rights, and in particular discrimination experienced by the girl child,[181] providing that States shall take appropriate steps to eliminate customs and practices that discriminate on grounds of sex[182] and importantly, that child marriages should be proscribed and laws passed setting the minimum age of marriage at 18 for both sexes.[183]

It is notable that the African system has a Special Rapporteur on the Rights of Women, one of whose tasks has been chairing the drafting of the Protocol to the African Charter on the Rights of Women.[184] She has also issued a joint *communiqué*

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[178] *Ibid,* para. 63.
[179] African Charter on the Rights and Welfare of the Child, 1990, OAU Doc CAB/LEG/24.9/49.
[180] *Ibid,* arts.3 and 21 (1) (b).
[181] *Ibid,* art. 21.
[182] *Ibid*, art. 21 (1) (b).
[183] *Ibid,* art. 21 (2).
[184] Draft Terms of reference for the Special Rapporteur on the Rights of Women in Africa, DOC/OS/34c (XXIII), Annex II, 1996. See also M. Evans and R. Murray "The Special Rapporteurs in the African System" in M. Evans and R. Murray (eds) *The African Charter on Human and Peoples'*

with the UN Special Rapporteur on violence against women and the Inter-American Commission on Human Rights Special Rapporteur on the rights of women on the need to eliminate violence against women.[185]

The dissolution of the Organisation of African Unity led to the constitution of the African Union. Its founding document, the Constitutive Act, 2000[186] in addition to pledging to uphold human rights,[187] also evidences a commitment to gender equality.[188]

In a move that reflects the history of the drafting of CEDAW,[189] the African Union adopted the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003 (African Women's Protocol). Dubbed the "African CEDAW", the Protocol came into force on 25 November 2005.[190] Like CEDAW and the other African human rights instruments, the Protocol has both civil and political and economic social and cultural rights. The preamble to the Protocol makes clear that despite widespread ratification of the African Charter and several international human rights instruments and states "solemn commitment to eliminate all forms of discrimination against women and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices." The definition of discrimination owes much to CEDAW providing: "'Discrimination against women' means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life."[191]

This is not the only provision that is inspired by CEDAW. There is within the Protocol an acknowledgement of the need to tackle both de jure and de facto

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Rights: the System in Practice, 1986-2000 (Cambridge, Cambridge University Press, 2002), 280 and 295.

[185] International Experts urge States to take Immediate Action to end Immunity for Violations of Women's Rights, UN Press Release, WOM/1330, 8 March 2002.

[186] Constitutive Act of the African Union, 2000, CAB/LEG 23.25, 11 July 2000.

[187] *Ibid,* preamble, arts. 3 (g), 3 (h) and 4 (m).

[188] *Ibid,* art. 4 (l). R. Murray *Human Rights in Africa* (Cambridge, CUP, 2004), 134-162.

[189] See L. Rehof (1997).

[190] As of 30 July 2007, it had received 20 ratifications out of a possible 53. See www.africa-union.org/documents.

[191] African Protocol, art. 1 (f).

discrimination and specifically to challenge gender stereotyping.[192]As with CEDAW, the first State obligation requires States to ensure that their constitutions prohibit discrimination against women.[193] Moreover, States are under an obligation to "enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well being of women."[194] Crucially States are under an obligation to ensure the "reform of existing discriminatory laws and practices in order to promote and protect the rights of women."[195]

Temporary special measures are also provided for in article 2 on State obligations requiring States, *inter alia*, to "take corrective and positive action in those areas where discrimination against women in law and fact continues to exist."[196] Article 9 on participation in political and decision making processes also calls on States to take "specific positive action…through affirmative action, enabling legislation and other measures" to ensure that women can participate without discrimination in elections and public life.[197] The preamble recalls Security Council resolution 1325 on Women, Peace and Security while article 10 focuses on the right to peace and provides that States should ensure "increased participation of women" in peace processes as well as local, national, regional, continental and international decision making structures."[198] The provision on access to justice calls on States to ensure that women are "represented equally in the judiciary and law enforcement organs."[199] Moreover, given the centrality of culture, and the narrow and gendered construction thereof, it is important that provision is made for women to participate in the determination of cultural policies.[200] Intersectional discrimination is recognised in the Protocol's focus on elderly, disabled women and those in distress.[201] Moreover the definition section makes clear that the term woman includes the girl child.[202]

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[192] This, the equivalent of CEDAW arts. 2(f) and 5 (a), is found in art. 2(2).
[193] African Protocol, art. 2 (1) (a).
[194] *Ibid,* art. 2(1) (c).
[195] *Ibid,* art. 8 (f).
[196] *Ibid,* art. 2 (1) (d).
[197] *Ibid,* art. 9 (1).
[198] *Ibid,* art. 10 (2).
[199] *Ibid,* art. 8 (e). Echoing CEDAW article 14, states are also to ensure that women participate in the conceptualisation of development policies.
[200] *Ibid,* art. 7.
[201] *Ibid,* arts. 22, 23 and 24.
[202] *Ibid,* art. 1 (k).

Although drawing its inspiration from CEDAW and the African Charter, the African Protocol on Women's rights fills in lacunae found in CEDAW. Unlike CEDAW, the Protocol has multiple provisions addressing violence against women and the girl child in both the public and private spheres.[203] The types of violence covered include rape, sexual harassment at work and in schools, trafficking, violence against women in armed conflict and the outlawing of degrading and harmful widowhood practices.[204]Female genital mutilation is dealt with in article 5 which explicitly prohibits the practice and enjoins States to outlaw the practice and also to provide rehabilitative services for those who have already undergone female genital mutilation.

In light of the AIDS pandemic on the continent, it is important to note that the African Protocol provides that women have the right to protect themselves from HIV. One of the more controversial aspects of the Protocol is article 14 on the reproductive rights. Unlike previous instruments, the African Protocol is clear that a woman has the right to control her own fertility and to decide on the number and spacing of children that she has. The Protocol also provides, for the first time in human rights law, for a limited right to abortion in cases of sexual assault, rape, incest and where the continuation of the pregnancy would endanger the health of the mother or the foetus.[205] While abortion is clearly controversial the world over, it is important, on a continent where it is estimated that over 4 million illegal abortions are carried out a year,[206]that African States have recognised that eliminating discrimination against women, may involve providing services needed only by women. Failure to do so may result in violations of the right to health and indeed life of women forced to carry on with unwanted pregnancies.

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[203] CEDAW only has article 6 on trafficking and prostitution. The Committee has attempted to fill the violence gap by way of general recommendations 12 and 19 on violence against women. The latter is now an established part of CEDAW jurisprudence.

[204] See arts. 4, 11, 12 (1) (c), 13 (c), 13 (m) and 20 (a).

[205] *Ibid,* art. 14 (2) (c).

[206] BBC "Should abortion be legal?" Tuesday, 25 February 2006, at http://www.newsbbc.co.uk/l/hi/world/africa/4724440.stm.

Other positive measures include the setting of a minimum age of marriage (18 years)[207] and also requiring States to promote women's access to resources including land.[208]

Like the African Charter, the Women's Protocol is silent on the issue of reservations. This is worrying especially when one considers the many reservations that have blighted CEDAW and also in light of the objections that were made during the drafting of the Protocol to provisions which could legitimately be considered the objects and purpose of the Protocol.

The Protocol is not without its problems. Chief amongst these is the shifting standard of equality. The definition of discrimination is clear. It suggests equality between men and women. It is reinforced by article 8 which provides that "men and women are equal before the law and shall have the right to equal protection and benefit of the law". States are expected to aim for equality of opportunity and result, or substantive equality. However, this understanding of equality is not found throughout the Protocol. If anything, there appears to be a lowering of standards where women's right to property on death or divorce is considered so that both articles 7 on divorce and 21 on inheritance provide for an "*equitable sharing*" of marital or inheritance property.[209] Equitable and equal do not mean the same thing.[210] Equity, or fairness, is, like beauty, in the eyes of the beholder. Equality is clearly a more objective measure. The use of the word equitable was not a drafting slip, but the subject of considered debate.[211] Given the similarity of the definitions of discrimination found in CEDAW and the Protocol, it is interesting to note, that when presented with a Paraguayan report that referred to equitable rather than equal treatment of women, CEDAW noted in its concluding observations that the two terms, equal and equity, were not interchangeable. It recommended the use of the term "equality."[212]

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[207] African Protocol, art. 6 (b).
[208] *Ibid,* art 19 (c).
[209] *Ibid,* art. 7 (d) and art. 21(2).
[210] Special Rapporteur on Religion (2002), para. 36.
[211] Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003, MIN/WOM/RTS/DRAFT.PROT. (II) Rev. 5).
[212] CEDAW Concluding Observations to the Combined Third, Fourth and Fifth Periodic Reports of Paraguay, CEDAW/C/PAR/CC/3-5, 15 February 2005, para. 23.

Also problematic is the equivocation of States parties over the issue of nationality of children exemplified in article 6 (h) which puts national law above international obligations providing: "a woman and a man shall have equal rights, with respect to nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests."[213]

The African States with reservations to article 9(2) of CEDAW were the same States that pushed for a watered down provision on nationality of children. That they succeeded constitutes a reversal in progress and a lowering of internationally agreed standards.[214]Now clearly the watering down of equality and the rolling back on nationality provisions in the African Protocol creates tension between regional interpretations and international commitments.

In interpreting the Protocol it is important to refer back to the definition of discrimination in article 1 (f) which does not admit of any qualification. Moreover, given that the Protocol is additional to the African Charter, it is worth recalling that article 60 of the Charter enjoins the African Commission to "draw inspiration from international law on human and peoples' rights…the Universal Declaration of Human Rights, other instruments adopted by the United Nations…" This is reinforced in the preamble to the Protocol which lists the non discrimination provisions of the African Charter and notes that "women's rights have been recognised and guaranteed in all international human rights instruments" before identifying, the international bill of rights and CEDAW, amongst others.[215] It is noteworthy that the African Commission has adopted the CEDAW guidelines on State reporting as the basis for State reports to be submitted under the Charter[216], and until Protocol specific ones are drafted, the Protocol as well.

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[213] *Ibid,* art. 6 (h).
[214] F. Banda "Blazing a Trail: The African Protocol on Women's Rights Comes into Force" (2006) 50 *Journal of African Law* 72, 76-7.
[215] See also First African Union Ministerial Conference on Human Rights in Africa, 8 May 2003, Kigali Rwanda, "Kigali Declaration", MIN/CONF/HRA/Decl.1(1), art. 25.
[216] F. Viljoen "The African Commission on Human and Peoples' Rights: Introduction to the African Commission and the Regional Human Rights System" in C. Heyns (ed.) *Human Rights Law in Africa* (The Hague, Martinus Nijhoff, 2004), vol. 1, 385 and 497.

In 2004 the African Union adopted a Solemn Declaration on Gender Equality in Africa[217] which reinforces provisions found in the Protocol. However, it has a separate monitoring mechanism requiring States parties to send reports to the African Union every four of years.[218] All States were required to report in the first year but only 8 out of 53 States reported.[219] This highlights a problem that pervades the whole human rights monitoring system-the delays in reporting and sometimes the complete failure of States to send in reports thus making constructive dialogue well nigh impossible. By implication follow up is also affected. Although some of the UN treaty bodies now proceed in the absence of States parties, it is note worthy that UN officials working within the system acknowledge the extraordinary burden placed on States of an ever expanding human rights reporting system leading one to note that "it was exhausting for States parties."[220]

The Arab Charter

Revised a decade after it was first adopted, is the Arab Charter on Human Rights, 2004.[221] In light of the criticism that had been received on the content of the original Charter, and indeed the Cairo Declaration on Human Rights in Islam, 1990[222] the aim was to bring the Charter into greater conformity with existing human rights standards. The jury appears to be out on whether this goal has been achieved.[223]

The preamble to the Charter reaffirms a commitment to the existing international bill of rights and the UN Charter while also "having regard to the Cairo Declaration on Human Rights in Islam." The Charter contains many positive provisions not least the standard non discrimination provision found in international human rights instruments

[217] AU Solemn Declaration on Gender Equality 2004, Assembly/AU/Decl.12 (III) Rev.1.
[218] See also 'Guidelines for Reporting on the AU Solemn Declaration on Gender Equality in Africa', adopted at the first African Union conference of ministers responsible for women and gender, Dakar, Senegal, 12-15 October 2005, AU/MIN/CONF/WG/2 (I), part E.
[219] These were: Algeria, Burundi, Ethiopia, Lesotho, Mauritius, Namibia, Senegal, South Africa. Non state agencies providing a synopsis of work undertaken were the Inter-African Committee, UNIDO and the World Food Programme.
[220] UN Official interviewed in New York, March 2007.
[221] League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), 7th ratification took place on 24 January 2008, the Charter will enter into force 2 months from that date.
[222] Cairo Declaration on Human Rights in Islam, 1990, UN Doc A/CONF.15/PC/62.Add 18. See A.E Mayer (1999) 89, 120-122.
[223] M. Rishmawi "The Revised Arab Charter on Human Rights: A Step Forward?" (2005) 5 *Human Rights Law Review,* 361 and 362.

which includes the prohibition of discrimination on grounds of sex.[224] Article 3(2) requiring *effective* equality in the enjoyment of rights suggests the adoption of a substantive rather than formal model of equality. Moreover, it provides that all persons are equal before the law and are entitled to be protected without discrimination.[225] Article 22 further provides that "every person shall have the right to recognition as a person before the law". This is reinforced by a guarantee of equality for all before the courts.[226] Guarantees of the right to work without discrimination and also of the right to equal pay for work of equal value are also to be found in the Charter.[227] Also noteworthy is the Charter's acknowledgment of intersectional discrimination against minorities and people with disabilities.[228] Equally important is article 33(b) prohibiting abuse and violence against women and children. Interestingly, the article goes on to provide that States should "ensure the necessary protection and care for mothers, children and older persons and persons with special needs and shall provide adolescents and young persons with the best opportunities for physical and mental development."

The criticisms of the Revised Arab Charter are linked to the many provisions that appear to make rights subject to national law or which appear to suggest religious interpretations of the rights. Key for women is article 3(3) which provides in part: "Men and women are equal in respect of human dignity, rights and obligations within the framework of positive discrimination established in favour of women by the Islamic Shari'ah, other divine laws and by applicable laws and legal instruments." The use of the phrase 'positive discrimination' suggests that temporary special measures are anticipated. However, Rishmawi argues that "while positive discrimination in favour of women… is badly needed within Arab societies, subjecting it to such qualifications as Shari'ah or national legislation could seriously undermine attempts at equality."[229]

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[224] Arab Charter, art. 3(1). See also UNDP *Arab Development Report 2005* on how equality is "at the heart of Islam", at 144.
[225] *Ibid,* art. 11.
[226] *Ibid,* art 12.
[227] *Ibid,* arts. 34 and 34 (4).
[228] *Ibid,* arts. 25 and 40.
[229] M. Rishmawi (2005), 375. Special Rapporteur on Religion (2002).

Other claw back clauses in violation of article 27 of the Vienna Convention on the law of Treaties include provisions on the right to freedom of movement which guarantees a person the right "to freely choose his (sic) residence in any part of that territory in conformity with the laws in force."[230] This is potentially problematic for some Arab women whose national laws require the permission of a husband, father or guardian to be able to exercise their right to freedom of movement. Echoing the African Protocol on Women's Rights, the Charter also seeks to make nationality of children subject to "domestic laws on nationality".[231] Although the national laws of some States recognise that a child can acquire the nationality of her mother, the reservations made to article 9(2) of CEDAW on this issue, suggests that many do not.[232] The Arab Charter not only enshrines "a father preference" but also clearly discriminates against women, and indirectly, children. Also problematic is the family provision which provides that family is constituted by marriage between a man and a woman and that "The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution".[233] Again recalling the reservations to CEDAW one is reminded that many of them pertain to article 16 on the family. Regulating marriage by reference to existing national norm, which the CEDAW, Human Rights Committee and CESCR have all identified as problematic is to seek to apply a lower standard at the regional level than is provided for at the international level. Also problematic is the narrow construction of family which ignores CEDAW and Human Rights Committee jurisprudence on the plurality of family form, all of which require support and protection.[234] Moreover, it looks like an attempt to roll back the gains made by women. This is unfortunate as States such as Algeria[235] and Morocco[236] have, in amending their personal status laws to better comply with international human rights norms, shown that it is possible to improve the rights of women within the family. Indeed in its third periodic report under the ICCPR, Algeria noted:

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[230] *Ibid,* art. 26(1).
[231] Arab Charter, art. 29 (2).
[232] States reserving article 9 (2) include Kuwait, Lebanon, Tunisia and Oman. See also Special Rapporteur on Religion (2002), para. 38.
[233] *Ibid,* art. 33 (1).
[234] CEDAW general recommendation 21; Human Rights Committee general comment 19 on family**;** Human Rights Committee general comment 28**;** see also M. Rishmawi (2005), 374.
[235] Algeria, Third periodic report, CCPR/C/DZA/3, paras. 123-128.
[236] Morocco, Fifth periodic report, CCPR/C/MAR/2004/5, paras. 59-66.

"The many social changes that had taken place in Algerian society, combined with the need to bring domestic legislation into line with international conventions ratified by Algeria, in particular the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child, made it natural that the Code should be revised."[237]

Seeking to enshrine national law in a human rights instrument removes the incentive for States to act and permits the retention or indeed enactment of laws that discriminate against women.

The absence of a complaints mechanism in the Charter is a shortcoming which is exacerbated by the non ratification of many Arab States of optional mechanisms of international bodies which would permit citizens to bring complaints before these bodies. [238] Finally, the confusion about the hierarchy between national and international law is exacerbated by article 43:

"Nothing in the Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set in force in international and regional human rights instruments which States parties have adopted or ratified, including the rights of women, the rights of the child and the rights of the persons belonging to minorities."

This provision seems to be based on the assumption that national law and international and regional human rights instruments are at one in their construction and protection of women's rights. Clearly they are not.[239] International law obligations voluntarily entered into by States parties should prevail. As noted in article 1(4) of the Charter it is important to "entrench the principle that all human rights are universal, indivisible, interdependent and interrelated".[240]

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[237] Algeria, third periodic report, para. 123.
[238].See M. Rishmawi (2005), 365.
[239] States enter reservations to CEDAW but do not enter reservations to ICCPR and the ICESCR although some of the reservations to CEDAW clearly also apply to provisions of the ICCPR and the ICESCR. States with reservations to CEDAW but not the ICCPR or the ICESCR include Libya, Morocco and Tunisia. M. Rishmawi (2005), 368 n.
[240] See S. Waltz "Universal Human Rights: the Contribution of Muslim States" (2004) 26 *HRQ* 799.

PART C – MAINSTREAMING WITHIN THE UN

The UN has in recent decades made a concerted effort to bring the interests of women, and indeed other groups, from 'margin to centre'. In addition to proclaiming that women's rights were human rights, the Vienna Declaration, 1993 also proclaimed that "The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights." [241] There was a demand that women's rights "be integrated into the mainstream of United Nations wide activity".[242] This call was taken up at the 1995 Beijing Conference.[243] Thereafter, the policy of integrating a gender perspective into the work of the UN was formally adopted. The UN has sought to integrate gender through a process called mainstreaming which it defines as:

"…the process of assessing the implications for women and men of any planned action, including legislation, policies and programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality."[244]

Although there have been criticisms of the UN's mainstreaming efforts, [245] there has been a marked improvement in the consideration of women's rights within the UN not least in the work of human rights committees and special procedures. This section looks briefly at treaty body jurisprudence as it pertains to laws that discriminate against women. It concentrates on CEDAW jurisprudence on laws that discriminate

[241] Vienna Declaration and Programme of Action, 1993, UN. Doc. A/CONF, 157/24 .
[242] UNHCHR *Report of the Expert Group Meeting on the Development of Guidelines for the Integration of a Gender Perspective into United Nations Human Rights Activities and Programmes,* E/CN.4.1996/105, 20 November 1995; *UN Coordination of the Policies and Activities of the Specialized agencies and other bodies of the United Nations* system, E/1997/66, 12 June 1997. Gallagher, A. "Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System" (1997) *HRQ* 283, 284. DAW/OSAGI *Gender Mainstreaming: An Overview* (NY, UN, 2001), DAW/OSAGI *Gender Mainstreaming: Strategy for Gender Equality* (NY, UN, 2001).
[243] Beijing Declaration and Platform for Action, para.229.
[244] ECOSOC, Agreed Conclusions 1997/2, ch.1, para. A.
[245] H. Charlesworth "Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations" (2005) 18 *Harvard Human Rights Journal* 1. S. Kouvo "The United Nations and Gender Mainstreaming: Limits and Possibilities" in D. Buss and A. Manji (eds) *International Law: Modern Feminist Approaches* (Oxford, Hart, 2005), 237.

against women. Thereafter the work of special procedure mandate holders in this area is considered in outline.[246]

Treaty Bodies

Prior to the mid 1990s the human rights treaty bodies, apart from CEDAW, did not, in their general comments, pay much attention to the specific violations of women's human rights.[247] In 1998, the Human Rights Committee acknowledged that it had hitherto not taken a sufficiently gendered approach in it is interpretation of Covenant provisions in its general comments.[248] The change was brought about by the move towards mainstreaming that followed the Vienna conference.[249] It would appear that hereafter treaty bodies took seriously the Secretary-General's injunction that in the field of human rights mainstreaming "involves realizing that there is a gender dimension to every occurrence of a human rights violation."[250] This can be seen by the adoption of general comments 28 by the Human Rights Committee,[251] 16 by the CESCR and 25 on intersectional discrimination by CERD, amongst many others. The consideration of treaty jurisprudence throughout this report is testament to the greater attention being paid by treaty bodies to issues pertaining to women's rights including laws that discriminate against them.[252] Although receiving fewer communications from women than from men, the Human Rights Committee has dealt with complaints pertaining to the rights of minority women,[253] discriminatory laws on nationality[254] and social security,[255] reproductive issues,[256] dress[257] and temporary special measures.[258]

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[246] A consideration of the UN review process is beyond the scope of this report. See in general (2007) 7 *Human Rights Law Review* for an interesting collection of papers on this topic.

[247] D. Otto (2002), 22. See also United Nations HRI *Integrating the Gender Perspective into the Work of the United Nations Human Rights Treaty Bodies,* HRI/MC/1998/6, 3 September 1998.

[248] HRI/MC/1998/6, 3 September 1998, para 67

[249] D. Otto (2002) 22. See also *UN Integrating the Gender Perspective into the work of the United Nations Treaty Bodies,* HRI/MC/1998/6, paras. 4-9.

[250] Report of the Secretary-General on the Question of Integrating the Human rights of Women throughout the United Nations system, E/CN.4.1998/49, 25 March 1998, para. 9.

[251] See also Human Rights Committee "Violence against Women in the Concluding Observations, General Comments, and Jurisprudence of the Human Rights Committee", Internal document prepared for DAW, September 2005.

[252] See also W. Vandenhole (2005) and A/HRC/4/104, 15 February 2007.

[253] *Lovelace v. Canada,* Communication No. 24/1977, July 1981.

[254] *Aumeeruddy Cziffra v. Mauritius,* (2000) AHRLR 3, Human Rights Committee, 1981.

[255] *Broeks v. the Netherlands,* Communication No. 172/84, 9 April 1987; *Zwaan-de Vries v. Netherlands*, Communication No. 182/84, 9 April 1987; *Vos v. the Netherlands,* Communication No. 218/1986, 29 March 1989.

[256] *Llantloy Huaman v. Peru,* Communication No. 1153/2003.

There is greater cross-pollination between committees aided in part by the regular joint meetings of Committee chairpersons. It is not uncommon for reference to be made to the concluding observations of a different committee in the process of "constructive dialogue" with a State party. Moreover, it is not unknown for committees to cite each other's jurisprudence. An example of this is the concern expressed by the Committee on the Protection of Migrant Workers when considering the Mexico's initial report to the Committee where it noted:

"However, the Committee remains concerned-like the Committee on the Rights of the Child-at the situation of extreme vulnerability of a great many unaccompanied minors…which leaves them at very high risk of exploitation of various kinds…"[259]

CEDAW

In its jurisprudence, the committee has always realised the importance of challenging discriminatory laws. It is currently working on a general recommendation on article 2 on State obligations.[260] The first CEDAW general recommendation to mention discriminatory laws was the fifth on temporary special measures which noted that although much had been done to repeal or modify such laws, there was still a need to "fully implement the Convention by introducing measures to promote de facto equality between men and women."[261] As noted in part A of the report, the use temporary special measures to address discrimination against women has gained currency. In its last general recommendation, 25 on temporary special measures CEDAW recommends that States parties:

"…should include, in their constitutions or in their national legislation, provisions that allow for the adoption of temporary special measures. The Committee reminds States parties that legislation, such as comprehensive anti-discrimination acts, equal opportunities acts or executive orders on women's equality can give guidance on the type of temporary special measures that should be applied to have a stated goal, or goals in given areas. Such guidance can also be contained in specific legislation on

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[257] *Hudoyberganova v Uzbekistan,* Communication No. 931/2000, 5 November 2004.
[258] *Guido Jacobs v. Belgium,* Communication No. 943/2000, 7 July 2004.
[259] Committee on the Protection of the rights of Migrant workers and members of their families, Concluding Observations: Mexico, CMW/C/MEX/CO/1, 20 December 2006, at para. 41.
[260] Center for Reproductive Rights "Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW): Comments for the formulation of general recommendation No. 26" CRR, New York, July 19, 2004. See also A. Byrnes, M. Hermina Graterol and R. Chartres *IWRAW Asia Pacific Expert Group Meeting on CEDAW Article 2: National and International Dimensions of State Obligation,* 14-16 February, Kuala Lumpur, Malaysia, Background Discussion Paper, prepared February 2007, revised May 2007. Available at: http:///www.iwraw-ap.org.
[261] CEDAW general recommendation 5. See also CEDAW general recommendation 8.

employment or education. Relevant legislation on non-discrimination and temporary special measures should cover governmental actors as well as private organizations or enterprises."[262]

It is in its general recommendations on violence that CEDAW first actively considered the impact of law on the ability of women to enjoy their rights. In general recommendation 12 it called on States parties to provide information on legislation that was in force to protect women "against the incidence of violence in every day life (including sexual violence, abuses in the family, sexual harassment in the workplace etc).[263] Interestingly while it was silent on the use of law in its general recommendation 14 on female circumcision[264], by the time of its influential general recommendation 19 on violence against women, legislation was seen as an important tool in the armoury for eradicating violence against women hence States were asked to consider changing their laws to deal with the myriad disadvantages faced by women as a result of gender based violence. Focusing on article 6 on trafficking and exploitation of prostitution, the Committee noted that because of their unlawful status prostitutes may be marginalized and that "they need the equal protection of laws against rape and other forms of violence."[265] The Committee further noted that armed conflict sometimes lead to an increase in sexual violence against women requiring "specific protective and punitive measures."[266] In its recommendations, the Committee identified several legal measures that should be taken to eradicate violence against women including "criminal penalties where necessary and civil remedies in case of domestic violence"[267] and also the suggestion that States introduce "legislation to remove the defence of honour in regard to the assault or murder of a female family member."[268]

CEDAW has also spent time considering the disadvantages experienced by women in the workplace and also the non recognition of their domestic labour.[269] In so doing, it

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[262] CEDAW general recommendation 25, para. 31.
[263] CEDAW general recommendation 12, para. 1.
[264] This was remedied in CEDAW general recommendation 24 on health, para. 15 (d).
[265] CEDAW general recommendation 19, para. 15.
[266] *Ibid,* paras. 16, 24 (g) and (h). See also CEDAW general recommendation 24, para. 15 (a).
[267] CEDAW general recommendation 19, para 24 (r) (i) and also para. 24 (t) (i).
[268] *Ibid,* para. 24 (r) (ii).
[269] CEDAW general recommendation 16 on Unpaid women workers in rural and urban family enterprises, UN Doc. A/46/38 (1991); CEDAW general recommendation 17 Measurement and

has urged States to create implementation machinery to put into place the provisions of CEDAW and the ILO Convention on equal pay for work of equal value[270] and also to put into place laws outlawing sexual harassment in the work place.[271]

It is in its consideration of family life and the discrimination that women experience that CEDAW has paid the most attention in both state reporting and also consideration of discriminatory laws.[272] To mark the international year of the family in 1994, the Committee produced general recommendation 21 on equality in marriage and family relations. It focused on articles 9 on nationality, 15 on equality and 16 on family relations. Identified as problematic are marital property systems that result in women losing their capacity, discriminatory procedural laws and domicile laws that indicate a wife's domicile is to follow that of her husband.[273] Identified as discriminatory and deserving of attention are States whose laws permit polygyny and which do not have a minimum age for marriage or provide for compulsory registration of marriages.[274] Omissions in law and specifically the non recognition of de fact unions are identified as requiring State attention.[275]Discriminatory laws privileging parental responsibility of married over unmarried parents or mothers over fathers are to be addressed.[276] Similarly laws enshrining discriminatory property entitlements on death or divorce are to be amended.[277]

In its general recommendation on political participation, CEDAW argues that compliance with and implementation of the rights of women is better in democratic States where there is "full and equal participation of women in public life and decision making."[278]In addition to using temporary special measures[279] to increase

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quantification of the unremunerated domestic activities of women and their recognition in the gross national product, UN Doc. A/44/38 (1991).
[270] CEDAW general recommendation 13 on equal remuneration for work of equal value, UN Doc. A/44/38 (1989).
[271] CEDAW general recommendation 19, para. 24 (t) (i).
[272] CEDAW general recommendation 21, paras.45-50.
[273] CEDAW general recommendation 21, paras 7-9, 17 and 31.
[274] *Ibid,* paras. 14, 16, 36 and 39. See also CEDAW general recommendation 24, para. 15 (d).
[275] *Ibid,* paras. 13 and 18.
[276] *Ibid,* para. 19.
[277] *Ibid,* paras. 25-35.
[278] CEDAW general recommendation 23, para. 14.
[279] *Ibid,* paras. 15 and 43.

the participation of women, States were obliged: to ensure that effective legislation is enacted prohibiting discrimination against women" [280] and also that:

"States parties are under an obligation to take all appropriate measures, including the enactment of appropriate legislation that complies with their Constitution, to ensure that organizations such as political parties, which may not be subject directly to obligations under the Convention, do not discriminate against women and respect the principles contained in articles 7 and 8."[281]

Reproductive rights throw up challenges when considering the principle of equality and non discrimination. Clearly the liberal model of equality based on comparing similarly situated men and women does not work. Instead, there is a need to recognise differences between the sexes whilst ensuring that those differences do not result in one group, usually women, experiencing discrimination. In its general recommendation 24 on health, CEDAW defines States' obligations as including:

"The duty…to ensure, on a balance of equality of men and women, access to health care services, information and education implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these obligations."[282]

While not prescribing abortion, CEDAW has recommended that punitive abortion laws should be amended as these lead to maternal mortality and morbidity.[283] Other "women specific" legal requirements included passing laws prohibiting female genital mutilation and early marriage.[284] Moreover, States parties: "should not permit forms of coercion such as non-consensual sterilization, mandatory testing for sexually transmitted diseases or mandatory pregnancy testing as a condition of employment that violate women's rights to informed consent and dignity."[285]

The coming into force of the Optional Protocol to CEDAW, 1999[286] provided an avenue for individuals to bring individual complaints alleging violations of the rights

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[280] *Ibid,* para. 47 (a). See also para 48 (a).
[281] *Ibid,* para. 42.
[282] CEDAW general recommendation 24, para. 13.
[283] *Ibid,* para. 31(c): "When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion." See also para. 11.
[284] *Ibid,* para. 15 (d).
[285] *Ibid,* para. 22.
[286] Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, 1999, GA Res 54/4, 6 October 1999. Sokhi-Bulley "The Optional Protocol to CEDAW: First Steps" (2006) 6 *Human Rights Law Review* 143.

in the Convention to the Committee. For those States not opting out, it also provided for the Committee to invoke article 8, the inquiry procedure, to investigate reports of grave or systematic violations of rights. It is noteworthy that one of the first cases dealt with by the Committee under the complaints provisions of the Optional Protocol to CEDAW relates to violence against women in the family and resulted in a recommendation that the State change its laws.[287]

In *A.T. v Hungary*, a woman had been severely assaulted by her partner on many occasions. She had complained to the police and the courts. However, little concrete assistance had come of her many complaints. A complaint was made to CEDAW. The Committee decided that Hungary had violated articles 2 (a), (b) and (e) as well as articles 5(a) and 16 of CEDAW. The Committee censured Hungary for not having provision in its law for restraining or protection orders. Moreover, it was censured for the absence of shelters to house Ms A.T and her children. The existing shelters had failed to offer refuge to Ms AT because one of her children was disabled and the refuges could not cope with children with disabilities. The prioritisation by the civil courts of the abuser's property rights over the victim's right to be protected from violence came under criticism. Echoing the recommendations found in its General Recommendation No. 19 on Violence Against Women and the General Assembly Declaration on the Elimination of Violence Against Women, 1993, the Committee made clear that to address the failings identified in the *A.T.* case, would require the State to undertake a range of measures which included providing legal aid, giving Ms AT and her children a safe and secure home, ensuring that she received the requisite child support, as well as compensation for the harm that she had suffered. In addition to implementing a national policy on the prevention of violence within the family, officials including judges and the police should be given training on CEDAW and its Optional Protocol. Moreover the State was to ensure the introduction of a specific law outlawing violence against women[288]and to: "Investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards."

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[287] *A.T. v Hungary,* Communication No. 2/2003, views adopted on 26 January, thirty-second session.
[288] *A. T. v. Hungary,* para 11 (e).

The first inquiry undertaken by the CEDAW was to Mexico to investigate reports of abduction, rape and murder of women, made by two non government organisations (NGOs).[289] The NGOs alleged that more than 230 women had been killed near Ciudad Juarez and that little had been done to investigate their deaths and disappearances or indeed to bring the perpetrators to justice. Families of the victims had been kept in the dark. The Committee sent two of its members to investigate. In a long and comprehensive report the Committee detailed the widespread violence against women and the fact that a culture of impunity appeared to have developed. The Committee produced a comprehensive list of recommendations for Mexico to implement. These included timely investigation of crimes committed against women, training of police and judges, ensuring that families were kept appraised of progress in investigations and that the law was enforced with punishments being meted out to the guilty and adequate remedies including compensation for those who had experienced violations of their rights. The State was asked to report on progress in its next report under article 18 of the Convention.

CEDAW has also, from the outset, engaged with States about laws that discriminate against women and also de facto discrimination.[290] Questionnaire responses indicated that in some instances, changes had been made to the law as a result of the State-committee dialogue so that the OHCHR response from Guatemala noted: "a provision regarding the possibility of avoiding prison for a rapist that would marry the victim

[289] CEDAW Committee "Report on Mexico Produced by the Committee on the Elimination of all Forms of Discrimination against Women Under article 8 of the Optional Protocol to the Convention and Reply from the Government of Mexico", UN Doc. CEDAW/C/2005/OP.8/MEXICO, January 27, 2005.

[290] Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined second and third periodic report of Azerbaijan (CEDAW/C/AZE/2-3) at its 765th and 766th meetings, on 23 January 2007.
CEDAW/C/AZE/CO/3, paras. 13 and 14. Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined third and fourth periodic reports of Belgium (CEDAW/C/BEL/3-4) at its 559th and 560th meetings, on 10 June 2002 (see CEDAW/C. SR.559 and 560) CEDAW A/57/38 part II (2002), para. 166. Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined initial, second, third, fourth and fifth periodic report of Brazil (CEDAW/C/BRA/1-5) at its 610th, 611th and 616th meetings on 1 and 7 July 2003 (see CEDAW/C/SR.610, 611 and 616), CEDAW A/58/38 (2003) paras. 104-5. Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined fourth and fifth periodic report of Burkina Faso (CEDAW/C/BFA/4-5) at its 695th and 696th meetings, held on 14 July 2005 (see CEDAW/C/SR.695 and 696), CEDAW A/60/38 part II (2005), paras. 339 and 340.

was change(d), in part, because there were recommendations of CEDAW to the Guatemalan State in that respect."[291]

Questionnaire responses also identified positive engagement with civil society and the use of shadow reports produced by the lobbyists so that the questionnaire response from WILDAF in Ghana attached the shadow report submitted to CEDAW when considering Ghana's last report.[292] The interaction between NGOs and CEDAW is important to both for committee members learn about the key issues affecting a State from NGO reports and rely on NGOs to lobby and pressure governments to implement the recommendations made in concluding observations. In turn, NGOs realise that opinions and recommendations emanating from international human rights experts are likely to carry greater weight with States and therefore rely on the monitoring efforts of treaty bodies such as CEDAW.[293] In its response to part D of the questionnaire on interaction with human rights bodies, the Nepal based Forum for Women, Law and Development (FLWD) answered as follows:

"3) Have you ever written a shadow report for a treaty body? If yes, please specify which.

Yes.
1. Initial Shadow report on CEDAW, 1999
2. Second and Third periodic Shadow report on CEDAW, 2004.

4) If you have written a shadow report, did you identify laws that discriminate against women?

Yes. The discriminatory laws identified by the study were mentioned in the shadow report and also the critical areas of concern.

5) How did the Committee respond to the shadow report-did they refer to the laws that your organisation had identified as discriminating against women in questioning the State or in concluding observations? If yes, please provide the name of the committee and year.

Yes. It was responded by the CEDAW Committee in 1999 and 2004.

6) Are the concluding observations of human rights committees disseminated in your country?

[291] OHCHR Guatemala questionnaire response Part D:8.
[292] The website of the Asia Pacific International Women's Rights Action Watch also has shadow reports. See http://www.iwraw-ap.org.
[293] S. Engle Merry (2006) 85 and 87.

Yes. The concluding observations were translated into Nepali and disseminated to all the concerned agencies and also in the various programs.

7) Have you or your organisation used the concluding observations of the human rights committees to lobby your government to change the law?

Yes.

8) If yes, with what result?

It was strongly and effectively used to advocate and lobby to amend the discriminatory laws against women."

Equally positive was the response from Georgia:

"3) Have you ever written a shadow report for a treaty body? If yes, please specify which.

Georgian NGOs prepared two shadow reports on the implementation of CEDAW. In 1999 the first report was presented to the CEDAW Committee. In August 2006 the joint second and the third report was discussed by the SEDAW committee where also two shadow reports were submitted by various NGO groupings. UNCT in Georgia have not so far prepared separate report for CEDAW.

4) If you have written a shadow report, did you identify laws that discriminate against women?

N/A

5) How did the Committee respond to the shadow report-did they refer to the laws that your organisation had identified as discriminating against women in questioning the State or in concluding observations? If yes, please provide the name of the committee and year.

Committee on Elimination of Discrimination against Women Chamber B, 747th & 748th Meetings, and Women's anti-discrimination committee encouraged Georgia to widen scope of efforts to promote gender equality; experts express concern regarding liberalization of employment rules, lack of state regulation, vulnerability of female refugees.

6) Are the concluding observations of human rights committees disseminated in your country?

Yes (Relevant NGOs are usually aware of the concluding observations)

7) Have you or your organisation used the concluding observations of the human rights committees to lobby your government to change the law?

Yes

8) If yes, with what result?

> National Action Plan (NAP) on Gender Equality Issues which havebeen held up for a while by Government is now put on the agenda again for further consideration."

While this is clearly impressive, it is worth noting that it is unusual for concluding observations to be widely disseminated or indeed translated into local languages. The questionnaire response from the Solomon Islands noted: "Concluding observations are not well disseminated in the Solomon Islands but to some extent they are taken into consideration within various key stakeholders."[294] Similarly FEMNET in Kenya said: "The concluding observations are not usually disseminated in Kenya. There are often found within civil society organizations, which disseminate the same during stakeholders meetings and workshops."[295]

Special Procedures[296]

Created more than two decades after the establishment of the UN, Special Procedures[297] have come to take on an important role in monitoring and enhancing the human rights work of the organisation. At the start of 2007, there are 38 country and thematic special procedures comprising 28 thematic mandates, including four working groups, and 10 country mandates.[298] Of the 28 thematic mandates, eight focus on civil and political rights, eight on economic, social and cultural rights and eight focus on specific groups (including violence against women). The four working groups deal with arbitrary detention, enforced and involuntary disappearances, mercenaries and people of African descent. The 10 country mandates cover Burundi, Cambodia, DPR Korea, DRC, Haiti, Liberia, Myanmar, the Occupied Palestinian Territories, Somalia, and Sudan.

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[294] OHCHR Solomon Islands questionnaire response Part D:6.
[295] FEMNET Kenya questionnaire response Part D:6.
[296] For a more comprehensive outlook see: I. Nifosi *The UN Special Procedures in the Field of Human Rights* (Antwerp, Intersentia, 2005).
[297] See H. Hannum "Reforming the Special Procedures and Mechanisms of the Commission on Human Rights" (2007) 7 *Human Rights Law Review* 73.
[298] United Nations Special Procedures Facts and Figures 2006 (Geneva, OHCHR) at http:www.ohchr.org/English/bodies/chr/special.index.htm. (For the most updated information see: Special Procedures of the Human Rights Council at http://www2.ohchr.org/english/bodies/chr/special/index.htm.)

The work of special procedures mandate holders, who are independent experts not in the employment of the UN, includes country visits, receiving and managing communications and reporting to the Human Rights Council. Increasingly mandate holders receive joint communications and may make joint statements or findings. Still, it is noteworthy that figures for 2005 show that only 14% of communications received were from women. Figures for 2006 show a three per cent increase to 17% women applicants. The figure for communications received from men was much larger at 76%. Seven per cent were unaccounted for. The gender imbalance in communications can be interpreted as reflecting women's ignorance of the mechanisms and the fact that they can if they wish submit complaints to any of the special procedure mandate holders, or as reflecting the fact that the existence of two "women specific mandates" on violence and trafficking has resulted in women thinking that these are the only topics that cover them and that they can complain about. Any other experiences falling out of these two broad areas are thus not complained of. Of the 1115 communications sent in 2006, 59 communications were sent on legislation by 18 mandates including Terrorism, Freedom of Religion, Internally displaced persons and independence of judges and lawyers.[299] There is no specific information on challenges to laws that discriminate against women, although one mandate holder, on housing has sent out a questionnaire covering discriminatory laws which will be considered in this section.[300]

As already noted, there are two "women specific" mandates, one on the causes and consequences of violence against women[301] and the other on trafficking in persons especially in women and children.[302] Their work has focused on both law and policy and practice which allow the practices under consideration to occur as well as providing recommendations for amendments to laws and also more proactive government and civil society engagement with the issues.

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[299] *Ibid,* 2.
[300] Special Rapporteur on adequate housing, Questionnaire on women and adequate housing (Commission on Human rights resolutions 2002/49 and 2003/22), available at: http://www.unhcr.ch/housing.
[301] Special Rapporteur on violence against women, its causes and consequences, CHR Res. 1994/45 (establishing mandate) and CHR Res. 2003/45 (extending mandate).
[302] Special Rapporteur on trafficking in persons, especially in women and children, CHR Res. 2004/110.

Thematic mandates mentioning women or gender include the Special Rapporteur on housing,[303] Special Rapporteur on the right to education,[304] Independent expert on the question of human rights and extreme poverty,[305] Special Rapporteur on the right to food,[306] Special Rapporteur on health,[307] Special Representative of the Secretary General on the situation of human rights defenders,[308] Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples,[309]Representative of the Secretary-General on the human rights of internally displaced persons,[310], Special Rapporteur on Freedom of Expression,[311] Special Rapporteur on the rights of migrants,[312] Special Rapporteur on freedom of religion or belief,[313]Independent expert on minority issues,[314]Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,[315]the working group on people of African descent,[316] working group on enforced or involuntary disappearances.[317]

Even without a specific gender focus within their mandates, it is important to acknowledge that there is greater awareness of gender within the work of special procedures. This can be seen as part of the mainstreaming efforts underway in the UN since the mid 1990s. Analyses of the work done by special procedure mandate holders

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[303] Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non discrimination in this context, CHR Res 2000/9 (establishing mandate).
[304] Special Rapporteur on the right to education, CHR Res. 1998/3 (establishing mandate).
[305] Independent expert on the question of human rights and extreme poverty, CHR Res. 1998/25 (establishing mandate) and CHR Res.2004/23 (extending mandate).
[306] Special Rapporteur on the right to food, CHR Res. 2000/10 (establishing mandate) and CHR Res.2003/25 (extending mandate).
[307] Special Rapporteur of the Commission on Human Rights on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, CHR. Res 2002/31 (establishing mandate) and CHR Res. 2005/24 (extending mandate).
[308] Special Representative of the Secretary-General on the situation of human rights defenders, CHR Res 2003/64 (extending mandate), preamble.
[309] Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, CHR Res. 2001/57 (establishing mandate) and CHR Res. 2004/62 (extending mandate).
[310] Representative of the Secretary General on the human rights of internally displaced persons, CHR Res. 2004/55 (establishing mandate), preamble.
[311] Special Rapporteur on Freedom of Expression, CHR Res.1997/27.
[312] Special Rapporteur of the Commission on Human Rights on the human rights of migrants, CHR Res. 1999/4 (establishing mandate).
[313] Special Rapporteur on Religion and belief, Human Rights Council resolution 2005/40.
[314] Independent expert on minority issues, CHR Res. 2005/79.
[315] Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, CHR Res. 2004/41 (no gender directions to rapporteur but note to States and donors to incorporate gender perspective in reporting to CAT and also bilateral programmes).
[316] Working group on people of African descent, CHR Res. 2003/30.
[317] Working group on enforced or voluntary disappearances, CHR Res. 2004/40 (extending mandate).

shows that there has, over the years been greater attention paid to issues affecting the enjoyment by women of their rights.[318] While some have identified (discriminatory) laws affecting women's ability to enjoy their rights,[319] many more have focused on the de facto situation of women painting a picture of exclusion.[320] In a series of reports, the Special Rapporteur on housing has examined *de jur*e and *de facto* discrimination against women, considering how the rights of women to enjoy their rights to housing are impacted by poverty, exclusion and disenfranchisement especially as regards ownership of land, legal and attitudinal discrimination and violence against them.[321] The Special Rapporteur prepared a questionnaire focusing on women and the right to adequate housing aiming to elicit information about both the legal protections offered to women within the various national systems (part one of the questionnaire) as well as the obstacles hampering their enjoyment of housing rights (part two of the questionnaire).[322] With the Special Rapporteur on religion's 2002 report on the impact of religious laws on women's ability to enjoy their rights, this can be said to be the most comprehensive consideration by a thematic rapporteur of legal and social rights of women.

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[318] E/CN.4/2005/68, paras. 4, 10-21, 52 and 55; Special Rapporteur on the right to education, Girl's right to education, E/CN.4/2006/45, 8 February 2005.

[319] See for example Special Rapporteur on Religion 2002 survey; Special Rapporteur on freedom of religion, A/HRC/4/21, 26 December 2006, paras. 36, 38 and 52; Special Rapporteur on freedom of religion or belief, E/CN.4/2006/5, 9 January 2006, paras. 43-51; Special Rapporteur on the right to food, A/58/330, 28 August 2003, paras. 16-18,22-24. Special Rapporteur on Food, Mission to Bangladesh, E/CN.4/2004/10/Add.1, 29 October 2003, paras. 27, 54 (e), 54(f); Special Rapporteur on the independence of judges and lawyers, E/CN.4/1999/60, paras. 41-2, E/CN.4/2000/61, paras. 27, 28; Special Rapporteur on the right to education, Mission to Indonesia, E/CN.4/2003/9/Add.1, 4 November 2002, paras. 30, 31. Independent Expert on minority issues, Mission to Ethiopia, A/HRC/4/9/Add. 3, 28 February 2007, paras. 64, 66, 67-72.

[320] D. Sullivan "Trends in the integration of women's human rights and gender analysis in the activities of the special mechanisms" in UN *Gender Integration into the Human rights system: Report of the Workshop,* 26-2 May 1999, 48-65; Integration of the Human Rights of Women and the Gender Perspective, E/CN.4/2005/68; Report of the Secretary-General on the implementation of resolution 2005/42, integrating the human rights of women throughout the United Nations System, A/HRC/4/104; Special Rapporteur on the Right to Food, Mission to Ethiopia, E/CN/.4/2005/47/Add.1, 8 February 2005, paras. 22. 26, 27. Special Rapporteur on the right to education, Mission to China, E/CN.3004/45/Add.1, 23 November 2003, paras 22 and 24. Report of the Independent Expert on minority issues, "Achieving the MDGS for minorities", A/HRC/4/9/Add.1, 2 March 2007, paras. 55-57. Independent expert on minority issues, Mission to Hungary, A/HRC/4/9/Add.2, 4 January 2007, paras. 57, 70-71, 93; Independent expert on minorities, A/HRC/4/9, 2 February 2007, paras 51, 52.

[321] Special Rapporteur on adequate housing, E/CN.4/2001/51, 25 January 2001, paras. 34-36, 68; Special Rapporteur on adequate housing, Women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing, E/CN/4/2002/53, 15 January 2002; Special Rapporteur on adequate housing, Women and adequate housing, E/CN.4/2003/55, 26 March 2003; Special Rapporteur on adequate housing, women and adequate housing, E/CN.4/2006/118, 27 February 2006.

[322] Special Rapporteur on adequate housing: Questionnaire on women and adequate housing, available at http:www//unhchr.ch/housing.

It remains true to say that with some notable exceptions, a consistent focus on the rights of women has, at times been missing. This is partly due to the quality of information provided. It is also important to acknowledge that central to the work of thematic mandates is consideration of a particular area of human rights which may necessitate a broader conceptual approach. Restrictions now placed on the length of reports has also meant that it is difficult to explore the way in which violations may affect one group in as much detail as might otherwise have been possible. Moreover, highlighted in both UN analyses and interviews was the need for greater training of mandate holders in using gender analysis in their work.

Questionnaire responses indicate that only a few respondents had had contact with rapporteurs, either from the UN or the regions. The rapporteur most often mentioned was the Special Rapporteur on violence against women, thus suggesting that the one with a specific "women's rights" mandate was the most well known. Positive comments were made about these contacts. Noteworthy was the response from Afghanistan noting that in addition to handling two cases from Afghanistan, the Special rapporteur on violence had visited the country in July 2005. As a result of her visit which included a visit to the female wing of Kandahar prison, there had been "increased interest in women's rights in Afghanistan at the Human Rights Commission in 2005."[323]

Responses from Nepal and Palestine revealed that there had been contact with more than one special rapporteur. The Palestinian Women's Legal Centre (WLAC) identified meetings with the country rapporteur and the special rapporteurs on education and violence against women. In responding to the question: were issues affecting women, especially laws that discriminate against women raised in your correspondence or meetings, the WLAC responded: "yes**,** but not in a condensed and focused way."[324]

OHCHR-Nepal invited the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples; and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related

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[323] UNAMA questionnaire response Part E:4.
[324] WLAC questionnaire response Part E:3.

intolerance as part of an advice mission to assist OHCHR-Nepal with its work on discrimination and social exclusion from 23-27 April 2007.

"Within the meetings with Special Rapporteurs, discrimination against women was considered as one of the major challenges in Nepal. Dalit women and girls endure the double burden of caste and gender discrimination. Participants mentioned several obstacles to the enjoyment of human rights by women: lack of representation in political parties, especially at the higher echelons of power; discrimination against Dalit women within their own families; lack of access to education and health care; lack of access to land. Women are also denied the right to inherit; they are subjected to labour exploitation; they are the subjects of massive migration to urban areas and to international migration; they are the victims of smuggling by organized crime syndicates. Indigenous women for their parts are particularly vulnerable to internal displacements; informal labour market arrangements. Women in general are victims of a whole range of violations including violence and sexual exploitation."[325]

On the usefulness of the meetings, the OHCHR in Nepal responded: "The meetings helped inform the Special Rapporteurs about the situation of various groups in Nepal, so that they can provide informed advice to OHCHR-Nepal as it seeks to address issues of discrimination."[326]

[325] OHCHR-Nepal questionnaire response Part D:3.
[326] *Ibid*

PART D – LAWS THAT DISCRIMINATE AGAINST WOMEN

It is clear from the responses to the sections on laws that discriminate that follow that direct discriminatory laws are a feature of the legal order in many States.[327] The situation is exacerbated by the co-existence of plural systems of law co-existing sometimes harmoniously, but more often in conflict with each other and the Constitution.[328] Laws governing family life were the ones most likely to be identified as containing discriminatory provisions.[329] Under this rubric could be found laws on age of marriage, consent to marriage, citizenship, divorce, guardianship of children and marital power of the husband. Other problematic areas included prejudicial procedural provisions in rape or sexual assault laws, employment laws and business related laws. One of the responses from Nepal noted that an updated survey carried out in 2006 by the Forum for Women, Law and Development: "identified **173** legal provisions of the 83 various Acts and Regulations are discriminatory against women."[330] Of these, 65 have been amended by the Gender Equality Act 2006.[331] There have also been judicial decisions ruling that discriminatory laws are *ultra vires*[332] leading the OHCHR Nepal office to put the figure of laws that discriminate at 101 pieces of legislation.[333] In its response to the questionnaire, the Women's Centre for Legal Aid and Counselling based in Jerusalem, noted that civil society had "presented **65** amendments for all laws with a special focus on Personal Status law" to the Model Parliament Project.[334] In its Pacific survey, UNIFEM listed 114 indicators to measure legislative compliance with CEDAW. Of the nine islands surveyed, Fiji was said to have the best compliance levels, completely meeting 49 of the 114 indicators listed.

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[327] Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined initial, second and third periodic report of Benin (CEDAW/C/BEN/1-3) at its 687th and 688th meetings on 7 July 2005 (see CEDAW/C/SR.687 and 688), CEDAW, A/60/38 part II (2005), para. 145.

[328] C. Mackinnon "Sex Equality Under the Constitution of India: Problems, Prospects and Personal Laws" (2006) 4 *International Journal of Constitutional Law* 181.

[329] For example the response from Niger listed 8 areas of discrimination in the Civil Code. ONG DIMOL response to questionnaire A:3. Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined initial, second, third, fourth and fifth periodic report of the Congo (CEDAW/C/COG/1-5 and Add.1) at its 606th and 607th meetings, on 27 and 29 January 2003 (see CEDAW/C/SR.606 and 607), CEDAW, A/58/38 part I (2003), para. 160.

[330] Forum for Women, Law and Development (FWLD) questionnaire response A:3, April 2007.

[331] This law will have far reaching effect in striking down discriminatory laws.

[332] *Ibid,* FWLD Nepal Part A:3 p. 14 and B:1 p. 15.

[333] OHCHR Nepal questionnaire response Part A:3 cited 101 discriminatory laws, May 2007.

[334] S. Hussein Head of Research and Documentation Unit, Women's Centre for Legal Aid and Counselling, OHCHR Questionnaire response Part B:1, April 2007. See also A. An Na'im (ed.) *Islamic Family Law in a Changing World: A Global Resource book* (London, Zed Press, 2002).

This part analyses the responses received to the questionnaires sent out. It does not purport to be a comprehensive review of the laws of all 192 States members of the United Nations. Rather it tries to present a snap shot of some discriminatory laws that remain. While every effort has been made to check on the accuracy of the information provided, it is possible that some States that are listed have amended their laws and others have discriminatory laws. The consultant takes full responsibility for any mistakes and would be grateful to receive corrections. Any inaccuracies are inadvertent and not in any way meant to embarrass either the UN or States parties.

The analysis starts with Part A on constitutional provisions.

i) Constitutional Provisions –Does the national constitution guarantee non-discrimination on grounds of sex and or gender and also equality before the law?

ii) Does the constitution contain provisions dealing with conflict between constitutional guarantees of equality and discriminatory customary or religious laws/norms?

Constitutional guarantees of equality are important because of the principle of constitutional supremacy that prevails in almost all States.[335] If the Constitution is the supreme law of the country, one would expect that other laws would be in compliance therewith.[336] However, States parties' reports to the human rights bodies, the concluding observations of said bodies and indeed responses to the questionnaire all show that where women's rights are concerned, this is clearly not always the case.

Questionnaire responses showed that most States had "universalist constitutions", that is, constitutions that respect international human rights norms of non-discrimination and equality and had explicit provisions outlawing discrimination on grounds of amongst other things, sex or gender[337] and which also upheld the principle of equality

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[335] G. Waylen "Constitutional Engineering: What Opportunities for the Enhancement of Gender Rights?" (2006) 27 *Third World Quarterly* 1209. Chile, fifth periodic report, CCPR/C/CHL/5, paras. 57 and 58.
[336] Beijing Declaration and Platform for Action, para. 232 (b).
[337] The Federal Constitution of Malaysia, arts. 8(1) 8(2); Afghanistan, art. 22; Fiji, arts 38 (1), 38(2); Solomon Islands, s. 15; Georgia, art. 14; Nepal, art 1; Nigeria, s.48; Democratic Spanish Constitution, 1978, art. 14. See also art 1(1) and art 9.(2); Guatemala, art. 4; South Africa, s. 9; Ethiopia, art. 25.

and non discrimination above custom, culture or religion. (Ethiopia, Fiji, Ghana, Georgia, Nigeria, Solomon Islands, South Africa) Some had specific constitutional provisions on women's right to be free from discrimination and other gender related harmful practices. (Afghanistan, Ethiopia, India, Ghana, Nepal).

However, it was noted that some constitutions, while guaranteeing equality before the law, were silent on the relation between potentially discriminatory customary or religious laws and the non discrimination provision.[338] Of Bangladesh the *Ain O Salish Kendra* (ASK) project noted: "Bangladesh Constitution is silent on the matter of plural laws. However, the guarantee of freedom of religion can implicitly be read to protect personal laws."[339]Another Bangladeshi group, the National Women Lawyers' Association was less circumspect arguing: "Personal law regarding marriage, divorce, restitution of conjugal life, inheritance, and guardianship will be prevailed (sic) if there is a conflict between constitutional and personal law."[340]

In Niger it was noted that the silence of the constitution on the relation between the constitutional guarantee of equality in article 8 and the existence of religious and customary laws was because the issue was dealt with in a separate law.[341] The ONG-DIMAL response to the questionnaire noted that to guarantee that article 8 of the constitution is upheld, the law provides that only those customs that do not violate international human rights norms, legislative provisions or laws on public order and security are to be upheld.[342] In case of conflict between a discriminatory provision and the Constitution, then that discriminatory provision is to be referred to the Constitutional Court. Despite this the questionnaire response indicates that there are several discriminatory laws on the books. Also worth noting are the concluding observations of the CRC to the Niger report: "While noting that discrimination is prohibited under the Constitution (art. 8), the Committee is concerned at the persistence of *de facto* discrimination in the State party."[343]

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[338] Afghanistan was one such state.
[339] *Ain O Salish Kendra* (ASK) response to Part A:2 of the questionnaire (May 2007).
[340] Bangladesh National Women Lawyers Association response to Part A:2 of the questionnaire (May 2007).
[341] Niger Law No. 62-11 as amended by Law 2004-50 as cited in ONG-DIMAL response to Part A:2 of the questionnaire (May 2007).
[342] *Ibid.*
[343] Niger, CRC, CRC/C/118 (2002), para. 152.

The CRC concluding observations reinforce the importance of seeing de jure and de facto discrimination as part of the same continuum. Finally, it is here worth recalling that Niger has entered reservations to the provisions of CEDAW (2(f) and 5(a) aimed at tackling de facto discrimination.[344]

In a federal system, the conflict may be between Federal and State law or policy. Nigeria appears not to have a definitive solution to any potential conflict:

"Section 14(3) of the 1999 constitution of the federal republic of Nigeria, entrenched the federal character principle without affirming the principle of equality and non discrimination that should strictly speaking be the basis for the composition of government of the federation or any of its agencies and the conduct of its affairs."[345]

By way of contrast is the Spanish approach to the resolution of potential internal conflict of laws which is documented in the questionnaire response:

"In the event of a conflict arising between the fundamental right to equality established in the Spanish Constitution of 1978 and a State or Regional law that includes some form of discrimination, Spanish Constitution of 1978 (arts. 161 and 163) sets forth several proposals for resolving the conflict. Along these lines, an appeal of unconstitutionality can be made to the Spanish Constitutional Court against the said, allegedly discriminatory law. The declaration of unconstitutionality of the law in question by the Constitutional Court will oblige the State or Regional Parliament that issued this particular law to modify it in whatever respects have been indicated by the Constitutional Court as being contrary to the fundamental right to equality; or as the case may be, the declaration of unconstitutionality by the Constitutional court may affect the entire law; in such a case the entire parliamentary process required for the elimination of the discriminatory content of the law declared unconstitutional by a Constitutional court ruling will have to be initiated."[346]

In a different vein, Professor Marsha Freeman notes with regard to the constitution of the United States of America: "The US constitution, 14th Amendment, has been read to prohibit discrimination against women, but the test is not as rigorous as it is with respect to race discrimination-that is, women's protection is to a lesser standard."[347] She later asserts: "The effort to expand the constitutional protection died a generation

[344] See also R. Holtmaat (2004).
[345] WILDAF Nigeria questionnaire response Part A:5.
[346] Professor Theresa Piconto Novales, questionnaire response at 2.
[347] Professor M. Freeman response to Part A:1 of the questionnaire (May 2007).

ago."[348] Other shortcomings were identified in the shadow report submitted to the Human Rights Committee prior to its consideration of the second and third reports of the United States of America:

"The Fourteenth Amendment's equal protection provision has not been consistently interpreted as protecting women from sex discrimination, and it has not been interpreted to require strict scrutiny of sex-based classifications. Instead, the standard ranges from requiring a 'rational basis' for sex-based distinctions to requiring an 'exceedingly persuasive' justification. The Fourteenth Amendment has not been interpreted to apply to sexual orientation or gender identity discrimination. Nor does it protect women from discrimination on the basis of pregnancy or childbirth. Further, the amendment has been interpreted to require a demonstration of discriminatory intent; it is not sufficient that a law or policy has a disproportionate impact on one sex."[349]

Given these criticisms the shadow report requested that the Human Rights Committee recommend that the USA hold Congressional hearings " on the intent and applicability of a Constitutional amendment assuring equal protection under the law for men and women"[350] and also that the U.S Senate move legislation to provide for the USA to ratify CEDAW without current reservations.[351]

Ironic in light of the global reach of the "Westminster constitutional model", is the absence of a written constitution for the United Kingdom. The questionnaire respondent from the United Kingdom explained:

"The UK does not have a written constitution as such so discrimination provisions are contained within specific statutes such as the Sex Discrimination Act 1975 as amended and the Equal Pay Act 1970. These apply only to certain areas-notably employment and provision of services. The Act has been extended to cover issues of sexual orientation. The UK is a member of the EU and covered by Treaty obligations including the non discrimination provision which relates to employment although its coverage has been extended somewhat by case law. In addition subsequent directives most particularly the framework directive has extended non discrimination measures to sexual orientation, age and religion."[352]

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[348] *Ibid,* response to Part B:1. C.f. Reservation/ Understanding of the USA to ICCPR, arts. 2 (1) and 26 and objections of Finland thereto, available at: http://www.unhchr.ch/html/menu3/treaty4_asp.htm.
[349] Report on Women's Human Rights in the United States under the International Covenant on Civil and Political Rights in response to the second and third periodic report of the United States of America, eighty seventh session, July 2006, at 2 of the Executive summary.
[350] *Ibid*, 2.
[351] *Ibid,* 3.
[352] Professor A. Stewart response to Part A:1 of the questionnaire (April 2007).

Although the majority of the constitutions guaranteed non discrimination on grounds of sex, there were still a few culturally relativist constitutions which, while recognising the principle of equality before the law, upheld customary and other personal laws above the principle of equality. In this category were the constitutions of Kenya and Zambia. Of the Kenyan constitution, the questionnaire response of FEMNET noted:

"Many laws including the Kenyan Constitution are discriminatory against women. It is only in 1997 that the Constitution was amended to outlaw discrimination on the basis of sex, but section 82(4) acts as a 'claw-back clause' by allowing discrimination with respect to adoption, marriage, divorce, burial and devolution of property on the death or other matters of personal law. Hence contravening Article 2(f) of CEDAW that obliges State parties to take appropriate measures to abolish existing laws, regulations and customs and practices that constitute discrimination against women."[353]

The FEMNET response highlighted a further problem created by having a constitution that sanctions discrimination against women, and that was the difficulty of bringing court cases to challenge laws that discriminate against women. If the supreme law of the country permits discrimination in certain spheres, "it is therefore rare to find court cases challenging the law." The lack of a clear anti-discrimination provision covering all laws wherever applied meant that the judges and magistrates were left with a wide discretion to interpret the law as they saw fit.[354] The effect of this was seen in the Zambian response to the questionnaire:

"The discriminatory provision in Zambia is in Article 23 of the Republican Constitution. Article 23 is the non-discrimination clause that prohibits discrimination on different grounds including sex. It has draw-back clauses in sub-article 4 (c) and (d). In these it allows discrimination in the practice of customary law and personal law especially marriage, divorce, devolution of property and custody of children. The effect is that customary law that discriminates against women is not prohibited. Therefore, if the custom posits that a divorced woman is entitled to kitchen utensils, that is what the court will grant her as settlement of marital property. As recent (sic) as 2000 the Supreme Court upheld this in *Chibwe v. Chibwe* where a woman was awarded an equitable share of marital property because the customary law under which she was married allowed it. (*R. Chibwe v. A Chibwe* SCZ Appeal No. 38 of 2000)."[355]

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[353] FEMNET (Kenya) response to Part A:3 of the questionnaire (May 2007).
[354] *Ibid* FEMNET Part C:3.
[355] Email correspondence from WLSA Zambia dated Tuesday 10 April 2007.

Another exemption was noted in Malaysia. While article 4(1) of the Constitution provided that laws that contravened the Constitution were to be considered ultra vires "i.e. Null and void as far as the inconsistency goes"[356] still:

"There are several worrisome exceptions to this rule, for example, Article 8(5) of the Federal Constitution. Pursuant to this Article, certain types of law are not considered ultra vires the constitution even if it is discriminatory (in contravention of Article 8 (2)(prohibiting gender discrimination)) for example, when the law concerns personal laws such as family laws. In this situation, said law shall prevail regardless of whether the provision in question is discriminatory or not."[357]

Human rights bodies have engaged States about the need to change or uphold constitutional provisions to reflect the principles of non discrimination and equality before the law. In respect of the Swiss Constitution, CEDAW notes:

"The Committee commends the State party for including the principle of gender equality in its Federal Constitution, which explicitly mandates legislators to ensure women's *de jure* and *de facto* equality, particularly in the areas of family, education and work, and authorizes legislators to take steps to ensure equality in line with article 4, paragraph 1, of the Convention. The Committee notes with appreciation that the Swiss legal order ensures the primacy of international treaties, including the Convention, in domestic law."[358]

CEDAW regularly recommends that States parties adopt article 1 of CEDAW as the constitutional definition of discrimination, even if the national constitution already guarantees equality between men and women and prohibits discrimination on the basis of sex.[359]

With some exceptions, most States have through their Constitutions, and in some cases separate laws on equality,[360] formally committed themselves to guarantee that there should not be discrimination on grounds of sex and gender and also to upholding the principle of equality for all before the law. However, personal status (family) laws

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[356] Sisters in Islam response to Part A:2 of the questionnaire (May 2007).
[357] *Ibid.*
[358] Switzerland, CEDAW, A/58/38 part I (2003) 20, at para. 101.
[359] See for example Concluding observations to the combined initial, second and third periodic report and combined fourth and fifth periodic report of Angola (CEDAW/C/AGO/1-3 and CEDAW/C/AGO/4-5) at its 655th and 661st meetings, on 12 and 16 July 2004, July 2004 CEDAW, A/59/38 part II (2004), para. 142.
[360] See IWRAW Asia Pacific compendium on gender equality laws at http://www.iwraw-ap.org/resources/laws.htm.

in many jurisdictions show that discrimination against women is ongoing. In its concluding observations to the Ugandan report CEDAW noted:

"While noting that article 33 (5) of the Constitution 'prohibits laws, customs, or traditions which are against the dignity, welfare or interest of women'. The Committee notes with concern the continued existence of legislation, customary laws and practices on inheritance, land ownership, widow inheritance, polygamy, forced marriage, bride price, guardianship of children and the definition of adultery that discriminate against women and conflict with the Constitution and the Convention."[361]

Family Laws:

Age of Marriage

Research undertaken by UNICEF[362] and the Forum for Marriage has shown that despite many legal and policy initiatives both at the UN[363] and regional levels,[364] many States continue to have laws that retain different minimum age of marriage for boys or young men than women.[365] In December 2005 the International Planned Parenthood Federation (IPPF) produced a wall chart showing percentages of girls married by 15 and the percentage of 15-19 year old girls who had ever been married.[366] The figures show that early marriage is serious problem primarily, but not exclusively, in Africa. Out of 146 States surveyed, States with joint percentages (that is for both marriage by 15 and before 19) in excess of 25% included Angola, Bangladesh, Benin, Burkina Faso, Cameroon, Central Africa Republic, Chad,

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[361] CEDAW Concluding observations: Uganda UN Doc A/57/38 (2002), para. 154.
[362] UNICEF *Early Marriage: A Harmful Traditional Practice* (New York, UNICEF, 2005), UNICEF (2007) 4. Forum on Marriage and the Rights of Women and Girls *Early Marriage: Whose right to Choose?* (London, Forum on Marriage and the Rights of Women and Girls, 2000). PLAN International (2007). A. Melchiorre (2004) "At What Age?", available at www.right-to-education.org.
[363] Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutional Practices Similar to Slavery, 1956, adopted by ECOSOC Resolution 608 (XX1) of 30 April 1956, art.2. Convention on Minimum Age of Marriage, Consent to Marriage and Registration of Marriage, 1962, GA Res.1763A (XVIII) of 7 November 1962. General Assembly Resolution adopting the Recommendation Consent to Marriage, Minimum age of Marriage and Registration of Marriages, A/RES/2018 (XX), 1 November 1965, Principle II. CEDAW, art. 16(2); CEDAW general recommendation 21, paras. 36, 38 and 39. Human Rights Committee general comment 28, para.23. CRC general comment 4 on Adolescent health and development in context, UN. Doc. CRC/GC/2003/4 (2003), paras. 9. 39 (g).
[364] ACRWC art 21(2) African Protocol on Women's Rights, art 6 (b).
[365] FWLD notes that in Nepal the Marriage Registration Act, 2028, provides that the minimum age of marriage for young women is 18 while that for young men is 21 (s. 4(3)). FWLD questionnaire response A:3 p. 10.
[366] IPPF Wall Chart revised 6 December 2005. I am grateful to Naana Ooyortey at IPPF for sending this to me.

Democratic Republic of Congo, Cote d'Ivoire, Cuba, Dominican Republic, Ecuador, Eritrea, Ethiopia, Gabon, Gambia, Guatemala, Guinea Conakry, Haiti, Honduras, India, Liberia, Madagascar, Mali, Mauritania, Mozambique, Nepal, Nicaragua, Niger, Nigeria, Pakistan, Senegal, Sierra Leone, Sudan, Syria, Tanzania, Uganda, Yemen, Zambia. Niger with a combined figure of 89% was undoubtedly the one with the most severe problem while in South East Asia it was Bangladesh with 75%. In South and Central America, Nicaragua came top with 53%. The responses to the questionnaires confirm the prevalence of early marriage and different ages for marriage.[367]

Tackling early marriage is important in several respects. Early marriage hinders a girl's chances of continuing with her education and this in turn hampers her life chances. Early marriage has negative health consequences for a girl not least because of the increased likelihood of early motherhood and the attendant health risks. [368] This in turn impacts on the health of any children that she may have. It goes without saying that a correlation has been established between early and forced marriage. As the age of marriage is lower than the legal age of majority in many States, it is understood that the girl will have little, if any say in the choice of marriage partner and not having a legal veto, cannot refuse to comply with the wishes of a parent or guardian.[369] Even where the law provides for annulment of a premature marriage, it may also provide that once the parties reach the age of majority or in the event of pregnancy, a marriage unlawfully contracted due to minority becomes valid, thus by implication condoning early marriage.[370] Compulsion or duress here constitutes a form of child abuse.[371] Indeed the rationale given by many States for the continued discrepancy in age of marriage is that "girls mature faster than boys." However, far from protecting girls, all

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[367] See also Special Rapporteur on education, girls' right to education, E/CN.4/2006/45 paras. 73-75.
[368] CESCR general comment 14 on the right to health, E/C.12/2000/4, CESCR (11 August 2000), para. 22.
[369] Women Living Under Muslim Law (WLUML) *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World* (London, WLUML, 2006), 121.
[370] See combined fourth and fifth periodic report of Burkina Faso, CEDAWC/BFA/4-5, 2:13 on article 15 at 44. In its concluding observations CEDAW urged Burkina Faso to "accelerate the process of legal reform to raise the minimum age of marriage for girls."
Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined fourth and fifth periodic report of Burkina Faso (CEDAW/C/BFA/4-5) at its 695th and 696th meetings, held on 14 July 2005 (see CEDAW/C/SR.695 and 696), CEDAW, A/60/38 part II (2005), para. 340.
[371] Even when the woman is not a minor, it is important that her consent be sought. WLUML identify Central Asia, Fiji, Gambia, Nigeria, Pakistan, Senegal, Sri Lanka, Sudan and Turkey as states where in practice forced marriages exist. WLUML (2006), 85-86. For the legal situation see 90-91. See also CEDAW Concluding observations Vietnam, UN. Doc. A/56/38, paras. 258-9.

this does is to reinforce ideas about their "availability." Moreover, there is the notion that young women (girls) are "less experienced" and likely to be more compliant. This has led to increased sexual and other assaults on young girls whether married or not. Links have already been made between increased sexual assault of young girls "because they are clean" and the spread of the HIV virus. UNICEF also notes that in some regions AIDS orphans are often steered towards early marriage by carers who are unable or unwilling to look after them.[372] By legalising different ages of marriage, the State, by implication can be said to condone these harmful attitudes and ideas. The absence of registration of marriages or in some cases the lack of enforcement of registration provisions makes possible the continuation of child marriages. In this regard it is worth noting that India's declaration to CEDAW article 16(2) that it cannot practically enforce compulsory registration of marriages because of the "variety of customs, religions and levels of literacy"[373] has been successfully challenged in domestic courts.[374] Acknowledging the government's declaration to CEDAW,[375] the Supreme Court noted the disproportionate effect on women of non registration of marriages and ruled that all marriages should be registered.[376] The Supreme Court decision fulfilled an earlier recommendation of CEDAW that India implement a marriage registration system to prevent forced marriages.[377] In its dialogue with CEDAW in January 2007, India revealed that it had still not implemented the recommendation.[378]

Despite these contra indications associated with the practice of early marriage, it is legally sanctioned in many States. In the Democratic Republic of Congo, le Code de la famille provides that girls can marry at 15 while boys can only marry once they reach the age of 18.[379] The situation in Guatemala is even more severe with boys

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[372] UNICEF (2006) *Excluded and Invisible,* 46.
[373] India reservation to article 16(2), available at http://www.ohchr.org/english/law/cedaw/htm.
[374] *Smt Seema v. Ashwani Kumar* T.P. Civ. No. 291 of 2005 (Supreme Court of India 14 February 2006). See also CRR (2006) 33, 75.
[375] *Ibid,* para. 2.
[376] *Ibid,* para. 17.
[377] India, UN. Doc. A/55/38, para. 62
[378] General Assembly Meetings Coverage, CEDAW Chamber A, 761st & 762nd Meetings "Anti-Discrimination Committee urges India to life Convention Reservations, at 7.
[379] Democratic Republic of Congo, Code de la famille, art.352. Provided by MONUC, Division des Droits de l'Homme Lubumbashi, May 2007. See also le Code Civil nigérien, in ONG DIMAL response A:3; Afghanistan UN Asia-Pacific response A:3.

being permitted to marry at the age of 16 as compared to 14 for girls.[380] Similarly the questionnaire response from Tanzania highlighted the following discrimination:

"Regarding the minimum age of marriage, the law is discriminatory in sex in respect of age of marriage. Section 13(1) of the Law of Marriage Act, is discriminatory to a girl child as she can be married before attending the age of majority. On the other hand the male counterpart, the law provides strictly that the age of marriage should be eighteen years and above and not otherwise. The government is urged to amend the law so that a new minimum age for marriage to be 21 years for both male and female." [381]

The Japanese Civil Code also provides for different ages of marriage for males (18) and females (16)[382] leading CEDAW to "express concern that the Civil Code still contains discriminatory provisions, including those with respect to the minimum age for marriage"[383]

The Syrian Law of Personal Status provides that while men marry at 18, young women can marry at 17. [384] However, it also permits earlier (child) marriage with article 18 providing: "If the male adolescent claims [to have reached] puberty after completing his fifteenth year or the female her thirteenth, and they petition to be married, the *qadi* shall permit it if the truth of their claim and their bodily capacity are apparent to him."

Noting that the use of age exemptions allowing earlier marriage if a court allows it, has led to marriage for girls as young as 12 in the Philippines and even lower in Iran, the group Women Living Under Muslim Laws argues that there needs to be: "a clear State policy that such provisions are not to be used as loopholes through which parties can continue to practice child marriage."[385]

In 2007 a group of civil society activists from Sudan presented a list of demands for law reform to the Human Rights Committee which was considering Sudan's third report to the Committee. One of the demands related to the age of marriage with the

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[380] Civil Code, art. 81 in questionnaire response of OHCHR Guatemala to part A:3 (June 2007).
[381] Tanzania Questionnaire response (April 2007).
[382] From Equality Now (2004), 3.
[383] Japan, CEDAW, A/58/38 part II (2003) 130, at para. 371.
[384] Syria Law of Personal Status law No. 95/1953 amended by Law No. 34/1975, and Law No. 18/2003 –as cited in L. Welchman (2007), 165.
[385] WLUML (2006), 120.

request that “The legal age for marriage should be 18, and 16 with judge’s order when it is in the best interest of the concerned parties.”[386] The CRC had, in 2002, already identified age (and its seeming flexibility) as a problem in Sudanese law:

“The Committee is concerned that the definition of the child is unclear under Sudanese law and is not in conformity with the principles and provisions of the Convention. For example, minimum ages may be determined by arbitrary criteria, such as puberty, and discriminate between girls and boys, and in some cases are too low (e.g. the minimum age of marriage is as low as 10 years).”[387]

The Committee had recommended: “that the State party review its legislation so that the definition of the child, the age of majority, and other minimum age requirements conform to the principles and provisions of the Convention, and that they are gender neutral, and ensure that the laws are enforced.”[388]

In the United Kingdom, a child can marry (with the approval of a guardian) and consent to medical treatment at 16, drive at 17 and vote at 18. Writing about Nigeria, Nkoyo also identifies how minimum age for marriage for both sexes is set at 18 in the Child Rights Act, 2003, but that child in the Children and Young Person’s Act is defined as one under 14, while a young person under the same act is between 14 and 17. She further notes that the Immigration Act defines a child as one under the age of 16 while the Matrimonial Causes Act identifies as a major, anyone over the age of 21.[389] Considering the Malawian report, the CRC noted that it was “concerned about the various legal minimum ages, which are inconsistent, discriminatory and or too low.”[390] It urged the State to “establish clear minimum ages for marriage and correct the discrimination between boys and girls.”

Also identified as problematic by Nkoyo is the clash of norms engendered by the existence of plural legal systems.[391] This is a problem identified by the CRC in its consideration of the report of Lebanon where it noted that the existence of 15 different

[386] “Sudanese women’s demands for Law reform”, presented to the Human Rights Committee during the review of Sudan’s third periodic report, July 2007. Forwarded to consultant by OHCHR WRGU.
[387] Sudan, CRC, CRC/C/121 (2002) 53, at para. 243. WLUML notes that “Even where the court’s permission is required for an under-age marriage, this requirement may not offer much protection if the legal minimum age is already extremely low, as in Sudan.” WLUML (2006), 121.
[388] *Ibid,* CRC (2002), at 243.
[389] T. Nkoyo “Revisiting Equality as a Right: the Minimum age of Marriage Clause in the Nigerian Child Rights Act 2003” (2006) 27 *Third World Quarterly* 1299, at 1303.
[390] Malawi, CRC, CRC/C/114 (2002), paras. 397-398**.**
[391] T. Nkoyo, at 1304. See also Egypt, third periodic report, CCPR/C/EGY/2001/3, para. 187.

personal law systems meant that there were in practice, different ages for marriage depending on the system of law governing the parties.

"Noting the average age at which a marriage is concluded (31 years for men and 28 years for women), the Committee is nevertheless concerned that there are many different minimum ages for marriage owing to the existence of 15 personal status laws administered by different confessional groups, and above all that some confessional groups permit marriage to be entered into by boys as young as 14 and girls as young as 9. The Committee is concerned in particular that its previous recommendations to review the minimum age for marriage and to adopt legislative measures with a view to ensuring respect for the rights of girls, especially in relation to preventing early marriage, have not been followed up."[392]

The Committee recommended that the State party: "Take all necessary steps to increase awareness among the confessional groups - e.g. via information campaigns highlighting the *de facto* average age of marriage - about the need to harmonize the minimum age for marriage, to raise it and to make it the same for boys as for girls."[393]

The Afghan response to the questionnaire notes the contradiction between marriage age for boys being set at 18 and girls at 16. However, the questionnaire identifies the internal conflict of laws highlighted by the Electoral Law:

"Therefore the woman should be able to obtain all her legal rights by the age of 16 but the political rights verified in the Electoral Law of Afghanistan in article 13 says; 'a person is eligible to vote in elections if that person is at least 18 years of age on the date of the election."[394]

Further confusion is created by the Juvenile Code which gives majority to girls at 17 and boys at 18.[395] Twelve female parliamentarians have formed a network to challenge this law.[396] One cannot escape the irony of girl children being made to marry at 16 and not yet able to vote on issues that affect them directly, for example, early and forced marriage. By way of contrast, is Algeria which in amended its Family Code and now provides that "the consent of both future spouses is a precondition for the validity of the contract, and the marriageable age is set at 19 years - the voting age - for both men and women."[397] Similarly, in its initial report to

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[392] Lebanon, CRC/C/15/Add.54, para. 28.
[393] *Ibid,* para. 51.
[394] Afghanistan, UN Asia-Pacific response Part A:5.
[395] *Ibid,* part B:1.
[396] *Ibid,* Afghanistan Part B:1.
[397] Ordinance No. 05-02 of 27 February 2005, amending and supplementing Act No. 84-11 of 9 June 1984 establishing the Family Code, Algeria, third periodic report, CCPR/C/DZA/3, para. 127. See also

the Human Rights Committee, Albania reported that it had amended its Family Code and equalised the age of marriage to 18 for both sexes thus removing the 18 for males and 16 for females discrepancy enshrined in the repealed Code from 1982.[398]

In Armenia, the minimum age for marriage was lowered from 18 to 17 with the possibility for a further lowering by one year for females in exceptional circumstances.[399]

Legal initiatives requiring a uniform age of marriage have to be followed up by practical measures. The Afghan questionnaire points to campaigns to ensure that marriages are registered with the courts in an effort to curtail forced or early marriages.[400] However, this requires education not only of the population but also court officials and those that solemnise marriages.

The treaty bodies have identified early marriage as a human rights violation and urging States parties to amend their laws to equalise marriage between boys and girls and also to raise the age of marriage to 18 as a minimum.[401] The CRC has raised the matter with States as diverse as Argentina,[402] Bahrain,[403] Gabon,[404] South Korea,[405] Guinea Bissau,[406] Malawi,[407] Niger,[408] Romania[409] and St Vincent and the Grenadines.[410] Similarly CEDAW has also been vigilant pointing out to Cuba that the exceptions made allowing earlier marriage for the sexes violated both CEDAW and the CRC:

"While noting that the minimum legal age of marriage is 18 years for both girls and boys, the Committee expresses concern that minimum ages of marriage of 14 for females and 16 for males may be authorized in exceptional cases. The Committee

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République Algérienne "Rapport National sur la déclaration solennelle sur l'égalité entre les Hommes et les Femmes", Juin 2006, available at: www.africa-union.org, at 5.

[398] Albania, initial report, CCPR/C/ALB/2004/1.

[399] Marriage and Family Code of the Republic of Armenia, amended 1992. See Armenia, second periodic report, CEDAW/C/ARM/2, paras. 27 and 116.

[400] UNAMA questionnaire response Part B:1.

[401] CRR and University of Toronto (2002), 37.

[402] Argentina, CRC, CRC/C/121 (2002) 8, at paras. 50 and 51.

[403] Bahrain, CRC, CRC/C/114 (2002) 122, at paras. 470, 471, 476 and 477.

[404] Gabon, CRC, CRC/C/114 (2002) 47, at paras. 196 and 197.

[405] Republic of Korea, CRC, CRC/124 (2003) 24, at paras. 105, 106

[406] Guinea-Bissau, CRC, CRC/C/118 (2002) 12, at paras. 49-50.

[407] Malawi, CRC, CRC/C/114 (2002) 104, at paras. 397 and 398.

[408] Niger, CRC, CRC/C/118 (2002) 37, at paras. 148 and 149.

[409] Romania, CRC, CRC/124 (2003) 49, at paras. 219 and 220.

[410] Saint Vincent and the Grenadines, CRC, CRC/C/116 (2002) 101, at paras. 428 and 429.

urges the State party to amend the legislation pertaining to age of marriage with a view to eliminating the exceptions that allow for marriage of females at age 14 and for males at 16 and to bring its legislation into line with article 1 of the Convention on the Rights of the Child, which defines a child as anyone under the age of 18 years, with article 16, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women and with general recommendation No. 21 of the Committee".[411]

In concluding this section, it is important to acknowledge that even when the minimum age of marriage is set above the legal age of majority, it can in some cases be constructed as having the potential to discriminate against certain groups. In what was described a protective measure, Denmark changed its law to provide that people from outside the European Union coming to live in Denmark as spouses had to be at least 24. Danish citizens and lawful residents can marry at a younger age. This has been constructed, not as a measure of protection but rather a means of imposing an additional barrier to immigration and thus potentially discriminatory against migrants and minorities who are most likely to marry someone outside the jurisdiction.[412]

Linked to early marriage is the notion of "paternal preference or power" in many legal systems. The father was privileged in decision making *vis-à-vis* the child in areas as diverse as choosing a child's name, registering the child's birth, custody, guardianship, applying for passports or granting permission to travel, consenting to marriage and nationality or citizenship. This is often linked to the construction of the father as being the head of the household or family and ignores the de facto situation that pertains in most States; the disproportionate burden borne by women in child rearing.[413]

Questionnaire responses from Bangladesh, the Democratic Republic of the Congo (DRC), Malaysia, Nepal and Niger, indicated that in the event of conflict between the parents in decisions concerning the child, the father's decision would prevail. Despite the positive changes wrought by the amendment to the Family Code promulgated on 1 August 1987, it would appear that in the DRC, the father takes precedence in deciding

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[411] Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined fifth and sixth periodic report of Cuba (CEDAW/C/CUB/5-6) at its 739th and 740th meetings, on 8 August 2006. CEDAW/SR.739 and 740 CEDAW/C/CUB/CO/6, paras, 13 and 14.

[412] A. Stolovitskaia and B. McElroy "Divorced from Reality: The True Impact of Denmark's 24 Year old Rule", available at: http://www.humanityinaction.org/docs/Final_report_Anastas130C50.doc. See also M. Brabant "Denmark cuts down on Migrant Marriage", available at h:ttp://news.bbc.co.uk/1/low/world/europe/2057594.stm.

[413] WLUML (2006), 229. Human Rights Committee General comment 19, para. 9.

on a child's name in the event of a disagreement.[414] Similarly in the case of disagreement over the exercise of parental authority, the father is to take precedence, which appears to conflict with CEDAW article 16(1) (d).[415] Even when the father is removed from the picture, the mother remains disadvantaged because the Code does not permit a mother to exercise sole guardianship of any marital children. She is required to exercise it in conjunction with members of the father's family.[416] In Niger ONG-DIMAL also identifies inequalities in the exercise of ***la tutelle et de la curatelle*** (guardianship).[417] In Senegal: "Under article 277 of the Code de la Famille the husband is the head of the family, and he has primary authority over the children during the marriage. Accordingly his decision overrides his wife's in the event that they disagree-that is provided his decision is based on the interests of the family (article 287)"[418]

The questionnaire response received from OHCHR-NEPAL pinpointed s. 3(1) of the Children's Act 1991 as discriminatory because the father has priority over the mother in naming a child. The Polish Family and Guardianship Code appears to privilege the father in the naming of the child providing that: "A child who is presumed to be the child of her/his mother's husband, shall bear *his surname,* except when the spouses have declared that the child shall bear the mother's last surname."[419] The same presumption seems to apply in the event that paternity has been established by the man recognising the child as his.[420] The default presumption is discriminatory. In South Africa the "name problem" appears to apply to adult women with the questionnaire response from the Women's Law Centre pointing out that "Section 26 of the Births and Deaths Registration Act 51 of 1992 'allows' for a woman to retain her name on marriage."[421]

The ASK response to the questionnaire noted that in Bangladesh discrimination included the fact that "in all government forms, only the name of the father is required

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[414] Code de la Famille, art. 59 al. 1er as reproduced by MONUC-HRC, (May 2007).
[415] *Ibid,* Code de la Famille, art. 317 (2).
[416] *Ibid,* Code de la Famille, arts. 198 and 200.
[417] Le Code Civil nigérien, arts 389 al. 1, 391, 392, 393, 394, 405, 480, 477, 369, 350.
[418] WLUML (2006), 162.
[419] Poland Family and Guardianship Code, art. 88 (1), as cited in Equality Now (2004), 4.
[420] *Ibid,* Family and Guardianship Code, art. 89 (1).
[421] Questionnaire response Women's Law Centre Part A:3.

not the mother's name".[422] Moreover, *de jure* discrimination was identified in both Muslim and Hindu personal laws. Of Muslim law, ASK averred: "Father is the legal guardian of a child. So even if a mother is successful in gaining custody of her child, it will be a temporary right only." [423]In Hindu personal laws it was said that "Similarly women suffer direct discrimination in matters of child Custody and Guardianship of their children."[424] In Malaysia parental rights and responsibilities appear to be determined by the religion of the parties so that in its response to the questionnaire, the NGO, Sisters in Islam acknowledges that changes have been made to the Guardianship of Infants Act to give equal guardianship to both parents, but then goes on to say that the change is only applicable to non-Muslims.[425] Following on from this, the organisation notes that under the Islamic Family Law (Federal Territories) Act, 1984 the male members of the family (father and paternal male relatives) always exercise guardianship over a child. Guardianship extended to disposal of his or her properties[426]and deciding on the child's religion.[427]Rules on custody also appear to be stacked against women:

"Section 83 of Islamic Family Law (Federal Territories) Act 1984 states the situations in which a female may lose her right to custody. The female-specific pronoun is used rather than gender-neutral ones, implying that men cannot lose the right of custody. The interpretation section does not rectify this, and the Interpretation Act 1948 and 1967 may not be used as there was never any situation in which it is declared that this act would be applicable to state-made syariah laws."[428]

"Father prioritisation" has been identified in the interaction of States and treaty bodies.[429]

The laws and regulations described above are discriminatory towards women. However, the rules which appear to apply mainly in marriage could be seen as creating the potential for women electing to have children born out of wedlock and

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[422] ASK response to questionnaire Part A:4 (Bangladesh) (May 2007).
[423] *Ibid,* Part A: 3.
[424] *Ibid.*
[425] Malaysia, Sisters in Islam questionnaire response: Part B: 2(b).
[426] Islamic Family Law (Federal Territories) Act 1984, s. 88, as reported by Sisters in Islam, *ibid,* p. 7.
[427] Federal Constitution, art. 12 (2), *ibid.*
[428] Sisters in Islam questionnaire response Part A:3 (p.6).
[429] South Korea, third periodic report, CCPR/C/KOR/2005/3, para 65. Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined third and fourth periodic reports of Belgium (CEDAW/C/BEL/3-4) at its 559th and 560th meetings, on 10 June 2002 (see CEDAW/C. SR.559 and 560), CEDAW A/57/38 part II (2002), paras. 165-166.

thus free, in many legal systems, from the control of a man. This in turn creates the potential problem of violating human rights principles that parents are to be equally responsible for their children and may lead to discrimination against unmarried fathers. This possibility is made manifest in the reservation of the Republic of Ireland to the "parental responsibility" articles in CEDAW:

"Ireland is of the view that the attainment in Ireland of the objectives of the Convention does not necessitate the extension to men of rights identical to those accorded by law to women in respect of guardianship, adoption, and custody of children borne out of wedlock and reserves the right to implement the Convention subject to that understanding." [430]

The area in which discrimination against women remains widespread is in relation to passing on nationality or citizenship to their children.

Nationality/citizenship discrimination

As noted in the discussion on reservations and also regional conventions, the granting of nationality and citizenship of children through the male line is one of the clearest manifestations of discrimination against women and children. Together with the limitations placed on married women in their ability to pass on their nationality to their husbands, it is an area where discrimination has been legally enshrined for a long time.[431] This is despite the clear international injunctions enshrining rights to nationality[432], which, linked to equality and non-discrimination provisions, ought to result in discrimination free laws.[433] The effects of nationality and citizenship

[430] Republic of Ireland reservations to CEDAW, available at: http://www.ohchr.org/english/law/cedaw.htm. This is unlikely to survive an ECHR challenge.

[431] C. Chinkin "Nationality: Marriage and Family Relations" in UN *Bringing International Human Rights Law* (New York, UN, 2000), 17. C. Chinkin and K. Knop "Remembering Chrystal MacMillan: Women's Equality, Nationality in International Law" (2001) 22 *Michigan Journal of International Law* 525. A. Gubbay "The Effect of the Deportation of Alien Husbands upon the Constitutionally Protected Mobility Rights of Citizen Wives in Zimbabwe" in UN *Bringing International Human Rights law Home* (NY, UN, 2002), 116. UN DAW/DESA "Women Nationality and Citizenship" *in Women 2000 and Beyond* (June 2003). Proposed *Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* Advisory Opinion OC- 4/84 of 19 January 1984, Series A. No. 4. *Unity Dow v. Attorney General of Botswana* [1991] LRC (Const) 575; [1992] LRC (Const) 627, *Abdulaziz v. UK* , *Aumeeruddy-Cziffra v. Mauritius* (2000) *AHRLR* 3 (HRC 1981).

[432] Montevideo Convention on the Nationality of Women, 1933, 7th International Conference of American States on the Rights and Duties of States. UDHR, art. 15; Convention on the Nationality of Married Women, 1957, 309 UNTS 65**;** ICCPR, art. 24 (3), CRC art, 7; Migrant Workers Convention, art. 29; Inter-American Convention on Human Rights, art. 20; ACRWC, arts. 6 (3) and (4). CEDAW general recommendation 21, para. 6; Human Rights Committee general comment 17, para. 8; Human Rights Committee general comment 19, para. 7; Human Rights Committee general comment 28, para. 25.

[433] See for example European Convention on Nationality, 1997, E.T.S 166, Strasbourg 6 November 1997, art. 5 (1). Although general comment 17 of the Human Rights Committee focuses on the right of

discrimination are far reaching. For women denied the right to pass on nationality or stripped of their nationality on marriage, it infantilises them and may result in the denial of core citizenship rights include the right to vote or to participate in public life. It may also have an impact on their freedom of movement as indeed may the insistence that a child must follow the nationality of its father. In States which permit the holding of only one nationality, it should be open to the parents of a child who themselves hold different nationalities, to decide which the child should take. On reaching the age of majority, it should be open for that child to make a decision for him or herself.

In many States, the father presumption only appears to hold where the child is born in marriage meaning that an unmarried father may find that he is not able to confer automatically his citizenship to his child, as he would if he had married the mother of the child. Unmarried fathers may be required to fulfil further requirements. An example of this is the United States of America Immigration and Nationality Act. [434] While an unmarried US mother can automatically pass on her nationality to her children, unmarried fathers whose children are born outside the jurisdiction are not. They are required to provide an acknowledgment of paternity, take a paternity test or proof payment of maintenance. It has been suggested that the law on stereotypes mothers as "caring" and unlikely to abandon their children and unmarried fathers as feckless until proven otherwise. It has been challenged unsuccessfully in the Supreme Court meaning that without Congressional legislative reform, this law is destined to remain on the statute books.[435]

Questionnaire responses identifying discrimination in nationality laws included Kenya, Bangladesh, Nepal, Malaysia, Vanuatu and the Republic of Cyprus. These are not by any means the only States with discriminatory nationality laws as regards children. Reservations to article 9 of CEDAW indicate that States as diverse as the

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a child to have a nationality, it does not provide that nationality laws should not discriminate between mothers and fathers. C. Chinkin (2000), 26.

[434] United States of America Immigration and Nationality Act s. 309. Reproduced in Equality Now (2004) 11. See UN DAW *Women 2000 and Beyond* (2003) 10 n .18.

[435] *Ibid,* 12.

Bahamas, Monaco[436], Jordan, Kuwait, Lebanon, Oman, Syria, Tunisia and the United Arab Emirates have also sought to uphold discriminatory laws.[437] The list does not include those States with general reservations whose impact may include legitimising discrimination including in the enjoyment of nationality rights of women and children. In recommendations made to States parties, discriminatory citizenship laws have also been identified as requiring amendment or repeal.[438] Questionnaire responses varied in that while some States laws directly discriminated against women, others tried to provide a rationale for the distinction. Those which "directly discriminate" include Kenya, Nigeria and Malaysia all of which seemed to enshrine discrimination in their national constitutions:

"The (Kenyan) Constitution endorses discrimination on women with respect to citizenship as it prevents women from conferring citizenship on their husbands and children when they apply for it."[439]

"Section 26 of the 1999 Constitution directly discriminates against men who are married to Nigerian women by preventing their acquisition of Nigerian citizenship where they desire."[440]

Provisions identified by Sisters in Islam as constituting discrimination against women vis a vis nationality and citizenship in the Malaysian constitution included:

"Article 14 (1) (b) and Part II of the Second Schedule s1(c) whereby women cannot confer citizenship on their children born outside Malaysia.

Article 15 (1) whereby there is no provision that enables foreign husbands of Malaysian women to receive the status of Permanent Resident as compared to Malaysian men's foreign wives. Dependents' spousal visas are given only to wives of Malaysian citizens.

Articles 24 (4) and 26 (2) which provides for the deprivation of Malaysian women of their citizenship."[441]

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[436] At the domestic level, amendments have been made to arts 1 and 3 of Monaco Law No. 115 on Nationality. However Neuwirth notes that but the law retains some discriminatory aspects not least women's inability to confer nationality on alien husbands. J. Neuwirth (2005), 53.
[437] See generally http://www.ohchr.org/english/law/cedaw.htm.
[438] See for example, Singapore, CRC, CRC/C/133 (2003) 84, at paras. 413, 414; Syrian Arab Republic, CRC, CRC/C/132 (2003) 116, at para. 558; Brunei Darussalam, CRC, CRC/C/133 (2003) 73, at paras. 359 and 360.
[439] FEMNET questionnaire response Part A:3.
[440] WILDAF Nigeria questionnaire response Part A:3.
[441] Sisters in Islam (Malaysia) questionnaire response Part A:3.

Further discrimination is identified in the Malaysian Immigration Regulations, 1963 which provide that the "foreign husband of a Malaysian woman is not entitled to a Dependent's pass while a foreign wife is entitled to the same."[442] There is also the Immigration Act, 1959 which states that "a female holder of a Work Pass/permit cannot have her husband's name endorsed on the permit, unlike the male holder who has the right to endorse his wife's name on his pass/permit."[443]

The OHCHR Nepal response to the questionnaire identified the 2007 Interim constitution as having discriminatory provisions vis-à-vis citizenship. Apparently Nepali women:

"…cannot transfer citizenship to a spouse who is a foreign national and also that children born to Nepali women married to foreign nationals can only acquire naturalised citizenship. However, in the case of Nepali men married to foreign nationals, the children acquire citizenship through descent."[444]

In its response, the FWLD noted that legal challenges to citizenship provisions on children contained in the 1990 Constitution[445] had been unsuccessful.[446] In Part G (anything else you would like to add), they go on to say that while amendments had been made to discriminatory laws, "some discriminatory laws still exist especially on citizenship, foreign employment…"

In 2006 CEDAW, in its consideration of the fourth and fifth periodic report of the DRC concluded: "While welcoming article 5 of the new legislation on nationality, which enables women to transmit Congolese nationality through filiation in the same way as men, the Committee regrets that article 30 provides that women cannot retain their Congolese nationality if they marry a foreigner."[447]

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[442] Immigration Regulations, 1963 s. 10, as cited in Sisters in Islam, *ibid.*
[443]Immigration Act, 1959 s. 12, from Sisters in Islam, *ibid.*
[444] Nepal Interim constitution, arts. 8 (6) and 8 (9).
[445] Constitution of the Kingdom of Nepal, 2047 (1990), art. 9(1) (2). On passing nationality to alien spouse art. 9 (5). See also Citizenship Act, 2020 (1963), s. 3(1), 3(4) and 3 (5). On married women see s. 6 (2). Taken from FWLD Nepal questionnaire Part A:3 at 2.
[446] Cases cited include *Advocate Chandra Kanta Gyawai v. HMG/Nepal,* 2058/10/25 NKP 2058 Vol. 11/12, p.615. *Advocate Achchuyt Prasad Kharel vs. HMG/Nepal* 2061/12/10. In FWLD questionnaire B:3 p. 24.
[447] CEDAW Concluding Observations DRC (2006), para. 31.

However, commenting on the equalisation of nationality laws removing discrimination against Congolese mothers, the World Organisation against Torture, notes that in practice:

"the Congolese population disregards this provision: usually, children born of a foreign father and of a Congolese mother are considered foreigners, notably in the cases of children born during wartime to a father from an enemy country. These children are often rejected, which is why it is important that the State be attentive to the full implementation of this recommendation."[448]

In the questionnaire responses, Bangladesh was also identified as having discriminatory laws on citizenship: "The Citizenship Act, 1951 and the Bangladesh Citizenship (Temporary Provisions) Order 1972: It states that only a man can transmit nationality. A woman does not have the right to transmit her nationality to her children born outside Bangladesh or to her husband."[449]

Following on from this in the same questionnaire response, ASK noted that in its lobby efforts to see the discrimination removed from the statute books, it had submitted draft "model laws", including on citizenship to the government. Although it describes the government as "largely unresponsive"[450] in 2004 CEDAW had raised the citizenship issue with Bangladesh which indicated a willingness to change the law:

"Although acknowledging that the State party has initiated the amendment of the 1951 Citizenship Act, the Committee is concerned that women are still unable to transmit their nationality to their foreign husbands and children.
The Committee urges the State party to ensure that a new citizenship law, which is in line with article 9 of the Convention, is adopted without delay, in order to eliminate all provisions that discriminate against women in the area of nationality."[451]

The CRC had also recommended that changes be made by Bangladesh to its Citizenship law:

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[448] World Organisation Against Torture (OMCT) *Violence against women in the Democratic Republic of the Congo* (Geneva, OMCT, 2006), 19.
[449] ASK (Bangladesh) questionnaire response Part A:3. See also Bangladesh National Women Lawyers Association questionnaire response Part A:3.
[450] *Ibid,* Part B:2.
[451] Concluding comments of the Committee on the Elimination of Discrimination against Women to the fifth periodic report of the People's Republic of Bangladesh (CEDAW/C/BGD/5) at its 653rd and 654th meetings, on 9 July 2004 (see CEDAW/C/SR.653 and 654), CEDAW, A/59/38 part II (2004), paras. 249 and 250.

"In light of article 7 of the Convention, the Committee is concerned at the apparent discrimination in respect of nationality, and that a child's name and nationality are derived solely from her/his father and not her/his mother.
The Committee recommends that the State party amend its legislation so that citizenship can be passed on to children from either their father or their mother. It also encourages the State party to introduce proactive measures to prevent statelessness."[452]

In 2001 Zimbabwe passed an amendment to the Citizenship Act requiring a Zimbabwean born person who was also entitled to the citizenship (by descent) of another country to renounce that citizenship regardless of whether said person had ever taken up the other citizenship in the first place. [453] The law which had retrospective effect arbitrarily stripped citizenship rights from many people. The constitutionality[454] of the amended law was successfully challenged by people born in Zimbabwe of Zimbabwean born mothers and alien fathers who were legally resident in Zimbabwe.[455]. Entitlement to foreign citizenship was interpreted by the Registrar General through a patriarchal lens so that in practice, had the mother been the "foreigner" and the father Zimbabwean born, then a Zimbabwean passport would have been issued without requiring prior renunciation thus highlighting sex discrimination in violation of Zimbabwe's international obligations.

Despite the recommendations of committee bodies,[456] some States, such as the Republic of Cyprus seek to justify the discriminatory laws. In the questionnaire response Cyprus acknowledged that although the law on citizenship had been changed in 2001 to provide that "all persons born in Cyprus or abroad, on or after 16.8.1960, acquired the Cypriot citizenship automatically if either their mother or father was, or would have been entitled to be a Cypriot citizen,"[457] this had been amended so that "persons born of Cypriot mothers, either in Cyprus or abroad, between 16.8.1960 and

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[452] Bangladesh, CRC, CRC/C/133 (2003) 93, at paras. 471 and 472.
[453] Citizenship Act of Zimbabwe Amendment No. 12 of 2001 s. 9(7)
[454] Constitution of Zimbabwe, 1979, as amended ss. 4, 5. See also Zimbabwe Lawyers for Human Rights Submissions on the interpretation of citizenship laws to the Parliamentary Committee on Defence and Home Affairs (2007), available from: http:/hrlr.org.zw/citizenship/citizenship%20submissions%20%20%20committee.doc.
[455] *Ricaurdo Manwere v. Registrar General* HH/ 87/02, judgment 5 June 2002; *Job Sibanda v. Registrar General of Citizenship and Another* HH/ 3626/02, judgment 20 February 2005; *Trevor Ncube v. Registrar General* HH 7316/06, judgment 24, 25 January 2007.
[456] Cyprus, CRC, CRC/C/132 (2003) 21, at para. 115.
[457] Republic of Cyprus Citizenship Law, 1967 (Law 43/1967), amended by Law 168 (1)/2001. Questionnaire response (letter) from L. Koursoumba, Law Commissioner to S. Corcoran, Political Officer, Civil Affairs Branch, UNFICYP (April 2007), 2.

11.6.1999 are given the option to acquire the Cypriot citizenship if they so wish by applying to the Minister of Interior." This *volte face* which now added an extra layer of bureaucracy to people born of Cypriot mothers, was justified because the original amendment, in the words of Law Commissioner Leda Koursoumba: "was not welcomed by a large majority of *male* persons who acquired the citizenship as of their mother's Cypriot citizenship, because automatically they became obliged to fulfil their military obligations in Cyprus." (my emphasis) Cypriot law does not require women to carry out military service. The Law Commissioner notes that the Minister of the Interior: "considers that they (amendments) do not amount to discrimination against persons born by Cypriot mothers during the period between 16.8.1960 and 11.6 1999; on the contrary, these persons are given the right to choose whether and when they wish to acquire Cypriot citizenship."

Also identified as an "issue of concern" in the questionnaire response from Cyprus is that of acquiring the status of displaced person. The Civil Registry Law provides that children can acquire the status of displaced persons if their father is a displaced person.[458] By implication children of displaced mothers do not acquire the status or the entitlements attaching to the status. The Commissioner notes that the government and the relevant parliamentary committee had reviewed this differential treatment and concluded that an equalisation of the law allowing the children of displaced mothers the same rights as those of displaced fathers could not be adopted. The reasons given were all related to socio-economic and political factors, but not, it would appear, the State's international obligations to prevent or remedy discrimination and to promote equality:

"(a) The percentage of the displaced persons will be increased disproportionately to the percentage of the displaced persons in 1974. A study conducted by the Statistical Service of Cyprus revealed that the percentage of the displaced persons will automatically be increased from 34% (as it was in 1974) to 42%. This percentage will be increasing continuously and by the year 2047 will reach the 80% of the whole population. Consequently, the real picture of the displaced population of Cyprus will be distorted.

(b)The increase of the percentage of the displaced persons will gradually affect the electoral lists, leading to an increase of the number of electors in the electoral

[458] Civil Registry Law-L.141(I)/2002, s. 119. *Ibid.*

catalogue of the occupied areas and to a decrease of the number of electors in the Government controlled area of the Republic.

The beneficiaries of the various housing plans and other grants for the displaced persons will increase to such a level that the Government will not be in the position to bear the economic burden."

In the questionnaire response there is an acknowledgment that in relation to the above, CEDAW had stated in its 2006 recommendations: "The Committee also urges the State Party to eliminate the legal discrimination against children born to displaced mothers in acquiring the status of displaced person, particularly in light of the Ombudswoman's view that the existing legislation constitutes discrimination."[459]

CRC had already expressed concern: "Furthermore**,** the Committee is concerned that certain factors linked to discriminatory attitudes may persist, in particular those related to acquisition of nationality, children born out of wedlock and Cypriot children of Turkish origin."[460]

Although issues of nationality and citizenship are more often than not legally enshrined, the questionnaire responses suggested that policy or rules governed the related question of freedom of movement. This was the case when it came to applying for passports or the issuance of permission to travel.[461] It remains worth noting that there are many State sponsored violations of women's rights to freedom of movement manifest in reservations entered to article 15(4) of CEDAW. Monaco's reservation to this article notes that it is bound only in so far as the provision relates to unmarried women, meaning that married women may be subject to restrictions on their freedom. Moreover research conducted by the UNDP in four Arab States (Jordan, Lebanon, Egypt and Morocco) showed that 70% of Egyptian respondents and 56% of Jordanian respondents disagreed with a woman travelling on her own.[462] By way of contrast 82% in Lebanon and 59% in Morocco agreed that a woman should be able to travel on her own.[463]

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[459] *Ibid,* at 5. Report of 30 May 2006 (CEDAW/C/CYP/CO/5), para.32.
[460] CRC Cyprus (2003), para. 115.
[461] Human Rights Committee general comment 27 Freedom of movement, paras. 6 and 18.
[462] UNDP (2006), 264
[463] *Ibid.*

Limitations on women's freedom of movement are also manifest in restrictions placed on their right to work (in mixed environments) or to participate in activities outside the home without an escort or chaperone and in the most infamous example their right to drive cars.[464] The World Bank has linked the comparatively lower employment rate of women in the Middle East and North Africa to restrictions on their freedom of movement.[465] There may even be in place a system of "protective custody" whereby women viewed as vulnerable may be placed in an institution from which they may not come and go as they please "for their own good." [466]Not all of these restrictions are State generated. In the case of *Sara Longwe v. Inter-Continental hotels*[467] a Zambian woman took on the hotel chain after it had refused her entry to its bar to wait for her children who had been swimming at the hotel, because the hotel had a policy of not permitting women unaccompanied by men to enter its premises. The same rule did not apply to men. Longwe successfully challenged the hotel policy which was held to constitute a violation of her freedom of movement and her right to be free from discrimination in light of international obligations entered into by the Zambian State.

The questionnaire responses identified as problematic, rules requiring a male guardian to consent before a passport or travel document could be issued, especially to children. It is here worth noting that denial of a passport to a child or the refusal to put the child on the mother's passport impacts upon both the mother and the child's ability to travel and by implication their freedom of movement. In its third report under the ICCPR Zambia listed the case of *Edith Zewelani Nawakwi v. the Attorney General.*[468] Here an unmarried mother challenged a rule that said she needed the written consent of the father of her child in order to obtain a passport for him. She said the rule discriminated against her on grounds of sex. The court upheld her claim finding that the practice requiring a father's consent before a mother could register a child on her passport constituted discrimination:

[464] Saudi Arabia Fatwa on Women's Driving of Automobiles (Shaikh Abdel Aziz Bin Abdallah Bin Baz), 1990, reproduced in Equality Now (2004), 13.
[465] World Bank *MENA* (2004), 13, 21, 93-127.
[466] Human Rights Watch *Libya: A Threat to Society? Arbitrary Detention of Women and Girls for 'Social Rehabilitation'* Human Rights (2006), vol. 18 No. 2 [E].
[467] *Longwe v. Intercontinental Hotels* [1993] 4 LRC 221.
[468] *Edith Zewelani Nawakwi v the Attorney General,* 1990/HC/1724. Zambia, third periodic report, CCPR/C/ZMB/3.

"it is not at all justified from whatever angle the issue is looked at, for a father to treat himself or to be treated by the institutions of society to be more entitled to the affairs of his children than the mother of that child or those children. The mother is as much an authority over the affairs of her children as the father is".[469]

In Malaysia, Sisters in Islam noted that although the Guardianship of Infants Act provided for equal guardianship for both parents, instances of discrimination still occurred when applying for passports, because "the immigration forms still read 'father/guardian' and some immigration forms discourage the mother from applying for passports for the children/and or require a letter of consent from the father."[470]

Questionnaire responses also revealed rules requiring parental or male approval for travel outside the jurisdiction, even for adult women. This was the case in Nepal where a woman required the permission of a male guardian to take up employment outside the jurisdiction. Both the FWLD and the OHCHR responses identified the Foreign Employment Act, 1985[471] as requiring the permission of both the guardian and the Government as a "prerequisite for women to go abroad for employment. There are no such prerequisites for men going abroad for employment."[472] Other restrictions related to travel abroad for the purposes of education so that the Nepalese Scholarship rules provide that a guardian's approval is necessary for women/girls to study in a foreign country, but not men.[473]

In the section on the marital relationship, the Qatari personal status law provides: "The husband shall give his wife the opportunity to complete her education to the end of the mandatory period and shall facilitate her pursuit of university education *inside the country*, in so far as this does not conflict with her family duties."[474] (my emphasis) The implication is that he is not required to support her if she chooses to study outside the country. Indeed it is questionable that she will be given permission to undertake study abroad.

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[469] *Ibid,* Human Rights Committee report, para 46.
[470] Sisters in Islam questionnaire response Part A:3.
[471] Foreign Employment Act 2042 (1985).
[472] *Ibid,* art. 12. OHCHR Nepal questionnaire response Part:3, p. 4 ; FWLD Part A:3, p.7.
[473] Scholarship Rules, 2029 (1972). In FWLD Part A:3, p. 7.
[474] Qatar Personal Status Law, 2006, art. 68, as cited in L. Welchman (2007), 176.

In *El Ghar v. Libyan Arab Jamahiriya*[475] a complaint was made to the Human Rights Committee. The author, of Libyan nationality was a law graduate who wished to undertake postgraduate study in France. She lived in Morocco with her divorced mother. She applied for a Libyan passport first obtaining, and attaching to the application, the authorization to travel that she had obtained from her father, a Libyan citizen still living in Libya. The Libyan consulate issued her with a *laissez passer,* which, not being a full passport would not entitle her to travel to France. After much delay the author complained to the Human Rights Committee, which upheld the complaint noting that there had indeed been a violation of article 12(2) "in so far as the author was denied a passport without any valid justification and subjected to unreasonable delay, as a result was prevented from travelling abroad to continue her studies."[476] The Committee requested the State party to issue the passport without delay and to ensure that such violations were not repeated in future.[477]

Recently Kurdish women have complained about the enforcement of a long ignored Iraqi law which states that "a woman who applies for a passport first has to have her father, uncle or brother's written permission."[478] Women's groups in Iraqi Kurdistan are said to be campaigning to abolish the law, organising a petition and taking their case to the government.[479]

Closely associated with father preference laws and male preference in decision making is the concept of marital power and specifically obedience laws found in some jurisdictions.

Obedience Laws - Husband's marital power

There appears to be a strong correlation between paternal power and preference in relation to legal decisions affecting children and a husband's marital power over a wife or the expectation of obedience. In the DRC the wife is placed under the marital authority of her husband in contravention of article 15(2) of CEDAW [480]and also has

[475] *El Ghar v. Libyan Arab Jamahiriya* (1107/2002), ICCPR A/60/40 vol. II (2 November 2004).
[476] *Ibid,* para. 8.
[477] *Ibid.*
[478] K. Tofiq "Kurdish Women Resent new Passport System" ICR No. 223, 8 June 2007.
[479] *Ibid.*
[480] Code de la Famille, art. 448. The United Arab Emirates has a reservation to art. 15 (2) of CEDAW.

to follow him and agree to his choice of residence.[481] Operating along similar lines is Niger which makes the husband head of the household[482]resulting in the curtailment of the civil rights of a married woman[483] who has to follow the husband's choice of residence and is subject to the domicile of his choosing.[484] In Pakistan:

"Under domicile provisions, a woman who had joined government service before marrying retains her domicile after marriage, but a woman who joins government service after marrying looses her original domicile and acquires the domicile of her husband. These provisions affect a woman's access to government jobs (which often require candidates to be domiciled in a specific area of the country); they have been unsuccessfully challenged in court."[485]

The exercise of the status "head of household" varies between jurisdictions.[486] In Iran and Egypt a wife needs her husband's permission to obtain a passport and to travel, while in Cameroon a husband has the right to determine 'whether or not (and under what conditions) wives may work or study, what they may study, and what type of work they may do. In Sudan a husband's control extends to requiring the wife to obtain the husband's permission before taking up employment in government.[487]

In States requiring obedience, the consequences of "disobedience" may be onerous and often limit a woman's autonomy. In States identified as having codified obedience, the penalty for a 'disobedient' woman involves the forfeiture of maintenance or some other economic benefit.[488] All States include leaving the home without permission or disobeying instructions about working or not working outside the home as conditions likely to lead to a wife being said to be disobedient.[489] This denial of a woman's independent or unfettered right to work outside the home may be because the husband is supposed to support her. However, the effect is to create dependence. An exception is Iraq which while providing that a wife will be denied

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[481] *Ibid,* Code de la Famille, arts. 454-455.
[482] Le Code Civil nigérien, art. 213, cited by ONG-DIMAL questionnaire response A:2.
[483] *Ibid,* arts. 216, 221 alineas 1, 2 et 3, 219, 222 alineas 1 et 2, 223, 224 and 225. (ONG-DIMAL)
[484] *Ibid,* arts. 108, 215, 878.
[485] Women Living Under Muslim Laws (WLUML) (2006), 161.
[486] WLUML (2006), 157.
[487] WLUML (2006), 157-158.
[488] Jordan and Kuwait also require obedience. Jordanian Law of Personal Status 1976 as amended in 2001, art 37, 69. Kuwaiti Personal Status Law 1984 art.87. Reproduced in L. Welchman (2007) 172-173. Moreover, elsewhere WLUML notes: "2005 amendments to Algeria's Code de la Famille did not repeal the requirement of obedience, profoundly weakening the introduction of wider mutual rights and responsibilities. WLUML (2006), 157.
[489] WLUML (2006), 162-3.

maintenance if she breaches certain conditions, also provides that she will not be considered disobedient if the home that is the matrimonial home is "far from the wife's place of work such as to make it impossible for her to reconcile her domestic and employment commitments."[490] It is also worth noting that although obedience is expected of wives in the legal systems mentioned, the laws do acknowledge that there may be instances where a wife is justified in refusing to obey. Moreover, the 'trade-off' is that the husband also has duties.[491] Still, the problem remains the imbalance between the sexes, the seeming absence of choice re conditions in some systems and the gendered nature of the rights and responsibilities not least the requirement in the Yemeni Personal Status Law No. 20 legally obliging a wife to do the housework.[492]

Violence against women (in the Family):

Although all States have within their legal systems provisions outlawing assault, torture degrading and inhuman treatment and violence, the situation in the home was different. Types of violence identified including wife beating, so called honour crimes and what amounts to rape within marriage.[493]

Non Consensual Sex in Marriage

Although rape is outlawed in most legal systems, sexual intercourse in marriage, including that which is not consensual is often not proscribed. The Secretary-General's report on violence notes that "Marital rape is not a prosecutable offence in at least 53 States." [494] WLUML note that "By failing to recognize marital rape, most systems implicitly deny a wife the right to refuse sexual intercourse."[495] This suggests that on marriage a woman is taken to consent to sexual intercourse for the duration of the marriage often under pain of divorce or denial of support if she declines. The legal systems of Kenya, Ghana, Ethiopia and Nigeria were all identified as "permitting" non consensual sex in marriage. The Centre for Reproductive Rights also identifies Cote d'Ivoire and Benin as not recognising marital rape as a criminal

[490] Iraq Law 1959 as amended by Law 1980, art. 25(2) (b), as cited in L. Welchman (2007), 172.
[491] WLUML (2006), 164
[492] WLUML (2006), 163.
[493] See Report of the Secretary-General on violence against women (2006), 83-88. Box 11 at 89.
[494] *Ibid*. The report notes that there data was not available for 16 states at 90 n.
[495] WLUML (2006), 156.

offence.[496] The UNAMEE response noted of Ethiopia: "Penal law defines 'rape restrictively as only taking place outside of wedlock thereby indirectly giving husbands licence to rape their wives. This is discrimination viewed in light of staggering increase of prevalence of domestic violence in Ethiopia."[497]

In Ghana section 42(g) of the Criminal Code[498] justifies the use of force in marriage:

"The use of force against a person may be justified on the ground of consent, but a person may revoke any consent which he has given to the use of force against him, and his consent when so revoked shall have no effect for justifying force; *save that the consent given by a husband or wife at marriage for the purposes of marriage cannot be revoked until the parties are divorced or separated by a judgment or decree of a competent court."*[499] (emphasis in the original)

In its report to CEDAW covering the fourth and fifth periodic reports from Ghana, WILDAF noted that the government had considered repealing the offending provision of the Criminal Code but had not done so because of public opinion and also because it would break up marriage and "lead to broken homes", as if a marriage in which one is assaulting another is not already a dysfunctional relationship.[500] A few years earlier, research undertaken by another NGO had shown that even when married women did seek the assistance of the police in marital cases, they were mocked and sent away to resolve the problem at home.[501] One way forward for Ghana would be to follow the lead of El Salvador and enact a law on violence within the family which results in the setting up of a special division in the National Civil Police to deal with claims of violence.[502]

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[496] Centre for Reproductive Rights *Women of the world: Francophone Africa Laws and Policies Affecting their Reproductive lives* (New York, CRR, 2001, 127 (Cote d'Ivoire) and p.39 (Benin).

[497] UNAMEE questionnaire response Part A:3. The Ethiopian Penal Code, art 589, defines rape as forcing a woman to "submit to sexual intercourse *outside wedlock…"* thus suggesting that force used in wedlock is acceptable. F. Banda (2005), 175.

[498] Ghana Criminal Code, 1960 (Act 29).

[499] WILDAF Ghana questionnaire response-Appendix 1 "Statement by Bernice Sam to the UN Committee for the Elimination of all forms of Discrimination against Women on the Combined Third, Fourth and Fifth Reports from the Government of Ghana", para.1.3.

[500] *Ibid,* para. 1:4. See also questionnaire response Part B:2.

[501] A Tagoe "Nkynkyim Violence against women Project" in Womankind Worldwide (ed) *What works where: Successful strategies to end violence against women"* (London, Womankind Worldwide, 2002), 12. CEDAW general recommendation 19, para. 24 (f). See also UNIFEM *Making a Difference: Strategic Communications to End Violence against Women* (New York, UNIFEM, 2003).

[502] See Center for Reproductive Rights *Gaining Ground: A Tool for advancing reproductive rights law reform* (New York, CRR, 2006), 85.

In its second and third periodic reports to CEDAW, Nigeria stated:

"In a traditional setting, spousal rape is inconceivable. Under Nigerian Laws in both section 357 of the Criminal Code and section 282 of the Penal Code, a husband cannot be charged with marital rape. Once the marriage is subsisting and the wife has attained puberty then any sexual intercourse with her is never rape."[503]

There appear to be gaps in Kenya's new Sexual Offences Act with FEMNET answering the question on gaps in the law thus:

"Yes, there has been a lacuna in the law regarding the overall cause of combating sexual violence. For instance the issue of marital rape, it is easy to prove the identification of the alleged perpetrator, however there is the thin line between the right of a spouse to be granted conjugal rights, the duty of the other to provide the same, as well as the individual right not to be forced into sexual intercourse against one's will. Even with the coming into force of the Sexual Offences Act, suspected sexual offenders are still being charged under sections of the penal code that have been repealed by the new legislation."[504]

Furthermore the obedience provisions of some legal systems suggested that a wife is expected to be sexually available to her husband. (Yemen, Sudan). Refusing or withholding sex (without good cause) may be construed as an act of disobedience. It is of course worth noting that within some legal systems, a wife is also entitled to request sex from her husband[505] and in Afghanistan: "Where the wife receives any harm from intercourse with the husband, and if this makes the continuation of intercourse between the couple impossible, she can demand from the court to grant her an order of separation."[506]

The difficulty of course is whether, in light of illiteracy and general dependence on husbands for survival, women feel able to exercise their exit options. Nevertheless it is important that States put in place laws that make clear that forced intercourse in marriage is a violation of a woman's human rights and constitutes a form of discrimination against her. In its concluding observations to the Korean report, the Human Rights Committee, noted its concerns about the general non-prosecution and

[503] Combined Second and Third Periodic Report of states parties: Nigeria CEDAW/C/NGA/2-3, 22.
[504] FEMNET questionnaire response Part A:6.
[505] WLUML (2006), 156.
[506] Afghanistan, Civil Code, art. 183, questionnaire response Part A:3 UNAMA, Human rights office (May 2007).

punishment of perpetrators of domestic violence before going on to note that it was concerned by the fact that marital rape was not criminalised (the State had not mentioned it in its report) and urging the State to rectify this in law as well as ensuring that police officers be given the necessary training to combat domestic violence.[507]

Although there are unlikely to be many marital rape complaints or indeed prosecutions, it is noteworthy that there are States and courts which have sought to outlaw the practice thus showing a commitment to protecting women from violence within the home.[508] In the Nepalese case of:

"In *Meera Dhungana for FWLD v. Ministry of Law an Justice*[509] the Public Interest Litigation was filed with the Supreme Court stating that Section 1 of the Chapter on Rape did not include marital rape and therefore failed to criminalize marital rape. Stressing the implication of "free" and "full consent" as a recognized ground of conjugal life, the court ruled that there must be mutual consent between husband and wife for the sexual intercourse after marriage. The court issued directive order to introduce a Bill for making complete legal provisions with regard to marital rape taking into account the special circumstances of marital relationships and the position of husbands."[510]

The result was the outlawing and punishment of marital rape in the Gender Equality Act, 2006.[511] Failure to legislate sends out the message that rape within marriage is acceptable.[512]

Another "obedience" related issue is that of so-called honour crimes whereby a woman is killed by a family member or someone hired to kill her for "dishonouring" the family for behaving or being alleged to have behaved in a manner that they find offensive.[513]

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[507] Concluding Observations –CCPR/C/KOR/CO/3, 28 November 2006, para. 11.
[508] Secretary-General's report on violence against women (2006), 89.
[509] WPN 55, decided on 2 May 2007.
[510] OHCHR Nepal questionnaire response Part B:3, p. 10.
[511] *Ibid,* Part:5.
[512] A comprehensive list of recommendations for tackling violence against women can be found in the In-depth study on all forms of violence against women: Report of the Secretary-General, UN GA A/61/122/Add.1, 6 July 2006, paras. 363-402.
[513] S. Hossain and L. Welchman (eds) "'Honour: Crimes, Paradigms and Violence against Women" (London, ZED, 2005).

Crimes in the name of "honour"

Although a great deal of work has been done, there are still States which have laws that condone, by sentencing policy or mitigation, the continuation of the practice, thus ignoring CEDAW's recommendation that States should "enact legislation to remove the defence of honour in regard to the assault or murder of a female family member."[514] Equality Now identifies the Penal Codes of Syria[515] and Haiti as violating this recommendation. The Haitian Code provides:

"The murder committed by one spouse on another spouse is not excusable, if the life of the spouse who committed the murder was not being threatened at the actual moment that the murder took place. Nevertheless, in the case of adultery as provided for in Article 284, the murder by a husband of his wife and/or her partner, immediately upon discovering them *in flagrante delicto* in the conjugal abode is to be pardoned."[516]

By way of contrast, the same statute provides that if the reverse is true then:

"A husband who has kept his mistress in the conjugal abode, and who has been convicted upon the complaint of his wife, will be sentenced to pay a fine of 100-400 gourdes."[517]

Equally problematic are procedural laws which recognise violence against women as problematic only when the woman is adjudged to be of "good character."[518] Laws also discriminate in giving greater weight to the evidence of a man over that of a woman.

Discrimination in procedural and sentencing laws

The OHCHR Guatemala questionnaire response identifies the chapter in the Penal Code on Sexual Violence (173-180) as still taking into account elements 'such as the good behaviour of the woman' to qualify as rape and which is aimed to protect the

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[514] CEDAW general recommendation 19, para. 24 (r) (ii). See also J. Connors "United Nations approaches to 'crimes of honour'" in S. Hossain and L. Welchman (eds.) (2005), 22.

[515] Syria Penal Code, art. 548, as cited in Equality Now (2004), 25

[516] Haiti Penal Code, art. 269, as cited in Equality Now (2004), 25. L. Meores, the Charge d'Affaires in the Permanent Mission of the Republic of Haiti to the UN wrote to Equality Now saying that the Ministry of the Condition of Women was in the process of amending or repealing the articles in the Haitian penal code that discriminate against women. The amendments would be put to parliament, "which unfortunately is not functional." It was hoped that they would be put before parliament once elections were held. See L. Meores in Equality Now Annual Report 2004, at 5.

[517] *Ibid,* art. 287.

[518] Beijing Declaration and Platform for Action, para. 232 (l).

‘reputation and honour’ and not the physical integrity of women.”.[519] Focusing on the “good behaviour” of a woman may lead to a married woman complaining about forced intercourse in marriage being constructed as a “bad wife” and therefore not worthy of assistance. The group WILDAF Nigeria identified parts of the Evidence Act as problematic noting:

“the provisions of section 211 of the evidence Act of the federal Republic of Nigeria states ‘When a man is prosecuted for rape or for an attempt to rape or for indecent assault, it may be shown that the woman against whom the offence was is alleged to have been committed was of generally immoral character although she is not cross-examined on the subject.’ This provision is usually used by lawyers to set rapists free.”[520]

Although highlighting the significant changes that have been made to remove all discriminatory laws in Fiji including comprehensive submissions to the Fiji Law Reform Commission for the enactment of domestic violence legislation, the questionnaire response did note:

“Other forms of outdated legislations which may have significant impact on women/girls are the Penal Code (Cap 17) and the Criminal Procedure Code which is the subject of law reforms, particularly the need to amend certain legislative provisions and acceptable common law provisions of “prior sexual history” of female complainants in rape or sexual violence cases, rules relating to “corroboration” whereby it is often dangerous to convict sexual perpetrators without corroborated evidence by the often female complainant. Various debates continue on the decriminalising of prostitution and/or soliciting.[521]

In its concluding observations to the sixth periodic review of Ukraine, the Human Rights Committee, while acknowledging the passage of the Domestic Violence Act and the establishment of rehabilitation services, expressed concern about “the provision in the law regarding the behaviour of the victim and authorizing official warnings to be given to the victim of domestic violence about ‘provocative’ behaviour (arts.7 and 26).”[522]

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[519] OHCHR Guatemala questionnaire response Part A:3.
[520] WILDAF Nigeria questionnaire response Part. A:3.
[521] OHCHR Fiji questionnaire response Part A:5.
[522] Human Rights Committee Concluding Observations Ukraine CCPR/C/UKR/CO/6, 28 November 2006, para. 10.

Other potential procedural constraints identified in the questionnaire response of Sisters in Islam noting that in Malaysia included the different weighting given to the evidence of men and women:

"In court proceedings, witnessing the execution of agreements etc, the testimonies of women who act as witnesses is considered to be of less or no weight. Two female witnesses are equal to one male one in most circumstances. An example of codified syariah law that relies on this principle is Section 86 of the Syariah Court Evidence (Federal Territories) Act 1997. Please note especially subsection (5) that states, witness testimony in general must be given by two males or one male and two females."[523]

The Iranian Penal Code provides:

"Art. 74 Adultery, whether punishable by flogging or stoning, may be proven by the testimony of four just men or that of three just men and two just women.
Art. 75 If adultery is punishable only by flogging it can be proven by the testimony of two just men and four just women.
Art 76. The testimony of women alone or in conjunction with the testimony of only one just man shall not prove adultery but it shall constitute false accusation which is a punishable act."[524]

Polygyny

Laws regulating polygyny may also be discriminatory. In its general comment 28 on equality between men and women, the Human Rights Committee states simply: "Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist."[525] However the regional systems are less clear. After a long and contested discussion,[526] African States agreed on the following provision on polygyny:

"[M]onogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected"[527]

Given that the preambular paragraph to article 6 requires States to ensure that men and women enjoy equal rights and are regarded as equal partners in marriage and also

[523] Sisters in Islam questionnaire response A: 3 p. 7.
[524] Iran Penal Code, as cited in Equality Now (2004), 26-7.
[525] Human Rights Committee general comment 28, para. 24. See also CEDAW general recommendation 21, para. 14.
[526] See F. Banda (2005), 76.
[527] African Protocol on Women, art. 6 (c).

that States should enact appropriate legislative measures to meet this objective, it is unclear how it is possible to reconcile the clear requirement of non discrimination in article 1 and also the provisions guaranteeing women their right to dignity[528] and equality before the law found elsewhere in the Protocol.[529] The government experts who decided on the final version of article 6 (c) were of the view that the abolition of the practice would be unfair to those women already in existing marriages. Moreover, they contended that polygyny was both a customary law and religious right. The last claim, that it is a religious right, is the subject of contestation with arguments about whether the Koran sanctions, restricts or renders impossible the practice within the parameters laid out in the holy book.[530]

Many States in Africa, Asia and the Arab region continue to recognise polygyny within their legal systems, and few lodge reservations (explicitly) retaining personal laws sanctioning polygyny. South Africa's Recognition of Customary Marriages Act, 1998 permits a man to marry polygynously.[531] Still under consideration in South Africa are proposals to recognise Muslim marriages. Recognition has been delayed partly because the question of whether polygyny is consonant with constitutional principles of non discrimination and equality is under consideration.[532] Non religious reasons advanced for the continuation of polygyny in South Africa as elsewhere include the economic vulnerability of women which make them dependent on a male breadwinner for survival.[533] There are also social norms which may hold it preferable that a woman be a second or subsequent wife, than that she remain unmarried.[534] Women in polygynous marriages in Tajikistan where the practice was banned in 1992, supported its continuation arguing that it protected them and their children and enabled them to access their legal rights.[535] Marriage to a polygynously married man

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[528] *Ibid,* art. 3
[529] *Ibid*, art 2, art. 8.
[530] N. Shah "Women's Human Rights in the Koran: An Interpretive Approach" (2006) 28 *Human Rights Quarterly,* 869, 890-892.
[531] South African Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), 7(6).
[532] W. Amein "Overcoming the Conflict between the right to freedom of religion and women's rights to equality: a South African case study of Muslim marriages" (2006) 28 *Human Rights Quarterly* 729.
[533] This was the reason given for permitting the continuation of the practice by Namibia in its initial report to CEDAW. Initial report of states parties: Namibia CEDAW/C/NAM/1, para. 172. F. Kaganas and C. Murray "Law, Women and the Family in the New South Africa" (1991) *Acta Juridica* 116.
[534] T. Nhlapo "African Family Law under an undecided constitution- the Challenge for law reform in South Africa" in J. Eekelaar and T. Nhlapo (eds.) *Changing Family* (Oxford, Hart Publishing, 1997), 617.
[535] WLUML (2006), 209.

may, in some societies be the only acceptable way for a woman who is keen to have a child to fulfil that wish. These justifications or rationalisations notwithstanding, it is important to recall CEDAW general recommendation 21:

"Polygamous marriages contravene women's right to equality with men and can have serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited."[536]

Several of the questionnaire responses identified polygyny as being part of the legal system and its continuation as a violation of women's right to equality. These included Afghanistan, Bangladesh, Ghana, Malaysia, Nepal (bigamy) and Nigeria. Concluding observations of committee bodies show that there are many other States that one could add.[537]

There are also States recognising plural personal law systems such as India, Singapore[538], Kenya[539] and Uganda.[540] Other majority States recognising polygyny include Mauritania.[541] WLUML highlight that in practice, many of the rules seeking to limit or regulate entry into polygynous unions are not implemented. Women are rendered particularly vulnerable due to illiteracy and inequality of bargaining power making their "consent" dependant on factors that are beyond their control.[542] Moreover, the laws of some States such as Qatar seem to suggest that an apparent inability to meet the conditions for marrying a second or subsequent wife will not lead to censure or indeed invalidation of the contract:

"In the event of marriage to another woman, the documenter shall ascertain that the wife has knowledge of the husband's financial circumstances if the husband's situation suggests that financial ability is not in place. The documenter may not refuse

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[536] CEDAW general recommendation 21, para. 14
[537] Human Rights Committee, Concluding observations: Gambia UN Doc CCPR/CO/75/GMB (2004), para. 18; Human Rights Committee, Concluding observations: Uganda CCPR/CO/80/UGA (2004), para. 9.
[538] See the reservations of both India and Singapore to CEDAW art. 16.
[539] Kenya Mohammedan Marriage and Divorce Act (Cap 164).
[540] Uganda Mohammedan Marriage and Divorce Act (Cap 214), Laws of Uganda 1964. E. Naggita "Why Men Come out Ahead: the Legal Regime and the Protection and the Realization of Women's Rights in Uganda" (2006) 6 *East African Journal of Peace and Human Rights,* 34.
[541] Mauritania Code of Personal Status, 2001, art. 45, cited in L. Welchman (2007), 168.
[542] WLUML (2006), 208-210.

to document the contract if both parties wish to conclude it. In all cases the wife or wives shall be informed of this marriage after it has been documented."[543]

A different problem was identified in Spain. Minority women in polygynous unions sometimes found themselves in legal limbo having contracted what were legal marriages in their countries of origin, but finding that they were not recognised when they moved to a new country which does not recognise such marriages.

"Furthermore, some of the institutions of Muslim law, such as polygamy and repudiation, have given rise to situations of lack of recognition of the rights of these women in Spain and Spanish courts have had to make a particular pronouncement on these kinds of family conflicts. In this context, for example, due to its significance and interest, the ruling made by the Higher Court of Justice of Galicia of April 2nd 2002 on the occasion of a case of polygamy, is worth pointing out. The details of the case involve application having been made to this Court for two widows' pensions and orphans' allowances for two Senegalese women and for the children that had been born of the marriage of these two women to a Senegalese national. According to Spanish law, only the first wife would have the right to a widow's pension, in which the legal rights of the second wife would not be recognised, despite the fact that such rights are recognised in her country of origin, where the marriage was contracted. This judicial ruling divided the widow's pension equally between the two women, making an analogous interpretation of what is stipulated for the sphere of separation and divorce in Spanish laws. The said ruling echoed the jurisprudence of other European countries, such as France, for example, in this kind of family conflict." [544]

An Na'im has noted a de facto decline in polygyny in many Arab States.[545] This is to be welcomed. However, the fact that it remains legal in many legal systems around the world is a form of on going discrimination against women. Precedent for abolishing polygyny has been established by Rwanda whose constitution explicitly provides that the only form of marriage recognised is monogamous marriage.[546] Also notable is Tunisia's long standing ban on polygyny grounded in a reading of the Koranic verses.[547] These precedents suggest that it is not only desirable but possible for States to outlaw a practice that so clearly constitutes de jure discrimination against women.

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[543] Qatar Amiri Decree no. 22 regarding the Law of the Family, 29 June 2006, Official Gazette no. 8 of 28 August 2006, art.14, as cited in L. Welchman (2007), 169.
[544] T Piconto-Novales questionnaire response p.4.
[545] A. An Na'im (ed) *Islamic Family Law in a Changing World: A Global Resource Book* (London, Zed Press, 2002), 160.
[546] Constitution of Rwanda, 1991, art. 25.
[547] Tunisia Code of Personal Status, 1956 as amended 1958, 1964 arts 18 (1), 18 (2) and 21, cited in L. Welchman (2007), 170.

Grounds for Divorce

Clear from convention provisions enshrining equality between men and women in the family including equal rights to enter marriage, for the duration of the marriage and at its dissolution, is the understanding that the law should not discriminate against the spouses in any way.[548] The existence in some legal systems of different divorce grounds for men and women would seem to go against these basic principles. Grounds for divorce reveal a multitude of practices and norms which boggle the mind of those coming from States with one system of law that applies to all. However, even in those States with the same grounds for divorce may see a gendered interpretation of the grounds to the detriment of women found to have acted improperly or outside acceptable social norms. In plural legal systems, there may be as many divorce laws as there are personal law systems.

The obtaining of divorce and the consequences (property division, custody and guardianship of children) will often also be different. Summarising the evidence before it, WLUML conclude:

"both laws and practices still tend to make divorce easier to access for men than it is for women, and to make life tougher for women than for men in the post-divorce period. That this is true for both systems based on Muslim law and for those based on other sources reflects a commonality of patriarchal control asserted through laws, practices and social attitudes."[549]

To get a feel for some of these differences, I turn to some of the questionnaire responses. The UNAMA response on Afghanistan notes that there are different grounds for divorce for men and women in the Civil Code.[550] ASK reports that in Malaysia:

"According to Part V of the Islamic Family Law (Federal Territories) Act 1984, husbands may divorce a wife unilaterally. He can even pronounce *talaq* outside the court (even via sms (mobile telephone message)) and he will only be asked to pay a small fine for this offence when the couple goes to court to register the divorce. This is a far cry to what the wives have to go through, as they may only apply for

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[548] CEDAW art. 16 (1) (1) (a) (b) (c) (h); CEDAW general recommendation 21; ICCPR art 23 (4); Human Rights Committee general comment 19, para. 6, and general comment 28, para. 26.
[549] WLUML (2006), 244.
[550] UNAMA questionnaire response Part A: 3, Civil Code arts. 135 (2), 133, 86, 87, 183.

dissolution of marriage in court or through lengthy arbitration or court proceedings."[551]

Similar discrimination was noted in Sudan by a group of NGOS presenting a report to the Human Rights Committee in 2007:

"There are many cases which give the wife the right to ask for divorce, but the procedure is discriminatory as a woman must go to court and seek a judge's order, whilst the husband can make a divorce with a single will by his word and does not need to see the judge. The law should be changed so the husband also has to seek a divorce in front of the judge and in his wife's presence and request her wife's consent."[552]

The FWLD response yielded two interesting cases from Nepal challenging discrimination. In the first *Meera Dhungana for FWLD v. Office of the Prime Minister and Council of Ministers,*[553] a rule in the Country Code chapter on Husband and Wife[554] permitting a husband to seek divorce if his wife was found to be infertile was struck down as being discriminatory and *ultra vires* the constitution. However, in *Radheshyam Paraluji v. Nepal*[555] provisions of the same Country Code chapter[556] as in the *Dhungana* case allowing women to file for divorce directly to the Court while men are required to submit an application for divorce to the concerned Village Development Committee or Municipality was challenged as constituting discrimination against men. However, the Supreme Court dismissed the case. It held that although article 11 of the Nepalese constitution guaranteed equality before the law and freedom from discrimination, article 11 (3) provided for special provisions "that may be enacted for the advancement of women. The impugned provision is not discriminatory against men and is necessary for the advancement of women."[557] The use of "special protection measures" to deal with procedural issues seems unusual, but may well reflect the reality of the situation on the ground in Nepal.

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[551] Sisters in Islam, Malaysia questionnaire response Part A:3.

[552] Sudan Shadow Report Human Rights Committee 2007. The reasons for the different grounds for divorce are often explained by reference to the different obligations of men and women within the marital relationship. This can most clearly be seen in the reservations of Egypt and United Arab Emirates (UAE) to article 16 of CEDAW.

[553] *Meera Dhungana for FWLD v. Office of the Prime Minister and Council of Ministers* (not cited). Discussed in FWLD Nepal Questionnaire response Part B:3 (case no. 19).

[554] *Ibid,* No. 1(1) of the Chapter on Husband and Wife of the Country Code.

[555] *Radheshyam Paraluji v. HMG/Nepal,* 2056/10/4, as cited in FLWD Nepal questionnaire response Part B:3 (Case no. 20).

[556] *Ibid,* No. 1 and 1A of the Chapter on Husband and Wife of the Country Code.

[557] *Ibid.*

Identified as problematic by Uganda in its third periodic report to CEDAW was the Divorce Act[558] which provided for different grounds for divorce for men and women.[559] Three years later, the Uganda Association of Women Lawyers brought a constitutional challenge alleging that the Divorce Act violated guarantees of equality before the law and constituted discrimination on grounds of sex.[560] In dispute was s. 4 of the Divorce Act which provided that while a man could seek divorce on the sole ground of his wife's adultery, a wife would have to prove adultery in addition to another fault ground listed in s. 4(2) of the Act. The Constitutional Court upheld the claim that the law was discriminatory. To equalise the position between men and women, the Court provided that the grounds in the Divorce Act were to be interpreted in a gender neutral way thus women could now rely simply on the adultery ground without having to allege further facts. A related, and more controversial case on adultery, was a challenge to the discriminatory provisions of the Penal Code.[561] Adultery was defined as a crime in the code. However, the definition of adultery was differentiated along grounds of sex, so that while for a wife, adultery was intercourse with any man, for a husband, adultery was intercourse with an *unmarried* woman.[562] Again this provision, identified as discriminatory by CEDAW in its concluding observations to the third Ugandan report[563], was struck down as being unconstitutional leaving open three possible interpretations: that wives could now have sanction-free intercourse with unmarried men (equalising up) or that adultery for a husband meant intercourse with any woman who was not his wife (equalising down), or that the provision had been repealed by implication.

Despite the recommendations for change from CEDAW, the DRC still retains double standards *vis-à-vis* adultery of the spouses.[564] The OMCT explains:

"Article 3 of the complementary provisions of the Criminal Code which summarises article 467 of Book IV of the Family Code does not place spouses on equal footing in

[558] Divorce Act (Cap 249).
[559] Third Periodic Report of States Parties: Uganda CEDAW/C/UGA/3, at 67.
[560] *Uganda Association of Women Lawyers v. the Attorney General* Constitutional Petition No. 2 of 2003, decision 10 March 2004.
[561] Penal Code (Cap 120) s. 154.
[562] *Law and Advocacy for Women in Uganda v. A-G of* Uganda Constitutional Petitions no. 13, of 2005 and 5 of 2006, decision 5 April 2007. See also E. Naggita at 45.
[563] CEDAW Concluding Observations: Uganda A/57/38, para. 154.
[564] CEDAW Concluding Observations to the initial, second and third reports of the DRC A/55/38, para. 197.

terms of the definition of the crime of adultery. Adultery committed by a woman is punishable in all cases, whereas that committed by a man is only punishable if it was induced. This seems to indicate that where a man's will is altered or inhibited by a married woman, for example through the use of alcohol, followed by the commission of a sexual act, the man is not at fault. Inequality also exists in the sanctions imposed for adulterous acts: article 467 of the Family Code prescribes a punishment of imprisonment for six months to one year as well as a fine for married women who commit adultery, whereas a married man may receive this punishment only if he is judged to have 'an injurious quality.' (article 467(2)"[565]

MONUC notes that injurious quality can include committing adultery on the marital bed.[566]

Property:

Key to women's legal disenfranchisement in many legal systems is the limitation placed on their ability to own or manage property and their entitlements to property on death or divorce.[567]

Post divorce property settlement

In spite of many pronouncements by human rights bodies,[568] the recognition that women have a right to share equally in the proceeds of matrimonial property after divorce is in many legal systems a fairly recent development. In England and Wales it was not until 2000 that the House of Lords pronounced in the case of *White v. White*[569] that there should be no discrimination between the home maker and the money earner in the post division of assets. It took until 2003 before a home making wife was given half of the matrimonial property.[570] This points to a common difficulty experienced by women, many of whom do not participate in the paid labour market and who are therefore unable to contribute in monetary terms to the acquisition of family assets. The non- recognition or minimisation of the unpaid work done by women in the home and community results in legal disenfranchisement.

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[565] OMCT (2006), 20. Also cited in MONUC questionnaire response (Code Penal).
[566] *Ibid.*
[567] See generally reports by the Special Rapporteur on adequate housing on women and housing.
[568] ICCPR art 23 (3); Human Rights Committee general comment 28, paras. 20, 26. CEDAW art. 16 (1) (h); CEDAW general recommendation 21 paras 30-33.
[569] *White v. White* [2000] 2 FLR 981.
[570] *Lambert v. Lambert* [2003] 1 WLR 926. See also *Miller v. Miller and McFarlane v. McFarlane* [2004] UKHL 24.

Nyamu-Musembi notes that in Kenya 95% of land is held in the name of the man and that "even co-ownership of the matrimonial home is a rarity."[571] She then cites the case of *Tabitha Wangeci Nderitu v. Simon Nediritu Kariuki*[572] where a judge described a stay at home wife who was seeking to claim a share of matrimonial assets after divorce as "sitting on her husband's back with her hands in his pocket" seemingly forgetting that the "cock bird can feather his nest because he does not have to spend all day sitting on it" or put differently, that a man is enabled to go out into the paid workforce because his wife is taking care of hearth and home for him.[573]

An additional difficulty faced by women is in the existence of many property sharing systems ranging from in community of property, out of community of property, deferred community and discretion based systems. There is also the possibility in some jurisdictions of contractual opt outs or private arrangements. Moreover, as seen in the section on divorce and also in the reservations of certain States parties, some legal systems may see the husband's duty to give dower for the wife and to maintain her during the course of the marriage as entitling him to unilaterally divorce her and also to keep the matrimonial assets on the dissolution of the marriage.[574] Equal sharing is made difficult in polygynous systems. Finally the co-existence of plural systems of laws means that women's entitlements in any one State may vary depending on which legal system governs their marriage. This was described as a problem in the South African response to the questionnaire where it was noted:

"The fight for equality has shifted to one which challenges laws that discriminate against women indirectly such as:
Section (3) of the Divorce Act 70 of 1979 which deprives women of protections on divorce based on their date of marriage,
Section 7(3) of the Recognition of Customary Marriages Act of 1998 which provides for marriages after the passing of the act to be in community of property while

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[571] C. Nyamu-Musembi "'Sitting on her husband's back with her hands in his pockets': Commentary on judicial decision making in martial property cases in Kenya" in A. Bainham (ed,) *International Survey of Family Law 2002* (Bristol, Jordan Publishing, 2002) 229, at 231. See also Human Rights Watch *Double Standards: Women's Property Rights Violations in* Kenya (London, Human Rights Watch, 2003).
[572] *Tabitha Wangeci Nderitu v. Simon Nderitu Kariuki,* Civil Appeal No. 023 of 1997, as cited in Nyamu-Musembi, *ibid*, 236.
[573] L. Weitzman "Marital Property: Its Transformation and Division in the United States" in L. Weitzman and M. Maclean (eds.) *Economic Consequences of Divorce: The International Perspective* (Oxford, Clarendon Press, 1992), 85.
[574] See for example the reservations of Egypt and the United Arab Emirates to article 16 of CEDAW.

existing marriages are subject to customary law (which makes no provision for sharing in the property by the wife)."[575]

The Women's Law Centre questionnaire response further elaborated:

"There is a glaring gap in that while civil and customary marriages are recognised in our law, those conducted by Muslim rites are not. This deprives spouses married under religious law of protections that other married couples have on death or divorce. The failure to provide any protection for women in domestic partnerships which are akin to marriage relationships but where there has been no formal registration.
The right to access to court for an order that the martial assets be re-distributed on dissolution of marriage where the marriages were concluded before 1984 and 1988 (depending on race)."[576]

Discrimination against women in de facto unions is widespread. Not having legally valid marriages, many find themselves without any protection whatsoever leading CEDAW to recommend:

"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 the law. Such women should share equal rights and responsibilities with men for the care and raising of dependent children or family members."[577]

In its fourth report to the Human Rights Committee, Paraguay showed that it had tried to resolve this problem by building into the law a presumption of legality giving the parties full marriage rights if the parties had cohabited for a period of 10 or more years.[578] While this recognition is to be welcomed the waiting period is longer than many marriages last. It may well be preferable to adopt the Mozambican approach which holds that if parties have lived together for a period of two or more years and regard themselves as being in a permanent union and are so regarded by their community, then legal recognition should be given to their union.

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[575] Women's Law Centre (South Africa) questionnaire response Part A:3.
[576] *Ibid,* Part A:6.
[577] CEDAW general recommendation 21, para. 18.
[578] Article 86 of Act No. 1 of 15 July 1992 partially amending the Civil Code as cited in Paraguay, second periodic report, CCPR/C/PRY/2004/2, para. 123.

Sometimes discrimination is based on policy rather than the formal law. In South Africa there is a policy: "to register a Council house in the name of the breadwinner, usually the husband, depriving women of security of tenure."[579]

The different matrimonial regimes throw up different challenges for women. In some in community of property systems, a woman loses her capacity leaving her husband to be the legal manager of family resources. Lesotho's Deed's Registry Act provides: "No immoveable property shall be registered in the name of a woman married in community of property".[580] Meanwhile in Swaziland section 16 of the Deeds Registry Act specifically excludes registration of title in the name of a woman who is married in community of property.[581] In practice this means that a business woman would need to seek the permission of her husband to register the business in his name.

In its fifth periodic report to the Human Rights Committee, Chile recognised the ongoing discrimination against married women by virtue of a provision in the Civil Code making the husband head of the household and providing that he would be responsible for administering the both the spouse's joint property as well as property owned by the wife.[582] However the State did go on to note that change was underway:

"It is proposed to replace the joint-property marital regime with a new regime of 'deferred community of acquisitions' which would eliminate the notion that the husband is the 'head of the conjugal partnership' and thus entitled to administer the wife's property. The bill would also put an end to the 'reserved property' system, which was conceived as a form of compensation to the wife for the husband's administration of her property, and which no longer makes sense if the woman administers everything that belongs to her. The bill was adopted on first reading by the Chamber of Deputies in November 2005, and is now going through its second reading in the Senate."[583]

While some legal systems allow parties to retain separate property, this may work against women. The Ethiopian Revised Family Code 2000 provides that parties have a choice of matrimonial regime on entering into marriage.[584] Parties are able to

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[579] *Ibid,* Part A:3.
[580] Lesotho Deeds Registry Act (No. 12 of 1967), cited in Equality Now (2004), 15.
[581] Cited by Special Rapporteur on adequate housing, E/CN.4/2003/55, para. 40.
[582] Chile Civil Code, art. 1749. Chile, fifth periodic report, CCPR/C/CHL/5, para. 57. See also Equality Now (2004), 15.
[583] *Ibid,* para. 59.
[584] Ethiopia Revised Family Code, Proclamation No. 213, 2000, art. 85 (1).

maintain their personal property separately and so, on divorce, each takes out what he or she brought in.[585] Any common property or property acquired jointly is shared.[586] In dividing common property it is provided that: "The utmost care shall be taken to give each spouse things which are most useful to him."[587] The separate property regime, although seemingly respecting the autonomy of each party, ignores the fact that often women enter into marriage with very little. Their home-making role, particularly in poor societies, makes it unrealistic to think that they will be able to acquire any meaningful property during the course of the marriage. Operating on the principle of "take what you have paid for" negates a woman's domestic contribution, for all she is able to point to, are the clothes on her back and maybe a few pots and pans. Moreover, even when women are able to earn, the division of labour in the home means that her money is used to pay for consumables such as food. How many people keep grocery receipts for 20 years "just in case we divorce?" Indeed in light of the criticisms made of the Labour Code of the DRC which requires that married women seek the permission of husbands before joining the labour market, how many women are able to decide how money that they earn is spent?[588]

Some systems recognise these potential pitfalls and provide for the exercise of judicial discretion in the division of matrimonial assets after divorce. This is the system in operation in England and Wales[589] and some of its former colonies.[590] The English Matrimonial Causes Act (MCA) gives judges a list of factors that they are to consider in deciding the allocation of marital assets. One of these includes contributions, including "any contribution by looking after the home or caring for the family."[591] Where judges are willing to recognise domestic labour as being on par with paid labour, there may be fairness. Indeed the African Protocol on Women's Rights requires that states "take necessary measures to recognise the economic value of the work of women in the home."[592] However, practice suggests that in many discretion based systems, there is a reluctance to do this meaning, again, that wives are left

[585] *Ibid,* art. 86 (1).
[586] *Ibid,* arts. 90-93.
[587] *Ibid,* art. 91 (3).
[588] OMCT (2006), 20. The CEDAW asked the DRC to revise its discriminatory labour laws.
[589] See Matrimonial Causes Act, 1973, as amended s. 25.
[590] Zimbabwe Matrimonial Causes Act (Cap 5:13) s.7 (3).
[591] English MCA s. 25 (2) (f).
[592] African Protocol on Women's Rights, 2003, art. 13 (h).

disadvantaged. A way forward would be to adopt an approach whereby there is a presumption (rebutable) of equal sharing.

Another way forward is to consider the approach of Paraguay which noted the following matrimonial arrangements in its revised Civil Code:

"118. With regard to marriage, article 6 of Act No. 1 specifies that: "In the home, men and women have equal duties, rights and responsibilities, regardless of their financial contribution to the upkeep of the joint home. They owe each other mutual respect, consideration, fidelity and assistance."
119. Article 9 deals with care and maintenance of the home, stating "that it is the joint responsibility of the two spouses".
120. Under article 15, both spouses have the duty and the right to participate in running the household. They have equal responsibility for deciding jointly on questions pertaining to the household economy.
122. With regard to the administration of community property, article 40 stipulates that the management and administration shall be the responsibility of both spouses, jointly or separately."[593]

Succession and Inheritance

Succession can be divided into two categories-the first being related to appointment to take on a certain status or role after the death of another and the other being the taking of property again usually following a death. Rules regarding these two understandings appear to suggest that in some legal systems, males are privileged.

Starting with the first meaning of succession, one finds that States make reservation seeking to ring fence rules of succession to hereditary title from treaty provisions including non discrimination. The reservations of Monaco, Belgium, Spain, UK, Luxembourg, Micronesia, Cook Islands and Niger to CEDAW fall into this category.[594] While it is sometimes argued that titular succession is more symbolic than substantive, it remains the case that there is a symbolism attached to the idea that leadership, however unimportant in constitutional terms, can only be exercised by men. The continuation of male preference and privilege (for these titular roles are seldom reward free) sends out a message that men are "natural" born leaders while

[593] Act No. 1 of 15 July 1992, which partly amended the Civil Code, cited in second periodic report of Paraguay to the Human Rights Committee.
[594] The FWLD (Nepal) questionnaire response identified the Succession to the Throne Act, 2044 (1987) as providing that only male descendants are eligible to succeed to the royal throne. CEDAW general recommendation 23, para. 31.

women should always follow.[595] The questionnaire response from Spain highlights social and political disapproval of the male preference:

"Despite the fact that equality is contemplated and guaranteed in the Spanish Constitution of 1978 as one of the higher values of the country's legal system (1.1 Spanish Constitution), as one of its constitutional principles (art. 9.2) and as a fundamental right, it does contain a single exception to the right to gender equality; namely, the succession to the Crown of Spain (art. 57). In fact, it is specifically set forth that the successor to the Crown of Spain shall preferably be a man rather than a woman. Despite this, within Spanish society there is broad social and political consensus regarding the need to reform this constitutional provision in order to eliminate this unjustified means of discriminating against women in the context of succession to the Spanish Crown."[596]

In the *Hoyos* opinion of the Human Rights Committee, it was indicated that the present King of Spain appeared to agree with the majority consensus and that in future daughters would also be in line to take on the role of constitutional monarch.[597] Precedent for this more egalitarian approach can be found in the revised law on succession to the ranks and titles of nobility of which the questionnaire response from Spain indicates:

"On the other hand, Law 33/2006, of October 30th, on equality between men and women in the order of succession to titles of nobility, establishes the equal right of women in this process, thus preventing men from being granted preference over women, as had been the case until this law came into force as a result of the extension of the application of article 57 of the Spanish Constitution of 1978 to these circumstances. In more specific terms, art. 2 of Law 33/ 2006 establishes that "the provisions of any Royal Letter granting a title of nobility that exclude women (…) or grant preference to men (…) or contradict in any manner whatsoever the equal rights to succession held by men and women shall cease to have legal effect"."[598]

Perhaps more problematic in light of women's lack of access to resources were succession laws that discriminated against women as wives and daughters. This

[595] See the opinion of Ruth Wedgwood in *Hoyos v. Spain* (1008/2001), ICCPR, A/59/40 vol. II.
[596] Professor T. Piconto Novales, questionnaire response p. 1.
[597] Professor Wedgwood in *Hoyas v. Spain.*
[598] Professor Piconto-Novales, questionnaire response at 1.

resulted in women, especially wives, being left at the mercy of relatives of the deceased husband, open to sexual and psychological abuse and unable to make decisions about their own lives and those of their children.[599] Discrimination against daughters was justified by stereotyped assumptions that they would marry and thus leave the family of origin. In this case it would be wrong to allow "natal family property" to be given to "outsiders". These rationales are still used to justify discriminatory rules and laws notwithstanding clearly articulated human rights principles on the matter.[600] Indeed reservations of States indicate custom (Niger),[601]religion (Libya)[602]and (Bangladesh)[603] being used to seek to circumvent principles of equality before the law.

Questionnaire responses indicated that discrimination in matters of succession continued to be a problem.[604] The Kenyan response noted: "According to nearly all customary practices in Kenya, women cannot inherit property from parents or husbands because property ownership generally follows a male lineage."[605] Similarly the UNAMEE response showed that: "Succession law-spouses do not inherit (from) one another (with men having more economic control in the event of a husband's death, the woman may have very law proportion of the common property."[606] Arguing in favour of the creation of a special mechanism on laws that discriminate against women is the Tanzanian questionnaire response which sees such a mechanism as forcing the government to address loopholes in the law:

"For instance the right of a widow on custody of children and Inheritance of Matrimonial Properties are set out in the Government Gazette No. 279 of 1962 under paragraph 62 – 70 ousts the rights of a widow over its (sic) custodian of children, second schedule paragraph 1 – 53 provides the rules of Inheritance. These paragraphs among other things are congregative, discriminatory, oppressive and biased in favour of man to the detriment of woman. For example rule 21 provides for the classes of

[599] U. Ewelukwa "Post-Colonialism, Gender, Customary Injustice: Widows in African Societies" (2002) 24 *Human Rights Quarterly* 424.
[600] Declaration on the Elimination of Discrimination against Women, 1967, art. 6. CEDAW general recommendation 21, paras 34-35,; AU Solemn Declaration on Gender, art. 7.
[601] Niger reservation to CEDAW arts. 2 (d) (f).
[602] Libya reservation to CEDAW art. 2.
[603] Bangladesh reservation to the CESCR arts. 2, 3.
[604] See also Special Rapporteur on adequate housing (2006), paras.38-46.
[605] FEMNET questionnaire response Part A:3.
[606] UNAMEE questionnaire response Ethiopia Part A:3.

heirs while rule 22 provides their rights thereto. To make it effective rule 30 go even further to provide for example of heirs according to gender and age."[607]

Of practice in Malaysia, Sisters in Islam noted:

"Section 2 of the Distribution Act 1958 and the Inheritance Act 1971 mandates that the statute shall not be applicable to Muslims. This has been used as a basis that Muslims cannot inherit from non-Muslims even though the Muslim is a Mualaf (convert) i.e. he or she cannot inherit from his or her non-Muslim parents and so on.

Aside from that, the method used to divide the estate of a Muslim (faraid) is discriminatory as the rules for division is unequal between male and female beneficiaries."[608]

Other areas of discrimination relate to the continuation of harmful practices not least forcible marriage to a brother or relative of the deceased. In Zimbabwe the Customary Marriages Act recognises levirate marriage as long as it is registered.[609] Confusingly the recently promulgated Domestic Violence Act outlaws forced wife inheritance.[610] As both statutes are on the books it is difficult to know what the law is.

Laws on succession and inheritance have formed an important part of the dialogue between States parties and human rights committees.[611] While it is important to acknowledge that many States have changed their laws to remove discrimination against women in inheritance and succession and also to outlaw customs and practices that constitute degrading and inhuman treatment of women following death of their husbands, implementation of these laws remains a problem.[612]Moreover, there have been several court challenges challenging discriminatory laws. Again, although often successful, the difficulty has been in enforcement.

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607 Tanzania –J. Shuma questionnaire response Part F.
608 Sisters in Islam questionnaire response Part A:3 p. 7.
609 Customary Marriages Act (Cap 5:07) s. 3 (1).
610 Domestic Violence Act (Cap 5:16) s. 3 (1).
611 Nigeria, CEDAW/C/NGA/4-5, CEDAW concluding comments on Nigeria CEDAW A/59/38, part. 1 (2004).
612 F. Banda (2005), 148-157.

Although family and personal laws comprised the bulk of the laws identified by questionnaire respondents as problematic, women were also found to be discriminated against in employment. The discrimination related to denial of access to certain fields of employment not least working in the military, equal pay and general equal opportunity issues. It is as well to remember that most of the work that women do is in the informal sector and is neither paid nor recognised as important.[613]

Discrimination in Employment

Examination of state reports to human rights bodies show that even States that have consistently topped the UN human rights development and gender indices, have a gender pay gap across all sectors. Moreover, the take up rate for employment is, in almost all sectors, higher for men than women. Factoring in differences based on disability or origin, there are further disparities in work place participation. Much of this occurs despite there being laws in place guaranteeing equality in the work place.[614]

Similarly the concluding observations of the CESCR report to Germany, echoed in a later set of recommendations of the Human Rights Committee, indicated concern and noted:

"Like the ILO, the Committee is concerned about the persisting impediments to women in German society, in terms of promotion in employment and equal wages for work of equal value, both in the private and public sectors, and especially in federal bodies and academic institutions, despite the efforts of the State party to give a new impetus to the equal participation of women in the Labour market."[615]

Similarly of Luxembourg the CESCR noted:

"with concern that women are still under-represented in the work force. While taking note that the disparities between wages of men and women have been reduced, the Committee also notes with concern that the current level of wage

[613] CEDAW general recommendation 16.
[614] Norway's Seventh Periodic Report to CEDAW, CEDAW/C/NOR/7 (2007), part 2:5 *et seq.*
[615] CESCR Concluding Observations: Germany, E/C/12/1/Add 68, para.19. See also Human Rights Committee Concluding Observations: Germany, CCPR/CO/80/DEU, para. 13.

difference (women receiving 15 per cent lower wages than men) remains a matter of concern."[616]

The fact that the same issues identified as problematic in the Norwegian, German and Luxembourg reports are also found in the CEDAW concluding observations to the report of Azerbaijan seems to indicate that there are common challenges facing women in the employment sector in many regions:

"The Committee continues to be concerned about the occupational segregation between women and men in the labour market and the gap in their wages. The Committee is also concerned about the potential negative impact on women of the Labour Code, which appears to be overly protective of women as mothers and to restrict women's economic opportunities in a number of areas."[617]

Problematic on the equal pay front are the reservations entered to article 7 of the CESCR by the UK and to article 11 of CEDAW by the Federated States of Micronesia. The latter provides:

"The Government of the Federated States of Micronesia advises that it is not at present in a position to take the measures either required by article 11, paragraph1(d) of the Convention to enact comparable worth legislation, or by article 11, paragraph 2(b) to enact maternity leave with pay or with comparable social benefits throughout the nation."

Questionnaire responses, reservations to CEDAW and case law highlight the fact that there are still some occupations that women are not permitted to enter. Military service is one such. New-Zealand and the United Kingdom[618] both have reservations to CEDAW noting limitations of women's ability to participate in armed combat or in certain sectors of the defence forces. Questionnaire responses also indicated limitations in Australia,[619] the Republic

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[616] CESCR Concluding Observations: Luxembourg, E/C.12/1/Add 86, para. 22. See also CESCR Concluding Observations: Lichtenstein, E/C.12//CO/LIE/1, para. 13.
[617] Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined second and third periodic report of Azerbaijan (CEDAW/C/AZE/2-3) at its 765th and 766th meetings, on 23 January 2007/
CEDAW/C/AZE/CO/3, para. 23.
[618] Sex Discrimination Act, 1975 s. 85(4), as cited by Equality Now (2004), 19-20.
[619] E. Evatt, questionnaire response Part A:3. See also Equality Now (2004), 16, citing the Sex Discrimination Act 1984, s. 43. However, see the letter written to Equality Now by Kerry Flanagan in the Office of the Status of Women, Department of the Prime Minister indicating that the government "was undertaking a major body of work to review the Australian Force job roles" but that the question

of Cyprus[620] and Nepal whose Army Act provides that women can join the army only in certain non combatant positions.[621] The exclusion of women from military service may have other consequences. In Cyprus it was noted that one of the reasons for the reversal in policy on granting automatic citizenship to children born of Cypriot mothers was dictated to by the fact that a male holding citizenship would automatically become eligible for military services and some did not welcome this. Discrimination against women is in their inability to access employment in the army and the denial of opportunities to earn a living in a field of their choosing. The questionnaire response indicated:

"The Army of the Republic Regulations (P.I. 44/1995) require, inter alia, candidates for a 5 year appointment in the army to be (i) male citizens of the Republic of Cyprus or Greece and (ii) to have completed their national service. (Regulation 6 of P.I. 44/1995).

The justification for the gender requirement is the fact that**,** women in Cyprus do not perform military service and, thus, Cypriot women would not, in any case, qualify for appointment.

Notwithstanding this, the Ministry of Defence is currently reconsidering the matter in the light of the Equal Treatment of Men and Women in Employment and Vocational Training Law, 2002 (L.205(I)/2002) taking into account the particularities of the military service."[622]

CEDAW has noted that the rule in Eritrea that exempts married women from performing national service is discriminatory not least because access to land is made conditional on having undertaken national service.[623]

Other exclusions identified related to women's ability to work in mines and at night.

Night work and mine work

Originally limitations on women's ability to participate in work in mines and at night were constructed as being for their "protection."[624] These protections were enshrined

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of women carrying arms in combat was a "complex cultural and social issue." Equality Now Annual Report 2004, at 4.

[620] Republic of Cyprus questionnaire response p. 3.

[621] The Army Act, 2016 (1959) s. 10, as cited in FWLD questionnaire response Part A:3 p. 7.

[622] Law Commission, Republic of Cyprus questionnaire response –narrative p. 2.

[623] CEDAW Concluding Observations: Eritrea,CEDAW/C/ERI/CO/3, para.14.

in international instruments including the ILO Convention Concerning Night work of Women Industry.[625] This was first concluded in 1919, revised in 1934 and also in 1948. It "provides protection" to women by limiting their participation in industry between the hours of 10pm and 7am. Article 1 provides: "Women without distinction as to age, cannot be employed at night in public or private undertakings except for members of their family." The ILO Convention Concerning Employment of Women in Underground Work of All Kinds, 1935.[626] It provides that no female can be employed in underground work at any time (many State refused to accept these instruments because of their discriminatory nature).

Although well meant at the time, the instruments are now considered as being out of date, discriminatory, paternalistic and as stereotyping women. Specifically the ban on night work is criticised for assuming that women are home makers and care givers but not breadwinners. The exemption for working for family reflects expectations that women will work without pay for family and indeed suggests that this is not work at all. Perhaps crucially in employment terms is the fact that night work is paid at double the rate of day time employment thus denying women the right to participate in night work is tantamount to limiting their income earning opportunities. Similarly accusations of paternalism have been made about denying women the right to work in mines. States are criticised for making choices for women and again for limiting their work horizons. Although initially the ban was put in place for the protection of women's health and because it was felt that women should not be made to do work which may be potentially harmful or hinder their ability to reproduce, it is now argued that developments in medical knowledge should be reflected by the removal of these bars.[627] While many States have heeded these criticisms, questionnaire responses, reservations and information gathered by Equality Now on the Labour laws of China,[628] Latvia[629] and Madagascar[630] suggest that many have not. In its pre-

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[624] N. Hevener "An analysis of gender-based treaty law: Contemporary developments in historical perspective" (1986) 8 *Human Rights Quarterly* 70.

[625] ILO Concerning Night Work of Women Employed in Industry, 1919 (Convention No. 4), revised in 1934 (Convention No. 41), and 1948 (Convention No. 89).

[626] Convention Concerning the Employment of Women in Underground work in Mines of all Kinds (Convention No. 45).

[627] CEDAW, art. 11 (3).

[628] China Labour Act 1994 Chapter VII s. 59 (mine work) –as cited in Equality Now (2004) 18.

[629] Latvia Labour Law, 2001 ss. 53, 136, 138 (travel restrictions, over time, night work), as cited in Equality Now (2004), 18.

sessional questions sent to the DRC in preparation for consideration of the country's fourth and fifth periodic reports, CEDAW raised the issue of the night work exemption for women in article 124 of Labour Code.[631] In the concluding observations to the State's report, CEDAW merely mentions the Labour Code as a cause for concern but does not isolate the exclusion of women from working at night as a particular problem.[632]

Some questionnaire respondents cited the existence of these exclusionary rules as being positive measures. Nigeria was one which identified the Labour Act as providing protection:

"Section 55 which provide that no woman shall be employed on night work in a public or private industrial undertaking or in any branch thereof or in any agricultural undertaking or in any branch thereof.
Section 56 (1) provides that no woman shall be employed in any work in any mine."[633]

Also noted in the questionnaires were limitations placed on women's ability to take up work without parental or spousal consent.

Barriers to Employment – the requirement for family or spousal consent

In Nepal a constitutional challenge brought to the rule in section 12 of the Employment Act, 1986 requiring foreign employment agencies to obtain the consent of the guardian and government before a woman could take up foreign employment was upheld as consonant with special laws for the advancement and protection of women.[634]

In the DRC a married woman cannot participate in commerce/take up salaried employment without the consent of her husband. The questionnaire response indicates that in practice this means that women cannot participate in the economic life of the

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[630] Madagascar, Labour Code (Law No. 94-029 of August, 25, 1995), art 92 (no night work without permission of labour minister), as cited in Equality Now (2004), 19.
[631] CEDAW/C/COD/Q/5, item 23 of CEDAW list of issues, in OMCT (2006), 22.
[632] CEDAW Concluding Observations: DRC fourth and fifth periodic reports, para.21
[633] The Labour Act 1971 Cap 198 laws of the Federation, as cited in WILDAF Nigeria questionnaire response Part C:1.
[634] *Advocate Sabin Shrestha v. HMG/Nepal,* Court Bulletin 2958 b.s. Vol. (19) p.1., as cited in FWLD questionnaire response Part B:3 case no. 27 on p. 24.

country in the same way that men can.[635] Linked to those provisions of the Family Code giving the husband marital power[636] and which indicate that a husband is responsible for making decisions in the home including about what to do with money earned by the wife in the course of her profession, [637] this constitutes serious discrimination against women. Equally problematic are the reservations of Malta to article 13 of CEDAW:

"The Government of Malta reserves the right, notwithstanding anything in the Convention, to continue to apply its tax legislation, which deems, in certain circumstances, the income of a married woman to be the income of her husband and taxable as such.
The Government of Malta reserves the right to continue to apply its social security legislation, which in certain circumstances makes certain benefits payable to the head of the household, which is, by such legislation, presumed to be the husband."

This reservation creates a disincentive for (married) women to work. A different kind of (marital) status discrimination was identified in the questionnaire response from the Bangladesh National Women Lawyers Association. A rule that only married women could be appointed to be Health Assistants was successfully challenged as constituting discrimination.[638] In a slightly different context both FWLD (Nepal) and Sisters in Islam (Malaysia) give examples of positive challenges to discriminatory practices within the airline industry. Sisters in Islam cite the case of *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor*:

"This is a case concerning discrimination at the workplace. In 2005, JAG lent its support to female staff of Malaysian Airlines who filed a case against the company and the staff union for gender discriminatory practices. Among these were the requirement that all female flight attendants resign from their jobs when they became pregnant; the practice of limiting each female flight attendant to a maximum of two children; and forcing them to retire at 40 years of age (45 years for senior female flight attendants) while male flight attendants retire at 55 years of age."[639]

Another area of discrimination in employment was maternity.

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[635] Art 4 of the Decree of 2 August 1913, as cited in MONUC (Droit Commercial).
[636] Art 448 Code de la Famille, as cited in MONUC (Code de la Famille).
[637] Arts 497 (2), 515, 524 and 531 Code de la Famille, as cited in MONUC (Code de la Famille).
[638] Health Assistants case cited by Bangladesh National Women Lawyers Association questionnaire response PartB:3.
[639] *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor* [2004] 4 CLJ 403, as cited in Sisters in Islam questionnaire response Part B:3. See also the Nepalese case of *Rina Bajracharya v. HMG, Secretariat of Minister of Council et al NKP*, 2057, Vol. V, pg.376, as cited in FWLD (Nepal) questionnaire response Part B:3 (case 3 p.16).

Maternity policy – hampering women's ability to participate in the labour market

While acknowledging women's unique reproductive burden in bearing children, human rights law makes clear that women should not be discriminated against in the workplace either because they might fall pregnant or because they have fallen pregnant. They are to be given equal opportunities which include access to (paid) maternity leave. The State's obligation under article 11 (2) (b) of CEDAW were spelled out in *Dung Thi Thuy Nguyen v. The Netherlands*:[640]

"Article 11, paragraph 2 (b, obliges States parties in such cases to introduce maternity leave with pay or comparable social benefits without loss of formal employment, seniority or social allowances. The Committee notes that article 11, paragraph 2 (b) does not use the term 'full pay', not does it use 'full compensation for loss of income' resulting from pregnancy and childbirth. In other words the Convention leaves to States parties a certain margin of discretion to devise a system of maternity leave benefits to fulfil Convention requirements."[641]

In a dissenting opinion, three CEDAW members added:

"It can be argued that the explicit wording of article 11, paragraph 2 (b), read in conjunction with other subparagraphs of article 11, paragraph 2, is aimed primarily at women as salaried employees in the private and public labour market sectors. On the other hand, the provision can also be interpreted to mean that States parties are also obliged to provide for a maternity leave with pay for self employed women."[642]

The dissenting addendum is particularly important in light of the fact that many women find themselves either self employed or working in the informal sector without access to employee benefits. In light of this it is important to note the provisions of the African Protocol on the Rights of Women requiring States to:

"establish a system of protection and social insurance for women working in the informal sector and to sensitise them to adhere to it;"[643]

And: "guarantee adequate and *paid* pre and post-natal maternity leave I both the private and public sectors."[644]

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[640] *Dung Thi Thuy Nguyen v. The Netherlands,* Communication No. 3/2004 Views of the Committee CEDAW, A/61/38 (2006) Annex VIII.
[641] *Ibid,* para. 10.2.
[642] *Ibid,* Individual opinion of Committee members, Naela Mohamed Gabr, Hanna Beate Schopp-Schilling and Heisoo Shin (dissenting), para. 10:3.
[643] African Protocol on Women's Rights, 2003, art. 13 (f).
[644] *Ibid*, art. 13 (i).

There are still States which seek to throw the reproductive burden onto women's shoulders for them to bear alone. In the DRC, the law provides that a woman cannot take annual leave if she has already had maternity leave in the same year.[645] This seems to punish women and suggest that child bearing is something that they do for their own selfish reasons rather than as a social function as anticipated by article 5 (b) of CEDAW.

The denial of maternity pay to women may also hamper their life chances as they may not feel able to have children. For this reason the reservations of both Australia and Micronesia to article 11 (2) (b) of CEDAW noting their inability to guarantee maternity pay and social benefits are to be regretted.

A major problem in employment is the non recognition of certain categories of employees who are therefore left without legal protection. Particularly vulnerable are domestic workers, especially if they are migrants.[646] The questionnaire response from Fiji reported: "Moreover Fiji's 1965 Employment Act does not adequately cover domestic workers such as cooks, house cleaners, gardeners, and washerwomen ."[647] In its concluding observations to the report of Germany in 2004, the Committee recommended that: "the State party intensify efforts to protect the human rights of foreign women domestic workers in diplomatic households."[648]

A final consideration is that of the different ways in which pensions for men and women are calculated and the potential discrimination that may occur.

Entitlement to Pension and other Benefits

It would appear that in some jurisdictions there is on going discrimination between the way that the law treats women in relation to entitlement to benefits and especially pensions. The response of the Nepalese Forum for Women, Law and Development showed that the discrimination was to be found in the pension rules of many public

[645] Article 25 of Loi No. 81-003 du Juillet 1981 portant statut du personnel de carrière des services public de l'Etat, in MONUC questionnaire response (III). See also OMCT (2006), 22.
[646] B. Ehrenreich and A. Hochshild *Nannies, Maids and Sex Workers in the New Economy* (London, Palgrave, 2003); UNIFEM *Claim and Celebrate Women Migrants Human Rights through CEDAW: The Case of Women Migrant Workers* (New York, UNIFEM, 2005), 32.
[647] OHCHR questionnaire response Part A:3.
[648] CEDAW Concluding Observations: Germany, A/59/38, para. 395.

bodies.[649] The Civil Service Act, 1992 provides that pension entitlement accrues to a person who has more than 20 years service. Retirement age is set at 58 years. The Act allows women to join the civil service until the age of 40 whereas men are only permitted to join up the age of 35. Technically therefore, women are given a benefit (later entry into the civil service) that is not given to men. However, in practice a woman who joins the civil service at 39 or 40 cannot draw a pension because she would not have served the 20 year minimum. [650] Clearly what starts off as a measure to benefit women, can work against them. Removing the discriminatory effect of the provision may require that pension be paid on a pro rata basis or indeed that the pensionable age be raised to 60 to enable those who wish to, to serve the requisite number of years entitling them to a full pension. It is here worth acknowledging that there was also discrimination against men in the Police Rules, 2049 (1992). These provided that a widower's right to "receive his dead wife's (women police personnel) pension is under discretion."[651] A different, but common, problem was identified in South Africa which provides for different ages of retirement for men and women. The response of the Women's Law Centre (WLC) noted that the constitutionality of this difference in treatment was being challenged.[652]

Summary

This part of the report has presented a snap shot of some of the laws identified by questionnaire respondents as causing concern. The fact that more than 60 years after the foundation of the UN and the adoption of its Charter "reaffirming faith in the fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women", one half of the population, women, continue to experience State sanctioned and condoned discrimination speaks volumes about the commitment

[649] FWLD, response to questionnaire Part A:3. They cite, amongst others, the Act Relating to the Remuneration Terms and Conditions of the Judges of the Supreme Court, 1026 (1969) ss. 7 (c) (5) and 7 (c) (3), (6); the Act Relating to the Remuneration, Terms and Conditions of the Judges of the Appellate and District Court, 2048 (1991) ss. 32(5), 32 (3) and (6); Civil Service Rules, 2050 (1993) ss. 98 (2), 98 (3), 98 (6), 101 (2); Nepal Health Service Rules, 2055 (1999) ss. 95 (2), 95 (3), 95 (6), 99 (2); Parliament Secretariat Personnel Administration Rules, 2059 (undated) ss. 83 (2), 83 (3), 83 (6); Postal Savings Bank Regulations, 2033 (undated) s. 11 (3); Armed Police Rules, 2060 (undated) s. 58 (3); Rules of Service of the Tribhuvan University Teachers and Staff, 2050 (undated) ss. 56 (3), 57 (1), 59 (2) and Royal Nepalese Army (Pension, Gratuity and Other Facilities) Rules, 2033 s. 7 (6). It is worth noting that the Gender Equality Act may have resulted in the amendment or repeal of some of these.

[650] Civil Service Act, 1992 s. 37(1). See also response of OHCHR Nepal to Part A:4 questionnaire.

[651] Police Rules, 2049 (1992), as cited by FWLD Part A:3.

[652] WLC response to Part A:5.

of States to women's rights. Clearly the pledge made in Vienna and repeated in Beijing that "women's rights are human rights" is still more rhetoric than action. Similarly, the promise given in Beijing to tackle de jure discrimination remains unfulfilled.

Although the focus has been on de jure discrimination, it is clear that the conditions of oppression and lack of voice and opportunity are as much a part of the discrimination that women experience as the laws. If anything the laws merely reflect and reinforce this gendered disregard for their worth as human beings. This calls for a holistic consideration of the causes of women's disadvantage and robust responses thereto. From a legal perspective, this demands that discriminatory laws are amended or repealed. Furthermore there needs to be greater commitment to the implementation of laws. Here is worth recalling the recommendation made in CEDAW's concluding observations to the report of Canada in 2003: "The Committee urges the State party to find ways for making funds available for equality and test cases under all jurisdictions and for ensuring that sufficient legal aid is available to women under all jurisdictions when seeking redress in issues of civil and family law and in those relating to poverty issues."[653]

[653] CEDAW Concluding Observations: Canada, A/58/38, Part D 336-389, at para. 356.

PART E – IS THERE A NEED FOR A SPECIAL RAPPORTEUR ON LAWS THAT DISCRIMINATE AGAINST WOMEN?

In both interviews and the questionnaire responses, it became clear that the arguments being put forward in support and against the creation of a new mechanism on laws that discriminate against women mirrored many of those already canvassed.[654] From the questionnaire responses, the vast majority of those addressing Part F on the advisability of a Special Rapporteur on laws that discriminate against women were in favour of the creation of such a mechanism.

This section starts by considering the views of those who were opposed or sceptical about the need for the creation of new mechanism. They argued the following in outline:

- vi) that the creation of new mechanism would result in duplication;
- vii) it would take away from the work of CEDAW;
- viii) other committees would stop focusing on women's rights issues;
- ix) that there was already a special rapporteur dealing with violence against women;
- x) that a focus on *de jure* discrimination was not helpful.

These views were countered by those in favour of the creation of a special mandate to deal with laws that discriminate against women. Bridging the two were those who could see both sides of the argument and who were concerned with the implication of a special mechanism on laws that discriminate against women on the UN's mainstreaming project.

In presenting the arguments, it seems best to let the voices of the various protagonists speak for themselves.

Arguments against the appointment of a special rapporteur on laws that discriminate against women

i) Duplication-Need to consolidate rather than create yet more mechanisms

[654] See E/CN.6/2006/8 and E/CN.6/2007/8.

It was argued that there was a proliferation of special rapporteurs. This was seen as counter-productive and as an unnecessary expense. Instead there needed to be consolidation of existing mechanisms to try to prevent mechanism fatigue. A UN official working with a specialised agency argued:

"We do not need other mechanisms. We have enough. We need to work with what we have. We need to make them more efficient and try to make them collaborate with each other and strengthen each other's work and disseminate. Even in the field people don't know all the Special Rapporteurs or what they do or where to find their work. There is a lot that we need to do now with what we have."[655]

This was echoed by a Geneva based UN official who commenting on the mandate review that was on going at the time asked:

"If there are 41 special rapporteurs, do we need another? It is not about numbers but about whether the need is there. It may be political-will the Council approve it?... Let's look at what we have in all parts of the house, especially when CEDAW comes here, see what our strengths are and what we can do together. We need to know what we have."

Yet another UN official working for a specialised agency cautioned: "you don't want to expand mandates indefinitely. The more mechanisms there are, everything ceases to have meaning or authority."[656]

ii) What about CEDAW? Will a new mechanism not duplicate it?

Concerns were expressed about overlap or duplication with CEDAW. A key State obligation under the Convention is the amendment or repeal of laws that discriminate against women. With this in mind, would not the creation of a Special Rapporteur on laws that discriminate against women merely duplicate the work of CEDAW or, as suggested by some, result in an encroachment on CEDAW territory? Responding to a letter from the Chief of the Women's Rights section of DAW asking for his opinion on the advisability of a special rapporteur on laws that discriminate against women, the Chairperson of the Committee on the Rights of Migrant Workers had noted:

"The Committee discussed this matter at its recently held 5th session. The majority of the Committee members is of the opinion, that while it is important to study the issue

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[655] Interview with UN official, specialised agency, New York, March 2007.
[656] UN Official interviewed in New York, March 2007.

of legislation that discriminates against women, care should be taken to avoid duplication with existing bodies and procedures, in particular the Committee on the Elimination of Discrimination against Women."[657]

iii) Other Committees will stop addressing women's rights

A UN official based in Geneva cautioned that the appointment of a new Special Rapporteur on laws that discriminate against women may lead human rights committees to abandon the work that they were doing on women's rights reasoning that the matter was being tackled elsewhere. This recalls the arguments over whether there was a need to elaborate a separate treaty focusing on the rights of women: would it help to focus to issues of special concern to women or would it lead to their ghettoisation?

iv) There is already a special rapporteur on violence against women and another on trafficking – why is another needed on laws that discriminate against women?

The question asked was, what is a Special Rapporteur going to achieve that existing mechanisms cannot, or put differently, why is a Special Rapporteur likely to be more effective than existing mechanisms? There was a link here with the duplication argument it being felt that "women's issues" were, or should already have been covered by the two Special Rapporteurs on violence and trafficking.

The questionnaire response from OHCHR Guatemala noted:

"At the international level, the CEDAW Committee together with the Special Rapporteur on Violence against women, are effective mechanisms to address discriminatory laws against women. Furthermore, as a crosscutting issue other human rights treaty bodies, have addressed these issues successfully. Thus we believe the existing mechanisms are effective enough to address this issue." [658]

v) Limitations of a Focus on De Jure Laws

The criticisms were two fold. One was about the problems thrown up by implementation with it being noted that it was not the laws per se that were always the problem, but rather the implementation. The second issue identified was the

[657] Letter from Prasad Karlywasam, Chairperson Committee on the Rights of Migrant Workers to Ms Christine Brautigam, Chief Women's Rights Section, DAW, dated Geneva 8 November, 2006.
[658] OHCHR Guatemala questionnaire response Part F.

perceived focus on State enshrined laws to the exclusion of community or customary laws. This was linked to arguments about the limits of law to change behaviour and of course of the usefulness to women of "law", broadly constructed.

Bringing all these arguments together without rejecting the idea of a special rapporteur on laws that discriminate against women outright, was Marsha Freeman, founder of International Women's Rights Action Watch, Minnesota. In an email and questionnaire answer, her response to the question "do you think that there is a need for the creation of a special mechanism to address laws that discriminate against women or are the existing mechanisms sufficient?" was as follows:

"Not particularly. I don't think existing mechanisms are sufficient, but I am not sure this is the way to go.

I have some doubts about the Special Rapporteur idea, although I am not totally against it. It will be very difficult to get a mandate adopted that covers the territory properly, and even more difficult to find appropriate resources.

1. Unless the mandate is drawn very broadly, addressing laws that discriminate on their face is on its own not very helpful. As you well know, one can have all the laws in place and still have heavy discrimination because of failure to implement or enforce, with all the issues of political will, culture, patriarchal power, and resource allocation that that entails. I would be concerned that a focus on eliminating discriminatory laws, without further elaboration of the mandate, would allow governments to claim progress by simply changing some words. Not enough.

2. Addressing laws that discriminate in effect is another issue and requires excellent documentation on discriminatory (disparate) impact. The SR would have to both have the expertise and be properly resourced to deal with that. Then all the other factors noted above still apply.

3. I think the work of any special rapporteur relating to sex discrimination should be better integrated with the work of CEDAW and the other treaty bodies than now occurs. There is an argument that a SR would unnecessarily duplicate CEDAW's work. I see it as potentially expanding upon CEDAW's work, but . . . We have a very poor history of coordination between the SR on Violence and CEDAW. The work of any SR can build upon and contribute to the work of the treaty bodies, but nobody has taken that in hand with respect to the sex discrimination issues. I would hope that with CEDAW moving to Geneva we could address that with the current SR on Violence, but it remains to be seen.

All that being said, I can't say it would be useless. The UN, the SRs, and the NGOs

just have not put enough into good coordination so far, and I am not sure about the impact, so I would have to be convinced that another SR would add a lot of value."[659]

Bridging the Gap- On the one hand – On the other hand-Seeing Both Sides

What of mainstreaming?

Professor Hilary Charlesworth noted:

"I have mixed feelings about the proposal, based on familiar debates about mainstreaming/sidestreaming women's issues. Would this SR be able to do things CEDAW cannot do?... On the other hand, the SRs generally have raised the profile of particular issues (eg Phillip Alston's recent work) so, on balance, I would support such a move."

Her views on the possibility of CEDAW engaging with the issue including by use of the inquiry procedure were echoed by Professor Rebecca Cook. A respondent from a London based NGO, (writing in a personal capacity) who asked for anonymity noted:

"V. interesting idea. Not sure about whether a SR (special rapporteur) is the best route as very time consuming in lobbying for and getting it set up, and then what would it do-is it a one off, to do a report (which gathers dust?) In an ideal world this would be done by CEDAW but not sure if they have the capacity or the inclination to do it?
If it's not within CEDAW, would be better to approach this on a gender rather than women (eg conscription). Would strengthen it, I think. We'd also of course want a strong element of intersectional discrimination to be addressed. I'd recommend, I think a flexible approach-saying this word needs to be done by the UN but having a couple of proposals about how it could be done (SR, CEDAW, OHCHR etc.)"[660]

Two members of ASK Bangladesh wrote:

"…we both have mixed feelings about a separate set up. Obviously we believe that a focused approach towards discrimination would be useful, but at the same time wonder what happens to the ongoing mainstreaming efforts within the treaty bodies and special procedures. Basically, if a separate commission does not take away from mainstreaming agendas and the two efforts could go side by side, then it would be a good initiative we think."[661]

Seeking Clarification – what would the Special Rapporteur do?

Those who were prepared to entertain the possibility of the appointment of a Special Rapporteur wanted to know what his or her mandate would include and the length: would it be a short sharp focus on de jure laws, and if yes, then they wanted to know

[659] Professor Marsha Freeman questionnaire response Part F, and also email, 8 May 2007.
[660] Anonymous by email, London, Thursday 17 May 2007.
[661] ASK Bangladesh (two members) by email (1 July 2007).

if there were sufficient laws to warrant the existence of a Special Rapporteur? A UN official asked "If the focus is on de jure discrimination, then why not just have an academic study of existing laws which the OHCHR can then take it up?" Another asked if the establishment of a Special Rapporteur at the UN level was the most effective way of dealing with laws that discriminate against women. The issue of compliance was also raised with one UN official asking: How would special rapporteur get compliance that is different from that of CEDAW? He noted that if there was a mechanism to compel compliance that would be very interesting.

Engaging the arguments against-arguments in favour of the appointment of a Special Rapporteur on laws that discriminate against women

i) On Duplication

Oft repeated was the idea that the creation of a Special Rapporteur on laws that discriminate against women would not add value. Rather, such a mechanism would merely be replicating existing mechanisms. Sir Nigel Rodley, who has been both a Special Rapporteur and chair of CAT and is now a member of the Human Rights Committee while acknowledging that some overlap between treaty bodies and special procedures is inevitable, says that the two mechanisms perform different functions and can co-exist happily.[662] Sir Nigel has noted that the existing thematic rapporteurs often cover issues that are already provided for in human rights treaties and yet those were not considered to be duplicating work because there is little overlap in their purpose.[663] Echoing this Marianne Mollman of the Women's Watch Division of Human Rights Watch noted: "I don't see any duplication at all. If you say there is duplication then all the special mechanisms are duplicates of existing human rights instruments."

When it was put to her that existing mechanisms might be able to absorb into their work laws that discriminate against women she noted:

"There would be a number of issues that would fall outside fore example family status laws would go, also refugees and issues of nationality. How would existing mechanisms have time to do legal mapping as well as conceptual mapping they are

[662] N. Rodley "United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights-Complementarity or Competition?" (2003) 25 *HRQ* 882.
[663] *Ibid,* at 887. See also 886.

trying to do together with country visits? Unless you say for this year, tell all of them to look at the area in your work that highlights discrimination between men and women."

A Geneva based UN official was very cynical about the "duplication idea" asking rhetorically: "Why do we have a Special Rapporteur on torture and also a torture committee? Maybe because it is seen as immediate and also that it matters. I guess they just don't rate women very highly or maybe they are afraid of the reaction in the Council."

Another UN interviewee noted wryly "one person's duplication is another person's focus." [Also] Contradicting the view of those who were of the opinion that the UN was overloaded with mechanisms and now needed to take a step back from adding more was a UN official who said that the creation of a Special Rapporteur: on laws that discriminate against women:

"was a wonderful way to focus. The Secretariat and the Division for the Advancement of Women have so many competing interests and bureaucratic demands. If you have the mandate, then they are duty bound to provide assistance and the mandate holder being independent can set his or her own pace of work and conceptualise the problem without interference."[664]

ii) The CEDAW "conflict"

Another UN official seemed to be alive to the false dichotomy that seemed to have been constructed setting CEDAW up in conflict with any potential Special Rapporteur on laws that discriminate against women. She noted simply that one did not have to see the two, CEDAW and or a special rapporteur as being in conflict. In her view the Special Rapporteur would focus primarily on legislation and having discriminatory laws uplifted. Similarly the European Women' Lobby which claims to be 'the largest organisation of women's non-governmental organisations in the EU comprising of over 4000 members'[665] noted:

[664] Interview with UN Official in New York, March 2007.
[665] European Women's Lobby "Contribution from the European Women's Lobby to the EU Network of Independent Experts on Fundamental Rights - 2005 report" (European Women's Lobby, November 2005).

"The mandate of the Special Rapporteur would not clash with the work of CEDAW and would in fact be complementary to the work of the Committee. Member States submit 4-year reports to the CEDAW Committee indicating the measures taken to ensure full compliance with CEDAW. However, while CEDAW address women's social, economic, and cultural rights, some issues are not included, notably violence against women. While country reports usually do include information on this, the laws- or lack thereof - that continue to discriminate in this area are not systematically reviewed. The Special Rapporteur therefore could assist the work of the Committee and as well as identifying discriminating laws, could also provide positive examples of law reforms. The fact that she would be reporting yearly would also "fill the gaps" in the four-year reporting mechanism."[666]

The vast majority of questionnaire respondents who engaged with Part F on the advisability of a SR on laws that discriminate against women was in favour of the idea of a SR. Significantly this included civil society respondents who had had cause to engage with CEDAW usually by way of provision of shadow reports. They did not see the appointment of a SR as duplicating the work of CEDAW or in any way undermining its work. Rather, they were of the view that a SR would enhance the work of CEDAW and that the two would complement each other. Indeed one noted that CEDAW could issue instructions to the SR about States that needed following up and that the two would have a symbiotic, co-operative relationship. WILDAF Ghana argued:

"Often various recommendations to amend discriminatory laws are found in different documents such as CEDAW recommendations, recommendations from Commonwealth mechanisms, AU (African Union) mechanisms and ECOWAS (Economic Union of West Africa) mechanisms. Therefore, state reporting to mechanisms under the above frameworks only occurs when a reporting period is due. A holistic monitoring of State compliance to various international human rights mechanisms is something that NGOs have not been able to do well. A special mechanism to address discriminatory laws will provide a one-stop facility that will address all discriminatory laws of a country at a go."[667]

Perhaps most persuasive are the views of two former CEDAW chairpersons, who are on record as supportive of the creation of a special rapporteur on laws that discriminate against women, thus putting paid to the idea of irreconcilable conflict or duplication. Elizabeth Evatt has written:

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[666] European Women's Lobby "Calls for a Special Rapporteur on Laws that Discriminate against Women" January 2007 (sent as part of response to questionnaire), (April 2007).
[667] WILDAF Ghana questionnaire response Part F.

"As a former Chair of the Committee on the Elimination of Discrimination against Women, I believe that a Special Rapporteur could supplement in a very positive way the work of CEDAW. A Rapporteur could engage a State in constructive dialogue, based on the Rapporteur's knowledge of the experience in other States in dealing with discriminatory laws. The reports produced by a Special Rapporteur should be invaluable to the CSW overseeing the implementation of the Beijing Platform for Action."[668]

Silvia Cartwright, a former member of CEDAW, has written:

"I have considered the preliminary proposal and agree that the creation by the CSW of a Special Rapporteur on Sex Discriminatory Laws would send a powerful signal to all States Parties. Not only would it support the commitment made to the Beijing Platform for Action, but such an arrangement would also emphasize the importance of ensuring that women have the same mechanisms available for the promotion and protection of their human right as do the general population."[669]

iii) What about other committees?

A keen supporter of the creation of a Special Rapporteur on laws that discriminate against women was Professor Catherine Mackinnon who, while acknowledging the work undertaken within the UN system to ameliorate the lives of women was of the view:

"Existing international mechanisms have been helpful but alone remain insufficient for effectively addressing laws that discriminate against women.
Expertise on this subject has been building, notably under CEDAW since 1979, as well as in the Human Rights Committee, laying the groundwork for further focused mechanisms. Discriminatory laws pervasively continue to exist, present mechanisms having barely begun to scratch their surface, far less to solve the problems they pose. A special mechanism would build upon and support the work of CEDAW and others in this area, including by generating the ongoing continuous (rather than periodic) dialogue with countries that no current mechanism can. It would also heighten the visibility of discriminatory laws internationally, including by reporting directly to the Human Rights Council, highlighting the issue as a priority in the human rights field.
Further, while some features of discrimination against women by law are simple and blatant, others interface in more subtle and complex ways with women's inequality as a whole. All the dimensions of *de jure* discrimination are more likely to emerge when investigated together in mutual comparative light. Current international mechanisms by design can only address these issues one country at a time. A complementary mechanism like a Special Rapporteur would offer the unique resources and mandate to approach the problem systematically on the global scale on which it exists. From the cumulative interconnections, patterns, and themes that can only be discerned in an

[668] Elizabeth Evatt, Former Chair, CEDAW, Sydney Australia, in Equality Now, Annual Report 2005, at 7.
[669] Silvia Cartwright, CEDAW, Wellington New Zealand in Equality Now, Annual Report 2005, at 7.

overarching cross-cutting transnational inquiry, fresh and effective approaches to legal equality for women could emerge."

Echoing her views was a civil society advocate who noted that the "mandate of a Special Rapporteur is to give an overview that we don't have now."[670]

A UN official familiar with the working of treaty bodies argued: "It would be good to have one person with a global overview of laws. The committees look at it from a compartmentalised perspective. There is no holistic view of the subject matter."[671]

The obvious answer to the concern expressed by the UN official who suggested that the appointment of a special rapporteur on laws that discriminate against women would be the disengagement by non CEDAW committees from considering women's rights, would be to note that existing human rights committees cannot really resolve to ignore women's rights anymore. Their jurisprudence and reporting guidelines all highlight the importance of considering the impact of discrimination on the enjoyment by women of rights guaranteed by the treaty under consideration. This together with mainstreaming within the UN and the impact of shadow reporting to treaty bodies militates against an abandonment of the women's agenda within non CEDAW committees. Also worth noting is the charge that for all the focus on women's rights, the approach of some human rights committees remains, patchy and sporadic.[672] The response from Tanzania also noted a common problem, the delays in reporting and non implementation by States of concluding observations of human rights treaties which could be ameliorated by the government being made the subject of "special attention" by a dedicated Rapporteur:

"Therefore there is need to create a special mechanism that will set a deadline for the countries to act fast and (to) the benefit of its people.
Reporting obligations by Tanzania as a member State to these treaties is still questionable as many reports are not submitted to the respective treaty bodies."

iv) There is already a Special Rapporteur on Violence against Women

[670] Interviewed in New York, 9 March 2007.
[671] Interview with UN official in New York, March 2007.
[672] R. Johnstone (2006).

The argument that there is already a Special Rapporteur on violence against women seems to suggest that violence is the only violation that women experience.[673] Kapur notes that the international community's coalescing around the issue of violence has led to a distortion of the "women's rights project" with violence against women now being seen as the principal human rights violation experienced by women.[674] She notes that the difficulty with this approach is that:

> "It deflects attention from the ways in which States are not implementing their obligations under a range of human rights documents, including CEDAW, which, if implemented could remove both structural and formal impediments that may contribute to women's experience of violence. The focus on violence against women has thus encouraged a focus on wrongs, rather than on rights and the facilitation of the promotion of these rights."[675]

Moreover, it is worth noting that the existence of a wealth of reports by the two Special Rapporteurs on violence against women since 1994 did not preclude the publication in 2006 of an equally comprehensive report on violence against women commissioned by the Secretary-General of the UN. This shows that an issue can, and sometimes should, have multiple beams of light shone on it to highlight the severity of the problem and to focus minds on addressing said problem.[676] A UN official familiar with the work of both the Special Rapporteur on violence and that of trafficking noted it was "not bad to have duplication; if you have 192 States then one can't cover them all."[677] Yet another who considered incorporating laws that discriminate into the mandates of the Special Rapporteurs on violence and trafficking decided it would not be a good idea: "I would be inclined to have a separate one because the visibility of the theme is lacking when embedded in an existing mandate. The issues may not receive the same consideration."[678]

Finally it is of course ironic that the success of the Special Rapporteur on violence against women, is being used to argue against creation of a new mechanism on laws

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[673] R Kapur "Feminist Critiques of Human Rights" in R Smith & C van den Anker *The Essentials of Human Rights* (eds.) (2005), 132, 133. See also R Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International Post-Colonial Feminist Legal Politics', 15 (2002); S Engle Merry (2006), 101-2.
[674] C.f. S Engle Merry (2006), 81.
[675] R. Kapur (2005), 133.
[676] Report of the Secretary General on Violence against women, July 2006.
[677] UN Official Geneva.
[678] UN Official Geneva.

that discriminate against women, whereas an alternative view could be that the success of the Special Rapporteur on violence against women augurs well for one on laws that discriminate against women.

v) The Limitations of a focus on De jure discrimination

Of focusing on *de jure* discrimination, Laura Katzive, of the Centre for Reproductive Rights noted:

"It wouldn't solve all the problems, but it would be an important step in the right direction. At the very least laws that apply to everybody should not be discriminatory. You can't stop discrimination overnight. Laws reflect the government position on women's rights."[679]

Simply and powerfully, Equality Now has argued:

"Law is the most formal expression of government policy. A government that allows discriminatory laws to remain in force endorses and promotes inequality. Without equality under law, women have no recourse when they face discrimination that affects all aspects of their lives…The fact that there are any laws –in fact so many laws- that explicitly discriminate against women nearly 10 years after the adoption of the Beijing Platform for Action, 25 years after the adoption of CEDAW and 55 years after the adoption of the Universal Declaration of Human Rights affirming that 'all human beings are born free and equal in dignity and rights' is unacceptable."[680]

Another questionnaire respondent in favour of the creation of a special mechanism argued:

"There is need of special mechanism to address laws that discriminate against women specially to identify the discriminatory laws and its impact on women. It is also important for addressing the structural and historical discrimination that women have been facing for long time. Addressing it at the global context could be an effective mechanism to eliminate discrimination at domestic level. It is also important to effectively monitor the implementation of equal laws and amended laws as in many instances the implementation part is very poor."[681]

Mainstreaming

The European Women's Lobby acknowledged the efforts being made within the UN "to rationalise" the gender agenda. However, rather than seeing a Special Rapporteur

[679] Interview with Laura Katzive, Centre for Reproductive Rights, New York, 9 March 2007.
[680] Equality Now *Words and Deeds* Women's Action 16.5 Update March 2004 p.2.
[681] FWLD Nepal, questionnaire response Part F.

on laws that discriminate against women as either irrelevant or a duplication of existing work, the group was of the view that such a person would enhance, rather than detract from the UN policy of mainstreaming and would complement any new Gender Architecture:

"It is true that the current proposals to reform the UN Gender mechanism (referred to as the Gender Architecture) could be used as an argument to postpone the appointment of the Special Rapporteur, when in fact these are two different and complementary tools.

In terms of the UN Gender Architecture, the proposal consists of strengthening the internal mechanism within the UN structures on the basis of a fragmented, under-resourced and sometimes incoherent capacity within the UN to promote gender equality and gender mainstreaming throughout the UN system. It proposes to merge the three main existing mechanisms namely, the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), the Division for the Advancement of Women (DAW) and the UN Development Fund for Women (UNIFEM) and to create a new Office on Gender Equality and Advancement of Women (Office), situated at the level of Under-Secretary General. This would undoubtedly facilitate and strengthen gender mainstreaming across all UN entities, including in the Security Council, the newly created Peace building Commission and the Human Rights Council. It is also proposed to establish the post of Executive Director at the level of Under-Secretary General, to head the new Office.

The Special Rapporteur would enhance the work of the Office in providing annual reports and close co-operation with the Office."

The group went on:

"We do believe that a Special Rapporteur on Law that Discriminate against Women is crucial in the future and would complement the current reforms underway. One area of the "added value" of such a Rapporteur would be the strengthening of gender mainstreaming across all UN entities. In addition, an annual report to the Human Rights Council would give priority to issues relating to gender equality in general and progress on the revocation of laws that discriminate against women in particular, and would therefore also place women's human rights at the heart of the work of the Council."[682]

Other arguments in favour of the appointment of a Special Rapporteur on laws that discriminate against women

The focus that the appointment of a Special Rapporteur would bring to the issue was highlighted in some of the responses. A Special Rapporteur could act as a spotlight on laws that discriminate against women. This was seen to be particularly important not

[682] Letter received from President of the European Women's Lobby, 9 May 2007.

least because of the lack of dissemination of concluding observations and also the lack of follow up. It was also suggested that the appointment of a special rapporteur would be assist in pressuring States parties to address the problem of discriminatory laws and practices within their societies. Elizabeth Evatt argued: "The process of country visits and discussions would help to focus government and public attention on laws that are clearly in violation of Convention obligations, and could be helpful in achieving change."[683]

Meanwhile the Malaysian based Sisters in Islam noted:

"Yes, there is a need for the creation of a special mechanism to address laws that discriminate women because:
i) This special mechanism focuses and specialises on law reform.
ii) The mechanism could act as a pressure point to the government in making sure that law reform takes place.
iii) The mechanism would help the women NGOs in their advocacy work
b) Woman who is being discriminated must have an avenue to get redress or heard, apart from the existing legal system.
c) This mechanism could monitor the status of women vis-à-vis the law.
Note: Even though Malaysia has ratified CEDAW, but it does not ratify the Optional Protocol."[684]

WILDAF Zambia argued; "A focused mechanism would help the situation. Other mechanisms are broad and little known."[685]

Similarly the Palestinian Women's Centre for Legal Aid and Counselling argued in Part F of the questionnaire, in favour of the setting up of a new mechanism:

"The special mechanism will support the ongoing efforts of women's movements and NGO's who are working of law especially on legal reforms. It will also give a focus and light to the importance of legal reforms based on women's-human rights. Despite that there may be some regional and or UN bodies that address laws, a mechanism that focuses only and solely in laws will help us on focusing deeper into the issue of laws, especially legal reforms. This mechanism has the potential to gather and support the existing work on the field of legal feminist theories. Moreover, it has the potential to open up doors for exchanging experiences on this issue not only regionally but internationally as well, also to help regional lobbying and campaigns on similar issues of legal reforms.

[683] Elizabeth Evatt, response to questionnaire Part F (April 2007).
[684] Sisters in Islam Malaysia questionnaire response Part F.
[685] WILDAF Zambia questionnaire response Part F.

For us at the Women's Centre for Legal Aid and Counselling (WCLAC), we support the creation of such a mechanism."

Under the rubric 'anything else that you would like to add', they continued:

"The Women's Centre for Legal Aid and Counselling (WCLAC) believes that this is an important initiative. It is a mechanism that if established has the possibility to affect and minimize the effects of discriminatory laws, something which has not until now become organized and focused enough to be shaken. Another important point to notice is that this mechanism, if established will also clarify any further development needed in the different areas relevant to legal reforms such as documentation, monitoring, which are not systematically done most of the times."

From Afghanistan, the UNAMA response to Part F of the questionnaire supported a new mechanism noting that it would help to hold States accountable for dealing with violations of the rights of women:

"Discrimination is rampant in Afghanistan and is practiced in all segments of the justice system and in and throughout society. Access to justice for women is difficult and currently the reform of the law, although including laws such as ending violence against women are tabled in parliament, they are seen as a lower priority. At the same time, existing mechanisms could be improved and clearer and more sustained action taken to ensure that the State is not allowing discrimination and more importantly not practicing it."

The response from Tanzania also saw the appointment of a Special Rapporteur as helping to keep pressure on the government:

"Yes there is a need for creation of a special mechanism to address laws that discriminate against women in Tanzania. This special mechanism will:
1. Push the government on the implementation of the national laws
2. Press on the amendments of current laws with loopholes and
3. Speed domestication of International instruments (protocols) that governments ratify every now and then."

In interviews, the consultant asked respondents to consider the question: "in the event that a decision was taken to appoint a special rapporteur on laws that discriminate against women, what should his or her mandate be and to whom should he or she report-the Human Rights Council or the CSW which originated the project?" The following suggestions were made.

Possible Mandate of a Special Rapporteur on laws that discriminate against women

A UN official who was supportive of the creation of a Special Rapporteur on laws that discriminate against women, nevertheless cautioned against an open-ended mandate noting:

"It is a good idea but it shouldn't be a permanent mandate –limit its time like the Sub-Commission mandates on right to self determination and states of emergency. Mandates take on a life of their own and terms of reference change after the real study is completed."[686]

The official suggested a mandate of six years as being "reasonable." This official was particularly helpful in identifying what work the Special Rapporteur on laws that discriminate against women could do:

"He or she could do a mapping exercise of the seven Conventions already in place. Look at the Regional Conventions. Do they overlap substantially and then see what the treaty bodies and regional bodies have said on particular bits. Then look at excerpts of concluding observations –the jurisprudence of international and regional bodies before coming up with a list of systematic violations of women's rights for example in employment, inheritance, family, reproductive rights etc. Then distil out of the compilation best practices. If one identifies a systematic pattern, then might from the mapping exercise find a common approach on how to remedy patterns of discrimination."[687]

The European Women's Network suggested:

"The terms of reference for the mandate of the Special Rapporteur might include:

- Compiling laws in force around the world that discriminate against women, submitted annually to CSW and the Human Rights Council, with an update on progress made during the reporting period;
- Engaging in ongoing dialogue with member States regarding laws that discriminate against women and related legal reform efforts
- Undertaking thematic studies and making general recommendations on issues of common concern to member States

Highlighting ways in which member States have used law reform effectively to counter legal discrimination against women."[688]

[686] UN Official, OHCHR, interviewed in New York, March 2007.
[687] *Ibid.*
[688] See European Women's Lobby "Call for Special Rapporteur on laws that discriminate against women" January 2007, p. 3.

On the question of where a Special Rapporteur should be based, it seemed, on balance, that even those who were not overly enamoured of the idea of a Special Rapporteur, felt that if such a mechanism were to be created, then the person should be mandated by the Human Rights Council and supported by OHCHR team in Geneva where the institutional framework for supporting SR already exists. Marianne Mollman**,** of the Women's Division at Human Rights Watch noted:

"I see the CSW as the place where Beijing is being followed up but if we want the Human Rights Council to look more closely at women's rights then we need to bring the machinery to them. At the same time it (having SR with CSW) could give the CSW something more concrete to work on and something to focus on."[689]

A Geneva based UN official argued that:

"All Rapporteurs on women's issues should be in Geneva, but they should also have to report to the CSW." Acknowledging the possibility of a CSW derived mandate, he noted: "If established by the CSW, then the Rapporteur should also report to the Human Rights Council. That should be made clear from the outset. Given that they are both independent bodies, it is important that the Rapporteur formally have an obligation to report to both. If we are serious about women's rights being human rights, then any mechanism established by CSW working on non discrimination should report to the Human Rights Council."

Warming to his theme he then asked: "Why not have a joint establishing mandate where the mandate holder reports to both Presidents? It would be good to have a hybrid model because having a Special Rapporteur that deals with human rights of women and also the status of women will help with mainstreaming."

Overall those arguing for any new Special Rapporteur to be based in Geneva focused on practicality, coherence of the special mandate system, the need for mutual support and reinforcement and general cost savings implicit in having all under one roof.

It is worth noting that two interviewees, both UN officials put forward alternatives to the appointment of a Special Rapporteur. One suggested that a working group on laws that discriminate against women comprising legal specialists from different legal traditions may be more appropriate. The other suggested having a special

[689] Interview with Marianne Mollman, Women's Watch, New York, 9 March 2007.

independent expert similar to the Secretary-General's Independent expert on violence against children who reported in 2006. The advantage of this was that the expert would write just one report and would not have to deal with communications. There would then be a study from which the OHCHR could engage in follow up activities.

To have or not to have a Special Rapporteur on laws that discriminate against women?

Human rights committees and existing Special Rapporteurs have clearly taken to heart the need to engage with women's rights within their work. This was seen from the general comments, questioning of States parties and concluding observations. However, human rights bodies suffer from 5 common problems:

1) A very tight working schedule. While the number of ratifying States has increased, the meeting time and human resources (committee members) have not, with the exception of the Children's Rights Committee, increased to keep pace with the increased workload. Even the increase in the CRC personnel has been absorbed by the adoption and widespread ratification of the two Protocols to the CRC.

2) Linked to the first is the growing sophistication in the analysis of groups or categories of people experiencing discrimination. This increased focus on intersectional discrimination, while welcome also highlights the limits of the committees in their ability to do justice to the concerns of each of the groups. This sometimes leads to a "tick box exercise" with Committee concluding observations listing disadvantaged groups to which the State should pay particular regard. Clearly it would be wrong to suggest that the rights of some groups should be privileged or given greater attention than others, but the current system creates a sense of a scatter gun approach which is not necessarily satisfactory for any group. CEDAW is the only committee focusing on women's rights. Still, it is important to acknowledge and pay tribute to the committees for the work that they are doing on women's rights.[690]

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[690] Mainstreaming –A/HRC/4/104, 15 Feb 2007.

3) Non-compliant States parties. All committees are forced to confront the problem of States parties that either do not report or do not do so in a timely fashion. Sometimes this results in the receipt of compound reports covering up to four or on rare occasions five reporting cycles that will have been missed. This tardiness makes the work of Committees, even those that have tried to put in place a system of seeking to hold a non-report producing State accountable at the scheduled time, very difficult and renders the monitoring process, in some instances highly unsatisfactory. In its ways and means report, CEDAW noted that there were 13 States that had not reported for more than 10 years.[691] This renders "constructive dialogue" difficult. A Special Rapporteur would not be subject to these constraints. If anything a Special Rapporteur could assist CEDAW by engaging with non reporting States.

4) Follow up-although some of the committees have arranged for one of them to act as a follow up rapporteur, the reality is that this function is again limited by time constraints. Although human rights committees are now better at using each other's concluding observations in engaging with States parties, it seems that some States parties are prepared to ignore these multiple prompts to effect change. A Special Rapporteur on laws that discriminate against women could act as the on-going follow up rapporteur for all the treaty bodies on the issue.

5) Clearly one of the main tools for shining a light on violations of human rights norms and of seeking to hold States accountable is the complaint mechanism found in some human rights treaties. The reality though is that not all States that have ratified the main convention ratify the Optional Protocol thereto or submit themselves to the complaint mechanism if contained within the body of the treaty. CEDAW has 185 States parties but only **90** States have ratified the Optional Protocol thereto thus making it difficult for women in States that have laws that discriminate against them to appeal directly to the committee. This was raised by some of the questionnaire respondents as an important reason to have a Special Rapporteur Moreover, although it is possible for other committees to receive complaints from women, few are aware of this possibility. Indeed the majority of

[691] CEDAW Ways and Means of Expediting the Work of the Committee on the Elimination of Discrimination against Women: Note by the Secretariat, CEDAW/C/2007/1/4, Annex III.

complaints brought to the Human Rights Committee are from men.[692] This means that an important element in the challenging discrimination arsenal is without women's access. Moreover, one would have thought that with laws that discriminate against a group that constitutes over half of the population, the inquiry procedure may have been invoked, but to date it is only CEDAW that has used it to investigate violence against women in Mexico.

All these constraints point to the Special Rapporteur system as able to offer some relief**.** Specifically a Special Rapporteur does not need to wait for a State to report, she or he may engage directly with the State. Moreover, the Special Rapporteur is able to receive communications from people in States parties who may not have ratified specific complaints mechanisms or indeed States which may seek to invoke reservations entered to treaties as a reason for non engagement or refusal to change the law. Special Rapporteurs may ask the State party for permission to undertake missions to that State notwithstanding that the State has opted out of all inquiry procedures. Special Rapporteurs may usefully follow up on concluding observations of *all* treaty bodies where these impact directly on the Rapporteur's mandate. Finally, having a specific focus on a theme, the Special Rapporteur may be able to more comprehensively address discrimination against women or other groups within the confines of that more tightly drawn mandate.

Special Procedures

Again, like treaty monitoring bodies the Special Procedures including existing Special Rapporteurs have developed a much better system of monitoring gender based violations of their mandates. For some this may be because they are specifically called upon to consider gender or women's rights within their mandates. However, despite these positive advances, it remains the case that, as with human rights committees, Special Rapporteurs have to operate within fairly tightly drawn mandates. It may well be that some of the laws identified as discriminating against women will fall into the mandate of a particular Special Rapporteur who may then take the initiative and recommend that States repeal or amend the laws. However, not all discriminatory laws fall into the existing mandates of Special Rapporteurs. This

[692] UN Official interviewed in NY, March 2007. See also gender mainstreaming A/HRC/4/104, para 52.

highlights the need for a specific *focus-specific* Rapporteur who will be able to bring a global overview to the theme of laws that discriminate against women and whose remit will be challenging States on these laws. This will mean that there is a coherent rather than hit and miss approach to the issue which is likely to yield results faster than a sporadic approach.

PART F – CONCLUSION AND RECOMMENDATION

In addition to the impressive work already being done within the human rights monitoring system, particularly by CEDAW, and also the work of special procedures, the time may well have come to have a focal point to address this very important conference pledge whose fulfilment underpins a great deal of UN policy and work not least in the delivery of the MDGs. Addressing the 51st session of the CSW, the President of the Human Rights Council noted:

"…I believe that the commitment to the human rights of women and the girl child undertaken in Beijing has been strengthened with the reform of the UN human rights system. At the World Summit of 2005, the Heads of State and Government recognized Human Rights as one of the pillars of the United Nations and reaffirmed their commitment to uphold the rights of women, gender equality and the empowerment of women.
Within this framework, the Commission and the Council have an important role in order for the United Nations to undertake integrated and coordinated strategies for the effective promotion and protection of the rights of women and the girl child."[693]

He went on:

"Madame President, I would like to emphasize that the relevance of the rights of women and the girl child and their eminently crosscutting nature, has been clear during the first months of the work of the Council, even when it has been focusing primarily on the work of institution building.
…the importance that the States and civil society grant to the rights of women and the girl child, as well as the necessity for the Council to address the issue in a comprehensive manner and through coherent mechanisms, has become evident.
Finally, I would like to indicate that the Council and the Commission could further their collaboration is (sic) the incorporation of a human rights and gender perspective in the United Nations system, as there are ample opportunities for cooperation in that field, in order to achieve further progress."[694]

A Special Rapporteur on laws that discriminate against women may be the focal point that has hitherto been missing. The mandate of such a rapporteur could include the following.

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[693] Office of the President, Human Rights Council, Statement by the President of the Human Rights Council, Ambassador Luis Alfonso de Alba, at the 51st Session of the Commission on the Status of Women, United Nations, New York, 7 March 2007.
[694] *Ibid.*

Mandate of a Special Rapporteur on laws that Discriminate against women

1) In keeping with the Beijing Declaration and Platform for Action pledge made by States, the focus of a Special Rapporteur, should be on laws and regulations that discriminate against women. The concept of what constitutes "law" would perforce be dependent on the legal system under consideration.

2) If a broader mandate were considered appropriate then it should include consideration of issues pertaining to implementation, access to justice and enforcement.

3) Initially, the Special Rapporteur, should be supported by the WRGU of the OHCHR in deciding on priorities and devising a work plan which could include:

   A conceptual analysis of the obligations of States emanating from the pledge made in Beijing linked to an analysis of violations most often identified in the work of human rights treaties bodies and other information brought to the attention of the Special Rapporteur as requiring urgent attention. Here it would be crucial to develop a close working relationship with CEDAW in particular to follow up its recommendations to States parties whose laws were found to be problematic. Although onerous, given the excellence of its methodology, the framework used by UNIFEM in its Pacific law project should be closely examined for its adaptability to a project by a Special Rapporteur on laws that discriminate in his or her work.

   Thereafter, could be the adoption of thematic approach focusing on a looking at a specific problematic area which could include nationality and citizenship laws or constitutional norms or any other area deemed a priority. The Special Rapporteur could promote the exchange of information among member States on issues of common concern.

   In the course of his or her mandate, the Special Rapporteur would also identify and record examples of good practice, across geographical and legal traditions,

which could be used in interactions with States parties and in any training that he or she may undertake.

4) In carrying out his or her mandate, the Special Rapporteur should have the same powers and access to the same resources and institutional resources that other rapporteurs have.

5) In addition, her mandate could include co-operating with the two regional Special Rapporteurs on the Rights of Women of the African Union and the Organisation of American States. Working together where the subject matter demanded could lead to a more efficient data gathering process, greater pressure being put on States parties to change discriminatory laws and an exchange of examples of good practice.

Appendix A – Consultant's Terms of Reference

Women's Rights and Gender Unit
Research and Right to Development Branch
Office of the High Commissioner for Human Rights

TERMS OF REFERENCE FOR THE PREPARATION OF AN

Analytical report on a mechanism to address laws that discriminate against women

Consultancy: Dr. Fareda Banda

Background:

International human rights law prohibits discrimination on the basis of sex and includes guarantees for men and women to equally enjoy their civil, cultural, economic, political and social rights. CEDAW article 2 commits States Parties 'to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.' In 1995, at the 4th World Conference on Women in Beijing, Governments undertook to 'revoke any remaining laws that discriminate on the basis of sex.' In 2000, at the Special Session of the General Assembly, States set 2005 as the target for removing discriminatory legislation against women. In 2005, when the Commission on the Status of Women (CSW) reviewed the commitments that had been undertaken at the 4th World Conference, it recalled the pledge to revoke remaining discriminatory laws and the concern expressed at the Special Session that 'legislative and regulatory gaps, as well as lack of implementation and enforcement of legislation and regulations, perpetuate *de jure* as well as *de facto* inequality and discrimination, and in a few cases, new laws discriminating against women have been introduced,' and decided to consider 'the advisability of the appointment of a special rapporteur on laws that discriminate against women, bearing in mind the existing mechanisms with a view to avoid duplication …..'

OHCHR was requested to submit its views to the 50th (2006) session of CSW on the implications of the creation of a position of special rapporteur on laws that discriminate against women. Its submission is contained in document E/CN.6/2006/8 dated 13 December 2005. CSW took note of the report and asked for further 'views on ways and means that could best complement the work of the existing mechanisms and enhance the Commission's capacity with respect to discriminatory laws,' for consideration at its 51st (2007) session. OHCHR responded on 10 October 2006 that while its views contained in the afore-mentioned report were unchanged, certain developments such as the review of the Special Procedures had to be taken into account. OHCHR suggested that a decision on the usefulness and viability of a special rapporteur be deferred to CSW 52nd session (2008) in order to incorporate and build on the review's outcome. To further assist the process, OHCHR offered to prepare an analytical report on the complementarity of such a mandate to the existing mechanisms, identifying how the existing mechanisms have addressed *de jure* discrimination against women and the resulting protection gaps.

Objectives:

To prepare an analytical report responding to the following objectives:

1. To identify how the treaty bodies and special procedures have addressed *de jure* discrimination against women, with the assessment and analysis including but not limited to:

- context in which *de jure* discrimination against women has been taken up, with reference to the mechanisms, treaty provisions and/or other relevant issues;
- the types of observations and recommendations made by the treaty bodies and special procedures mandate-holders;
- actors to which recommendations have been addressed;
- how treaty bodies and special procedures mandate-holders have followed-up on issues of concern and recommendations;
- the extent to which the treaty bodies and special procedures have cooperated/complemented each other on cases/issues of *de jure* discrimination;
- gaps in coverage across the mechanisms with indication of how external partners have filled/are filling or could fill in the gaps.

2. Based on the assessment and analysis, to examine how existing mechanisms could work towards reducing and ultimately eliminating *de jure* discrimination against women, and the viability of the mechanism currently being considered in the CSW. Consideration should also be given to how UN entities including DAW, UNIFEM and other organisations can contribute to the objective of reducing and ultimately eliminating *de iure* discrimination against women.

Scope of work:

The analysis should:

- review the work of the treaty bodies and special procedures along with initiatives outside the UN System, including regional and non-governmental organisations, and academic institutions;
- include lessons learnt and good practices for amending or revoking discriminatory laws against women;
- assess the extent of coverage and gaps;
- analyse and assess whether the existing mechanisms are sufficient or whether the proposed mechanism would be useful (taking into account the need to avoid duplication and enhance complementarity between the mechanisms as well as the ongoing reviews);
- present observations and recommendations on the substance, form and scope of a mechanism(s) which could contribute to eliminating *de jure* discrimination against women.

Suggested methodology:

The consultant will conduct consultations with all relevant stakeholders including the treaty bodies and special procedures mandate-holders, OHCHR and other UN staff supporting the mechanisms, NGOs and others; s/he will develop, disseminate and analyse a questionnaire designed to help ascertain the report's objectives; s/he will conduct research including reviewing general comments, concluding observations, individual complaints, country, thematic and communications reports, and other relevant materials such as the Secretary-General's report on the appointment of a special rapporteur (E/CN.6/2006/8). In addition, s/he will conduct a mission to Geneva/New York for consultations with relevant staff, mechanisms, UN departments and organisations, NGOs and academic institutions.

Due attention should be paid to the treaty bodies and special procedures consideration of civil and criminal laws in all areas affecting women's civil, cultural, economic, political and social rights; equal geographical emphasis should be achieved.

Output:

An analytical reporting on a mechanism to address laws that discriminate against women with annexes containing a comprehensive listing/synopsis of each mechanism's consideration of *de jure* discrimination against women; a mapping of how the UN and other external organisations are addressing the issue; and source references.

Workplan:

This project will start on 1 February to 30 April 2007 for a period of three months. The consultant will submit a draft for comments to OHCHR before finalisation. The final report incorporating OHCHR's comments should be submitted no later than 30 2007.

Appendix B:

Methodology

In deciding the parameters of the project on *de jure* discrimination, a major question to resolve was what was meant by "law"?[695] In many States law is complex, comprising plural normative systems including statute law, common law, customary laws and religious laws. These co-exist, sometimes harmoniously, often not. The WRGU of the OHCHR noted that the project focused on *de jure* discrimination hence the decision to concentrate on State law. It chimed in with the stimulus for the project, namely the injunction in the Beijing Declaration and Platform for Action that governments should "revoke any remaining laws that discriminate on the basis of sex." However, given the multiple configurations of many legal systems, the resolution was to allow the respondents to determine, within the parameters of a focus on *de jure* discrimination, what constituted State law. The preamble to the questionnaire that went out said:

"The project covers State sanctioned laws and regulations 'in all areas affecting women's civil, cultural, economic, political and social rights.' By State sanctioned is meant those laws that receive official recognition within the formal legal system."

While de jure discrimination was the focus, the questionnaire made clear that information on de facto discrimination would also be welcome. Indeed the adoption of the definition of discrimination found in article 1 of CEDAW made this a sine qua non. Moreover, evidence from State reports and general comments all pointed to the fact that *de facto* discrimination was a key factor in women's lack of enjoyment of their rights. [696]Additionally, a UN official with experience working in plural legal systems noted:

"There is a distinction between cultural discrimination and *de jure* discrimination. There are few laws promoting discrimination but many *de facto* practices. It is more about practices than laws. The law will say there is equality but the practice is different"[697]

His views were echoed by Professor Marsha Freeman, Director of the Minnesota based International Women's Rights Action Watch, who in response to the questionnaire noted:

"I have considerable experience working in multiple legal systems and eliminating the laws (or customs) that discriminate against women rarely solve the problem, as knowledge of the law and having the power and resources to claim rights remain huge issues. Moreover, it is far to easy for governments to throw their hands up and say, 'it is the law, it's the custom, and we can't

[695] See also WLUML (2006), 27-30.
[696] See also CEDAW general recommendation 21 on marriage and family relations, paras, 3, 12, 15, 24, 28, 33, 45, 46; CEDAW general Recommendation 23 on Women in public life, UN Doc a/52/38/Rev. 1, paras, 9, 10.
[697] See also R. Holtmaat (2004). S. Ali (2000) 82n.151. Human Rights Committee General Comment 18 on Non-Discrimination, CCPR/C/21/Rev.1.Add.1, para. 9.

infringe on identity expressed through custom' or 'it's the culture' or 'can't interfere with religion.'"

Also highlighted by many interviewees was the importance of recognising the impact on women, of the non implementation of those laws that do exist. The UNAMEE response to the questionnaire noted simply "Implementation of a law is as good as the law itself."[698] For this reason, questions were put about the ease or difficulty of accessing law and also State and judicial response to claims of violations of rights.

Data collection techniques
Meeting the objectives of the project necessitated the use of three data collection techniques. To address the issue of the work currently being undertaken within the UN required collecting and analysing treaty body general comments, State reports, concluding observations and where relevant, communications. Time constraints limited the consideration of State reports to the past five years. It also required examining the mandates of Special Rapporteurs. Some of the reports of the Special Rapporteurs were further analysed for their gender content. Moreover initiatives undertaken by UN agencies in the field of women's rights (including the girl child) were considered. UN documents on mainstreaming were considered.) A second data collecting mechanism involved conducting interviews with UN officials and NGOS. This was to try to get the views of those charged with administering the system-did they consider a new mechanism necessary? What did their work involve? The NGOS provided the civil society perspective. I was grateful to them all for their time and candour.

Finally, given that the focus of the project was on laws that discriminate against women, it was necessary to try to ascertain the extent to which such laws were still in existence. While the campaigning NGO, Equality Now had already done excellent work, producing a list of States with discriminatory laws and reproducing the offending provisions, it was still important to send out a questionnaire to ascertain the current position. The questionnaire can be found in Appendix ***C***. A total of ??? questionnaires was emailed to organisations and individuals around the world. Reminders were later sent once the deadline for responses had passed. A list of people and organisations emailed is found in Appendix ***D.*** The questionnaire invited recipients to pass it on and data received indicates that some did indeed pass the questionnaire on. This means that the exact number of recipients cannot be stated.

The questionnaire was in English. Two requests were received for different languages. One asked for the questionnaire in French, while another correspondent from an international NGO noted that partners in the field may require different languages without specifying which. A request for translation of the questionnaire was forwarded to the OHCHR which duly passed on the questionnaire to the UN translation department, for translation into the

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[698] UN Mission in Ethiopia and Eritrea, Human Rights Section response to Part F questionnaire (May 2007).

remaining five languages of the UN. Although a time frame of 15 days for receipt of the translated questionnaire was given in early April, the reality was that the process took over nine weeks. This created scheduling problems not least because the translated questionnaires would have to be sent out, three weeks given to respondents to answer, before sending the replies back to the translation service for conversion to English. In any event the Spanish questionnaire was received on 4 June and was sent out that week. It was important to send out the Spanish questionnaire as only 1 questionnaire had been returned from the region.

Further details of data collection methods two and three are considered below.

Interviews

In February and March 2007, the consultant travelled to both Geneva and New York, spending three full working days in each place. The interviews with both UN staff and NGOs were kindly organised by UN staff from the WRGU of the OHCHR. They sent emails notifying colleagues about the project and requesting interviews. In Geneva interviews were held with OHCHR staff only. Interviews were conducted with people in the special procedures department, mainly Special Rapporteurs' advisors, as well as those whose work focused on servicing the human rights committees. By way of contrast, in New York interviews were conducted with staff in the human rights office including DAW and OSAGI, as well as some of the UN agencies including UNICEF, UNDP, UNIFEM and UNFPA. Interviews were also conducted with three non-government organisations working in the area of women's rights. These were Centre for Reproductive Rights, Equality Now which initiated this project and finally Human Rights Watch, Women's Rights division. [699] Finally an interview was held at the IOM in New York.

I found the interviews very helpful not least because interviews always present an ideal opportunity for the researcher to get opinion at first hand. One is able to pick up on nuances that are absent in printed material. One is also able to learn about the internal dynamics of an organisation which may make some solutions or suggestions more or less acceptable than others. Inevitably interviews also throw up the biases or fears ("perspectives") of the interviewee. On a practical level, in both Geneva and New York, I was acutely aware of the extreme time pressures that people appeared to work under and was therefore very grateful for their time. In passing, as an outsider, I was somewhat taken aback by the shortage of office space which necessitated much doubling up and which resulted in a not insignificant number of interviews taking place in the UN café, not least in Geneva. In Geneva, some staff were also in the process of packing to move offices. They agreed to be interviewed amongst their packing boxes, apologising, unnecessarily, for the "chaos." I have to confess that it came as a surprise to find to find so many "internally displaced" UN personnel. It is a testament to the dedication and hard work of the staff that they were able to maintain a

[699] I have used quotes from the interviews which quotes are based on my hand written notes. I have not had the opportunity to cross check the quotes with the interviewees, but have in any event rendered UN officials anonymous.

high degree of professionalism in difficult working conditions. I was enormously impressed.

Questionnaires
Given the relatively short period of time in which the project was originally scheduled to be completed (three months), it seemed efficient to use a questionnaire to try to get information about the existence and scope of laws that discriminate against women. The widespread use of electronic communication which is almost instantaneous made this method a quick, efficient and cost efficient way of sourcing data. However, for all these advantages, questionnaires as a data gathering method have the disadvantage of having a relatively low response rate.[700] People receive questionnaires and *mean to* respond, but do not always get round to doing so. The technical specificity of the information required by this questionnaire (specific provisions from national laws) meant that time and effort was needed to provide accurate answers, and this may (have) militated against a high response rate. In any event the responses comprised completed questionnaires, while others sent in opinions on particular aspects of the questionnaire and links to reports and other information. Finally, one of the challenges in preparing the report has been the uncertainty over the future of the special procedures as a result of the on going Human Rights Council mandate review.[701] Interviewees and correspondents noted variously that *all* Special Rapporteurs were to be abolished or that only the country mandates were to be extinguished. Another view was that the mandate "rationalisation" would see an amalgamation of some mandates and the non renewal of some mandates, both thematic and country. Others were of the view that the scope of the mandates of Special Rapporteurs were to be severely curtailed.[702]**.** In the midst of it all, I was sent an NGO petition addressed to the Human Rights Council and requesting that Special Rapporteurs not be abolished. It has been difficult to write this report in the light of the uncertainty.

[700] M. Maclean and H. Genn *Methodological Issues in Social Surveys.*
[701] See generally 2007 (7) *Human Rights Law Journal*.
[702] **S**ee NY times Sunday 11 March 2007.

Appendix C – Cover Letter and Questionnaire
OHCHR Cover letter- Project: Laws that Discriminate against Women
Dear Colleague

I am writing to ask for assistance on a project that I have been asked to do by the women's rights and gender unit of the United Nations Office of the High Commission for Human Rights in Geneva. The project concerns the advisability of setting up a mechanism to address laws that discriminate against women. This might include the possibility of appointing a Special Rapporteur on laws that Discriminate against Women. It is focused on *de jure* discrimination and arises out of two Secretary-General Reports which can be accessed by looking up these documents:

E/CN.6/2006/8 and E/CN.6/2007/8 (Both are available in the six working languages of the UN).

The project is divided into two parts. The first is an analysis of UN and regional bodies to see if and how they address laws that discriminate against women. The second involves identifying current laws that discriminate against women. This is the part that I need help with. One cannot comment meaningfully about the advisability of setting up a special mechanism focusing on laws that discriminate against women, without knowing how many such laws still remain and in which areas they remain. It is for this reason that I am writing to ask for your assistance in sending me information about laws in your country or region that pertain to the issue of *de jure* discrimination. I have prepared a list of questions that I would be grateful if you could answer. I would appreciate it, when commenting on laws that discriminate if you could provide specific details about the nature of the discrimination and, if possible attach a copy of the relevant offending sections.

Although the terms of reference specify *de jure* discrimination, I am alive to the fact that in some instances one may have to also discuss de facto discrimination. Moreover, I am also aware that implementation of law is an important issue when considering women's ability to enjoy their rights.

The time frame for completing the project is relatively short. I would be grateful if you could send me your response by the 31st of May at the very latest. I know that this is an imposition on your time and would like to thank you in advance for your help. Your assistance will be fully acknowledged in the report that I write.

Yours sincerely

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United Nations OHCHR Project on a Mechanism to address laws that Discriminate against Women-March 2007

Introduction

As noted in my covering letter, the women's rights and gender unit of the Office of the High Commissioner for Human Rights (OHCHR) has asked me to prepare a report on the advisability of setting up a special mechanism to address laws that discriminate against women. The project covers State sanctioned laws and regulations "in all areas affecting women's civil, cultural, economic, political and social rights." By State sanctioned is meant those laws that receive official recognition within the formal legal system. The focus is on *de jure* discrimination.

Discrimination is understood as comprising article 1 of the Convention on the Elimination of all Forms of Discrimination against Women:

"For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment and 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."

I appreciate that you are busy, but please may you answer as many questions as you can. Even if you do not manage to complete the entire questionnaire, do please forward the completed part. Please feel free to share this questionnaire. May I ask that if at all possible, replies be provided in English? My language skills are limited and for that I apologise. Unless you request anonymity, your assistance will be acknowledged in the final report. Please indicate those aspects of your answers that you would wish to be confidential, that is, not directly attributable to you.

Part A –The Constitution and National Laws

1). Does the constitution of the country prohibit non discrimination on the basis of sex and or gender and does it provide for equality before the law/equal protection of the law? Please list the provisions.
2). If the constitution recognises plural laws, for example in the family law field, does it specify what is to occur if there is a conflict between equality provisions of the constitution and a discriminatory personal law?
3). If there are still laws that discriminate against women, please provide statute name, chapter number or other identifying feature and relevant sections/provision.
4). In what way does the law discriminate? Is it direct discrimination or indirect?

5). Please identify any laws that discriminate either directly or indirectly against certain groups including, but not limited to, the aged, disabled indigenous women, different minorities and migrant women and girls.
6). Are there gaps (omissions) in the law which could, or do lead to, discrimination against women?

Part B -Responding to Discriminatory Laws

1). What has been done about the discrimination –by governments/agencies/NGOs/ other?
2). Have governments been responsive to lobbying by NGOs/other agencies?
3). Have court cases been brought challenging the law? (Please comment briefly on the ease or difficulty of accessing/using the law to challenge discrimination). Also please give names and citations for case law mentioned.
4). Have court challenges been successful, that is, have courts struck down discriminatory laws?
5). Have governments responded by changing the law or ignoring courts? Any good practice to share?

Part C -Omissions and the use of temporary Special Measures

1). Are there any laws that can be said to depart from the non-discrimination principle in a positive way for women (e.g. the use of temporary special measures, sometimes called positive discrimination or affirmative action)?
2). If yes, in what spheres are these laws found (e.g. employment/political participation/other) ? Please give details (chapter numbers and sections of relevant laws).

Part D-The International and Regional Human Rights Systems

1). Which international and regional human rights instruments has your State ratified?
2). Please list the regional and international instruments that are part of national law? (That is those that are incorporated into the national legal system).
3). Have you ever written a shadow report for a treaty body? If yes, please specify which.
4). If you have written a shadow report, did you identify laws that discriminate against women?
5). How did the Committee respond to the shadow report-did they refer to the laws that your organisation had identified as discriminating against women in questioning the State or in concluding observations? If yes, please provide the name of the committee and year.
6). Are the concluding observations of human rights committees disseminated in your country?

7). Have you or your organisation used the concluding observations of the human rights committees to lobby your government to change the law?
8). If yes, with what result?
9). Have you taken part or assisted in bringing a complaint or requesting an inquiry investigation under any of the treaty mechanisms?
10). When and with what result? Please give details.
11). Did the government change the law or alter its policies?
12). Have you found the treaty mechanisms useful in challenging laws that discriminate against women?

Part E-Special Procedures

1). Are you aware of the existence of thematic and country Special Rapporteurs or working groups? (Please specify regional, UN or both).
2). Have you ever made use of the Special procedures, for example, written to, or met with a Special Rapporteur on a visit to your country?
3). Were issues affecting women, especially laws that discriminate against women raised in your correspondence or meetings?
4). What was the result of any communications or meeting?
5). In your view, is your State likely to comply with requests or recommendations made by a Special Rapporteur?

Part F- Advisability of Special Mechanism to Address Laws that Discriminate against Women

1) Do you think that there is a need for the creation of a special mechanism to address laws that discriminate against women or are the existing mechanisms sufficient?
Please give reasons for your answers.

Part G–Anything else that you would like to add.

Please add anything other comments you wish. Feel free to comment further on regional perspectives on the issue of laws that discriminate against women. This could include the challenges of operating within plural legal systems.

In conclusion, may I thank you again for your time and urge you to please send your answers back as soon as you can.

Sincerely
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Appendix D –Questionnaire Recipients

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