



DUE DILIGENCE PROJECT'S

**THE DUE DILIGENCE PRINCIPLE AND  
THE ROLE OF THE STATE:  
DISCRIMINATION AGAINST WOMEN  
IN FAMILY AND CULTURAL LIFE**

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## I. INTRODUCTION

The Due Diligence Project<sup>1</sup> (DDP) welcomes the UN Working Group thematic focus on Discrimination against the Women in Family and Cultural Life.

The purpose of this contribution is to highlight new and innovative thinking beyond the current language and discourse in understanding and conceptualizing discrimination against women in family and cultural life, to critically examine crucial basic concepts which adds to this understanding and to look at discrimination against women in family and cultural life through the lens of the State Obligation.

The lens of State Obligation is presented through the Due Diligence Framework developed by the Due Diligence Project.<sup>2</sup>

### a. *Situational context*

There is a growing wave of conservatism, in the name of culture and religion, threatening to repudiate women's human rights norms and standards. At the national level, States are passing laws and by-laws restricting women's rights, agency and mobility. For example, *Buddhist Women's Marriage Bill* (Myanmar) which restricts Buddhist women's rights to marry or cohabit with men of other faiths. The Bill is based on a petition presented by a coalition of nationalist Buddhist monks known as the Organization for the Protection of Race, Religion, and Belief.<sup>3</sup> Another example is the Anti-Pornography Law (Indonesia) which definition of pornography includes women's dressing "that violates the moral values of society". The anti-pornography law was promoted by a small group of Islamist parties, and passed by parliament in October 2008.<sup>4</sup> At the international level, Human Rights Council resolutions on *Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind*,<sup>5</sup> *Combating defamation of religions*<sup>6</sup> and *Protection of the Family*<sup>7</sup> all draw on 'traditional and cultural values' to mediate human rights norms.

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<sup>1</sup> The Due Diligence Project (DDP) is a global project which explores and unpacks the international legal principle

<sup>2</sup> Zarizana Abdul Aziz and Janine Moussa, *The Due Diligence Framework: Framework on State Accountability to Eliminate Violence against Women*, International Human Rights Initiative, 2014. The Due Diligence Framework contains guidelines in the five areas of State Obligation, namely prevention, protection, prosecution, punishment and provision of redress and reparation.

<sup>3</sup> Zarni Mann, *Monk Conference Backs Bills to Restrict Interfaith Marriage, Rohingya Voting*, The Irrawaddy, 16 January 2014, available at <http://www.irrawaddy.org/burma/monk-conference-backs-bills-restrict-interfaith-marriage-rohingya-voting.html>. Last visited 15 January 2015.

<sup>4</sup> Olivia Rondonuwu, *Indonesia's constitutional court defends pornography law*, Reuters, 25 March, 2010, available at <http://www.reuters.com/article/2010/03/25/us-indonesia-pornography-idUSTRE62O28R20100325> (last visited 15 January 2015)

<sup>5</sup> Human Rights Council resolution A/HRC/RES/16/3 (2012) *Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind*.

<sup>6</sup> Human Rights Council, Resolution A/HRC/RES/13/16 (2010) *Combating defamation of religions*.

<sup>7</sup> Human Rights Council resolution A/HRC/26/L.20/Rev.1 (2014) *Protecting the family*.

Gender stereotypes are reinforced and legitimized by the traditional roles of men and women said to have their basis in conservative interpretations of culture and religion. Women's human rights claims are rejected as being not part of "our culture". This is compounded by the global north's essentialization of gender discrimination as "the others' culture" deserving of non-interference.

Although these stereotypes permeates all facets of women's lives, often supported by constitutional and legal systems, women's human rights are particularly threatened in the realm of the family, and are often regulated by what is known as personal laws on marriage and divorce, guardianship of children (and at times, of women) and succession as well as violence against women in particular sexual violence and intimate partner violence.<sup>8</sup>

Cultural rights are essential to the recognition and respect of human dignity and must include non-discrimination and equality principles. Whereas the right to express and enjoy one's culture and religion is protected by international human rights law<sup>9</sup>, it cannot be fulfilled at the expense of other fundamental human rights, nor at the expense of the fundamental rights of others (irrespective of whether they are from the same or different culture or religion).<sup>10</sup> The right to culture also includes the freedom to contribute in the creation of culture and its replication in everyday life.

Culture is neither static nor monolithic. The State has a role to play in mediating these competing and, at times complementary, interests. Article 5 of the Convention on All Forms of Discrimination against Women (CEDAW) reaffirms this by declaring that States have an obligation to "take all appropriate measures 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 the superiority of either of the sexes or on stereotyped roles for men and women".

State responsibility has further expanded over the years to include not only the State obligation not to violate human rights, but its obligation to exercise due diligence to ensure that violations of human rights, whether committed by State actors or non-State actors are eliminated. In examining the relationship between discrimination against women, culture and religion, the due diligence principle is all the more important as States have tremendous power, ability and interest in moulding, tolerating, encouraging and developing values and culture. States should take measures to protect women and girls against negative social and cultural practices that are harmful to their well-being, dignity and health.

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<sup>8</sup> Guardianship of women requires that a woman be in perpetual need of a male guardian (*wilayat*).

<sup>9</sup> See HRC resolution A/HRC/10/23 (2009) reaffirming "that cultural rights are an integral part of human rights, which are universal, indivisible, interrelated and interdependent", para. 1.

<sup>10</sup> Ibid, "[N]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law.", para. 4. See also UNESCO Universal Declaration on Cultural Diversity (2001), Article 4.

*b. Purpose of submission*

Discrimination against women in family and cultural life has stood out as one of the underlying causes in the Due Diligence Project's extensive three year research-advocacy on violence against women. Likewise, the role of the State as the entity ultimately responsible for preventing and addressing human rights abuses has also been a central approach to the work of the Due Diligence Project.

Given this and the current socio-economic context, the DDP convened an expert group meeting on 2-3 December 2014 on the Role of the State and Discrimination against Women in Family and Cultural Life.<sup>11</sup> The meeting brought together experts from diverse religious and cultural backgrounds with expertise in the area of women's human rights to critically explore, analyse, and formulate strategies on human rights and its intersections with culture and religion with particular attention to their impact on the family through the lens of State obligation.

Outcomes of this expert meeting as well as independently conducted research in the area by the DDP are contained in this document. The document is offered as a contribution to the discourse on this critical and complex issue and to the UN Working Group for consideration in its 2015 annual thematic report on Discrimination against Women in Family and Cultural Life.

*c. Concepts and terminology*

For purposes of this report, the following terms should be taken to mean :

- Discrimination against 'women' should be taken to include discrimination against lesbians, bisexual women and transgendered individuals.
- 'Cultural life' also has an expansive and amorphous meaning. It includes the space within which we live, work, and play and encompasses the realms of religion, traditions, custom, arts, sports and education.
- 'Family' is the basic unit of society which can take diverse forms<sup>12</sup> requiring both recognition and protection by the State, when in line with international human rights norms and standards.

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<sup>11</sup> The meeting was hosted by The Robert F Kennedy (RFK) Center for Justice and Human Rights and supported by Association for Women's Rights in Development (AWID), United Nations Development Fund (UNDP), UN Women Asia-Pacific, The Carter Center and the Office of the High Commissioner of Human Rights (OHCHR).

<sup>12</sup> See section II (3) *infra*.

## II. CONTRIBUTIONS TO THE DISCOURSE

### **1. Due Diligence Framework and the Role of the State**

The ‘due diligence principle’, as it is commonly termed, holds States accountable for human rights abuses committed not only by the State or State actors, but also by non-State actors. Discrimination against women is perpetrated by both State and non-State actors. By making the State accountable for discrimination committed by both State and non-State actors, public international law recognizes that discrimination against women, regardless of who commits it, constitutes human rights violations. The due diligence principle is a critical tool in the formulation of accountability.

The principal importance of the due diligence obligation of the State is its duty to intervene and protect individuals from harm, even where the actors concerned may be private actors (rather than agents of the State). This key principal can be leveraged in developing strategies to protect persons from rights abuses. Due diligence has also ruptured the artificial ‘public/private sphere’ divide and the dichotomy between State and non-State actors. States are now not only permitted but obliged to ensure that no justification may be invoked for States to deny accountability for discrimination against women.

The Due Diligence Framework is a tool, developed by the Due Diligence Project, to help gauge and assess State compliance with its due diligence obligation effectively to prevent and respond to human rights violations.<sup>13</sup> Derived from international human rights law,<sup>14</sup> the due diligence principle obligates a State to take reasonable action to prevent, protect, protect, punish, and provide redress (“5Ps”) for human rights violations. The Framework is organized along the due diligence “5Ps” and supported by Guiding Principles which further break down the 5P’s into tangible, actionable, and implementable elements.

The Framework places the role of the State at the centre of the discussion. This is not to say that non-State actors do not, indeed they do, have a role to play in eradication of discrimination against women. But rather the Framework provides a lens for analysis and underscores that the ultimate responsibility and obligation to prevent, address and respond to human rights violations rests with the State.

This emphasis on the role of the State is responsive to the call for a paradigm shift and a more comprehensive and holistic approach to eradication of discrimination against women in family and cultural life. The due diligence principle challenges the “culturalization” of gender

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<sup>13</sup> Abdul Aziz and Moussa, *supra* n. 2

<sup>14</sup> See for example, CEDAW General Recommendation no. 19 (1992); Human Rights Council resolutions 11/2 (2009); 14/12 (2010); 20/12 (2012); UN General Assembly resolutions 65/187 (2010), and 69/xx (2014) on State Obligation (forthcoming).

discrimination. It demands that States focus on unequal gendered structures and the wider social, economic and political environment in which gender discrimination thrives.<sup>15</sup>

The Due Diligence Framework and its Guiding Principles assist in identifying the different actors, stakeholders, and allies; takes into account the socio-economic-historical contexts of women and particular groups of women; and emphasizes the need to address root causes, risk factors and incorporate transformative justice ideals into programmes, laws and policies to eradicate discrimination against women.

## 2. Culture

### *a. Basic premises*

**Culture is a social construct** and is the result of contestations. It draws from customary practices and tradition on the one hand and yet, reflects our lived realities, which is interpreted through and guided by contemporary ideas, ethos, norms, social-economic and political circumstances on the other hand. **Culture is not static and unchanging**, even if presented as such by some States. Culture is ever changing; it adapts and re-creates itself in support of society's values.

**Culture is neither singular nor monolithic.** Furthermore, cultural practices are not uniformly practised throughout community. Culture is constantly reproduced by both collective and individual contributions through exchanges; as such, culture is formed by contestations between differing views. Consequently culture is a living process and is necessarily dynamic, adaptive and innovative. Cocooning gender discrimination within tradition and culture deceptively increases the appearance of the naturalness of and necessity for discrimination against women even as it appeals to the justice of maintaining the status quo.<sup>16</sup>

It is noteworthy to remember that **gender discrimination is a global practice** that manifests itself in culture and is often justified in name of culture. As gender discrimination is not intrinsic only in specific cultures, it cannot be said to be essentialized and embedded only in some cultures and not others. The confusion arises due to the conflation of acknowledging the prevalence of gender discriminatory practices with accepting, tolerating and essentializing gender discrimination as a traditional manifestation of culture deserving of preservation.

It is this mistaken reasoning that allows culture to be invoked as an explanation, if not a justification, for gender discrimination, thus conceptualizing women not as victims/survivors of discrimination but transgressors of culture. This is particularly so as women are conceptualised

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<sup>15</sup> Yakin Ertürk, *Culture versus rights dualism: a myth or a reality?*, 50.50 Inclusive Democracy, 25 April 2012. Also available at <https://www.opendemocracy.net/5050/yakin-erturk/culture-versus-rights-dualism-myth-or-reality> (last visited 15 January 2015)

<sup>16</sup> Abdul Aziz, *Culture, Power and Narratives in Domestic Violence Discourse* in Maznah Mohamed & Saskia E. Wieringa: *Family Ambiguity and Domestic Violence in Asia*, Sussex Academic Press, UK (2013).



as markers and symbols of culture. In fact symbolism of women's representation have ignited fierce public debates over "[the clash of alternative masculinities](#)".<sup>17</sup> Incidences of gender discrimination within a certain culture do not constitute proof that they form part of that cultural milieu. What they do prove, however, is that gender discrimination is a pervasive a problem.

Cultural rights and protection of **cultural diversity** is an integral part of human rights. Cultural diversity may not be invoked to limit or deny human rights of others. Respect for other cultures must be read within the human rights cultural diversity paradigm. Cultural diversity also includes right to diversity within the community. Intrinsic in the idea of cultural diversity is cultural relativism, namely respect for the culture of others. **Cultural relativism** however does not equate passive acceptance of all cultural practices. It does not require or promote tolerance of oppressive norms within cultures and cannot be divorced from the demands of human rights including the protection of the rights of women.<sup>18</sup>

Women also have the right to protection of women's human rights and the constitutional guarantees of fundamental liberties and freedoms e.g. freedom of expression, movement, right to marriage, education, housing, own property. Women have the **right to participate in and shape cultural life** and to interpret culture. This includes the right to contribute equally to development and production of culture and to have social and cultural patterns of conduct that contain stereotyped and discriminatory prejudices and practices modified.<sup>19</sup> More and more women are participating in (re) interpretation of religious texts in more gender friendly ways, a realm which has traditionally excluded to women.

**Not all cultural practices deserve preservation.** Practices that are repressive, discriminatory and violent should be abolished, no matter what their sources of origin may be. A practice in Swaziland known as "kulamuta" where a husband is expected to initiate sexual relations and eventually marry his wife's younger sister, is an example. As is the practice of 'widow cleansing' practiced among certain tribes in Sub-Saharan Africa, whereby a widow is required to have sexual relationship with 'cleanser/s' after a suitable period of mourning before being accepted back by her community.

The prevalence of discriminatory practices such as these does not equate to acceptance of discrimination as a cultural practice. Neither does it equate gender discrimination as a practice deserving of preservation. Other practices, even those that privileged powerful members of society once defended in the name of culture, have long been delegitimized or abandoned due to evolving values and ethos. Slavery, torture and to a lesser degree, racial discrimination, have

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<sup>17</sup> Yakin Ertürk, *supra* n. 13. Ertürk referred to Afghanistan to illustrate the clash of masculinities. The Taliban's objective was to erase public presence of Afghan women while the US' war in Afghanistan was premised on saving Afghan women.

<sup>18</sup> A. An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in A. An-Na'im and F. Deng (eds) *Human Rights in Africa: Cross-Cultural Perspectives* (1990), 331

<sup>19</sup> See CEDAW article 5.

evolved over time from acceptable practices to prohibited norms internationally.<sup>20</sup> The State has an obligation and must take action, based on the due diligence principle to combat and eliminate gender discrimination.

One way to accommodate concerns on essentializing oppressive elements in cultural groups is to **exclude illiberal norms and practices in our cultural narratives** so that what is essential for cultural survival does not overlap with what is oppressive and reprehensible. It is also possible to investigate and **preserve the ‘good’ in cultural norms** which have been lost in practice. For example, the original value of the practice of “widow inheritance” in parts of Africa may have been to protect and provide for widows and orphans. But in current practice, male members of the deceased husband’s family are also given sexual access to the widow. It is therefore possible to preserve the ‘good’, that is ensure that the widow and her children are cared for by the deceased husband’s family without granting sexual access to the widow. Similarly the intent of requiring four credible adult male witnesses to support accusations of *zina* (consensual sexual relations outside marriage under Muslim laws) is to protect women from false accusations and underline that sexual intercourse should be a private act.<sup>21</sup> Yet today, *zina* is conflated with rape and women who prefer rape charges against their assailants without tendering four adult male witnesses are punished for *zina*.<sup>22</sup>

Where internal interpretations of culture fail to **uphold fundamental human rights**, the appeal to contemporary values, ethos and norms as well as external standards becomes necessary.<sup>23</sup> Culturally sensitive applications of human rights result in cohesive and resilient communities<sup>24</sup> and reinforce the cultural legitimacy of human rights.

Particular groups of women may experience **multiple forms of discrimination** based on a myriad factors including the way they identify/are identified and the socio-economic context in which they live. For example, **women with HIV/AIDS** are discriminated against by their families and communities, partially because it is sexually transmittable and they are assumed to have transgressed moral mores on sexual activity. Often too, when a man contracts HIV/AIDS, his wife and more so his widow, is blamed for transmitting HIV/AIDS to him. This may then be

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<sup>20</sup> Slavery was declared a crime against humanity. See the Slavery Convention 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1957, 226 UNTS 3, (30 April 1957). See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment A/RES/39/46 dated 10 December 1984.

<sup>21</sup> See also Ziba Mir Hosseini, *Control and Sexuality: The Revival of Zina Laws in Muslim Contexts*, Women Living Under Muslim Laws, 2012

<sup>22</sup> E.g. Chris McGreal, *Somalian rape victim, 13, stoned to death*, The Guardian, 3 November 2008 available at <http://www.theguardian.com/world/2008/nov/03/somalia-rape-amnesty> (last visited 15 January 2015)

<sup>23</sup> See also A. An-Na’im, *supra* n. 18

<sup>24</sup> Report of the Special Rapporteur in the Field of Cultural Rights Farida Shaheed, on *Promotion of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, (2012).

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/459/30/PDF/N1245930.pdf?OpenElement>

used to deny her inheritance to his estate, to evict her from the matrimonial home and to take custody of her children, particularly sons.<sup>25</sup>

**Single women** or women seen alone (without a male companion) and working women are also frequently targeted. In July 2001, working women in the Saharan city Hassi Messaoud were attacked by a mob of three-hundred men following a sermon given in the local mosque. The women were cleaning personnel, secretaries and cooks, all employed by foreign oil companies. Media reports indicate that the Imam accused these women of 'immoral' behaviour and called on the men in the mosque to a 'jihad against evil' and to 'chase the women fornicators out of the area', on the ground that since they were living on their own by themselves, (without guardians) they could be considered to be prostitutes.<sup>26</sup> In Ciudad Juárez, Mexico, women, especially single women working in factories (maquila), have been targeted for violence including sexual violence, mutilation and murder for decades. The discrimination was rendered more critical because of police failure to investigate and prosecute the cases, partially due to similar negative perceptions of single women and thus fuelling impunity for perpetrators of the violence.<sup>27</sup>

Widows, like single women are also targets for gender discrimination. For example, in Swaziland, land rights are exercised largely through the power invested in the king through traditional authorities. Families in Swaziland use this power structure to justify their actions and prevent women from exercising their rights to land, citing the common refrain that “this is our culture”. Women with disabilities, internally displaced women, women refugees, undocumented migrant women, immigrant women, incarcerated women and women from sexual minorities similarly face multiple forms of discrimination.

#### *b. Factors that influence Culture*

There is an urgent need to understand the sites and modalities of the discrimination women face in culture. The term “culture” however, is interpreted differently by different parties. What is the space we identify as culture and by what is it shaped and influenced? The starting point needs to be the recognition of our **lived realities**. This exploration can bring about a paradigm shift in understanding these sites and modalities which incarnate and perpetuate discrimination.

Cultural spaces include arts, religious spaces, artistic production, education, employment and State procedures. Culture in itself is a means of constituting demands upon human behaviour. It

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<sup>25</sup> Expert Group Meeting, *Gaps, traps, and opportunities: exploring access to justice and human rights for women affected by HIV in the context of plural legal systems* convened by United Nations Development Programme, 16-17 July 2014, Addis Ababa.

<sup>26</sup> These women were murdered, tortured, stabbed, mutilated and raped. Mahl, *Algeria: Attacks on women in Hassi Messaoud*, Women Living Under Muslim Laws, available at <http://www.wluml.org/node/639> (last visited 15 January 2015)

<sup>27</sup> IACHR, (2003) *The Situation of the Rights of Women in Ciudad Juárez, México: The Right to Be Free from Violence and Discrimination*. OEA/Ser.L/V/II.117, Doc. 44, 7 March, para. 137; See also *González et al. v. México (Campo Algodonero)*, IACHR Judgment of 16 November 2009, IACHR, Annual Report 2009, OEA/Ser.L/V.II.111 Doc.20 rev. (2000)

is thus important that we question the role of **values, norms and expectations** in shaping culture. It is also important to recognize and identify the actors responsible for discrimination against women and the complicity of institutions in actively or passively supporting these actors. By identifying the actors, we can articulate the scope of State obligations in addressing discrimination against women.

In this regard, it is essential to differentiate culture from **tradition**. Culture may be shaped by tradition; but it can equally be shaped by recent historical and contemporary experiences and ideas and politics. These interconnections between culture, the State and politics include colonial and political history, national and liberation movements, constitutional values and advances in technology. For example, colonial inheritance of the Penal Code in India had, since 1862 criminalized consensual homosexual acts which had gradually become synonymous with Indian culture. Indeed arguments on retaining the prohibition (s. 377) were often based on defending Indian culture. In 2001 however, the High Court interpreted the relevant section to exclude sexual acts between consenting adults which prompted the Indian Parliament to decriminalize homosexuality.<sup>28</sup> Likewise, while religion, like tradition, is an element of culture, religion is also a factor that has tremendous impact and influence in shaping culture. Paradoxically, **religion** is also shaped and influenced by culture, which has resulted in diversity in the interpretation of religion that is then exploited by politics of the State to incarnate a national cultural identity.

Culture is dynamic, contemporary, diverse and reflects the lived realities of men and women. Normative laws and rights are not only intrinsic to cultural formations, the formulation of the cultural narrative is itself bound to **law making, power and privilege**. Furthermore, culture is increasingly subject to globalization, reflecting culture's dynamic nature.

It is imperative that we discern the interrelationship between culture, power and privilege. Cultural practices are exercises of power that can be used to fulfill diverse political agendas such as identity politics, protecting existing power relations or resisting change. Existing cultural narratives are generally controlled by voices from positions of power and privilege. When conservative forces claim ownership over an "authentic" interpretation of culture, tradition and/or religion that includes gender discrimination, women are not only told to accept discrimination, they are denied any role as equal and active contributors to the development and production of culture.<sup>29</sup>

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<sup>28</sup> See *Naz Foundation v. Government of NCT of Delhi*, WP(C) No.7455/2001, Delhi High Court; Decision on 2nd July, 2009

<sup>29</sup> In her 2007 report, the United Nations Special Rapporteur on Violence against Women, its Causes and Consequence Yakin Ertürk likewise challenged the dominant culture-based paradigms that justify or explain violations of women's rights. The report critically examines how cultural discourses are created, reproduced and instrumentalized. It also traces the trends in the development of the international normative framework on violence against women, warns against cultural essentialism that ignores the agency of women in the developing world and the trajectories of their resistance to violence and oppression and underlines the primacy of women's right to live a life free of gender-based violence over any cultural considerations. Yakin Ertürk, Report of the Special Rapporteur on violence against women, its causes and consequences, *Intersections between culture and violence against women*,

Power and the use of power to protect privilege, not only leads to the defeat of the voices of the powerless but, over time, to their silence altogether. Thus, culture as a practice is reflected in wilful action, power relations, struggle, contestations and contradictions. Questioning the narrative of culture and gender discrimination puts power back at the centre of our understanding of culture and allows us to interrogate upon what terms of engagement and in whose interest culture is narrated.<sup>30</sup> Arguments positing a clash between traditional cultures and modernization in the discourse of gender discrimination are misplaced. Discrimination against women is a systemic global practice embedded in masculinities, patriarchy and the domination of women that is then justified in the name of honour, culture and religion.

Culture is also connected to people's **work, professions, livelihood** or other pursuits, such that cultural norms shape how people undertaking different work, professions and other pursuits should behave. Other factors influencing culture are **immigration and social status**. In fact, individuals frequently move between different roles and cultural spaces within a society.

Culture and religion can also be influenced by external trends, ideas and practices. In recent years, we have witnessed waves of **globalisation of conservative interpretations** of culture/religion which preserve stereotypical perception about the status and role of women, namely confining women to their roles as wives, homemakers and mothers.

The impact and influence of **patriarchy** on gender discrimination is wide-ranging. The **culture of violence against women** and its normalization has rendered women being in persistent fear of rape, sexual violence and femicide/feminicide. This existing modality is premised on women being rendered compliant persons. The culture of **machismo** in society also reinforces acceptance of sexual violence and domestic violence as a means amongst others, to control women and resolve conflicts. Masculinities need to be deconstructed in terms of addressing gender issues. The key objective must be to separate 'being male from being violent'.

**Sexuality** too plays a role in relation to culture with all but one expression of female sexual activity (namely sexual activity with her lawfully wedded husband) frowned upon if not stigmatized.<sup>31</sup> Women who transgress this taboo are deemed to have 'dishonoured' their families and often subjected to violence including murder with perpetrators enjoying impunity.<sup>32</sup> Legitimizing the commission of a category of violence in the name of 'honour' circumscribes the

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A/HRC/4/34, 17 January 2007, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/103/04/PDF/G0710304.pdf?OpenElement> (last visited 19 January 2015)

<sup>30</sup> Abdul Aziz, *supra* n. 16

<sup>31</sup> In Ecuador, families are reported to send their lesbian daughters to rehabilitation clinics which use abuse and torture to 'cure' the women's of their homosexuality. *Rights groups hail Ecuador's crackdown on lesbian 'torture clinics'*, NBC News, 25 January 2012, available at [http://worldnews.nbcnews.com/\\_news/2012/01/25/10237126-rights-groups-hail-ecuadors-crackdown-on-lesbian-torture-clinics?lite](http://worldnews.nbcnews.com/_news/2012/01/25/10237126-rights-groups-hail-ecuadors-crackdown-on-lesbian-torture-clinics?lite)

<sup>32</sup> For example in Tunisia, Jordan, Lebanon, the Occupied Palestinian Territories, Philippines. Husbands who murder their wives on the suspicion of their wives' committing adultery have historically and still enjoy impunity or light sentences in many cultures.

boundaries of “honour”. In this instance, legal rules not only influence the development of the “honour” norm; by accepting the “honour” defence, legal rules perpetuate if not create it.

### *c. Sites and Actors*

In forging a national or communal identity, culture is frequently reinforced by repetition through power structures and these structures assume the role of providing a monolithic interpretation of culture. Consequently a singular culture is often presented as having been achieved through a consensus or common practice accepted by the community. How power is legitimized and power relationships established must be mapped and examined.

It must be remembered that these **State institutions**, such as the state and its organs are not monolithic and consequently even where culture is presented as singular, it is subjected to multiple interpretations, resulting in plurality in cultures. Yet, oftentimes, despite the State’s interest in incarnating and perpetuating culture and cultural identity and its interventions toward creating a monolithic culture, many States treat cultural and religious norms and laws as beyond the pale of their regulation.

Another power structure that influences culture is **religion**. It is important to understand religion as expressing individual volition and a belief in a way of life, reflecting a specific pursuit in life. Initiatives in hermeneutics in order to understand the meaning of the role and status of women in contemporary society have also helped in contextualizing prior knowledge and developing fresh understanding of this issue that support equality and non-discrimination between the sexes. These critical works can only enhance and usher a robust understanding of religion. Cultural diversity requires “States to both abstain from interfering with the exercise of cultural practices and with access to cultural goods and services and to take positive action to ensure preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods”.<sup>33</sup> Human rights should protect individual discovery and prevent the imposition of beliefs.

A primary actor with whom women should engage in changing culture must be the male-dominated **religious establishments**. Existing institutions must be willing to evolve and shape less discriminatory religious knowledge.<sup>34</sup> Religious approaches and the human rights approach need not be mutually exclusive. Often overlooked are the plurality of religious discourses and the unity of cultural and religious practices and discourse. For example, widows are sometimes segregated in churches even though segregation of widows is often vestiges of customary practices.

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<sup>33</sup> The Committee on Economic Social and Cultural Rights *General Comment 21 on Right of everyone to take part in cultural life* (2009).

<sup>34</sup> Compare this to other areas such as “Islamic finance” where new interpretations have been used to create innovative financial, equity and debt products.

Institutions of power, such as **the State**, also intervene to favour and promote politically expedient discourses to justify their actions, policies and vision. **Politicians** who are dependent on electoral votes and campaign funds frequently placate, negotiate with, pander to if not actively support the conservative lobby and in the process, negotiate away women's rights or postpone women's equality agenda for fear of disrupting existing power structures. Failure of the State often provides the opportunity for the rise of **extremist and fundamentalist religious ideology and movements**, which, if left unchecked, may gradually become integrated into and assume a definitive role in shaping culture. While acknowledging that religion can contribute to fulfilling women's moral ethical and spiritual needs, "any form of extremism may have a negative impact on women and can lead to violence and discrimination".<sup>35</sup>

**Judges and the courts** are key actors in either perpetuating or eliminating discrimination against women. Judges are themselves products of their environment and often adopt the same perceptions about women's role and status which inform their decisions. For example, Morocco enacted a Family Code (*Moudawana*) in 2004 that has been widely acknowledged as being progressive. The Code sets the minimum age for marriage at eighteen for both men and women and both shall have equal access to divorce. The Code also bans polygamy. Despite these provisions, difficulties persisted in so far as the judiciary still plays a key role and its interpretative accounts of the Code had rendered some of these provisions ineffective. As such, the judiciary would require further sensitization if the rights enshrined within the Code were to be properly protected.

**Law enforcement and security officers**, such as the police, prosecutors and military, may also impose their own cultural values and prejudices when enforcing the law. This includes reluctance to arrest and sentence domestic violence perpetrators, preferring instead to 'talk to the perpetrators' or provide justifications for the violence. These officers act out their cultural biases and prejudice, sometimes without sanction of the law. For example, immigration officers may require the father's consent in an application for a child's passport even though the law does not require it. At times, lack of confidence in the police may also be due to mistrust of certain communities of the police as a result of appearance of police bias or violence against the community.<sup>36</sup> There is also a general reluctance by the State to take action where the perpetrators are themselves members of force.<sup>37</sup>

In fact **the law** itself can perpetuate discrimination and violence against women, These include not merely the obvious laws such as family and inheritance, but also tax laws, social benefits, insurance laws and criminal laws. For example laws that provide that women can only claim

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<sup>35</sup> United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, para 24, available at <http://www.un.org/womenwatch/daw/beijing/platform/> (accessed 18 January 2015)

<sup>36</sup> For example mistrust of Sunni police officers by Shiite women in Bahrain or of police officers by the African-American community in USA. Abdul Aziz & Moussa, *supra* n. 2, p.53

<sup>37</sup> E.g. Fiji. Expert Group Meeting, *supra* n. 11.

family tax benefits in the absence of men; insurance proceeds that can only be paid out in accordance to inheritance regulations which provide for unequal distribution for men and women (Malaysia); rapists who can avoid prosecution and punishment if they marry the rape victims/survivors as marriage is deemed to expunge the ‘dishonour’ brought on the families of victims/survivors.<sup>38</sup>

**Education** can also be a site of discrimination or alternatively, of gender equality and empowerment. The school curriculum, designation of girls’ subjects and activities (‘home economics’, netball) and boys’ subjects and activities (industrial science, carpentry, football) and choice of class and sports captains, segregation of girls and boys, compulsory dress codes and interpretations of appropriate feminine and masculine behaviour for girls and boys re-enact gender discrimination in the family and society in student’s everyday education.

**Inter-governmental organisations, international organisations, civil society (national and international)** also have crucial roles in addressing discrimination against women in cultural life and the family. While international law and norms are clear in prohibiting discrimination against women, ensuring that these norms and standards are adopted domestically requires intimate knowledge and understanding of the local political, economic, social and cultural and terrain.

**Donor and funding agencies** dictate agendas through issuing grants that work on identified priorities. States are also known to use State funds to promote specific religious interpretations and discourses including conservative discourses that discriminate against women.<sup>39</sup> Consequently, even religious interpretations and perceptions are similarly susceptible to funding.

Similarly, **development agencies** that prioritize specific key areas for development are also capable of influencing culture. For example, one of the priorities for development agencies and donors in Afghanistan was working with plural systems. Programmes were conceived to strengthen and support informal and plural systems with little attention to the gender dynamics of these tribunals and their role as guardians and enforcers of customary, communal and traditional practices that discriminate against women. Consequently these systems continue to entrench gender discrimination. While women’s access to the formal legal system is often restricted (due to distance and cost, for example), strengthening plural informal systems without similar attention to bolster the formal legal systems and to make it more accessible to women have the unfortunate consequence of weakening the formal legal system in favour of the informal system.

Discrimination against women and violence is also promoted by **corporate and media interests** such as producers of video games, many of which promote the objectification of women and require or encourage players to collect points by committing sexual violence against or murdering women, for example *Rape Lay* and *Grand Auto Theft 5*. The movie and television

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<sup>38</sup> For example, Bolivia, Cameroon, Syria, Lebanon and Algeria. Abdul Aziz & Moussa, *supra* n.2, p57.

<sup>39</sup> For example State donor agencies may dictate that grantees are prohibited from engaging in activities that relate to specific issues on women’s reproductive rights.



programming industry too perpetuate gender stereotypes. They can instead be enlisted to promote gender equality and as a vehicle to discuss social issues such as sexual violence and domestic violence, child marriage, the glass ceiling, intersectionality between HIV/AIDs and discrimination against women, and other otherwise unspoken or taboo issues. The Brazilian *telenovelas* for example, have been positively linked to declining birth rates and heightened awareness of social issues.<sup>40</sup>

The media plays a key role in influencing if not developing the cultural narrative. Freedom of expression and of the press, themselves guaranteed by human rights, must be tempered with respect for human rights, including women's human rights. Corrupted influences over the media have skewed media coverage to sensationalize violence against women, glorify patriarchy, demonize women's empowerment, stigmatize women who transgress social norms, perpetuate stereotypes and idolize harmful images of female beauty.

**Militarisation, conflict and organized crime** are also responsible for and have a high tolerance for its members committing violence against women. The fear generated by overt acts of violence against women and threats thereof again serve to render women compliant. For example, thirty years of war in Guatemala had seen women used as weapons of war in which they were subjected to extreme levels of violence. Women are now gradually reclaiming their identities although violence against women remains high. Gang violence has replaced armed conflict and each year there are around 700 cases of femicides linked to this activity.<sup>41</sup> In Pakistan's SWAT valley and surrounding regions which witnessed prolonged conflict between the government and extremist militants, girls' schooling were banned by extremist religious militants.<sup>42</sup> Schools, particularly girls' schools were damaged or destroyed by militants and school children and teachers targeted.<sup>43</sup>

**Women's bodies** are often the sites of power struggles as society continues to make decisions that affect women's ability to exercise control and make decisions regarding their bodies. In Indonesia for example, several provincial governments had enacted various by-laws on restricting women's mobility and regulating women's dressing; each by-law being the product of diverse forces' politicization of culture and cultural life of women.

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<sup>40</sup> "Social merchandising" by telenovelas fashion lifestyle choices and "contribute to an increasing awareness and tolerance of difficult social issues". George Webster, *Brazil's soap operas linked to dramatic drop in birth rates*, CNN.Com, 10 September 2009, available at <http://www.cnn.com/2009/HEALTH/09/10/brazil.novelas.study/index.html?iref=24hours>

<sup>41</sup> Women working in maquilas and women sex workers are also particularly subject to abuse. Women in Guatemala are subject to exploitation in respect of their being asked to smuggle weapons and drugs into prisons, or collect protection fees on behalf of gangs. Women's groups' advocacy has resulted in legislation to address violence against women and femicide/feminicide, yet there has been a lack of enforcement.

<sup>42</sup> Pakistan: Militants announce ban on girls' education in Swat, Irin, 1 January 2009. Available at <http://www.irinnews.org/report/82161/pakistan-militants-announce-ban-on-girls-education-in-swat>

<sup>43</sup> Global Coalition to Protect Education from Attack, Country Profiles: Pakistan. Available at <http://www.protectingeducation.org/country-profile/pakistan> (last visit 7 January 2015).

**Identity politics** draw on culture to provide a sense of security and belonging in society. Consequently, the promotion, protection and fulfillment of **women's rights are seen as secondary** and constitute a longer-term objective that can be postponed. The civil rights movement in the United States adopted this approach in prioritizing the claim to rights of African American people (i.e. men) and delaying the claim to rights of African American women. In post-colonial society it was also often important to create a group that could be seen as secure within society, and in this respect the promotion of women's rights was seen as a secondary, longer-term objective; which is subsequently never realized.

Similarly today, the continued politicization of identity and culture is evident in militarized, conflict and post-conflict States. For example, Fiji where some of the churches, the military and its pro-military institutions, politicians and the supporters of an alternative chieftain system (all of which patriarchal) advocate for a new "Fijian" culture under the call of "equal citizenry"; Palestine where one's cultural identity is perceived to be under attack from outside, the expectation is that both men and women stand firm and not criticize it from within; and Liberia where the end of the civil war ushered in more conservative and nationalistic cultural practices.

Conversely, minority and ethnic communities that perceive rejection of their cultures, may oppose integration into a dominant national culture. Law, seen as an institution of the national culture, may similarly be rejected. Women in these communities, such as the Roma, risk transgressing the taboo of seeking State intervention should they attempt to obtain redress for discriminatory practices; again postponing their rights in the interest of the community.<sup>44</sup>

**Individual leaders** – be they religious, political, customary leaders or even pop cultural icons – have a large role in shaping culture. Given the 'pulpit' from which they speak they are uniquely situated to reach and influence a wide audience. It is therefore incumbent upon them to make informed decisions with the best interest and human rights of their people in mind. This is evident, for example, in the successful "Real men don't buy women" campaign whereby American male celebrity actors speak out against trafficking of women and girls.<sup>45</sup>

Finally, we as **individuals** are all actors in shaping and moulding culture. Our behaviour, actions, omissions, beliefs, ethos, morals, prejudices, bias, choices and perceptions contribute to how we experience culture and cultural life. This includes our choices in education, career, marriage, children, dressing and mobility.

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<sup>44</sup> For example, in Bulgaria. Expert Group Meeting, Dec. 2014.

<sup>45</sup> See <https://www.facebook.com/dontbuygirls>

### 3. FAMILY

Human rights protect individuals in the family institution. The family is a **cultural space** that can either be warm and nurturing or stifling and abusive. Even states that eschew discrimination on the grounds of gender or sex do not see their acceptance of the unequal treatment of women within the family as a contradiction.<sup>46</sup>

#### *a. Various forms of family*

The family is **neither a distinct or discrete concept** and various forms of the family exist. For example, single-parent families and women-headed families (children of unmarried couples are often received and cared for by their maternal grandmothers), child-headed families (such as those children orphaned by HIV/AIDS), joint families, families of same sex unions, extended families (including indigenous extended families such as in Mexico and among the iTaukei of Swaziland), self-created or self-defined families, families without children, families of divorced individuals, polygamous families, and inter-generational women-headed families, female (in non-sexual relationship) headed families.<sup>47</sup> Men are also known to have multiple households (“little house” as it is known in Mexico) or second families with their surrogate wives or de facto partners. Self-defined or self-created families include families formed by street children who look out for one another or families formed in communities that are otherwise marginalized such as the hijras in South Asia.<sup>48</sup>

Similarly there are various **forms of marriages**, though some are frowned upon or considered taboo. For example, same sex marriage; marriage to foreigners (frowned upon particularly in Gulf States in the Middle East); and inter-faith/inter-communal/inter-caste marriages. Some of these self-defined or self-created unions and marriages are often not tolerated, if not ostracized and criminalized. Women and less often, men in these non-traditional marriages are subjected to prosecution.

Where States adopt religious laws or are influenced by religious actors, **interfaith marriages** are often prohibited. In Myanmar, the government is in the process of tabling a set of laws which will prohibit Buddhist women from marrying men of other faiths, prohibit de facto co-habitation between Buddhist women and men of other faiths, prohibit adultery, restrict birth rate amongst

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<sup>46</sup> For example, the second Prime Minister of Singapore, Goh Chok Tong, viewed not according equal treatment to women as “traditional areas of differential treatment” and not “pockets of discrimination” or “blemishes”, Kong & Yeoh, *The politics of landscapes in Singapore: Construction of ‘nation’*, Syracuse University Press, 2003, p. 43

<sup>47</sup> For example, where two siblings raise a family together. This is not uncommon in Egypt.

<sup>48</sup> Homa Khandelwal, *Hijra: India's third gender claims its place in law*, The Guardian, 16 April 2014, <http://www.theguardian.com/society/2014/apr/16/india-third-gender-claims-place-in-law> (last visited 18 January 2015). Although hijras have been recognized as a third gender in Nepal, Pakistan, Bangladesh and India, debate continues to rage around the problem of universally designating each person with a gender, which is a binary, and does not allow for the full range of gender identities to be recognized.

certain populations and require State permission to religiously convert, all of which will have detrimental effect on human rights; the brunt of which borne by women.<sup>49</sup>

In some cases, these marriages are not legally recognized but even when they are legally recognized, societal and communal disapproval generates severe **backlash**. In India, for example, partners of different faiths or castes are often subjected to criminal charges, death threats and rape; lesbian couples suffer discrimination and family members in some cases abduct and hold captive women thought to be involved in lesbian relationships; those in transgendered communities are also subject to discrimination and frequently exploited; and particular problems also arise where transgendered persons experience discrimination in inheritance rights (biological family members who have disinherited their transgendered relatives would appear to claim inheritance rights even when the deceased had evinced a wish the her property be inherited by her transgendered community).

Despite legal regulation, **customary or informal marriages** continue in the shadow of the law. In Tunisia, many polygamous marriages are customary marriages. Customary marriages are also popular amongst students and for example among Melanesian societies in the Pacific such as in Solomon Islands and in Papua New Guinea. Customary marriages afford less protection for women, for example in Egypt, customary wives are unable to instigate divorce proceedings.

Not all families and marriages are deserving of recognition. This includes those that discriminate against women or do not afford women equality and justice, irrespective of whatever the legal system, religion, custom or tradition.<sup>50</sup> **Child (early) marriage, forced marriage, temporary marriage and polygamy** are some of these examples. The CEDAW Committee recommended that States discourage and prohibit polygamous marriages as it “contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents”.<sup>51</sup>

Indigenous women and girls in Guatemala for example, continue to be subjected to child marriage and forced marriage. The Civil Code legalizes marriage for girls at 14 years old and boys at 16 years old.<sup>52</sup> The law stipulates that girls may be married even younger with the consent of their guardians.<sup>53</sup> In fact UNICEF estimates that among women aged 15 to 24, the

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<sup>49</sup> ‘Protection Laws’ submitted to Burma’s Parliament, The Irrawaddy, 2 December 2014. Available at <http://www.irrawaddy.org/burma/protection-laws-submitted-burmas-parliament.html> (last visited 8 January 2014)

<sup>50</sup> UN Committee on the Elimination of Discrimination against Women (CEDAW), *CEDAW General Recommendation No. 21 on Equality in Marriage and Family Relations*, CEDAW/C/GC/21, 1994, para 13; see also Convention on All Forms of Discrimination against Women, Article 2, [G.A. res. 34/180, 34 U.N. GAOR Supp. \(No. 46\) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981](#).

<sup>51</sup> UN Committee on the Elimination of Discrimination against Women (CEDAW), *CEDAW General Recommendation No. 21*, para 14. See also Convention on All Forms of Discrimination against Women, Article 5(a)

<sup>52</sup> Guatemalan Civil Code 89(2).

<sup>53</sup> *Ibid.*

percentages who were married before age 18 were 48% in South Asia, 42% in Africa, and 29% in Latin America and the Caribbean.<sup>54</sup>

Meanwhile, temporary marriages are sometimes used for purposes of legalizing sex holidays. For example, intermediaries link wealthy men from the Gulf with poor Egyptian families with young daughters. The men then enter into temporary marriages with these Egyptian women and girls. The marriages end when the men return to their countries.<sup>55</sup>

How a family is shaped and whether it is recognized, is influenced by a myriad of factors including one's culture, caste, religion, sexuality, status, and livelihood. While international human rights recognizes the diversity in the concept of the family and that "in different cultural, political and social systems, various forms of the family exist"<sup>56</sup>, many of these **non-traditional forms of family** are not recognized by the State. As recognition is oftentimes a precursor to families receiving services, protection and accommodation both by the State and non-State actors, the absence of recognition results in these families being marginalized.

Public institutions often require a **male family member or male guardian** to start or complete an official transaction which severely disadvantages women-headed or women-only households, driving some to take drastic measures to overcome this bias. For example some families in Afghanistan, without sons, resort to dressing their girl children as boys in order to have access to these 'male only' privileges such as education, freedom of movement to conduct errands, etc.<sup>57</sup>

**Female-maintained households** are also very often among the poorest because of discrimination<sup>58</sup> as are children-headed families. Consequently, it is crucial that the diverse forms of families be recognized. Even when male consent is not officially required it can still be the case in practice, such as in Swaziland where requiring a husband's consent before providing a woman with a passport is common administrative practice.

Certain forms of families face particular disadvantages and discrimination and are more vulnerable; therefore they are more in need of protection from the State, than others. For example, **child-headed households** in Swaziland are often those where one or both parents have

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<sup>54</sup> UNICEF, *Early Marriage: Harmful Traditional Practice*, 4, (2005).

<sup>55</sup> Milena Veselinovic, *Scandal of 'summer brides'*, The Independent, 15 July 2012, available at <http://www.independent.co.uk/news/world/africa/scandal-of-summer-brides-7944467.html> referring to the US State Department 2012 report "Trafficking in Persons", p. 146 available at <http://www.state.gov/documents/organization/192595.pdf> (both last visited 18 January 2015)

<sup>56</sup> "The family is the basic unit of society and as such should be strengthened. It is entitled to receive comprehensive protection and support. In different cultural, political and social systems, various forms of the family exist. The rights, capabilities and responsibilities of family members must be respected", *Platform for Action*, United Nations Fourth World Conference on Women, Beijing, para 29.

<sup>57</sup> See also Jenny Nordberg, *The Afghan girls raised as boys*, The Guardian, 22 September 2014 <http://www.theguardian.com/lifeandstyle/2014/sep/22/girls-boys-afghanistan-daughters-raised-as-sons-puberty-bacha-posh> (last visited 15 January 2015)

<sup>58</sup> This includes wage discrimination, occupational segregation patterns in the labour market and other gender-based barriers. *Supra* n. 56.

died from HIV/AIDS. In such cases it is frequently the eldest child or in certain cases the eldest daughter who becomes the head of family. In such cases it is often the case that the daughter performing this role abandons her education, which impacts her welfare and employment prospects. A further difficulty for child-headed families is that members of the family frequently have difficulties in accessing State benefits and rights, for example, asserting their rights to citizenship. Furthermore, these families may also prove vulnerable to members of the extended family and community; for example, they may be coerced or forced into giving up their claims or be subject to physical raids to their land.

Impunity for discrimination against women in the family is also of concern. The ability of families or communities to forgive those who have committed violence against family members, with or without the victim/survivor's consent, in the interest of family honour. Similarly the States must ensure that the law does not facilitate secondary discrimination such as allowing a rapist to marry the victim/survivor to escape prosecution.

*b. Rights and violations experienced within the family*

Although the family is entitled to receive comprehensive protection and support, the family in and of itself is not a subject of human rights protection. Erroneously vesting the family as a holder of human rights risks subverting the rights of individuals, including women and children, to the "rights" of the family.<sup>59</sup>

Women and men must assume **equal responsibility for the family**. Where both parents work outside the home, there is a need to ensure adequate childcare facilities, failing which parents have been known, in desperation, to leave their children unattended.

Human rights also protect **freedom of choice to marry** and to form a family. Forced and non-consensual marriages violate a woman's human rights and cannot be justified in the name of culture. In Swaziland, freedom of choice is denied to sisters of a woman in a childless marriage who are expected to become surrogate wives of their brothers-in-law. Similarly, widows are compelled to undergo cleansing rites and be sexually 'inherited' by their deceased husband's siblings or father.<sup>60</sup> Sometimes, women are reported to have unknowingly been inducted into these 'marriages' which are conducted as part of customary rites or rituals.

Families are infused with patriarchal norms. As long as men's "**conjugal mastery**" over women can be rationalized as rooted in tradition and culture, the right to maintain and enforce this mastery through discrimination in the family will remain unquestioned.<sup>61</sup> This includes mastery

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<sup>59</sup> This was one of the reasons that the United Nations Human Rights Council resolution on the "*Protection of the Family*", requiring the Council to host a panel and produce a report on protecting families, had received vociferous criticisms.

<sup>60</sup> Known as *kulamuta* in Swaziland.

<sup>61</sup> The assumption being that a woman always agrees to subordinate herself as a wife. See also Pateman, C, *The sexual contract*. Stanford University Press, Stanford, 1998.

over decision-making, responsibility over housework, resource ownership, asset control, guardianship and custody of children, unequal rights to enter and exit as well as during marriage. This is also transmitted in unequal treatment of sons and daughters, where sons are given more rights and freedom than daughters.

Oftentimes, the conjugal mastery is accompanied by the **right by men to commit violence** as a means of resolving disputes within the family. The availability of this defence in domestic violence was and still is indicative of a particular understanding of the marriage relationship and of the comparative social positions of women and men within that relationship. The law, in espousing a norm that the ordinary man can lose his self-control and commit violence against his wife and other women in his (or her) family, removes the constraint on men to control their behaviour.

When law provides violence against women with an excusatory dimension, individuals are wont to practice it whenever an affront is perceived and true equality between the sexes will remain an unattainable goal. Recognizing that at least one in three women are abused by their intimate partners, the State must exercise due diligence to prevent, protect against, and remedy violations and ensure true equality within the family.

The importance placed on the family as a unit is such that it is seen as an inviolable social institution. Women must have the right to **exit a marriage** failing which the family can remain under some circumstances an instrument of oppression. Divorce is not an option in some States. The CEDAW Committee, for example, had advised the Philippines that the country should enact divorce laws.<sup>62</sup> Though the Philippines allow for judicial separation, the conditions to exiting a marriage can be so onerous so as to render it near impossible for women to leave a marriage.<sup>63</sup> In many jurisdictions adopting Muslim family laws, a husband may exit the marriage merely by pronouncing that he divorces his wife (*talaq*) while a wife's right to divorce is restricted and the conditions similarly onerous.

The inviolability of marriage has also led the State to criminalize **adultery**. Although adultery is criminalized in some jurisdictions, in practice, adultery laws, where they are implemented, for example in the Philippines, are implemented more harshly against women with men receiving lighter sentences for infractions of this law than women.<sup>64</sup> Criminalisation of sexual relations between consenting adults is also a violation of human rights and the right to privacy. Article 12 of the Universal Declaration of Human Rights provides that, "No one shall be subjected to

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<sup>62</sup> CEDAW/C/PHI/CO/6, para. 31.

<sup>63</sup> Article 36 of the Philippines Family Code allowed for separations although rarely can the conditions be met as the process of filing a claim and proving her case was onerous (the woman having to prove the psychological instability of her partner prior to marriage, and produce evidence to prove her assertions).

<sup>64</sup> This is compounded by the conflation of adultery and pregnancy and adultery and accusations of rape. In both cases, a woman who is unable to prove rape, may be charged and punished for *zina* in countries that implement Muslim criminal laws.

arbitrary interference with his privacy, family, home ...”. This protection is reiterated by Article 16 of the International Covenant of Civil and Political Rights.<sup>65</sup>

Similarly discrimination against women in culture and the family is shaped by our **perception of women primarily as mothers or daughters**. This has resulted in gender discrimination in the health system, for example by failure to recognize women’s control over their bodies and sexuality and denying women their reproductive rights such as access to contraceptives except with proof of marriage and even then, only upon their husbands’ consent.

Where religious leaders, the government, judges and social movements share conservative views of women’s role, status, and sexual rights, family planning and choices over reproductive health can be presented as anti-family, anti-nationalistic, anti-child, anti-religious. This is the case in the Philippines where the Courts struck down parts of the reproductive health law passed by Parliament on the grounds that the law was unconstitutional,<sup>66</sup> and in the United States where the Supreme Court found that corporations were not required to provide contraception health insurance coverage for their female employees if it went against their religious beliefs.<sup>67</sup> Contraception remains restricted, and the consent and presence of male partners are often required for women to access prescription contraceptives (Argentina, Guatemala, Philippines).

Women are also sometimes coerced into **crime** by family members. These include women being coerced into sex work, as drug carriers (especially for male family members who are imprisoned) and into collecting protection money on behalf of male family members; all of which expose women to imprisonment or femicide.

Women married to foreigners are legally sanctioned by way of not being able to **pass their citizenship to their children** thus restricting the children’s rights to social benefits that are otherwise available to citizens. Children’s rights to a name, to education, theoretically to be part

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<sup>65</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 23 March, 1976. See also Statement by the UN Working Group on Discrimination against Women in Law and in Practice, *Adultery as a criminal offence violates women’s human rights*, 2012, available at

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&#sthash.pryqYb2z.a> (last visited 18 January 2015). Adultery is also illegal in at least 18 states in the U.S., including Arizona, Colorado, Florida, Illinois, Massachusetts and Michigan. It is illegal in Myanmar, the Philippines and countries that criminalizes *zina*. The Guatemalan Constitutional Court in 1996 and Ugandan Constitutional Court in 2007 struck down their respective provisions criminalizing adultery. See UN Working Group Statement.

<sup>66</sup> See also Cris Larano, *Philippine Supreme Court Upholds Most of Reproductive-Health Law*, Wall Street Journal, 8 April 2014, available at <http://www.wsj.com/articles/SB10001424052702304819004579488974266047850> (last visited 18 January 2015)

<sup>67</sup> The newly established federal healthcare policy in the USA has also witnessed challenges to women’s access to family planning and abortion particularly by conservative religious organizations unwilling to provide access to birth control under healthcare insurance policies. See *Burwell v. Hobby Lobby*, 573 U.S. (2014) also available at [http://www.supremecourt.gov/opinions/13pdf/13-354\\_olp1.pdf](http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf). See also Richard Wolf, “Justices rule for Hobby Lobby on contraception mandate”, USA Today, 30 June 2014 available at <http://www.usatoday.com/story/news/politics/2014/06/30/supreme-court-hobby-lobby-religion-contraception-obama/11473189/> (both last visited 18 January 2015)



of a family and to inheritance are similarly denied or negatively affected if a child is not born of a recognized marriage or family or if the marriage or family does not have a male member/guardian. The Convention on the Rights of the Child protects children's human rights irrespective of the status of the child's parents or family.<sup>68</sup>

#### *d. Plural legal systems*

Legal systems may hinder or facilitate processes of justice for women. Many countries have multiple sources of law based on their different cultures and religions and laws inherited from colonization. Where plural legal systems exist, they should be linked such that a civil/secular alternative is always available.

Plural legal systems operate in the face of the formal justice systems and at times challenge the formal system. However sometimes, these systems, where they are guided and infused with respect for human rights, have proven to be effective. In Chad, CSOs have developed a programme of training paralegals to attend hearings conducted in customary courts and intervene where necessary to bring to the attention of the tribunal human rights norms or at the very least record and report the proceedings, which heightens accountability of the tribunal.

Plural legal systems exist in many countries studied by the Due Diligence Project — all countries studied in Africa and some in MENA and Asia-Pacific. Israel for example, allows communities to be regulated by their own sectarian personal laws. The Lebanese Constitution grants different sectarian communities the right to oversee their members' personal and family matters. This has created 18 sectarian personal status laws with a total absence of uniformity and consistency in the relief granted to women. These laws neither comply with international standards nor the preamble of the constitution, which states that international conventions supersede internal laws.

The existence of plural legal systems in all African countries has a significant impact on the States' practice of due diligence. For example, DDP survey respondents indicated that many customary and religious legal systems justify or condone violence against women. Rarely do customary or religious legal systems, often based on patriarchal interpretations, act in women's best interests.<sup>69</sup> According to an expert quoted in a 2005 Women's Bureau report, all Senegalese cultures treat men and women differently. Men wield authority within the household and establish the overall climate and rules and women shoulder the burden of domestic life. Women are expected to respect and obey their husbands.<sup>70</sup>

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<sup>68</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

<sup>69</sup> Abdul Aziz & Moussa, p. 63

<sup>70</sup> Women's Bureau of the Senegalese National Strategy for Equality and Gender Equity Women's Bureau, 2005 report.

Plural legal systems may also lead to protection gaps for women, particularly women who already face multiple forms of discrimination, such as women living with HIV/AIDS or from religious or customary groups that hold discriminatory views of women. In Papua New Guinea for example there is evidence of increase in sorcery-related killings of women thought to suffer from HIV/AIDS.

**Reconciliation processes** may also form “a vital custom of the indigenous [community] for reconciliation and cementing kinship ties”.<sup>71</sup> In many instances, the harm (dishonor) is deemed to have been caused by the perpetrator to the family or the community (rather than to the women). In these instances, families can forgive crimes and ask for compensation which is payable to the family.<sup>72</sup> These processes may not in themselves be necessarily problematic if steps are taken to guarantee that the power imbalance is checked, the victim/survivor has an equal say and the outcome is in the interest of the woman and to provide reparation for the harm done to her; not her community or family. The problem also lies with its use in relation to crimes of violence against women. Violence against women and other serious crimes against women are not suitable for reconciliation.

In general, groups should be encouraged to recognize a singular **State civil law** as holding precedence, rather than accepting the implementation of various systems in plurality (noting that women rarely have much influence over informal justice mechanisms). Difficulties have arisen where the recognition of informal justice systems had weakened and undermined the formal justice system. This happened in Afghanistan as a result of the role played by aid agencies in recognizing and developing/supporting informal justice systems without putting the same attention to strengthening the formal justice system. In order for State civil law to hold precedence, it is also critical for States to enhance women’s accessibility to these laws.

### **III. RECOMMENDATIONS: STATE OBLIGATION**

The power of international human rights law lies in its fundamental norms and standards based on the notion of equality of all regardless of sex, ethnicity, religion or other social grouping. The strength behind this is the obligation of the State to ensure realization of these rights, and to prevent and punish violations thereof. Given the machinery of the State and its power and vantage point to influence, direct and shape programmes, policy, laws and culture – the centrality

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<sup>71</sup> Fiji government’s reply to questions posed by the CEDAW Committee in relation to Fiji’s first report on *bulubulu* (UN Press Release 22/01/2002) as quoted by Sally Engle Merry, *Tensions between Global Law and Local Social Justice: CEDAW and the problem of Rape in Fiji*, Conference on conference *Justice Across Cultures* at Brandeis University, March 2004, available at [https://www.brandeis.edu/ethics/pdfs/internationaljustice/otheractivities/JAC\\_Merry.pdf](https://www.brandeis.edu/ethics/pdfs/internationaljustice/otheractivities/JAC_Merry.pdf) (last visited 18 January 2015).

<sup>72</sup> Such arrangements are widespread in Polynesia and Melanesia and the Middle East as well as parts of Asia, for example amongst certain communities in Myanmar where the perpetrator would offer gifts to the village.

of the role of the State cannot be overstated. At times though, the State can be both the principal violator of these rights, and the principal actor for change.

States legitimize ethos, values and practices through their legal and political machinations as well as through their actions and more so, their inaction and are in positions to politically determine cultural narratives. The State cannot profess a religion and as such the State is neither religious nor atheist. However, when power is invested in the State, as it is in the modern conception of the Westphalian state, it does have an obligation to mediate the cultural narrative, (i.e. culture, politics and rights) and to abstain from eliminating cultural diversity.<sup>73</sup>

**In this regard, a paradigm shift is required. Instead of looking at gender discriminatory cultural practices as an obstacle, we should focus on ensuring that States deliver on their state obligations to encourage and create a culture free of gender discrimination.**

The Due Diligence Framework places the State at the center of its analysis, and studies the violation and ensuing remedy through the lens of its “5Ps” obligation, namely the obligation to prevent, protect, prosecute, punish and provide redress and reparation for human rights violations. This lens can then be applied in a variety of contexts, such as the present discrimination against women in family and cultural life.

On **prevention**, the State is obligated to challenge the cultural narrative and norms that discriminate against women including structural discrimination, taboos and gender stereotypes which constitute the root causes of discrimination against women; design effective programmes based on gender diseggregated data; transform attitudes and behaviours; eliminate risk factors by strengthening women’s economic and legal rights and eliminating gender inequalities in access to formal wage employment, secondary education, access to finance and assets, housing security and security over children; reach out to key stakeholders and target groups and establish smart partnerships for change including with civil society organizations and religious and customary leaders; and formulate comprehensive laws and non-derogable Constitutional guarantees that entrench human rights including equality between the sexes.

On **protection**, the State is obligated to ensure accessible, prompt and timely delivery of multi-sectoral and coordinated services focusing on short, medium and long-term needs of women; provide adequate and on-going training for service providers; identify warning signs of imminent danger and cultural essentialism of gender discrimination; and provide quick and effective intervention by trained first responders.

States also have an affirmative duty to **investigate and prosecute**, where appropriate, discrimination against women. This includes efficient and thorough action to investigate and prosecute which addresses victim’s/survivor’s fear of negative repercussions with sensitivity that guarantees confidentiality and privacy. Women’s needs and fears such as stigmatization,

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<sup>73</sup> Abdul Aziz, *supra* n. 16

social ostracization and fear of retribution should be supported and addressed throughout the legal process. Plural legal systems should also be harmonized with and incorporate international human rights norms and standards. Special measures particularly for underserved communities need to be implemented. The DDP survey indicated that lack of confidence in police and judiciary are two of the most oft-quoted obstacles to women seeking State intervention. Therefore the State also needs to be foster confidence in the police and judiciary including plural legal systems, where available.

State obligation to punish must provide certainty of **punishment** and eradicate impunity, excuses and justification for gender discrimination against women. In this regard, punishment policies must be based on an understanding of systemic and structural inequalities. Punishment must be just and commensurate with the offence; capable of preventing recidivism and rehabilitate the perpetrator; and premised on the principle that gender discrimination is not justifiable.

**Redress and reparation** looks at the needs of women and aim to address the harm and loss suffered as well as eliminate or mitigate the effects of discrimination through compensation (monetary/in kind), restitution, opportunity loss; rehabilitation including medical/psychological; guarantees of non-repetition incl. measures toward prevention; and measures of satisfaction e.g. truth tribunals, public apologies, commemoration. Corrective measures should also serve as transformative tools serving individual and/or societal needs to instigate change towards full equality. Reparation should adopt a woman-centered approach and be proportional to the harm or loss suffered.

Specifically, we urge States to take the following into account when preventing and addressing discrimination against women in family and cultural life:

*a. On Culture*

Women and men have the right and obligation to define and craft culture that regulates their lives. After all, culture like law, serves a purpose. It is meant to benefit, not cripple, the community. In the endeavour to eliminate gender discrimination, culture needs to be deconstructed. Instead of justifying gender discrimination in the name of culture, culture should be enlisted to create a gender discrimination-free society.

In this respect, the State and its people have the right to discard illiberal and repressive practices within culture and maintain or substitute these practices with practices that serve the common and individual good and are premised on human rights.

The State is political institution but is not monolithic. State institutions and laws must promote non-discrimination and equality. The judiciary should implement such principles in full, and in principle there should not be discretion to decline so to do. Equality in cultural institutions must also be achieved. In this respect the State must also take action against institutions, state actors

and non-state actors that threaten women and itself follow through with its commitment to eliminate discrimination and promote gender equality by, for example, withdrawing all reservations made to CEDAW and prosecuting State agents who commit discrimination against women.

States should be engaged in promoting the tackling of gender stereotypes, which constitutes one of their positive obligations. State obligations are such that they must protect women from discrimination by private actors in both the public and private spheres. Addressing stereotyping is a political issue of particular importance and special measures are needed including sanctions, studies of attitudes, promotion of diverse images and training of the judiciary. The State must review its cultural practices including its own laws, regulations and policies to weed out gender discriminatory elements, assess what should constitute cultural heritage, ensure equal resources are made available to men and women and reflect and memorialize women's contribution in history in the national narrative. Historical and memorial narratives are part of the cultural heritage and crucial in shaping collective identities; consequently States should preserve the cultural diversity and the multiplicity of historical narratives among and within communities.<sup>74</sup>

Dialogue and public debate can prove constructive in achieving change as persuasion is key where culture and tradition are pitted against change. For example, in Pakistan efforts to engage with religious leaders has led to a reduction in early-age marriages. The challenge is to negotiate change and where desirable, remove male patriarchal influences in culture. The engagement of community and state leaders in this debate is critical.

Discourse is needed to deconstruct symbols, values, norms and practices; paradigms require further review, and women given the access and opportunity to engage within the existing cultural space.

Conflicts present a challenge as often, armed groups and militants involved are non-state actors. In such circumstances, those who assume State roles, such as governance and administration of territory should be invested with the same State obligations as States.

The State being sovereign, it is important to keep in mind stakeholders who are capable of holding States accountable. These include civil society, political parties, politicians, individual citizens, intern-governmental and international bodies, such as the United Nations, international and regional courts and tribunals.

States must also know when to intervene and when not to intervene in the interest of diversity. Cultural diversity for example should be encouraged, and States should be required not only to

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<sup>74</sup> Statement by Ms. Farida Shaheed, Special Rapporteur in the Field of Cultural Rights at the 25th session of the Human Rights Council, 12 March 2014 available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14370&LangID=E#sthash.0sa4qsRW.dpuf>

respect a diverse range of opinions and pluralism but to actively protect and encourage this diversity. The long-term objective must be the creation by the State of a diverse culture that respects, promotes and protects rights. This would entail changes in the spheres of art, education, religion and the media. In this regard States should recognize that they should not privilege any single moral norm. Secularism in this context may encourage such an approach toward establishing a plural public culture.

Societal or customary practices need not always be preserved. The discussion on the important and extensive role of cultural factors has often been focused on the need for unquestioned cultural conservatism. The danger of encouraging and preserving conservative customs in cultural groups solely on the basis that they have been practiced over the ages is that it necessarily implicates culture's paralysis and strips it of dynamism. For culture to maintain its dynamism, the State must provide persons within the cultural group with cultural freedom, which includes the liberty to question the automatic endorsement of past traditions when people see reason for changing their ways of living<sup>75</sup>.

Where cultural practices assume the ability to regulate rights, whether formally or informally, the State must provide reasons and justifications for the policy, engage in civic discourse to defend the policy and exhibit the 'goodness' of the policy beyond the refrain "this is our culture". These cultural practices must also accord with international human rights norms including the International Covenant of Civil and Political Rights, the International Covenant of Economic Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women.

States are responsible to integrate human rights into the national cultural narrative in order to reinforce the cultural legitimacy of human rights. States must further unlock women's agency by tracing and memorializing sources of women's activism to allow women to take forward their agendas.

#### *b. On Family*

States have an obligation to protect every member of the family, and to recognize various forms of the family. All individuals, men and women, have the right to freely chose whether and with whom and when to enter and exit a marriage and family relationship, so long as it conforms with international human rights standards and norms. Women's rights must be recognized and enjoyed regardless of their sexuality, marital status, or legality of relationship. To this end, States must address and prohibit communal and societal backlash as well as institutional and structural discrimination such as requiring the presence or consent of a male family member for official transactions.

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<sup>75</sup> Amartya Sen *Identity and violence: The illusion of destiny*, Norton, New York, 2007

States are also obligated to prohibit and eliminate child/early marriages, forced marriages and polygamous marriages irrespective of whether the same are justified in the name of culture. States must ensure that marriages and families are not abused to harbor gender discrimination, violence and patriarchy. Neither should they be abused for sexual exploitation such as temporary marriages.

Addressing discriminatory cultural practices must go beyond criminalization and into addressing root causes. Criminalizing early marriage for example without ensuring adequate redress and remedies for the child victim/survivor or addressing the cause of such early marriage such as poverty and lack of educational/employment opportunities for women, might just drive the practice underground. With respect to redress remedies provided must be accessible and of a fitting level commensurate with the gravity of the infraction.

States are obligated to ensure that the family cannot negotiate away a woman's rights to seek redress for discrimination or violence committed against her in the interest of family honour. Similarly the States must ensure that the law does not facilitate this secondary discrimination such as allowing a rapist to marry the victim/survivor to escape prosecution.

### *c. On Plural Legal Systems*

States with multiple sources of law or diverse sociocultural demographics must ensure that customary or religious legal systems are interpreted (or reinterpreted) to meet contemporary and changing dynamics, values and challenges. States should circumscribe the applicability of such laws if they breach women's human rights.

States must ensure that customary or religious legal systems are harmonized with human rights principles and all codified civil/criminal law equally apply to plural and customary/religious legal systems whether officially sanctioned or otherwise so long as they are practiced. For example in Botswana, the Southern Africa Litigation Centre (SALC) successfully ran a High Court challenge of a customary rule providing for male inheritance of the family home on the grounds that it infringed the right to equality under the Botswana Constitution thereby providing precedent for application in respect of other customary legal systems.

The State also should actively engage religious and customary leaders to bring their practices in conformity with international human rights law. Customary laws must be subject to constitutional equality guarantees. For example, the 2010 Constitution of Kenya similarly declares that customary laws inconsistent with its equality provisions are void. Kenya also has had success working with the elders in remote Kenyan communities, to resolve disputes involving widows, orphans and the families over their right to inherit property using a human rights framework.

**Reconciliation processes** may not in themselves be necessarily problematic if steps are taken to guarantee that the power imbalance is checked, the victim/survivor has an equal say and the outcome is in the interest of and to provide reparation to the woman and not the community or village. Violence against women and other serious crimes against women are however not suitable for reconciliation.

This is important as women do resort to these informal systems, either because they are more accessible or due to family and societal pressures and expectations or cultural identity. Consequently, States must also address shortcomings in the formal system to make it accessible so that women may opt to use the formal system and are supported when they attempt to access the formal system. The informal justice mechanisms should not however be used in addressing issues pertaining to sexual violence and domestic violence.