Particularity of Rights, Diversity of Contexts: 
Women, International Human Rights and the Case of Early Marriage

by

Annie Bunting

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ABSTRACT

This thesis presents an alternative way of approaching and analyzing practices that are criticized on the basis of human rights and defended on the basis of culture. I illustrate the thesis through the case of early marriage. Rather than reinforcing the dichotomous debate between universalistic conceptions of human rights and culturally relative challenges to universalistic interpretations of rights, this thesis inhabits the space between the dichotomous poles. I argue that human rights can be appropriated, particularized and used in diverse contexts, but not without attention to the local and global socio-political contexts in which the rights debate takes place.

I argue throughout the thesis that, to address practices that are criticized according to international women’s rights and defended as integral to culture, the presuppositions of judgement must be exposed and criticized. This methodology includes an understanding of the context in which the practice takes place as well as the context from which criticism emanates. I argue that this is particularly true when the external critics are evaluating practices that take place in a Muslim context, given the problematic manner Muslim women’s bodies have taken center stage in the international debates. This thesis critically interrogates the preoccupation with Muslim women in international human rights and the treatment of Muslim women’s claims in the case of early marriage.

This thesis proceeds along three levels: the international, national and local levels. On examining the international level through the work of the women’s committee, CEDAW, I show the predominance of the universalism / relativism dichotomy, with CEDAW invested in rhetorical claims to the universality of human rights. This thesis demonstrates that the practice in the area of marriage age tolerates particularity and variance. Further, I argue that a strength of international law on this point is its flexibility or ambiguity, which can allow for constructive particularity, without sanctioning all instances of cultural particularity. The local level of analysis stems from fieldwork in northern Nigeria and grassroots activism to address early marriage. Finally, I evaluate the national domestication of international norms through the example of Canadian refugee cases concerning marriage and culture.
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Human rights have become "universalized" as values subject to interpretation, negotiation, and accommodation. They have become "culture".¹

I. Introduction

Even before the inception of the Universal Declaration of Human Rights in 1948, its "universality" was controversial. The oft-cited statement by the American Anthropological Association in 1947 criticizing the cultural arrogance of a Universal Declaration marks the beginning of the contemporary debate and many scholars since then have harkened back to that statement:

The problem is thus to formulate a statement of human rights that will do more than just phrase respect for the individual as an individual. It must also take into full account the individual as a member of a social group of which he is a part, whose sanctioned modes of life shape his behavior, and with whose fate his own is inextricably bound... How can the proposed Declaration be applicable to all human beings and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America? ...It must embrace and recognize the validity of many different ways of life.²

Over the past two decades, the international human rights community has remained preoccupied with the question of whether international human rights norms are universal.³ What is new about


³Adamantia Pollis claims that she and Peter Schwab triggered the contemporary debate with their co-edited volumes challenging the prevailing view of the universality of Western conceptions of human rights: Adamantia Pollis and Peter Schwab (eds.) Human Rights: Cultural and Ideological Perspectives (1979) and Toward a Human Rights Framework (New York: Praeger, 1982).
scholarship in the late 1990s is that authors refer to "revisiting", "rethinking", "reimagining", and "redefining" the challenge of cultural relativism in human rights law. Rather than charting the contours of the debate between universalistic conceptions of human rights and culturally relative challenges to liberal conceptions of rights, some scholars are looking to work through the dilemma and to move beyond the dichotomy. This thesis also inhabits the space between the dichotomous poles of relativism and universalism.

Much of the contest over the universal application of international human rights has landed on Asia, Muslim Africa, and the Middle East. Asian perspectives, indigenous African concepts, and Muslim alternatives to "Western" human rights have been "discovered", presented, and compared sometimes by North American and European scholars, sometimes by Asian, African, and Arab scholars. And much of the debate has been played out on women's bodies as women's reproductive freedoms and their roles in society have led to the most heated exchanges at all levels of the international community. Invocations of universal human rights and cultural

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rejections of those rights have played predominant roles in international human rights. Both have dangers and neither lends itself to constructive dialogue between the dichotomies. I reject both facile universalism and facile relativism and seek to challenge this dominant discourse in favour of a less stark dialogue about rights and cross-cultural judgement.

II. Outline of Thesis

In this thesis, I present an alternative way of approaching and analysing practices which are criticized on the basis of human rights and defended on the basis of culture. I illustrate my thesis through the case of early marriage. I discuss the scholarship in the 1990s concerned with cross-cultural judgement in women’s international human rights, with a particular focus on the Convention on the Elimination of All Forms of Discrimination Against Women, its Committee, women’s conferences, and activism. I interrogate critically the preoccupation in international human rights with Muslim women and the treatment of Muslim women’s claims in the case of early marriage. I suggest that human rights can be appropriated, particularized, and used in diverse contexts but not without attention to both the local and global politics in which the rights debate takes place.

I argue throughout the thesis that, to address practices which are criticized according to international women’s rights and defended (by various actors) as integral to a culture, the presuppositions of judgement must be exposed and criticized. This methodology includes both an understanding of the context in which the practice takes place as well as the context from which criticism emanates. Marilyn Strathern refers to this process as the “laying bare of
assumptions", both indigenous concepts and analytical ones. Strathern goes on to argue that,

Of course, ‘we’ may still wish to make up our own minds... Making up our own minds always remains an option; the only observation would be that one has to understand the [indigenous cultural] constructs first before taking them apart.

Judgement never takes place in an acultural or apolitical context devoid of power relations and history. Further, I argue that self-criticism is an essential part of cross-cultural judgement where self means an external observer. I argue that this is particularly true when the external critics are evaluating practices that take place in a Muslim context, given the problematic manner in which Muslim women’s bodies have taken centre stage in the international debates.

Critical reflection promotes a consideration of practices that may be familiar to the observer and that on further investigation share features with practices in another culture that appear immediately offensive to the observer. To some extent self-criticism is about high heels (foot binding), divorce rates (arranged marriages), breast implants (clitorectomies), anorexia, and teenage pregnancy (teenage marriage) in North America. But it is also more. Self-criticism entails understanding the power of human rights discourse which is built on colonial and

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10 "I choose to show the contextualized nature of indigenous constructs by exposing the contextualized nature of the analytical ones. This requires that the analytical constructs themselves be located in the society that produced them. For members of that society, of course, such a laying bare of assumptions will entail a laying bare of purpose or interest." Marilyn Strathern, Gender of the Gift: Problems with Women and Problems with Society in Melanesia (Berkeley: Univ. of California Press, 1988) at 8.

11 Ibid. at 326.

12 Sherene Razack similarly argues that refugee law in Canada is marked by a politics of rescue where stereotypical, orientalist and racist images of women fleeing Muslim countries are perpetuated. I would argue that these same images are at work in international human rights for women. Sherene Razack, "Policing the Borders of the Nation: The Imperial Gaze in Gender Persecution Cases" in Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms (Toronto: Univ. of Toronto Press, 1998) 88 at 125.
imperial histories. International law “was law that was founded on the violence of European imperialism, not law based on global consent”. Recall that at the time of the Universal Declaration many countries were still colonized and independence did not come until the years between 1960 and 1980. While the direct colonial rule of this century has given way, neo-colonial and imperial relationships remain. Imperialism, Edward Said describes, is the relationship of dominance and subordination between nations, including modern economic and cultural control:

“imperialism” means the practice, the theory, and the attitudes of a dominating metropolitan center ruling a distant territory; “colonialism”, which is almost always a consequence of imperialism, is the implanting of settlements on distant territory ... In our time, direct colonialism has largely ended; imperialism, as we shall see, lingers where it has always been, in a kind of general cultural sphere as well as in specific political, ideological, economic and social practices.

Said explores the cultural and intellectual dynamics of imperialism. Here one can see the place of international law in imperialism: “Neither imperialism nor colonialism is a simple act of accumulation and acquisition. Both are supported and perhaps even impelled by impressive ideological formations that include notions that certain territories and people require and beseech domination”. Self-criticism includes acknowledging the racist contexts in which judgements

\[13\] The American Anthropological Association statement explains this in the following manner: “Rationalized in terms of ascribing cultural inferiority to these peoples, or in conceptions of backwardness in development of their ‘primitive mentality’, that justified their being held in the tutelage of their superiors, the history of the expansion of the western world has been marked by demoralization of human personality and the disintegration of human rights among the peoples over whom hegemony has been established”. American Anthropological Association, supra note 2.


\[16\] Ibid.
are passed, criticizing the politics of human rights, and being open to alternative frameworks of analysis. Finally this methodology requires “attending to the different forms of postcoloniality in the former colonial societies”.

I argue that my methodology can guide the inquiry and lead to sensitive and effective cross-cultural judgement. I suggest that certain questions ought to be asked when approaching challenging cases; these questions are generated by insights from a combination of sources, including the contribution of scholars and case studies. This method brings together insights from social anthropology, feminist theory, post-colonial studies and international human rights. Questions are gleaned from interdisciplinary theory and the examination of particular examples in their social context. For example, what are the cultural circumstances, including historical circumstances, in which the impugned law or practice is taking place? What are the underlying reasons for and consequences of the practice, and how are these understood within an indigenous framework? What are the variations of the law or practice and contests over its meaning at play? Is the examiner (in this case Western) open to these various meanings or is the judgement predetermined by the framework of analysis or by an intuitive response? Are there analogous practices in the critic’s culture that will assist both in the understanding of the practice and in challenging her easy assumptions and criticisms? Is the cross cultural judgement playing upon and entrenching dangerous stereotypes about women in non-Western cultural contexts? I argue

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that the human rights academic or researcher as well as international bodies such as the Committee on the Elimination of Discrimination Against Women (CEDAW) ought to be attentive to these issues in their judgements.

This thesis proceeds along three levels: international, national, and local levels. First, I will examine the international dimension through the work of the international women’s committee, CEDAW. The thesis demonstrates how the historical evolution of international women’s human rights set the stage for the contemporary debates. My examination of the international level, in Chapter 2, shows us how women’s rights discourse remains steeped in the universalism/relativism dichotomy, with the Committee invested in claims to universality. I argue that the Committee is paradigmatic of rhetorical universalism and works within the dualistic framework of universalism and relativism.

Despite this rhetoric, the practice of international women’s rights in the area of marriage age demonstrates particularity and variance. While CEDAW has pronounced a preferred minimum marriageable age of eighteen years for women and men, there is a diversity of standards for marriage age tolerated around the world. Further, I argue that the strength of the international law on this point is its flexibility or ambiguity which can allow for constructive particularity, without sanctioning all instances of cultural particularity. Activists can exploit the flexibility in international law pertaining to marriage age and domesticate the norms into their cultural context. The critical bite of human rights norms can be strengthened, not weakened, by this
approach.19

Ambiguous numerical definitions of child marriage coupled with concepts such as the “evolving capacities of a adolescent”20 result in norms open to local interpretation. Through a sampling of examples of the marriage of minor girls around the world I show, in Chapter 3, that particular tenacious themes appear in the stories of “child brides”; at the same time I chronicle the ways in which the experiences of young brides differ across cultures in important ways. In addition, in Chapter 3, I show that teen pregnancy has similar consequences for young women in North America as teen marriage in Nigeria and elsewhere leading me to question whether marriage per se is the practice most worthy of indictment. Early marriage literally means different things in different places and must be analysed from that point of view.21 Since cultural notions of childhood, maturity and responsibility vary from culture to culture, so too do the minimum age of marriage standards in those cultures. Activists concerned with the marriage of minor girls can invoke international women’s rights in their strategies and can argue that child marriage is

19 I also argue in Chapter 2 that international women’s rights rests on a bed on international law that can allow for more deference to national moral systems. See Chapter 2, Section II.

20 Report of the International Conference on Population and Development [Cairo Programme of Action], (1994) A/CONF.171/13 at para 7.45 (the notion of “evolving capacities of the adolescent” is here developed in the context of reproductive rights and reproductive health). Paragraph 7.45 further states that in providing services and information to adolescents, countries should respect the adolescents’ rights to privacy, confidentiality, informed consent, and cultural values and religious beliefs. The International Conference on Population and Development (ICPD) took place in Cairo, Egypt on September 5-13, 1994. The Programme of Action adopted at the end of the meeting is referred to as the Cairo Programme of Action. The principles in the Cairo Programme of Action were taken into account by CEDAW in preparing its general recommendation on Article 21 concerning women and health (CEDAW/C/1999/I/WG.II/ WP.2/Rev.1).

21 Marie-Andre Couillard writes about Islam and Malay women as follows: “Islam for Malay women is not a ‘cultural trait’. It is structuring difference. Such differences come from complex choices in the construction of reality and the meaning given to it. Women’s agendas have to be understood within this frame of reference and not with regard to our own.” Marie-Andre Couillard “From Women’s Point of View. Practising Feminist Anthropology in a World of Differences” in Sally Cole and Lynne Phillips (eds.) Ethnographic Feminisms: Essays in Anthropology (Ottawa: Carleton Univ. Press, 1995) 53 at 63.
prohibited by international law but need not insist on a marriageable age of eighteen since this may be rejected outright as a foreign or offensive standard in their social location.

This brings me to the second level of analysis in my dissertation: the local or grassroots. I examine, in Chapter 4, activism in northern Nigeria to address the practice of early marriage and the appropriation and rejection of international human rights discourse and law in this reform effort. I also discuss the involvement of international human rights activists, including myself, in the project. Given the historical moment in time when I participated in the human rights mission to Nigeria, the language of human rights was met with hostility in many quarters. Some Muslim feminists argued that a secular framework was inappropriate in northern Nigeria as antithetical to the indigenous normative system. Others explained that human rights may be seen as an attempt to secularize the population (this was the case, for example, with mandatory education initiatives which were met with opposition in the north of the country). Due to Nigerian national politics, with the association of the south of the country with a Christian or non-religious human rights movement, international human rights was greeted with suspicion, even by those who had invited Human Rights Watch to study the problem of early marriage and its associated health problems. An outright rejection of international human rights on the basis of religion and culture signals a refusal of dialogue and silences those people in Nigeria who want to debate the issue of early marriage. It is a manouevre that does not engage with the moral force of human rights and the "transnational juridical processes". ²²

Finally, I evaluate the national domestication of international norms through the example of the Canadian refugee determination process in Chapter 5. This thesis includes an investigation of the legally binding nature of international norms, through the Refugee Convention and the Women’s Convention, but the focus remains on the use of international human rights in political struggles. Cases of women who claim refugee status due to the circumstances of their marriage are read critically to analyse the treatment of marriage and culture in the decisions. Where in earlier chapters I examine the application of international human rights pertaining to marriage age to cases in northern Nigeria, I investigate in this fifth chapter the domestication of international refugee law in Canada. Each domain constructs images of those “worthy of protection” and each constructs narratives of Muslim women and their cultures.

On examination of the national level, through the Canadian refugee system, I argue that one of the strengths of refugee law is the ability to put an individual woman’s life in social/cultural/political context. Unlike the country reports which make up much of the jurisprudence on the women’s convention, refugee cases start with an individual and put her life into a broader social context. If done properly, through what I call deep contextualization,

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24 Non-governmental reports to the committee can serve the function of highlighting individual women’s cases in their national context. The government country reports, however, necessarily work at a level of generalization and abstraction that leads to crude pictures of the diversity of women’s experiences in any one country.
this process can present important narratives of women's lives in contrast to dominant superficial stories in circulation of women from non-Western countries. I also document the risk, however, in the areas of both refugee determination and international human rights: the danger of cultural misrepresentation. Both refugee law and human rights are built on notions of charity, humanitarian assistance, and compassion which presuppose unequal relations between states, cultures and communities. Through the portrayal of women “fleeing” their country of origin narratives of cultural superiority can be promoted and entrenched. Here I see the dangers of facile external cross-cultural judgement.

I do not attempt in this thesis a formulaic proposal for cross-cultural judgement. I do not set out a three-step test nor a set of rules which, if applied, will always result in good judgement. Rather I assert that rules and formula are inappropriate for the field. Indeed the search for definitive rules is intertwined with the power of the existing discourse. When the universality of international human rights is taken to be the imposition of one interpretation of a norm without cultural contextualization and flexibility, it neglects the importance of local social movements and normative orders. Similarly, when cultural sensitivity is understood as an outright rejection of international debates including human rights, the argument neglects the global connections and dimensions of local practices. To go beyond the characteristics of the current debates,


As Akbar S. Ahmed and Hastings Donnan write in their introduction to Islam, Globalization and Postmodernity, “If research on contemporary Muslim societies is not to be similarly dismissed as the most recent manifestation of Orientalism, it is clearly imperative to introduce conceptual innovations which both surmount the limitations of Islamic studies as identified by Said, and transcend the shortcomings of his own analysis [the fact that Muslim societies are now diasporic]. This would seem to be possible only by
including the universalism / relativism dichotomy, we have to learn from examples. This thesis presents examples that reveal that somehow between the universalistic language and the articulated counter-claims, unexpected and subtle appropriation and particularization of human rights is occurring. When viewed as not simply impositions of universally conceived rights or relativist defences, these instances can provide us with illustrations to guide future inquiries. Through “ethnographies of rights” in this thesis we see the risks associated with abstraction that can lead to over-generalizations and misrepresentations of cultures. It is a less than ideal method of judgement to start with a fixed standard (marriage age of eighteen years) and criticize countries on that basis, as CEDAW does. Similarly, by not examining the assumptions at work in judging the case of early marriage in northern Nigeria, the critic is closed to the possibility of seeing things within a different framework. With contextualization and self-criticism some of the risks of cultural misrepresentation can be avoided. When human rights approaches draw upon the power of the claim to universality without sacrificing grounded cultural particularity, their moral legitimacy is stronger. The connection between human rights law and its subjects is maintained in this way. “Thus our study of human rights becomes an exploration of how rights-based normative discourses are produced, translated and materialised in a variety of contexts.”

This thesis seeks to demonstrate how international women’s human rights is a complicated


28 Ibid. at 13.
mixture of universally articulated rights claims and constructively contextualized norms. There is a complex interaction between rhetoric and practice. Universal concepts can take on different forms. And given the contested nature of cultures, these indigenous forms are not easily ascertained nor should they be assumed to be static. This thesis seeks to make a unique contribution in documenting the phenomenon of rhetoric and practice, universal and particular, with respect to marriage age. Through this case study we can better see what is actually occurring in this area and help abandon dualistic positions of either universality or particularity. I argue that the invocation of universally conceived rights is not destined to be destructive, since as we see, the practice allows for much greater flexibility than the rhetoric would have us believe. Within the institutional framework of universality there is room for cultural particularity of rights norms. Indeed, the persuasiveness of rights is strongest when the invocation of the language of rights is linked to particularity.29

While promoting the cultural particularity of universal rights claims is crucial in my project, this thesis does not maintain that the language of rights need be the best way or the only way to capture ideas about values and acceptable practices. A central claim in my work is that a cross-cultural critic has to be open to alternative normative frameworks. To be closed to such possibilities risks by-passing opportunities for an "enlargement of the mind"30 and risks reinforcing dominant Western presuppositions. In this important way I am pointing to the possibilities that have yet to be explored in international human rights and suggesting the deeper


30 Nedelsky, supra note 17.
dimensions of cultural particularity. The work of some scholars on new universalisms is instructive. The Asian Women’s Human Rights Council (AWHRC) and El Taller are two non-governmental organizations that are exploring new universalisms in human rights. El Taller argues that,

A ‘universal vision’ based on the dominant ideas of rationality, secularity and progress has guided the spirit of practically all public and political institutions that were developed during the last two centuries. However, the universalisation of this world view has dispossessed the majority, denigrated women and endangered numerous civilizations and cultures.

Perhaps, in the future, indigenous concepts of justice will teach many others about alternatives to rights-based judgement. Here I distinguish myself from other scholars in the area, scholars who may be unwilling to abandon the international human rights project in the face of non-secular or other frameworks.

I build on the work of social anthropologists Richard Wilson and Sally Engle Merry but I apply ethnographies of rights to doctrinal analysis and international treaty body practice rather than solely local social movements. I move the analysis into international women’s rights at the levels I described above. I also have affinity with critical international law scholars such as Dianne

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32 El Taller, *Programmes and Activities* (pamphlet on file with author); El Taller is a non-governmental organization made up of over 120 NGO’s worldwide and with a fifteen member Board of Directors. In its mission statement El Taller uses the image of the wind from the South: “We invite you to listen to the wind; More specially to the wind from the South; the South as third World, as civilizations of Asia, the Arab region, Africa, Latin America; the South as the voices and movements of peoples wherever the movements exist; the South as the visions and wisdoms of women; the South as discovering of new paradigms, which challenge the existing theoretical concepts and categories, breaking the mind constructs, seeking a new language to describe what it perceives, refusing the one, objective, rational, scientific world view as the only world view. The South as the recovery of other cosmologies, the South as the discovery of other knowledges that have been hidden, submerged, silenced. The South as an ‘insurrection of these subjugated knowledges’.”
Otto, combining their work with social anthropology. I push the analysis, of practices criticized on the basis of human rights and defended on the basis of culture, through these lenses.

III. Muslim Women's Place in the Debates

The troubling coincidence in these debates is the international preoccupation with Muslim culture in general\textsuperscript{33} and Muslim women in particular\textsuperscript{34} as emblematic of the relativity of rights.\textsuperscript{35}

For example, half of all the articles on religion which appeared in the first twenty volumes of

\begin{itemize}
  
  
  \item \textsuperscript{35} For critical commentary on this point, see Chandra Mohanty “Under Western Eyes: Feminist Scholarship and the Colonial Discourses” (1988) 30 Feminist Rev. 61; Vasuki Nesiah, “Toward a Feminist Internationality: A critique of U.S. feminist legal scholarship” (1993) 16 Harvard Women’s Law J. 189; Nancy Kim, “Toward a feminist theory of human rights: straddling the fence between Western imperialism and uncritical absolutism” (1993) 25 Columbia Human Rights L. Rev. 40; Radhika Coomaraswamy, “To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights” in Cook, supra note 23, at 39; Eva Brems, “Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse” (1997) 19 Human Rights Quarterly 136; Carla Makhlof Obermeyer, ibid. at 370 (notes that “prevalent is the view that there is a basic incompatibility between the notions of universality and equality that are at the core of reproductive rights and the Islamic emphasis on complementarity rather than equality in gender roles”).
\end{itemize}
Human Rights Quarterly concern Islam. Of my sample survey of thirty articles on women’s rights and culture, ten concern Muslim women. The preoccupation with Muslim women, of course, is not a coincidence; it is part of a history of colonialism and orientalism.

Feminist scholars and technicians alike all too frequently cite cases from Muslim countries as the most barbaric violations of women’s rights. Eva Brems argues that most of the debate between cultural relativists and feminists has been about “harmful traditional practices”: “the lion’s share of feminist outrage concerns the practice of female circumcision” which is often conflated with Muslim culture. Restrictions on women in Muslim communities are seen as natural and unopen to change as compared to restrictions on women in non-Muslim communities. Helen Watson writes,

The plethora of books about women behind, beyond or beneath the veil may give the impression that Muslim women’s main activity and contribution to society is being in a ‘state of veil’. For non-Muslim writers, the veil is variously depicted as a tangible symbol of women’s oppression, a constraining and constricting form of dress, and a form of social control, religiously sanctioning women’s invisibility and subordinate socio-political status... The image of a veiled Muslim woman seems to be one of the most popular Western ways of representing the ‘problems of Islam’...  

The Islamic religion is often presented as misogynist without discussion of the debates between religious schools. “[S]ubtleties are usually ignored by those who render the fateful diagnosis of incompatibility between ‘Islam’ and ‘the West’.” When discussing the Shah Bano case concerning Muslim Personal laws in India, Anna Funder argues that “Shari’a values and the

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36 Eva Brems, ibid. at 148.


38 Obermeyer, supra note 34 at 371.
laws in which they find expression, like traditional values the world over, are predominantly concerned with the control of women - with demarcating a sphere of male private control over women, a sphere in which traditional values are replicated, and culture maintained”. Funder further states that the notion of “cultural integrity” is used to privatize the role of women in society and take it out of the international arena. Funder fails to discuss the four schools of Islamic law as well as the cultural variations in Shari’ā laws. In contrast, many devout feminists argue that Islam guarantees rights of women within society and the family but “the major challenge facing Muslim countries is in translating the ideal concepts into reality”.

Racism and orientalism are rarely discussed when international women’s rights scholars examine cases of Muslim women’s rights. In fact, as Strawson argues, international human rights discourse in this area is characterized by orientalism:

The development of an international legal culture free from colonial attitudes will involve a systematic unravelling of the Eurocentric discourse which Mayer represents when she says, “the principle of the supremacy of international law is a given in the modern international order”. This “given order” she tells us rests on the “Western traditions of individualism, humanism and rationalism”.

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39 Funder, supra note 34 at 428 (footnote omitted).

40 Ibid. at 419.


42 In discussing the French trials of immigrant women for excision, Bronwyn Winter makes the analogous point about the law in France: “a legal system that is based on universalistic principles and thus contains no overall concept of racism or cultural diversity ... has to account for, and be accountable to, the reality of racism and the diversity of cultural contexts within French society. The problem is how to do it coherently, and particularly how to do it without women losing out once again.” Winter, supra note 34 at 969.

43 Strawson, supra note 33 at 37 (footnotes omitted).
Further, the way in which Muslim women’s bodies have been marked and used in feminist texts is under-theorized in conventional international women’s rights scholarship. Take for example the following statement from Reza Afshari writing about Iran, in the author’s words, from a “secular and universalist perspective as a non-religious Middle-Easterner”:

Secular habits have become habitual, and small truths are discovered which cumulatively replace the Truth of tradition. Already they have proved more tenacious than the zealotry of the Islamist revivalists. As the Islamist storm blows overland, raising a whirlwind of collective hysteria and fear, shrouding women in the dark hijab, and hiding Islamist radicals in the veil of their own ignorance, the secular undercurrent continues to flow under the vast swathes of Iranian life.

At the same time, Muslim governments assert relativist challenges to the application of international human rights. Delegates from diverse countries such as Morocco, Sudan, Malaysia, and Iran defend themselves from criticism on the basis of cultural integrity or cultural sovereignty. This position is often used, as we will see, when governments are negotiating, or refusing to negotiate, the substance of international women’s rights. On the other hand, Islamic feminists who argue for more liberal interpretations of the Quran and hadiths have been dismissed as marginal and unrepresentative. Shahnaz Khan writes that,

The similarities between construction of knowledge in Orientalist and Islamist discourse indicates how dominant western stereotypes and Islamist visions of authority intersect. The body of the Muslim woman is placed at this intersection and faces combined pressures of authority from orientalist/racist western

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45 Afshari, supra note 33 at 236.

46 Ibid. at 240.

47 Al-Marayati, supra note 41 at 172-173.
constructs as well as fundamentalist Islamist constructs.\textsuperscript{48}

Thus the parameters of the debate about women's rights and culture is defined to a large degree by orthodox religious political leaders to whom feminists and liberal governments must respond. What CEDAW calls "constructive dialogue" is also characterized by this feature. In this thesis, I will discuss the rhetoric of relativism and the universalistic response and argue that through vernacularised rights the shortcomings of these dichotomous approaches can be avoided.

IV. Narrative

"Stop researching us"\textsuperscript{49} were the words of one activist from the disabled women's community. "Stop studying the dispossessed, study power and patriarchy"\textsuperscript{50} were the thoughts of a longtime rape crisis worker and advocate for transition houses in Canada. How academics and feminist researchers use the stories of other women has been a theme as long as there has been feminist research. Dichotomies between theory and practice, academics and activists, data and lived experience persist in these discussions and debates. I was struck during a meeting recently by the antagonism expressed by feminist non-governmental organization representatives toward university-based feminists and university-based research projects. Issues of appropriation of voice and of representation are as relevant and pressing in women's human rights as ever before. In this section I discuss voice or narrative, and representation in international women's rights and

\textsuperscript{48} Shahnaz Khan, "Race, Gender, and Orientalism: Muta and the Canadian Legal System" (1995) 8 Cdn. J. Women & Law 249 at 253.

\textsuperscript{49} Eileen O'Brien from the DisAbled Women's Network and other organizations, Roundtable Discussion (CEDAW Impact) York University (November 24, 1998).

\textsuperscript{50} Lee Maracle, ibid. (November 24, 1998).
argue that it is possible to work through these challenges; in fact, I argue, it is necessary in an international feminist project to tell other women's stories.

Lawyers are asked to represent a client. Feminist lawyers are asked to represent a woman whose human rights have been violated. Academic lawyers teach students about cases, stories, legal phenomena and law's role in society. Academic feminists conduct research about women's lives. It is all about telling someone else's story. Sometimes they ask you to tell it for them; sometimes they pay you to translate it for them; sometimes a group of women ask you to relay a part of their history; and the best times are when women write their own stories and you listen and learn. Anthropologist Ife Amadiume stated more than ten years ago that,

> [t]here is a need for material about women, collected and explained by African and other Third World women themselves, from which adequate and suitable theories and methodology can be worked out ... It can be argued that because of their plural and multicultural backgrounds as a result of the colonial heritage. Third World women are best qualified to carry out comparative studies and make generalized statements about women's position in their societies.\(^5\)

In international human rights, the work is defined in part by giving voice or drawing attention to a situation which might not otherwise be noteworthy. The discourse of rights is invoked to make the claim louder, to legitimize a woman's story through the language of the law. As trite as this sounds, international human rights activism and activist scholarship is the business of lending the weight of international norms and treaties to the lived experiences of individuals and communities. It is not taking the voice of communities but amplifying the voice or perhaps facilitating its currency through the air. The problem with this scheme is the power of the

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language of law to distort and the power of the Western observer to appropriate stories for purposes quite unrelated to the community and individuals involved. Aihwa Ong talks of this as the “betrayal” possible in this work.

As Ruth Behar explains with respect to the privilege of authorship in feminist anthropology,

> Sharing privilege, sharing literacy, sharing information - which in our world is power - is one way for feminist relationships in postcolonial conditions of inequality to bridge the gaps between women in the academy and women in ethnic communities.

Aihwa Ong argues that the valid concerns over privileged women writing the stories of less privileged women “are nevertheless blind to the complex ways in which power can work.”

People being interviewed - informants - choose what information to disclose, what words with which to describe experiences, and what weight to place on their narrative. Women with whom I spoke in northern Nigeria, for example, chose not to discuss working in prostitution nor sexual activity outside marriage. Contrary to my interpreters’ warnings and cultural norms, however, women openly discussed the circumstances of their first intercourse with their husbands and violence in their homes. Of course I had to learn how to ask these questions respectfully. Initially I would ask directly if she had experienced violence; soon I learned that it was more appropriate to ask if she had run away from her husband’s house to return to her father’s house at any time.

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53 Mohanty, supra note 35.

54 Ong, supra note 18, 350 at 354.


56 Ong, supra note 18 at 353.
Many women would answer the first question in the negative but the second in the affirmative and go on to explain that she did not feel ready for sex, that she did not want sex, or that he was beating her.

During other interviews the power imbalances were hard to overcome, as much as between myself and the interpreter as myself and the informants. On one occasion the interpreter was more interested in my “straight nose and hair” and blue eyes - if there were ever markers of privilege! Being a mother and wife gave me more currency in interviews, however, than having blue eyes. Women would ask whether I had children, where they were, and who was taking care of them. I told them about my son, sometimes about the birth, and about my partner. Somehow being able to talk about children gave me legitimacy in their eyes; perhaps they trusted me more as a woman. Their experiences of travelling during the late stages of labour across an extremely rough road to arrive at a health centre with no supplies or giving birth without an attendant made me reflect on my own experience of pregnancy, labour, and birth. My own experience determined - to some extent - how I heard those parts of the story. Lila Abu-Lughod realized that during her earlier field work in Egypt in the 1970's she “hadn’t paid much attention to things that now mattered enormously” to her, as she was pregnant for the first time. Abu-Lughod goes on


58 Lynne Phillips muses at the end of her essay that “I am tempted to speculate about whether the fact that I am now a mother will make me more female/ human for those women I know in Ecuador. But as soon as I write this I realize that this kind of humanist connection is fraught with tension.” Lynne Phillips, “Difference, Indifference and Making a Difference: Reflexivity in the Time of Cholera” in Sally Cole and Lynne Phillips (eds.) *Ethnographic Feminisms: Essays in Anthropology* (Ottawa: Carleton Univ. Press, 1995) 21 at 33. Similarly Marie-Andre Couillard says that “having a child and forty odd years behind me brings me close to the majority of women I work with in this context”: supra note 21, 53 at 55.

to state that,

there was often a perceived kinship, *albeit limited*, between women anthropologists and their women subjects that made seeking knowledge of their situations more of a political project that had implications at “home”... that one’s own construction of personal experience would be shaped by knowledge of these women’s lives and even by particular women one had come to know.  

Aiwha Ong placed along side one another three stories, including her own, in her article on Chinese diasporic women. This self-conscious technique, of including the voice of the ethnographer herself, results in a deconstruction of her own authority. By placing herself in the text the commonplace objectivity of traditional anthropology is undermined with refreshing political consequences.  

In my own work on early marriage in northern Nigeria I intersperse a few of my own journal entries for this purpose. Further I question the role of the external critic in human rights much in the fashion that feminist anthropologists question the role of the ethnographer.

Further, the feminist ethnographer can choose to use this information to decentre taken-for-granted assumptions about “less privileged” women:

Feminists can become a channel for the voices of postcolonial women, thus creating greater opportunities for them to interrupt and intervene in metropolitan circuits of gender and cultural theory. Ordinary women telling their own stories inter-nationally - in the double sense of talking about border-crossing lives and the transnational dissemination of tales - should form a counterpoint to hegemonic narratives.

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In this thesis I present the narratives of women, the testimonials of informants, with whom I had the privilege of speaking in northern Nigeria as an attempt to undercut stereotypical images of women in Muslim African cultures. I argue that through deep contextualization of the circumstances of their lives the reader will appreciate the diversity of cultural, religious, local and global factors which coalesce in women’s lives in northern Nigeria. “I strip away comfortable Western pronouncements”63 in international human rights about women in Muslim Africa.

I initially used narrative in my work as a technique inspired by human rights case studies. In human rights advocacy and law, the story of an individual whose rights have been violated by the state or state actor forms the core of the jurisprudence. Quintessential human rights cases are based on accounts of torture, abductions/disappearances, intimidation and unfairness. The rights violations include breach of civil and political rights. In human rights law, unlike sociology, you need only prove the “truth” of the individual testimonial for there to be violation of her rights. Narrative therefore has always played an important legal and political role in international human rights; legal in the sense of creating/constituting the jurisprudence and political when advocates tried to draw international attention to the plight of political prisoners, dissidents and activists.

Narratives are an important complement to aggregate data, or perhaps aggregate empirical data are essential to contextualize narratives. In this thesis, I rely on both the power of narratives and the context of data. Individual narratives and social science research allow women’s rights issues

63 Ibid. at 366.
to be contextualized without over-generalizing. Where narratives can be criticized for abstraction or inaccuracy, empirical studies can be criticized for over-generalization. I use each as a corrective to the other in my work. For example when I am discussing the cases women married at or before puberty in northern Nigeria, I establish that individual husbands raped their wives, denied them access to education and that women’s health and security were affected. I also document, however, the broader social context in the area and the larger trends of women’s health and reproduction. Further, I contend that empirical data establishes where governments are failing to abide by their obligations in international law. In addition to the violations of an individual woman’s rights, states can be responsible for ineffective protection and promotion of women’s rights.

V. Case Studies

There was some serendipity in how the case study of early marriage in northern Nigeria came about. It is difficult to say if I chose the case of early marriage or it chose me. I had the good fortune to meet Abdullahi An-Na’im at the University of Toronto in 1994. We discussed the possibility of my doing a human rights internship with Human Rights Watch where An-Na’im was the director of the Africa Watch programme at the time. Soon thereafter a HRW mission to northern Nigeria was confirmed as a joint project with the Women’s Rights Programme and Africa Watch of HRW. I started researching the issue of early marriage in May 1994 and

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traveled to Kano, Nigeria in October 1994.

As it turns out, I feel that there could be no better case study for my investigation of the place of Muslim women in the international human rights' imagination. Nor is there a better example in international women's rights of variance and particularity in international norms than the case of marriage age. The complexity and subtlety in this area are humbling. I had the privilege of participating in a human rights mission to Nigeria, to meet with women who shared stories of their marriages and pregnancies, and to write about the experiences over the next four years.

The case of marriage age in international law strikes some as an "easy" case in so far as we can generate substantial cross-cultural agreement on what is problematic in the area. Others find early marriage a "hard" case since the strategies to address the issue are difficult to agree upon. I think of female genital surgeries as an "easy" case; arranged marriage as a hard case. However, I studiously avoid the case of female circumcision for two reasons. First, female circumcision has been used as an symbol of culturally relative standards by numerous authors in the area, to the point where the Muslim African societies in which the practice exists are defined by the issue. Unlike North American activism around violence against women where the culture as a whole is not seen by the international community as violent per se, African feminists point out how female circumcision comes to define whole cultures as "barbaric". I do not want to further entrench these notions. Almost nothing has been written about marriage age and international law. At the same time I am aware of the power of the symbol of marriage and marriage patterns, such as arranged and early marriage, in international discourse. As Uma Narayan writes,

[v]eiling, polygamy, child-marriage, and sati were all significant points of
conflict and negotiation between colonizing “Western” culture and different colonized Third-World cultures. In these conflicts, Western colonial powers often depicted indigenous practices as symptoms of the “backwardness and barbarity” of Third-World cultures in contrast to the “progressiveness of Western culture.” The figure of the colonized woman became a representation of the oppressiveness of the entire “cultural tradition” of the colony.65

Second, the international standards concerning female genital surgeries have evolved to less equivocal norms whereas the norms around early marriage remain open. Through an examination of cultural variance in international norms, this thesis can contribute to undercutting staid rhetoric about the necessity of universally applicable international women’s rights standards. In other words, I argue that in the area of international human rights “ethnographies of rights”66 reveal greater particularity than the rhetoric reveals. This is not so much the case with female circumcision. I write in the spirit of an anthropology of human rights.

The cases presented in Chapter 3, the overview of early marriage, serve another purpose: comparative analysis of early marriage around the globe demonstrates how the practice is neither solely a Muslim phenomenon nor are the consequences dissimilar to phenomena in North America. The case of Hmong living in California is an example of a diasporic community struggling in North America while the case of teen pregnancy undercuts easy indictments of early marriage. Finally the cases of women who claim refugee status due in part to the early marriage or the circumstances of their marriage, discussed in Chapter 5, represent cases of women who have crossed borders and have engaged refugee law and international human rights


66 Wilson, supra note 22 at 17.
after leaving their country of origin.

V. Conclusions

My objectives in this project are four fold. First, to show the insights and merits of alternative approaches to international human rights for women. Second, to broaden the debate about universalism and relativism in international human rights by showing that anti-universalistic positions are taken by individuals and groups other than autocratic self-interested government officials for disingenuous governments. Third, to show that, in practice, variance and “particularization” of rights already exists in international law, for example the international law on minimum marriageable age. Fourth, to endorse what Sally Engle Merry calls “vernacularised rights”. I examine how people use human rights and international law at the different levels I outlined above. Thus my project, in part, is about contested universalism, contested cultures in international human rights law: I seek to make a modest yet distinctive contribution to the ongoing discussion about women, culture and international human rights within the discursive space opening up between the simplistic polarities of universalism and relativism. As Edward Said wrote in Orientalism, “my two fears are distortion and inaccuracy, or rather the kind of

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68 See Wilson, ibid. 1 at 23.

69 Schor, supra note 31.
inaccuracy produced by too dogmatic a generality and too positivistic a localized focus". 70

This thesis seeks to transcend both facile universalism and facile relativism, to mediate between claims to universalism and cultural specificity, and to lay the groundwork for effective and constructive dialogue. The moral and political authority of international human rights claims is best promoted by culturally specific application and interpretation of universal human rights norms. The conditions for moral authority and constructive dialogue do not exist at either end of the universal/relative spectrum. Facile universalists lack moral authority to speak to the particular cultural experiences of women and marginalized communities and risk reinscribing Western norms. Facile relativists refuse any dialogue with the moral power of universal human rights. In promoting the emerging space between the dichotomies it is essential to challenge simplistic portrayals of Muslim women. With interdisciplinary insights, narratives and case studies we can endorse and enlarge the space between the dichotomies.

CHAPTER 2: Culture and Rights Discourse in Women's International Human Rights

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In "a world of radical inequality, relativist resignation reinforces the status quo".

I. Introduction

In this chapter I lay out the parameters of the debate about cultural diversity and international women's rights - as part of the laying bare of assumptions of judgement. The historical evolution of women's rights set the stage for the contemporary debates. The key international women's rights cases decided by the Human Rights Committee set the minimum threshold for considering women as members and agents of their cultures. These foundational decisions hold out the promise of seeing women as active participants in cultural transmission rather than the objects of cultural practices. That promise has not always been fulfilled in the subsequent rhetoric and practice of women's international human rights. I argue that the Committee on the Elimination of Discrimination Against Women (CEDAW) is quintessentially universalistic in its rhetoric and serves as a good example of this tendency in international human rights law and discourse. Here I find some of the dangers of cross-cultural judgement. I argue that despite the rhetoric of universality of human rights, the practice of women's rights, specifically in the area of marriage age, shows a particularity of norms, unexpected subtleties not suggested by the mainstream discourse.

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2 Lovelace v. Canada; Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius; Broeks v. The Netherlands; and Zwaan-deVries v. The Netherlands; infra pages 42 - 49.
The feminist scholarship on women and culture in international human rights during the 1980s is characterized by a *modified* universalism, acknowledging diversity either in strategies or in prescriptions. Recently some authors, such as Adetoun Ilmoka, Dianne Otto and Eva Brems, have challenged more fundamentally the dualism of universality and relativism in international women's rights. I apply Celina Romany's argument that,

> Feminist articulations of [constitutional] frameworks must, however, take into account the specific contextual dimensions in which gender relations are inserted. To do otherwise is to fall into the trap of feminist universalism, a trap that invariably leads into the abstraction-wonderland so much revered by the patriarchal authors of social covenants.³

In the next section I will describe briefly the history of international women's rights and claims to universal applicability of human rights. I then discuss the leading sex discrimination cases in the Human Rights Committee jurisprudence. The Convention on the Elimination of All Forms of Discrimination Against Women and its Committee (CEDAW) will be analyzed, in the portion of the paper that follows, to demonstrate how women rights debates are characterized by the universalism/relativism dualism that I seek to transcend in this work. In an effort to clarify my thesis and methodology for going beyond this dichotomy, I discuss developments in the anthropology of human rights before turning to a survey of feminist scholarship on international women's rights and culture. Riding the wave of this new scholarship, I argue in this chapter that the methodology of analysis of practices criticized on the basis of human rights and defended on the basis of culture needs to better incorporate deep contextualization. I argue that the debates around these practices have been marked by polarized positions that need to be reoriented to

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embrace the possibilities of constructive particularity of universal human rights norms.

II. Dimensions of Universality in Women's Rights

The United Nations' constituting document, the Charter of the United Nations adopted in 1945, and the Universal Declaration of Human Rights (UDHR), passed by the General Assembly in 1948, are the formative international human rights instruments. The latter was drafted by an eight-member committee chaired by Eleanor Roosevelt. Following the Declaration, the Commission on Human Rights set about drafting the International Bill of Rights to create specific human rights standards for the general principles enshrined in the UDHR. The idea of a single convention was abandoned eventually and replaced with two separate instruments: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which were adopted by the General Assembly in 1966 and entered into force a decade later.⁴

Universality in international human rights is found in the positive law as well as its supporting philosophical framework. The International Bill of Rights, including the UDHR and the Covenants, vests rights in every individual human being on the basis of her or his humanity. In

⁴The separation can be explained largely by the ideological differences in states' attitudes to the importance of protecting economic as well as political rights. Alison Dundes Renteln, International Human Rights: Universalism Versus Relativism (London: Sage Publications, 1990) at 33. The creation of two covenants and the subsequent priority given to the civil and political rights in international human rights has had an impact on women's rights: as within the mainstream human rights world, economic and social rights have been less important in international women's rights. See Leilani Farha "Women, Violence and Housing Rights" (paper on file with author) and Dianne Otto, paper presented at University of Toronto Faculty of Law conference, October 3, 1998.
this sense, rights are said to be universal since they belong to all humans. Article 1 of the UDHR states that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The preambular statements in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights recognize that "these rights derive from the inherent dignity of the human person".

Rights in international law are further articulated as universal in the substance of their application: rights are to be universally applicable, across time and across cultures. The aspiration to universal application of human rights is evident in the Universal Declaration of Human Rights’ title, and in the statement in the preamble that its rights and freedoms are a "common standard of achievement for all peoples and all nations". Member states commit to securing the "universal and effective recognition and observance [of rights], both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction". The cross-cultural applicability presumed in the document is shared by many advocates of the human rights machinery. For example, the World Conference on Human Rights in Vienna (1993) reiterated the principles of universality and adopted the Vienna Declaration and Programme of Action. Paragraph 1 of the Vienna Declaration "reaffirms the solemn commitment

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7 *UDHR*, supra note 5.
of all States to fulfil their obligations to promote the universal respect for, observance and protection of, all human rights and fundamental freedoms for all. The universal nature of these rights and freedoms are beyond question.\(^8\) In a compromise to recognize the diversity of states making up the contemporary global community and the diversity of cultures within those states, the Vienna Declaration goes on in Article 5 to state as follows:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.\(^9\)

Michael Perry describes universality claims in the following manner:

Universalism about human good is correct: human beings are all alike in some respects such that some things good for some human beings are good for every human being and some things bad for some human beings are bad for every human being.\(^{10}\)

Perry goes on to argue that universality does not claim that all things are good for all human beings; rather it is a claim about certain human goods and certain harmful practices. “There are many important respects in which human beings are not all alike; some things good for some human beings, including concrete way of life, might not be good for every human being”.\(^{11}\)


\(^\text{9}\) Vienna Declaration and Programme of Action, Ibid., U.N. Doc. A/Conf. 157.24 (Part 1), at 20-46 (13 Oct. 1993) at para. 5. This paragraph is also intended to underscore the indivisibility of civil and political rights and economic, social and cultural rights.


\(^\text{11}\) Perry, supra note 10 at 473.
The United Nations era has been marked by the expression of liberal individualism in human rights documents and theories.\textsuperscript{12} According to this school of thought, the individual is given priority over society or community, rights are considered immutable, and by definition they are universal for all human beings.\textsuperscript{13} The rights-holder in international human rights law, then, is the individual and states are responsible for the protection of those rights.\textsuperscript{14} It should be noted, however, that the description of human rights as individualistic may be overstated: "Whilst some of the rights that we find in the various charters protect strictly individual interests, others, as Marx noted, are oriented toward participation in a common life with others".\textsuperscript{15} Rights for minority groups (such as religious, linguistic, or cultural freedoms) and the right to self-determination in modern international human rights law are examples of rights which require the individual rights-holder to be a member of a group, community or people. Article 27 of the ICCPR explicitly states that "in those States where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, \textit{in community with other members of their group}, to enjoy their own culture, to profess and practise their own religion,

\begin{enumerate}
\item "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments." Vienna Declaration, \textit{supra} note 8, para. 1.
\end{enumerate}
and to use their own language." The rights of indigenous peoples in international law rests on the principle of the respect for "the value and diversity of [indigenous peoples'] cultures and identities". However, the focus of this thesis is not on these rights that are aimed at the protection and advancement of group interests. Rather my focus is on the non-discrimination guarantees in international human rights instruments and the balancing of these protections with cultural respect and sensitivity. I will turn now to the non-discrimination provisions in early human rights treaties.

**Non-discrimination Provisions**

These early UN initiatives did give some formal recognition to the problem of women's subordination. The United Nations' Charter, the UDHR, and the International Covenants all included prohibitions of discrimination on the basis of sex, and these instruments are expressly stated to be of universal and equal application. Moreover, the Commission on the Status of Women was established in 1946, providing a forum for articulating women's distinct concerns. Since the 1940s a plethora of UN conventions and declarations have been promulgated concerning women, many as a result of concerted pressure on the UN to address particular issues.

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16 Article 27, ICCPR, supra note 6 (emphasis added).

17 Preamble, Vienna Declaration, supra note 8.


19 Some of these specialized instruments are: *Convention on the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others* (1949), G.A. resolution 317 (IV) of 2 Dec. 1949, entered into force 25 July 1951; *Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for*
Notwithstanding these conventions and declarations, many critics argued women's issues were accorded little importance and marginalized during the first two decades of the UN. Many feminists argue that the history of the Human Rights Committee and other committees charged with implementing human rights demonstrated a lack of serious concern for the abuses women suffer around the world. The Human Rights Committee decided very few sex discrimination cases in comparison to the number of cases concerning torture, prison conditions, and access to counsel. Feminists saw the rhetoric of universality as deeply gendered. One strategy feminists adopted to address the male bias was promoting the universality of human rights and the need to include women in this universal vision. Thus, universality became a commodity of which

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21 See discussion in the following section with respect to early sex discrimination cases decided by the Human Rights Committee, infra pages 42 - 49.

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women wanted a part. Feminist critiques centred on three features of dominant human right law and discourse: the prioritization of civil and political rights (so-called first generation rights); the individualistic focus of human rights law and discourse; and the superficial analysis of discrimination against women. I will examine each in turn.

Conventional international human rights law prioritizes civil and political human rights abuses suffered by individuals at the hands of the state. This approach forecloses the examination of the many human rights abuses women are subjected to by institutions and other individuals. The critique of the preoccupation with matters between the state and citizens has been labelled by feminists as the public/private distinction in human rights discourse. While the two Covenants are said to be interrelated and indivisible, only the ICCPR has an Optional Protocol allowing individual communications to the Committee. Further, the ICESCR is framed as requiring states to progressively achieve the realization of those rights whereas the ICCPR requires States parties to the Covenant to adopt measures to realize civil and political rights. As we will see on examination of the early Human Rights Committee cases, a measure of interdependence of the Covenants has been constructively applied. The Women's Convention explicitly challenges the prioritization of civil and political rights and provides a comprehensive document including both families of rights.

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23 For a challenging discussion of rights fetishism generally see Valerie Kerruish, Jurisprudence as Ideology (London: Routledge, 1991) at 139-160.


25 ICCPR, supra note 6, Article XX. The ICESCR requires States parties to submit reports concerning the implementation of the rights contained in the Covenant: ICESCR, supra note 6, Articles 16 and 17.
Secondly, the conception of the self encoded in human rights discourse is predominantly individualistic and non-relational. Feminists have argued that this is a male conception which leads to a bypassing of women's concerns in human rights law and continued differential treatment of women in society. Indeed, Carole Pateman incisively criticizes this aspect of contract theory for assuming a relationship between the male rights-bearer and his spouse. In other words the individual of human rights discourse is dependent on his relationships to others. Feminists also argued that the (masculinist) subject of international human rights law falsely is assumed to encapsulate men and women equally; however, not all human rights violations perpetrated against women can be equated with those of men.

Finally, the instruments which were of particular application to women or which contained gender-specific provisions largely could be cast in the 'separate spheres' and protective veins: protecting women workers from adverse conditions, protecting young women from marriage

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27 Pateman, supra note 12.


29 A separate spheres approach to women's rights holds that men and women appropriately occupy different spheres in society: women are responsible for the domestic sphere while men are active in the public domain. This premise rationalizes viewing women solely in their reproductive and familial roles. It was also used to defend the lack of extension of the vote to women.


without consent, and reiterating non-discrimination on the basis of sex for political and employment rights. Thus, the structural causes and systemic nature\(^{32}\) of women's oppression were not challenged and in fact may have been buttressed given the lack of recognition of power differentials between the sexes or of how women's reproductive capability has historically been used to deny women full participation in society. While early feminist criticisms recognized the need for structural analysis of women's oppression, this was not tied to a critique of the cultural dimensions of conventional human rights discourse. Indeed, the mirror arguments being made by scholars from non-Western countries on the basis of culture were not integrated into feminist critiques at this stage.

It was not until the late 1960s and 1970s that progress was made in international fora for the meaningful articulation of women's human rights. In 1967 the Declaration on the Elimination of Discrimination Against Women was passed, marking some change within the UN community;\(^{33}\) it reflected a growing recognition of the variety of legal, institutional and social ways in which women's rights are violated and a recognition that protection of those rights may require both standards the same as those for men and standards specific to women's distinct social roles.\(^{34}\) In 1972 the General Assembly designated 1975 International Women's Year and

\(^{32}\) As Dr. Rose D'Sa comments, approaching equality between men and women at the individual level "may be ineffective in addressing a much wider problem, namely that of a structural bias against women within the system as a whole". Rose M. D'Sa, \textit{ibid.} at 672.

\(^{33}\) G.A. resolution 2263 (XXII), 7 November 1967.

\(^{34}\) The separate spheres approach was therefore explicitly challenged.
the World Plan of Action was adopted at the Mexico Conference in 1975. From the time of the Declaration, the process of adopting a Convention as an integrated approach to the rights of women was put in motion. A Commission on the Status of Women working group began drafting in 1976 and the Convention on the Elimination of All Forms of Discrimination Against Women was adopted unanimously by the General Assembly in 1979.

Nevertheless, much criticism was levied at the UN human rights bodies for excluding or inadequately dealing with the specific human rights abuses suffered by women. Feminist critiques were successful in dismantling male bias in international human rights claims to universality and the contemporary recognition of the rights of women is a result of the challenges made by feminists to the mainstream human rights community and instruments. The façade of universality also was being challenged along ideological and cultural grounds by socialist and non-Western scholars. Despite commonalities in these two critiques based on gender and culture, the two largely bypassed each other's insights. I argue in the following section that

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38 Such as the work of the UN's Commission on the Status of Women, women's national and international non-government organizations, and academics and activists within and beyond the UN.

39 For a list of selected articles from non-Western perspectives, see Alison Dundes Renteln, International Human Rights, supra note 4 at 55-56.
opportunities for cross-pollination existed in early Human Rights Committee cases on women’s membership in cultural communities but that this did not happen until much later in feminist theorizing.

*Lovelace and Mauritian Women: Human Rights Committee Jurisprudence*

There are very few early Human Rights Committee decisions relating to sex discrimination. The foundational international women’s rights jurisprudence concerned membership in community, in one case an aboriginal community in Canada, in the second case the Mauritian national community. These are threshold cases that serve as a prelude to harder issues involving perceived clashes between gender and culture. Nonetheless, the cases signal the minimum threshold for considering women as agents and subjects of culture and participants in cultural transmission. Both cases deal with the presumption, common in Western cultures, that men are the creators and keepers of the cultural identity of the family and nation. The decisions are positive developments as the Committee challenges this stereotypical notion of cultural transmission and participation. The promise that these early decisions hold is not always reflected in the rhetoric and practice of contemporary international women’s rights, as I will discuss later in the chapter.

The same year that the Women’s Convention was adopted, 1979, the Human Rights Committee found the communication from Sandra Lovelace, a Maliseet Indian40 living in Canada, to be

40 The term “status-Indian” refers to an aboriginal person who is a member of a Band pursuant to the Indian Act in Canada and is registered as an “Indian” with the federal government. “Indian” can include both status and non-status aboriginal persons who are neither Metis nor Inuit. I will use the terms in this precise manner although the appropriate description is ‘aboriginal’, ‘Native’ or ‘First Nations’.
admissible.\textsuperscript{41} The case concerned the provisions of the Canadian \textit{Indian Act} and the effects of those provisions that determined that status-Indian women who married non-status men would lose their status and rights under the \textit{Act}. Numerous consequences flowed from the loss of status, including the removal of a woman’s right to live on the reserve, her entitlement to tax exemptions, her hunting and fishing rights, and her right to benefit from other provisions of the \textit{Act}. In the original communication, Sandra Lovelace alleged that because Indian men who married non-Indian women did not lose their status, the Act discriminated on the ground of sex and was contrary to the Covenant.\textsuperscript{42} Article 27 concerning the rights of minorities was only mentioned in the head-note for the admissibility decision. The Committee issued an interim decision on 31 July 1980 after requesting additional information from the author and after receiving the submission from the Canadian government. In the interim decision, the Human Rights Committee, noting that the Covenant was not in force in Canada at the time of Lovelace’s marriage in 1976, asked the parties to provide information on five matters: statistical data on how many Indian women marry non-Indian men each year; the legal basis for the prohibition for Lovelace to live on the reserve; the reasons to justify the denial of that right; the legislative reforms that are proposed to address equality of the sexes; where Lovelace was living before and after her marriage; and whether she was denied the right to reside on a reserve as a consequence.


\textsuperscript{42} Ibid.
of her marriage.\textsuperscript{43}

In its decision the Human Rights Committee found a violation of Article 27 of the Covenant concerning minority rights because Sandra Lovelace was denied the right to reside on the Tobique Reserve as a result of her marriage.\textsuperscript{44} Reading Article 27 in the context of other articles, including the prohibitions on discrimination found in Articles 2, 3, and 26 of the ICCPR, the Committee concluded that “to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under Article 27 of the Covenant”.\textsuperscript{45} The decision found that the primary violation of Lovelace’s rights under the Covenant was the deprivation of her right to enjoy access to her native culture and language in community with others from her group. The Committee found it unnecessary to decide the discrimination argument in part because Sandra Lovelace was married before the Covenant came into force with respect to Canada and in part due to the fact that she was no longer married to a non-Indian. The effect of the decision thus was narrowed to the particular circumstances of status Indian women who wish to move back to their reserve. It did not indict the provisions of the \textit{Indian Act} which deprive women of their status. In a dissenting opinion Mr. Nejib Bouziri wrote that not only article 27 but also articles 2, 3, 23, and 26 of the Covenant had been breached: “The Act is still in force and, even though the Lovelace case arose before the date on which the Covenant became applicable in Canada, Mrs. Lovelace is still suffering from the adverse discriminatory effects of the Act in matters other than that


\textsuperscript{45} \textit{Ibid.} at Para 17.
covered by article 27."46

What is interesting for the present purposes is the debate between Lovelace and the government of Canada with respect to the meaning of belonging to an aboriginal community. In response to the communication, Canada sought to defend membership rules that treated women differently from men by reference to a patriarchal conception of culture that was itself the product of the Canadian government’s colonial relationship to aboriginal communities. Canada stated that "traditionally, patrilineal family relationships were taken into account for determining legal claims".47 Lovelace disputed this claim. Sandra Lovelace further stated that she was “able to remain on the reserve in violation of the law of the local Band Council because dissident members of the tribe who support her cause have threatened to resort to violence in her defence should the authorities attempt to remove her.”48 This internal dissent and debate surfaced in her submission and in relation to the government’s justification for discrimination. Canada explained, in a response after the adoption of the Committee’s views, that it had set about amending the Indian Act to remove sex discrimination.49 It stated that “it is also desirous that the Indian community have a significant role to play in determining what new provisions on Indian status the Indian Act should contain. The issue of how Indian status should be defined in the

46 Ibid. Appendix.


49 The Human Rights Committee received and found admissible a second communication from an aboriginal woman who lost her status in accordance with section 12(1)(b) of the Indian Act: L.S.N., Communication No. 94/198, decision 30 March 1984, Selected Decisions under the Optional Protocol Vol. 2, supra note 22, at 6. It was withdrawn by the author in 1985 when the section of the Act was abrogated.
Indian Act is a matter of considerable controversy amongst Indian people. The federal government in fact struck a parliamentary sub-committee to study the problem and the legislation was amended by Bill C-31 in 1985.

While acknowledging the internal debate about membership within aboriginal communities, the Canadian government was not self-conscious about its role in defining and controlling the parameters of the debate and its role in colonial relations toward aboriginal peoples in Canada. As is apparent in its initial response, the government tried to shift the focus to patriarchal membership rules within Bands away from its own inscription of colonial, patriarchal rules onto Bands and Indian communities. The Committee decision does not deal with the colonial history in Canada as a deeply contextualized analysis demands:

Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of other provisions referred to.

The Lovelace case, however, does promote rules that treat women as equal members of their culture and challenges rules that exclude women from the "conversation through time" on the

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51 S.C. 1985, c. 27. The issue of the enduring effects of the "marrying out" provisions continues today as the second generation cut-off for reinstatement under the Act is being litigated in a case by Sharon McIvor.

52 Lovelace v. Canada, supra note 22, at 87 (para. 17) (emphasis added).

53 Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in Royal Commission on Aboriginal Peoples, Aboriginal Peoples and the Justice System: Report of National Round Table on Aboriginal Justice Issues (Ottawa: RCAP, 1993) 133 at 137; and Jeremy Webber, "Multiculturalism and the Limits of Tolerance" in Lapierre, Patricia Smart and Pierre Savard (eds.)
basis of a stereotype that women are objects and not agents of cultural practices and transmission.

In 1981, the Human Rights Committee expressed its views in the *Mauritian Women's* communication concerning the women who marry men who are not citizens of Mauritius.\(^5^4\) As in the *Lovelace* case, the communication concerned legislation which made a distinction between men and women who “marry out” although in the *Mauritius* case it had to do with immigration and naturalisation of the husbands rather than status of wives. The authors did not lose their citizenship as a result of marrying a non-national; their spouses’ residency status was subject to the discretion of the Minister. Unlike in *Lovelace*, where no discrimination violation in relation to minority rights was found, the Committee found there to be a violation of articles 2(1), 3, and 26 in relation to family life in article 17(1) and 23(1). Neither case, however, undertook the necessary interrogation of colonial and post-colonial dynamics that constituted the production of patriarchal rules of cultural membership. Both decisions, though, on the instigation of the authors, took the national debate on sex discrimination into the international forum and brought the international juridical norms into the ongoing national debates. Deep contextualization in the *Lovelace* and *Mauritian Women* decisions would demand attention to these dynamics.

The Human Rights Committee also decided two sex discrimination cases in 1987 arising from

unemployment insurance schemes in the Netherlands: *Broeks* and *Zwaan-de Vries*. A central claim by the government was that, since the legislation in question concerned the right to social security which is specifically protected in the ICESCR, the Human Rights Committee ought not proceed with an examination of the substance of the communications. Since a communication is not admissible if it is submitted for examination to another international investigation or settlement, the government argued that its reporting obligations under the Economic Covenant foreclosed examination of the communication under the Political Covenant. The Human Rights Committee disagreed and advanced its jurisprudence, and the jurisprudence on sex discrimination, in important ways.

First, the Committee found that it can examine cases which allege a violation of prohibited discrimination as protected in article 26 even if the impugned legislation also encompasses rights protected in the ICESCR. Since article 26 requires states to eliminate discrimination in its laws the ICCPR will apply: "The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments, for example the International Convention in the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, or, as in the present case, the International Covenant on

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Economic, Social and Cultural Rights."\(^{58}\)

Second, the Committee explained that not all distinctions in law amount to discrimination under the Covenant. Rather only those distinctions based on unreasonable criteria will be found to be discriminatory. The Committee found that the requirement that married women, and not married men, prove that they are "breadwinners" or separated from their husband, to receive continued unemployment insurance payments was unreasonable and the author was a victim of a violation of article 26 on the basis of sex. Third, the Committee rejected the government’s argument that should a violation of article 26 be found in relation to the social security legislation it should be remedied consistent with the notion of progressive realization as found in the ICESCR.\(^ {59}\)

These cases, like *Lovelace* and *Mauritian Women*, put in place a set of legal understandings that one can applaud as elementary in the promotion of women’s equality in international human rights. They are easy cases founded on stereotypes about women’s relationships to culture, nationality and economic activity. The Committee signalled it would not defer to States parties relying in part on facile notions of cultural integrity premised on gender stereotypes or political practices deeply implicated in colonial histories. At the same time, by neglecting to undertake the careful examination of historical, political and social contexts of the cultural claims advanced in *Lovelace* and *Mauritian Women* – an examination that would have called into question the accuracy of the claim that the laws in question promoted cultural integrity – these fundamental

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\(^{58}\) Zwaan- deVries, supra note 22, at 213 (para. 12.1).

\(^{59}\) Government submission summarized at paragraph 8.3 of decision; Ibid. at 212.
decisions helped promote a universalistic understanding of the meaning of sex equality in international human rights. Very little case law has since emerged from the Human Rights Committee; the meaning of sex equality has been left to developments within the Women's Convention and the Committee on the Elimination of Discrimination Against Women (CEDAW) which I explore in the next portions of the chapter.

**Convention on the Elimination of All Forms of Discrimination Against Women**

The Convention on the Elimination of Discrimination Against Women,60 adopted in 1979 by the General Assembly, both incorporates rights articulated in earlier instruments and in some cases goes beyond those documents.61 It specifically enunciates rights concerning discrimination in the areas of politics, economics, education, health care, finance, law, and family, thereby encompassing both civil and political and economic, social and cultural rights.62 The Convention establishes the Committee on the Elimination of Discrimination Against Women (CEDAW) and sets out its enforcement mechanism. CEDAW monitors government implementation of standards through the reporting mechanism for state parties to the Convention.63 It is worth emphasizing

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60 Women's Convention, *supra* note 36.


63 CEDAW is made up of twenty-three experts “of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographic distribution and to representation of different forms of civilization as well as principal legal systems”: Article 17, Women’s Convention, *supra* note 36.
the Preamble of the Convention that reads, in part, as follows:

Convinced that the establishment of a new international economic order based on equity and justice will contribute significantly towards the promotion of equality between man and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neocolonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual cooperation among States irrespective of social and economic systems, ... will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women.  

The link between the attainment of sex equality and the eradication of racism, apartheid, neocolonialism and international economic inequity is a positive feature of the Women’s Convention. Unfortunately, as Brynes has observed, the "issues in the preamble are not taken up again in the main text; they remain as rhetorical statements". It is still possible that these issues could serve as interpretive aids in constructing a particularized women’s rights norm in the future. The preambular statements are consistent with the methodology I present in this thesis.

Some commentators assert that the theory of equality embodied in the document is that of same treatment for women as for men. It appears, however, that the Convention is based on a

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64 Women’s Convention 1979, supra note 36, Preamble. As Noreen Burrows explains, this is "unsurprising" since "issues relating to women have become inextricably linked with questions of development and peace within the United Nations": supra note 35 at 423.


66 Burrows, supra note 35 at 459.
combination of formal equality and a recognition of women's specificity in reproduction. Further, Article 4 of the Convention states that affirmative action plans to ameliorate sex discrimination will not be considered discriminatory. Article 5 specifically calls upon states to "modify the social and cultural patterns of conduct of men and women...which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women". Bymes notes in 1989 that unfortunately, [CEDAW] has not explicitly articulated any collective view of its understanding of the models of equality/ nondiscrimination embodied in the Convention. Furthermore,...no unified theory about the nature and causes of [women's] oppression has emerged.

In sum, the Convention defines discrimination largely as unequal, meaning different, treatment of women and men with derivations from this formal equality model in the areas of maternity, traffic in women and prostitution, and sex-role stereotyping. There was little attempt by CEDAW to enunciate a theory of systemic discrimination in the 1980s. As I will discuss below,

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67 Byrnes 1989, supra note 65 at 28.

58 This article also takes the convention into the realm of relations between "private citizens" which is not the traditional domain of human rights treaties. This is an important distinction between the Civil and Political Covenant and the Women's Convention. CEDAW, therefore, is mandated to examine "social and cultural patterns" as part of the eradication of discrimination against women.

69 Byrnes 1989, supra note 65 at 28.

70 Article 1 defines discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.": Women's Convention, supra note 36.

through its General Recommendations in the 1990s CEDAW has developed greater sophistication with respect to the meaning of discrimination and equality for women.

The predominant tenor of feminist scholarship concerning international human rights over the last three decades has been one of protested marginalization from the mainstream. Feminists have sought to fulfill the universalistic promise of equal rights for men and women alike. Not surprisingly, the passage of the Convention and the establishment of CEDAW did not end, in itself, the trivializing of women's issues by the UN member states and the staff. As one commentator put it, the Conventions and Declarations concerning women "have been treated by member states ... with less seriousness, and more hypocrisy, than other instruments of international law." Moreover, the marginalization of women's concerns in the UN human rights community is evidenced by the substantially less power and legitimacy accorded to CEDAW relative to other committees charged with supervising the implementation of human rights documents. The Committee has addressed some of these shortcomings through additional time


74 See Burrows, supra note 35; and Byrnes 1989, supra note 65.

75 Ashworth, supra note 37 at 5.

76 "There is a perception among members of the Committee that it is the poor cousin of the human rights treaty bodies and is provided with technical and legal resources at a level far below that provided other treaty bodies." Byrnes 1989, supra note 65 at 57. Pietila and Vickers note, on the other hand, that, "advanced feminist thinking [regarding equality, development and peace] has influenced the texts of the documents" within the mainstream UN community: Pietila and Vickers, supra note 20 at 127. Their optimistic analysis is
for meetings and additional support from other organs of the UN. Both General Recommendation 7 concerned with resources\textsuperscript{77} for CEDAW and recommendation 19 concerned with the tenth anniversary of the Convention\textsuperscript{78} request adequate resources for the committee. In 1995 in General Recommendation 22 the Committee noted that it “is the only human rights treaty body whose meeting time is limited by its Convention, and that it has the shortest duration of meeting time of all the treaty bodies”\textsuperscript{79} along with a growing number of ratifications. Thus, the poor sister to the Human Rights Committee plays out the history of marginalization which predated its creation. This marginalization has contributed to and continues to contribute to the appeal of promoting universalistic understandings of sex discrimination in international human rights discourse and law.

In addition to its marginal position, the Convention can be criticized as being very much embedded in the universalist and liberal traditions; that is, despite its preamble, there is little substantive recognition of the multiplicities of oppressions experienced by women in various cultural settings and there is no displacement of the 'disembodied self'.\textsuperscript{80} For example, while the

\textsuperscript{77} CEDAW/ General Recommendation No. 7 (seventh session, 1988), A/43/38 (4 March 1988).

\textsuperscript{78} CEDAW/ General Recommendation No. 10 (eighth session, 1989), A/44/38 (3 March 1989).

\textsuperscript{79} CEDAW/ General Recommendation No. 22 (fourteenth session, 1995), 3 February 1995.

\textsuperscript{80} The Women’s Convention makes no reference at all to discrimination against lesbians and leaves heterosexuality unproblematized; the provisions concerning marriage and family relations in fact solidify priority for heterosexual relations. See Charlotte Bunch, “Reflections on Global Feminism After Nairobi”, in \textit{Passionate Politics} (New York: St. Martin’s Press, 1987) 346 at 350. However this issue has been taken up both in Cairo and in Beijing. At the Fourth World Conference lesbians were well organized with their own caucus and clear agenda.
preamble states that the eradication of all forms of racism is necessary for realizing the rights of women, there is no mention made in the Convention of racism suffered by women. Moreover, the Convention places no obligation on states to examine their role in international monetary and trade systems and the impact these systems have on women in less developed countries, although the preamble again calls attention to the need for a new international economic order. As well, the lack of a structural approach to issues of equality leaves the individualistic focus of human rights intact. The Committee has addressed some of these issues in its Concluding Observations on States Party reports and in its General Recommendations.

While there was multicultural participation in the drafting process, for the most part the Convention is culturally homogeneous, embodying predominantly Western notions of the rights of women. For example there is no mention of the positive role of spirituality in women’s lives or the affirming potential of culture for women. The disagreements which arose between delegates during the drafting discussions generally concerned issues related to civil rights, family law, and 'traditional' cultural values. Burrows documents that it was primarily the delegates from Egypt, Indonesia, Morocco, and Iran who expressed difficulty with the compatibility of certain

81 Byrnes notes, however, that CEDAW members have “shown sensitivity to and interest in the way race, class and level of development interact with sex to produce different problems for women in different societies.”: Byrnes 1989, supra note 65 at 32, footnote 106. According to Professor Rebecca Cook a General Recommendation on race and gender is being drafted for the Committee of the Elimination of Racial Discrimination; personal communication with author, April 14, 1999.

82 See Byrnes’ discussion of this issue, supra note 65 at 31-5.

83 The Women’s Convention, for example, is premised upon the division between individuals and the state, a particular form of ‘liberal democracy’, individualism, and familial relations. Further, it does not substantively link women’s rights to national liberation and anti-racist struggles. There is, in fact, an antipathy for cultural and customary practices: Article 5(a). The only exception to this characterization is found in the provisions concerning rural women: Article 14, Women’s Convention, supra note 36.
articles with Islamic law.84 Some paragraphs were amended and some were passed unchanged with delegates abstaining on the vote.85 These and other countries have ratified the Convention and then exercised the power to reserve, which is provided for in the Convention, concerning articles to which they feel they cannot comply. In fact, the Convention "has so far [1986] received only five ratifications by Muslim countries".86 As of May 1999, Egypt, Indonesia and Morocco have ratified the Women's Convention. In addition, Algeria, Bangladesh, Ethiopia, Ghana, Jordan, Kuwait, Pakistan and Tunisia, countries with a significant proportion of Muslim citizens, have ratified the Convention. Notable exceptions remain Iran and the United Arab Emirates.87

Thus, the lack of effective mediation of culture and women's rights in the drafting of the Convention set the stage for subsequent contests between women's rights and religious and cultural traditions. Under article 28, States parties can enter a reservation to the Convention and

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84 Such as Articles 15(4), 16(1)(c) and (d), Women's Convention, supra note 36.

85 Jane Connors discusses the participation of "Islamic" countries in the preparation of the Women's Convention precursor, the Declaration on the Elimination of Discrimination Against Women, and the Convention. Connors notes that many countries with predominantly Muslim populations sponsored the Declaration and unanimity was achieved. "The preparation of the Convention was an entirely different matter... The final vote, however, was 130-0 with 11 abstentions. These included Bangladesh, Djibouti, Mauritania, Morocco, and Saudi Arabia." Jane Connors, "The Women's Convention in the Muslim World" in Mai Yamani (ed.), Feminism and Islam: Legal and Literary Perspectives (New York: New York Univ. Press, 1996) 351 at 353-54.

86 An-Na'im, supra note 20 at 512. An-Na'im considers 32 countries to be Muslim applying a criteria of Muslims constituting over 70% of the population.

many countries have done just that. States are not to enter a reservation which goes against the spirit, “object and purpose” of the Convention. For example it would be counterproductive to enter a reservation against the non-discrimination article, article 1, on which the convention builds. Many states have entered a reservation against article 16 concerning the rights in family life, in particular as it conflicts with the Sharia law applicable in their country’s national legal system. Egypt, Iraq, Israel, Morocco, and Thailand have entered reservations against the entire article while other countries have entered reservations to one or more sub-paragraphs of the article. Brazil, Turkey, Ireland, Bangladesh, Tunisia, France and Luxembourg, for example, each have entered reservations against provisions of the article. The Committee has expressed its concern at the number of reservations entered against the Convention and against the marriage and family article. In Recommendation 21 the “Committee has noted with alarm the number or States parties which have entered reservations to the whole or part of article 16, especially when a reservation has also been entered to article 2, claiming that compliance with a commonly held vision based, inter alia, on cultural or religious beliefs or on the country’s economic or political status”. The Committee goes on to state as follows:

In some countries where fundamentalist or other extremist views or economic hardships have encouraged a return to old values and traditions, women’s place in the family has deteriorated sharply. In others, where it has been recognized that

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88 For a useful discussion of the issues of reservations to the Women’s Convention see, Rebecca Cook, supra note 31; and Jane Connors, in Women and Islam: Legal and Literary Perspectives, supra note 85.

89 Bangladesh, Egypt, Maldives, Morocco, Iraq and the United Kingdom have entered reservations against part or all of article 2, however, which delineates the undertakings of states to condemn discrimination. See CEDAW/SP/1996/2, 8 February 1996, “Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention in Elimination of All Forms of Discrimination Against Women” for the texts of reservations.

a modern society depends for its economic advance and for the general good of the community on involving all adults equally, regardless of gender, these taboos and reactionary or extremist ideas have progressively been discouraged.\textsuperscript{91}

Over the past two decades since the Women’s Convention came into force the debate about culture and women’s rights has been framed by the issue of reservations.\textsuperscript{92} The large number of reservations signals a lack of state support for specific applications of a universal norm - non-discrimination on the basis of sex - to which they have subscribed. Reservations have served as a mechanism for accommodating diversity through the crude means of refusing any form of conversation about, or accountability regarding, specific aspects of women’s international human rights. Cross-cultural dialogue and a balancing of interests is avoided, not accommodated, through this mechanism. However, it must be acknowledged that if the reservations mechanism were not available to states, many countries simply would not have ratified the Women’s Convention and any ensuing dialogue between the state and CEDAW would not have occurred. Further, non-governmental organisations can also lobby for the reservation to be withdrawn and thereby enlarge the dialogue with the national government and international treaty body.

Apart from the reservations provision, there are other provisions of the Convention that allow for a measure of particularity and sensitivity to the diversity of women’s experience. The

\textsuperscript{91} Ibid. (thirteenth session) at para 42.

preambular statements described above, although rhetorical, can be invoked in the interpretation of the Convention by the Committee in a constructive and important manner. The role of rural women in development and the particular challenges faced by rural women are addressed in article 14. Specifically, the Convention calls on states to ensure the rights of rural women to participate in development planning and in all community activities. Article 5 invites States parties to examine cultural practices that are founded on stereotypical notions of gender superiority and inferiority. Governments are obliged to,

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.

To date the interpretation of Article 5 by CEDAW has been to challenge cultural practices and stereotypes and not to interrogate more incisively the reliance on cultural integrity. Article 5 reinforces, to some extent, the tension and dichotomy between culture and gender equality. It remains possible that an interpretation of Article 5 could be inspired by a respect for diverse cultural patterns and based on meaningful interrogation of the significance of those practices for women in communities.

The Women’s Convention also rests on a bed of international law which allows for some particularity and deference to national cultural conditions in the interpretation of treaties. In the Mauritian Women case, the Human Rights Committee noted a degree of cultural variance and

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93 See text accompanying note 64, supra.

94 Article 14(2)(a) and (f), Women’s Convention, supra note 36.

95 Article 5(a), Women’s Convention, supra note 36.
deference to the state in protecting the family unit in society. The Committee stated that “the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on the different social, economic, political and cultural conditions and traditions”. Where such protection is extended to the family, however, it must be non-discriminatory on the basis of sex. The Committee therefore acknowledged a tempered variance in the way in which the state protects the family unit. One has to wonder whether the notion of formal equality implicit in the norm of non-discrimination would negate cultural variance.

In addition, the “margin of appreciation doctrine” has been applied by the Human Rights Committee and may be applied by CEDAW in its interpretation of the Women’s Convention. The margin of appreciation doctrine is similar to the notion of judicial deference to the legislative branch of government in national legal systems. In the international fora, the doctrine sets a limit on the international review such that the Committee or Court would defer to the State Party. While the margin of appreciation doctrine has been developed more fully in European caselaw, the Human Rights Committee has adopted the test in the Hertzberg v. Finland case.

The Hertzberg case began in 1979 and concerned freedom of expression of five gay individuals in Finland who alleged that the censorship of their television and radio programmes concerning homosexuality constituted a violation of article 19 of the Covenant. A provision of the Finnish

96 Mauritius Women v. Mauritius, supra note 22, Vol. 1, at 70-71 (para. 9.2(b) 2(ii) 1).

97 Ibid. (para 9.2(b) 2(ii) 2).

Penal Code was specifically at issue for it made it an offence to "encourage indecent behaviour between persons of the same sex" punishable with imprisonment up to six months or by fine. One author had prepared a radio programme about gay youth identity in Finland and one author had participated in a discussion in this production. The radio programme was censored by the Finnish Broadcasting Company with no remedy available to the authors, their communication alleged. Two other authors had produced a television programme about marginal groups in society, including homosexuals. The Finnish government in its response relied on article 19(3) which states that the exercise of the right to freedom of expression may be restricted "for the protection of national security or of public order, or of public health or morals". The Committee found this article to be applicable and was of the view that no violation of the authors right to freedom of expression had occurred. In reaching its decision the Committee found that a margin of appreciation ought to be given to Finland:

It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities... As far as radio and TV programmes are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded.  

While this decision reads as very dated and abhorrent, it remains important regarding deference to the national context with respect to public policy. As more global consensus grows with respect to prohibited discrimination, however, the margin of discretion narrows. Thus Hertzberg and others would likely receive a different result in 1999. In the European context the margin of appreciation doctrine has been invoked more frequently but has also been narrowed as

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99 ICCPR, supra note 6.

100 Hertzberg v. Finland, supra note 98, 124 at 126 (para. 10.3).
“common human rights practices can be discerned among the Contracting States” in Europe.\(^{101}\) Perhaps in contrast to the European community however, the global community to which international human rights apply may not present discernible common human rights practices.\(^{102}\) But this is not necessarily negative; rather this may be a demonstration of the degrees of particularity that exist in international human rights law. International treaty bodies may defer to national authorities with respect to issues of morality or national or ethnic cultural identity. Unfortunately, as we see in Hertzberg, this doctrine has the potential to condone disingenuous and discriminatory invocations of “public morality”. The decision stands in contrast to the Lovelace and Mauritius cases where deference was not afforded to the respective governments in their attempts to legitimize discriminatory treatment of historically disadvantaged groups. The Human Rights Committee decision in Hertzberg shows the dangerous use of this doctrine and the risks associated with not assessing the harmful effects of excluding individuals and groups from their national culture through censorship of their creative productions. The Committee could have concluded, as it did in Mauritius with respect to national security, that limits on freedom of expression could not be pursued on discriminatory grounds.\(^{103}\)

International feminists commenting on the early human rights jurisprudence did not argue that


\(^{103}\) The Human Rights Committee wrote in the Mauritius case as follows: “Though it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them therefrom for security reasons, the Committee is of the view that the legislation which only subjects foreign spouses of Mauritian women to those restrictions, but not foreign spouses of Mauritian men, is discriminatory with respect to Mauritian women and cannot be justified by security requirements.” *Mauritian Women, supra* note 22, Vol. 1, at 71 (para. 9.2(b)2(ii)3).
international human rights ought to be applied with variations for women. That was the problem they were seeking to correct. Their claim was that international law had to be applied equally and correctly for women. Thus, the critique of the gendered nature of human rights did not result in a sustained critique of international human rights discourse. The claim was that human rights had yet to be universally applied and the goal was to achieve their universal applicability. Contemporary debates at the Vienna, Cairo and Beijing conferences demonstrate how attempts to advance international women’s rights is tied to a rhetoric of universality. In Vienna, women fought for the universal application of human rights to include women. In Cairo, women’s reproductive rights were attacked as antithetical to certain religious and cultural beliefs. Women’s activists responded with claims founded on the universality of rights. In Beijing, religious and moral conservatives again tried to undermine women’s sexual and reproductive freedoms on the basis of religion and culture. Since the cultural defence of practices has come from government delegations in these fora, the parameters of debate are very crudely drawn between universality and relativity.

While fewer people assert an unmodified or categorical universalism, the universalism/relativism dualism persists. The rhetoric of universalism remains very present at the end of the 1990s. Within the Women’s Committee and at international conferences, for example, the rhetoric of universality persists. In the next section I will examine the concluding observations and general recommendations of CEDAW to demonstrate how the rhetoric of universalism is articulated. I will go on to argue that this rhetoric is not matched in the practice of the Committee.

104 See Anne Bayefsky’s article on the Lovelace decision: Anne Bayefsky, “The Human Rights Committee and the Case of Sandra Lovelace” (1982) 20 Can. Year Book of Int’l L. 244.
which in fact can allow for a measure of variance and particularization of rights across cultures.

III. Rhetoric of Universality within CEDAW and at Conferences

It was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so.\textsuperscript{105} Kofi Annan

Committee on the Elimination of Discrimination Against Women (CEDAW)

The \textit{jurisprudence} of the Committee on the Elimination of Discrimination Against Women is a combination of Concluding Observations on country reports and General Recommendations on Convention articles issued by CEDAW. This jurisprudence indicates the primacy of dichotomized debates on women’s rights and cultural practices and the need for continued exploration of a more nuanced approach. Some developments within CEDAW and within feminist international human rights scholarship point to alternative spaces being opened up, though these approaches have yet to occupy centre stage.

The mechanism for enforcement of the rights contained in the Women’s Convention is through States parties reporting to CEDAW on their compliance with the obligations set out in the Convention. On examination of these reports the Committee engages in “constructive dialogue” with the government in question and makes suggestions and recommendations for improvement.

\textsuperscript{105} Quote from Kofi Annan, on UN High Commissioner for Human Rights web page, \texttt{<http://www.unhchr.ch>}, accessed October 11, 1998.
The role of non-governmental organisations is increasingly important in this process as non-governmental organisations provide shadow reports to CEDAW that furnish information for questions to the government. These shadow reports must also be considered as part of the dialogue between governments and the Committee, and as an essential part of the enforcement of the Women’s Convention. A State Party to the Convention can also dispute the interpretation or application of the Convention by another State Party. This dispute, pursuant to Article 29, can be negotiated; failing successful negotiation of the dispute the matter may be submitted to arbitration. Should the parties be unable to agree on the arbitration, the matter can be referred to the International Court of Justice. Such a reference has never occurred.

An Optional Protocol to the Women’s Convention has just been adopted by the Commission on the Status of Women (CSW) and will be open for signature by States parties in the year 2000.\textsuperscript{106} The Optional Protocol provides that affected individuals or groups with knowledge of a violation of rights contained in the Convention can make a communication to CEDAW.\textsuperscript{107} The Protocol also provides for an inquiry procedure for CEDAW. The Optional Protocol will be an additional mechanism available to individuals and groups communicating violations of the Convention.

The Committee is often presented with details of the social, economic, cultural, and religious


\textsuperscript{107} The idea that not only a victim but also an interested organisation can submit a communication is an important feature of the Optional Protocol, \textit{ibid.}
conditions in a country when States Parties are explaining impediments to women’s rights. In “constructive dialogue” with Morocco the Committee reiterated that international human rights are universal and culture cannot be used as a means to justify derogation from the norms articulated in the Women’s Convention:

The Committee emphasized that cultural characteristics could not be allowed to undermine the principle of the universality of human rights, which remained inalienable and non-negotiable, nor to prevent the adoption of appropriate measures in favour of women. As a result, the Committee remained concerned at the profound inequalities affecting the status of women in Morocco.

[...] While respecting the stages in Morocco’s political, economic, sociological and cultural evolution and the need for the population to support any reform concerning women’s rights, the Committee encouraged the Government to persevere in using ijtihad, which was the evolving interpretation of religious texts so as to give the necessary impetus to the improvement of the status of women and thus gradually to change attitudes.108

Similar comments were made in discussions with Tanzania with respect to customary and religious laws and practices: “traditional practices and the existence of a multiplicity of laws hinders the advancement of women ...The Committee recommends immediate action to modify customary and religious laws to comply with the Constitution and the Convention.”109 Countries are put by the Committee in a role of defending women’s rights in an acultural context. The parameters of discussion limit the complexities with which the Committee might otherwise understand and seek to address a problem.

In discussions with Ethiopia, the “Committee identified as major factors and difficulties affecting


the implementation of the Convention: poverty; deep-rooted customs and traditions; illiteracy; high birth rates; and unemployment. These were compounded by the existence of different kinds of laws, national as well as a variety of customary and religious ones.

It reiterated concern about “the deep-rooted cultural obstacles”. The Committee also expressed “great concern” about early marriage and suggested that the age of marriage be the same for boys and girls.

The representative from Turkey invited a more sophisticated and global assessment of the position of women in Turkish society when she “placed women’s status within the framework of globalization, which seemed to offer new hopes but also the possibility of growing inequalities, including between men and women”. She noted that “contradictions of globalization, modernization and traditionalism had an impact” on women. The Committee responded to this broader contextual framework and the interplay between various pressures on Turkish society. In contrast to the dialogue with Morocco, the tone with Turkey was characterized by much more nuance. The role of the national reports and delegations is critical.

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110 CEDAW, A/51/38, paras. 134-163, 9 May 1996 (fifteenth session), Concluding Observations on the combined initial, second and third periodic reports of Ethiopia (CEDAW/C/ETH/1-3 and Add.1 and see CEDAW/C/SR.292, 293 and 299) at para. 139. At paragraph 154, “the Committee suggested that a review of all existing customary laws in ethnic groups be carried out in order to evaluate them as to their substance and their compatibility with international conventions and national legislation.”

111 Ibid. at para. 147.

112 Ibid. at paras. 149 and 159. And at paragraph 148, the Committee writes: “Great concern was expressed by the Committee about the issue of widespread female genital mutilation as well as the incidence of violence against women and girls and the insufficiency of measures to eradicate it.”


114 Ibid. at para. 153.

115 Ibid. at para. 164.
therefore, in the process of the normative development of women’s rights. When stark dichotomies between indigenous cultures and women’s rights are cast by government reports and reservations, the response is often equally stark. Take, for example, the language of reservations entered against article 16 of the Women’s Convention.

A number of countries entered reservations to the effect that nothing in the Convention and in the article of family life in particular shall override the application of Shariah law operative in the country. Bangladesh, Egypt, Iraq, Kuwait, Libya, Malaysia, and Morocco each entered reservations stating that accession to the Convention "is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Shariah law".\footnote{CEDAW/SP/1996/2, 8 February 1996, Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women.}

Egypt reserved on article 16,

without prejudice to the Islamic Shariah provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity which guarantees true equality between the spouses, not a quasi-equality that renders the marriage a burden on the wife.\footnote{Ibid. at 11.}

The theme of complementarity and balance between spouses is in the text of other reservations and provides a challenge to the notion of equality of spouses as articulated in the Women’s Convention. The Committee has predominantly responded by requesting compliance with the provisions of the Convention. The more promising approach is contained in CEDAW’s
acknowledgement in its comment to Morocco of the process of *ijtihad* which is interpretation of the religious text, the Qur'an, and Sunna. Rather than assert the universality of human rights, CEDAW can have a more constructive engagement with states and non-governmental organizations about socio-legal reforms in their countries.

When the Committee in dealing with the issue of aboriginal women or immigrant women in a developed country such as Australia, Belgium or Canada\(^\text{118}\), on the other hand, the Committee applauds measures to accommodate cultural specificity. In assessing the second report of Belgium for example the Women's Committee "lauded the Government for its multicultural orientation in its programmes on women, which *respected cultural identities* under the umbrella of a federal system."\(^{119}\) And in dialogue with Denmark, "the inadequacy of culturally and gender-sensitive measures and programmes for immigrant and refugee women to enable them to benefit from legal and social services available in Denmark was noted as an area of concern by the Committee."\(^{120}\) This asymmetrical approach to multicultural communities in developed and developing countries is problematic. The Committee could do well by interrogating the presuppositions of judgement when addressing cultural diversity in various countries and attempt to apply some form of respect for (multi)cultural identities in their dialogues with countries such as Australia, Belgium or Canada.

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\(^{118}\) CEDAW states as follows: "A comprehensive picture of the situation of aboriginal women should be provided, including their educational situation, their position in the labour force and a description and evaluation of past and present federal and provincial programmes for aboriginal women. Programmes directed at aboriginal women should be monitored for possible discriminatory effects. The plight of aboriginal women in prison is of urgent concern." CEDAW, A/52/38/Rev. 1, paras. 306-343, 29 January 1997 (sixteenth session), Concluding Observations on the third and fourth periodic reports of Canada (CEDAW/C/CAN/3 and 4).

\(^{119}\) CEDAW, A/51/38, paras. 164-196, 9 May 1996 (fifteenth session), Concluding Observations on the second periodic report of Belgium (CEDAW/C/BEL/2).

\(^{120}\) CEDAW, A/52/38/Rev. 1, paras. 248-274, 27 January 1997 (sixteenth session), Concluding Observations on the third periodic report of Denmark (CEDAW/C/DEN/3).
as Morocco, Ethiopia, and Tanzania.

In some cases programmes for aboriginal or immigrant women may include derogations from national standards of non-discrimination. Nonetheless these programmes are to respect the diversity of women’s experiences and acknowledge the need to accommodate difference. Not unlike the case where a country argues that the minimum age of marriage reflects cultural and religious norms in their country or that Article 16 on family conflicts with Islamic law, Canada or Belgium have argued that aboriginal female inmates need special programmes to accommodate their cultures and CEDAW applauds the initiatives. The two discussions must be brought to bear one on the other for the dialogue within CEDAW to be richer.

The General Recommendations on violence (No. 19) and health (No. 24) indicate substantive developments of the norms contained in the Convention. The Recommendations also indicate a level of complexity in the assessments of violence against women and health care. In 1989 CEDAW requested that governments furnish it with information about legislation and other support services to protect women against violence. In 1990 CEDAW adopted its recommendation on female circumcision “noting with grave concern that there are continuing cultural, traditional and economic pressures which help to perpetuate harmful practices, such as female circumcision”. Then in 1992 the recommendation on violence against women was passed, representing the most extensive recommendation to that time. Since the Convention does not explicitly deal with violence, CEDAW had to incorporate violence as a form of

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discrimination within article 1 of the Convention. The recommendation goes through each of nine articles and comments on how gender-based violence may breach the specific provision of the Convention.

The Committee elaborated a general recommendation on article 12, relating to health care, in 1999. This too is a comprehensive and significant comment on the article and contributes to the meaning of non-discrimination and women’s rights contained in the Convention. Building on the programmes of action adopted at the world conferences in Vienna, Cairo, and Beijing, the Committee emphasized “the conditions which enable good health to be achieved.” The recommendation also noted the interconnectedness of women’s health with other rights contained in the Convention and earlier recommendations on HIV/AIDS, female circumcision, violence and family relations.

It is little wonder then that women’s rights activists and human rights scholars adhere to universalistic conceptions of human rights for these rights and norms are used to defend women’s autonomy and dignity against states which seek to maintain the status quo sometimes by relying on facile notions of cultural integrity or by refusing dialogue altogether by exercising a reservation. Facile universalism has been an appealing strategy for Western feminist activists seeking to present a simple challenge to androcentric biases of the human rights tradition. Few progressive alternatives are presented which mediate between facile universalism and facile


123 Ibid. at para 4.
relativism and which interrogate both women's position in society and human rights norms. Either one is a feminist who adheres to international human rights in their universalistic package or a conservative government which questions these norms and challenges any expansion of women's rights. Where in this debate is the place for feminists who are critical of liberal universalism? In the next section I will describe how the same debate has played out at World Conferences including the Fourth World Conference on Women in 1995.

**World Conferences**

Western feminist international human rights scholars generally see arguments based on “cultural relativism” as antithetical to the project of women’s emancipation from oppression. Feminist scholars and activists most often hear these defences of cultural particularity, cultural sensitivity, or cultural relativism from government delegates at international conferences or in response to direct criticism for violating existing international legal norms for women’s equality. At the 1993 World Conference on Human Rights in Vienna, 1994 the International Conference on Population and Development, and the Fourth Conference on Women held in Beijing in September, 1995, for example, spokespersons from the Holy See and various countries opposed provisions for the protection of women’s reproductive rights and women’s freedom over sexuality as being

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offensive to the religious and cultural norms of their nations.\textsuperscript{126}

The debates around sexuality and reproductive rights were the lightening rod for the debates on universality of human rights but also contributed to the dualistic framework onto which the debate was mapped in Beijing. The claim of deference to religious and cultural contexts was heard most loudly from the Vatican and delegations representing orthodox religious governments; the responses from Canadian delegates and others were framed as an assertion of the universality of human rights. Alternative conceptions and voices were muted. Little would one know that there were feminists in Beijing arguing from alternative philosophical and religious frameworks. For example, in Beijing Conference there was a Muslim Women’s NGO Caucus and other events for Muslim women to discuss issues of concern to them:

At the Conference, discussions took place among Muslims, such as the Sisters in Islam from Malaysia, who are entertaining alternative interpretations of the primary sources of Islam, namely the Holy Quran and Hadith (saying and practices of the Prophet Muhammad). Other women from Egypt, Pakistan and Iran organized a workshop to discuss the significance of marriage contracts ... A North African group called Maghrib ‘95 is seeking a re-evaluation of the personal status codes in effect in North African countries ... While these groups have been criticized as rejecting Islam, they are merely attempting to re-evaluate the religion’s primary sources in light of the twentieth century circumstances. These examples show that Muslim women in various regions are at the forefront of challenging the status quo in their struggle to achieve their rights as Muslim women.\textsuperscript{127}

\textsuperscript{126} See, for example, reservations and interpretative statements on the Beijing Declaration and Platform for Action from Argentina, Dominican Republic, Egypt, Guatemala, Holy See, Iraq, Kuwait, Mauritania, Morocco and Peru: Report of the Fourth World Conference on Women, A/CONF.177/20 (17 October 1995), Chapter V, Reservations and Interpretive Statements on the Beijing Declaration and Platform for Action, 157-176.

In other UN conferences there has been considerable debate about universalistic conceptions of international human rights. Various government delegations and regional conferences have pushed the UN to provide greater deference to the notion of cultural diversity in the global community. Such positions met with fierce opposition at the Vienna human rights conference. The compromise ultimately agreed to was that universal values embodied in the UN human rights declaration and covenants are paramount while acknowledging the world’s diversity.

The Vienna conference was heralded as a victory for universality but “behind the rhetoric there were sharp cultural cleavages”.

Following Vienna, the cultural debates were taken up in Cairo where women’s reproductive rights, specifically access to safe abortions and contraception, were under attack. It was considered a great success and relief that women’s reproductive and health rights were not eroded by the agreements coming out of Cairo. The successes from Cairo then were challenged in Beijing when the same “unholy union”, as it was called, between Muslim fundamentalist/orthodox/conservative governments and the Vatican, Holy Sea, opposed reproductive freedoms for women and progressive interpretations of sexuality. The issue of lesbian identity was highlighted in the debates in Beijing as well.

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130 Pollis makes the point that the Vienna final document was heralded as a triumph of universalism while on close reading the compromises are obvious. Adamantia Pollis, “Cultural Relativism Revisited: Through a State Prism” (1996) 18 Human Rights Quarterly 316 at 330.
At the Beijing Women's conference, lesbians were active participants and had increased visibility at the conference. Their advocacy for recognized protection, however, was not successful. Indeed, much of the lobbying around sexuality was defensive since the Holy See and other groups were opposed to certain provisions in the Platform of Action because, they argued, lesbians and homosexuality threatened the traditional family and the fabric of society.\(^{131}\)

All references to "sexual orientation" - which the Vatican and other states fought hard to kill - were dropped from the document, but some gay rights supporters say the references to women's human rights offer at least vague protection.

Lesbian activists shook their heads in dismay after ... Pope John Paul's spokesperson here, said the proposed agreement could give paedophiles the right to sexually abuse children.\(^{132}\)

The Commission on the Status of Women acted as the preparatory body for the Fourth World Conference on Women, coordinated the regional meetings and contact groups, and conducted informal consultations on the draft platform of action leading up to the conference.\(^{133}\) The regional preparatory conferences were held in five areas: South Asia and the Pacific; Latin


\(^{132}\) "The talks went almost until sunrise after a bloc of 20 or more mainly Roman Catholic and Muslim countries threatened to simply opt out of the sections the United Nations' plan they didn't like."; Paul Watson, "Long talks get compromise on U.N. women's action plan", Toronto Star, September 15, 1995 at A2.

America and the Caribbean; Europe; Africa; and the Arab region. Each regional conference produced a report. The Arab regional report noted in its general framework that “Arab States are facing an international climate and accelerating changes characterized by a tendency towards more economic domination and religious extremism that distorts the image of Arab women in Islam”. The report also calls for “swift action to eliminate the effects of war, occupation and armed conflict and the suffering they have caused, especially the Gulf war”. The African Platform also emphasizes the importance of peace “and that peace can only be achieved with full involvement of women as equal partners with men at all levels of decision-making”: “Women and children are the major victims of ethnic and civil strife including religious extremism.”

It recognizes the effects of structural adjustment programmes, unfavourable terms of trade and natural disasters on African countries.

After the session of the CSW which considered the draft platform of action, the CSW conducted consultations to further consider the platform of action, “specifically those portions of the text of the draft platform of action that remained within brackets”. The results of that consultation -


135 Arab Regional Preparatory Meeting, Draft Report, ibid. at 9 (para. 12).

136 Ibid. at 10 (para. 22).

137 Draft African Platform of Action, supra note 134 at declaration and para. l(e).

suggestions for removing brackets and revising text - were then available at the pre-conference in Beijing. The Beijing Platform is now integrated by CEDAW into standard-setting and states must report on their compliance with the obligations undertaken in Beijing. In an effort to clarify my thesis and introduce the feminist scholarship that I review in the last sections of the chapter, I will discuss insights from social and legal anthropology in the next section.

IV. Culture and Rhetorical Relativism

Cultural relativism in the "Boasian tradition"\(^{139}\) was grounded in an anti-racism which asserted that non-Western, non-European cultures have their own value systems that ought not be subjected to foreign criticism. Within the discipline of anthropology people like Ruth Benedict\(^{140}\) and others who worked with Franz Boas were concerned with creating ethnographies of communities; collecting folktales as stories that peoples tell themselves; and writing the texts of cultures.\(^{141}\) This school in anthropology affected not only anthropologists but also human rights scholars. Human rights scholars, in particular scholars from Asia and Africa, have applied relativism to international human rights norms. Much of the debate over the past two decades about the universal applicability of human rights standards has been conducted by international


\(^{141}\) See discussion in Barbara A. Babcock, "'Not in the Absolute Singular': Rereading Ruth Benedict" in Ruth Behar and Deborah A. Gordon (eds.) *Women Writing Culture* (Berkeley: Univ. of California Press, 1995) 104.
lawyers, scholars, policy makers, and government delegates – in other words without much input from anthropology. Sally Engle Merry writes that anthropologists “historically resisted engagement with human rights movements because they feel the concept of human rights is an artefact of Western cultural traditions raised to the status of global normativity”.142

Early formulations of cultural relativism argued that since cultures had distinct logics and since the individual was constituted according to this unique logic, cross-cultural judgement was not legitimate. In particular due to the “Western” liberal philosophical genesis of international human rights, the applicability of these norms to non-Western cultures was inappropriate and in some cases imperialistic. This formulation of cultural relativism relied on a view of culture or society as a cohesive unit, relatively unaffected by other cultural frameworks. Culture was something which could be ascertained, documented, compared and defended. The paradigmatic culture had a shared language, history, territory (not always) and value system, much in the way the term nation or people (volk) is used.143

Within anthropology this concept of culture was subjected to much criticism as was the role of the anthropologist. The contemporary view of culture within the discipline is that culture is hybrid or creolized, changing and evolving rather than bounded. As Ann Belinda Preis argues,

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this notion of culture being used within anthropology had not cross migrated contemporaneously into human rights thinking. Rather cultural relativists within the human rights field were relying on the idea of culture as distinct and unique. With the newer formulation of culture came a modified anti-universalism. Since cultures are no longer separate entities unaffected by global politics and international values, then their value systems are not completely separate either. This conception was part of the debates in the eighties in the form of people like Rhoda Howard who argued that cultural relativists romanticized “traditional cultures”. According to Howard and others, since no culture was immune from international influence international human rights can be applied to all cultures.

Anthropologists such as Merry, Preis and Richard Wilson, however, come to another conclusion. As Wilson argues,

Just because an Asian or African human rights organisation uses the language of human rights against its government, it should not be assumed that human rights are being invoked in an orthodox and positivist legal manner. This assumption ignores the degree to which human rights doctrine does get reworked and transformed in different contexts, whether that context is ‘non-Western’ or not.

While they agree that it is romantic and inaccurate to maintain that cultures are separate entities with their own logics, they do not believe that the creolization of cultures justifies universal applicability of international human rights. Rather the hybridity and fluidity of cultures suggests

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146 I use the phrase “creolization of cultures” to refer to the mixture of cultural discourses and the resulting amalgamated normative orders.
the vernacularization or particularization of international norms. Norms will be filled with the cultural context in which they are applied or appropriated. As anthropologist Sally Engle Merry writes,

As various societies mobilise Western law in their demands for human rights, they reinterpret and transform Western law in accordance with their own legal conceptions and with the resources provided by the global human rights system. They talk rights, reparations, and claims - the language of law - but construct a new law with the fragments of the old."147

This position has both theoretical and methodological dimensions; theoretical in so far as international human rights’ norms are not conceptually universal; methodological in so far as this position suggests that social scientists, activists and human rights scholars focus on the use or the appropriation of rights rather than on discovering comparable values across cultures. Wilson, Preis and Merry proceed with a case study approach in their work. Case studies alone however do not guarantee that we have gone beyond the universalism/ relativism dualism. As I argued above, the doctrine and rhetoric of international women’s rights must acknowledge the unexpected and open norms beyond the dualistic framework of women’s rights.

I do not assume, in this work, that rights can be used by marginalized communities and individuals in society without complicated results. Neither do I assume that rights (indeed law) are solely an instrument of the state or coopted by dominant classes. As Wendy Brown argues, "the question of the liberatory or egalitarian force of rights is always historically and culturally circumscribed; rights have no inherent political semiotic, they carry no innate capacity either to

147 Sally Engle Merry, "Legal Pluralism and Transnational Culture: The Ka Ho ‘Okolokolonui Kanaka Maoli Tribunal, Hawai‘i, 1993" in Wilson, supra note 142, 28 at 29.
advance or impede radical democratic ideals."^148 Rights discourse, whether operating at the national or international level (local or global level), is a potential tool in socio-political struggles. The power of rights discourse and its "success" as a tool depends on a host of factors, including its claim to universality, abstraction and ahistoricism. "Thus, while the measure of their political efficacy requires a high degree of historical and social specificity, rights operate as a political discourse of the general, the generic and universal".^149

As Richard Wilson argues, the contemporary debates which remain seized by the dualism of universalism and relativism do not take us beyond the entrenched discussions. Nor does dualistic thinking push us beyond the liberal theoretical framework. Case studies however lead us to a better understanding of how rights are used by various communities as they appropriate and localize global international human rights norms. This may take the form of indigenous courts interpreting international law or it may take the form of non-governmental organizations invoking international law to criticize their government's actions.

Legal and social anthropology have important insights for the study and practice of international human rights. First, I would argue that the notion of culture as creolized or hybrid is empirically and normatively persuasive. Consistent with the postmodern critique in other disciplines, this approach to culture does not assert a coherent culture unchanging over time. Yet at the same time anthropologists have not jettisoned the concept altogether. Nor have anthropologists theorized


^149 Ibid. at 87.
themselves out of a discipline altogether. Culture remains important to their field of study.

Second, it is opportune at this juncture in the debates in international human rights to seek further studies of how human rights are actually in use. Rather than further entrenching facile universalism or relativism in the international human rights rhetoric, case studies invite human rights scholars to better concretize the context of international human rights. The examples contained in this thesis will hopefully shed light on how local communities and courts are interpreting the norms in their own fashion, within various normative orders.

Third, the role of the Western scholar herself is interrogated in a manner not commonly found in human rights scholarship. As I discuss in Chapter 1, there has also been sustained criticism of the role of the anthropologist from privileged countries studying less “privileged” societies and writing the authoritative cultural text. Let me now turn to feminist scholarship on women’s international human rights, some of which has integrated aspects of social anthropology.

V. Modified Universalism in Women’s Rights

Throughout the 1980s and early 1990s the scholarship on women’s international human rights was characterized by a concern with demarginalizing women’s rights. Activists and scholars were very tenacious and successful in their efforts to draw international attention and serious concern to issues of women’s lives. The work of Charlotte Bunch, Andrew Byrnes, Hilary Charlesworth, Rebecca Cook, Christine Chinkin, among others, was instrumental in shifting the
international human rights paradigm to better include women.\textsuperscript{150}

\textbf{Feminist Scholarship in the 1980s}

According to some commentators, the "challenge from relativism [was] increasing" in the 1980s.\textsuperscript{151} Certainly the legitimacy of positions based on anti-colonialism, anti-racism and cultural integrity was increasing. How serious a challenge these arguments made to the mainstream discourse is still to be determined. Theorists who defended universal human rights relied upon natural law, positivist or modernizing arguments. Some asserted that since the international documents have been ratified by most countries, their universal applicability and validity is proven. Others asserted that since societies are no longer isolated entities and are influenced by a wide variety of external forces, the cultural relativists are misrepresenting or idealizing 'traditional' society.\textsuperscript{152} Another position was that international human rights norms in fact can be found in indigenous concepts of justice and, therefore, are applicable. Yet another universalistic theory simply held that the standards articulated in the international documents are the best way to protect individual rights against violation and hence ought to be complied with.\textsuperscript{153} Most

\textsuperscript{150} This scholarship is not the subject of this thesis. For a very useful analysis see Karen Engle, "International Human Rights and Feminism: When Discourses Meet" (1991-92) 13 \textit{Michigan J. Int'l L.} 517.

\textsuperscript{151} Alison Dundes Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human Rights" (1985) 7 \textit{Human Rights Quarterly} 514 at 520: "Despite the absolutist language in which the Charter is framed, the need to quell relativism remains." See also Dundes Renteln, \textit{supra} note 4.


\textsuperscript{153} Jack Donnelly, "Human Rights and Human Dignity: An Analytical Critique of Non-Western Human Rights Conceptions", (1982) 76 \textit{American Political Science Review} 303. This article is discussed and critiqued in Dundes Renteln, \textit{supra}, note 151 at 525-531 and \textit{supra} note 4 at 39-51.
universalists also expressed dismay at the apparent critical paralysis and international impotence which relativism implies.\textsuperscript{154}

Feminists writing about women's international human rights protections\textsuperscript{155} expressed concern that relativism will only prolong the inattentiveness of the world community to the needs of women and often relied upon one of these above defences when considering cultural relativism. In her survey of feminist scholarship on international human rights up to 1989, Karen Engle noted that feminists trying to secure protection of a particular right for women,

reject a cultural relativist perspective. Nevertheless, they are acutely aware that disagreements exist. Rather than suppressing the disagreements, most of the advocates accept them and attempt to work around them. They do not see such disagreements as causing or reflecting any conflicts within human rights or between women's rights and human rights.\textsuperscript{156}

Thus, through the strategic implementation of a universalist norm, the debates about fundamental cultural differences were centred on remedies and strategies but not the norms or rights themselves. With these larger debates left unresolved, cultural diversity may in effect be suppressed and disagreements on the basis of culture may be rejected – as it appeared happened in Vienna and Beijing.

The prevailing tendency in writing on women's international human rights was to strongly

\textsuperscript{154} "Some people take a more disparaging view of relativism. They either equate it with a strong form of skepticism, calling it nihilistic, or insist that it undermines our ability to condemn repressive practices in other countries.": Dundes Renteln, supra, note 4 at 67 (footnotes omitted).

\textsuperscript{155} It is beyond the scope of this thesis to detail all the criticisms made of human rights machinery by feminists. My purpose is to trace the tendency in the scholarship as a whole to rely on the universal premises of the human rights discourse.

\textsuperscript{156} Engle, supra note 150 at 546.
oppose cultural relativism, largely I would think because authors perceived these arguments as being the defence of a sexist, not the deliberation of a sister. Ashworth stated, for example, that,

The cry against 'interference in culture' is used as a defense of men's rights, not of women's; it is used to avoid creating a 'national shame over the behaviour of one sex toward the other, at the expense of the second sex.'

Even when radically criticizing the dominant discourse as encoding 'androcentric' notions, feminists were not apt to include the cultural specificity of rights discourse in their critique. Culture was seen as something which perpetuates the subordination of women to men. Culture was seen as an impediment to the implementation of universal laws. Understandably, for feminists women's rights claims seem most "plagued by counter-claims of cultural relativism".

Some feminists took a strategically positivistic (universalistic) approach by arguing that countries have ratified documents on the rights of women and therefore practices which on their analysis contravene those standards ought to be challenged. "For the most part, I consider these advocated to be liberal feminists. Believing that women should have the same possibilities and rights as men, they aim to assimilate women's rights to the dominant human rights structure."

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157 Ashworth, supra note 37 at 8.

158 See Ashworth, ibid. and Howard 1984, "Women's Rights in English-speaking Sub-Saharan Africa", supra note 152. When it came to issues of membership in communities, feminists argued for the inclusion of women in culture, as in Lovelace and Mauritian Women.

159 Engle, supra note 150 at 545.


161 I have taken this terminology from Engle, supra, note 150. I also have adopted her characterization of three bodies of feminist work on international human rights (at 521-24).

162 Ibid. at 534.
This body of international feminist jurisprudence went beyond the strictly liberal paradigm. However, when dealing with the question of enforcing international protections of human rights for women, the authors generally recognized the need to combine legal implementation strategies with educational and other non-juridical strategies. The point at which these scholars were likely to turn to questions of cultural appropriateness was when they were attempting to formulate strategies for the implementation of a right. They never saw conflicts between the substantive/normative content of human rights and culture, however, as undermining or complicating their project of giving universally applicable substantive content to women's international human rights.

A second grouping of feminist scholars took a more institutional focus, criticizing the mainstream and women's systems for failing to adequately assimilate or enforce women's rights. The authors in this category "turn [in their work] to institutions in much the same way that doctrinalists turn first to the legal and moral authority of the law and later to strategies for implementation." These writers were not as concerned with showing that a particular right had been violated and ought to be rectified through the international mechanisms. Rather, it was implicit in their discussions that women's rights had been or are being violated and they focussed on the mainstream institutional exclusion of these issues. In a similar fashion, but perhaps to a larger extent than the first group, these authors relied on the existing international bodies. By


164 Engle, *supra* note 150 at 560.
implication, then, it is clear that questions of cultural relativism were rejected.

A third approach was to question more radically the appropriateness of human rights discourse as an integral part of the feminist project.\textsuperscript{165} While advocates of this position believed that the discourse can be used for women, they did not believe it can succeed without significant alteration. This perspective on international human rights law was parallel to the feminist critiques of rights discourse\textsuperscript{166} and legal strategies for women generally. International scholarship tended to diverge from the latter, however, because it did not abandon the discourse entirely. Nonetheless, there were feminist critics who argued that by definition the human rights rhetoric is conceptually male and, therefore, an ill fit with feminism.\textsuperscript{167} As Engle showed, they critiqued human rights theory "as fundamentally flawed for its basis in a 'male' definition of human rights, which precludes sufficient attention to women's concerns."\textsuperscript{168} Others pointed to the imbedded public/ private distinction which remains in international law.\textsuperscript{169} These authors relied upon different theories of women's oppression and patriarchy (notions of women's difference to more power-based analyses) but they too dismissed the possibility that their theories lacked


\footnotesize{\textsuperscript{167} Ashworth, \textit{supra} note 37.}

\footnotesize{\textsuperscript{168} Engle, \textit{supra} note 150 at 584.}

\footnotesize{\textsuperscript{169} Ashworth, \textit{supra} note 37; Byrnes, \textit{supra} note 65; Charlesworth, \textit{supra} note 24; and Eisler, \textit{supra} note 165.}
international applicability.

The feminist project of using international human rights strategies, by definition a project of vast cross-cultural significance, could not avoid incorporating the implications of cultural diversity at all stages of analysis if it was to be an effective and meaningful tool for the empowerment of women in various communities. Simply to dismiss cultural relativism and to resist engaging with other critiques of international human rights discourse could lead to a strategy which is only relevant to a minority of women in the world. More recent work by non-Western and Western feminists has done more to interrogate the universalism of human rights discourse by questioning its cultural as well as gender dimensions.

**Beyond the Dichotomy: “new universalisms” in feminist scholarship**

In these times of increasing religious orthodoxy and violent ethnic conflicts, it is not surprising that cultural arguments are approached with trepidation and almost exclusively associated with conservative moral regulation. Cultural integrity arguments from women in developing countries, therefore, are heard less by Western scholars. And yet there are clearly groups of women and individuals who argue that Western human rights approaches are not appropriate in their cultural context. Their arguments are not opposed to changing the structures of gender relations in their country; rather, they argue that their strategies do not match those of traditional human rights discourse. Women’s rights scholarship in this decade has come to reflect a broader diversity of strategies. David Berry writes,

> International feminists, taking their cue from such diverse sources as ‘rights sceptic’, ‘anti-racist’ and ‘radical’ feminist theorists in national systems, are no longer placing uncritical reliance upon human rights to deal with the various
forms of discrimination against women. They are grappling with the fact that 'what women want' internationally cannot be identified with a simple or universal framework, and instead must be contextualized within specific legal, cultural, political and social systems involved. As a result, international feminists are turning to broad, multidisciplinary and multifaceted strategies.\footnote{David Berry, “Conflicts Between Minority Women and Traditional Structures: International Law, Rights and Culture” (1998) 7 Social & Legal Studies 55 at 56.}

One group of feminists from non-Western countries and women of colour are writing about the challenges of women’s rights and cultural diversity in various contexts. These scholars are less invested in conventional conceptions of international human rights and their approaches are informed by a deep understanding of the cultural and religious contexts in which women’s rights struggles are being waged. They are concerned with critically interrogating the position of women in society and the use of rights discourse and law in indigenous struggles. Their approaches implicitly and explicitly assess whether international women’s rights can be adapted to local contexts and take a pragmatic viewpoint.

Rahdika Coomaraswamy argues that the obstacles to implementation of human rights for women in South Asia include a lack of awareness of women’s rights, a lack of institutional machinery to realize those rights, and “an ideological resistance to human rights for women”\footnote{Rhadika Coomaraswamy, “To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights” in Rebecca Cook (ed.) supra note 1 at 40.}. In her exploration of the latter barrier to human rights for women, Coomaraswamy discusses the challenge to rights discourse made by scholars in South Asia who see modern law as a colonial instrument “that aims at erasing tradition and plurality”.\footnote{Ibid. at 43.} She notes that both Buddhism in Sri...
Lanka and Hinduism in India contain values at odds with those values expressed, for example, in the *Universal Declaration of Human Rights*. Coomaraswamy argues that “rights discourse, because of its construction and its style of implementation, is not plugging into many of the dynamic social movements taking place in South Asia” such as those strategies based on the discourse of motherhood. With respect to women’s rights in South Asia “the values of rights discourse ... are not part of the popular consciousness, and, in fact, in some contexts, the reverse may persist in the practices of civil society”.

Coomaraswamy acknowledges that she is “in agreement with the enlightenment view of human personality. But it would be wrong to assume that the values contained in the Universal Declaration of Human rights are truly universal. Such an assumption would make more than half the world the subject of ridicule.” Her stated goal then is to understand alternative ideologies which “view women as inferior” and to “learn how Asian societies may in fact further the rights of women even beyond those contained in international conventions”. What the reader is left wondering is how the gap between South Asian notions of the role for women and international legal conceptions of sex equality will be bridged. Since Coomaraswamy sets out to detail the challenges of human rights implementation for women, she does not offer strategies for a dynamic interface of rights discourse and other relevant ideologies.

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175 *Ibid*. at 41.
176 *Ibid*.
177 Radhika Coomaraswamy is now the U.N. Special Rapporteur on Violence Against Women.
Other feminist authors have addressed the challenges of implementing women's rights in countries where religious and cultural opposition exists. A number of feminists have discussed women's rights in South Asia. Ratna Kapur and Brenda Cossman, for example, discuss the role of the Hindu right in India and detail its successful campaigning against women's rights.\textsuperscript{178} Sara Hossain also argues that in South Asia the "state’s accommodation of orthodoxies whose agenda involves the control of women’s autonomy, and in particular women’s subjugation within the family, has resulted in its continued resistance to challenging personal laws".\textsuperscript{179} Hossain analyzes the international and national doctrine pertaining to women’s equality and family law to paint a picture of the relationship between international and constitutional norms, with a focus on Bangladesh. Hossain concludes that "restrictive interpretations [of family law] have been compounded in their effect by the conflict set up between human rights principles, in particular between religious rights, family rights, community or cultural rights, and equality rights".\textsuperscript{180}

These issues also have been taken up by African feminists. For example, Adetoun Ilumoka places the challenges for women in African states within the historical context of colonialism and contemporary global economies. Ilumoka critically assesses the relevance of international human rights for women in Africa and cautions against the "western preoccupation with individual

\begin{itemize}
  \item \textsuperscript{178} Ratna Kapur and Brenda Cossman, \textit{Subversive Sites: feminist engagements with law in India} (New Delhi: Sage Publications, 1996). In particular Kapur and Cossman discuss the Hindu Right in India in their chapter "Women, the Hindu Right and Legal Discourse" at 232-283.
  \item \textsuperscript{179} Sara Hossain, "Equality in the Home: Women's Rights and Personal Laws in South Asia" in Cook, \textit{supra} note 1, 465 at 466.
  \item \textsuperscript{180} \textit{Ibid.} at 486. Hossain then states that "it is imperative to insist on the incorporation of universally accepted norms to prioritize the rights of women over those of the traditionally defined community." \textit{Ibid.}
\end{itemize}
rights”. Asma Mohamed Abdel Halim offers a very interesting analysis of the use of international women’s rights law in the religious state of the Sudan. She provides the reader with a historical background of the Sudan and the status of women pursuant to Islamic laws in the country. Abdel Halim’s approach to the implementation of international women’s rights in the Sudan is an example of what I call deep contextualization as she explores the obstacles to women’s rights including patriarchal interpretations of Islamic law, resistance to the use of international human rights in the country, and manipulation of the concept of women’s liberation. She writes that “scholarship that leads to a reinterpretation of the Shari’a in a manner consistent with the international women’s rights norms will provide a strong foundation for advocates and educators of human rights. Despite strong obstacles to the use of international and regional law, its use warrants further study and effort.”

In the Nigerian context, Muslim feminists and the Federation of Muslim Women’s Associations of Nigeria (FOMWAN), work within the parameters of Islamic teachings and Muslim cultural norms to improve the conditions of women’s lives. The language of human rights is considered secular and “foreign” in contemporary northern Nigeria. It is also associated with the Christian south of the country and the non-Muslim world. Thus some feminists choose to not invoke the language of international human rights. Practising or devout Muslim feminists in other countries

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182 Asma Mohamed Abdel Halim, “Challenges to the Application of International Women’s Human Rights in the Sudan” in Rebecca Cook (ed.), supra note 1 at 397.

183 Ibid. at 419.

184 I discuss this point in detail in Chapter 4, “Nigerian Narratives”.
also work without secular human rights norms. Azizah al-Hibri discusses the gap between secular and Muslim feminists in their treatment of women’s rights in Muslim societies and within the Islamic religion.\textsuperscript{185} Azizah al-Hibri comments that,

It is unfortunate that some First World women's discourse has poisoned the local well for Muslim and other Third World feminists. But Third World feminists will struggle on until they achieve all the rights their respective states and patriarchal cultures have thus far denied them. They will do this by developing feminist analyses of their own religious texts, much like Mary Daly and others did for Christianity, and then relying on these analyses to advance their cause. They will recruit supportive First World feminists to help them in their efforts, but they will specify the kind of support needed, and they will lead their own battles. They will not seek to achieve their liberation by denigrating their religion or culture or by forcing upon their communities inappropriate priorities and demands. They will do it their own way.\textsuperscript{186}

The international feminist debate about Muslim women's rights is one of the most challenging for traversing the debate about cultural deference since Muslim examples are most frequently cited by both proponents and critics of cultural relativism or particularity. It is striking in fact how the Muslim context has come to represent this apparent dichotomy between universality and relativity in international judgement. There are other important examples of cultural or religious contexts wherein human rights are contested. Notably, the Catholic Church and countries in Latin and South America have consistently argued that women's reproductive rights cannot include the right to abortion for cultural reasons. The American Convention of Human Rights includes a provision which protects the right to life as commencing at conception. Argentina and the Dominican Republic both cited this proposition when entering their reservations to the


Beijing Platform for Action. While orthodox interpretations of all religions have been the subject of feminist critique, it is the Islamic religion which seems to attract the most attention and has come to occupy a central symbolic place in these debates.

A new twist on the theme of culture and women’s human rights is the argument that postmodernism, as a political and intellectual movement characterized by its criticism of transcendental truth claims and totalizing humanism, “puts itself in service to power and the status quo”. Some feminists contend that the celebration of the local and of diversity in postmodernism reinforces both cultural orientalism and religious fundamentalism. Nigerian feminist Phil Okeke argues that postmodernism does not hold out the potential for structural change for women in Africa: “if we begin with Foucault we will not ever get back to Africa”. Indian eco-feminist Vandana Shiva recently stated that “hyphen politics” (disabled-black-woman) is a “cut and paste job of the Cartesian world: multiple identity issue is not multiple in integrity but multiple in divisions”. These feminists are engaged in complicated politics of social change and see theories of anti-modernism as “exoticizing diversity and romanticizing cultural practices”.

In discussing the anti-essentialist feminist critique, Celina Romany also has concluded that “to

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187 Haideh Moghissi, “Feminism, Postmodernism and Muslim Women of Their Imagination” paper presented at Atkinson College, York University, February 1996.

188 Phil Okeke, Praxis/ Nexus conference, University of Victoria, 1996.

189 Vandana Shiva, plenary speech at Praxis/ Nexus conference, University of Victoria, 1996.

190 Moghissi, supra note 187.
isolate the cultural component from the workings of patriarchy is akin to walking (blindfolded) along the tightrope of cultural traditions. Two of the crucial questions that demand dialogic interaction among women are how much authority is given to tradition, and how much in doing so is the challenge to the hegemony of male values surrendered.\textsuperscript{191} Relying on Habermas, Romany has suggested that “Women as aliens within such a system [of international law] must enter a dialogue that shies away from the one-dimensionality that currently infects the human rights discourse”.\textsuperscript{192}

A second group of feminist writers are grappling with the issue of women’s rights and cultural diversity and rely on various theoretical frameworks to try to surpass dichotomized thinking. A number of feminist authors have attempted to navigate through the universalism / relativism impasse which has consumed the international human rights discipline.

Dianne Otto has made a significant contribution in this area with her recent articles on rethinking universalism.\textsuperscript{193} Otto draws on critiques from feminists, postcolonial scholars, subaltern studies, lesbian and gay authors, critical race theorists and indigenous peoples. She seeks to build transformative human rights strategies and argues that “the egalitarianism of modernity may yet assist in the struggle toward a world without domination if it is rethought from the margins of

\textsuperscript{191} Romany, supra note 1 at 107.

\textsuperscript{192} ibid. at 109.

modernity using 'poststructural' tools of analysis". Otto is specifically critical of the dualistic thinking in international law as it constructs and regulates margins and exclusions, all the while “reinforc[ing] the dominance of European masculinist norms, even though it might alter their content”. Otto offers theoretically sophisticated and grounded strategies for feminist international activists to respond to the universalism and relativism debate: reject universalizing knowledge that excludes other knowledges; refuse hierarchies such as North and South; resist dualisms including universality/ relativism; decenter the state; and resist “legal imperialism”, recognizing the power and the limitations of law.

As I discussed above, anthropologist Sally Engle Merry has suggested that a framework of legal pluralism and local mobilization can move the debate beyond dichotomies. Ann-Belinda Preis has offered an anthropological critique of the universalism/ relativism dichotomy. Preis argues that human rights scholarship ought to be grounded in case studies and research. She presents three such case studies, to suggest "that a more dynamic approach to culture is needed in order to capture the various ways in which human rights give meaning to, and are attributed meaning

194 Dianne Otto, “Rethinking the ‘Universality’ of Human Rights Law” ibid., at 4. Otto’s analysis of the disparities of power in human rights dialogue is consistent with my thesis: “I would go much farther and insist that transparency of the operations of global networks of power, of exploitation and domination, is a vitally important component of transformative dialogue. Human rights tribunals and monitoring mechanisms must be redesigned to take account of inequalities of power, in order to find ways to admit the voices of modernity’s Others and incommensurables... In other words, transformative strategies involve trasformation of the self as concomitant to rethinking the systems of which we are all apart.” Ibid. at 33.

195 Ibid. at 21.

196 Ibid. at 37-44.


198 Preis, supra note 144. See discussion above in Section V, Culture and Rhetorical Relativism, supra pages 78 - 81.
in, the on-going life experiences and dilemmas of men and women." While the latter portion of her piece is not as persuasive as her introduction, Preis successfully pushes our understanding of culture *in use* in international human rights debates.

Eva Brems posits a more concrete, legal framework with the individual as the starting point. Brems' suggests a "need to be wary of excessive abstractness... [and that] a measure of concreteness, specificity, or particularity has to be incorporated into the human rights concept". She also calls for the conflict between rights and culture to be framed in legal terms with the caveat that cultural rights, or rights that protect cultural identity, be afforded higher respect than they are currently provided. Another guideline that she suggests is that conflicts between feminism and cultural relativism take the individual, the contextualized individual, as the starting point.

Tracey Higgins calls for a nuanced "combined strategy that respects commonality and difference". Kristin Louise Savell has relied on Abdullahi An-Na’im’s notion of cross-cultural

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199 Ibid. at 290.


201 Ibid. at 158. Brems endorses Seyla Benhabib’s interactive universalism.

202 Ibid. at 161.

203 Ibid. at 162.

dialogue to negotiate the tensions around female genital surgeries. David Berry characterizes these authors' approaches as an expanded integrationist approach – as opposed to the doctrinal and institutional approaches described above – in that it “harmonizes a selection of the advances offered by other subdivisions of feminist theory into one, multifaceted approach to deal with a specific set of problems faced by women”.

Two non-governmental organisations, the Asian Women’s Human Rights Council and the El Taller, have held a workshop on new universalisms. In the spirit of the *rainbow weavers*, AWHRC writes, women “have dared to shift the parameters of the human rights discourse”. In language that echoes Dianne Otto, AWHRC asserts as follows:

> Listen to the women as they begin to rediscover lost knowledges, as they begin to reclaim other ways of acting and knowing the world, weaving together reason and intuition, science and mysticism, the logical and the lyrical, the personal and the political: reaching new depths, creating new visions that are holographic responding to the complexities of reality more critically, more creatively; regenerating new cultural and women’s spaces, creating new possibilities for our time. *They are the rainbow women.*

These scholars and others addressing culture and women’s rights are arguing for more sensitivity to “cross-cultural dialogue” and cultural diversity. However, it remains that many international women’s rights activists and scholars are concerned with the effective implementation of rights

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208 AWHRC pamphlet, *ibid*. 
for women rather than interrogating the cultural underpinnings, and therefore perhaps the cultural limitations, of international human rights. This is neither illegitimate nor insincere. Feminist international human rights scholars have made a tremendous contribution to the area and have advanced the cause of gender justice; with critiques of the public/private distinction, androcentric interpretations of legal concepts, and the international community’s inattention to the needs of women, feminist have shifted the human rights paradigm. Some authors remain rooted in conventional approaches to international law while trying to push the boundaries from a feminist perspective. The primacy of universalistic conceptions of rights, of the individual liberal subject in international law, and the primacy of civil and political rights over social, economic, cultural rights, are left virtually unchallenged.

The more serious challenge to the universalistic project in international human rights asks whether it is enough to acknowledge diversity alongside universal human rights, in the fashion of the Vienna Declaration. Feminists from various countries, including those discussed above, have called for a fuller recognition of difference that would shift the dominant understandings of human rights and the future interpretations of international norms. I argue that the strength of an international project can be grounded in particularized international norms, one that is the product of neither a facile application of universal norms nor the product of a facile rejection of international processes.
VI. Particularity in Existing International Human Rights Law

Current international law does not provide a numerical definition of “child marriage”. Various early treaties and declarations proposed that marriage before fourteen or fifteen years of age be prohibited. Contemporary international treaties, including the Women’s Convention, state that the marriage of a child shall have no legal effect but call on states to legislate the minimum age of marriage. International law, therefore, defers to governments to legislate a marriageable age. While the Convention on the Rights of the Child considers the age of majority to be eighteen years and prohibits the marriage of children, it too defers to states to set the minimum age of marriage. Thus countries will themselves regulate what they consider to be unacceptably early marriage and this will vary from country to country, from culture to culture. Indeed in northern Nigeria many would argue that the age of puberty signals the time in a woman’s life when she is ready for marriage. Since puberty varies from girl to girl, the appropriate marriageable age will be fluid. The applicable legal norms in northern Nigeria reinforce the idea that puberty is a girl’s threshold to womanhood and therefore marriage. In Canada a person can be married between the ages of sixteen and eighteen years with parental consent and under sixteen in exceptional circumstances. The Committee on the Elimination of Discrimination Against Women, in its recommendation on the family relations article, has proposed that eighteen be the uniform age of marriage for girls and boys. In its discussions with states, CEDAW recommends that there be the same age of marriage for girls and boys and expresses concern when the age of marriage laws derivate from eighteen years.

599 I explore the marriage of minor girls and the international legal framework fully in Chapters 3 and 4.
I am not proposing that the existing laws on marriage age in Nigeria (or elsewhere) be a model for women's rights. Rather this example demonstrates that particularity exists in international law and that the law can accommodate diversity in its norms. This is not to say that those standards will be unopen to challenge and change, but they do not need to be the same across the board, across the globe. Feminists can challenge, successfully I would argue, the marriage age laws and customs in their countries using an international law which is not fixed. While it is not conventional or popular wisdom to argue for "domestication and particularization of rights", I contend that it is necessary to a dynamic and relevant international women's human rights strategy.

VII. Conclusions

I believe in an international project that does not jettison cultural difference in the name of universalism while at the same time does not rely on a notion of culture and cultural difference which is static or essentialist. My perspective is distinctive insofar as many authors are not willing to abandon the idea that an international project can be anything other than based on universalistic values. Some authors approach the question of cross-cultural dialogue and external criticism of a cultural practice with the idea that it is best to be aligned with internal dissidents and sensitive to the cultural and religious dynamics at play, but they do not allow that the external criticism ought to be equally open to change as the practice under scrutiny. We must try to fill rights with meaning and particularize women's rights for a strong international project.

This chapter has sought to lay out the history and parameters of the contemporary debate
concerning practices criticized on the basis of women’s rights and defended on the basis of culture. The history of the Women’s Convention, reservations to that treaty, and the World Conferences in Vienna, Cairo and Beijing demonstrate the oppositional nature of the debates and show the tenacity of the universalism/relativism dichotomy in this area. The jurisprudence of the CEDAW and the Human Rights Committee is characterized by these tones but offers some hope for alternative frameworks and approaches. In many ways, the debates between certain governments, and orthodox perspectives they represent in the global fora, and the proponents of universally conceived human rights have been left unresolved due to the antagonism between them. The tenacity of the universalism/relativism dichotomy invites theoretical innovations to take us beyond the conventional approaches in international human rights. Rather than rhetorical invocations or rejections of universal human rights, this study shows the need for complex understandings of the practice of international women’s rights.
CHAPTER 3: Not a Minor Affair:
Marriage of Girls Around the Globe

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I. Introduction

Early marriage of girls and young women is common in many parts of the world. Indeed, the issue captured the attention of the international press when a thirteen-year-old "child bride" from England, Sarah Cook, married an eighteen-year-old waiter, Musa Komeagac, in Turkey after a summer romance. The marriage was nullified by the Turkish courts and Ms Cook was forced to return to Britain while her husband was charged with rape and sent to jail. The English public was "appalled by the tale of the teen from Essex". "Yet the story was seen by the people of Turkey as a tragic tale of young love thwarted by the authorities. Local Turks accused Britain of hypocrisy for attacking the marriage, yet condoning under-age casual sex at home by allowing doctors to issue young girls with contraceptive pills." This story captures well the tensions surrounding the issue of "child marriage" that I want to explore in this chapter.

In northern Nigeria, religious community leaders tell their constituents that it is an Islamic duty to marry out their daughters before puberty so as to ensure that no shame could be brought upon their homes. Girls are often married at the of age thirteen or fourteen, some as young as nine or ten, with consequences including an end to formal education, vulnerability to rape and vesico-vaginal fistulae (VVF). In India, UNICEF has identified early marriage as an important issue

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3 See chapter 4.
in their campaign to address the needs of the girl child.\textsuperscript{4} Save the Children in Bangladesh also published a report on the “child bride”.\textsuperscript{5} In Ethiopia,\textsuperscript{6} Palestine, Israel,\textsuperscript{7} and Indonesia,\textsuperscript{8} girls often are married before puberty or in their early teenage years. Within some immigrant communities in North America, such as the Hmong\textsuperscript{9} and Iraqi\textsuperscript{10} communities in the United States, the practice of early marriage persists. In the Canadian province of Alberta, if a young woman is pregnant she can be married before the statutory minimum age of sixteen\textsuperscript{11}

The marriage of minor girls lands on much contested legal terrain since the age of marriage and indeed the age of consent for sex has varied widely over time and across cultures. The common law age of consent for marriage was seven until early this century\textsuperscript{12} and evolved slowly to the

\begin{footnotes}


12 Berand Hovius, \textit{Family Law: Cases, Notes and Material} (3rd Ed.) (Scarborough, Ontario: Carswell, 1992) at 145. The matter of marriageable age is within federal jurisdiction in Canada. However, the federal government has not enacted legislation in this area, leaving the issue to be governed by the common law (incorporated from English law) and provincial legislation of dubious constitutional validity.
\end{footnotes}
current statutory age of eighteen found in England and other jurisdictions. There is no international consensus, however, as to the optimum age of marriage although the range in national standards could fairly be drawn between the ages of fifteen and eighteen years. This chapter attempts to contribute to the developments in this area by documenting the incidence of child marriage, discussing its causes and consequences, and formulating the issue as an international women's rights question in a flexible and contextualized manner. This chapter puts the Nigerian case study in Chapter 4 into broader global perspective while demonstrating how the most salient features of the practice in northern Nigeria may not be important factors in other places.

This chapter begins with a review of the prevalence of early marriage of girls around the world, including in North America. As much as constituting a presumption that early marriage is a problem, this overview shows that the norms around marriage age deviate from a uniform age of eighteen. On examination of the causes and consequences of early marriage, I present two results. First, there are a number of common causes of early marriage around the globe but the importance of these factors varies from place to place. I summarize six tenacious themes in the lives of minor brides while demonstrating how these incentives may play more or less important roles in different cultural contexts. Similarly the consequences of marriage at a young age vary from culture to culture. Dire consequences, therefore, cannot simply be presumed or ascribed to the practice. I argue that the strategies to address early marriage should be grounded in the actual

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13 Because early marriage often means early childbearing for women, legal aspects of women's reproductive health are discussed. The review of literature relevant to the issue will necessarily include both scholarly articles and reports from non-governmental organizations, such as Human Rights Watch and Save the Children, and United Nations bodies such as UNICEF, United Nations Development Program (UNDP), and the World Health Organization (WHO).
causes and consequences which differ in important ways across cultures.

Second, adolescent motherhood outside the institution of marriage in North America is included in this chapter, as well, since young women in different cultural contexts - whether married or not - can experience similar consequences for early childbearing: motherhood in their teens, withdrawal from secondary education, health problems, vulnerability to poverty and violence. I show how teenage motherhood outside of the institution of marriage in North America can result in similar consequences to those flowing from early marriage in Nigeria and elsewhere. The fact that the same problems arise outside marriage suggests that the root of the problem may lie elsewhere. This information casts doubt on the proposition that early marriage is a social ill. Therefore, it may not be the marriage per se that is the greatest risk to young women’s education, opportunities, health and well being. To indict marriage practices may miss the complexity of the situation. Systemic problems such as lack of access to education, employment and poverty can lead to women marrying young. To decry early marriage, without addressing these systemic problems, may leave women with fewer opportunities and worse off.

After exploring the underlying reasons for and consequences of early marriage, this chapter assesses various strategies for challenging the practice. The applicable norms of international human rights law are examined, taking into account cultural contexts and the extent to which these standards can play a role in grassroots initiatives used to change early marriage. My thesis is about surprising results in the practice of international women’s rights.
II. Who is the Child in Child Marriage?

Despite numerous condemnations of child marriage in international treaties, declarations, and recommendations, there is no settled numerical definition of the child in child marriage. One early international convention called on States parties to pass legislation to specify a minimum age for marriage and to eliminate the marriage of girls under the age of puberty.\(^\text{14}\) The United Nations passed a Recommendation three years later, in 1965, which advocated that the minimum age of marriage be not less than fifteen years of age.\(^\text{15}\) The Universal Declaration on Human Rights and both Covenants hold that marriage shall be entered into with free and full consent, but neither the Covenant nor the Declaration defines the age below which an individual does not have the capacity to consent to marriage.\(^\text{16}\) Article 16 of the Universal Declaration does, however, refer to men and women "of full age" who have the right to marry and found a family.\(^\text{17}\)

Over the past three decades, the Convention on the Elimination of all Forms of Discrimination

\(^{14}\) *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, opened for signature Nov. 20, 1962, G.A. Res. 1763A (XVII), 521 U.N.T.S. 231. This Convention is ratified by only 35 countries.


Against Women\textsuperscript{18} and the Convention on the Rights of the Child\textsuperscript{19} have been promulgated. The Women’s Convention states that the “betrothal and marriage of a child shall have no legal effect” but does not define a child. The Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW) recommended, however, that the global minimum age of marriage for men and women should be eighteen years.\textsuperscript{20} The Child’s Convention defines a child as anyone under the age of eighteen, \textit{unless} majority is attained earlier. Marriage so confers majority upon a girl.

In addition to the tapestry of international norms, there are various legal regimes in national jurisdictions which regulate the age at which individuals can legally marry. The relevant legislation includes civil marriage laws which govern marriageable age, capacity and consent requirements, criminal laws which deem persons of a certain age capable of consenting to sexual relations (within or outside marriage), and notions of majority in civil law which regulate when individuals are considered capable of exercising the rights of full citizens, such as the right to vote, to make independent legal and financial choices, and act without the guardianship of a parent or other adult. These legal regimes are complicated and can differ greatly from one jurisdiction to another. Many cases of the marriage of minors, of course, are not regulated by formal laws but take place within the framework of customary, non-statutory norms. Often the


\textsuperscript{20} Committee on the Elimination of All Forms of Discrimination Against Women, General Recomm. 21, \textit{Equality in Marriage and Family Relations}, (04/02/94).
problem of child marriage is seen as a gap between the law (on the books) and practice in a state rather than an issue of a state-sanctioned regime of early marriage. I prefer to see it as a result of competing legal norms, some originating from the state, some originating from other sources such as religious law and custom. If the law on the books bears no resemblance to the values of the population, no enforcement mechanisms short of dictatorial ones will bring the two closer together. This was the history of colonial law in many parts of the world.

Certain generalizations can be made about the causes and consequences of early marriage and the experiences of young brides and mothers around the world. I demonstrate in this chapter that particular tenacious themes appear in many stories of "child brides" such as the relationship between the age at marriage and girls' levels of education, poverty, and ill-health. Another theme is the pressure girls find themselves under (in some cases from men much older than themselves) to be sexually active in adolescence and in some places to become mothers in adolescence.21

Since many of these factors also impact on early childbearing in North America, some aspects of "teen pregnancy" will be dealt with in these sections as well. In fact, some adolescent mothers are cohabiting with the father of their child in what is termed "common law marriages". While not formally married, these young women experience many of the legal and social consequences of marriage due to their parenting status. Further, early childbearing is one of the main consequences flowing from early marriage. Thus in the interests of being comprehensive, cases

21 An overwhelming majority of young women in Sub-Saharan Africa, five developed countries surveyed, Latin America and the Caribbean have had first intercourse in adolescence (defined as between fifteen and nineteen years of age): The Allan Guttmacher Institute, Into a New World: Young Women's Sexual and Reproductive Lives (1998).
of early childbearing from North America, regardless of the mother’s marriage status, are included. Finally, by placing alongside one another cases of “child marriage” and “teen pregnancy” I am interested in how I might see better the gendered, racialized, and class dimensions of notions of culture, childhood and the law in my own and other communities.

Despite these commonalities, this chapter chronicles the ways in which the experience of young brides differs across cultures in important ways. The variance in consequences of early marriage for girls can be seen in three broad areas: agency, education and health. Individuals’ choices are culturally constructed and children’s agency, their capacity to choose or consent, greatly depends on their socialisation. Secondly, marriage in certain places does not mean necessarily a woman will end her education while in other places, it will certainly mean her education is ended. Finally, the health consequences of early marriage and childbearing are not solely functions of age either but a combination of physical and emotional maturity, available health care services and information. Even puberty, a concept I am willing to hang part of the international human rights argument on, varies with each individual woman. Further, there is a contradiction in the results since education and employment opportunities for women are both causes and effects of early marriage. While we tend to think that early marriage and childbearing causes young women to cut short their education and work, it may be these very factors contribute to women marrying young and having children. In the context of the American debates on “teen moms”, Kristin Luker persuasively argues that,

According to the conventional wisdom, for example, teenagers are at great risk

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during pregnancy because their bodies are too immature for motherhood; teen mothers, faced with the demands of a baby and schoolwork, tend to drop out of high school; and teen mothers who have dropped out lose any educational chances they may have had, condemning themselves and their children to lives of disadvantage. But since the teens who become pregnant are discouraged and disadvantaged to begin with, and since the fact that they are living in bleak circumstances increases the likelihood that they will get pregnant, the real question is whether early childbearing has additional effects on their lives.

It is my contention that the international law argument ought to rest not on a number, an age, but rather ought to be grounded in the repercussions which women experience in particular cultural contexts. I argue in this chapter that despite the convenience of having one age of majority, say at eighteen years, and one age of marriage, for example also eighteen years, it is untenable and undesirable to seek such a single age. Further, from the perspective of women's international human rights, I argue that the interests of the girl child and in particular the girl "child bride" will not be better secured through a uniform marriage age. Rather, it is my contention that if the international legal norms can be sufficiently flexible to adapt to the different and changing contexts in which the marriage of minor girls takes place then international law may have a role in changing the practice of early marriage.

I insist that where women experience as a result of early marriage the risk of reproductive and

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24 I am proposing a case by case analysis as well as a context by context approach which may or may not map onto national boundaries. If there is a minimum age of marriage set in a country which is less than eighteen years, I would argue that the government has to demonstrate that the consequences of marriage for women do not violate their human rights to health, education, freedom from violence and participation in society. I will return to this in the last section of the chapter.

25 Sharon Stephens argues too that the goal is to make international rights discourse "more powerful and more flexible": Sharon Stephens (ed.), "Introduction", supra note 22, at 40.
other ill-health, vulnerability to violence, aborted education, and limited choices to participate in their community and where governments fail to meet their obligations to ameliorate these conditions, the marriage can be attacked as violating women's international human rights. In the next sections I explore some of the complex factors contributing to women marrying young and the consequences flowing from the practice of early marriage and childbearing.

III. Global Overview

(A) Girls Around the Globe

Around the globe girls are married young, some even before reaching puberty. Thousands and thousands of other young women are married in their teen years - certainly before the age of eighteen. Before exploring the social causes contributing to the widespread phenomenon of the marriage of girls, this section will provide a brief overview of where child marriage is occurring. The next section will discuss how women's inequality, the disparity between young women and men with respect to age at marriage, views of female sexuality, poverty, and cultural traditions contribute to the incidence of early marriage and how laws - civil and criminal - maintain the practise of the marriage of minor girls.

In Bangladesh, one study found that 73% of girls marry by the age of fifteen. In Guinea, Mali, Niger and Yemen UNICEF reports that more than half of the women they interviewed were...

26 Bettina Boxall, "Women and Power; Childhood; Tougher from the Word ‘Go’", L. A. Times, June 29, 1993 at WR-2. See also The Allan Guttmacher Institute, supra note 21.
married by the age of sixteen. One sample of Palestinian women found that “more than a third (37%) of the entire female population got married under the age of 17 - the legal minimum marriage age for women in the Gaza”. In another fourteen countries, half of all women are married before eighteen years of age. In many countries of Sub-Saharan Africa it was reported that forty to sixty percent of adolescent women marry by age eighteen and some twenty-five to forty percent of young women marry by the age of eighteen in most of Latin America and the Caribbean. Girls are sold into matrimony to foreign men in Egypt and India, in what people call a modern ‘slave trade’.

A growing number of Arab men, mainly Saudis, have flocked to Muslim-dominated impoverished areas of India to buy teenage brides through brokers, prompting the Indian government to order a crackdown on the slave trade.

Early marriage is reported amongst both African Americans and Mexican Americans with socio-economic factors (occupation, education, and income) playing an important role in that working class persons are more likely to marry sooner than their middle-class counterparts. What is

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29 The Demographic and Health Surveys Program reported in 1994 that “in 14 out of the 42 countries surveyed, at least half of women were married before age 18”: *Demographic and Health Surveys Program, Women’s Lives & Experiences* (Calverton, MD: DHS, 1994) at 14.

30 The Allan Guttmacher Institute, *supra* note 21.

31 Deutsche Presse-Agentur, “Tourist’s ‘marriage’ to minor ends tragically in Egypt” March 3, 1996.


33 Ray Hutchison and Miles McNall, *supra* note 9 at 580. Hutchison and McNall do not cite race and racism as a factor in marriage practises in the United States; however, race and ethnicity obviously overlap with socio-economic factors in young women’s lives.
unique to Hmong women is that they “were found to have the youngest average age of marriage of all Southeast Asian refugee groups [in the U.S.], ranging from 13 to 18 years of age”:\textsuperscript{34}  

"We like them young," Xiong explained. "The men have a saying in Hmong: 'If you marry a girl your age, by the time she has given you enough children, she will look twice your age.'\textsuperscript{35}  

Bee Xiong married thirteen-year-old Mee when he was twenty. He was attending junior college when she was in seventh grade. Among the Hmong community living in California, girls are frequently married in their teens, many leaving high school to enter marriage and begin families. Hmong girls interviewed in California estimate that as much as 70\% of Hmong girls marry before age seventeen and that some of the brides have yet to reach puberty.\textsuperscript{36} Once married, Hmong young brides have an average fertility rate of 9.5 children per woman. An anthropologist who has studied the Hmong communities in Southeast Asia and California states that, "there is no such thing as adolescence in the Hmong culture ... Girls go from childhood to adulthood by the mere act of marriage."\textsuperscript{37}  

The story of teenage girls being married in the United States is not unique to Hmong communities. Nor is it an uncommon occurrence in other parts of the world. Despite the fact that the phenomenon of the marriage of girls under the age of eighteen years exists around the world,  

\textsuperscript{34} \textit{Ibid.} at 581. Further, “teenage marriage is often cited as one of the most significant deterrents to high school completion for Hmong adolescents”: \textit{Ibid.} And “of the 125,000 Hmong in the United States, more than 62\% rely on public assistance”: Arax, \textit{supra} note 9.  

\textsuperscript{35} Arax, \textit{supra} note 9.  

\textsuperscript{36} \textit{Ibid.} And see Donald F. Hones, “Crises, Community, and the Refugee: Educational Narratives of a Hmong Father and His Children” (1999) 28(2) \textit{J. of Contemporary Ethnography} 166.  

\textsuperscript{37} \textit{Ibid.}
the differences in age are important. A country where the median age of marriage for women is sixteen is significantly different from a country where the median age is seventeen years. Coupled with the variance in causes and consequences of early marriage, these differentials need to be underscored.

(B) Causes Contributing to Early Marriage

The factors contributing to early marriage around the world may be generalized under the themes of gender inequality in society, discriminatory emphasis of girls' virginity, legal inequality, economic hardship and cultural dynamics. Of course, the causes in any particular place will depend on the historical, geo-politics of that cultural context. For the purposes of understanding the phenomenon of the marriage of minor girls and attempting to devise strategies, it is useful to draw common themes out of specific stories without losing sight of their specificity.

(i) Gender Inequality

A four year study of Hmong Minnesota high school students found a “strong correlation between early marriage and gender - only five of the male Hmong high school students were married”38 (9.4%) while twenty-six of the female students (53.1%) were wed by senior year. Traditionally Hmong women are married in their teens and men are married in their twenties. This pattern in marriage age is repeated around the world as women marry men five, ten, or more years their senior. For example, one sample of households in the Sudan found that “89% of the wives were already brides by the age of 12-17, and most were married at the minimal limit of this range -

38 Hutchison and McNall, supra note 9 at 584.
i.e., at the age of 13 or 14... Men are more usually married in the age range 18-23.39 In a study of child marriages in northern Nigeria, it was found that of the seventeen girls and women who knew their husbands' ages, reported an average ten-year age disparity; the widest margin was greater than twenty-five years.40 A 1994 survey of more than one thousand adults in northern Ethiopia also found that “in the rural survey sites, the average age [of marriage] for girls was 13.5 and for boys was 19.5”.41 In the most egregious cases, men in their fifties and sixties marry girls who have yet to reach puberty.42

The age disparity at marriage between men and women is rooted in stereotypical gender roles, that remain in most cultures, which hold that women are to be mothers and wives and men are to be providers for the family unit. Women therefore are deemed to be ready for marriage at an earlier age than men who ought to finish their professional training and ideally be financially

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40 See notes from investigation with Human Rights Watch.

41 Dagne, supra note 6 at 36.

42 "In 1993, a 68 year-old Sheikh [from Saudi Arabia] was arrested trying to smuggle out a nine-year-old Muslim girl whom he had married as per the Islamic laws. Indian authorities are helpless in stopping these forced marriages of minor girls for fear of offending 120 million Muslim population."; U.P.I. “Saudis deport 76 minor girls to India”, U.P.I. Jan. 15, 1997.
secure. In Pakistan, Bangladesh, and Nigeria girls are socialized to run a household by the age of twelve and are considered ready to marry at puberty. Their opportunities beyond the role of wife and mother are very limited as is particularly evident with low school enrolments and employment for girls in certain countries.

As the World Health Organization has argued, “young girls in traditional societies are often bound by cultural norms that equate marriage and motherhood with female status and worth. Even the youngest brides often face enormous pressure to prove fecundity soon after marriage through the birth of a child.” While some argue that this analysis is applicable to “traditional societies” and others would argue it is a “middle-class script”, these gender roles are operative in places where women work in subsistence farming, the market or informal economy. Different roles are not necessarily inherently discriminatory if the social value placed on these roles is comparable and if the consequences are equal for men and women. In the case of age at

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43 “As is the case in several other nations, the status of Pakistani women is intricately linked to their reproductive capacity, particularly their ability to bear sons. One of the consequences of cultural norms that view women primarily as reproductive beings is early marriage for girls. These customs, coupled with a rural society's traditional emphasis on large families, creates a situation in which women experience many closely spaced births.” Anika Rahman, “A View Towards Women’s Reproductive Rights Perspective on Selected Laws and Policies in Pakistan” (1994) 15 Whittier L. Rev. 981 at 986.


45 During the Eastern and Southern African Regional Consultation leading up to the World Congress on the Commercial Sexual Exploitation of Children the “low status of girls and women was cited a number of times as a continuing cause and consequence of the problem. Lack of access to education, affecting mostly girls, prevents them from acquiring the adequate knowledge or skills for productive employment as women.” Executive Summary, Eastern and Southern African Regional Consultation on the Commercial Sexual Exploitation of Children, Pretoria, South Africa (1997).


marriage, however, the repercussions to which young women are susceptible can be dire and are not experienced by young men in their cultures.

As we will see as we examine the consequences of the marriage of minor girls, gender inequality is both a cause and an effect of this practice. Discrimination against girls in decision-making in the family, education, employment, access to health care information and services, matters of sexuality, and the law creates and perpetuates the conditions in which early marriage of girls occurs.

(ii) Adult Grooms, Minor Wives

In both Canada and the United States recent studies have revealed that the fathers of young women’s babies are not their peers but rather men in their twenties, five to ten years older than the teenagers in question.\(^48\) "California has the highest rate of teenage pregnancy in [the United States]. About 70,000 babies are born to teenage mothers every year[...] In nearly 80% of cases, the fathers are adults."\(^49\) Statistics Canada published a report in October 1997 which showed that young Canadian women also are having sex and children with older men.\(^50\)

In California, teenaged girls were presented by social welfare officials with an option to marry their adult male partners:


\(^{49}\) Christopher Goodwin, "Wed or go to jail, says US", Sunday Times, Sept. 8, 1996.

\(^{50}\) Statistics Canada, October 1997.
In recent months as many as 15 girls - some as young as 13 - have been encouraged by Orange County social services to marry the adult fathers of their children. Social workers argue this guarantees the young mothers, who might otherwise be abandoned, some degree of emotional support.  

In a bizarre sequence of legal events, a welfare worker can take into state custody a child suspected of being the victim of statutory rape or child molestation; the agency then makes recommendations to the "Juvenile Court judges who ultimately decide whether the abused children should be taken away from their parents, kept in a children's home such as Orangewood, assigned to foster parents, or -- as in the cases of these girls -- permitted to marry." Social workers within social services, the State Governor, and others who work with young women criticized this scheme.  

This strategy by social welfare is cynical for a number of reasons but cannot be easily dismissed on any one basis. Social services has an interest in shifting the financial responsibility for the minor in their care and her child to a private citizen. Even though the agency may deny this motivation in specific cases, it is a transparent rationale behind the welfare policies. Secondly, the adult man in these cases has an overwhelming interest in not being prosecuted for statutory rape or child molestation. At the same time, police complain that when they charge these men with rape, prosecutors do not secure convictions since the girls refuse to testify in court or more

51 Goodwin, supra note 49.  


53 Matt Lait writes that "Maryanne Xavier, who runs a shelter for teenage girls, dismissed the suggestion that the policy could benefit them. 'It's a ridiculous thought' she said. 'We're talking about official approval of a criminal act of child abuse. Guys in their twenties and thirties are pros at manipulating naive girls looking for love that they never had at home.'": ibid.
dramatically marry the "perpetrator": "No jury would convict in those circumstances". Thus, adult men could take their chances in court and not marry the women with whom they have a child.

As for the young women at the centre of this "terrible social dilemma", "as many as half of all teenagers who give birth are prior victims of sexual molestation or rape". This fact should cause social workers, police officers, prosecutors and policy makers to stop and think about the ethics and legality of encouraging young women to enter a marriage with the adult father of their child. Studies from "Botswana and Kenya showed that many adolescent women's first sexual experience was forced or coerced".

A further complication in this and other cases of early marriage is that young women themselves may not describe the relationship as exploitative or non-consensual:

Among the young mothers who have already been pushed into marriage is Isabel Gomez, 13, who was encouraged to marry her 20-year-old boyfriend, Juan Pineda, several months ago. According to Pineda, social workers threatened to arrest him for child molestation but then suggested that if the couple married, no charges would be brought. Gomez insists that she is happy with the marriage and says she loves her new husband...

In northern Nigeria, too, young women often were vague in their criticism of marriage practices,

54 Lait, supra note 52, quoting Deputy District Attorney Charles Middleton.

55 Ibid.


57 World Health Organization (WHO), supra note 47.

58 Goodwin, supra note 49.
preferring to say that they would let their own daughters mature or finish school before being married out. Many women were quick to point out, though, that the decision about a daughter’s marriage rests with the father.59

In the fifteen Orange County cases “all but one of the girls are Latina” and in California, Latina teenagers make up 62% of all births to unmarried teens.60 One social worker wrote that,

The whole thing, I’m sorry to say, smacks of racism and sexism ... I would venture to say most of the girls involved in these marriages are Hispanic and the justification for allowing them to continue to be abused is that it is ‘cultural’. 61

Another case of the marriage of minors and adult grooms which has been presented as a clash of cultural values and the law comes from Nebraska. In September of 1997, two Iraqi men were sentenced to four to six years in jail each for sexual assault of a child. The men, aged twenty-eight and thirty-four, had married sisters who were thirteen and fourteen years old in November 1996 through an arrangement with their Iraqi father. The father was charged with child abuse for arranging the marriages and allowing them to be consummated.62 The two girls testified in court that they had agreed to the weddings under their father’s influence. The father and the two husbands had recently immigrated from refugee camps in Saudi Arabia and claimed to have little

59 Similarly “[f]ew girls can even conceive of raising objections since child marriage is a socially accepted institution [in northern Nigeria]. Most young girls either ‘agree’ to marry for economic reasons or ‘consent’ to the marriage in order not to bring shame and dishonor to the family... Physical force or violence is rarely used, only the pressure of cultural norms and expectations.”: Sarah Y. Lai and Regan E. Ralph, “Female Sexual Autonomy and Human Rights” (1995) 8 Harvard Human Rights J. 201 at 223-24.

60 Lait, supra note 52.

61 Ibid.

62 Hammel, supra note 10.
knowledge of Nebraska law.

The lawyer representing the two husbands presented the case as one of clashing cultures and misunderstanding: “Nobody involved has any idea they were doing anything wrong... Americans’ views on marriage and parental rights are in the minority in the world.”

Mohamed Nassir, a spokesperson for the Iraqi community in Lincoln Nebraska, also stated that,

> according to Islamic rules there is nothing wrong with this... He said many Iraqi parents in America are concerned about sex among teen-agers here. The father of the two girls, Nassir said, arranged the marriage in part to “protect” them from sinning.

Parents’ fear of being shamed or of their daughters’ sinning so far outweighs the wishes of their daughters that sex within marriage, even coerced sex with young and unwilling girls, is condoned. The hypocrisy of facilitating sex for a minor daughter while at the same time being affronted by it is not apparent to the parents in these cases. The same is true for the social workers who encourage minors to marry their adult sex partners or for the policy makers and judges who allow pregnant teenagers to be married under the legal age of consent. Even in cultures where the idea of illegitimate children, babies born out of wedlock, has been undermined and omitted in statutes, young women are encouraged to marry for various rationales including that babies born to unwed mothers are ‘disadvantaged’, and a society which condones pregnancy outside marriage is immoral. Marriage is constructed as an institution which will shield the young woman and her family from social scorn. Better married and abused than single

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63 Ibid.
64 Ibid.
and pregnant.

(iii) Sexuality — Threats to girls’ virginity

In many cultural contexts, elder members of the communities talk of the ‘shame’ which would be brought onto a household should a girl become pregnant out of wedlock. Rather than confront teenage sexuality and encourage safe and protected sex, parents and religious leaders promote early marriage for girls. “Chue, 18, a senior at Merced High, said she was caught in public with her boyfriend two years ago. To fend off gossip, her parents pushed marriage, even though they knew it could block her goal of college.”

Those who explain a girl’s readiness for marriage in relation to her physical maturity do not discuss her psychological and emotional maturity nor her level of formal and informal education.

Alhaji Abdullahi, the district head for Zaria, Nigeria told Human Rights Watch,

[girls] get married very early for so many reasons: Either they develop fast ... or the husband-to-be may be over anxious to marry the girl, and he wants the girl with him. [The time of marriage] depends on the body build and age or both. Or sometimes it depends on the girl; if the relatives are poor to maintain the girl,[or] she may be too loose as a result they may have to get her married so they won’t get embarrassed.

Thus some young women in northern Nigeria may be married because they are sexually active or perceived to be sexual beings as their bodies mature. On the other hand, prepubescent girls with no knowledge of sex are married to “impatient husbands” and are vulnerable to non consensual sex in marriage. Similarly,

Hmong marriage rituals here are a mix of the old and the modern. Some

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65 Arax, supra note 9.
marriages are arranged by parents, but in many cases the bride's parents don't learn of the wedding until afterward. Often the marriages are spurred by a girl seeking independence from parents who forbid dating, or by an older man who employs techniques ranging from sweet talk to snatching a bride by force.66

The imperative of virgin brides seems to drive early marriage in many places. In the Ethiopian study "[f]ear that a daughter who was married late would lose her virginity before marriage and thus disgrace her family was the third most frequently mentioned reason why children were married off young."67 More esoteric examples of early marriage come from traditions in Asia and among the Ewe people of west Africa of "placating gods by giving virginal daughters to traditional priests".68 In the age of HIV and AIDS, marrying prepubescent or pubescent girls is also seen as a way of guarding against the disease whether in Nigeria or California.69 Further, "the spread of the disease and its deadly consequences has led to the dangerous myth that sex with a virgin or young child will either cure or prevent AIDS".70 The discriminatory emphasis on girls' virginity has also been documented in Turkey where forced virginity examinations are conducted before marriage for girls but not for boys.71

66 Ibid.
67 Dagne, supra note 6 at 36.
69 In California the “difficulties social workers face in parts of California where gang culture predominates are immense. Some gang members are said to win ‘points’ for each young girl they get pregnant. Older gang members are also said to prefer sleeping with young virgins to avoid the risk of disease.” Goodwin, supra note 49.
In many cultures there is pressure on girls to be sexually active at a very early age. In some communities this sexual activity is quite separate from conventional family morality while in other places early sex is explicitly within the institution of marriage:

In most traditional societies sexual activity is normally initiated within marriage, albeit many before or soon after the onset of menses - at times as young as 10 or 11 years of age. In an adolescent clinic population in Ethiopia, premenarche sexual initiation was noted to occur in 40% of the girls.

Within some communities in the United States, on the other hand, sex within marriage for many adolescent girls is irrelevant:

Early sex is part of the accepted mores of teens on the underclass mommy track. Tabitha, a 16-year-old Latino with a month-old daughter, explained that she had her first sexual encounter two years earlier because she “was sick of being the only 14-year-old virgin around. I didn’t really like the guy that much; I was just trying to get my friends off my back”.

Marriage, as far as these kids are concerned, is gone, dead, an unword.

Even where sex is a matter of adolescent exploration, however, childbearing often can be the consequence. All over the world young women are having babies shortly after the onset of puberty; some refer to this phenomenon as “babies having babies”. In the United States much social policy is now concerned with “unwed teen moms” just as legislators in Nigeria and elsewhere are being encouraged to address the problem of early marriage and its consequential health problems. Thus, while early marriage may not be statistically significant for young

72 “Although there is great diversity both between and within geographic regions, most women and men, married and unmarried, become sexually active during adolescence.”: WHO supra note 46.


75 Hymowitz, supra note 47.
women in North America, early sex and childbearing are significant issues.

(iv) Legal Inequalities

In many countries the disparity between when women and men are married is reflected and codified in law. It is common to find that the marriageable age for girls is one or two years less than that for boys. In Columbia, according to its government report to CEDAW, a girl of twelve or a boy of fourteen can marry with the express consent of their parents. In Madagascar, the marriageable age for girls is fourteen years and for boys is seventeen years, although the consent of the prospective spouse’s parents is required when she is under the age of eighteen. Ethiopian law designates the minimum age of marriage for girls at fifteen and for boys at eighteen. In Jordanian law the marriage age is fifteen for girls and sixteen for boys and in Egyptian law the marriageable age for girls is seventeen while for boys it is eighteen. In 1974 Indonesia passed the National Marriage Act which set the minimum age of marriage for girls at sixteen and for boys at nineteen. More than fifty countries allow marriage at age sixteen or

76 Supra note 39.

77 Until 1991, the Marriage Act (1961-1973) of Australia stated in section 11 that the marriageable age for males was eighteen and for females was sixteen and that a female person between the ages of fourteen and sixteen years could apply to a judge for authorization to marry. In 1991 the Sex Discrimination Amendment Act, 1991 (No. 71 of 1991) amended the marriageable age for female persons from sixteen to eighteen years.


80 Dagne, supra note 6 at 37.

81 Hammami, supra note 28 at 288.

below, and seven allow marriage as early as age 12.\textsuperscript{83}

In Senegal, the minimum age of marriage for girls is sixteen while for boys it is eighteen. When questioned about this legal disparity by the Committee on the Rights of the Child, the Senegalese representative stated that “all laws had to conform in some degree with socio-cultural traditions, and in Senegal, girls developed earlier than boys and were thus ready for marriage at a younger age”.\textsuperscript{84} One report found the social reality in Senegal to be that “the proportion of [15-19 year old] married girls is 30 times higher than that of [15-19 year old] married boys”.\textsuperscript{85}

In Sri Lanka the minimum marriageable age is also different for boys and girls with the minimum age for girls being twelve. The Committee on the Rights of the Child questioned Sri Lanka about both this legal disparity and the low age-limit for girls. In response, the representative for Sri Lanka stated that “existing legislation which set the minimum marriage age for girls at 12 years was clearly obsolete, did not reflect public attitudes and would be amended. To her knowledge, no 12 year-old girls had married in recent years, even in rural areas... It was, however, possible that girls as young as 14 married in some areas.”\textsuperscript{86} While the representative referred to the age-limit as obsolete, her government had lowered the legal age for marriage for

\begin{thebibliography}{99}
\bibitem{83} Safe Motherhood Fact Sheet, \textit{Adolescent Sexuality and Childbearing} (1998).
\bibitem{84} United Nations, Committee on the Rights of the Child, CRC/C/SR.248, 13 November 1995 at 5.
\bibitem{86} United Nations, Committee on the Rights of the Child, CRC/C/SR.228 (13 June 1995) at 11. In fact, the median age at first marriage in Sri Lanka is one of the highest in Asia, 22.4 years, according to 1987 data: \textit{Demographic and Health Surveys Program, Women’s Lives & Experiences} (Calverton, MD: DHS, 1994) at 15.
\end{thebibliography}
While the statutory minimum age of marriage in many Asian and African countries, such as those cited above, is comparable to North American\textsuperscript{87} and European\textsuperscript{88} standards, the phenomenon of underage marriage in these countries is not comparable with statistics from industrialized nations.\textsuperscript{89} Although the law on the books may prohibit the marriage of girls under the age of sixteen or even eighteen, the legal standard may be virtually unknown to the majority of the population. In Nigeria, women's rights and health activists said the vast majority of people were unaware of the existence of statutes and by-laws that various states in the north of the country had passed to prohibit child marriages or penalize parents for withdrawing their daughters from school for the purpose of marriage. Madam Justice Pat Mahmood of the Kano State High Court explained to Human Rights Watch that "in 1988 or so in Kano State, marriageable age was fixed at sixteen for girls. However, very few people know about the law, and it is not enforced". Indeed learned lawyers in northern Nigeria stated that they did not know about certain laws on child marriage.\textsuperscript{90}

\textsuperscript{87} In most provinces of Canada the statutory minimum age of marriage is eighteen for both men and women, sixteen with parental consent and under sixteen if extraordinary circumstances, ex. the female applicant is pregnant. See, for example, Marriage Act. R.S.B.C. 1996, c.282, s. 29 and Marriage Act, R.S.A. 1980, c.M-6, s. 16. In some states of the U.S. marriage is allowed for girls of twelve: Jones and Welhengama, \textit{supra} note 2 at 199.

\textsuperscript{88} Family Law in Europe cited in Jones and Welhengama, \textit{supra} note 2 at 199.

\textsuperscript{89} "Western Europe and Northern America have ... seen steady rises in age at marriage, increasing from the early to the mid- or late twenties. Eastern and Southern Europe have shown more stability. Eastern Europe at a relatively low age (on average between 21 and 22), Southern Europe at a higher (on average between 24 and 25)." UNPFA, "The Right to Choose: Reproductive Rights and Reproductive Health", \textit{The State of the World Population 1997}, chapter 3.

\textsuperscript{90} Interview with Mahmood Oredola, Kaduna, November 1, 1994. It should be emphasized that there is no national uniform marriage age in Nigeria and that customary marriages, whether Muslim or not, do not have to be registered under Nigerian law. The laws to which I am referring here date from the early 1960's and lie.
Even when there is a basic level of legal literacy, the law may be unenforced or unenforceable. In Bangladesh the government passed legislation in 1984 setting the minimum age of marriage for girls at eighteen years and for boys at twenty-one years. Punishment for violating the law includes imprisonment for one month and a substantial fine. "In practice, though, the law has not been able to make even the slightest difference ... families simply falsify their daughters' age in marriage registration books, often in connivance with gazis (registrars)."\(^91\)

Criminal laws may also be implicated in early marriage where penal provisions exempt husbands from responsibility for rape of their wives, including their minor wives. This marital rape exemption exists in many countries. In both Egypt and Peru the criminal law states that if an accused rapist can convince his victim to marry him, then the charges will be dropped:

> An Egyptian girl married the man who abducted and tried to rape her, in an attempt to save him from imprisonment with hard labour. The ceremony took place at his family's request. The girl divorced the man five minutes later.\(^92\)

In Peru a girl was persuaded to marry one of the men who gang-raped her but, in this case, the marriage was not a mere formality to help the accused rapist escape hard labour. In the Peruvian case, the marriage was not immediately nullified. In northern Nigeria, the Penal Code has a marital rape exemption but requires that the wife have attained puberty.\(^93\) Unfortunately, cases dormant.

\(^91\) Tabibul Islam, *supra* note 44.

\(^92\) "Girl Marries Rapist", *USA Today*, February 9, 1996.

of rape of prepubescent wives have not been pursued by the police and judiciary. In California or Alberta or Australia, a young woman of fifteen or fourteen years of age also can be legally married even when her spouse, the father of her child, might otherwise be subject to criminal prosecution for sex with a minor. While these penal provisions clearly do not contribute on a large scale to a phenomenon of early marriage, the laws exonerate rapists and use the institution of marriage to legitimize violence against women, in particular young women who are the objects of sexual violence.

(v) Economics

The level of development and the economics of parenting in many countries also motivate high rates of early marriage. An interesting case comes from Palestinian areas where “one study documented a rise in early marriage in the years 1988/1989 [the first two-year period of the Intifada]... The suggested reasons for this were the long term school closures ... coupled with the deteriorating economic situation, which has meant that for many families an adolescent girl is simply another mouth to feed.” And the common,

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94 Marital rape exemptions only recently were amended in North American and European penal codes and under-enforcement of sexual violence against women, in particular married women, is a problem found in many countries around the world.

95 United Press International reported that, “A superior court has overturned a magistrate’s refusal to allow a pregnant underage Australian girl to marry her 22-year-old sweetheart. Amie Willis, 17, will now go ahead with her scheduled wedding to Adam Cooper Saturday instead of having to wait until she reaches the legal age of 18. Supreme Court Judge Kerry White ... [disagreed with the magistrate who] had ruled that Amie’s pregnancy and their desire to ensure the child is born in wedlock were not exceptional circumstances as required by local laws. He commented that many marriages of minors had been ‘absolute failures’. The law was only updated in 1993 [sic 1991] raising the legal age for women from 16 to 18 to bring it into line with men and remove discrimination.”: “Underage Aussie girl can wed”, U.P.I. Jan. 23, 1997.

story of a 12-year-old Bangladesh girl, one of a large family. She and her younger sister were attending school. Their father, viewing the girls as more mouths to feed, wanted to marry the oldest one off. She resisted, prompting threats from the father that he would force the younger girl to marry... World Vision responded by arranging a loan for the father to help him start a business, thus giving the family enough financial security to allow the girls to continue their classes.97

The view of girls as simply “more mouths to feed” can be worsened by the practises of bride price or lobola or dowry in some countries: “Child brides have been an integral part of Islamic life in northern Nigeria for a millennium. Poor families depend on -- and sometimes borrow against -- the $200 to $900 bride price that a father can expect for a daughter.”98 Dowry in India is the money paid by the girl’s family to the groom’s family and dowry has been linked to early marriage there since “the younger the bride, the smaller the dowry demanded”.99 One has to be cautious in including bride price as a contributing factor in early marriage since many women interviewed in northern Nigeria explained that the bride price was in fact used to buy dishes and pots for her new household. In addition, economics alone does not explain why poverty leads to child labour in factories or in the informal economies of the street (including street kids and gangs) for both boys and girls in some cultures, while poverty leads to early marriage for girls in other cultural contexts.

Often statistics show a marked differential between urban and rural settings when it comes to the

97 Boxall, supra note 26.


99 “[Families] also believe that marrying off a daughter early in life reduces the chance that her honour will be spoiled before she can be paired with a suitable husband.”: John Ward Anderson, “Early To Wed; Still Common in Rural India, Child Weddings Highlight Clash Between Tradition and Today”, The Washington Post, May 24, 1995 at A27.
number of minors being married. In Ethiopia, Nigeria, Turkey, and India studies have shown that the average age of women at their first marriage is lower in the villages than in the larger cities. The Washington Post reported in 1995 that:

According to the most recent government statistics, the mean age of a bride in [India’s western state of] Rajasthan is 16, and about 18 percent of girls between ages 10 and 14 are married. In some rural districts, however, as many as half the girls in the 10-to-14 age group are married, according to a 1991 study by the state’s Department of Women and Child Development.101

Since urban areas can afford people greater economic opportunity than rural village economies, one could postulate that as families have greater financial security the phenomenon of child marriage will be less prevalent. This is not always the case globally, however, since there are documented cases of early marriage amongst the middle class. Factors such as the social shame associated with pregnancy out of wedlock, cultural traditions, and the status and roles of girls and women in society, therefore, overlap with poverty and economic class considerations to encourage the marriage of minor girls.

(vi) Culture ~ Threats to Survival of Community

Historically early marriage has been statistically significant during wartime and when a cultural community views itself as under threat. Thus, as one Hmong cultural leader in California explained,

"We have lived in many hostile environments ... In Laos [in the 1960's fighting the Viet Cong for the CIA], people died or were killed at 34 or 35. Infant mortality was very high. So marrying young and having children was a way to

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101 Anderson, supra note 99.
preserve our own kind.”

In the West Bank and Gaza a similar dynamic occurred as “death is considered even more tragic for a young man if he leaves no male heir behind”.

In the context of the Intifada, therefore, parents decided to marry their sons and daughters at an earlier age than before. Parents in northern Ethiopia cited their own short life expectancy as a reason to marry children off young since “they feel obliged to invest in the future of their children when they themselves have the most resources, and this also secures their own futures”.

In times of more subtle social upheaval early marriage also becomes an important cultural practice. In northern Nigeria, for example, the Muslim population feels quite misunderstood by the Christian population in the south of the country as well as by many Western observers. As Dr. Mandara stated,

Some people in the North believe they are under a religious obligation to marry girls young, at thirteen or fourteen. One cannot confront someone who has been a Muslim for generations [and tell him] that he is wrong... A lot of human rights groups make mistakes on [the issue of early marriage], take things for granted, and interpret as if happening in the U.S. This causes a defensive reaction ... People feel [the groups are] just coming to attack his culture, religion and beliefs.

Thus early marriage can be a part of a struggle over cultural traditions and the future meaning of those customs. In many ethnically and religiously diverse countries, one sector of society

102 Arax, supra note 9 quoting Houa Wa Yang of Fresno, president of the national Hmong Council, made up of leaders from the culture’s 18 distinct clans.

103 Hammami, supra note 28 at 289.

104 Dagne, supra note 6 at 36.

105 Interview, Dr. Mairo U. Mandara, ObGyn, Ahmadu Bello University Teaching Hospital, Zaria, October 31, 1994. Dr. Mandara is a Federation of Muslim Women Associations of Nigeria (FOMWAN) member and wrote her Masters thesis on the medical condition vesico-vaginal fistulae (VVF).
(often the urban, educated class) will criticize another sector (usually the rural, illiterate class of a different religion) for perpetuating the marriage of minors. For example, the Sri Lankan spokesperson at the Committee on the Rights of the Child blamed “customary” laws and practices in various communities as perpetuating discrimination against women and children in her country.106

Obviously these causes are not neat categories of explanation but rather overlap with one another. Gender stereotypes about women’s roles in society manifest themselves in legal provisions along with cultural norms about sexuality, virginity and community. Similarly, poverty intersects with gender dynamics in the family and affects choices about education and marriage. These causes too are determined by historical, cultural factors.

(C) Consequences of Early Marriage

Early marriage not only ensures that the responsibility and cost of raising daughters is shifted away from the birth family but it also entrenches traditional gender roles. Where early marriage is a significant institution, girls’ education is cut short, their opportunities beyond marriage and childbearing are limited, and their ability to imagine different ways of participating in their

106 The representative from Burkina Faso, for example, similarly stated that “the disparity [between the minimum age of marriage for boys and girls] resulted from the cultural concepts prevailing in his country. At the present time, however, the reality was changing and his Government would gradually be able to eliminate the disparity.” United Nations, Committee on the Rights of the Child, CRC/C/SR.136 (12 April 1994) at 2. Data from 1993 shows that the median age at first marriage in Burkina Faso is 17.5 years: Demographic and Health Surveys Program, Women’s Lives & Experiences (Calverton, MD: DHS, 1994) at 15.
communities is seriously curtailed. And for girls growing up in these countries “adolescence as a stage in the life cycle is nonexistent, and often has no special name”. Marriage becomes the rite of passage from childhood into adulthood for many girls.

(i) Reproductive Ill-health

The consequences of early marriage include not only the susceptibility to violence but also to sexually transmitted diseases, HIV/AIDS, and difficulties in childbearing. As Allyn Taylor notes,

Traditional practices, such as the early marriage of girls, means that women are also becoming infected at a significantly younger age than men - five to ten years earlier than men on average, often in their early childbearing years. The majority of women become infected in their teens and early twenties. Cases of HIV infection in fifteen and sixteen year old girls have been documented, which means that they have become infected a few years earlier.

Epidemiological surveys and field research show that pregnancy and childbearing at an early age

107 Put the other way around, “where women marry later, they have more time to complete their education, learn about reproduction and contraceptive methods and develop marketable skills. Moreover, delayed marriage and first birth means fewer years spent in childbearing, and is often linked to lower total fertility.” WHO supra note 46.

108 Sohoni, supra note 85 at 9.

109 “In some settings, particularly where the man engages in sexual activity with other women, including prostitutes, outside marriage, the girls in such marriages have an increased risk of acquiring sexually transmitted diseases on two counts: the increased likelihood of acquiring such infections from her husband; and their vulnerability to the consequences of such infections due to relative lack of resistance to the immature reproductive tract. Data from several countries in Africa, for example, have shown higher levels of infertility the earlier age of onset of sexual activity.”: Belsey, supra note 74. Infertility can also be a contributing factor in divorce: Mark Belsey, “The Epidemiology of Infertility with Particular Reference to Africa”, in Bulletin World Health Org., 54: 319-341 (1976).

have serious health consequences for women.¹¹¹ Women’s risk of reproductive ill-health and death increases dramatically when women are under the age of eighteen.¹¹² Maternal mortality rates of this group are extremely high.¹¹³ Young women between the ages of fifteen and nineteen years are twice as likely as women in their twenties to die in childbirth.¹¹⁴

In northern Nigeria young women often become pregnant in the first year after marriage, some as soon as after their first two or three menstrual cycles.¹¹⁵ In a 1988 study in Sokoto, Nigeria the maternal mortality rate per 100,000 deliveries for women aged sixteen was 6,897, but 1,251 for women between the ages of twenty and twenty-nine; in a 1988 study in Katsina, Nigeria the maternal mortality rate was 4,481. Another 1988 study in Zaria, Nigeria found that women who were fifteen or younger had a mortality rate of between 3,780 and 3,970, but for those who were sixteen, the rate dropped to 1,430.¹¹⁶ According to the United National Development Program (UNDP), Nigeria’s national maternal mortality in 1988 was 750 per 100,000 live births.


¹¹² Demographic and Health Surveys Program, supra note 29 at 30-31.


compared to the United States rate of thirteen. Nigeria's infant mortality rate in 1992 was 97 per 1,000 live births, compared with a rate of thirteen for all industrialized countries. 117

Women who are married before or soon after puberty in Nigeria, Ethiopia and elsewhere are also susceptible to vesico-vaginal fistulae (VVF) which is a miscommunication between the bladder and the vagina which results in continuous, involuntary leakage of urine through the vagina. 118 VVF is most often due to prolonged, obstructed labour where the baby's head cannot pass through the pelvic bones of the birth canal. This causes damage to the bladder and other consequences. 119 While not caused solely by early child bearing, VVF is related to the immaturity of a young woman's pelvic bones. As the head of an obstetric and gynaecology department explained, "no doubt about it, early marriage is a very prominent factor in the causation of this VVF". 120 Other factors contributing to a disproportion between the mother's pelvis and her baby's head include malnutrition from underfeeding girls, inadequate antenatal care, material poverty, and inaccessible emergency medical treatment. 121

VVF, if not repaired, has profound impact on a woman's life: she can no longer have children, she is preoccupied with keeping herself clean and washing her urine-soaked clothes, she is often


119 While VVF now occurs in a statistically significant way only in developing countries such as Nigeria and Ethiopia, the first hospital performing VVF repairs was in Boston in the nineteenth century.

120 Interview, Dr. Shittu, Ahmadu Bello University Teaching Hospital, Zaria, Nigeria, October 31, 1994.

121 Harrison et. al., supra note 113 and interview, Dr. Mairo U. Mandara, October 31, 1994.
abandoned by her husband122 and her community,123 and she can be forced to make money through prostitution. Ironically the same men who abandon wives with VVF pay (minimally) to have sex with women with VVF.

(ii) Risk of Conjugal Violence

Sohoni identifies that an “advantage associated with early age marriage is the greater malleability of the younger girl to adapt her self to the ways of her husband and his family”.124 The UNPFA reiterates Sohoni’s assertion stating that “larger age differences between husbands and wives reinforce gender stereotypes of wifely dependency and powerlessness”.125 With greater dependency on her husband and his family, a young woman does not have the external support systems nor the knowledge of where to seek assistance should she be assaulted or raped. While living in a compound environment can provide strong female support for some women, it also can be dominated by the mother-in-law or first wife and, therefore, not necessarily helpful for young brides. Unfortunately the girl’s own family may compel her to stay in an abusive situation, too, for a variety of reasons. The following story from 1985 in Nigeria is a particularly graphic example of the risks to young women:

At the age of 9, Hauwah [Abubakar] was forced by her parents to marry a much older man. She rebelled and ran home to her parents. But last June, she turned 12 and started menstruating. Under Islamic law, she was mature enough to have sexual relations with her husband. Her father sent her

123 Waaldijk, supra note 118 at 1.
124 Sohoni, supra note 85.
125 UNPFA, supra note 128.
to live with her husband. She ran home twice. Each time, the father, who is indebted to the husband, returned her.

Finally, last February, she tried to run away a third time. Her husband took an ax and cut off both her legs, the police said. Doctors said they believe that the husband coated the ax blade with poison. He is expected to go on trial for murder charges this month.

The wounds did not heal. Hauwah refused to eat. And, on March 4, she died.126

(iii) Education

Statistics show an inverse relationship between education and marriage such that where school enrollment especially in secondary school is very low, girls are married early. For example, in Mali, Niger, Senegal, and Yemen where the median age at first marriage ranges between 15.1 and 16.2, the percentage of women with no education is very high, between 73 percent in Senegal to 89 percent in both Niger and Yemen.127 Further when you look at the percentage of young women enrolled in secondary school as compared to young men in these countries, you see that they are approximately half as likely to remain in school as young men between the ages of sixteen and twenty. This is most marked in Yemen where 14 percent of young women are enrolled in school as compared to 61 percent of young men; 10 percent of young women in Senegal versus 22 percent of young men are enrolled in school; and 5 percent of young women are attending school in Niger whereby 11 percent of young men are in school.128

The WHO has also shown that women with less education are more likely to bear children during adolescence: more than two-thirds of women with no education in the Dominican


127 Demographic and Health Surveys Program, supra note 29 at 15 and 3.

128 Ibid. at 7.
Republic, Ecuador, Mexico and most African countries give birth before age twenty.\textsuperscript{129}

Contrary to a 1990 finding in California that only one female Hmong student for every three male students graduates from Merced high school,\textsuperscript{130} Hutchison and Miles found in their four year study of Hmong Minnesota high school students that “while more than half of Hmong females are married by the senior year of high school, nearly 75\% of this group have remained in high school and report educational aspirations and expectations no different from those of their unmarried peers.”\textsuperscript{131} In fact, Hutchison and McNall challenge the common postulations that early marriage for girls necessarily ends their formal education and professional career aspirations:

[The individualistic] model may not be appropriate for the Hmong, where early marriage and high fertility still are viewed as an effective economic strategy that increases the chances that one or more children will be successful in the world of education and work... The cultural structures of Hmong society have been utilized to ensure that the younger generation will pursue the educational opportunities available to them in American society, thus enabling them to become economically independent in the second generation.\textsuperscript{132}

This study demonstrates how one has to be aware of the actual consequences of marriage for a young woman in a particular cultural context. In some places, marriage will almost certainly signal the end of her formal education, while elsewhere it may not. Nonetheless, a strategy to undercut the negative consequences of early marriage for girls might begin with advocating that girls remain in school through secondary education since the overwhelming evidence is that girls

\begin{itemize}
  \item \textsuperscript{129} WHO, Delay Childbearing Factsheet, supra note 46.
  \item \textsuperscript{130} Arax, supra note 9.
  \item \textsuperscript{131} Hutchison and McNall, supra note 9 at 588.
  \item \textsuperscript{132} Ibid.
\end{itemize}
are pulled from school to be married in places where girl-child marriage is a significant phenomenon.

(iv) Divorce and Prostitution

Women are more likely to be divorced if they marry young which can lead sometimes to prostitution:

Marital discord is also more common with a younger age of marriage, and both circumstances are associated with child prostitution, often as a consequence of the child-wife running away and having no other means than prostitution for supporting herself.¹³³

Studies from Ethiopia also indicate that “early marriage and divorce are the major causes for women leaving their homes to join prostitution. Most of the prostitutes who have migrated into urban centers have been married at an early age of 9 to 12 years or even younger.”¹³⁴ For some women the likely consequences of early marriage are too much to bear. Arzaq Shams Hussein reportedly committed suicide at age sixteen by jumping out of a nine-storey window after her Egyptian parents married her to a German tourist, aged forty-three.¹³⁵

While there is a wide spectrum of experience for adolescent girls around the globe, there are a number of tenacious themes in their experience. Girls almost everywhere encounter pressure to be sexually active around the age of puberty, while simultaneously being held responsible for getting pregnant before marriage. Further, adolescent girls are the object of adult male sexual

¹³³ Belsey, supra note 74.


¹³⁵ Deutsche Presse-Agentur, supra note 31.
attention in most cultures, and, one could argue, increasingly the object of adult male desire due
to factors such as AIDS and commercial sexualization of nubile young women. These
imperatives play out differently of course along race, class, and cultural lines such that Mexican
American or rural Nigerian teenaged girls will be more likely than their middle-class
counterparts to be married young.

Girls in North America go through rites of passage of adolescence just as girls in parts of west
Africa and Asia go through rites of passage into womanhood. The ironic aspect of American
adolescence, of course, is that the result of those rites of passage can be the same as marriage for
teenaged girls elsewhere in the world: pregnancy, childbearing, motherhood, reproductive ill-
health, interrupted education, vulnerability to poverty and violence, and, in some cases, marriage.

IV. Strategies Including International Human Rights

Strategies to address child marriage, teenage marriage or the marriage of minors can be as
multifaceted and diverse as the cultures in which the practice exists. The initiatives can range
from lobbying for state compliance with international legal standards on marriage registries,
consent laws, and the rights of women and children, to grassroots popular education programs
about the effects of early marriage on girls. One can find examples of nation-wide campaigns
to end child marriage and small-scale theatre troops touring with plays about VVF. In some
settings the arguments founded in international human rights are essential to the strategy while
in other cultural contexts the international law remains in the background.
(i) Community Level Programmes to Support Delayed Marriage

In northern Bangladesh women organized into associations to fight the issues of unilateral divorce, dowry, harassment, and unregistered marriages. Women in each village choose a coordinator by ballot and the associations of ten villages in the Gaibandha district are joined together in a council, the Grameen Unnayan Parishad (GUP) or the Rural Development Council. The GUP is headed by an elected chairwoman.\textsuperscript{136} The village groups meet twice monthly to discuss issues of concern to the villagers, act as dispute mediators and adjudicators, and encourage savings which are “pooled and used for micro-enterprise. Two-thirds of the people in Muktinagar Union live in poverty, and income generation is naturally a priority.”\textsuperscript{137} The village representatives also work with the chairmen in the district to address women’s issues and boast a decrease in the rate of divorce, compliance with the mandatory registration for marriage deeds, and increased consciousness of women’s rights among the members:

Instances of polygamy and marriage of minors have also fallen. A member of the union once secretly made an arrangement to marry off her teenage girl, a 7th grader. When the GUP members heard of it, they persuaded her to stop the wedding.\textsuperscript{138}

In Nigeria, a variety of strategies have been used by different groups to try to reform marriage practices. Health workers travelled between villages in the north with a play about the implications of early marriage and childbearing, in particular with a focus on the health consequences such as VVF. Members of non-governmental organizations also prepared pamphlets with basic information on early marriage and VVF.

\textsuperscript{136} Ruhul Motin, “Poor Women of Rural Bangladesh Take Control”, \textit{Chicago Tribune}, Aug. 24, 1997 at W2.

\textsuperscript{137} Ibid.

\textsuperscript{138} Ibid.
(ii) Government Initiatives: Marriage Age Laws

The government in Bangladesh attempted to address the marriage of girls by fixing the minimum age of marriage for girls at eighteen in 1984, requiring the registration of all marriages, and reducing the registration fee to encourage compliance with the law. In October 1996, “for the first time... parents of two 12-year-olds were served show cause notices in a northern district for marrying off their minor daughters. The report received wide coverage in newspapers across the country, not because action was finally being taken to stop the illegal practice, but because an official had considered at all important to implement rules against the marriage of minors.”

Contrary to the modest achievements boasted by the women’s associations of rural Bangladesh, the government initiatives have not met with much success. Nonetheless, without the official legal requirements with respect to a minimum marriageable age and marriage registration, the GUP members’ arguments would have less power.

During a 1994 conference organized by Women in Nigeria (WIN), the national feminist umbrella organization, many participants called child marriage a human rights abuse. WIN, together

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139 Tabibul Islam, *supra* note 44.


141 In this and other countries one finds a gap between the law and practice. A government can be held accountable nonetheless where the legal standards, on minimum marriageable age for example, are not enforced and where women do not enjoy the right to full protection of the law.

with the National Council of Women’s Societies, and the Nigerian Medical Association lobbied the national government in the early 1990’s to legislate a universal minimum age of marriage at eighteen years. This law reform effort has not succeeded.\textsuperscript{143}

Some recent government initiatives, however, include municipal laws to prohibit a parent from removing his or her minor daughter from school for the purposes of marriage;\textsuperscript{144} state legislation making it an offence for a parent or guardian to marry out his daughter or ward unless the daughter or ward has consented;\textsuperscript{145} and minimum age provisions (age sixteen) in the same State.\textsuperscript{146} Again as in Bangladesh, however, there are problems of inadequate enforcement of by-laws, statutes, and criminal laws, as well as general ignorance of the existing legal provisions which are supposed to protect girls from non-consensual or underage marriage or from sexual and physical assault.

In other countries there have been legislative attempts to regulate marriage practices: as early as 1929, India passed the \textit{Child Marriage Restraint Act}; the same year England passed the \textit{Marriage Act, 1929} to raise the minimum age from twelve to sixteen;\textsuperscript{147} in 1931 Egypt enacted

\begin{footnotesize}
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\item[143] The Nigerian federal government itself stated in its first report to the Committee on the Elimination of All Forms of Discrimination Against Women that there "is a crying need" to codify marriage laws and establish uniform marriages ages at 16 for boys and girls with the consent of their parents and 18 for boys and girls with the consent of one parent and 21 without parental consent: Initial Report of Nigeria under Article 18 of the Convention, CEDAW/C/S/Add.49 11 May 1987 at 31.
\item[144] Interview with Yahaya Mahmood, November 2, 1994, Kaduna.
\item[146] \textit{Ibid}.
\item[147] Jones and Welhengama, \textit{supra} note 2 at 198-99.
\end{itemize}
\end{footnotesize}
the *Law of the Organization and Procedure of Shariah Courts of 1931*; and minimum age of marriage laws were legislated over the years in Tunisia and Iran, Iraq, Syria, Jordan, and Morocco. Recently, both Israel and Indonesia have passed laws to regulate the marriage of "minors".

In an attempt to curb the marriage of minor girls, the Indian government raised the age of marriage for girls in 1976 from fifteen to eighteen by the *Child Marriage Restraint (Amendment) Act* "but enforcement is uneven".

Strong resistance from traditionally privileged groups ... is illustrated by a case in September 1992 in which a women’s rights activist in rural Rajasthan was gang-raped by men who objected to her advocacy against child marriage. Although the case was referred to the central Bureau of investigation, as of late October [1993] the five men accused by the victim had not been arrested.

In a specific initiative to deal with the international marriage of minors (girls under the legal marriage age of eighteen), the Indian government made "official embassy permission a prerequisite for a foreigner wanting to marry an Indian girl". Professor S.W.E. Goonesekere

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150 There are statutes defining the minimum marriageable ages for girls in most countries, ranging from fifteen in Morocco, sixteen in Egypt and India, seventeen in Tunisia, Jordan and Syria, to eighteen in Iraq and Iran: Mr. Justice Aftab Hussain, *Status of Women in Islam* 473 (1987).

151 Treitel, supra note 7.

152 Cammack, Young and Heaton, supra note 82.


155 "Saudi attempts to marry Indian minor", supra note 18.
writes that the “failure to impact on the problem of child marriage in the countries of the subcontinent of India has been due to lack of political will in implementing the standards as well as inclination to adopt and maintain double standards in policy formulation”. Others say that the solution to address child marriage lies not only in laws but also in a complex web of programmes to deal with its underlying causes:

Instead of alienating uneducated, tribal people with condemnation of a centuries-old tradition, ... others prefer programs that attack what they see as the underlying causes of child marriages: the low status of women, poverty and illiteracy, which is as high as 95 percent among women in rural Rajasthan, according to some estimates.

(iii) International Strategies: Linking to Local

The international community has also been concerned with the issue of early marriage of children since the 1960s. The Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages (1962) was followed by numerous conventions which condemn child marriage and include the right of spouses to free and full consent to marriage. The Convention on the Elimination of All Forms of Discrimination Against Women (1980), for example, contains the right to consent to marriage in Article 16(1) and states in Article 16(2) that the “betrothal and marriage of a child shall have no legal effect”. Despite these provisions there

156 Professor S.W.E. Goonesekere, A Child's Right to Health: An Inspirational Norm or a Basic Right.

157 Anderson, supra note 102.


159 Women's Convention, supra note 18.
is no settled international standard defining child marriage.

Article 1 of the *U.N. Convention on the Rights of the Child* (1990), defines a child as "every human being below the age of eighteen years unless, under the law applicable, majority is attained earlier."\(^{160}\) Since marriage confers upon a woman the age of majority, the provisions of the *Convention on the Rights of the Child* are not applicable to married girls and women.\(^{161}\) The Committee on the Rights of the Child has asked the governments of Madagascar and Bolivia to amend their marriage laws for precisely this reason, that the marriage age denies girls the benefits of the Convention itself.\(^{162}\)

While the *Convention on the Elimination of All Forms of Discrimination Against Women* does not stipulate a minimum age of marriage, it states in Article 16(2), that "the betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an


\(^{161}\) Belsey, *supra* note 74.

\(^{162}\) "The Committee [on the Rights of the Child] is concerned that the national legislation establishes a different minimum age for marriage between boys and girls and that it authorizes the marriages of girls as young as 14 years of age who have obtained parental consent from the father or the mother. Such situations may raise the question of compatibility with the principles of non-discrimination and the best interests of the child, in particular as these children will be considered as adults and therefore no longer eligible for the protection afforded by the Convention": Committee on the Rights of the Child, Concluding observations on Madagascar, U.N. Doc. CRC/C/15/Add.26 (Seventh session, 1994) (14 Oct. 1994) at paragraph 9. Bolivia: at paragraph 9. "The diminished level or protection for girl children inherent in the lower minimum age for marriage is discriminatory and, as a result, deprives this group of children of the benefit of other protections afforded by the Convention."
official registry compulsory."\textsuperscript{163} The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) commented on this article:

Notwithstanding this definition [in the Convention on the Rights of the Child], and bearing in mind the provisions of the Vienna Declaration, the Committee considers that the minimum age for marriage should be 18 years for both man and woman. When men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before they have attained full maturity and capacity to act. According to the World Health Organization, when minors, particularly girls, marry and have children, their health can be adversely affected and their education is impeded. As a result their economic autonomy is restricted.\textsuperscript{164}

The Committee goes on in paragraph 38 to state as follows:

Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, these provisions should be abolished. In other countries, the betrothal of girls or undertakings by family members on their behalf is permitted. Such measures contravene not only the Convention, but also a women's right freely to choose her partner.\textsuperscript{165}

The \textit{African Charter on the Rights and Welfare of the Child} states in Article 21(2) that "[c]hild marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 and make registration


\textsuperscript{164} Paragraph 36. In the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, held at Vienna from 14 to 25 June 1993, States are urged to repeal existing laws and regulations and to remove customs and practices which discriminate against and cause harm to the girl child. Article 16 (2) and the provisions of the Convention on the Rights of the Child preclude States parties from permitting or giving validity to a marriage between persons who have not attained their majority. Paragraph 37. This not only affects women personally but also limits the development of their skills and independence and reduces access to employment, thereby detrimentally affecting their families and communities.

\textsuperscript{165} And in paragraph 39: States parties should also require the registration of all marriages whether contracted civilly or according to custom or religious law. The State can thereby ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children.
of all marriages in an official registry compulsory."\textsuperscript{166} This and the African Platform of Action leading up to the women’s conference in Beijing are indications of official regional consensus that child marriage is a practice contrary to the rights of children.\textsuperscript{167}

The Preamble to the UN \textit{Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages} (1962)\textsuperscript{168} also includes the goal of "eliminating completely child marriages and the betrothal of young girls before the age of puberty". Article 1 guarantees "free and full consent to marriage" and Article 2 directs that "States ... shall take legislative action to specify a minimum age for marriage". The \textit{UN Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages} (1965), as well, states in Principle II that the "minimum age [for marriage]... shall not be less than fifteen years of age".\textsuperscript{169}

Anti-Slavery International, a London-based organization, has argued that child marriage is "an effective way of ensuring control over [a young bride's] productive and reproductive labor." In a submission to the U.N. Committee on the Rights of the Child, it cited Article 2 of the 1956 \textit{Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and

\textsuperscript{166} This Convention is open for signatures and ratification. It has not been signed by Nigeria but it has been signed by a number of countries and ratified by five: Burkina Faso, Cape Verde, Mauritius, Seychelles, and Uganda.

\textsuperscript{167} The \textit{Draft African Platform for Action} leading up to the Forth United Nations World Conference on Women (Beijing, 1994) calls on states to "review policies and legislation to ensure the promotion of girls in matters pertaining to education, health and early marriage": at para 123(c).

\textsuperscript{168} \textit{Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages}, opened for signature Nov. 20, 1962, 521 U.N.T.S. 231. Nigeria has not signed this Convention.

Practices Similar to Slavery, which states that,

States Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages.\textsuperscript{170}

International treaties do unequivocally guarantee men and women the right to enter into marriages only with their full and free consent. The \textit{International Covenant on Civil and Political Rights (ICCPR)} in Article 23 requires states parties to “respect and ensure” that “[n]o marriage shall be entered into without the free and full consent of the intending spouses.”\textsuperscript{171} The Women’s Convention guarantees women the same right as men to enter into marriage, to freely choose a spouse, and free and full consent to marriage (Article 16 (1) a-b). Article 1 of the UN \textit{Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages} (1962) and the UN \textit{Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages} (1965) and also guarantee spouses "free and full consent to marriage".

As Lai and Ralph argue, the “use or threat of violence or other physical force to compel marriage interferes with a person’s ability to marry with her free and full consent. Individual autonomy in decision making with regard to marriage is explicitly guaranteed by the ICCPR” in Article 23(3) and by the Women’s Convention in Article 16.\textsuperscript{172}

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\item \textsuperscript{172} Lai and Ralph, \textit{supra} note 182 at 221.
\end{itemize}
Since it is most often parents who marry their daughters before or soon after puberty, it is implicit in an argument against the marriage of minors that parents are not acting “in the best interests of the child”:

In order to be consistent with international human rights norms... the permission of parents should be understood as an additional requirement above and beyond the consent of the intending spouses; parental permission should not serve as a substitute for the child’s agreement where the two conflict.173

The issue of consent of intending spouses, however, may not be as important as the age at which individuals are legally capable of marrying since in many cases girls and young women do not object to their family’s arrangement at the time of marriage or themselves seek to be married as minors.

In light of international treaties and declarations and national statutory provisions on the minimum age of marriage, activists may argue that it is contrary to international law to marry a child under the age of sixteen.174 Few countries remain which have statutory marriageable ages below sixteen years.175 The rationale behind such an international standard is that young women do not have the necessary life experience to make a life decision such as marriage and that serious consequences flow from marriage below this age. Further, activists may argue that the age of marriage ought to be the same as the age of majority in domestic legislation since

173 Ibid.

174 It is more difficult, though not impossible, to argue that the marriageable age ought to be eighteen years since the binding international treaties do not specify a minimum age for marriage and there is no consensus at eighteen years in domestic laws. At the same time, international developments in this area may evolve to a clearly delineated age of eighteen.

175 See supra notes 30-36.
marriage confers upon a young person the responsibilities of mature civil citizens. In many countries this age will be eighteen years. Where the age is less than eighteen years, governments ought to justify the discrepancy between the statutory age of majority and the age of marriage. International law is also clear that governments must create a marriage registry for statutory and customary marriages. As Professor Rebecca Cook argues,

The right to found a family incorporates the right to maximize the survival prospects of a conceived or existing child ... [and] complements the right of a woman herself to survive pregnancy, for instance by delaying a first pregnancy; ...State laws that do not provide a minimum age of marriage, and practices that do not enforce such laws, permit young girls to marry, often with questionably free consent, and to conceive children before they have matured physiologically, with consequent high rates of maternal and infant mortality and high levels of morbidity.

Given the preponderance of evidence to support the severe implications of early marriage for young women’s health and education, it can also be argued that early marriage denies women the rights to life, health, and education. Indeed the international human rights argument

176 For a girl married at age fourteen, for example, she may be pulled from school and soon begin childbearing and homemaking. Paradoxically marriage confers on her the responsibilities and rights of adulthood while placing her in a context where she can not exercise the rights of majority. She is no longer considered a child but is not able to be a full citizen in her society.


178 Ibid. at 689-690.

179 Article 12 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to health and specifically calls on States Parties to reduce infant mortality and the rate of still-births. Article 12 of the Women’s Convention requires that States Parties provide access to health care in a non-discriminatory fashion. Article 16 of the African Charter on Human and Peoples’ Rights states that “every individual has the right to enjoy the best obtainable state of physical and mental health”; OAU Doc. CAB/LEG/67/3/Rev.5 (1981).

180 Article 13 of the International Covenant on Economic, Social and Cultural Rights, Article 10 of the Women’s Convention, and Article 17 of the African Charter on Human and Peoples’ Rights protect the right to education and each of these treaties ensure the enjoyment of the rights without discrimination on the basis of
ought to be grounded in the particular consequences which women experience in specific contexts, such as the discriminatory impact on women's education, reproductive well-being,\textsuperscript{181} economic opportunities, and physical integrity.\textsuperscript{182} The Women's Convention specifically requires that states undertake, among other things, "to repeal all national penal provisions which constitute discrimination against women" and "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women".\textsuperscript{183}

Some say, however, that "the discourse of rights at the international level has little meaning in the day-to-day realities of women's lives. International legislation is unlikely to alter the underlying social structures which define women's roles and limits their choices. Existing stereotypes about the role of women in society are a bastion of tradition and a source of powerful customs that are difficult to legislate against at the national, let alone the international level."\textsuperscript{184}

As discussed above, there are serious problems of legal illiteracy around the world which are particularly acute for women. Moreover, because countries such as Pakistan have yet to adopt most major international human rights instruments, "international human rights claims do not

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\item sex. Article 10(f) of the Women's Convention specifically calls on States Parties to ensure the "reduction of female drop-out rates and the organization of programmes for girls and women who have left school prematurely".

\item Berta E. Hernández, "To Bear or Not to Bear: Reproductive Freedom as an International Human Right" (1991) 17(2) \textit{Brooklyn J. Int'l L.} 309 at 335.

\item Sarah Lai and Regan Ralph argue that forced marriage in northern Nigeria can be construed as violating a woman's right to privacy. See Lai and Ralph, \textit{supra} note 182 at 222-223.

\item \textit{Convention on the Elimination of All Forms of Discrimination Against Women}, Articles 2(g) and (f) respectively, \textit{supra} note 18.

\item Fletcher, Taylor and Fitzpatrick, \textit{supra} note 110 at 333.
\end{itemize}
appear to provide adequate additional grounds for promoting women's rights".  

Some commentators and activists looking at the issue of child marriages argue that early marriage is "a misunderstood cultural phenomenon that has been sensationalised by the media" or exaggerated by policy makers. Commentators point out that while marriages may take place at a very early age, the couple may not start living together and having sexual relations until they reach the age of majority. In Nigeria, for example, people noted that "it used to be" that brides did not move into their husband's home nor start sexual relations until they reached puberty. In India, too, the couple may not live together until they are sixteen or seventeen. Further, marriage at an early age need not imply all of the negative consequences outlined above; it may be that, upon marriage, a girl does not stop her formal education nor begin childbearing nor be subjected to violence.

Both of the above criticisms of international human rights strategies to reform child marriage practices are well heeded. Not in every cultural context will the use of legal norms, in particular international legal norms, be the best strategy for social engineering. In some places, the small-scale theatrical approach will be most appropriate. In other places, the law reform initiatives will

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185 Rahman, supra note 43 at 983.

186 Ibid.

187 Legally, however, marriage confers upon the spouses the age of majority regardless of their age. A married woman may not be able to drive or vote due to other applicable statutory age requirements.

188 "Some say child marriages have a debilitating impact on young people, particularly girls, thrusting them into early motherhood and beginning a dangerous downward health spiral for them and their babies. Even though many of the young couples don't live together until age 16 or 17, they often are pulled out of school immediately after marriage and put to work full time, stunting their potential and depriving them of any control they may have had over their lives." Anderson, supra note 99.
go hand in hand with programmes to improve the status of women and girls. The strength of an international women’s rights argument which rests on the empirical data about the consequences of marriage for women in a particular context, is that the legal argument will be flexible and responsive to those contexts not just in framing the solution but also in articulating the human rights norms and violations.

V. Conclusions

Since cultural notions of childhood, maturity and responsibility vary from culture to culture, so too does the minimum age of marriage standards in those cultures. Where the marriage of girls is a significant problem, though, one sees a number of factors in common: an age disparity between when girls and boys marry (this may be codified in law); low levels of education, high levels of illiteracy for girls; no enforcement of statutory rape laws for married girls; controls on women’s sexuality; economic hardship; and reproductive ill-health for young women. These consequences of child marriage can claim the lives of young brides.

International human rights strategies provide women with the language and legitimacy of law to challenge practices which they see as discriminatory. Some activists will insist on their government’s compliance with international standards concerning the establishment of a marriage age, marriage registries, and the requirement of free and full consent of spouses. Other activists will lend weight to their arguments with community and religious leaders by citing the international human rights norms. Women will use the rights to health and education in their awareness campaigns on the repercussions of child marriage. While the minimum age of
marriage which women seek in different countries will likely vary, the international law is sufficiently elastic to adapt to these particularities.
CHAPTER 4: Nigerian Narratives:
Dilemmas of Early Marriage in Northern Nigeria

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My name is Rabi Hamisu Karaye and this is my story.

I do not know how old I am for sure.. maybe sixteen years old. I am a Muslim Hausa woman, from Karaye in Maiyama Local Government, Kebbi State. I am the third child of seven children. I had no schooling. My older brother went to Islamic school and is now an Islamic teacher. My fourth junior brother is also in Islamic school. I wanted to go to school but could not tell my father. But I asked my husband and he promised me schooling - not yet...

I was married five years ago, at approximately eleven years of age. I learned I was getting married from my father who had been approached by my husband. Before this man there was another who had asked to marry me but the family said I was too young. My husband is a Local Government employee with the Education Department, Maiyama. He may be five years older than my senior brother, maybe twenty-five... as old as the man you came with, older than twenty-five. I am the second wife in the household. I live in purdah.

Dower was paid to my family but I don't know how much. My family bought clothes and plates for me to take to my husband's house. I started menstruation in my husband's house. I started sexual relations with my husband before menstruation. I gave my consent to sex with my husband … though on the first
approach I was a little afraid then relaxed.

I had eight menstrual cycles before my first pregnancy. The pregnancy was ok only vomiting - I had no antenatal care. I laboured about twenty-four hours at home with the assistance of my mother, no Traditional Birth Attendant. My mother administered (traditional) herbal medicines. She wrote Quranic verses onto a chalk board then washed them off, catching the murky water in a cup. I drank the solution of water and chalk. There was an attempt to take me to the Hospital but it was too late... I delivered a still born baby at home.

I started leaking urine immediately after the birth. It was eight months of leaking before I was assisted by a World Health Organization grant to go to Katsina for an operation: 1992. I was fourteen years old. I had one operation, it was a successful repair. They told me not to carry heavy loads, drink plenty of fluids, and stay seven months in my mother’s house. I obeyed and returned for follow-up.

I make groundnut oil to afford the trips back to Katsina One year after the operation I got pregnant and delivered successfully at home. I did not go to Hospital for the delivery as instructed. This is my baby on my back.

I will allow my girls to mature before getting them married out.
I. Introduction

When I met Rabi I would have described her as a “girl”; her eyes had a certain innocence and her voice was shy and small. Yet her life experience evokes different words. By the age of sixteen she was married, working, had had two pregnancies, one traumatic labour, and a baby for whom to care. She had not been to school nor had she learned to read the Qur'an.

I was struck by the overlapping and contradictory discourses impacting on women’s identity as I was sitting in a health activist’s home in the village of Tukur-Tukur in northern Nigeria in 1994. One daughter worked at the sewing table against the wall. Her second daughter had just given birth to her first child, a girl, and sat on the couch watching television. On the screen was Beverly Hills 90210. The noise of American television formed the backdrop for our discussion of early marriage and women's rights in northern Nigeria. Expectations of girls and women in northern Nigeria thus are determined by the interwoven fabric of Muslim culture and religion, Hausa ethnic identity, modernization and development, class politics, and military governance.

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1 I use the term “girl” throughout this thesis to mean prepubescent female. The cultural meaning of “girl”, however, is much more fluid and contested. For this reason, it is important to interrogate our own presumptions of childhood and female sexuality.

2 The Hausa ethnic group is the most populous in northern Nigeria. The Fulani is the second most populous and was historically a nomadic group.
In this chapter I explore the socio-legal dilemmas of early marriage in northern Nigeria and attempt to complicate intuitive responses to the narratives of young women with whom I spoke during field research in the fall of 1994. Bearing in mind the need to avoid conclusions flowing from the imprint of non-Muslim values and to build a better understanding between Muslims and non-Muslims, within and outside Nigeria, of the practice of early marriage I am vigilant not to make generalizations about the Islamic religion. I explore and criticize marriage practices using as many indigenous concepts as possible. It is hoped that the result is a nuanced and layered treatment of the issue. By blending narratives from the Islamic religion and Hausa folklore in addition to women's testimonies, I explain early marriage as a matter of communal self-definition as opposed to an exercise of individual self-determination. The criticisms of early marriage are also grounded in conflicting narratives from Muslim Hausa culture. In other words, the communities in northern Nigeria are divided over whether early marriage ought to be reformed. In the end, I find there to be compelling reasons to criticize the practice of early marriage; however these criticisms are grounded in the consequences that women experience, not on an abstract number.

This chapter demonstrates the need for alternative approaches in international women's rights to practices such as early marriage in northern Nigeria. To proceed to criticize early marriage in Nigeria using a fixed numerical approach and without a deeply contextualized understanding

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1 Naming is extremely powerful in political struggles. Human Rights Watch and other international non-governmental organizations use the terms “child marriage” and “child bride” which evoke particular, strong images. Nigerian activists prefer the term “early marriage” which connotes less prior judgement of the practice and the idea that marriage takes place along a continuum of age and maturity. I have come to use early marriage in my thesis as it is consistent with my methodology to avoid pre-judgement where possible. I refer to “child brides” in quotations as a sign.
of the practice will only result in ineffectual and offensive reform strategies. Further, the potential to develop a constructively particularized norm of early marriage in this context will be lost. This chapter begins by describing the relevant national and international standards concerning the legal minimum age of marriage, consent to marry, and rape in marriage.

Against this backdrop of legal norms, the next section critically interrogates intuitive responses to early marriage, including my own reactions to women’s testimonies. I argue that it is essential to start the process of cross-cultural judgement and international human rights activism by challenging the presuppositions of judgement. When approaching a case in a Muslim cultural context, as I argued in Chapter 1, one has to work and write against the gendered orientalism and racism that marks the field.

In the two sections that follows, I explore how the practice of early marriage is understood in northern Nigeria and the conflicts over that meaning. In order to fully analyze the relationship between early marriage and its presumed consequences, we have to carefully examine its cultural causes and actual repercussions for women. Early marriage means different things and is caused by different factors in various places. In this case study, I illustrate its significance in northern Nigeria. I then lay out strategies for reform of early marriage that are grounded in the grassroots dimension of the preceding discussions and analysis.

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4 I include a few of my own journal entries from the research mission for this purpose.
II. Nigerian Narratives: the Empirical Context

The marriage of girl children is common in many developing countries in Africa, Asia and the Caribbean. Nigeria is no exception. According to a survey conducted by Nigeria’s National Population Bureau, one-quarter of all women are married by the age of fourteen, one-half by the age of sixteen, and three-quarters by the age of eighteen. The age of marriage for girls is particularly young in the northern part of the country where the Hausa ethnic group and Muslim religion are dominant. Dr. Kees Waaldijk, a Dutch surgical doctor who has treated thousands of Nigerian girls and women for vesico-vaginal fistulae (VVF), states that “more than 90% of the girls/women in the rural areas of Northern Nigeria marry premenarchally under twelve years of age...”. Research I conducted (in collaboration with Human Rights Watch- Africa and the Women’s Rights Project) between October 25 and November 14, 1994 showed results that were consistent with these social surveys; I found that girls in northern Nigeria are frequently married before they are fourteen years of age.

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8 VVF is a miscommunication between the bladder and the vagina which results in continuous involuntary leakage of urine through the vagina. VVF is most often due to prolonged, obstructed labour where the baby’s head cannot pass through the pelvic bones of the birth canal. This causes damage to the bladder and other complications.

Fifty-eight women were interviewed about the circumstances of their marriage during my field research in northern Nigeria. Their average age of marriage was roughly fourteen years. Seven women were married at age ten or younger, few older than sixteen. Their husbands were usually at least five years their senior. Many girls were removed from school by their parents to be "married off" and regretted having their education interrupted. The majority of girls and women with whom we spoke started menstruation after they had been married and moved to their husband's house. The majority began having sexual relations with their husbands before menstruation.

Marriage for a woman is most often arranged between her parents and the husband-to-be or between the two families. In either case, the young woman's consent is rarely sought. In one instance a woman, Barira Sule, was not informed that she was to be married until the morning of the wedding ceremony as "they were getting her dressed and painting her legs in preparation for the marriage". I took testimonies from women in Kano (the largest city in the north), Zaria.

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10 Interviews were conducted using a standard questionnaire: Appendix A.

11 Results were as follows: twenty-seven women said they were married at thirteen or younger; eleven at age fourteen, fourteen at age fifteen. While women were not always sure about their exact age, we could calculate from their accounts of schooling and pregnancies. Examples of interview notes are attached in Appendix B.

12 This metaphor of "marrying off" is used in the north of Nigeria as well as the phrase "marrying out".

13 Twenty-two of thirty-four women who were asked stated that they had sexual intercourse with their husband before their menstrual cycle began. (All testimonies on file with the author.)

14 See section below regarding "Consent to Marriage". In Nigerian legal culture the consent of the father, grandfather or guardian stands in for the consent of the girl; therefore, the marriage remains technically a consensual act.

15 Interview, Barira Sule, Zaria, October 30, 1994. It seems that the practice of not informing the bride of her marriage until the wedding day is more common in certain areas of the north, such as Sokoto State, and less common in other areas such as Kano city.
and elsewhere who clearly stated that they did not want to marry their husband.\textsuperscript{16} Balkiso Bello ran away from her husband's house only to be returned by her father under his threat of violence.\textsuperscript{17} It was not uncommon to hear from a young woman that she had run away from her matrimonial home on numerous occasions but was always taken back by her parents.

The age at which women are married in northern Nigeria has an impact on when they have sex. Some teenaged girls and boys will have pre-marital sex, although it is strongly discouraged socially. The women I interviewed had not had sex before marriage. For example, a number of women commented that they did not feel prepared for sexual relations with their husbands when they were married.\textsuperscript{18} I also took testimonies from women who described being violently raped by their husbands after refusing to have sex.\textsuperscript{19} Further, contrary to the penal legislation of northern Nigeria,\textsuperscript{20} statutory rape (defined as sexual relations with a girl who has not reached puberty) of young brides is occurring and occurring with impunity for those "impatient husbands" who will not wait for their wives to reach a minimum level of physical and psychological maturity.\textsuperscript{21} Thus, both pre-pubescent and non-consensual sex, condoned through

\textsuperscript{16} Interviews, Aisha Usu, Kwalli VVF Hostel, Kano, October 26, 1994 and Zanet Ibrahim, Sabon Sara, Kebbi State, November 10, 1994.

\textsuperscript{17} Interview, Balkiso Bello, Sokoto Specialist Hospital, VVF Ward, November 7, 1994.

\textsuperscript{18} Interview, Rabi Monde, Sokoto Specialist Hospital, VVF Ward, November 7, 1994.

\textsuperscript{19} Interview, Hussaina Mohammed, Sokoto Specialist Hospital, VVF Ward, November 7, 1994.

\textsuperscript{20} Section 282(2) of the Penal Code states that "[s]exual intercourse by a man with his own wife is not rape, if she has attained to puberty": Penal Code (1959), Cap. 89 Laws of Northern Nigeria, 1963.

the institution of marriage, are experienced by women in northern Nigeria.

The stories of women in northern Nigeria raise a number of issues for consideration for the (non-Nigerian) critic. The prior dilemma involves a challenge to my own intuitive response to the narratives from Nigeria. This issue can be stated as how to respond to the issues evoked by the stories of Nigerian women without reinscribing inaccurate or racist understandings of Muslim culture, and a sense of Western moral superiority. I will explore these dilemmas of describing and critiquing a social institution in a different cultural context from my own. I believe that there is a dialectical relationship between a researcher's privileged narrative and those of Nigerian women; therefore, I will attempt to constantly reflect on the tension inherent in privileged Western perspective while exposing the legal problematics of marriageable age, consent to marriage, and capacity for sexual autonomy for women in northern Nigeria. It is hoped that the challenge to my own cultural presuppositions will result in broadening the socio-legal horizons of questions about Nigerian marriage practices and facilitating genuine intercultural exchange.

Further, since there is no consensus across cultures of a threshold "tender" age below which there

22 That such an effort is necessary to develop a conversation between Muslims and non-Muslims is made evident in the work of Heiner Bielefeldt, "Universality of Human Rights in a Multi-Cultural World" (on file with author) and the writings of Bhikhu Parekh, "British Citizenship and Cultural Difference" and "The Rushdie Affair: Research Agenda for Political Philosophy"; Joseph Carens and Melissa Williams, "The Rights of Islamic Minorities in Liberal Democracies: The Rhetoric of Inclusion"; and Joseph Carens, "The Case of Fiji" in Carens, Problems of Political Community (course materials, University of Toronto, 1994-95).

23 It is also important to be aware of the limitations of using a translator for interviews and of the ways in which my identity as a young, white, Canadian, married woman and mother necessarily impacted on the dynamics of the conversations and thus the response of women to me. I will not fully explore these issues of cross cultural communication in the context of this chapter. See discussion in Chapter 1, Methodology and Narratives.
should be a bar to marriage, why should there be an attempt to enforce a common age of maturity for the purposes of marriage in international law? Second, is it problematic that girls do not have practical influence on their parents’ choice of husband? Or can the practice of arranged marriages, which is condoned through the principle of *ijbar* in Shariah law\(^\text{24}\), be defended on legal grounds? Third, is pre-pubescent sex within marriage inherently wrong? Leaving aside sexual relations involving physical assault or coercion, is it persuasive to argue that pre-pubescent girls are not capable of consenting to sex with their husband? In the next section I provide a brief description of the Nigerian and international legal standards relevant to legal age of marriage, consent to marriage and marital rape. I will then take up the issue of being an outside critic of this practice.

III. Nigerian and International Legal Contexts

(1) Legal Age of Marriage

The school of Islamic law which is applied in northern Nigeria is the Maliki school.\(^\text{25}\) Under this school, there is no minimum marriageable age. That is not to say that Islamic law necessarily encourages or prescribes early marriage for girls but rather that there is arguably

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\(^{24}\) *Ijbar* is the Islamic legal principle which holds that a father can conclude a marriage on behalf of his virgin daughter without her consent, regardless of her age. Should the father give her the choice between two or more suitors, he loses the right of *ijbar* and must accept her choice. This principle will be discussed in greater detail in the body of the chapter.

\(^{25}\) There are four schools of Islamic law: Maliki, Hanafi, Shafii, and Hanbali schools, each associated with a founding Islamic jurist from the 8\(^{th}\) century Arabia/Middle East.
little basis in Maliki law to prohibit this practice.\textsuperscript{26} The hadith (a story from the life of the Prophet Mohammed) which some people use to justify the marriage of prepubescent girls is the story of A'isha. The Prophet Mohammed is said to have married his “favourite wife” A'isha “when she was six years old. When she came to him, she was nine and still played with dolls, according to some historical reports”.\textsuperscript{27} It is this hadith which is the basis for the legality and the moral legitimacy of prepubescent marriages in Islam. At the same time, liberal Islamic scholars and lawyers as well as Muslim feminists within Nigeria argue that it is wrong to rely upon the story of A’isha for the legality of early marriage since it was more a betrothal than a marriage.\textsuperscript{28} There has been no decision of the Sharia courts in northern Nigeria which holds that the marriage of a prepubescent girl is contrary to Islamic personal law.

Along with the Islamic law in the north, there are statutory regimes at the local and state levels concerning the legality of the marriage of minors. The 1979 Nigerian Constitution delegates

\textsuperscript{26} With respect to marriage age and its legal regulation in the Gulf region, Munira Fakhro writes that “the shari’a does not specify an age limit. Historically, boys and girls entered marriage at an early age, and a minimum age for marriage has never been introduced in the Gulf, except in Kuwait where it is set at 15 years for both sexes. In the remaining Gulf states, it is left to the father or the nearest male relative to decide when to sign the marriage contract ... This practice [of child marriage] is still recognised as legally valid because of the absence of the minimum age of marriage.”: Munira Fakhro, “Gulf Women and Islamic Law” in Mai Yamani (ed.), Feminism and Islam: Legal and Literary Perspectives (New York: New York Univ. Press, 1996) 251 at 258-9.


\textsuperscript{28} Interview, Massoud Oredola, Kaduna, November 1, 1994.
jurisdiction over Islamic personal law to the states. The Sharia Court of Appeal Law, 1960 places the regulation of Muslim marriages within the power of the Sharia courts. Under the pre-independence Native Authority Law, 1954 of Northern Nigeria, a native authority could legislate in the area of "regulating child betrothals" and "regulating and controlling the movement of children and young females from or within the area". There were some attempts to use these powers in the late 1950s and early 1960s - the time of independence - to regulate early marriage with legislation on minimum age but the laws were largely ineffective. It is interesting that these laws are still on the books in Nigeria but people, even learned lawyers, are unaware of their existence or pessimistic about their utility. According to Madam Justice Pat Mahmood, a judge in the Kano State,

There are no legal restrictions on age of marriage. In 1988 or so in Kano State, marriageable age was fixed at sixteen for girls. However, very few people know about the law, and it is not enforced.

29 The Second Schedule to the Constitution lists the powers within the exclusive jurisdiction of the federal Legislature. At Item 60: "The formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto." [emphasis added]


31 See also section 242(2) of the 1979 Constitution which states that "the Sharia Court of Appeal shall be competent to decide-- (a) any question of Islamic personal law regarding marriage in accordance with the law, including a question relating to the validity or dissolution of such a marriage".

32 Cap.77 Laws of Northern Nigeria, 1963. This law seems to no longer be in force in its 1954 form.

33 Sections 38(17) and 38(18) Native Authority Law respectively. Native Authorities are now called Local Governments.

34 Native Authority (Declaration of Biu Native Marriage Law and Custom) Order 1964, s. 1(a): age fourteen; Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order 1959, s. 2(1)(a): age twelve; Native Authority (Declaration of Tiv Native Marriage Law and Custom) Order 1955, s. 2(a): age of puberty; and Native Authority (Declaration of Borgu Native Marriage Law and Custom) Order 1961, s. 2(1)(a): age thirteen.

Thus, there are conflicting legal provisions with respect to the legal age for the solemnization of Islamic marriages leaving an effective statutory vacuum. Indeed the conflicts emanate from tensions between formal and informal laws, between the statutory and religious and cultural normative orders. As Clifford Geertz would argue, local legal customs have trumped other sources of law with respect to marriage age.

Article 1 of the *U.N. Convention on the Rights of the Child* (1990), ratified by Nigeria in 1991, defines a child as “every human being below the age of eighteen years unless, under the law applicable, majority is attained earlier.” While the *Convention on the Elimination of All Forms of Discrimination Against Women* (the Women’s Convention), which Nigeria ratified in 1985, does not stipulate a minimum age of marriage, it states in Article 16(2), that “the betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”

The Preamble to the *Convention on Consent to Marriage, Minimum Age of Marriage and
Registration of Marriages (1962) also includes the goal of "eliminating completely child marriages and the betrothal of young girls before the age of puberty". Article 1 guarantees "free and full consent to marriage" and Article 2 directs that "States ... shall take legislative action to specify a minimum age for marriage". Nigeria has not signed this Convention. The UN Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1965), as well, states in Principle II that the "minimum age [for marriage]... shall not be less than fifteen years of age".

The African Charter on the Rights and Welfare of the Child, which is drafted but not yet in force, states in Article 21(2) that "[c]hild marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 and make registration of all marriages in an official registry compulsory."

This is an indication of some regional consensus that child marriage is a practice contrary to the

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Anti-Slavery International, a London-based anti-slavery organization, has recently argued that child marriage is "an effective way of ensuring control over [a young bride's] productive and reproductive labor." In a submission to the U.N. Committee on the Rights of the Child, it cited Article 2 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which states that,

States Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages.


42 This Convention is open for signatures and ratification. It has not been signed by Nigeria but it has been signed by a number of countries and ratified by five: Burkino Faso, Cape Verde, Mauritius, Seychelles, and Uganda.
rights of children. The regional and international 'consensus' reflected in international doctrine is in direct conflict with the practice and law in action in northern Nigeria.

(2) Consent to Marriage

The issue of consent to marriage was dealt with by the Sharia court in northern Nigeria in the Yakubu v. Paiko decision. The case concerned the principle of *ijbar*. The court held that according to this principle, "a father has a right [under the Maliki school of Islamic law] to compel his virgin daughter into a marriage without her consent and even if she has attained puberty, but if he consults her it would be desirable."\(^{43}\) I was told by Islamic lawyers and community leaders that a daughter has no right to protest her father's choice.\(^{44}\) Therefore, the law provides no means for a young woman to object to her father's choice of husband. However, if a father gives his daughter a choice between two suitors, then he loses his power of *ijbar* and her consent is required in that case.\(^{45}\)

There is also the concept of repudiation of a marriage which is concluded without a woman's consent, once she has reached puberty. This is an option which some reformist Islamic legal scholars argue is implicit in Islamic law. Unfortunately, this more progressive interpretation of

\(^{43}\) *Yakubu v. Paiko* (1985), 1 *Sharia Law Reports* 126 (C.A. Kaduna, Nigeria) at p. 137. The editor of the Law Reports noted that puberty “is generally accepted to be 14 years”.

\(^{44}\) Interview, Chief of Gangara, near Zaria, October 29, 1994.

\(^{45}\) Historically in the Hanafi school of Islamic law, Mona Siddiqui writes, women are free to contract in their own name. In the contract of marriage "the two parties to the contract, however, are not necessarily the two people bound by the contract since the groom may contract with the girl's father or closest guardian. In this way, the woman may be viewed as a third party to the contract.": Mona Siddiqui, "Law and the Desire for Social Control: An Insight into the Hanafi Concept of Kafa'a With Reference to the Fatawa 'Alamgiri (1664-1672)" in Mai Yarnani supra note 26, 49 at 52.
Islamic law does not carry any weight with the judiciary in Nigeria. In fact, when I asked about what would happen if a girl wanted to exercise the option to repudiate her marriage, I was told that the case would have no chance of success. In the Hanafi school, as well, “if the girl is a minor at the time her guardian enters her into marriage, on reaching maturity she has the option of rejecting the contract, known in legal terms as khiyar al-bulugh. However, there is a conflict within the Hanafi tradition as to whether the woman retains this right if the guardian was her father or grandfather.”

Some states have passed laws to regulate forced marriage. For example, a Kano State law makes it an offence for a parent or guardian to give out his daughter or ward in marriage unless the daughter or ward has consented to the marriage. These laws, as in the case with the laws on minimum age of marriage, are not enforced, nor is there any popular awareness of them.

At the local government level, I was told that two governments have drafted by-laws requiring the express permission of the local authorities and the school for a parent to remove their child from school to be married. It was understood by the drafter of this by-law that it was aimed at encouraging parents to educate their daughters through secondary school before marrying them.

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46 Interview, Yahaya Mahmood, retired Chief Magistrate for the Kaduna High Court of Justice, Kaduna, November 2, 1994.

47 Mona Siddiqui, supra note 26, 49 at 52-3.


49 The punishment for violation of this ordinance is N500. Interview with Yahaya Mahmood, November 2, 1994, Kaduna. These by-laws were not yet passed into law in 1994 and, therefore, were not being enforced.
out. Contrary to the domestic laws, international treaties signed by Nigeria do guarantee men and women the right to enter into marriages only with their full and free consent. The International Covenant on Civil and Political Rights (ICCPR), ratified by Nigeria in 1993, in Article 23 requires states parties to “respect and ensure” that “[n]o marriage shall be entered into without the free and full consent of the intending spouses.”\(^{50}\) The Women’s Convention, ratified by Nigeria in 1985, guarantees women the same right as men to enter into marriage, to freely choose a spouse, and free and full consent to marriage (Article 16 (1) a-b). Article 1 of the UN Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages (1962)\(^{51}\) and the UN Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1965) and also guarantee spouses “free and full consent to marriage”\(^{52}\).

(3) Rape in Marriage

The Penal Code of northern Nigeria considers pre-pubescent girls incapable of consenting to sexual intercourse and yet there is no prohibition on marriage for girls before puberty. The crime of statutory rape is defined as sexual intercourse with a girl before the age of puberty (14) regardless of her marital status.\(^{53}\) There is a marital rape exemption still in force but it applies

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51 Nigeria has not signed this Convention.


53 Section 282 of the Penal Code Cap. 89, supra note 20.
only if a wife "has attained to puberty." Historically, it was understood that girls may be betrothed and married at a very young age but that sexual relations would not begin until the girls were mature, or in other words had reached puberty. I was told by women's rights activists in Nigeria that "men are no longer 'patient'" and therefore the practice of early marriage has different implications in contemporary Nigerian society. For example, with girls being married so young, and becoming pregnant after only three menstrual cycles, their bodies are often not mature enough to give birth without serious medical complications. 

The Women’s Convention specifically requires that states undertake, among other things, "to repeal all national penal provisions which constitute discrimination against women" and "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women".

The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) defined gender-based violence in its recent General Recommendation No. 19 adopted in January, 1992 as "a form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men". It also argues that the definition of discrimination in article 1 of the Convention includes gender-based violence. The Recommendation goes on to

54 Section 282(2) of the Penal Code, supra note 20.

55 One such implication of prolonged obstructed labour is obstetric fistulae, either vesico vaginal fistulae (VVF) whereby a hole in the bladder causes urine to seep uncontrollably from the vagina, or rectal fistulae (RVF) whereby faeces is leaked through the vagina. The majority of women I interviewed had experienced VVF.

56 Convention on the Elimination of All Forms of Discrimination Against Women, Articles 2(g) and (f) respectively, supra note 39.
define gender-based violence as "violence against a woman because she is a woman or which affects women disproportionately. It includes physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivation of liberty."57

Nigeria ratified the International Covenant on Civil and Political Rights (ICCPR) in 1993. The Covenant states that all the rights contained therein shall be protected without discrimination on the basis of sex and there shall be equality before the law and equal protection of the law (Articles 3 and 26 respectively). The ICCPR guarantees in Article 9.1 that "[e]veryone has the right to liberty and security of [their] person ... No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."58 This right requires that direct state action not interfere with an individual's pursuit of liberty and also that the state ought not limit an individual's liberty through legislative action. It can be argued that the right to liberty and security of the person is violated by laws which restrict women's control over their sexuality, by denying them the right to consent to sex.59

The United Nations Special Rapporteur on violence against women concludes that the non-


58 ICCPR, supra note 50.

59 Rebecca Cook argues that the right to liberty and security of the person has been found to be violated by analogous domestic laws which restrict women's reproductive choice, or which give parents the power to veto the personal choices of mature or emancipated minors who seek abortions alluding to: for example, the Supreme Court of Canada found this right to be violated by the restrictive criminal abortion law: Morgentaler v. R., (1988) 44 D.L.R. 4th 385 (S.C.C.) (where two judges used the liberty argument); and in France parents' attempts to enjoin their minor daughter from having an abortion were rejected in Judgment of Nov. 8. 1982, Tribunal pour les Enfants d'Evry, 15 D.S. Jur. 218 (1983) and Gillick v. West Norfolk and Wisbech Area Health Authority, [1985] 3 All E.R. 402 (H.L.), cited in R. Cook, "International Protection of Women's Reproductive Rights" (1992) 24 New York Univ. J. Int'l L. & Pol. 645 at pp. 696-699.
discrimination clauses in the ICCPR, read together with Articles 6, 9.1 and 26, "means that the Covenant may be construed as covering the issue of gender-based violence." The Expert Group Meeting on Violence against Women (under the auspices of the UN Division for the Advancement for Women) has suggested that Article 17 of the ICCPR be reconceptualized as the right to "violence-free private and family life". Thus, it can be argued that the fact that the Penal Code fails to protect women from rape by their husbands, a clear violation of women's liberty and security of the person, amounts to interference by the Nigerian government with the civil and political rights of married women.

The Human Rights Committee has issued a General Comment explaining the duties of state parties to the ICCPR. Paragraph 2 of Article 2 reads as follows: “each State Party to the present Covenant undertakes to take necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” The Committee wrote that, "the obligation under the Covenant is not confined to the respect of human rights, but the States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States...

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62 The Inter-American Court of Human Rights found the Honduran government responsible for failing to respond effectively to the actions of death squads operating with impunity in the country. The government was found responsible for failing to investigate and prosecute violations of the rights protected in the American Convention on Human Rights: Velazquez-Rodriguez, 28 I.L.M. 294 (1989).
parties to enable individuals to enjoy these rights." CEDAW also emphasized in its General Recommendation 19 that,

> under general international law and specific human rights covenants, States may ... be responsible for private acts if they fail to act with due diligence to prevent violations of rights, to investigate and punish acts of violence, and for providing compensation.  

The *African Charter on Human and Peoples' Rights*, signed by Nigeria, includes non-discrimination on the basis of sex in Article 2. In Article 18(3) the Charter states that "the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and child as stipulated in international declarations and Conventions." One commentator has noted that the effect of this Article is that it "establishes binding obligations for states parties, ... [and] transform[s] the non-binding declaratory character of such declarations into legally binding instruments. In its text, the African Charter incorporates as law the normally moral persuasive value of international declarations that are concerned with the rights of women." The African Charter also establishes in Article 18(2) state obligation to

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63 Human Rights Committee General Comment 3(13) CCPR/C/21/Rev.1 (1989). The UN Special Rapporteur on violence against women and a number of international human rights scholars have argued that States can be held accountable in international law for violence against women in the family, including rape. The Special Rapporteur concludes at paragraph 72 of her first report that "[s]tates are under a positive duty to prevent, investigate and punish crimes associated with violence against women". And "[s]tate inaction in situations of violence against women is one of the major factors that allows such violence to continue." R. Coomaraswamy, *supra* note 60 at paragraphs 72 and 51 respectively. See also paragraphs 99-107.

64 *Human Rights Committee, supra* at para. 9. The Declaration on Violence Against Women is also important. The Declaration provides, among other things, in Article 2(a) that states must prohibit marital rape. The Declaration "is a comprehensive statement of international standards with regard to the protection of women from violence. Although the Declaration is not legally binding, it sets out international norms which States have recognized as being fundamental in the struggle to eliminate all forms of violence against women.": Radhika Coomaraswamy, *supra* note 60 at para. 95.

protect the "physical and moral health" of the family and provides that "the family is the custodian of moral and traditional values recognized by the community."\textsuperscript{66}

The international law in this area, as I argued in Chapter 2, is characterized by a mix of rigid doctrine and more flexible principles, such as the state's responsibility to exercise due diligence in preventing and protecting international human rights and the margin of appreciation doctrine. To date, we have not seen deference being paid by international treaty bodies to national, religious and cultural systems with respect to marriageable age under a margin or appreciation doctrine. The legal practice in Nigeria and elsewhere stands in contrast. Should the national and international be brought together, as I argue in the following discussion about Nigeria, it requires more than an invocation of a uniform age of marriage.

IV. My Narrative Intervention: the Intuitive Challenge

Marriage at an early age is often considered by women to be the will of Allah, a dictate of Islam. Religious leaders and parents tell women "the Qur'an, Islam says you must be married. According to religion it is at twelve years old." In the words of Salamata Sani, a twenty-five year old woman from Musawa, Katsina State:

I was married twelve years old. We met as young boy and girl. God said I would marry him. I didn't have to tell my parents. The boy was visiting my parents... Eleven months after the marriage I started menstruation. Sexual intercourse started in the third month [after being married]. He had to beat me to me to agree to sex-- broken bones.

After her second pregnancy, Salamata Sani developed incontinence. She stayed for eight days in hospital and then returned to her village. A month after the birth her husband told her she was "spoiled". When I met her in Zaria, Salamata was selling groundnut cakes to earn money for a second VVF repair operation: "If God says I will have enough, I will have an operation. Now money is to buy soap.

As Salamata's words illustrate, the discussion of early marriage is associated necessarily with religious discourse in Nigeria. I was frequently told that early marriage "is a very sensitive issue in the north" and that criticisms of the practice are seen as attacks on Muslim religion and culture. Because early marriage is a factor in the causation of VVF, the issue of VVF also is

68 Interview, Salamata Sani, VVF Home, Zaria, October 30, 1994.
69 Ibid. The forty day period after birth is significant in Muslim Hausa tradition.
70 Interview, Dr. Mairo U. Mandara, ObGyn, Ahmadu Bello Teaching Hospital, Zaria, October 31, 1994.
71 Interview, Mairo V. Bello, Adolescent Health & Information Project, Kano, October 27, 1994.
imbedded in the religious politics in northern Nigeria. Whether VVF should be dealt with as a health priority is a matter of some controversy. 72

It was quite arresting to walk into the first room of patients at the VVF hostel—all my senses were confronted. Women were lying on plastic-covered mattresses, flies swarming. The smell of urine (of course) present. A small baby lay on her mother’s bed. They greeted us, some without being able to move. In comparison to the ample women who escorted us, these women seemed lifeless and diminutive... I felt like I had stepped back in time and stood as a colonial missionary in their midst. Their generous treatment was surely in part [only] because they thought we could help with supplies or money or knowledge. (Personal journal entry, October 26, 1994)

It is easy to react with indignation when confronted with images of young women suffering from VVF or when hearing the stories of scores of women who had their childhood and their education cut short for the sake of entering marriage. My intuitive response was often critical of the way in which girls and post-pubescent young women were “married out” and critical of the severe social and health consequences for women of early and frequent pregnancy and childbearing:

 Girls have their childhood aborted and their adulthood stunted. Sex in adolescence is not protected experimentation in erotic pleasure but rather sex for procreation. Women do very little beyond making babies from shortly after they start menstruating until they are too old, divorced or weak. (Journal entry Nov. 11, 1994)

An intuitive response such as this, however, can only be the beginning of any intervention. My own reaction is determined in large measure by my own cultural, racial, religious and class background and should not be used as a measure of cross-cultural judgement. To do so would

72 Amino Sambo, Chair of the National Task Force on VVF, explained that “people think you are treading on toes and [query] why capitalizing on early marriage?” Interview, Kano, October 26, 1994.
obviously impose my own normative framework onto the practice under consideration. Further, while Human Rights Watch was invited by indigenous women’s organizations to study and draw attention to the issue of early marriage, this does not imply that my role as a human rights researcher is unaffected by global tensions and divisions. The history of white judgement of practices in colonized territories is literally the ground on which I stand. The global divisions of labour and knowledge, further, mean that a report published by Human Rights Watch would receive more attention and legitimacy than a report produced by the Federation of Muslim Women’s Associations in Nigeria (FOMWAN). These relationships structure my location. Therefore, I have to work with a full awareness of the limits and challenges of intuitive reactions to testimonies.

One has to be cautious not to overemphasize the religious dimensions of early marriage especially in the context of the all too common “identification of the West with civilization and Islam with barbarism”. Marnia Lazreg argues that both feminist scholars and traditional social scientists writing on North Africa privilege a “religious paradigm” which gives Islam overarching explanatory power. Lazreg notes that North African women’s feminist project

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73 For an interesting collection of essays on the role of Western women in the colonies and imperialism that analyses “both complicity and resistance by Western women to the cultural values dominant during an imperialist era [and that] offers the reader many important insights into the workings of race and class ideologies within imperialism”, see Nupur Chaudhuri and Margaret Strobel (eds.) Western Women and Imperialism: Complicity and Resistance (Bloomington and Indianapolis: Indiana Univ. Press, 1992) at 5.

74 Carens and Williams, supra note 22 at 12.

"unfolds within an external frame of reference and according to equally external standards". Lazreg identifies three problematic assumptions underlying the religious paradigm which are useful to highlight: first, that Islam is “a self-contained and flawed belief system impervious to change”; second, that Islamic society is in decline; and finally, that “Islam cannot produce adequate, scientific knowledge of itself, since the political conditions of Islamic societies preclude critical, autonomous scholarship”. This third assumption is used to justify the need for external involvement in Muslim communities.

Within such orientalist generalizations about "Islam", or the Islamic religion, Muslim women have a specific location. “From a western vantage point, women in the Middle East are often pitied as the victims of an especially oppressive culture, generally equated with Islamic religion.” As Lazreg rightly argues, to reduce women living in Algeria or women in northern Nigeria to a monolithic or homogenous label such as "Islamic women" is to deprive them "of self-presence, of being", voice, of cultural history and certainly of agency for change. This solipsism, which can be a failing of academic feminism, also implies that it is an oxymoron to be an "Islamic feminist", a Muslim feminist in Nigeria or in Algeria, for to be a feminist entails a disassociation from an inescapably patriarchal religion and culture.80

76 Ibid. at 326.
77 Ibid. at 328.
78 Arlene Elowe MacLeod, “Hegemonic Relations and Gender Resistance: The New Veiling as Accommodating Protest in Cairo” (1992) 17(3) SIGNS 533 at 535.
79 Lazreg, supra note 75 at 330.
80 Of course there is a rich tradition of Muslim feminists working for an interpretation of Islam conducive with respect for women. See Leila Ahmed, Women and Gender in Islam: Historical Roots of a Modern Debate (Princeton: Princeton Univ. Press, 1995); Fatima Mernissi, Beyond the Veil: Male-Female Dynamics in Modern
Lazreg's insights warn us against certain tendencies when approaching an issue in a Muslim community and help provide critical distance from an intuitive response to marriage practices in northern Nigeria. In much of the social science literature, my own work, and anecdotal commentary by non-Muslims on women in northern Nigeria you can find examples of the predominance of the religious paradigm as described by Lazreg with all the consequential pitfalls. Islam is the dominant structure through which women are seen to be oppressed, rather than one of a series of important political structures impacting on women's lives such as the global economy, military governance, class politics and other cultural factors. Thus, we have to be rigorous in our specificity when using categories of inquiry. In this spirit, I will attempt to clarify what aspects of the practice of early marriage are in fact Islamic, those which are justified using Islamic discourse, and those which are not grounded in the religion at all.

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82 It is interesting that the tendency to see Hausa women as primarily oppressed by religion is very common among other ethnic groups in Nigeria as well. For example, the minority Christian population in the north pronounce on the way in which Muslim men treat their women, consider it based in religion and see it as immoral.

83 There is 'us and them' working on every level: religion, class, tribe, education, literacy, age, sex. (Journal entry, October 30, 1994) While religion is the predominant way in which difference is constructed in the Nigeria, literacy and education differences, rural/ urban splits, class divides etc. also have explanatory power for many people.
As well, Islam as practised in northern Nigeria is not seen as one version of a religion, an orthodox version, but rather as "Islam" per se. Mention is not made of the variety of alternative translations and interpretations which have been given to certain verses in the Qur'an. For example, the verse in the Qur'an which is often cited as justifying the beating of wives for disobeying their husband has been translated in more liberal readings of the text as "talk to them suavely" rather than "to strike them". Further, the Prophet Mohammed, it is said in a hadith, forbade the beating of any women. Islamic feminists have also argued that this verse was meant as a purely symbolic gesture. Yet to gloss over these complexities leaves the impression that Islam condones, even encourages, men to beat their wives and that there is only one Islamic reading of this verse. In this way, Muslim women are effectively denied the possibility of reshaping and re-imagining the teachings of Islam for them.

In her discussion of the politics of "a voluntary women's movement to abandon Western clothes in favour of some form of covered Islamic dress" in Cairo, Arlene Elowe MacLeod, on the other hand, attempts to complicate and historicize women's agency in a particular Muslim political community:

My interpretation of the politics of this dress centers on its expression of a contradictory message of both protest and accommodation... For the new veiling in Cairo takes place not as a remnant of traditional culture or as a reactionary

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84 Cited by Callaway and Creevey, for example, supra note 7 at 30. Carens and Williams note that the veil in colonial times was the symbol of subordination of women in Muslim societies just as female genital mutilation now plays a "symbolic and political role" in the presumed conflict of Western and Islamic values: Carens and Williams, supra note 22 at 15 and 12. All of these issues have contested meanings which must be explored.

85 Section 55(1) of the Penal Code also exempts from criminal responsibility violence used to "correct" the behaviour of children, servants, apprentices and wives so long as it "does not amount to the infliction of grievous hurt": supra note 20.
return to traditional patterns, but as a form of hegemonic politics in a modernizing environment, making its meaning relevant to women in other settings as well.\textsuperscript{86}

Similarly in the Nigerian case study, women's defence of early marriage or reticence to criticize the practice publicly cannot be understood solely as acquiescence in an oppressive, traditional religion. Rather, the negotiations and politics of gender roles take place at an extremely complicated historical moment in Nigeria.

Not enough effort is made by authors and critics to distinguish between Islamic and Hausa ethnic traditions and to see the ways they are intertwined. In their view, young women are taken from Hausa culture and "socialized into Islamic culture" rather than a syncretic blend of both. I would argue that one ought to explore the aspects of Hausa culture that are equally patriarchal and dovetail with aspects of orthodox Islam. For example, it is part of Hausa culture that girls are brought up to be very shy and deferential; kunya is "the Hausa behavioural and attitudinal constellation expressed in modesty, shyness, disguise and secrecy"\textsuperscript{87} especially as to pregnancy and childbirth. Modesty for women, therefore, is not unique to Muslim culture.\textsuperscript{88} The two discourses interact to construct women's identity, autonomy and choice.\textsuperscript{89}

\textsuperscript{86} MacLeod, supra note 78 at 536.


\textsuperscript{88} The place of modesty for women within the Islamic religion has also been open to various readings. For a good discussion of this issue see Helen Watson, "Women and the veil: personal responses to global process" in Akbar S. Ahmed and Hastings Donnan (eds.) Islam, Globalization and Postmodernity (London: Routledge, 1994) 141 at 144-147.

\textsuperscript{89} Coles and Mack's discussion of Hausa cultural norms and Islamic prescriptions is instructive: "Hausa women do not follow Islamic norms in their behaviour any more than do Hausa men. A discrepancy between norms and actual behaviour is particularly clear in women's observance of seclusion, in procedures for divorce, and in child custody." "Women in Twentieth Century Hausa Society" in Coles and Mack (eds.), supra note 81,
For some people, early marriage is only based in religion while for others it has no religious basis; each perspective is uni-dimensional and therefore equally problematic. Many non-Muslims and orthodox Mallams see the practice as deeply rooted in the teachings of Islam. Traditional religious leaders in northern Nigeria are preaching to the (illiterate) population that the teachings of the Qur’an and the Prophet dictate that you are to marry your daughter before she reaches puberty. Nigerian Muslim feminists and liberal Islamic scholars respond that early marriage is an abuse of Islamic law and doctrine and the result of confusion with Hausa cultural edicts. Any intervention like my own, therefore, must be attendant to these conflicting interpretations of religious and ethnic prescriptions. As one Nigerian doctor eloquently described the problem of early marriage:

*We have a cultural issue. [People] drink religion and mix it with culture and make it all religion— but it is not religion.*

V. **Weaving Narratives: Defences of Early Marriage**

As my methodology implies, an understanding of early marriage is required according to the presuppositions at work in northern Nigeria. The external critic has to try to expose the Nigerian values just as she has to expose her own non-Nigerian values. In this section, I present the bases offered to defend, or least not reform, the practice of early marriage. The defence of early

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3 at 9.

90 Interview, Mairo Bello, Adolescent Health and Information Project, Kano, October 27, 1994.

91 Interview, Dr. Sulaiman Sadiq, Kano, October 27, 1994.

marriage is necessarily grounded in indigenous cultural and religious beliefs: narratives from Islamic *hadith* and Hausa cultural tradition as well as contemporary women’s narratives can be interwoven to support marriage practices in northern Nigeria. Since some of the reasons explained here may be counter-intuitive for the Western reader, I let this section stand so that the reader may pause here before proceeding with the reasons offered to change early marriage. Early marriage is defined for our purposes as a pre-pubescent union to which a girl does not necessarily give her consent. It is important to recall that in rural northern Nigeria, where three-quarters of the northern population lives, a very high proportion of girls are married by the age of fourteen. The community practice and tradition favour marrying girls before they see their menses.

Morality in any culture is closely tied to the community’s religious canons and doctrines. This is equally true in Hausa culture where the overwhelming majority of people are Muslim. Many individual Muslims consider their religion to be a “complete code of life” as opposed to a more Western conception of religion as one sphere of personal ethics.93 The religious leadership in the north plays an important role in social policy, education, and moral instruction. The state is not secular in so far as the government appoints Districts Heads and Emirs in collaboration with the Sultan; there is a close relationship between the state Governors and the Islamic leaders.94

Many people in northern Nigeria, including some influential religious leaders, believe that it is

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94 Interview, Yahaya Mahmood, Kaduna, November 2, 1994.
the will of Allah and the teaching of the Prophet Mohammed that girls be married before they see their menses:

Some people in the North believe that they are under a religious obligation to marry girls young, at thirteen or fourteen. One cannot confront someone who has been a Muslim for generations [and tell him] that he is wrong. Federation of Muslim Women's Associations of Nigeria [FOMWAN] members ... emphasize the teachings of the Islamic religion and the most important issues of Islam...

A lot of human rights groups make mistakes on [the issue of early marriage], take things for granted, and interpret as if happening in the U.S. This causes a defensive reaction... People feel [the groups are] just coming to attack his culture, religion and beliefs. Should come rather with knowledge of the Qur'an. A lot of human rights groups are seen as offensive in my community.95

The "Islamic source" for early marriage stems from an Hadith from the life of the Prophet and his marriage to A'isha.96 Despite debate about the meaning of maturity and about A'isha's actual age at puberty,97 this hadith is the basis of the lawfulness of marriage of minors in the Islamic religious law and its moral legitimacy for Muslims. Further, the expectations and development of a child in Hausa culture are so very different from our own that we ought not assume that a thirteen year old girl in Zaria is incapable of the level of maturity required for marriage nor incapable of consenting to sex.

While there is no minimum marriageable age under Islamic law in Nigeria, there is a cultural belief and tradition that sexual intercourse in marriage is not to take place until the bride

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95 Interview, Dr. Mairo U. Mandara, ObGyn, Ahmadu Bello University Teaching Hospital, Zaria, October 31, 1994. Dr. Mandara is a FOMWAN member and wrote her graduate thesis on VVF. She has given talks on VVF in Muslim settings.

96 Walther, supra note 27 at 58.

97 There is general consensus among a majority of Islamic scholars that A'isha was married very young.
reaches puberty. The Penal Code of northern Nigeria does, in fact, consider pre-pubescent girls to be incapable of consenting to sexual intercourse. While it is widely believed among the Hausa in northern Nigeria that girls should not start menstruation in school or at their parents’ house but rather in their husband’s house, this need not result in sex. Early marriage is seen as a mechanism to safeguard respectability and honour, regulate unwanted pregnancies out of wedlock, and provide an opportunity for spouses to bond (all highly valued in Muslim Hausa culture); it is not seen as a way of guaranteeing sexual access of men to young women.

The principle of *ijbar* found in Shariah law justifies paternal decision-making in marriage.98 If, however, a father gives his daughter a choice between two suitors, then he loses his power of *ijbar* and her consent is required in that case. Islamic lawyers and scholars reiterated that a daughter has no right to protest her father’s choice. As the Chief of the village of Gangara near Zaria stated “the girl has no say if her parents say she is ready to be married.”99 It is an assumption of Muslim family law that fathers “would not have sinister motives in arranging their [children’s] marriages”.100

Should a marriage be contracted by someone other than the girl’s father, grandfather, or guardian, or contracted fraudulently or negligently, there exists the “option of puberty”: the

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98 *Yakubu v. Paiko* (1985), 1 *Shari’a Law Reports* 126 (C.A. Kaduna, Nigeria), *supra* note 43 at 137. The editor of the Law Reports inserted that puberty “is generally accepted to be 14 years”.

99 Interview, Chief of Gangara, near Zaria, October 29, 1994.

*khiyar al-bulugh* principle.\(^{101}\) By this principle, a daughter may repudiate, upon reaching puberty, a marriage which is concluded without her consent. Some liberal Islamic legal scholars argue this is implicit in Islamic law generally and in Maliki law in Nigeria in particular.\(^{102}\) A girl's interests are safeguarded first by her father and then, if necessary, by the "option of puberty".

Just as parents in North America and Europe make decisions on behalf of their minor children which are considered both socially legitimate and lawful, so too do parents in northern Nigeria. Parents in Canada have the right to make decisions about their child's education, medical treatment, moral instruction, social interactions, and diet -- all being decisions which profoundly impact on their child's adult life and choices. In contemporary liberal democracies it is accepted that children do not have the capacity to make certain choices and parents are deemed their legal guardians and assumed to make decisions in the best interests of children. The state only interferes in these parental choices when the child's safety or health is seriously at risk. The state is then considered to be standing *in parentus locus*, or in the shoes of the parent. In northern Nigerian Muslim culture, the choice of spouse for a child is analogous to those choices made by parents in other cultural contexts and ought not to carry a different moral value.

In addition to the Islamic concepts of family honour, respect and *ijbar*, there are relevant Hausa

\(^{101}\) Esposito, *ibid.* at 17.

cultural beliefs. Hausa marriages in northern Nigeria generally represent the union of two families rather than the union of two individuals. Families establish or rekindle ties through marriage of their children. In some areas of the country, spouses will be distant relations while in other tribes the couple will not be related by blood. A family’s status may be intertwined with the appropriate marriage of their daughters to well-respected, older men. Girls and women view their role in such arrangements as honourable and desirable. As Nkiru Nzegwu writes in her fictitious nineteenth century intercultural dialogue, women view marriage as an affirming and powerful role:

As umu ada (daughters of the lineage) we embody and preserve the female principle in the families of our lineage. That is why our primary home is our natal home. We view ourselves as “strangers” in our marital home. We agreed to live with “strangers” to assist them in the miracle of continuity; of bringing new life to the lineage, and in nurturing the spirit entities that have chosen to incarnate in their family.

Our roles as wives and mothers are vital to the continuity of the community. Our marital families know this and reciprocate by always being there for our natal families. We marry the entire extended family not just one individual male-member of the family.

Reading the Hausa folktale of ‘Yal Baturiya, Connie Stephens also argues that, “‘Yal Baturiya’s story ... juxtaposes sexual oppression with other forms of cosmic disequilibrium and social oppression.”


104 People “resuscitate relationships between families that used to exist centuries ago.”: Interview, Sani Hassan Salihu, community health worker, Ahmadu Bello Univ. Teaching Hospital, Zaria, October 29, 1994.

105 Nkiru Nzegwu, “Gender Equality in a Dual-Sex System: the Case of Onitsha” (1994) 7 Cdn. J. of Law and Jurisprudence 73 at 79-80. The “case of Onitsha” derives from the Igbo and Yoruba tribes which are located in southern and eastern Nigeria. The view expressed of marriage and women’s roles however is similar to the Hausa.
Tyranny, she suggests, has no rightful place in Hausa culture. To be human is to acknowledge the equality and interdependence of diverse elements of the Hausa milieu: nature and humanity, rich and poor, powerful and weak, male and female. Man and women may be as distinct as man and animal, king and subject, but each plays an independent role vital to the other.  

Many accounts detail how girls are groomed for the responsibilities of marriage and therefore implicitly support the view that girls may be ready at an earlier age than in other cultural contexts. We took testimonies from many girls who said they were happy about their marriage and only experienced hardship when they developed VVF after a prolonged obstructed labour.

In Connie Stephens’ exploration of four Hausa narratives she concludes that,

...the four heroines act out the miracles of reproduction and resurrection in a specific context in these *tatsuniyoyi* [folktale narratives]. Their physical identities, the spatial movements they make, the actions they perform, and the resolution of conflicts combine to depict Hausa wives as separate and often superior partners in their marriages...men shape women in important ways, but without women the culture they often seem to dominate would die. *Tatsuniya* performers have long communicated this message in image form.

Therefore, it can be argued that arranged marriages are not considered wrong according to the conception of marriage in northern Nigeria, marriage being a (not romanticized) union of families as much as a union of individuals. The idea of marriage which permeates popular North American culture is that of two consenting adults, experiencing romantic love and choosing to be wed; nonetheless, choice and consent are constrained. Families invariably attempt to affect

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107 Interview, Dr. Clara Ejembi, Zaria, October 28, 1994.

108 Interviews, Rukaya Lawan, Murtala Mohammed Hospital, Kano, October 27, 1994 and Ladida Al’Hassan, Gangara village, October 29, 1994.

their members' choices about life partners\textsuperscript{110} all the while considering it inappropriate for parents to choose a spouse outright for their child. Further, like women in northern Nigeria, North American women are also socialized into a dominant heterosexual model for relationships. While the institution of marriage in a particular Western context is conceived of differently, neither model seems to have produced greater longevity of relationships. Indeed in both settings, divorce rates are extremely high.\textsuperscript{111} The cultural values and rights associated with marriage in North America ought not be transferred to northern Nigeria:

\begin{quote}
We have noted that women's liberation movements, with their history traced to Western countries, have no relevance in Muslim communities, as Allah has granted Muslim women all the rights they need, be they political, legal, economic, or social. However, we are not happy over the attitudes of Muslim men who ignore Islamic injunctions with respect to women's rights. We therefore call on both Muslim men and women to join hands together to allow women to exercise the rights Islam has granted them, as contained in the Qur'an and Sunna, in order to save society from looking elsewhere for salvation.\textsuperscript{112}
\end{quote}

\textbf{VI. Conflicting Narratives: Criticisms of Early Marriage}

The Islamic justification for early marriage has been much debated and thus must be seen as narrative open to many, even conflicting, interpretations. There is a lack of consensus amongst Islamic jurists regarding the meaning of the hadith about A'isha and whether it, in fact, condones

\begin{quote}
\textsuperscript{110} Most people have experienced family pressure not to date someone from a different ethnic background or religion or class, let alone pressure not to date someone from the same sex.

\textsuperscript{111} See Callaway and Creevey, supra note 7, at 35-37. See also Anastasia J. Gage-Brandon, "The Polygyny-Divorce Relationship: A Case Study of Nigeria" (1992) 54 \textit{J. of Marriage and the Family} 285.

\textsuperscript{112} Communication of the International Islamic Conference on Women 4-8 Apr.1985.
\end{quote}
the marriage of minor girls. Some liberal Islamic scholars, including Massoud Oredola in Nigeria, argue that A'isha was in her twenties when she moved to the Prophet's house. Further lack of agreement stems from the various translations and interpretations which have been given to the word *nikah* found in the Qur'an (which is the time at which marriage is to occur). Some hold that *nikah* means physical maturity while others argue that it means maturity of intellect and an ability to handle his or her own property and affairs. It seems that the interpretation of *nikah* has evolved in a gendered manner in northern Nigeria where women are expected to wed before they reach puberty or at puberty, while men are not expected to wed until they are financially secure.

Many have argued that the narrative of A'isha from the life of the Prophet is really a betrothal and not a marriage and thus cannot be used to justify contemporary marriages of prepubescent girls. Therefore, contrary to the argument that A'isha’s story permits or encourages pious Muslims to marry out their preadolescent daughters, the hadith has contested and conflicting meanings.

Islam is not a static religion nor is Sharia a static law. Both evolve with social custom.

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115 Qur’an, 4:6 states as follows: “And test (and try) the orphans until they are of marriageable age. If you find them of sound judgement, then hand over their property to them”. Contemporary Translation by Ahmed Ali, *Al-Qur’an*, at 74.

116 Helen Watson writes that “[t]he desirable state of *nikah* (narrowly translated as marriage) and the prohibited state of *zina* (unlawful intercourse) are two fundamental categories of interaction between men and women... these categories define and reinforce the boundary between the sexes”: *supra* note 88, 141 at 143.
Commentators have noted that Sharia law has adapted to the modern capital economy, for example, but has shown less flexibility in areas of family law. Just as Western perceptions of childhood have changed since the Victorian vision of children as miniature adults, so too have the Muslim perceptions of childhood changed since the time of the Prophet. Women’s life expectancy and the expectations of women, too, have changed radically and continue to change.

As well, the “option of puberty” for girls in Islamic law which is to mediate against her lack of consent to marriage arrangements (ijbar) carries no weight with the judiciary in Nigeria. There are no reported cases of a girl seeking judicial dissolution of her marriage on this ground nor did any woman I interviewed speak of this option to repudiate her marriage at puberty. In fact, when I asked lawyers about what would happen if a girl wanted to exercise the option to repudiate her marriage or if she wanted to complain of marital rape, I was told that the case would go nowhere.117 This so-called option therefore cannot be seen as a means to safeguard girls’ interests.

Likewise, while in theory Hausa marriages are to be a union of two families, we heard much more about a man who “saw her, liked her” and would wed her. Men can choose a wife or suggest someone to their parents but girls cannot similarly choose a spouse. On a liberal equality analysis, unlike boys in Nigerian society who can effect some choice in marriage matters, girls unfairly have no means through which to exercise decision-making.

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117 Interview, Yahaya Mahmood, retired Chief Magistrate for the Kaduna High Court of Justice, Kaduna, November 2, 1994.
High moral value is placed on education in the Islamic religion and the Hausa Muslim culture in Nigeria. The Islamic injunction is to learn “from the cradle to the grave”. Dr. Mandara, a Federation of Muslim Women’s Associations of Nigeria (FOMWAN) member, notes that contrary to the Qur’an, girls are not being educated because they are removed from school to be married.\textsuperscript{118} Two local governments have recently drafted by-laws to penalize parents who take their daughters out of school to be married.\textsuperscript{119} While there are Islamic schools for married women in some villages and centres, marriage for the majority of women signals the end of their education. In a 1985 sample of men living in the rural area of Gwarzo who stated they are opposed to Western-style education, eighty-eight percent feared it “would make girls forsake their tradition and culture (88%). Eighty-two percent (82%) also believed that schooling would interfere with early marriage.”\textsuperscript{120} In the intervening decade the popular perception of state education seems to have changed very little. And given the effect of the current economic crisis in Nigeria on the education system, the priority placed on schooling for girls has not improved.

Dr. Shehu Lawat argues that religious discourse has been appropriated and exploited for class and military interests and in such a fashion as to insulate it from political criticism. Dr. Lawat stated that Traditional Rulers and the current Sultan in Nigeria “sabotage efforts to educate the poor people; the easiest way to get it through is to use Islam... [saying it is] ‘unislamic to have

\textsuperscript{118} Interview, Dr. Mandara, Zaria, October 31, 1994.

\textsuperscript{119} Interview, Yahaya Mahmood, Kaduna, November 2, 1994. I have not been able to confirm that these bylaws have been passed and are being enforced to date.

\textsuperscript{120} F. Sushila Niles, “Parental Attitudes Toward Female Education in Northern Nigeria” (1989) 129 J. Soc. Psychology 13 at 17.
grown girls in the family'... 'unislamic to go through [state] primary education'”.[121] This is a compelling critique of the Islamic discourse pertaining to marriage practices in northern Nigeria.

In addition, there are serious health consequences for women of early pregnancy and childbirth which have been documented in epidemiological surveys and in my original field research in Nigeria. Women’s risk of reproductive ill-health and death has been shown to increase dramatically when women are under the age of sixteen. Maternal mortality rates of this group of women are extremely high.[122] In a 1988 study in Katsina, the maternal mortality rate per 100, 000 deliveries was 4,481; in a 1988 study on Sokoto, the maternal mortality rate for women aged sixteen was 6,897, but 1,251 for women between the ages of twenty and twenty-nine. Another 1988 study in Zaria found that girls who were fifteen or younger had a mortality rate of between 3,780 and 3,970, but for those who were sixteen, the rate dropped to 1,430.[123] According to the United Nations Development Program, Nigeria’s maternal mortality in 1988 was 750 per 100,000 live births compared to the U.S. rate of thirteen. Nigeria’s infant mortality rate in 1992 was 97 per 1,000 live births, compared with a rate of thirteen for all industrialized countries.[124]

[121] Interview, Dr. Shehu Lawat, past national President Nigerian Medical Association, Sokoto, November 6, 1994.


The condition of VVF, while obviously not caused solely by early childbearing, is related to the immaturity of young women’s pelvic bones. As the head of an obstetrics and gynaecology department explained, “no doubt about it, early marriage is a very prominent factor in the causation of this VVF”. Other important factors contributing to pelvic disproportion are feeding and nutrition for girls during childhood and for young women during pregnancy, adequate antenatal services and material means. If young women were allowed to attain greater physical maturity before carrying a pregnancy to term there would not be the same risk of their experiencing prolonged obstructed labours leading to VVF.

The health implications of early pregnancy are clearly not a complete indictment of marriage at a young age, for marriage need not necessarily imply reproduction. It appears that, in the past, sexual relations would not start immediately after marriage, especially when the girl had yet to reach puberty. The social custom of forbidding prepubescent sexual intercourse even between a husband and his wife is codified in the penal legislation of northern Nigeria. In addition, when the betrothal of a girl took place at an early age she would stay with the mother-in-law who would take responsibility for telling her what was involved in sex and reproduction. Now, however, neither the mother nor the mother-in-law are educating young brides about sex and husbands are not waiting for them to reach maturity. These cultural changes are obviously

125 Interview, Dr. Shittu, Ahmadu Bello University teaching Hospital, Zaria, October 31, 1994.

126 Harrison et al., supra note 122.

127 “Early marriage and neglect associated with that groups of girls leads to VVF, not early marriage alone. Feeding, growing to size, adequate pelvis, antenatal services... the class of VVF women is the underprivileged. Being too unfair to early marriage if you blame early marriage alone for VVF.” Interview, Dr. Mandara, October 31, 1994.
occurring for many, complex reasons. Dr. Dora Shehu speculated that “development, the influx of videos, and promiscuity” have contributed to the environment in which men are no longer “patient to let a girl grow from tender years to maturity.”

In the current social and economic climate of northern Nigeria where there is a dearth of information about contraceptives and reproductive health, and where women are becoming pregnant in the first year after marriage, early marriage has serious health risks. Further, because the health system is in shambles in Nigeria (in part due to the IMF-enforced structural adjustment programme), Cesarian sections are not available for women who do experience difficulty during labour:

*The stories of maternal health services are appalling: botched c-sections, pulling babies out without any instruments or vacuums, botched episiotomies. Gishiri cuts severing a woman’s urethra, nine days unconscious after labour, more than 90% still born babies for women with VVF... unbelievable. Traditional birth attendants, doctors, nurses all operating under impossible conditions with no supplies. They can’t do an emergency c-section because the family has to buy sutures, blood supplies, instruments, anaesthetic etc. The family or husband has to sell agricultural goods or other wares for money. And all the while the woman is in labour, the foetus is in distress. And all this because the baby’s head won’t pass into the birth canal because the mother is too small... (Personal Journal entry, October 27, 1994)*

Marriage practices in northern Nigeria have been criticized by women’s rights activists using indigenous cultural concepts and universalistic notions of maturity, consent, and personal autonomy. The language of international human rights has been invoked by some people in the

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128 Interview, Dr. Dora Shehu, Prevention of Maternal Mortality Project, Sokoto, November 6, 1994.

struggle to change the practice of early marriage in northern Nigeria. Women’s dissent, on the individual and collective levels, is persuasive for it undermines the otherwise compelling cultural narratives regarding women’s value in their roles as wife and mother. Criticism of marriage institutions comes from individual women themselves who stated that they did not want to be married at the age nor in the manner in which they were married. Often women said they would have preferred to stay in school as opposed to being married. Many women expressed bewilderment about the nature of sexual relations and said that they did not feel ready for their husband’s “first approach”. Stories of rape in marriage were not uncommon. Other women were critical of the marriage practices in more subtle ways and stated that they would want their own daughter to be more mature than she was at the age of matrimony.

Indigenous women’s groups, including the Muslim women’s organization FOMWAN, are engaged in an advocacy process to reform early marriage practices in northern Nigeria. During the 1994 conference of the national feminist organization, Women in Nigeria (WIN), many speakers declared that child marriage is a human rights abuse. At FOMWAN’s International

130 Interviews, Habiba Rabiu and A’isha Usu, Kwalli VVF Hostel, Kano, October 26, 1994.

131 Interviews, Rabi Monde, Sokoto Specialist Hospital, November 7, 1994; Zeinabu Ibrahim, Sabon Sara, Kebbi State, November 10, 1994; and Binta, Katsina, November 12, 1994.

132 Zainab Ismail stated she would support her daughter to continue to degree level in her education: Interview, Tukur-Tukur village, November 1, 1994.

Seminar on family and society held in 1986, "FOMWAN members expressed concern over the practice of marrying off preadolescent girls and appealed to religious leaders to discourage such a trend."\textsuperscript{134}

Various organizations are lobbying government for a minimum marriageable age of eighteen years to be legislated. These groups include Women in Nigeria (WIN), Planned Parenthood of Nigeria, National Council of Women's Societies, and the Nigerian Medical Association.\textsuperscript{135}

There is growing national\textsuperscript{136} and African regional consensus,\textsuperscript{137} as well as consensus in other Muslim communities,\textsuperscript{138} that early marriage is not appropriate and ought not be defended as a religious practice worthy of perpetuation.

The age at which women are being married may only be one determinant in women's maternal health and infant mortality but it is one factor which can be addressed at the grassroots level. Dr.

\begin{itemize}
  \item \textsuperscript{134} Bilkisu Yusuf, "Hausa-Fulani Women: The State of Struggle" in C. Coles and B. Mack (eds.), \textit{supra} note 81, 90 at 100-101.
  \item \textsuperscript{135} Interview, Mairo Bello, Kano, November 13, 1994.
  \item \textsuperscript{136} The Nigerian federal government itself stated in its first report to the Committee on the Elimination of All Forms of Discrimination Against Women that there "is a crying need" to codify marriage laws and establish uniform marriage ages at 16 for boys and girls with the consent of their parents and 18 for boys and girls with the consent of one parent and 21 without parental consent: Initial Report of Nigeria under Article 18 of the Convention, CEDAW/C/S/Add.49 11 May 1987 at 31.
  \item \textsuperscript{137} The \textit{African Charter on the Rights and Welfare of the Child}, which is drafted but not yet in force, states in Article 21(2) that "child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18..." The \textit{Draft African Platform for Action} leading up to the Forth United Nations World Conference on Women (Beijing, 1994) calls on states to "review policies and legislation to ensure the promotion of girls in matters pertaining to education, health and early marriage": at para. 123(c).
  \item \textsuperscript{138} There are statutes defining the minimum marriageable ages for girls in most countries, ranging from fifteen in Morocco, sixteen in Egypt and India, seventeen in Tunisia, Jordan and Syria, to eighteen in Iraq and Iran: Hussain, \textit{supra} note 113 at 473. The is no codified marriage age in Nigeria.
\end{itemize}
Dora Shehu concludes in her study of these issues in Sokoto that,

[t]he lower status of women exposes them to unnecessary risks. In order to effectively tackle the problem of high maternal death and morbidity rates, several factors have to be addressed on a large scale. Attention needs to be focused on the men, particularly the religious leaders; sustained discussions must be carried out between them and the providers of health care. In this case, the role of government policy is imperative.\(^{139}\)

Due to the effects of early marriage on girls’ education and their vulnerability to sexual violation, and the serious health implications of early marriage and childbearing, Nigerian activists argue it is unsound to defend the practice.

VII. The Possibilities for Reform

The need for reform seems most pressing when one is faced with young women who, before they reach their late teens, have experienced marital rape, early pregnancy and traumatic labour. Due to complications in prolonged obstructed childbirth, they have developed vesico-vaginal fistulae (VVF), a hole in the vaginal wall allowing urine to seep between the bladder and the vagina. As a result they have been abandoned by their husband and returned to their family home. They are left waiting for an operation to repair the tear, with few resources to fund the medical procedure. While early marriage is not the sole cause of VVF, it is a contributing factor in women’s reproductive ill health. Further, there are concerns about the psychological well-being of young women required to be married before they menstruate.

The Nigerian feminists with whom I spoke had a number of strategies to address early marriage and VVF. The Muslim women's umbrella group, Federation of Muslim Women's Organizations of Nigeria (FOMWAN), unlike WIN, is more concerned with making illegal the marriage of pre-pubescent girls within their communities. FOMWAN argues for a more liberal interpretation of Islam to be applicable in northern Nigeria. They attempt to persuade the religious leadership, the Mallams, Emirs, and the Sultan, that early marriage is not a defensible Islamic practice or at least, not one that they should be actively condoning. Given that Islamic law is not a static law, they argue that prepubescent marriage should be seen as contrary to other (higher) principles in the Quran such as education for girls\textsuperscript{140} and that it is ill-placed in contemporary society. FOMWAN seems to be increasingly suspicious of efforts to legislate a minimum marriageable age which would be perceived as a Christian initiative from the south of the country.\textsuperscript{141}

The federal non-governmental organization, Women in Nigeria (WIN), had been involved in lobbying the government in the late 1980's and early 1990's to institute a uniform marriageable age law and called on the government to legislate eighteen years of age as the minimum age for marriage. Even the Nigerian government itself has acknowledged the "crying need" for reform in this area. In its first report to CEDAW, the government stated that minimum marriage ages should be established at sixteen for boy and girls with the consent of their parents and eighteen for boys and girls with the consent of one parent and twenty-one without parental consent.\textsuperscript{142} No

\textsuperscript{140} Interview, Dr. Mairo U. Mandara, ObGyn, Zaria, October 27, 1994.

\textsuperscript{141} When the federal government attempted to bring about universal primary education, it was widely perceived in the north to be an attempt to Christianize the population through secular schooling. Any legislative initiatives on early marriage must deal specifically with this religious context.

\textsuperscript{142} Initial Report of Nigeria under Article 18 of the Convention, CEDAW/C/S/Add.49 11 May 1987 at 31.
legislative reforms have ever been undertaken. Since the early 1990s the issue of early marriage has become increasingly tied to religious politics contributing, in part, to women’s groups’ apparent change in strategy and the federal government’s withdrawal from earlier commitments to address the issue.143

Prior to bringing about uniform marriageable age legislation, therefore, there would have to be extensive grassroots education about the policy so that it might be accepted as “true” to Islam, coming from within the Muslim community, and ultimately complied with. There would have to be popular changes to the institution of marriage. One example of this type of outreach is dramatic plays about VVF which were mounted at the village level by community activists and health workers. These plays were successful in bringing about some awareness about the causes and consequences of VVF. Any grassroots popular education campaigns about early marriage (workshops, plays and village meetings) could integrate information about the recent local government ordinances which were passed to keep girls in school, creating penalties for parents who remove their child from the school system to be “married out”, as well as information about the health consequences of early and frequent childbirth.

Reform efforts are complicated, however, by the fact that very few of the women interviewed

143 Members of the secular federal government of Nigeria have commented that the issue of early marriage is too difficult to address because of the powerful religious leadership in the north and the lack of education and literacy amongst the rural population. The state governments in the north might respond to international calls for reform of marriage in northern Nigeria with the charge of cultural insensitivity. They could claim that this is a traditional practice based in the Islamic faith which should not be criticized from a Western rights perspective. Contrary to the North American conception of marriage as based on the romantic union of two autonomous adults, freely consenting to the union, an alternative conception of marriage exists in Nigeria as the union of two families as much as the union of two individuals.
directly criticized early marriage. Rather they said that they would prefer that their daughters be allowed to “mature” before being married out or be allowed to complete more formal education than they enjoyed before marriage. Some women stated that they were not happy about their wedding or the choice of their husband, but these assertions were made in quite indirect ways. In addition, few women approach the police with complaints of domestic violence and marital rape. As Lai and Ralph comment in their discussion of the limits of international law to address early marriage in northern Nigeria,

Most of the cases of child marriage in northern Nigeria documented by Human Rights Watch did not involve the outright application of “force” per se... Few girls can even conceive of raising objections since child marriage is a socially accepted institution. Most young girls either “agree” to marry for economic reasons or “consent” to marry in order not to bring shame and dishonour to the family.\(^\text{144}\)

From the international standards presented above, one can argue, persuasively I believe, that the Nigerian government is failing to meet its international obligations. It should be pointed out that, at a bare minimum, the federal government has not moved to register Muslim marriages nor has it established a uniform marriageable age law at it is required to do through the Women’s Convention. Rather, the government has allowed a legal vacuum to exist and has withdrawn from its international and national responsibilities. Even though it is harder to rely upon the Convention on the Rights of the Child, since the definition of “child” is subject to age of majority being attained earlier than eighteen years under domestic law, the case could be made that a prepubescent girl can only be considered a “child” in law and marriages involving children are

\(^{144}\text{Lai and Ralph, supra note 52, at 223-224.}\)
null and void. Nonetheless, it is open to the Nigerian government to argue that majority for the purposes of legal Islamic marriage is attained at puberty (or earlier should the family deem the child to be mature). A stronger case can be made on the issue of consent to marriage for girls and women in northern Nigeria. Here the international law is clear and the applicable Islamic law conflicts with the guarantees for both spouses of free and full consent to marriage.

It can also be argued that the marital rape exemption which exists on the law books of northern Nigeria is codified discrimination against female citizens of Nigeria. The government is failing to guarantee women who experience rape in marriage equal protection of the law and equal enjoyment of their civil and political rights, contrary to Nigeria’s obligations in domestic constitutional law and international law. Given the preponderance of international norms prohibiting discrimination against women and specifically calling on states to address sex discrimination found in statutes, it is incumbent upon the Nigerian government to amend the marital rape exemption found in the Penal Code and to investigate and punish rape of women in marriage.

Thus when looking at possible organizing and law reform initiatives, the international standards offer certain options: registration of Muslim marriages, legislation on age of marriage, outlaw nonconsensual marriages, enforce statutory rape offenses, change the marital rape exemption in

145 On the other hand, this legal marriageable age conflicts with the Nigerian legal age for entering into a contract (twenty-one), voting (eighteen) and driving (eighteen).

146 Section 39(1) of the 1979 Constitution guarantees women freedom from discrimination, "disabilities or restrictions".

147 The Women’s Convention, supra note 39, Article 2 and ICCPR, Articles 3 and 26.
the Penal Code, and uphold international obligations of women's right to nondiscrimination. On the other hand, feminist activists in northern Nigeria suggest that the criminal law reforms would be met with fierce opposition and the marriage law reforms would be perceived as unIslamic and therefore unsuccessful. Rather they suggest lobbying the government on the basis of women's health and education needs.

Strategies which appear to be most practical include community-based education on the consequences of early marriage (for example by theatre troupes), dissemination of health information through community health workers, local government initiatives to keep girls in school longer, lobbying of Traditional Rulers and Mallams, and Qur'anic (and legal) literacy campaigns. Some of these strategies are currently taking place in northern Nigeria. A legislated marriageable age, though a sound law reform strategy, is unlikely to prove effective especially without prior grassroots efforts. Such a statute would have symbolic importance but may be as much a symbol of religious insensitivity as a symbol of changing cultural mores.

In sum, they argue there ought to be a genuine and open dialogue within northern Nigeria about the age at which girls should be married. This could take the form of a village meetings or government sponsored consultations leading up to the passage of legislation or an alternative process; what is important is that the discussion and education campaign take place within the indigenous context and prior to the enacting of a marriageable age law. The same process can take place regarding a girl's consent to marriage. In this case, it seems that the first step may be a judicial recognition of the "option" of repudiation at puberty.
VIII. Conclusions

As in so many cultures, women in Hausa Muslim culture are the bearers of tradition and morality. They embody communal ethics and their lives are the site of struggle in a changing political climate. As Anita Weiss argues,

[entering the twenty-first century, Muslim societies are struggling in their confrontation with enormous cultural dilemmas as they are rethinking, renegotiating and in some instances re-inventing traditional society with unique modern tones. Where women fit into this process is critical, since Muslim social order revolves around the concepts and values associated with izzat (respect) and sharafat (honour), in which women’s actions are pivotal.]

It is not surprising in times of serious economic decline and political upheaval in Nigeria that the meaning of cultural tradition and morality is much contested. And because of the religious and ethnic splits in the Nigerian political psyche, the meaning and ownership of religious discourse is particularly important. Where the issue of veiling has been the lightening rod of gender politics in some Muslim countries, the issue of early marriage seems to occupy this status in Nigeria. Apologists cite the Qur’an and “true” Islamic values and charge that critics have no understanding of the role of women in Muslim society. Critics, on the other hand, cite the Qur’an and other equally “true” Islamic values and charge that conservative religious leaders are abusing religious dogma.

Within northern Nigeria it is clear that the power to define the meaning of “Islam” rests with

prominent male orthodox leaders. Liberal Muslims and feminists are the voices of dissent. And Muslim women with VVF "are voiceless. Not a cry to attract attention... her death is not even recorded."\textsuperscript{149} It is in these voices of dissent that I found the compelling ground on which to interrogate the practice of early marriage in northern Nigeria.

\textsuperscript{149} Interview, Dr. Mohammed Bello, Rayika Memorial Hospital and Maternity, Kaduna, November 1, 1994.
CHAPTER 5: Marrying the National with the International: Treatment of Marriage and Culture in Refugee Cases for Women

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I. Introduction:

The previous chapter explored how marriage in northern Nigeria is tied to the religious and cultural duties of parents and daughters. Orthodox religious leaders tell parents to marry their daughters before they have breasts for fear of their bringing shame onto the house; some women are married as young as ten and many before or at puberty. In Papua New Guinea the compensation for the death of a clansman was reportedly fifteen pigs, $10 000 and one eighteen year old woman.¹ The marriage of women is tied to the spiritual role played by women in Papua New Guinea culture, one commentator explained, thus to challenge the marriage is to strike at the “root of society”.² As the testimonies of women outlined in Chapter 4 indicate, however, many women from northern Nigeria are not overtly critical of early marriage; it is not these women who seek refugee status here in Canada. For women who are critical of marriage practices and who suffer persecution as a result, they may have to flee their country of origin and claim refugee status abroad. Thus to leave is to pull up the roots of society.

Women from countries such as the United Arab Emirates, Zimbabwe, Kenya, Iran, the Gambia, and Bangladesh have claimed refugee status in Canada due to the circumstances of their marriages: early marriage, forced marriage, or abusive marriage. This chapter will examine the role of international human rights norms in the adjudication of Canadian refugee determination.

¹ Seth Mydans, “A Bartered Bride’s ‘No’ Stuns Papua New Guinea”, International Herald Tribune, May 7, 1997 at 1. The journalist writes, “Dollar by dollar the offending clan began to collect the money. One by one the pigs were rounded up. But then something happened that shocked the elders of both clans and has since reverberated through this largely tribal nation. Miriam Wilngal refused.”

² Ibid.
The parameters, content and jurisprudence of Canada’s Immigration Act are determined in large part by Canada’s obligations as a signatory to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. As well, other international human rights treaties are considered in the refugee determination process. For example, the Universal Declaration on Human Rights, the Convention on Elimination of All Forms of Discrimination Against Women, and the International Covenants can be considered in refugee determination. In the preamble to the Immigration Act, the Refugee Convention is referred to and section 2 of the Act incorporates the definition of refugee from the Convention. The definition of a refugee is a person who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; who, not having a nationality and being outside he country of his former habitual residence, is unable or, owing to such fear, unwilling to return to it.

Refugee law thus is a component part of international human rights law, a part that is adjudicated “municipally”: it is an example of domesticated, international norms.

My particular focus in this chapter is the marrying of the national with the international for women who claim refugee status in Canada. I examine cases where women base their claim or

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5 Ibid. Article 1(2) (emphasis added).

6 Refugee law has been seen traditionally as distinct from international human rights, but their interrelatedness is now recognized.
part of their claim to asylum on the circumstances of their marriage. This chapter is the domestic dimension of the exploration of practices criticized on the basis of women’s rights and defended on the basis of cultural integrity. I am preoccupied with questions of how rights are used by women in different cultural contexts, both nationally and internationally, in these case studies how international women’s rights are used in domestic national courts or tribunals. I present ethnographies of rights strategies, including adjudicative strategies, to evaluate cross-cultural judgement in this area and to see what stories of women’s lives are in global circulation. These cases, like the discussion of early marriage cases, construct images of women “worthy of protection”. Further, I am interested in the diversity of women’s voices in the international discourse.

In this chapter I have two central themes. I argue that one strength of the refugee determination process is its potential to deal sensitively with the circumstances of a particular claimant’s life. The process, being by its very nature an assessment of an individual’s life in social-political cultural context, can allow for the particularization of rights and the contextualization of an individual’s claim. The process demands attention to the dynamics in a country and the complexities of the claimant’s life in relation to those particular circumstances and the refugee definition. As I show when examining refugee determination as an example of cross-cultural judgement, decision-making can be done with respect and sensitivity.

If done well, the refugee determination process can be a forum for a diversity of women’s voices to be brought in to existing narratives of women from other countries, to complicate and undermine stereotypical narratives, as I argued in Chapter 1. For example, the claimant’s
Personal Information Form (PIF) is often attached as an addendum to the refugee decision. This life story is written in the first person and represents the most important events of her life. Although her narrative is influenced by the parameters of refugee law (which has its own vernacular) and influenced by her lawyer, her voice sits alongside the official decision as to whether the circumstances of her case meet the requirements of the Convention refugee definition.

Through the application of this definition in the claimant’s case the norm can adapt to the context. This adjudication of the norm necessarily modifies the standard to different fact situations as in a case-based system, such as in the common law. Just as the rhetoric of universality is matched by a practice of particularity at the international level, refugee determination is marked by variance and fluctuation depending on the country from which the claimant originates and the fact situation presented by the refugee. Further the meaning of social group has evolved to include gender-based claims in a way that was previously excluded from refugee determination. Of course in refugee determination, the context to which the norm is applied is also Canadian. My contention is that the application of the refugee definition reflects back on the Canadian context and changes both normative orders. I will examine cases in this chapter that demonstrate the positive potential in the system: examples of sound, sensitive judgement.

Nonetheless and paradoxically, there is the danger of cultural misrepresentation in refugee cases. Since refugee discourse is built on notions of charity, humanitarian assistance, and compassion, it presupposes an unequal relationship between cultures or an inequality in state responses to
oppressive cultural practices: you persecute, we do not; your culture is oppressive, ours is not; you are a refugee-creating country, we are the refugee-receiving country. Thus, refugee law risks presenting ahistorical versions of the cultures from which refugee women "flee" and lacks a sense of self-reflection that is essential for an international feminist project which uses rights.

As I explored in Chapters 1 and 2, this second theme is an unavoidable element of inter-cultural assessment that is normative and hierarchical. Like international human rights, refugee determination requires the evaluation of practices and events in other countries. Refugee claimants have an incentive to play upon the narratives of Western superiority and charity in presenting their cases. This is not to say that refugees do not feel grateful to have a safe haven. However, as Sherene Razack argues, “successful cases ought not to require the demonization of the claimant’s culture and her country’s political climate”. Further,

Border control is, in the wider sociopolitical framework Cheney alludes to, an encounter between the powerful and the powerless, and the powerful are always from the First World and mostly white and powerless are from the Third World and nearly always racialized or ethnicized.

In this chapter, I explore the tensions surrounding the need for culturally specific and contextualized analysis and the dangers of promoting, fostering, playing upon narratives of cultural superiority in the refugee determination process. The cases represent examples of bad

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8 Sherene H. Razack, “Policing the Borders of Nation: The Imperial Gaze in Gender Persecution Cases”, in Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms (Toronto: University of Toronto Press, 1998) 88 at 126.

9 Ibid. at 88.
and better cross-cultural judgement. At times the same case can expose both the potential and pitfalls of refugee determination.

The same questions need to be asked here as in the context of international human rights judgement. For example, what are the cultural and historical circumstances, in which the impugned practice is taking place? What are the underlying reasons for and consequences of the practice, and how are these understood within an indigenous framework? What are the variations of the practice and contests over its meaning at play? Is the examiner, in this case the Canadian adjudicator, open to these various meanings or is the judgement predetermined by the framework of analysis or by an intuitive response? Are there analogous practices in the critic’s culture that will assist both in the understanding of the practice and challenging her easy assumptions and criticisms? Is the cross cultural judgement playing upon and entrenching dangerous stereotypes about women in non-Western cultural contexts?

I map on to the interpretation of the refugee definition discussed here an analysis of rigid norms without cultural sensitivity and rigid cultural practices without gender sensitivity. To proceed with an interpretation of the refugee definition to accommodate women’s claims without a deep cultural contextualization can result in imperialist legal judgements, devoid of a global understanding of the impugned practices such as marriage practices and domestic violence. On the other hand to respond by arguing that women’s claims on the basis of gender should fail on the grounds of local cultural norms renders the individual invisible. It too neglects the global dimensions of the local practices.
II. Cultural Context and Sensitivity

Developments both in international human rights law generally and in refugee law in particular have brought abusive practices into view that had previously been excluded from the mainstream human rights and refugee analysis. Quintessential human rights cases concerned political activists detained, tortured, disappeared or murdered by police or military agents of the state. The nexus between the violation of individual's rights and the state action was direct. As I outlined in Chapter 2, this traditional construction of international human rights violations overlooked the gendered violations of women by non-state actors, including other civilians. Much feminist lobbying and scholarship shifted this traditional paradigm and constructively reoriented the gaze of international human rights to see the experiences of women. As a result, the cultural and private violations of women's rights are increasingly viewed as human rights abuses.\footnote{For a discussion of the issue before the Guidelines see Jacqueline Greatbatch, “The Gender Difference: Feminist Critiques of Refugee Discourse” (1989) 1(4) \textit{Int’l J. Refugee Law} 518. And see Felicity Stairs and Lori Pope, “No Place Like Home: Assaulted Migrant Women's Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds” (1990) 6 \textit{J. Law & Social Policy} 148.} The evolution in refugee law to better address gender claims matches the evolution in international human rights where the concept of state persecution has evolved to potentially embrace private, familial, and cultural practices. This is an important development for women. Refugee women's cases bring these “private” practices – domestic violence, discriminatory emphasis on female virginity, rape, early marriage, and sex stereotypes – into view and demand attention to cultural dynamics. In the positive decision of an Ecuadorian woman, for example, the Panel stated as follows:

The question is whether the violence endured by these women in appropriate cases should be regarded as persecution. There is a vast difference between a
matrimonial home and a torture chamber. If a wife is subjected to violence repeatedly then in our assessment, she stands in no different situation than a person arrested, detained and beaten on a number of occasions because of his political opinion.\textsuperscript{11}

Parenthetically, it is important to recall that the obligations in Article 5 of the Women’s Convention take into consideration the interaction of citizens and institutions and require States parties to modify stereotypical cultural and social attitudes which are premised on ideas of gender superiority/inferiority. However, international adjudication of women’s rights remains predominantly state-centred as opposed to the investigation of cultural patterns as they impact on individual women’s lives.

The Canadian refugee determination process has been given new life through its 1993 guidelines on “Women Refugee Claimants Fearing Gender-Related Persecution” (commonly known as the \textit{Gender Guidelines}) that seek to include gender-specific persecution in the definition of UN Convention refugee status. These \textit{Guidelines} suggest how adjudicators can take gender (and culture) into account and deal sensitively with female claimants.

Prior to the \textit{Guidelines}, some women had been successful in their gender-based refugee claims within the five enumerated grounds of race, religion, nationality, membership in a social group or political opinion. For example, a few women were successful in arguing that non-conformity with dress codes in Iran constituted persecution on political grounds. In a 1987 case, \textit{Shahabaldin, Modjgan v. M.E.I.}, for example “the former Immigration and Appeal Board found

the claimant to be a Convention refugee on the basis of her political opinion, because she opposed the Iranian laws governing dress". 12 A 1990 refugee board also held that the Iranian dress codes could be persecutory and that women were subjected to "extreme discrimination". 13 The Federal Court Trial Division upheld a positive decision in Namitabar v. M.E.I that opposition to dress codes can be understood by the government as political activism. 14 The Federal Court of Appeal held in 1992 that the claimant could fear persecution on the basis of membership in the particular social group of "Trinidadian women subject to wife abuse". 15 The United Nations High Commissioner for Refugees' Guidelines also envisioned that women who were subject to severe discrimination for state-sanctioned social mores could be considered Convention refugees. 16

In two other decisions that predate the Guidelines, women were found to have membership in a particular social group defined as "women without male protection". One case concerned an Armenian woman and her daughter living in Turkey who had been harassed and tried in vain to seek protection of the Turkish authorities. The decision held that the social group was made up

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14 Namitabar v. M.E.I, [1994] 2 F.C. 42 (T.D.) at 49: Per Tremblay-Lamer J., "I consider that in the case at bar the female applicant has demonstrated that her fear of persecution is connected with her political opinion. In a country where the oppression of women is institutionalized any independent point of view or act opposed to the imposition of a clothing code will be seen as a manifestation of opposition to the established theocratic regime."


of "single women living in a Moslem country without the protection of a male relative (father, brother, husband, son)." In a second decision, the Refugee Division found that a Somali claimant belonged to a particular social group, "young women without male protection". Refugee women could also argue that their persecution stemmed from religious persecution for choosing not to ascribe to the prevailing interpretation of the religion in her country. This could include devout Muslim women in a secular state, Christian women in a Muslim country, or secular Muslims in an orthodox Muslim state.

In addition to the ways in which women fit their gender-related claims into the enumerated categories of religion, political opinion, membership in a social group, race, and nationality, some refugee women of course have claimed asylum for reasons unrelated to their gender. The problems arose however when gender-related persecution was not found to satisfy the UN Convention definition and women were refused refugee status. In four unsuccessful cases, the Refugee Board determined that the dress codes are "'inconveniences' at best, discriminatory at worst, but do not amount to persecution". Drawing on international precedents and national lobbying, the Immigration and Refugee Board of Canada set out to assist decision-makers in their assessment of gender-related claims.

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19 Razack, supra note 8 at 119. See also her footnote 115 where she lists four unsuccessful cases.
Gender Guidelines 1993

The interpretation of the refugee definition under the Immigration Act was reinvigorated with respect to gender-related persecution when the Chairperson of the Immigration and Refugee Board, Nurjehan Mawani, brought in the Gender Guidelines on March 9, 1993. The Guidelines were to respond, in part, to the concerns sparked by negative decisions in the 1992 case of "Nada", a Saudi Arabian woman who denounced discriminatory laws in her country, and cases of women fleeing domestic violence, some from the Caribbean and others from Bangladesh, Syria and Bulgaria. The Guidelines build on the United Nations High Commissioner for Refugee Guidelines on the Protection of Refugee Women of 1991. After the Canadian government instituted the Gender Guidelines, the United States and Australia both issued similar guidelines on refugee women.

20 Immigration and Refugee Board, Guidelines Issues by the Chairperson Pursuant to Section 65(3) of the Immigration Act (1993).

21 As Audrey Macklin explains, however, "Because the Guidelines only apply to the determination of refugee claims within Canada, they do not apply to women unable to make the journey to Canada. Approximately two-thirds of asylum seekers in Canada are male. A variety of psychological, cultural, and financial impediments render women less able than men to undertake the hazardous, uncertain, and expensive journey to Canada": Audrey Macklin, "Refugee Women and the Imperative of Categories" (1995) 17 Human Rights Quarterly 213 at 220 (footnote omitted).


24 The Dutch Refugee Council had issued a policy directive in 1984: "It is the opinion of the Dutch Refugee Council that persecution for reasons of membership of a particular social group, may also be taken to include persecution because of social position on the basis of sex. This may be especially true in situations where discrimination against women in society, contrary to rulings in international law, has been institutionalized and where women who oppose this discrimination, or distance themselves from it, are faced with drastic sanctions, either from the authorities themselves, or from their social environment, where the authorities are unwilling or
Nada claimed refugee status in Canada due to her politics in Saudi Arabia. She refused to conform to requirements of dress codes, including modesty and covering her head. She was publicly harassed, spat upon, and threatened with virginity testing and arrest. She was turned down for refugee status in a condescending decision wherein she was told she would be better to comply with laws of general application. The media, feminists and social activists expressed outrage at the decision by the Immigration and Refugee Board. Her cause was championed by numerous organizations and Nada's story's was told by others in a number of versions. In some cases, to her explicit rebuttal, her story was one of a woman fleeing an oppressive religion. She contended that her not wearing the veil "had nothing to do with Islam" but with moral regulation of women without foundation in the religion. Like many women faced with orientalist reactions to their religion – she is Shiite Muslim – she was forced to defend Islam and criticize Saudi Arabia. In January of 1993 the Minister of Immigration granted Nada a Minister's permit to remain in Canada and pursue landed immigrant status. While Nada was not ultimately granted refugee status, her case sparked intense public debate about women who claim refugee status for

unable to offer protection." Cited in Macklin, supra note 21 at 216, footnote 12.

25 Razack, supra note 8 at 120. Razack interviewed Nada about the circumstances of her case and the public reaction which included her being described as "the feminist refugee". Razack concludes that "[i]t is likely that colonial images of Muslim women played a part in how Nada's story was heard". Ibid.

26 This is reminiscent of the Shah Bano case where the plaintiff, a Muslim woman, applied for maintenance form her husband after separation. The court found in her favour. The Muslim community was outraged and the government passed a law to limit the applicability of the decision. In the ensuing debates and national fury, Shah Bano herself recanted her initial position in large part in reaction to racist portrayals of the Islamic religion. See Radha Kumar, "Identity Politics and the contemporary Indian Feminist Movement" in Valentine M. Moghadam (ed.) Identity Politics and Women: Cultural Reassertions and Feminisms in International Perspective (Boulder: Westview Press, 1994) 228.
reasons related to their gender just as the Immigration and Refugee Board was considering new guidelines.\textsuperscript{27}

The Chairperson's Guidelines (Update) begin with the following preambular statement:

The definition of a Convention refugee in the Immigration Act does not include gender as an independent enumerated ground for a well-founded fear of persecution warranting recognition of Convention refugee status. As a developing area of the law, it has been more widely recognized that gender-related persecution is a \textit{form} of persecution which can and should be assessed by the Refugee Division panel hearing the claim. Where a woman claims to have a gender-related fear of persecution, the central issue is thus the need to determine the \textit{linkage} between gender, the feared persecution and one or more of the definition grounds.\textsuperscript{28}

The Guidelines explain the ways in which gender can be a factor in a refugee claim and assist decision-makers in coming to their decisions on gender-related claims. They do not add gender to the list of enumerated grounds and cannot do so for that would require a statutory amendment. The Guidelines explicitly state that women refugees may properly come within the Convention definition for “gender-related persecution by reason of any one, or a combination of, the enumerated grounds”. In other words, where there is a demonstrated, well-founded fear of gender-related persecution the claim should succeed.

\textsuperscript{27} Indeed Nada's case may have succeeded under the Gender Guidelines. Her case fits within the requirements of political opinion and gender and other women, before her and after, have successfully applied for asylum for similar reasons as she articulated in her claim.

\textsuperscript{28} Immigration and Refugee Board, \textit{supra} note 12 at 1 (emphasis in original).
Refugee determination

The refugee determination process includes three component parts. First, the refugee claimant must prove “fear of persecution” against her. This well-founded fear of persecution involves a finding of a subjective fear of persecution for which there is an objectively valid basis. Persecution is distinguished in the jurisprudence from prosecution and prejudicial treatment, although severe discrimination or disproportionate and severe sanctions for offences can constitute persecution. The Guidelines note that “the social, cultural, traditional and religious norms and the laws affecting women in the claimants’s country of origin ought to be assessed by reference to human rights instruments which provide a framework of international standards for recognizing the protection needs of women”. Credibility assessments of claimants and country reports are central to this step in the analysis.

Credibility can be an important aspect of cross-cultural judgement. Some scholars have argued that women who weep or demonstrate grief are more likely to be believed as genuine refugees. Razack argues that central to the credibility test is how the claimant’s race is read by the adjudicators. Where the decision-maker can imagine a woman in need of male protection, read a Muslim women fleeing an oppressive religion and culture, she is more likely to be believed.

29 Ibid., at Part B “Assessing the Feared Harm”.

Where the adjudicator can imagine an independent and capable, perhaps criminal, woman she is less likely to be found to be a refugee in need of protection of Canada.\textsuperscript{31}

Persecution is distinct from random acts of violence but may properly include cumulative vulnerability to violence. The adjudicator must assess how serious is the harm complained of in the particular claimant’s case. Infringements of internationally protected rights are taken into consideration as benchmarks for persecution.\textsuperscript{32} Thus in a 1995 case where an Asian Muslim woman (in her twenties) from Kenya who left the country before an arranged marriage, the Federal Court found that the claimant’s fundamental rights had been violated. The international prohibitions on marriage without full and free consent were invoked to reinforce the finding of persecution. The Federal Court Trial Division stated in Vidhani as follows:

\begin{quote}
In my view, women who are forced into marriages against their will have had a basic human right violated. There are United Nations conventions to which Canada is a party which state that the right to enter freely into marriage is a basic human right. If the applicant falls within the first category [innate category], as in my view she does, it is not necessary for the Board to look at whether the sanctions are so severe that they severely interfere with bodily integrity or human dignity. However, the restriction on the exercise of a human right does not constitute persecution in every case.\textsuperscript{33}
\end{quote}

In a decision concerning a claimant and her minor daughters from the United Arab Emirates the decision-maker also states that,

\textsuperscript{31} Razack, \textit{supra} note 8 at 113-114.

\textsuperscript{32} The Federal Court of Appeal in coming to a positive decision of a claimant from China in \textit{Cheung v. M.E.I.}, [1993] 2 F.C. 314 (C.A.) at 324 held that the "forced sterilization of women is a fundamental violation of human rights. It violates Articles 3 and 5 of the United Nations \textit{Universal Declaration of Human Rights} ... The forced sterilization of a woman is a serious and totally unacceptable violation of her security of the person. Forced sterilization subjects a woman to cruel, inhuman and degrading treatment."

\textsuperscript{33} \textit{Vidhani v. Canada (Minister of Citizenship and Immigration)}, [1995] 3 F.C. 60 (T.D.) at 64-65 per McKeown J.
In passing judgment on what kinds of treatment are considered persecution, we have considered an objective standard as provided by international human rights instruments that declare the lowest common denominator of protected interests. The panel acknowledges that while the international human rights instruments are not binding on the Convention Refugee Determination Division unless they are incorporated into Canadian law, the principles enunciated in these instruments may helpfully inform the reading given to the definition of a Convention refugee, given that the definition is not uniquely Canadian.34

And the Refugee Division panel "referred to the UDHR and the Convention on Consent to Marriage in arriving at the conclusion that forced marriage of a fifteen-year-old Zimbabwean girl to a polygamous man, followed by years of physical and sexual brutality, amounted to persecution".35

Second, there must be a nexus between the persecution and one of the listed Convention grounds: race, religion, nationality, political opinion, or membership in a social group. While there is a fairly straightforward analysis to be applied to the first four categories, social group is more ambiguous. The recent Supreme Court of Canada decision in Ward36 has offered authority on how to assess membership in a particular social group for the purposes of the refugee definition. The Ward case concerned a Northern Irish refugee claimant who was a member of the Irish National Liberation Army (INLA). He fled the country after he refused to execute hostages in his captivity and feared retaliation from INLA. Ward had been sentenced to death by the ILNA for allowing the hostages to go free. He escaped and sought protection of the


police; the police charged him with his part in the hostage taking and he served three years in prison. He then came to Canada and claimed refugee status based on his fear of persecution form the ILNA and the lack of available state protection in Northern Ireland.

In coming to its decision, the Supreme Court held that there are three possible categories of social group. First there are those who share an innate or unchangeable characteristic which the Court found included gender, sexual orientation or linguistic background. Second, the social group may be made up of those who voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake association, such as human rights activists. Third, there are groups associated by former voluntary status, unalterable due to its historical permanence. In this category the Supreme Court offered that one’s past is an immutable part of the person.37

According to Ward, a refugee is not simply to assert that she is part of a social group made up of persecuted persons like herself. This would lead to a circularity of asserting a claim on basis of gender linked to membership in the social group of gender, women.38 However, the Guidelines assert that where the social group is made up of those sharing an innate characteristic of gender, the social group may properly be made up of similarly victimized women. Persecution against

37 Ibid. at 33-34.

38 Nicole LaViolette critically assesses the holding by the SCC that to be the basis of a social group the shared characteristic must be innate or immutable: “The Immutable Refugees: Sexual Orientation in Canada (A.G.) V. Ward” (1997) 55(1) Univ. Toronto Faculty of L. Rev. 1. Catherine Dauverne discusses the application of three Canadian immigration cases, including Ward, by the High Court of Australia: “Chinese Fleeing Sterilisation: Australia’s Response against a Canadian Backdrop” (1998) 10(1) Int’l J. Refugee L. 77 at 81-84.
gay men or lesbians ought not to fail because the social group is defined by sexual orientation.\textsuperscript{39} The Guidelines note that there "is increasing international support for the application of the particular social group ground to the claims of women who allege fear of persecution solely by reason of their gender".\textsuperscript{40} The Executive Committee of the UNHCR concluded in 1985 that, States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article A(2) of the 1951 United Nations Refugee Convention.\textsuperscript{41}

Adjudicators in Canada have defined social groups as ‘women’\textsuperscript{42} or ‘women in arranged marriages’ or ‘women subject to restrictive laws’ ‘women subject to domestic abuse’\textsuperscript{43} or ‘women without male protection’.\textsuperscript{44} The Guidelines note that it is open to women combine grounds of persecution such as religion (or non-practice of religion) and political opinion and gender. Women can allege membership in the group of women without protection of male family member and race, or women who have transgressed the social mores of the community (religion) or women who are victims of domestic violence. In a positive determination on behalf of a


\textsuperscript{40} Immigration and Refugee Board, Update, \textit{supra} note 12.

\textsuperscript{41} \textit{Ibid.}

\textsuperscript{42} Or as in the case of an ethnic Somali woman living in Kenya, "The panel finds the claimant to be a member of a group defined by an innate or unchangeable characteristic, that of Somali Kenyan women." \textit{V. (Z.J.) (Re)}, [1993] C.R.D.D. No. 211.


\textsuperscript{44} See above footnotes 17-18.
Malaysian woman, the panel dealt with race, religion and gender. The claimant had refused conversion to Islam. Women have made successful claims on the basis of domestic violence. The combination of grounds of persecution allows for more sophisticated analysis that avoids compartmentalizing a woman’s identity to fit the legal definition.

Third, the claimant cannot or will not avail herself of the protection of the state for this persecution. This has been a stumbling block for women in international law generally as the archetypal persecutor and human rights violator is the police officer, the interrogator, or the military, not the private citizen. The Supreme Court of Canada in Ward explicitly held that the persecution need not be meted out by state agents: “persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens”. The Guidelines explain that when considering whether it is objectively unreasonable for the claimant not to have sought the protection of the state, “the decision-maker should consider, among other relevant factors, the social, cultural religious and economic context in which the claimant finds herself”. For a refugee to meet the legal requirements, she also must satisfy the adjudicator that there are no internal flight options – internal flight alternative (IFA) requirement – available to her. Again the Guidelines encourage decision-makers to take the claimant’s gender into account when assessing whether internal

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46 Ward, supra note 36 at 17.

47 Immigration and Refugee Board, Update, supra note 12.

48 Ibid.
flight alternatives exist and the difficulties she may experience in traveling safely within the country as well as cultural, economic and religious factors affecting female claimants.

**Jurisprudence**

The jurisprudence shows some positive signs as examples of good cross-cultural judgement of practices criticized on the basis of international rights.49 As Sherene Razack notes, the “strength of the individualized approach” in refugee determination is “when the specific persecution of domestic violence is taken into account ... when a women’s capacity to flee her specific abuser is assessed in light of her country’s conditions, gender persecution as a construct is extremely valuable”.50 This jurisprudence can offer some insights for the future adjudication of women’s rights claims that will take place pursuant to an Optional Protocol to the Women’s Convention. Lessons learned here about the potential and dangers of individual claims in a global legal framework can help in the treatment of women’s communications to CEDAW.51 As I argued in chapters 3 and 4, the actual consequences of a woman’s early marriage must be evaluated in socio-cultural context.

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49 I reviewed the Cdom RefWorld (30 documents regarding forced or early marriage), United Nations High Commissioner for Refugees database; QuickLaw database Canadian Refugee Determination Division decisions (198 concerning the Gender Guidelines, 32 concerning Muslim women, 14 on forced marriage, 5 on early marriage, 0 regarding child marriage); Federal Court decisions; academic commentary; international treaty bodies resolutions and reports; Immigration and Refugee Board Documentation Centre information; and personal communications with Sherryn Aitkin, Sandy Kline (IRB research and training personnel) and Audrey Macklin (former Board member).

50 Razack, supra note 8 at 106.

51 See Chapter 2.
A Canadian Refugee Determination Division panel, in *Re G (B.B.)*, found in favor of a Palestinian woman who, at age nineteen, married in the United Arab Emirates through an arrangement by her father and grandfather. For the duration of her fifteen year marriage she and her daughters endured violence at the hands of her husband. In her Personal Information Form the claimant described how, after the Gulf War, the situation for Palestinians in the United Arab Emirates deteriorated and many Palestinians lost their jobs, were deported or were arrested under suspicion of sympathizing with the Iraqis. The claimant stated that her husband’s began to drink heavily and his abuse worsened. The police did nothing when she complained to them on two occasions about the violence. The claimant also sought the assistance of her parents but they were not sympathetic: “Her father told her to return to her husband as he had the right to beat her. He would not agree to the dissolution of the marriage because it would bring shame upon the family.”

The panel stated,

*While it is not our position to pass judgement on the laws and customs in effect in a particular society or country, our mandate is to make an individual determination as to whether the claimants have good grounds to fear persecution. We find that she has been denied the right of maintaining and protecting her family which as stated by the UDHR is "the natural and fundamental group unit of society and is entitled to protection by society and state". To the panel's mind, the female claimant's having to live this kind of life in order not to bring shame upon her relatives amounts to persecution. The female claimant fled the U.A.E. because of the harm she feared for herself and her children.*

With respect to the interpretation of early marriage and forced marriage as persecution under gender guidelines, the Convention Refugee Determination Division panel found the “particular

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52 *G. (B.B.) (Re)*, *supra* note 34 (emphasis added).
social group described as: Women in or who face arranged marriages and in addition there is the social group of minor children with respect to the minor claimants.

In the same decision one of the three daughters of the claimant expressed fear of having her father arrange a marriage on her behalf given his extremely abusive behavior and therefore his blindness to this tendency in another man:

[The eldest minor claimant] also testified that she did not want to have to marry someone that her father selected for her. We find that what she fears is persecution and that given the family life she has thus experienced, the attitudes and treatment of her father and grandfather and lack of protection from the state, we find her fear well-founded.

At the same time the panel members were careful not to over generalize: they talk of the particular circumstances giving rise to the claimant’s fear of persecution. The Panel also discusses Sharia law as implemented in U.A.E., not as a monolithic Islamic code. Finally, the Panel concludes by saying that they,

are not disposed to making a finding that all women in Islamic society who wish to dissolve their marriages and retain custody of their children are Convention refugees or that all forced marriages form the basis of a well-founded fear of persecution. However sound in principle the Sharia law may be, in the case of this family the effect has been less than sound. In fact we have found it to be persecutory.

The Federal Court considered the issue in Vidhani, a judicial review of a negative decision where the applicant, an Asian woman who refused to enter into an arranged marriage in Kenya and

53 Ibid.
54 Ibid.
55 Ibid.
feared attack by police if she were to complain, was found not to be a Convention refugee. The Court comes close to arguing that since forced marriage is a violation of fundamental rights, women subject to arranged marriage without their consent will constitute a particular social group. This conclusion is modified however by that “the restriction on the exercise of a human right does not constitute persecution in every case”.

The decisions concerning early and forced marriage show attention to the circumstances of the claimants’ lives and the particular social, cultural, religious and economic context from which they seek asylum. In one case the Convention Refugee Determination Division found in favor of a devout Muslim woman (ethnic Somali) fleeing her marriage but not her religion and culture in Kenya. The claimant married early (though her exact age at marriage is never given) through an arrangement by her stepmother to a non-religious man. The claimant’s husband held a position with the Kenyan Post and Telecommunications Union and was a member of the KANU government party. The claimant testified that her husband raped her and abused her for seven years. Following the 1993 Convention Refugee Determination Division positive decision concerning a Zimbabwean woman who was married at age fifteen to an abusive man influential with the government, this panel found the claimant and her children to be Convention refugees.

A third case from Kenya also concerned early and forced marriage. In this case the claimant was


57 Ibid.


a Seventh Day Adventist. The panel reviewed information about early marriage in the country and dowry. The panel concluded that she was not credible, and not a "helpless woman"; the claim for Convention refugee status failed.⁵⁰

As a second negative determination on arranged marriage demonstrates, underage or forced marriage does not create a _prima facie_ refugee finding. A young woman from The Gambia fled the country fearing for her life after threats from her father that he would kill her; the claimant refused to marry the man chosen for her by her father when she was sixteen.⁵¹ She had been subjected to numerous beatings. The claimant, in her Personal Information Form, described her father as a "fanatic Muslim and very abusive". The panel did not find the claimant to be credible nor that she was unable to seek protection of the Gambian authorities. It seems the decision turned on the fact that the claimant was confused and unclear in her testimony and had made irrational choices to seek the assistance of the police in a town two days walk away from the capital city where she lived. There is also the impression on reading the decision that the panel is not convinced of her nationality and citizenship since she cannot sing the national anthem nor name the official languages. Relying on United States Department of State country reports and _Countries of the World_, the panel also notes that The Gambia has a good human rights record and non-governmental human right organizations operate freely in the country. It is problematic to rely on US State Department reports as the authority on human rights records around the

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globe; it is also problematic to rely on an invocation of a fanatic Muslim father to ground a claim.

In contrast to refugee determination, international human rights commentary on forced and early marriage is disposed to finding that all marriages of girls under the age of eighteen and all marriages entered into through parents arrangement are inherently violating individuals’ rights. At the international level, it is not individual complainants but the abstraction of country reports and issue-oriented resolutions. The essential ability to deeply contextualize may be lost in the abstraction. Let us look at the international law on point for a moment by contrast.

The General Assembly in 1998 as well as the Human Rights Committee, the Committee on the Rights of the Child, the Women’s Committee in discussion with states over the last number of years, have each dealt with early or forced marriage or differences in marriage age laws. The UN General Assembly in its Resolution on “The Girl Child” lists early marriage and marriage age laws as areas of concern and in its Resolution on the “Traffic in girls and women” discusses forced marriage as a form of trafficking. The Human Rights Committee in 1995 found the marriage age laws in Sri Lanka to be incompatible with Covenant article 3, 23(3), and 26.

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62 A/RES/50/38 (31 MAY 1995). The Women’s Committee has also been active in this area and recently rebuked Tunisia for their different marriage ages for men and women.

63 The Supplementary Convention on Slavery defines forced marriage as a slavery-like practice and most human rights conventions include the right to free and full consent as a protected fundamental human right (UDHR, ICCPR, Women’s Convention).


65 A/RES/50/40 (3 OCT. 1995).
Marriage age laws, early and forced marriage were also a topic for discussion at the Committee on the Rights of the Child when reviewing the periodic reports from France, Burkina Faso, Ukraine, Yemen, Korea and Pakistan in 1996. These discussions are at a high level of abstraction given the treaty-body process. At the same time, it is obviously similar to argue that women have experienced a violation of international human rights and persecution given that they must prove that the state is not protecting women from persecution if the abuse is not at the hands of a state official. The threshold to be determined a Convention refugee remains higher.

Distinct to the international domain seems to be the finding that \textit{underage} marriage \textit{per se} can constitute a violation of international human rights (CEDAW Comment defining 18 as the minimum age of marriage). While the \textit{Convention on the Elimination of All Forms of Discrimination Against Women} (the Women's Convention), does not stipulate a minimum age of marriage, it states in Article 16(2), that “the betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”

The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) commented on this article in 1994:

\begin{quote}
Notwithstanding this definition [in the Convention on the Rights of the Child], and bearing in mind the provisions of the Vienna Declaration, the Committee considers that the minimum age for marriage should be 18 years for both man and woman. When men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before they have attained full maturity and capacity to act. According to the World Health Organization, when minors, particularly girls, marry and have children, their
\end{quote}

\footnote{A/51/41 (18 JUNE 1996) At Paragraphs 26, 59, 85, 234, 378, 625, 773, 827, 955, 1110.}
health can be adversely affected and their education is impeded. As a result their economic autonomy is restricted.\textsuperscript{67}

It would be consistent with the Guidelines and jurisprudence to argue that, in addition to the recognition of cases where women are fleeing persecution at the hands of an abusive spouse or father in a sexist country where the husband wields a lot of social influence, panels could recognize cases where the cumulative effect of human rights violations associated with marriage as a minor: non prosecution of under age rape, the health effects of pregnancy and child birth as a teen and the state's inability or unwillingness to provide for education, health and employments services for young women who choose not to live within the marriage arranged for her as a minor (early marriage). All this would be absent violence at the hands of the individual spouse but with the knowledge that such violence may occur and is common for similarly situated young women in that society.\textsuperscript{68}

In looking for the traveling norms surrounding Hausa Muslim women from Nigeria, I found no refugee claims from Nigerian women based on early marriage. In one case of a Hausa Muslim woman, the claimant was from Ghana and claimed refugee status for her refusal to be subject to

\textsuperscript{67} General Recommendation No. 21 (13\textsuperscript{th} session, 1994) Equality in marriage and family relations, Paragraph 36. Choice in marriage is a very complicated matter and I would argue we have to see the context in which young women make the choice to be married at a young age. Often young women "consent" to arranged marriage. While I do not want to undermine their agency in those choices, I want to complicate the picture of free choice. I do not presume that they cannot act b/c of oppressive cultural context but at the same time do not assume they acted without influence - sometimes coercive - of parents community imam etc. Under 18 is ill-conceived strategy, however.

\textsuperscript{68} On the flip side a Jordanian woman was unsuccessful in her refugee claim when she asserted that she feared persecution as she married without consent of her parents, did not cover herself and had a child. In large measure the negative determination seemed to turn on the fact that she left Jordan without the intention to make refugee claim, returned to Jordan when her mother was ill then ran away from her family, hid with an uncle then returned to Canada: \textit{C.Z.K. (Re), [1996] C.R.D.D. No. 96 T94-01325, V. Bubrin, M. Eustaquio, March 8, 1996.}
female genital mutilation or clitorectomy. Interestingly, in northern Nigeria among Hausa Muslim women female genital surgeries were not performed on girls. In this decision the panel excerpts from the Encyclopedia to describe the Hausa ethnic group. The panel concludes that "FGM violates the right not to be married against one's consent, inasmuch it is frequently - as it is well documented - a precondition of marriage, and a precondition that is imposed by physical, psychological or social constraint upon its victims".\(^6\) I will return to this case in the next section when discussing the cultural othering involved in refugee determination.

The narratives of women's lives presented and discussed in refugee cases are diverse and do not fall easily into categories of analysis. There are a number of cases wherein Muslim women have been recognized as Convention refugees within a framework of respect for their religious views. For example, refugee women are not expected to drop their veil and other symbols of their culture in order to conform to the refugee definition.

In one case the Convention Refugee Determination Division found in favor of a devout woman (ethnic Somali) fleeing her marriage but not her religion and culture.\(^7\) Another woman who also described herself as a devout Muslim who wore chador in Somalia\(^7\) was found to be a refugee. In this 1990 case the claimant was successful due to change in circumstances in Somalia. Muslim feminists working within the Islamic paradigm in Bangladesh and Tanzania also have received


positive determinations. The Bangledeshi claimant was an activist within her community and targeted for her reform efforts. Similariy the panel in the Tanzanian case described the claimant as “knowledgeable about women’s rights” and a feminist Muslim woman. A religious Muslim woman associated with FIS in Algeria was also successful due to change in circumstance in Algeria. There are cases of non-conformists within Iran not wearing the hejab:

The claimant is a Muslim. However, she describes herself as secular and non-practising. In her everyday life outside the privacy of her own home or the home of friends, the claimant made every effort to comply with the religiously-based laws regarding dress and behaviour. Outside the privacy of her home and those of friends, she was not radical in her behaviour towards the societal norms of Iran. [...] In Iran, not only are the laws governing women's behaviour oppressive but the penalty for non-compliance is disproportionately severe and arbitrary. The claimant by wearing make-up, having her hair uncovered and by wearing Western-style clothes at a private party has expressed political and religious opinions contrary to those of the government of Iran. The Iranian government views what the claimant did as an expression of undesirable Western religious and political opinions.

or women refusing conversion to Islam in Malaysia. These decisions present a varied portrait of Muslim women who claim refugee status in Canada.

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75 Y. (J.Z.) (Re), [1993] C.R.D.D. No. 335 M93-80487, E. Harker, R. Sahay, August 30, 1993: “The claimant was not politically active in any way. She was raised in a home which was significantly influenced by western values and which supported women’s rights to education and equal treatment.”

I will return to these cases when I discuss the pitfalls of the process but I argue that the refugee determination system has provided protection in a wide variety of situations and with sensitivity to cultural context. While the refugee process compartmentalizes a woman's identity and dissects her life experience to fit into the steps of a legal definition, it does what other legal reasoning does: siphons information, assesses credibility and applies precedent. The notion of refugee *sur place* is interesting because it allows for the refugee determination process to see the cultural circumstance as evolving and changing, not a static snap shot that we are sometimes presented in the mainstream media and elsewhere, in particular I would argue a problem for representation of Muslim culture as unchanging and backward.

In sum, I contend that when dealing with an adjudicative process we find advantages in terms of specificity and context over other kinds of mechanisms available for promoting international women's human rights. The irony is that this happens on exit – women who stay behind may be left with less precise or less effective mechanisms to secure protection. Even though women may not always have to present themselves as abandoning their cultural and religious identities, they are already outside those cultural and religious societies and present them as oppressive. This brings me to the second theme of my chapter.
III. Oppressive Cultural Narratives

The refugee determination scheme and international human rights can build upon orientalist notions of Arab, Muslim cultures. It can reinforce racist ideas about African traditional practices and reiterate the ideas of Western superiority/African inferiority, Western rationality/African barbarism. The process can rely on simplistic ahistorical versions of post-colonial societies which make invisible the role of colonialism and imperialism. Sherene Razack argues,

when the histories of imperialism, colonialism, and racism are left out of sexual violence, we are unable to see how these systems of domination produce and maintain violence against women ... there is First World complicity in both sexual and racial persecution of Third World women.77

While there may be mention made of the Gulf War and its impact on Palestinians living in the United Arab Emirates in the claimant’s Personal Information Form, the panel did not address this aspect of her story in their decision.78 The notion of state accountability is singular and limited to the claimant’s country of nationality. In assessing the country conditions in The Gambia, colonialism is uncritically mentioned. Since the country has the British legal system and constitutional protections of citizens’ rights, the panel finds no objectively reasonable basis for the claimant’s subjective fear of persecution.

This critique points out the ways in which contemporary refugee determination is akin to early anthropological ethnographies of Other cultures. This work sought in the most benign forms to

77 Razack, supra note 8 at 91.
78 G. (B.B.) (Re), supra note 34.
expose the primitive cultures without acknowledging the power of the observer and the inequality of languages for cultural translation.\footnote{Talal Asad, “The Concept of Cultural Translation in British Anthropology” In James Clifford and George E. Marcus (eds.) Writing Culture: The Poetics and Politics of Ethnography (London: Univ. Of California Press, 1986) 141.} These narratives had an important place in the colonial project- recall of course that the treatment of women in traditional societies was used to justify the invasion by colonial powers in some places and the colonial powers. The Federal Court in \textit{Annan} invokes this tone in their denunciation of female genital mutilation or clitorectimony as “a cruel and barbarous practice”, a ‘frightful torture’ and an ‘atrocious mutilation’\footnote{\textit{Annan v. M.E.I.}, [1995] F.C.J. No. 1038, IMM-215-95 (T.D.) online: QL (FCJ).}. The Convention Refugee Determination Division panel in \textit{R.S.F.} “agrees with this characterization”\footnote{\textit{R.S.F (Re)}, [1997] C.R.D.D. No 78 M95-13161, E. Didier and J. Provost; March 13, 1997, at para. 24.}. In coming to its conclusion in this case the panel relied on the Hosken report and Encyclopedia descriptions of Hausa Muslim culture in Ghana. The decision-makers may have attempted to contextualize in this fashion. However, the effect of their cross cultural judgement is a reinforcement that Ghanian culture must be spoken for, that Fran Hosken is the authority on the meaning of female genital surgeries in Ghana (the panel does cite a Ghanian Minister later in the determination), and that the practice defines the culture. This is not to say that the claimant, a girl who politically opposed the procedure for girls in her school, refused to be subjected to it herself and had witnessed two girls die in her school after the procedure, should not be found to be a Convention refugee. It is a criticism of the cross cultural judgement, in this case a judgement which reinforces stereotypical views of African Muslim culture.
In addition, this is not to say that there were not struggles within those societies and resistance and contest that remain today about the place of women in Indian society, Morocco, or Algeria. Rather my claim is that this critique exposes the historical global dimensions that often go unmentioned and therefore reinforced by refugee determination. Caren Kaplan eloquently cautions feminists that,

In a transnational world where cultural asymmetries and linkages continue to be mystified by economic and political interests at multiple levels, feminists need detailed, historicized maps of the circuits of power. As superpowers realign and markets diversify, many of the conventional boundaries of earlier eras have been dismantled. Yet our critical languages and methodologies continue to refer to these older constructs.\textsuperscript{82}

This is of particular concern for Muslim women given the history of misinterpretations of the Islamic religion and current anti-Arab sentiments. As I argue in the previous chapter, Marnia Lazreg's insights are essential. When approaching a case from a Muslim African country, social scientist, feminist and refugee critics ought to be mindful of working within a religious paradigm which overdetermines the analysis and presupposes that the community cannot produce and adequate knowledge of itself. Thus the history of orientalist knowledge justifies intervention and critique. Edward Said states,

There is no other vantage outside the actuality of relationships between cultures, between unequal imperial and non-imperial powers, between different Others, a vantage that might allow one the epistemological privilege of somehow judging, evaluating and interpreting free of encumbering interests, emotions and engagements of the ongoing relationships themselves.\textsuperscript{83}


\textsuperscript{83} Edward Said, 1989 at 216.
Sherene Razack in her analysis of refugee women cases from the Caribbean and Muslim countries argues that "refugee discourse ... is one of pity and compassion. It is not one of justice and responsibility". Women should not have to demonize their culture and country’s political climate to have a successful refugee claim in Canada:

From pity to responsibility ... and our responsibility has to stretch wide. At the very least, we in the West cannot begin by dispensing with historical specificities and contemporary realities of colonialism and neocolonialism. We have to push for greater acknowledgment of this context in the same breath that we push for and acknowledgment of the violence that men do to women.

Razack finds that women from the Caribbean do not fit as easily into our idea of helpless women in need of protection. Rather, racism informs an image of Black women as “mammies” and criminals. Women from Muslim societies on the other hand more readily fit the Western imagination of women oppressed by religion and culture. Where these two paradigms overlap is in the case of Muslim African women. In my analysis of refugee decisions, eight of the twelve cases concerning marriage from Muslim Arab countries including Jordan, Turkey, and Algeria resulted in positive determinations. Of the seven cases from Muslim African countries, four were successful. Finally, six of the eight refugee claims from Muslim South Asia, including India, Bangladesh and Pakistan, resulted in refugee status. Two negative decisions for Kenyan claimants, one which was overturned on appeal to the Federal Court Trial Division, found that

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84 Razack, supra 8 note at 126.

85 Ibid. at 127.

86 Do I find that Muslim women claimants are treated differently than non-Muslim? or Arab from non-Arab? Are there restrictive scripts that women from Muslim or Arab countries have to fit into for a positive determination on refugee status? Do they have to renge their religion and their culture to avail themselves of the charity of the Canadian legal system? I found that while we may see some patterns in the scripts for women in this system, they do not necessarily lend themselves to simplistic conclusions along Muslim/Arab vs non-Muslim/Arab lines.
the asylum seekers were not "helpless women", consistent with Razack's conclusion that Black Carribean women may have a harder time convincing decision-makers of their fear of persecution.

Scripts for refugee women

There are three broad groupings of Muslim refugee women, I would argue, in the determination jurisprudence. In each of these scripts there are risks of cultural misrepresentation due to ahistorical explanations for refugee creating situations and over-generalizations of religion and culture. First, there is the script of the "helpless woman", victim of severe spousal abuse, and neglect by the state. This category includes cases from Zimbabwe (the leading case on early marriage), Kenya, India, Bangladesh, Turkey and Iran. The claimant's testimonies in their Personal Information Forms and oral evidence often discuss the grave circumstances in which they found themselves and their feelings of helplessness. Of course these life stories are akin to those of women who have "battered women's syndrome" and the criticisms of that syndrome can be equally applied here. In so far as it portrays women as without resourcefulness and agency, the syndrome is problematic. As well, the way in which the syndrome may include racist presumptions must be interrogated. Are white women the archetypal battered woman, foreclosing others from gaining the protection of the legal category?

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Second, there is the script of the feminist activist, critical of the dominant gender roles and state policies in her country of origin. This script often applies to Iranian women “influenced by western values”, “knowledgeable about women’s rights”, educated abroad or “emancipated”. The feminist activist may or may not be devout for there are cases of Muslim feminists who are not westernized per se. This was the case of a Bangladeshi woman for example who was described as an activist within Islam. In the treatment of refugee women’s cases in this script “[t]he body of the Muslim woman is placed at this intersection [of Orientalist and Islamist discourse] and faces the combined pressures of authority from orientalist/racist western constructs as well as fundamentalist Islamist constructs”.

Third, in the script of the non-conformist woman who unlike the feminist outspoken woman, has this story told about her or for her: “woman living alone without a male protection in Turkey” or “single raped woman with a child in Pakistan” or “not politically active in any way in Iran”. A Kurdish woman from Turkey claimed refugee status fearing death at the hands of her husband or his family. She was kidnaped in 1985 and forced to marry a man from her village. In finding in her favor the panel found that she has a well-founded fear of persecution based on her membership in a particular social group:

[If she returned to Turkey,] she would be considered a Muslim woman, a Kurdish Muslim woman in a small village, who has violated the social mores of her culture and her country by refusing both to return voluntarily to her country with

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90 Shahnaz Khan, “Race, Gender and Orientalism: Muta and the Canadian Legal System” (1995) 8 CJWL 249 at 253.
her husband and by refusing to live with him. She would also be considered a Kurdish Muslim woman who would be living alone, in an Islamic tradition where this is considered unacceptable. If she were to be without the protection of a male relative because of having asked for a divorce from her husband, she would be considered a “bad woman”, in the claimant’s words, referring either to a prostitute or a woman who is unfaithful to her husband.91

This decision leaves the categorical impression that Islam leaves no room for female agency nor any room for renegotiation of the religious norms.92

Re C (I.J.)

Another case that shows the dangers of cultural misrepresentation in the refugee determination process is the case of Re C (I.J).93 The claimant is a Bangladeshi woman whose last country of origin was Saudi Arabia. She makes the claim along with her second husband and daughter from her first marriage. It is the circumstances of that first marriage which forms the basis of the claim. She was married at thirteen years of age to a man fifteen years older than herself. Her family had agreed to the marriage on the condition that he not live with her until she was eighteen years old. Nonetheless, he sexually assaulted and raped the claimant at the time of the marriage. She gave birth to her daughter when she was seventeen. Her husband was extremely abusive and controlling; he prevented her from contacting her family from Saudi Arabia where they were living. Despite characterizations of orthodoxy throughout the decision, the claimant’s husband had agreed to give his wife the power in law to divorce him without his approval in the


92 See also B. (L.Y.) (Re), [1995] C.R.D.D. No. 78, T94-04946, R. Adamson, D. Winkler, April 11, 1995, where the claimant, a woman from Somalia fled after an unwanted marriage to her brother-in-law. The panel finds her to be a member of a particular social groups made up of “women who have transgressed the social mores of the society in which they live”.

event of marriage breakdown and deprived him of the right to divorce. The claimant "obtained a divorce without his approval and knowledge". He is described as influential within the fundamentalist Islamic group, the Jamaat-E-Islam Party, and connected to the Bangladeshi National Party (BNP) in Bangladesh and is described as coming from a fundamentalist family.

What is striking is comparing the PIF and the decision, the latter which does not deal with the time the couple spent in Texas when the violence still went unchecked. In fact, the claimant called the police, her husband was charged, but he spent only three days in jail. After this time he was released and threatened her with more severe violence: "My situation was very bad in Texas, putting up with constant physical and emotional abuse". Further, the claimant in her testimony claims that her husband had contacts in Chicago, New York and Texas that made her fear for her safety. The panel does not inquire into how, if he has so many contacts in the United States, he will not threaten her in Canada nor why she did not make a claim to refugee status in the United States. The claimant states: "We did not even feel safe in the United States. Some of XX's friends found out that we were in the United States and we had to move around through various cities in order to avoid them. XX has brothers and friends in the United States."\(^{94}\)

_{Re Q (L.P.)}_

In a second case where an Iranian claimant and her abusive husband went to Sweden before coming to Canada, there is no mention made of the fact that the Swedish government, like the

\(^{94}\) _Ibid. Personal Information Form._
Texan, was unable to protect the claimant from her husband’s violence. In many cases, immigrant and refugee women testify that the violence they endure worsens when they come to Canada due to their social isolation and their husband’s loss of economic and employment opportunities and self-esteem.

In dealing with marriage and apostasy, the Refugee Division found to be a refugee an Iranian man who had converted from Islam to Christianity to marry the woman he loved. The circumstances of his case included a beating by Iranian officials that left him permanently disabled. On the scheduled wedding day, officials from the public prosecutor’s office came to the claimant’s house but he was not home. The claimant left the country before without having married. The panel noted that the punishment for apostasy is either death or imprisonment. “Moreover, denial of a fundamental right, when such denial is systematically effected, is tantamount to persecution. The right to love is such a fundamental right, and the claimant’s right to enter freely into marriage with someone who loved him was deliberately denied.”

In a negative determination from 1994 concerning an Iranian woman’s claim the panel wrote,

Perhaps the most simplified way to draw the distinction is by opposing that which one “is” against that which one “does”, at a particular time. The claimant, even though she disagrees with the Iranian dress code, could chose to obey them; such compliance does not violate her basic human rights. The claimant was harassed for what she was doing, not for who she was in an immutable or fundamental way.”


96 See also the discussion of Nada’s case, supra note 25. Audrey Macklin, “Refugee Women and the Imperatives of Categories”, supra note 21 at 254, and Sherene Razack both discuss this case.

One rebuttal offered to these critiques may be that the refugee herself is asking for asylum having been forced to exit from her community and state for reasons or persecution. The 'West' did not champion her cause and rescue her; she comes to the border asking for protection and asylum. While this is true in a narrow sense, how the utter poverty of global mal-distribution has visited upon certain nations and produced refugees goes unexplored. The rich nations, former colonial powers and contemporary imperial powers, have a responsibility in the creation of the problem, a role which is seldom if ever articulated in the decisions of refugee women. The state's inability to protect them may have to do with lack of resources, lack of will, lack of infrastructure, bad faith, corruption, IMF fiscal restructuring and so on.

In Nigeria for example, the health system is in shambles in the north of the country. Women routinely give birth without an attendant whether a traditional birth attendant trained through the community health workers or a nurse in a rural health facility. This is to say nothing of making it to the hospital. These conditions undermine the realization of women's right to health. When added to the risk of giving birth at a young age (much higher likelihood of maternal and infant mortality, VVF, reproductive ill health) the violations of women’s rights are compounded. Due to lack of an education system a girl’s options beyond marriage may also be severely curtailed.

In the words of Salamata Sani, a 25-year-old woman from Katsina State: “I was married at twelve years old. We met as young boy and girl. God said I would marry him. I didn’t have to tell my parents. The boy was visiting my parents... Eleven months after marriage I started menstruation. Sexual intercourse started in the third month after being married. He had to beat me for me to agree to sex - broken bones.” After her second pregnancy, Salamata Sani developed
incontinence. She stayed for eight days in hospital and then returned to her village. A month after the birth her husband told her she was “spoiled”. When I met her she was selling groundnut cakes to earn enough money for a second operation to repair the VVF. Salamata is not the woman at the door. But if Salamata reaches the border, how ought we evaluate the circumstances of her claim?

In a 1998 case from Nigeria, the claimant had been forced into an arranged marriage with a “high ranking military officer” and had been physically abused throughout her married life. She had escaped to another town and had attended university there. “In July 1996, her husband located her and forcibly brought her back to his home. He continued to beat her and threatened to kill her if she tried to run away again”.98 In coming to its decision that the claimant had a well-founded fear of persecution because of her membership in a particular social group, *Nigerian women who are victims of domestic violence*, the Refugee Division panel states that wife abuse was common in Nigeria and the police did not normally intervene in domestic disputes: “In addition, the source [documentary evidence] states that the police may not have the necessary resources for addressing the problems of women being threatened by males in society”.99 Not only does this case raise the economic conditions in the country which impact on the state’s ability to protect women and women’s willingness to seek government assistance, but it also highlights the economics of claimants. Part of the reason few rural women from Nigeria claim refugee in Canada is that they do not even have the means to travel to the next town let alone the

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next country or continent. The refugee determination system does nothing to address these stark issues of global division of wealth.

The other rebuttal to this line of criticism is that it is looking in the wrong place for redress of the global imbalance of power and resources, and histories of oppression. Why should the refugee determination system, a system built to provide protection when the state has failed, i.e., when individuals are forced to leave their home and become global migrants, address these more macro issues?

This is short-sighted for obvious reasons because the utopian goal of human rights, and refugee law within this. One goal must be the ebb of refugee creating circumstances; we are working toward a world without refugees and without violations of women’s rights; the best way to do that is tackle the problems which create the abuses.

Evidentiary issues are important; sources of information more reliable and sensitive than those normally relied upon by decision-makers. For example, the use of Encyclopedia accounts and not human rights organization or other indigenous sources of information reinforces the orientalist knowledge paradigm. The rules of evidence are not as strict as those in civil proceedings.¹⁰⁰ I will discuss the issue of documentation further in my concluding chapter.

¹⁰⁰ Nicole Laviolette, supra note 38.
In the script about domestic violence I was struck by the utter silence regarding the fact that the United States in one case and Sweden in another were also unable to protect women in flight from violence.\textsuperscript{101} In the first case the husband continued his abuse while the couple was living in Texas, was charged and jailed over night but seemed to have escaped a longer sentence and certainly was still abusing his wife. In the second case, as well, the violence continued almost unchecked in Sweden. I am insisting that we critically evaluate problematic practices within our own borders just as we "police the borders".\textsuperscript{102}

IV. Conclusions:

I have tried to explore the tensions in refugee determination cases for refugee women. These tensions can be described as between the need for cultural contextualization and the dangers of cultural misrepresentations. I have argued that the refugee determination scheme is one which potentially can see women in their complexity and evaluate their claims in their social and political context. Perhaps more so than the international schemes to "enforce" international human rights, the refugee determination process can bring a diversity of voices into the intercultural debate. Paradoxically, this process occurs at the moment when a woman exits from her community and state. Thus while the domestic process may allow for cultural contextualization of the individual claimant, she is already an outsider to that culture.\textsuperscript{103} The

\begin{itemize}
\item \textsuperscript{102} Sherene Razack, \textit{supra} note 8.
\item \textsuperscript{103} She was already an outsider to her culture; need to see cultures as very fluid and interdependent.
\end{itemize}
process, due to its charitable premises, risks presenting the woman’s story to fit with common myths and stereotypes about cultural superiority and civility. Refugee women have a life-saving incentive to play into those narratives when presenting their claims. This is the second theme I have tried to explore.

The best way to address this tension is to insist on historical and cultural contexts of oppression when assessing a claim to refugee status. The traditional country report does not ordinarily undertake such an analysis. There ought to be an element of self-reflection and self-criticism in the evaluation of refugee claims so as to reduce the risk of judging others from a position of moral superiority. Finally, and related, we need to see cultures as in flux and interdependent on one another.
CHAPTER 6: Conclusions

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Conclusions and Recommendations

When Lia was about three months old, her older sister Yer slammed the front door of the Lees’ apartment. A few moments later, Lia’s eyes rolled up, her arms jerked over her head, and she fainted. The Lees had little doubt about what had happened. Despite the careful installation of Lia’s soul during the hu plig ceremony, the noise of the door had been so profoundly frightening that her soul had fled her body and become lost. They recognized the resulting symptoms as quag dab peg, which means “the spirit catches you and you fall down”. The spirit referred to in this phrase is the soul-stealing dab; peg means to catch or hit; and quag means to fall over with one’s roots still in the ground, as grain might be beaten down by wind or rain.1

Anne Fadiman tells of the encounters between one Hmong family and the Merced medical and child welfare systems in her book The Spirit Catches You and You Fall Down. The Hmong family, the Lees, have a daughter, Lia, with epilepsy which causes numerous and serious seizures throughout her life. Fadiman explains the Lee family’s history, journey to the United States, belief system, customs, and perceptions of the American medical system. The book spans a number of years and evokes a powerful image of American misunderstanding of the Hmong community and the Lee family. With a careful and thorough method Fadiman offers the reader a sense of the medical professionals’ struggle to “treat” for epilepsy and the Lee family’s struggle to cherish their favored daughter. On one occasion, Lia is apprehended by the child protection authorities because her parents do not administer the medication as instructed by her doctors. Lia is returned to the family in worse health after a very serious seizure. But Fadiman does not come to easy conclusions about cross-cultural treatment nor simple prescriptions for cross-cultural interactions. Rather she leaves the reader with a rich picture of the struggles for

understanding and compromise along the way.

This thesis also tries, in a more modest fashion, to leave the reader with a richer picture of international women's rights and early marriage practices. As the examples from the Hmong community show, there is a need for deeper understanding of the cultures of which women are a part and in which women are marrying young. In particular, the role of colonialism and imperialism needs to be an explicit component part of these studies. "The name that the Hmong give themselves means ‘free people’ or ‘those who must have their freedom’". The Hmong people lived independently in the mountains in Southeast Asia until the eighteenth century. They then fled Chinese rule moving through Indonesia to Laos. They were surrounded by war in the 1960s and 1970s. The Americans were involved in the region arming anti-communist forces and they enlisted and conscripted the Hmong for military support and "to help build air bases for the Americans near [Hmong] villages". In 1973, the United States began pulling out of the region, leaving the Hmong vulnerable to attack by the Lao People’s Democratic Republic and their Vietnamese allies.

Many Hmong fled to refugee camps in Thailand. Fadiman describes how the Hmong had to travel silently to avoid bullets and mines. Families would use opium to keep the babies from crying; many babies died from accidental overdoses. Many other children and adults died crossing the Mekong river to Thailand. "An unknowable fraction of the Hmong who attempted


3 Ibid. at 172. And see Fadiman, supra note 1 at 125.
to flee Laos – some survivors estimate it was half, some much less – died en route from Pathet Laos and Vietnamese bullets and mines, as well as from disease, starvation, tiger maulings, poisoning by toxic plants, and drowning.\textsuperscript{4} With the closing of Thai refugee camps, the Hmong were forced to choose between two undesirable options: return to Laos or settle in another country. Many Hmong felt the choice was impossible but reluctantly decided to apply to immigrate to the United States.\textsuperscript{5}

The Hmong living in the United States are survivors: survivors of resistance, flight, wars, refugee camps, and more relocation. Their response to demands of assimilation has been to flee, to relocate rather than to assimilate. Now in the United States, the Hmong struggle is to maintain their culture as their children go to schools, hospitals, and shopping malls. They came to the United States to survive not to embrace American culture. Fadiman argues that she “can think of no other group of immigrants whose culture, in its most essential aspects, has been so little eroded by assimilation”.\textsuperscript{6} One aspect of cultural survival is marrying within the Hmong community and marrying young. How then do we judge early marriage among Hmong families in the United States? And, as Donald Hones asks, “what responsibility does the American government and society have for refugees, many of whom are here as a direct result of American military activity abroad?”\textsuperscript{7} The answers to these questions are not easy demands for assimilation and the inscription of American laws and cultural values nor simple treatments of Hmong culture

\textsuperscript{4} Fadiman, supra note 1 at 165.
\textsuperscript{5} Ibid. at 168-69.
\textsuperscript{6} Ibid. at 208.
\textsuperscript{7} Hones, supra note 2 at 195.
as completely unaffected by the larger communities in which they now live. To criticize early marriage among the Hmong, or any other group, without an understanding of their socio-political history and contemporary struggles would be to judge in a legal and ethical vacuum. The challenge is to contextualize local practices within global structures.

I have tried to explore the space between dichotomized positions on the question of the universality of international women's rights. Chapter 2 demonstrates the tenacity of the polarized positions of universality and relativity in the history and discourse of international women's rights while showing the existence of subtle forms of deference to national systems and particularity in human rights norms. In Chapter 3, I argued that early childbearing in North America ought to be placed alongside early marriage in other cultural contexts in an effort to interrogate the cross-cultural judgements about "child marriage". In particular this method has led me to question whether early marriage is the practice most worthy of indictment in various contexts. Secondly, this cross-cultural survey shows how systemic issues such as poverty, cultural pressures on girls, and lack of educational opportunities for adolescents, must be addressed as part of strategies to deal with the consequences of early marriage.

I have demonstrated my methodology of case studies and deep contextualization in Chapter 4, through the case of early marriage in northern Nigeria. Inspired by methods and theory in feminist anthropology, I have tried to weave a description of early marriage in northern Nigeria

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and to suggest reform strategies including the potential use and limitations of international human rights norms in those strategies. The Nigerian example shows how international human rights can be perceived by some as part of a secularizing or Westernizing project that has its roots in colonial practices. The criminal and family laws of many former colonies remain the product of colonial powers and conflict with indigenous normative systems. In Nigeria customary, religious and statutory laws pertaining to marriage coexist. I concluded from my research that the coexisting religious and cultural norms in practice trump any statutory definitions of the appropriate minimum marriageable age.\textsuperscript{10}

**Future Study: Ethnographies of rights**

The thesis also implies areas for future study and methods with which to pursue those studies. The importance of ethnographies of rights is central to future inquiries. The practice of international human rights must substantiate its rhetoric with a better understanding of how rights are domesticated and used in indigenous legal cultures.\textsuperscript{11} The study of how rights norms are taking on vernacularized forms needs to be further documented by human rights activists and scholars.\textsuperscript{12} For example, in addition to the ways in which Nigerian feminists were articulating their concerns about early marriage, we need to ascertain how other non-governmental organizations in Bangladesh, Ethiopia, India, Indonesia, and Morocco are advocating for reform


of marriage practices in their countries and communities. It may be that within the same country women are challenging early marriage with very different strategies and with varying degrees of success. Further, ethnographies of rights need to be placed in the same frame as early marriage practices such as early childbearing in North America and Europe.

Ethnographies can be made up of narratives in their social context written by women engaged in processes of change. These ethnographies will not necessarily be taken as the only version of cultural meaning given to practices. But narratives provide some necessary corrective to stereotypical or simplistic versions of cultural change. During some of the interviews I conducted in northern Nigeria, women discussed how they did not object to their own marriage but would prefer to let their daughters “mature” before their being married. They then qualified this by further stating that the timing of their daughters’ marriages would be the decision of their husbands. These responses suggest a dynamic negotiation of marriage norms within families and societies that needs to be further explored. There is an important role for indigenous non-governmental organizations in the documentation of these dynamics and rights struggles in relation to them. The international community needs to be more attentive to the complexities.13

Ethnographies also can include interviews, testimonies, observation, participant focus groups,

13 These issues presented themselves acutely in India in 1985 when a seventy-five-year old Muslim woman, Shah Bano, applied to the court for maintenance under the Criminal Procedure Act, a section to prevent destitution. The court ordered her husband to pay maintenance under the Act. A member of Parliament then introduced a Bill to exclude Muslim women from the application of the legislation. Many people in the Indian Muslim community organized around the Bill and against the Shah Bano decision as an encroachment on Muslim family law. Shah Bano herself was reportedly torn as the countries religious politics played out through her case. See Radha Kumar, “Identity Politics and the Contemporary Indian Feminist Movement” in Valentine Moghadam (ed.) Identity Politics and Women: Cultural Reassertions and Feminisms in International Perspective (Boulder: Westview Press, 1994) 274 at 275-283.
and legal research. Human Rights Watch uses some of these techniques in their human rights mission methodologies. Human Rights Watch will spend various numbers of weeks in a country, interviewing contacts, activists, community health workers, lawyers, doctors, politicians, and others. After conducting the field investigation portion of the mission, Human Rights Watch will write a report for publication explaining the documented violations of human rights in relation to the relevant international human rights law. Human Rights Watch has had good success in drawing attention to many individual and systemic violations of human rights substantiated in their work. There are two troubling aspects, however, of the method of Human Rights Watch and other international human rights organizations.

The first shortcoming stems from the prioritizing of civil and political rights. Human Rights Watch has a mandate to deal with the protection from violations of civil and political rights. When drafting the report for Human Rights Watch on early marriage, I was struck by the limitations of this approach since the violations of women’s reproductive health and education rights in particular were most pressing and relevant to the Nigerian context. The final draft of the report fore-fronted the violations of forced marriage, child marriage and rape in marriage. The report could only deal with the discriminatory aspects of the social consequences of early marriage (health and education). The violations of the rights to health and education, and the ways in which systemic problems in these areas contributed to early marriage, were not dealt with as separate human rights violations.¹⁴ Human Rights Watch has debated over the years

¹⁴ In correspondence back and forth about the drafting of the report, I was told that the health and social consequences, including educational consequences, of early marriage could not be dealt with “unless we can link them to a human rights abuse”. Correspondence from Karen Sorensen 12 June 1995 on draft of report.
whether to expand this mandate to include economic, social and cultural rights although this has not happened. Certainly the movement in international human rights scholarship and international conferences is to recognize the interconnectedness of civil, political, economic, social and cultural rights.

The second problem is the way in which international human rights activism reproduces the power of voices from Western countries pronouncing on the human rights record of other countries. In the language of Human Rights Watch, it works in partnership with local activists and human rights organizations: "[w]e stand with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhuman conduct in wartime, and to bring offenders to justice." Nonetheless, Human Rights Watch writes the reports in their Washington and New York offices and controls the material presented in their reports. Again, this is not an indictment of their work so much as a call for alternative modes of human rights reporting to be given equal legitimacy.

Despite the number of indigenous human rights organizations working on these issues, their voices are not accorded the same weight and value as Human Rights Watch. International treaty bodies and organizations are increasingly open to indigenous non-governmental participation in the international human rights discussion. However, much more needs to be done. It seems that the complexity and subtlety of arguments about human rights violations and cultural respect bears an inverse relationship to the place on the continuum from local to global. In other words,

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the farther the debate is from grassroots organizing, the more likely we are to hear invocations of facile universalistic or relativist discourse.\textsuperscript{16}

**Ethnographies and international bodies**

The Committee on the Elimination of Discrimination Against Women relies on a wide variety of sources including shadow reports provided to it by non-governmental organizations. Building on the knowledge of non-governmental organizations, international human rights can be a forum for the voices of indigenous activists. The adoption of the Optional Protocol to the Women’s Convention will specifically invite such participation as groups and organizations with sufficient interest in the matter of a violation may submit a communication to the Committee for its examination. Thus, the Committee’s interpretation of admissible communications under the Optional Protocol will be key in the future of women’s rights. The Committee will also have an independent inquiry mechanism available to conduct inquiries into serious or systemic violations of women’s rights set out in the Convention.\textsuperscript{17} With the adoption of an Optional Protocol, the Committee will be called upon, as well, to elaborate further the normative content of the rights contained in the Women’s Convention.

The adjudication of refugee claims in Canada also needs to rely on a wider variety of documentation, beyond traditional sources such as Western-based organizations and governments. As Dianne Otto writes, “human rights NGOs are one means to bringing local

\textsuperscript{16} See discussion of world conferences in Chapter 2.

knowledges to the fore in order to confound the certainties of dominant positions and destabilize the closure brought about by the binary opposition” in universality debates. While indigenous non-governmental organizations may present and interpret information in unconventional ways, the adjudicative process in Canada, like the international fora, needs to be open to these alternative expressions. Specifically the role of spiritual and religious discourse and its place in women’s lives needs to be included in international discourse in a way that has, to date, not been embraced.

Muslim women who claim refugee status in Canada, for example, need not be required to present their religion as static, sexist and fundamentalist to successfully claim the protection of refugee status. And in finding individual women to be Convention refugees – just as in finding practices to be violations of international human rights – we must not collapse religions and cultures with specific practices in those contexts. Once women have immigrated to Canada or been “granted” refugee status in Canada, cross-cultural judgements continue. Muslim women living in the diaspora participate in the Canadian judicial system and legal culture. Issues that arise and which need further reflection and study include the treatment of Muslim women in family and criminal law matters. Shahnaz Khan has written about the case of a young Shi’a Muslim Canadian woman who entered into eight temporary marriages (muta) with a man, her Sunday school teacher, who


19 Ibid. at 38.
was already married. They had a child together and the biological father and his wife adopted the girl. The legal dispute arose when the father of the child and his wife wanted to leave the country with the girl but her biological mother objected. The judge found in favor of the biological father and the child was allowed to leave the country. “The word muta was not even mentioned”.

Khan concluded her review of the decision as follows:

The judge and others within the Canadian legal system involved in this case did not understand muta and it appears that they did not wish to either. The implications of muta in Farhat’s case were largely ignored and the dispute was treated as if muta had not occurred and did not exist. Thus for Farhat her dispute became a multi-sided struggle – not only against community and family pressures, but also against the ethnocentrism of a legal system that considered the institution of muta and its consequences to be inconsequential.

This thesis has sought to explore cases of cross-cultural judgement from which we can glean the dangers and possibilities of cross-cultural legal assessments. When the interpretation of legal norms, national or international, occurs without attention to the cultural dynamics producing the practices under review and is taken to be the imposition of inflexible rights, it neglects the importance of alternative normative frameworks. Likewise, when cultural sensitivity is understood as an outright rejection of rights discourse and law, it neglects the interconnectedness and complexity of cultural practices. Somewhere between the imposition and the rejection of international rights discourse rests the place of constructive particularity of universal human

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20 Shahnaz Khan, “Race, Gender, and Orientalism: Muta and the Canadian Legal System” (1995) 8 Cdn. J. Women & Law 249 at 250. The Shi’a Muslims are a minority of the world’s Muslim population and live predominantly in Iran. Muta is now only practised among Shi’a Muslims but does not necessarily have broad public support. Ibid. at 251.

21 Ibid. at 256.

22 Ibid. at 257. Khan acted as an expert witness in the case and interviewed the biological mother, whom she calls Farhat, on two occasions before the matter was heard in court.
rights.
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APPENDIX A: SAMPLE QUESTIONNAIRE ISSUES

Name (Optional):
Age:
Religion:
Marital Status:
Town/ Village:
Local Government:

1. Have you gone through Quranic School system? If yes, how far?
2. Have you gone through state [Western-style] school? If yes, how far? If no, why not?
3. At what age did you get married?
4. Did your parents give you the chance to choose your husband? If no, did they seek your consent to their choice of husband? Were you happy with choice?
5. What does your husband do for a living? farming? government worker? businessman?
6. Are you the only wife of your husband? If no, how many?
7. Is this your first marriage? If no, were you widowed? divorced?
8. Did your husband encourage you to continue your schooling?
9. Is your husband from your own ethnic group?
10. Do you consider the custom of marrying girls at twelve or thirteen to be Islamic? If no, what is the source of this tradition?
11. Was dower paid to your parents?
12. Are you in purdah?
13. Do you earn an income? If yes, how?
14. Do you keep the money? What do you spend the money on?
15. Was the first time you had sex with your husband after puberty? If no, when?
16. How many children do you have? When did you give birth to each child? Where?
17. Would you consider divorcing [leaving] your husband? for cruelty? adultery?
18. Do you have a driver's license? Do you drive?
19. Did you and your husband make will?
20. Did you vote in last year's national election? Why or why not?
21. Have you heard of VVF?
22. Do you know anyone who has VVF?
23. Is your marriage what you expected when you entered into the union with your husband?
24. Would you want your daughter to marry when you did, in the way you did? Why?
APPENDIX B: TESTIMONIES

SOKOTO SPECIALIST HOSPITAL, VVF WARD 7 NOVEMBER 1994

1. Sume Abubakar

-25 years old from Yabo, Sokoto state
-no schooling
-one brother went to Islamic school
-three other brothers did not go to school
-"yes would want to go to school" [giggling]
-15 years old when married, happy; mother advised her to marry and gave one month
advance warning of the wedding
-yes, dower paid but does not now how much; took bad, mattress, decorations, etc to
husband's house
-no mates, only wife -stayed two years in husband's house
-started menstruation in husband's house
-started sexual relations before menstruation
-first pregnancy two years after marriage
-stayed four days in labour in house with her mother attending
-"will laugh at them if they go to hospital to deliver"; "believe they should deliver by
herself"
-was not conscious when taken to Hospital
-no gishiri cut
-[they] used hands to pull the baby out; still born baby
-stayed in Hospital one month; husband did not visit her in the Hospital
-after one month, went to mother's house
-since that time have had VVF (7 years with VVF)
-started leaking urine immediately after delivery, RVF as well
-village welcomed her and started looking for local treatment for her
-didn't work
-husband divorced her when VVF/RVF: "he just writes a paper to her that he divorces her,
three times"
-on her discharge from Hospital, they advised her to come back for VVF repair
-she came back and had RVF operation 1992: colostomy, healed not immediately but after
two years; the operation in 1992 for VVF
-had three operations in total, last year told to come back
-she provided materials, paid for ... brothers are helping
-very expensive; she sold some of her things because of her illness
-sometimes N 2000 [for materials for operation]
2. Balkisu Bello
- 20 years old Hausa from Wurno, Sokoto state local government
- [translator questioning her age, she has a tiny voice]
- no schooling; yes would has wanted to go to school
- married at 15; mother introduced husband to her
- father called her and told her the man she would be marrying two years before wedding
- husband also a young boy
- husband paid N 6000 with a basket of kola nut for dower
- from money bought all the necessary things for her to take to house
- there was another man but the father didn't agree that she would marry him & she said no
- started menstruation in her husband's house
- started sexual relations after menstruation
- she didn't agree [to sex]
- "wanted to run home but her father said that if she runs home he would beat her"
- "so had to relax for the husband"
[translator interjects that they will sometimes tie the girls' legs to the bed]
- husband forced her to have sex
- he is a farmer
- she was a housewife in purdah
- no money of her own
- 2 menstrual periods before pregnancy; 1 1/2 years after marriage
- laboured three days in the house before taken to the Hospital
- [when beyond their powers will take them to the Hospital]
- she was semi-conscious, still born baby
- delivered baby by c-section operation
- started leaking urine immediately after the birth
- stayed one week before she knew she was in Hospital and knew she was leaking
- stayed seven months in Hospital, visited by relations, husband visited twice
- went to parents house after discharge fro Hospital; when discharged they told her she should not do any hard labour, eat balanced diet, then three months later returned for VVF repair
- has not returned to husband's house again; he has not given any divorce papers, doesn't know if he is married again
- returned to Hospital three months later, admitted for VVF repair at Teaching Hospital
  - not successful - then referred her here: August 31, 1994 operation - successful
- parents paid for materials and will go to their house upon discharge
- need three months after discharge for return check-up
- "would not like to get married again", "parents will force her"
3. Rabi Monde

- 20 year old Hausa from Bingi, Sokoto state
- last of six children in the family: 3 sisters and 2 brothers
- none went to state school
- went to Islamic school for five years (including from husband's house)
- learned the Quran and Hadith in Islamic school
- stopped school because of marriage; would like to continue if get better
- it was between the parents of her husband and her parents
- not told about marriage until the day of the wedding
- was 8 years old
- "she knew him, but had never been close"
- started sexual relation with husband before period; was shy didn't know what to do"
- didn't feel ready for sexual relations; used to try and run away to parents' house when she was small but they took her back
- 5 years in husband's house before she got pregnant; only one pregnancy
- stayed four days in labour at home before taken to the Hospital; no gishiri cut, only herbs and traditional drugs; not conscious when taken to Hospital
- baby dead removed by forceps
- stayed in Hospital one year; this is her second year in Hospital
- mother visits her in the Hospital, husband used to come but not recently
- started leaking urine immediately after the delivery
- waiting for operation now, selling her things to afford the materials
- hospital assisting because not paying for operation and feeding them
- Women's Commission assist by paying for soaps and wrappers
- only waiting for the doctor to operate
- if successful will not return to husband because he abandoned her
4. Mariam Abdul

-17 years old Hausa from Hammam Ali, Sokoto State
-no primary schooling but since she was young went to Islamic school because the school was close to her home
-until when she grew up and got married
-six children in her family: 3 brothers and 3 sisters; only one brother went to state school and he is now in Primary school
-since she was young she was introduced to husband as the man she would marry
-both very young when told about arrangement
-found out at 15 when married
-dower of N 1000 was paid; used it and more to pay for things to take with her to the husband's house
-started menstruation in husband's house
-was in his house for some time before sexual relations
-menstruated three times before sexual relations
-first pregnancy two years ago
-labour was prolonged and obstructed: three days, delivered at home with a tear and VVF
-started leaking since the day she delivered
-husband divorced immediately after he discovered she has VVF
-he wrote her a note
-was taken to Hospital
-told her to go and come back,
gave her drugs and diet: high protein and carbohydrates because so weak
-this was two months ago that she came back to hospital
-earned no money of her own while she was married
-her property was sold to afford the materials for the operation
-she has not had an operation yet and has no date for operation: "waiting in the queue"
-she spends time in parents' house, "just staying" "helps mother sweep, wash plates, cook, and other things"
-"would like to marry again if better"
5. Hussaina Mohammed

-22 years old Hausa (a twin)
-has three elder sisters and one brother
-all went to Primary and Islamic school
-Primary School until Primary 6, no Secondary school
-Islamic school since she was small; Primary in mornings and Islamic in afternoons
-learned the Quran and Hadiths
-can read and write Hausa
-marriage was arranged through parents; parents told he who she would marry
-was 17 when got married, found out only on the wedding day
-husband was 25 years old, he is a farmer
-dower was paid, unknown to her how much
-took some things to his house
-started menstruation in husband’s house, stayed one year in his house before mensas
-started sexual relations with husband before mensas
-did not feel ready for sex
-for one year ran off to avoid sex
-"then he just closed the room one day and forced me"
-first pregnancy last year
-had three menstrual cycles before pregnancy
- laboured 4 days at home then became unconscious and taken to Hospital
-baby delivered at Hospital by vacuum extraction
-right after delivery started leaking urine, only VVF
-stayed in Hospital for one week
-went to parents' house upon discharge, told about drugs and diet
-husband came to see her in the parents' house
-he is the person who brought her here
-came to Hospital 4 days ago, admitted her, gave her list of materials to buy
-she was here one before and they told he to come back three weeks later
-husband buying operation materials
-if successful, then go back to parents; house until much better and then will return to husband's house
1. Abu

- not sure how old she is, probably around 40
- from Andarai
- no schooling
- no siblings
- married at 13 years old (about)
- started sexual relations before menstruation
- started menstruation after staying about one year in her husband's house
- has VVF and RVF
- 4 pregnancies, 2 children alive
- first pregnancy was ok
- labour pains, child fine, now approximately 15 years old
- three years later, second pregnancy also fine, labour [ok], child died
- four years later, third pregnancy with twins
- first baby still born, second died later the same day
- 18 hour labour at home and her senior sister stayed with her
- 12 hours in Koko Hospital but no light
- taken to Yauri Hospital where they performed a c-section
- seven months later, fourth pregnancy, second child alive
- no problems in pregnancy
- only problems in the labour
- 48 hours in labour at home then taken to the Hospital (one day) and another Hospital (one week); the child was born the first day she arrived at the second Hospital
- started leaking urine about ten years ago right after the delivery
- also experiencing stool leakage
- referred her to Babbar Ruga Hospital in Katsina for operation
- 14/10/1992 in Katsina operation
- still leaking urine; discharged home and advised that she should return when she can prepare for another operation
- "if no aid she will not go back"
- first operation was with the aid of the Prevention of Maternal Mortality Programme, Sokoto [Dr. Tahzib]
- spends her time now working and tending to the house
- sells foods stuffs
- husband is a farmer
- "only this problem"
- "nothing further to say"
2. Hassana

-approximately 40 years old
-no schooling
-only one sister, but she is dead
-married at 14
-11 pregnancies but one child alive
-menstruated in husband's house
-stayed one year in his house before menstruation
-sexual relations with husband after 8 months of mensas
-first pregnancy was after one and a half years in husband's house
-child not born alive
-laboured one day, forceps delivery, no problem
-second pregnancy was one year later, labour no problem
-child born alive but died hours later
-nine more pregnancies
-last one only went to Hospital seven years ago
-last pregnancy laboured only one hour then taken to Gulbi in Niger where baby "removed by instrument"
-after that, problem started 21 days later
-went home
-advised her nothing
-operation was in Katsina, Babbar Ruga 12/10/1992
-successful
-managed to get there and pay for materials with the assistance of a programme
-sold her ram to help pay for the expenses
-sold nothing else
-"has not encountered any problems"
-her daughter is grown and lives in Sokoto and has a child herself
-Hassana is a grandmother
KARAYE TOWN

Rabi Hamisu Karaye
-does not know how old she is for sure; [maybe 16 years old]
-Hausa, married, from Karaye in Maiyama Local Government, Kebbi State
-third child of seven children
-no schooling
-older brother went to Islamic school and is now an Islamic teacher; fourth junior brother also in Islamic school
-wants to go to school but cannot/ could not tell her father; but asked her husband and he promised her schooling - not yet
-married five years ago, at approximately 11 years of age
-she learned she was getting married from her father who had been approached by her husband
-before this man there was another who had asked to marry he but the family said she was too young
-husband is a Local Government employee: Education Dep’t, Maiyama
-he may be five years older than her senior brother, maybe 25
-as old as the man we can with, older than 25
-she is the second wife in the household
-dower was paid to her family but she doesn't know how much; bought clothes and plates to take with her to the husband's house
-started menstruation in husband's house
-started sexual relations with husband before menstruation
-had eight menstrual cycles before first pregnancy
-gave her consent to sex with husband though on the first approach she was a little afraid then relaxed
-pregnancy was ok only vomiting - no antenatal care
-laboured about 24 hours at home with the assistance of her mother, no Traditional Birth Attendant
-her mother administered (traditional) herbal medicines such as writing Quranic verses onto a chalk board then washing them off and drinking the solution of water and chalk
-there was an attempt to take her to the Hospital but was too late; delivered still born baby at home
-started leaking urine immediately after the birth
-eight months of leaking before assisted by WHO grant to go to Katsina for operation: 1992 (14 years old)
-one operation, successful
-told her not to carry heavy loads, drink plenty of fluids. stay seven months in mother's house, she obeyed and returned for follow-up
-she makes groundnut oil to afford trips back to Katsina - i drove this road from her village in Kebbi State to the Hospital in Katsina State, about 10 to 12 hours non-stop in a hired taxi.
- one year after the operation got pregnant and delivered successfully at home, did not go to Hospital as instructed 
-will allow her girls to mature before getting them married out -in purdah
Ai

doesn't know how old she is (15?), not told and mother now dead
-Hausa, married, from Karaye village
-mother is deceased, father alive, lives with guardian (grandmother)
-no schooling
-only daughter in her family, others died
-her husband would not permit her to go to school
-married four years ago (11?): he came to her house and her father approved of him; father told her one year before the wedding
-dower was paid, doesn't know how much; father and husband's family also contributed to buy clothes, food items and grandmother donated plates and food items at wedding
- he is a ground nut farmer and her senior but not as old as the man who brought us
-there was someone else but he came too late; there was no one else she wanted
-started sexual relations three months after going to husband's house; she agreed and did not try to run back to father
-about two years in husband's house before pregnant (13 or 14)
-severe fever at 5 months pregnant and haemorrhaging, taken to Maiyama Clinic for her fever and to Alhaji Lodango for the haemorrhaging
-obstructed labour, laboured one day at home then taken, unconscious, to Kebbi Specialist Hospital where laboured from morning to night
-delivered by forceps but still born, unconscious for 15 days
-one month in Hospital
-one year immobile in her guardian's house: "could not do anything", just recently beginning to feel better
-when in the Kebbi Specialist Hospital she inquired about VVF but told that they don't have the equipment so she should return home; has gone to Hospital more than 10 times, the last time being four months ago; has not gone to Sokoto
-they never referred her anywhere else
-grandmother pays everything; she is a make ground nut cake and ground nut oil
-husband visited her in Hospital and in guardian's home;
-she has not returned to husband's house but when she has recovered she'll return to husband's house
-he doesn't say anything, she is his only wife
-he doesn't pay anything: sometimes brings mangoes, oranges and bread but not always
-her hope is to go to get operation; "worried about this VVF problem", "don't treat her badly in the village", Rabi is the only other girl that she knows with VVF
Zeinabu Malla Ibrahim

-about 30 years old now, probably older
-has senior sister
-first married at 12 years old
-her parents gave her out to husband's parents
-she was selling food items and her husband saw her
-parents told her she was getting married; at first she was trying to argue but since they don't argue with parents, stopped arguing
-ther was another man before her husband but grandfather made decision- "that's it"
-she preferred the other suitor
-three years between the time she found out about marriage and the wedding date
-dower paid, can't remember how much
-husband is a farmer and was about 17 [check with Karen] or 17 years older
-went to Islamic school after marriage
-one year in husband's house before started menstruation
-started sexual relations with husband about four weeks ... [check]
-didn't understand, know what to do but did not try and run back to mother's house
-in second year in husband's house got pregnant; can't remember how many menstrual cycles before pregnant
-first pregnancy was ok but still born baby; [was approximately 14 years old]
-second pregnancy, started labour in husband's house, spent about three days in labour, child was dead before coming down and that was when she got VVF
-senior sister and her mother attended
-that date [?] she started to see urine coming
-knows that something had happened and parents knew but nothing they could do
-so sick, couldn't move herself for about three months after labour
-could not stand, gave her herds, local medicines of different types
-then started recovering, it came gradually, sitting to standing to walk with a stick, more than four months
-went to parents' house one week after delivery because her condition had not improved; husband came once or twice to see her... after a long time he didn't visit
-her parents wanted her to return to her husband's house but because he didn't visit her she didn't want to return
-she went to the Court
-her husband initiated the divorce, gave her the divorce letter
-N 50 paid and asked them to divorce them
-her parents didn't say anything about it
-in parents' house before remarrying
-didn't go to any medical facility during this time, taking local medicines, until about 2
years ago when attended Hospital
-making caps during that 5 years
-would sell them by bookings, tailor made for people
-she kept herself ok, people wouldn't even know that she had this problem
-got married again about 4 years ago, no other pregnancies
-went to Hospital 2 years ago, Dr. did operation in katsina 1992: 12/12/92 first
appointment then operation 10/7/93 not fully successful [2/9/93 operation as well]
-second VVF operation was a year after the first, returned after four weeks,
-stayed one year in Katsina
-[confusing] after three months after first operation, then three months second operation
was done
-RVF as well, now ok
-vvf remains
-first operation taken by an organization, second operation parents gave her money
-sold her caps for money as well
--problem was reduced greatly, that is why not worried abut going back; hasn't discussed it
with husband
-still making caps, buys things for herself
-apart from the two who went with her to Katsina, doesn't know anyone else with VVF
-depends on daughter's father when they will be married
-"the children usually get husbands early — nothing you can do if marry them off
-students from Koranic school came to teach her in her husband's house
-"did not ask husband's because they are children"
1. **Aisha Mutar**

- 32 years old from Kano Local Government
- married at 14 years old
- he saw her on the road and liked her, went to her house
- finished Primary 6 then married
- husband is a trader
- 7 pregnancies, 6 children
- all children delivered in hospital
- last pregnancy developed VVF because of third degree tears
- was not feeling fine, couldn’t tend to the children and the house
- she is a housewife
- just been operated upon
- hopefully successful
- items supplied by the Hospital: urine bags sutures
2. **Rukaya Lawan**

- 17 years old from Kano  
- married at 14 years old  
- no schooling "prevented from school"  
- brother went to school, "female not allowed"  
- husband found her, found her house, parents agree  
- she was happy  
- he is a trader, has never asked his age  
- no mates  
- dower was paid to the parents, forgotten how much  
- went to husband's house immediately after marriage  
- is a housewife and doesn't earn own money  
- started menstruation in husband's house at 15 years old  
- two years in house before pregnant  
- first pregnancy was prolonged labour, one day at home the mother brought her the Hospital, vacuum delivery, baby died  
- 42 days before started leaking urine  
- "when I delivered I was discharged with catheter then 10 days at home then brought back to the hospital referred to the VVF ward  
- her husband visits her always and her mother is caring for her here  
- been three days on Ward  
- operated upon on Monday  
- feeling happy
3. **Ubaida Yahaya**

- 20 years old from Sokoto state
- married at 15 years old
- no schooling
- husband came to her house saying that he wanted to marry her and her parents agreed,
- parents accepted the dower from him: N 2000
- she doesn't know what happened to the money
- she was happy
- no mates
- husband is a farmer
- she does not work on the farm, is a housewife
- started menstruation two years after going to husband's house
- first pregnancy: three days prolonged labour at home
- mother took her to the hospital where she was given an episiotomy and baby delivered by vacuum: still born
- after delivery had RVF
- was operated on in Sokoto N 2500
- colostomy on
- returned after three months but the doctor refused to operate the second time
- so came to Kano
- had operation this week
- came with government transport N 600; [public transport would be N 550 ?]
- husband is always visiting her
- going back to husband's house
4. Asama'u Abdulhayatu

- has VVF and RVF as well as drop foot
- 18 years old from Kano Local Government
- 14 year old when married
- has had three pregnancies, one baby is alive (little boy from second pregnancy
- baby is with mother in law now
- husband is motor cycle mechanic
- doesn't know how old he is, "middle aged"
- husband wanted to marry her but the parents of girl [initially] refused then parents of
husband went to her parents [who then agreed]
- engagement was three months
- "did not get engaged until he personally came to me"
- dower of N 200 was paid and bought a sheep and a ram for them
- no mates
- husband had been married and divorced before
- last pregnancy:
  - when started labour, taken to Gwarjo General Hospital (same day)
  - child "presenting one leg"
  - "hospital staff did not take care of her"
- "after three days mother was annoyed and went to the Hospital authorities
- pulled baby out from her vagina
- developed VVF
- this was nine months ago
- has been operated on for VVF only
- [if strong enough for anaesthetic then would have operation for both]
- husband comes to visit her and mother here with her
5. Hanne Ayuba

-17 years old (VVF)
-married at 14 years old
-from Gworazu Local Government, Kano State
-no schooling
-junior brother went to secondary school
-she was selling when her husband saw her
-he went to her parent who agreed
-they asked her consent, if she agree
-dower was N 200 bought goods
-he is a farmer and middle aged
-she is the junior wife
-senior wife has two pregnancies, both still born children
-she has also had two pregnancies, both still born
-started menstruation in husband’s house after 5 months in his house
-second pregnancy: 2 days prolonged labour
-delivered at hospital
-pulled baby out without instruments or vacuum
-3 days later started leaking
-then referred here immediately
-VVF operation, repaired
-will go to parents’ house
-when discharged completely plans to go to husband’s house
-he visits her here
-[she was lying down with a headache]
6. Maria Amadu

- 20 years old
- from Gaya Local Government, Kano State
- married
- no schooling since she was 7 years old
- "was not interested past primary
- married at 15 years old
- her husband was 40 years old
- he saw her in her house
- he is a friend of his elder brother
- parents agreed right away
- they asked her
- dower paid but does not know the amount
- he is a butcher
- she is a housewife
- no mates
- one pregnancy - still birth
- started menstruation in husband's house after one year
- pregnancy: "I was 2 days prolonged labour before brought to hospital by mother, had vacuum delivery"; "I thought would deliver by self"
- started leaking after four days
- still in hospital
- husband and mother brought her to the VVF clinic
- has had operation this week
- feeling better since operation
- catheter
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