

FAMILY LAW, PLURALISM, AND HUMAN RIGHTS

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Contemporary human rights law builds on a theoretical foundation laid during the Enlightenment, which emphasized the types of civil and political rights that were at the center of the American and French Revolutions of the late eighteenth century.¹ This conception of human rights extended only to male citizens, who were understood to be the heads of households, and did not address the rights of women or children or the possibility that families could be sites of oppression.² A more universal vision of human rights expanded through the nineteenth and into the twentieth century, slowly extending to women and children. Traditional laws of domestic relations have gradually been transformed to match this new understanding.

Family law in the United States and Canada traces its roots to England, where the common law and Christian ecclesiastical law shaped families based on a norm of monogamous marriage, without divorce, in which fathers and husbands wielded authority over the bodies and property of their wives and children.³ These traditions were adjusted in the New World, where church courts had no official authority, but the transition to a legal regime in which married women have full legal rights has taken centuries.⁴ This process was by no means complete when the United Nations (“UN”) adopted the Universal Declaration of Human Rights⁵ in 1948, or when those principles were incorporated into human rights law in 1966 with the UN Bill of Rights, comprised of the International Covenant on Economic, Social and Cultural

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¹ MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 64–66 (2d ed. 2008).

² See SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 99–105, 197–230 (1979).

³ See WILLIAM BLACKSTONE, *THE COMMENTARIES OF SIR WILLIAM BLACKSTONE ON THE LAWS AND CONSTITUTION OF ENGLAND* 433–45, 446–57 (2009); HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 21–25 (2d ed. 1988).

⁴ See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000); MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS* (1996) (chronicling the development of women’s rights concerning child custody).

⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter *Universal Declaration*].

Rights (“ICESCR”)⁶ and the International Covenant on Civil and Political Rights (“ICCPR”).⁷ Those instruments mandated that men and women should have both the right to marry and equal rights in marriage, and addressed the protection of children by requiring that there should be no discrimination based on a child’s birth in or out of wedlock. Seen against the backdrop of American family law of the time, these were idealistic, aspirational statements envisioning a reality that had not been achieved.⁸

Despite its roots in ecclesiastical tradition, contemporary family law in the United States and Canada maintains a clear separation between civil and religious authority over families. Secular laws have abandoned some aspects of Christian tradition, such as the prohibition on divorce, and maintained others, notably the prohibition of polygamy. These legal systems generally provide for separation of church and state,⁹ and from the perspective of the state any obligations of religious law are purely voluntary. Family law creates a space for couples to contract a civil marriage in a religious ceremony, but the state defines who may marry and maintains a monopoly over the dissolution of civil marriage.¹⁰

Until recent years, authorities in the United States gave little serious consideration to the marriage and family traditions of other religious groups. In 1879, the U.S. Supreme Court had harsh words for the religiously based polygamy of Mormons in the Utah Territory, linking the practice to “despotism” and racializing polygamy as “a feature of the life of Asiatic and of

⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The ICCPR was ratified by the United States in 1992.

⁸ Constitutional decisions addressing these equality issues in the United States begin with *Loving v. Virginia*, 388 U.S. 1 (1967), *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Reed v. Reed*, 404 U.S. 71 (1971). See also Susan Moller Okin, *Feminism, Women’s Human Rights, and Cultural Differences*, 13 HYPATIA 32, 33 (1998).

⁹ In the United States, religious freedom is protected by the First Amendment to the Constitution, which includes a prohibition on establishment of religion. Section 2(a) of the Canadian Charter of Rights and Freedoms guarantees freedom of conscience and religion, but these rights also have a much longer history. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter Canadian Charter], available at <http://lois.justice.gc.ca/eng/charter>; Beverly McLachlin, *Freedom of Religion and the Rule of Law: A Canadian Perspective*, in *RECOGNIZING RELIGION IN A SECULAR SOCIETY: ESSAYS IN PLURALISM, RELIGION, AND PUBLIC POLICY* 12, 28–33 (Douglas Farrow ed., 2004).

¹⁰ See generally Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449 (2009) (discussing the interplay between secular and religious law in the context of marriage dissolutions).

African people.”¹¹ Courts today accommodate cultural and religious diversity more generously, but always within a larger framework of law requiring nondiscrimination, freedom of conscience, gender equality, and protections for dependent or vulnerable family members. In this context, although the unofficial family law of customary and religious authorities has important consequences for individuals and families, those authorities have not been able to enlist the coercive machinery of the state to enforce their orders.¹² This type of pluralism, characteristic of the United States and Canada, poses significantly different questions than the pluralism of nations in which customary or religious law is backed by the authority of the state.

Part I of this Essay surveys the key human rights protections relevant to family law, including the right to culture and religion, marriage rights, and the rights of women and children in families. Part II considers the tension between religiously specific understandings of marriage and family and broad conceptions of human rights, focusing on two types of challenges. First, human rights law requires governments to accommodate the family practices of distinct cultural and religious groups, but governments must also protect the individual rights of family members from infringement by religious groups exercising state-backed authority. This would be difficult to accomplish in the United States and Canada, where state supervision of religious tribunals would violate constitutional norms of religious freedom. A second difficulty, typical of circumstances in which customary or religious leaders exercise official authority over group members, is that human rights norms also require governments to define the limits of group authority and the boundaries of group membership. For the groups themselves, these boundary questions are strongly shaped by religious and family law. But when boundaries are policed by the state, membership issues also implicate human rights norms and explicit pluralism raises difficult questions concerning the rights of citizenship. Moreover, to the extent that pluralism breaks a nation into separate bounded groups, subject to different legal rights and obligations, it weakens the bonds between communities and the sense of belonging to the broader society.

¹¹ *Reynolds v. United States*, 98 U.S. 145, 164 (1879); *cf.* *Cleveland v. United States*, 329 U.S. 14, 26 (1946) (Murphy, J., dissenting) (arguing that polygyny, “like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears”). In the U.K. context, see also *Hyde v. Hyde and Woodmansee* (1866) 1 L.R.P. & D. 130 (Eng.).

¹² Proposals to integrate civil and religious law in the setting of divorce have been controversial and largely unsuccessful. *See Estin, supra* note 10, at 467–70.

I. HUMAN RIGHTS AND FAMILY LAW

The Universal Declaration embraces the proposition that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”¹³ This principle is repeated in the ICESCR and the ICCPR,¹⁴ and recognized in regional instruments such as the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”)¹⁵ and the 1981 African Charter on Human and People’s Rights.¹⁶ Broad international consensus on the importance of “the family” elides wide differences within and between societies on the shape and meaning of family life.¹⁷ Moreover, it masks the possibility that protection for family life will pose other human rights dilemmas, particularly for women and children who have special vulnerabilities in family settings.¹⁸

A. *Rights to Culture and Religion*

Two provisions in the Universal Declaration of Human Rights frame the discussion of religious and cultural pluralism. The nondiscrimination principle in Article 2 provides that the rights and freedoms of the declaration apply to everyone, “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁹ Article 18 articulates a religious freedom principle, extending freedom of thought, conscience, and religion to everyone, specifically including the freedom to change religion or belief.²⁰ This vision of religious freedom includes an individual’s right “either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.”²¹ These rights were made legally binding in the ICESCR²² and the ICCPR.²³ Article 27 of the ICCPR states that

¹³ Universal Declaration, *supra* note 5, art. 16(3).

¹⁴ ICESCR, *supra* note 6, art. 10(1); ICCPR, *supra* note 7, art. 23(1).

¹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

¹⁶ African Charter on Human and People’s Rights, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, art. 18(1), (June 26, 1981).

¹⁷ Cf. Philip Alston, *The Best Interests Principle: Toward a Reconciliation of Culture and Human Rights*, 8 INT’L J.L. & FAM. 1, 5 (1994).

¹⁸ See Okin, *supra* note 8, at 41–42 (analyzing the difficulties for human rights law as idealized notions of the family).

¹⁹ Universal Declaration, *supra* note 5, art. 2.

²⁰ *Id.* art. 27.

²¹ *Id.*

²² ICESCR, *supra* note 6, arts. 2(2), 13(3).

members of ethnic, religious, or linguistic minority groups “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”²⁴ Under ICCPR Article 18(3), freedom of religious worship, observance, practice, and teaching “may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”²⁵ For countries such as the United States, this language suggests an obligation to define a neutral justification for any laws that prohibit religious practices such as polygamy.

B. Marriage As a Human Right

As framed in the Universal Declaration, marriage rights have three dimensions, including the right to marry, equal rights within marriage, and consent to marriage.²⁶ The first two are addressed in Article 16(1), which states: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”²⁷ The equality norm is carried forward into the ICCPR²⁸ and elaborated further in the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).²⁹

International law also seeks to eradicate forced marriages and child marriages. Article 16(2) of the Universal Declaration, states that “[m]arriage shall be entered into only with the free and full consent of the intending spouses.”³⁰ These protections are implemented in the 1962 UN Convention on

²³ ICCPR, *supra* note 7, arts. 2(1), 2(18).

²⁴ *Id.* art. 27; *see also* Convention on the Rights of the Child, art. 30, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. The United States signed the CRC in February 1995 but has not ratified it.

²⁵ ICCPR, *supra* note 7, art. 18(3); *see also* Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55 (Nov. 25, 1981) [hereinafter Declaration on Religious Discrimination], available at <http://www.un.org/documents/ga/res/36/a36r055.htm>. *See generally* Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT’L L. & POL. 795, 814–20 (1992).

²⁶ Universal Declaration, *supra* note 5, art. 16.

²⁷ The right to marry is also recognized in ECHR, *supra* note 15, art. 12.

²⁸ ICCPR, *supra* note 7, art. 23(4). Although equality in marriage is not addressed in Article 10 of ICESCR, that convention addresses gender equality more generally in Article 2(2) and Article 3. *See* ICESCR, *supra* note 6, arts. 2(2), 2(3), 2(10).

²⁹ Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 13, 1981, 1249 U.N.T.S. 13 [hereinafter CEDAW].

³⁰ Universal Declaration, *supra* note 5, art. 16(2); *see also* ICCPR, *supra* note 7, art. 23(3).

Consent to Marriage, Minimum Age for Marriage, and Registration of Marriage³¹ along with a subsequent recommendation that the legal age for marriage should “not be less than fifteen.”³² CEDAW Article 16(2) guarantees the right of free and full consent to marriage, and provides that “[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”³³ Forced marriage is also condemned in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.³⁴

Laws in the United States and Canada reinforce the consent principle with remedies that allow for an annulment or declaration of invalidity when a marriage was procured by fraud or duress.³⁵ In the United Kingdom and other European countries, forced marriages in immigrant communities have been a focus of concern and legislation,³⁶ but the United States and Canada have not implemented similar measures to address this problem. Although laws in some U.S. states still allow young teenagers to marry with parental consent, most of these also require judicial approval.³⁷

³¹ Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, Dec. 10, 1962, 521 U.N.T.S. 231, available at <http://www2.ohchr.org/english/law/convention.htm>. See generally Egon Schwelb, *Marriage and Human Rights*, 12 AMER. J. COMP. L. 337 (1963) (addressing the legal issues and complications of the convention).

³² Recommendation on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, G.A. Res. 2018 (XX), U.N. Doc. A/6014 (Nov. 1, 1965).

³³ CEDAW, *supra* note 29, art. 16(2).

³⁴ 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 226 U.N.T.S. 3.

³⁵ See, e.g., *Singh v. Singh*, 325 N.Y.S.2d 590, 592 (N.Y. Sup. Ct. 1971); *B. v. L.*, 168 A.2d 90, 92 (N.J. Super. Ct. Ch. Div. 1961); see also JULIEN D. PAYNE & MARILYN A. PAYNE, *CANADIAN FAMILY LAW* 32–37 (2d ed. 2006).

³⁶ See, e.g., Forced Marriage Act (Civil Protection) Act 2007, c. 20, available at <http://www.legislation.gov.uk/ukpga/2007/20/contents>. For a useful critique of Norway’s response to forced marriages, see Sherene H. Razack, *Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages*, 12 FEMINIST LEGAL STUD. 129 (2004).

³⁷ The common law age of consent to marriage was twelve for girls and fourteen for boys, and marriages of younger children were sometimes upheld if the parties continued to cohabit after reaching the legal age for marriage. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 141–44 (1985). These ages were gradually increased by statutes in the United States. *Id.* Minimum marriage ages in state law are typically eighteen, or sixteen with parental consent, but a number of states allows marriages of even younger children. See, e.g., COLO. REV. STAT. § 14-2-108 (2009), amended by Act of May 15, 2009, ch. 264, § 5, 2009 Colo. Sess. Laws. 264; N.H. REV. STAT. ANN. § 457:4 (2008); see also Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 568 n.168 (2004).

C. *Rights of Women and Children in Families*

In the Anglo-American tradition, only men held full citizenship, including the right to vote and participate in civic life.³⁸ The doctrine of coverture gave a husband broad legal rights with respect to his wife's property, earnings, and body; fathers enjoyed similar authority over their children.³⁹ Economic, social, and legal norms made it difficult for wives and children to escape this authority, even in cases of serious abuse.⁴⁰ Across the world, it has taken several centuries to begin dismantling the legal structures that sustain patriarchal authority. Contemporary human rights law, reflected in CEDAW and the Convention on the Rights of the Child ("CRC"), understands that governments have some responsibility to protect dependent or vulnerable individuals from the risk of "private" abuse.⁴¹

1. *Gender Equality*

CEDAW builds on the gender equality principle of the Universal Declaration,⁴² the ICCPR,⁴³ and the ICESCR.⁴⁴ CEDAW Article 1 defines "discrimination against women" to mean:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁴⁵

Under CEDAW Article 2, nations agree to pursue a policy of eliminating discrimination against women "by all appropriate means and without delay."⁴⁶ This obligation is spelled out in a series of more specific commitments, such as making constitutional changes and adopting legislation to prohibit discrimination, as well as acting "to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against

³⁸ BLACKSTONE, *supra* note 3, at 15–18.

³⁹ *Id.* at 60.

⁴⁰ *See id.*

⁴¹ *See infra* note 80 and accompanying text; *see also* CRC, *supra* note 24, art. 19; CEDAW, *supra* note 29, art. 1.

⁴² Universal Declaration, *supra* note 5, art. 2.

⁴³ ICCPR, *supra* note 7, arts. 2(1), 2(3), 2(26).

⁴⁴ ICESCR, *supra* note 6, arts. 2(2), 2(3).

⁴⁵ CEDAW, *supra* note 29, art. 1.

⁴⁶ *Id.* art. 2.

women.”⁴⁷ Similarly, Article 5(a) requires participating states to take steps to modify “the social and cultural patterns of conduct of men and women” in order to eliminate “prejudices and customary and all other practices” based on the idea that either sex is superior or inferior or on stereotyped roles for men and women.⁴⁸ Article 9 mandates that women have equal rights both to acquire, change, or retain their own nationality and with respect to the nationality of their children.⁴⁹ Focusing on family law, Article 16(1) requires states to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations” and lists eight particular areas where equality should be ensured.⁵⁰

These provisions extend the coverage of CEDAW into the realm of marriage and family law, where many legal systems still distinguish the rights and responsibilities of women and men. Numerous countries have ratified CEDAW without accepting the principles of gender equality in the family, however.⁵¹ These are primarily, but not exclusively, countries with religious family law systems, including Algeria, Bahrain, Bangladesh, Egypt, India, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Malaysia, Mauritania, Morocco, Niger, Oman, Saudi Arabia, Singapore, Syria, Tunisia, and the United Arab Emirates.⁵² Other CEDAW members have objected to these reservations as

⁴⁷ *Id.* art. 2(f).

⁴⁸ *Id.* art. 5(a).

⁴⁹ *Id.* art. 9.

⁵⁰ *Id.* art. 16(1). These are the right to enter into marriage; the right to choose a spouse and to enter into marriage with free and full consent; rights and responsibilities during marriage and at its dissolution; rights and responsibilities as parents, irrespective of marital status; rights to decide on the number and spacing of children; rights and responsibilities with regard to guardianship, wardship, trusteeship, and adoption of children; personal rights as husband and wife, including the choice of a family name, a profession, and an occupation; and rights in respect of the ownership, acquisition, management, administration, enjoyment, and disposition of property. *Id.*; see also Comm. on the Elimination of Discrimination Against Women, Gen. Rec. No. 21, 13th Sess. (1994) [hereinafter General Recommendation No. 21], available at <http://www.un.org/documents/ga/docs/49/plenary/a49-38.htm> (affirming equality in marriage and family relations).

⁵¹ Article 28(2) of CEDAW provides that “[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted.” CEDAW, *supra* note 29, art. 28(2). The UN Committee on the Elimination of Discrimination against Women takes the view that Articles 2 and 16 are core provisions of the Convention, and, accordingly, that reservations to these provisions are contrary to the Convention and to international law. See *Reservations to CEDAW*, UN.ORG, <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>.

⁵² In addition, France, Korea, and Switzerland entered reservations to Article 16 concerning the right to choose a family name, Ireland made a reservation concerning the rights of mothers with respect to children born out of wedlock, and Thailand made a reservation with respect to all of Article 16. See also *infra* note 56 and accompanying text (proposed U.S. reservations).

incompatible with the object and purpose of the convention.⁵³ Moreover, a General Recommendation on equality in marriage and family relations under CEDAW by the Committee on the Elimination of Discrimination against Women noted that the family laws of even those countries that had not entered reservations still contained many measures that discriminated against women.⁵⁴

Canada ratified CEDAW in 1981; the United States signed CEDAW in 1980, but has not ratified it.⁵⁵ The Senate Foreign Relations Committee has recommended that the Senate give its advice and consent to ratification, subject to a set of reservations, understandings, and declarations designed to maintain consistency between CEDAW and the existing law of sex equality in the United States.⁵⁶ Under current constitutional law, legislative classifications based on gender are subject to an intermediate level of scrutiny, under which the state must demonstrate that the law is substantially related to the achievement of an important governmental objective.⁵⁷ It is important to note, however, that although women were accorded the right to vote in the United States in 1920, constitutional arguments for women's equality were not accepted by the Supreme Court until 1971,⁵⁸ and did not reach the area of family law until 1979.⁵⁹

⁵³ See generally Michel Brandt & Jeffrey A. Kaplan, *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 J.L. & RELIG. 105 (1995–96) (discussing the tension between women's and religious rights in CEDAW based on Islamic law); Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990) (addressing the juxtaposition of the number of reservations to the integrity of the document).

⁵⁴ See General Recommendation No. 21, *supra* note 50.

⁵⁵ *State Parties*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

⁵⁶ SENATE COMM. ON FOREIGN RELATIONS, REP. ON THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, S. REP. NO., at 103–38 (1994). See Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?* 23 HASTINGS CONST. L.Q. 727, 800–05 (1996). CEDAW was approved again in 2002, but did not make it through the Senate. See James Dao, *Senate Panel Approves Treaty Banning Bias Against Women*, N.Y. TIMES, July 31, 2002, at A3.

⁵⁷ See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728–29 (2003).

⁵⁸ *Reed v. Reed*, 404 U.S. 71 (1971). This followed many unsuccessful challenges. See, e.g., *Goesaert v. Cleary*, 355 U.S. 464 (1948); *Mackenzie v. Hare*, 239 U.S. 299 (1915); *Muller v. Oregon*, 208 U.S. 412 (1908); *Bradwell v. Illinois*, 83 U.S. 130 (1873).

⁵⁹ *Caban v. Mohammed*, 441 U.S. 380 (1979) (striking statute that allowed unwed mothers but not unwed fathers to block proposed stepparent adoption of nonmarital child); *Orr v. Orr*, 440 U.S. 268 (1979) (finding that statute imposing alimony obligations only on husbands violated the Equal Protection Clause).

2. *Children's Rights*

Protections for children were included in the ICCPR and the ICESCR, and elaborated in the 1989 Convention on the Rights of the Child.⁶⁰ The CRC reaffirms the broad nondiscrimination principle of the earlier conventions,⁶¹ and requires that the “best interests of the child” be a primary consideration in all actions taken concerning children, including actions by social welfare institutions, courts, administrative authorities, and legislative bodies.⁶² The convention affirms a child’s right to preserve his or her identity, including nationality, name, and family relations,⁶³ and includes a series of provisions that protects the parent-child relationship.⁶⁴ Balanced against these protections for the family, the CRC requires State Parties to protect children who are subjected to violence, abuse, or neglect by a parent or other responsible person,⁶⁵ as well as children in circumstances such as child labor, sexual exploitation, trafficking, and armed conflict.⁶⁶

The United States signed the CRC in 1995, but remains the only country in the world except Somalia that has failed to ratify it.⁶⁷ One focal point for opposition within the United States has been the argument that the CRC would undermine parental rights through provisions such as the protection for a child’s freedom of thought, conscience, and religion under Article 14.⁶⁸ In this respect, the CRC departed from the approach of the ICCPR and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, both of which protect the right of parents “to ensure the religious and moral education of their children in conformity with their own convictions.”⁶⁹ Various countries have ratified the

⁶⁰ See ICCPR, *supra* note 7, arts. 23, 24; ICESCR, *supra* note 6, arts. 10, 13(3).

⁶¹ CRC, *supra* note 24, art. 2(1).

⁶² *Id.* art. 3(1). Under Article 12, a child “capable of forming his or her own views” has a right to be heard “in all matters affecting the child.” *Id.* art. 12.

⁶³ *Id.* arts. 7, 8.

⁶⁴ See *id.* arts. 5, 7, 9, 16, 18.

⁶⁵ *Id.* art. 19.

⁶⁶ *Id.* arts. 32, 33, 34, 35, 36, 38, 39. These are also addressed in two Optional Protocols to the CRC. See G.A. Res. 54/163, U.N. GAOR, U.N. Doc. A/54/49 (May 25, 2000) [hereinafter CRC Optional Protocols].

⁶⁷ The United States has ratified the Optional Protocols to the CRC addressing the involvement of children in armed conflict and the sale of children, child prostitution, and child pornography. See CRC Optional Protocols, *supra* note 66.

⁶⁸ Several countries have entered reservations stating that application of the CRC will be subject to national customs or laws. See William A. Schabas, *Reservations to the Convention on the Rights of the Child*, 18 HUMAN RTS. Q. 472 (1996) (emphasizing that the reservations of forty-seven countries have mitigated support for the convention).

⁶⁹ ICCPR, *supra* note 7, art. 18. See also Declaration on Religious Discrimination, *supra* note 25, art. 5.

CRC with reservations or declarations related to Article 14, or to the CRC more broadly, to avoid any conflict with Islamic law.⁷⁰ Another friction point has been the requirement in Article 24(3) that State Parties “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”⁷¹ This language, in combination with CEDAW Article 5(a), is the basis for efforts to eradicate practices such as female genital cutting, infanticide, and early marriage and childbirth.⁷²

Children’s rights in the United States are addressed by a patchwork of statutory and constitutional provisions that cover many of the subjects addressed in the CRC. The U.S. Supreme Court ruled in a series of cases that classifications based on legitimacy or illegitimacy of birth violate the Equal Protection Clause.⁷³ Limitations on child labor were the subject of a long legislative campaign, and Congress eventually approved federal laws limiting child labor in the 1930s.⁷⁴ In criminal law, the Court has held that states may not impose the death penalty for crimes committed by children.⁷⁵ The Court has also recognized that children have some rights of free speech and religious expression,⁷⁶ and older children have some rights to make their own reproductive or health care decisions.⁷⁷ At the same time, the Court has regularly reaffirmed the fundamental constitutional right of parents to make decisions concerning the care, custody, and control of their children.⁷⁸

⁷⁰ See CRC, *supra* note 24, art. 2; *Status of Ratification, Declarations and Reservations*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#53.

⁷¹ See CRC, *supra* note 24, art. 24(3).

⁷² See *Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children*, UNHCHR, Aug. 1995, available at <http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>.

⁷³ *Levy v. Louisiana*, 391 U.S. 68 (1968). *But see* *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53 (2001) (upholding a citizenship statute that requires formal acknowledgement of paternity of a non-marital child before the child turns eighteen); *Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding a state inheritance law that requires paternity adjudication during the father’s lifetime for an illegitimate child to inherit).

⁷⁴ Restrictions on child labor were included in the 1938 Fair Labor Standards Act, which was upheld in *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941). *Cf.* *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁷⁵ *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that a death sentence is cruel and unusual when imposed on a defendant who was under age eighteen at the time of the crime); *see also* *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (finding that the death penalty is not permitted for crimes committed by the defendant before the age of sixteen). These rulings removed one obstacle to ratification of the CRC, which prohibits execution of juvenile offenders. See CRC, *supra* note 24, art. 37(a).

⁷⁶ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 241–49 (1972) (Douglas, J., dissenting); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). In these cases, the interests of parents and their children are often conflated.

⁷⁷ See, e.g., *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977).

⁷⁸ See *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

As suggested by the large number of reservations to CEDAW and the CRC, family law in many societies is embedded in a religious or political framework that is not fully consistent with the norms of international human rights.⁷⁹ In addition, human rights laws reflect but do not resolve the tension between protections for religion and the family on one side and individual rights on the other.⁸⁰ In different communities, and at different moments in history, the shape of these conflicts has been different, but they have been more serious in times and places when religious or family groups exercised greater social and legal power over family members. In the United States, the tension is most notable in both the debate over the CRC and the powerful fear that recognition of children's rights will diminish the authority of parents.⁸¹ The challenge for all governments is to find an appropriate balance between support for families and tradition and protection for potentially vulnerable family members.⁸²

II. PLURALISM AND HUMAN RIGHTS

Within a legal regime that is committed to the protection of human rights, culturally specific understandings of families and family law present several distinct challenges. Government authorities have an obligation under international law to protect family members from abusive treatment, including violence and harmful traditional practices. Governments also have an obligation to balance respect for culture and religion with protection from discrimination when group members seek legislative accommodation of their traditions, bring their disputes to be resolved in the civil courts, or challenge traditional norms. When governments permit cultural or religious groups to exercise official authority over their members, governments must also ensure that the rules defining the scope of jurisdiction and group membership satisfy the requirements of human rights.

⁷⁹ See *supra* notes 51–54, 70, and accompanying text.

⁸⁰ See Sullivan, *supra* note 25, at 795–96.

⁸¹ At one time, U.S. political discourse was marked by similar arguments that the recognition of women's rights would diminish the authority of their husbands. See COTT, *supra* note 4, at 63–69.

⁸² Much literature discusses the reformist aspects of early Islamic law and recent legislative reforms of marriage laws in countries such as Tunisia, Egypt, and Morocco. See, e.g., JAMAL J. AHMAD NASIR, 1 THE STATUS OF WOMEN UNDER ISLAMIC LAW AND MODERN ISLAMIC LEGISLATION (3d ed. 2009).

A. *Accommodating Family Practices*

Practices such as forced marriage⁸³ and female genital cutting,⁸⁴ which are often at the center of debates over multiculturalism and the family, are raised and debated as public policy problems in both international law and in countries including the United States and Canada. Debates on these issues are complicated by the difficulties of cross-cultural communication and the substantial risk of cultural bias and misunderstanding,⁸⁵ but the principles of international human rights law are relatively clear. CEDAW requires states to take measures to address family violence,⁸⁶ and the CRC requires states to take measures to protect children “from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”⁸⁷ This is the province of criminal law and child welfare law, and although “cultural defense” arguments may be asserted in an attempt to moderate the sanctions imposed by the state, the state clearly cannot deny protection to anyone on the basis of culture or religion.⁸⁸

There is also a longstanding debate over the practice of polygamy,⁸⁹ which is often defended on the basis of culture or religion. The prospect of legalizing polygamy is almost uniformly rejected by human rights and family law scholars in the United States and Canada, and the UN Committee on the Elimination of Discrimination against Women has concluded that “[p]olygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.”⁹⁰ In this setting, as with the problem of forced marriage, the important challenge lies in designing remedies that do not separate families unnecessarily, stigmatize or disparage immigrant or minority groups, or put vulnerable individuals at greater risk.⁹¹

⁸³ See *supra* note 36 and accompanying text.

⁸⁴ See 18 U.S.C. § 116 (2006) (outlawing female genital mutilation on a child under eighteen).

⁸⁵ See generally Razack, *supra* note 36.

⁸⁶ See Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104e (Dec. 20, 1993); Comm. on the Elimination of Discrimination Against Women, Gen. Rec. No. 19, 11th Sess. (1992) (violence against women); Gen. Rec. No. 14, 9th Sess. (1990) (female circumcision).

⁸⁷ CRC, *supra* note 24, art. 19(1); see *DeShaney v. Winnebago Cnty.*, 489 U.S. 189 (1989).

⁸⁸ See generally ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 48–72 (2004).

⁸⁹ See generally MARTHA BAILEY & AMY J. KAUFMAN, *POLYGAMY IN THE MONOGAMOUS WORLD: MULTICULTURAL CHALLENGES FOR WESTERN LAW AND POLICY* (2010).

⁹⁰ General Recommendation No. 21, *supra* note 50.

⁹¹ See, e.g., BAILEY & KAUFMAN, *supra* note 89, at 143–87.

There is more room for accommodation of cultural and religious practices in the context of disputes over marriage, divorce, inheritance, support, or child custody. Courts and legislatures have considered recognition of marriages celebrated under religious (but not civil) law,⁹² enforcement of Muslim or Jewish premarital agreements,⁹³ recognition of non-judicial religious or custody decrees obtained in another country,⁹⁴ disputes surrounding religious divorces in the Jewish tradition,⁹⁵ and faith-based resolution of family disputes.⁹⁶ Judges and lawmakers are often willing to accommodate diverse family practices, but only when this can be accomplished within the larger framework of constitutional and human rights values, including due process, nondiscrimination, and protection for potentially vulnerable family members.

B. The Problem of Membership

Pluralist systems, in which authority over family law matters is assigned on the basis of religious or group membership, must have procedures for defining and regulating group membership.⁹⁷ International human rights law prohibits discrimination on grounds including “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁹⁸ For most groups, however, membership rules are closely linked to the core of group identity, self-definition, and belief,⁹⁹ and these rules are often deeply gendered.¹⁰⁰ Men and women may be subject to both different

⁹² See Estin, *supra* note 37, at 559–69. Note that this issue may overlap with questions of marital consent and polygamy. See *id.*

⁹³ *Id.* at 569–77.

⁹⁴ *Id.* at 586–90, 593–98.

⁹⁵ *Id.* at 578–82.

⁹⁶ *Id.* at 582–86.

⁹⁷ In the United States, Native American groups, many of which are federally recognized, set their own criteria for membership. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Federally recognized tribes have jurisdiction over their members for various purposes, including family law.

⁹⁸ Universal Declaration, *supra* note 5, art. 2; see also CRC, *supra* note 24, art. 2(1); ICCPR, *supra* note 7, art. 2(1); ICESCR, *supra* note 6, art. 2(2). In Canada, the Charter of Rights and Freedoms affirms broad equality rights and prohibits discrimination on these and other grounds. Canadian Charter, *supra* note 9, art. 15(1) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”).

⁹⁹ See, e.g., Gershom Gorenberg, *How Do You Prove You’re a Jew?*, N.Y. TIMES MAG., Mar. 2, 2008, at 46.

¹⁰⁰ The Jewish tradition traces membership through the mother’s line, while the Muslim tradition looks to the father’s line. A child with a Muslim father and Jewish mother would be claimed by both groups, while a child with a Jewish father and a Muslim mother would be claimed by neither. See *id.* at 48; see also Clark Hoyt, Commentary, *The Public Editor: Entitled to Their Opinions, Yes. But Their Facts?*, N.Y. TIMES, June 1, 2008, at WK 12.

constraints and sanctions if they violate group marriage norms, and different rights with respect to their children's membership.¹⁰¹ Group membership may also be shaped in other ways that would constitute discrimination if practiced by a state.

For a state that is committed both to protecting religious and cultural rights and to preventing discrimination, accommodating group membership rules is extremely difficult. Rules that restrict religious intermarriage¹⁰² violate the right to marry and the nondiscrimination principle.¹⁰³ Rules that deny non-marital children the right to claim a relationship with, or financial support, from their birth fathers also violate human rights law.¹⁰⁴ In both Jewish and Muslim tradition, divorce laws impose particular constraints on women, so that some women are unable to leave a marriage and remarry without also leaving their religious community.¹⁰⁵

Any group membership rules that are recognized or enforced by the state must allow for both affiliation with and exit from the group.¹⁰⁶ The exit question is particularly complicated in the Muslim tradition, which encourages conversion to Islam but treats leaving Islam as apostasy.¹⁰⁷ This issue intersects with other family law questions, particularly in the circumstances of intermarriage¹⁰⁸ and divorce.¹⁰⁹

¹⁰¹ CEDAW, *supra* note 29, art. 9; see also Daphna Hacker, *Inter-Religious Marriage in Israel: Gendered Implications for Conversion, Children, and Citizenship*, 14 *ISR. STUD.* 178, 185 (2009). On the role of family law in constructing group identity, see AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* 45–62 (2001).

¹⁰² Muslim women are prohibited from marrying non-Muslims. See NASIR, *supra* note 82, at 85–86; MUSLIM-NON-MUSLIM MARRIAGE: POLITICAL AND CULTURAL CONTESTATIONS IN SOUTHEAST ASIA 1–4 (Gavin W. Jones et al. eds., 2009); Noryamin Aini, *Inter-Religious Marriage from Socio-Historical Islamic Perspectives*, 2008 *BYU L. REV.* 669 (2008); Hacker, *supra* note 101; Sullivan, *supra* note 25.

¹⁰³ See *supra* note 27 and accompanying text; *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁰⁴ See *supra* note 73 and accompanying text; NASIR, *supra* note 82, at 169–70.

¹⁰⁵ See Estin, *supra* note 37, at 578–86.

¹⁰⁶ See, e.g., ICCPR, *supra* note 7, art. 18 (“Everyone shall have the right to freedom of thought, conscience and religion; this right shall include freedom to have or to adopt a religion or belief of his choice.”). In the family law context, see *Abbo v. Briskin*, 660 So. 2d 1157, 1159 (Fla. Dist. Ct. App. 1995). See also SHACHAR, *supra* note 101, at 122–26.

¹⁰⁷ See generally Andrea Elliott, *In Kabul, a Test for Shariah*, *N.Y. TIMES*, Mar. 26, 2006, § 4, at 3.

¹⁰⁸ See Hoyt, *supra* note 100 (discussing the controversy regarding whether Barack Obama should be considered a Muslim by birth and his Christian affiliation as apostasy).

¹⁰⁹ Conversions are sometimes obtained to forum shop, particularly because divorce is more readily available under Muslim law than in the Christian tradition. For one example, see Nadim Audi, *Egyptian Court Allows Return to Christianity*, *N.Y. TIMES*, Feb. 11, 2008, at A11.

Cultures vary over time and across communities. Diversity within cultural and religious groups can be an important source of strength and vitality, but poses other challenges for a system with official membership rules. In the United Kingdom, where there is an official Chief Rabbi, the question of group membership recently reached the Supreme Court.¹¹⁰ The court rejected an admission policy of a state-supported Jewish school that followed a strict orthodox definition of membership that excluded a child whose mother had converted to Judaism in a non-orthodox Masorti synagogue.¹¹¹ One risk (or benefit) of formal legal pluralism is that tradition may become frozen in orthodox institutional and legal structures. Another risk (or benefit) is that changes in traditional or religious law may be accomplished by legislation or judicial ruling. For example, a number of Muslim countries have imposed constraints on polygamy,¹¹² and the courts and legislature in South Africa have moved customary law toward greater protections for women's equality.¹¹³

In conditions of official legal pluralism, membership and boundary issues become conflict of laws problems, requiring a legal framework of laws for families that form across group boundaries, including families that belong to multiple legal systems and families that fall in between. When systems of law overlap, individuals may find that they are married for some purposes but not for others.¹¹⁴ When family laws differ between groups in significant respects, for example with respect to polygamy or divorce, there is the question of whether individuals can forum shop by changing their group affiliations.¹¹⁵ Because membership rules and rules regarding marriage outside the group are strongly gendered, however, men and women may experience different pressures and opportunities to convert.¹¹⁶

Any system giving legal effect to religious law or the actions of religious authorities in the United States or Canada would have to address these conflict of laws questions within the larger framework of constitutional rules protecting

¹¹⁰ *R.(E) v. Governing Body of JFS* [2009] UKSC 15.

¹¹¹ *See id.* (holding that denial of admission constituted discrimination under the Race Relations Act 1976). Two of the nine justices dissented. All members of the court agreed that the school could premise admission on genuine religious adherence and practice, which was not disputed in this case. *Id.*

¹¹² *See NASIR, supra* note 82, at 25–28.

¹¹³ *See RAN HIRSCHL, CONSTITUTIONAL THEOCRACY* 185–95 (2010).

¹¹⁴ *See, e.g., E.I. NWOGUGU, FAMILY LAW IN NIGERIA* 66–69 (rev. ed. 1990) (discussing the interaction of statutory and customary law marriage); *see also Estin, supra* note 10, at 459–62.

¹¹⁵ *See, e.g., Audi, supra* note 109.

¹¹⁶ *See Hacker, supra* note 101.

freedom of religion.¹¹⁷ Arguments might be made to allow individuals to contract or opt in to a system of religious authority, as is sometimes done with religious arbitration of divorce disputes, but this would also require provisions that allow individuals to opt out again.¹¹⁸ The case law in both countries suggests some willingness to enforce agreements to submit disputes to religious authorities,¹¹⁹ but such agreements may not be enforceable if one of the parties subsequently objects on religious grounds.¹²⁰

A system of official pluralism, where legal rights depend on group membership, also challenges the unity and cohesion of the broader society. In the United States, the long struggle to extend full citizenship rights to men without property, freed slaves, Native Americans, and women underlines the importance of an inclusive vision of membership. Our idealization of America as a nation of immigrants is bound up with values that have strongly promoted assimilation into a single polity and shared set of basic values.¹²¹ Against this background, a pluralism that entrenches differences with jurisdictional or legal boundaries risks undermining the collective identity central to the core of our nationhood.

From this perspective, the membership issue is the core problem of legal pluralism. As author Ran Hirschl observes, “religious and customary leaders relying on sacred texts or oral traditions,” who offer an alternative to the institutions of the state, may be “perceived as challenging or defying the state law’s ultimate authority over a given territory and its citizenry.”¹²² For this reason, even nations committed to pluralism and multicultural accommodation “are not keen on autonomous, rival adjudicative systems that derive their authority and morality from sources external and prior to, and in some cases insulated from, secular law.”¹²³

¹¹⁷ See *supra* note 9 and accompanying text.

¹¹⁸ See Estin, *supra* note 10, at 463–70; SHACHAR, *supra* note 101, at 103–09.

¹¹⁹ See, e.g., *Braker v. Marcovitz* [2007] 3 S.C.R. 607 (Can.).

¹²⁰ Cf. *Marriage of Goldman*, 554 N.E.2d 1016 (Ill. Ct. App. Ct. 1990); see also *Marriage of Victor*, 866 P.2d 899, 902 (Ariz. Ct. App. 1993); *Aflalo v. Aflalo*, 685 A.2d 523, 531 (N.J. Super. Ct. 1996). In the custody context, see, for example, *Marriage of Weiss*, 49 Cal. Rptr. 2d 339 (Cal. Ct. App. 1996) (refusing to enforce parents’ agreement to raise children in the Jewish faith) and *Abbo v. Briskin*, 660 So. 2d 1157, 1159–61 (Fla. Dist. Ct. App. 1995) (same). On the general problem of secular approaches to religious questions, see Jared Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497 (2005).

¹²¹ Native American communities, which retain some aspects of self-governance, can be distinguished from other minority groups because they are not immigrants.

¹²² HIRSCHL, *supra* note 113, at 185–86.

¹²³ *Id.*

CONCLUSION

Laws in the United States prioritize protection for individual human rights over the group rights that shape cultural or religious pluralism. This reflects an understanding of citizenship that has become broader and more inclusive over several centuries. Changes to the law of domestic relations have been an important aspect of this transformation, as activists, legislatures, and courts have slowly dismantled the legal framework that denied full membership to women and fostered or tolerated other types of discrimination grounded in tradition. The process is not complete, particularly with respect to protection against private violence. In countries such as the United States and Canada, this process reflects the emerging understanding that family law is not exempt from broader norms of equality and human rights.

Just as the state cannot place “the family” outside the realm of human rights, it cannot invoke pluralism to insulate social and legal practices from human rights scrutiny. Religious groups are not subject to international law and have no legal obligation to protect human rights. But when religion and the state are intertwined, when governments endorse or enforce the laws and practices of private or religious actors, those governments bear secondary responsibility for violations of human rights within those spheres. For this reason, pluralist regimes in which religious or other groups exercise official authority but operate autonomously from the state pose particularly difficult challenges in ensuring respect for human rights.

This Essay argues that pluralism in family law presents two types of challenges. One concerns substantive practices permitted in religious or customary law that violate international human rights law. These practices must be regulated in pluralist nations and fall outside the boundaries of accommodation in countries, such as the United States and Canada, where customary and religious laws operate on an unofficial basis. The other challenge of family law pluralism is inherent in the project of dividing citizens into separate groups based on factors such as religion or ethnicity. Beyond the human rights issues that this presents, it is legally and politically problematic for nations committed to the ideals of equality and universal citizenship.