Chapter 7

State Responsibility Under International Human Rights Law to Change Religious and Customary Laws

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Introduction

States are responsible for bringing their domestic law and practice into conformity with their obligations under international law to protect and promote human rights. This responsibility applies not only to laws enacted by formal legislative organs of the state but also to those attributed to religious and customary sources or sanction, regardless of the manner of their "enactment" or articulation and/or implementation.[1] In other words, every state has the responsibility to remove any inconsistency between international human rights law binding on it, on the one hand, and religious and customary laws operating within the territory of that state, on the other. This responsibility is fully consistent with the principle of state sovereignty in international law, since it does not purport to force any state to assume legal obligations against its will. It simply seeks to ensure that states effectively fulfill legal obligations they have already assumed under international law.

These obligations could be based, in general terms, on customary international law, and on the Charter of the United Nations in relation to all its member states. But since neither international custom nor the UN Charter is adequate or specific enough,[2] the existence of an international obligation to respect and protect particular human rights, and the consequent obligation to change domestic laws, can be problematic in the absence of specific treaty provisions. Moreover, there are questions about the circumstances and context of the implementation of that obligation. In view of space limitations, I will focus in this chapter

on issues raised by the realistic circumstances of implementation in countries where practices attributed to religious and customary laws are most likely to violate the international human rights of women. This choice of emphasis is supported by the fact that, to my knowledge, this set of issues has not received sufficient attention in available literature. But I will begin by briefly highlighting some questions relating to the sources and nature of the obligation.

The principle that states are responsible for changing domestic laws in order to bring them into conformity with international human rights law could simply be based on the notion that the state is bound to do so by international custom or treaties. However, it may not be sufficient to rely on a formalistic understanding of this notion, especially in relation to the international human rights of women. The argument that this obligation can be founded on customary international law may be somewhat controversial and strained in relation to the human rights of women. Customary international law, in general, is notoriously vague and difficult to prove.[3] Moreover, it would probably be difficult to establish a principle of customary international law prohibiting all forms of discrimination on grounds of gender. The restrictive formulations suggested by the few authors who support the existence of such a principle in customary international law clearly show that its scope and implications would be problematic and controversial.[4]

The rationale of binding agreements would, of course, apply when the state is party to a relevant treaty. For example, Articles 2(f) and 5(a) of the International Convention for the Elimination of all Forms of Discrimination Against Women (the Women's Convention) require states parties to implement "appropriate measures" to eliminate discrimination against women in customary practices.[5] However, this rationale would not be applicable where the state has not ratified relevant treaties or has entered reservations that exclude the obligation to change religious or customary laws. For example, Egypt ratified the Women's Convention, but entered a reservation on, inter alia, Article 16, concerning equality between men and women in all matters relating to marriage and family relations, which are governed in Egypt by Islamic Shari'a law.[6]

Even where a state is party to an appropriate treaty and has not entered a reservation with regard to a particular human right, it should not be assumed that the application of the notion of binding treaties to the obligation to change religious and customary laws will be a simple or straightforward matter. First, an effort to identify or define the exact extent and nature of the obligations of states parties to a treaty will probably face some problems of interpretation and operation of the provisions of the treaty in question.[7]

Second, there are serious questions about who is going to raise the issue of the state's failure to comply with its treaty obligations, where, and how? For example, it is probably true that Egypt's reservations on the Women's Convention are inadmissible under the law of treaties.[8] But who is going to raise the issue, where, and how? Unlike commercial and other treaties where the states parties would usually have the motivation and resources to raise and pursue the issue of failure to comply in appropriate fora, state self-interest is normally lacking in relation to human rights treaties. Although there are some enforcement mechanisms for human rights treaties,[9] this aspect of international law remains extremely underdeveloped and largely dependent on the activities of underfunded and overworked non-governmental and voluntary organizations.

In light of these considerations, the nature of international law in general,[10] and its dependence on largely voluntary compliance and cooperation of sovereign states in the field of human rights in particular,[11] I suggest that it is better to seek deeper consensus and sustainable commitment to the human right in question in order to support its implementation in practice, including efforts to change religious and customary laws accordingly. This can and should be done, I believe, in addition to invoking the notion of binding international custom or agreement whenever and to the extent possible, and in support of that notion itself.

It is also important, I suggest, to understand the nature and dynamics of the behavior of governments as political entities, acting within the context of specific political, economic, and social conditions, and also the nature and dynamics of power relations prevailing in the particular country. No government can afford to disregard the politically articulated wishes or positions of powerful groups or segments of its population who might want to maintain religious and customary laws. This will be true, I suggest, of even the most authoritarian or undemocratic governments, in the unlikely event of their being "interested" in effecting such change.

Although it is obvious that the responsibility to change domestic laws must apply to religious and customary law, the implementation of this principle can be problematic in many parts of the world. In practice, a state's willingness or ability to influence practices based on religious and customary laws depends on many factors, any of which could cause difficulty in situations where domestic religious and customary laws are likely to be in conflict with internationally recognized standards of human rights.

Take the example of customary land tenure practices favoring males or the practice of female genital mutilation in some African coun-

tries.[12] There is first the question whether these practices do in fact violate the international human rights obligations of the particular state. In other words, is the state required or obliged to eradicate these practices not only as a matter of good or just domestic policy, but also by reason of international human rights law? The latter proposition presupposes that the practices in question violate specific human rights that are binding on the state as a matter of international law.

Assuming the existence of an international human rights obligation to eradicate these practices, there may still be some problems of implementation. A government may not be sufficiently motivated to engage in land tenure reform unless, for example, there are clear fiscal or other incentives to do so. Similarly, not all governments are particularly concerned with the serious health and psychological consequences of female genital mutilation. Even if there is the political will to act, it may not be easy for a government to influence the socio-cultural roots of these practices. As explained below, this task is complicated by the nature of these practices and the inaccessibility of their manifestation or incidence. Moreover, in practice, governments do not necessarily speak with one voice or act with a unified will. Policies adopted at higher political or administrative levels can be frustrated by hostile or uncooperative bureaucrats, officials, or local actors.

In recognizing and appreciating these and other difficulties of changing religious and customary laws in order to bring them into conformity with international human rights law, I am not arguing for relieving the state of its obligation to effect such change. I would personally support the establishment of this obligation as a matter of international human rights law when that is not already the case, and support its effective implementation where it exists. It is precisely because of this commitment that I would argue for developing a realistic understanding of the problems involved in the application of this principle with a view to overcoming them. In the rest of this chapter, I will try to explore some facets of the required change process, and suggest guidelines for its achievement.

To place the objectives of this chapter in context, however, I wish to address the question of the universal cultural legitimacy of internationally recognized standards of human rights. That is to say, to what extent are these standards accepted as legitimate and binding in all the major cultural traditions of the world? This question must be taken seriously precisely because it is sometimes raised with the intention of undermining international human rights law, or of justifying its violation. Those who raise the issue of universality in the context of a given culture do so because they anticipate that the argument has strong appeal or apparent validity to the constituencies they address. There-

fore the best course of action for proponents of international human rights standards is to address these questions rather than ignore them.

The Universal Cultural Legitimacy of Human Rights

The following brief discussion of the cultural legitimacy of human rights is premised on a view of culture as a primary source of normative systems, and as the context within which such norms are interpreted and implemented. In this light, it is reasonable to assume that the prospects for practical implementation of a given regime of human rights as a normative system are related to the degree of its legitimacy in the context of the culture(s) where it is supposed to be interpreted and implemented in practice. Otherwise, how can a people be expected to accept and effectively implement a system that they believe to be inconsistent with their own cultural values and institutions? Since the present system of internationally recognized standards of human rights is supposed to apply throughout the world, it should be accepted as legitimate in all the major cultural traditions of the world.[13]

In my view, this premise is beyond dispute because I am unable to conceive of coercing people into implementing a human rights system they do not accept as legitimate. What might be at issue, I suggest, are two questions that follow from this premise. First, are the present internationally recognized standards of human rights, or aspects thereof, in fact culturally legitimate on a universal level? If, or to the extent that, this is not the case, what is to be done about the lack of cultural legitimacy in any given situation?

The argument against the universal cultural legitimacy of the present internationally recognized standards of human rights in general is often made on the ground that the basic conception and major principles expressed in these standards emerged from western philosophical and political developments. This may well be true as a matter of historical fact.[14] Moreover, it may also be true that the predominance of western assumptions and conceptions of human rights was reinforced by such factors as the nature and context of the drafting process, the limitations of studies purporting to cover a variety of cultural perspectives on the subject and the quality of representation of non-western points of view.[15]

It must also be emphasized here that the history and development of the present internationally recognized standards of human rights can also give rise to other concerns. Given the male bias of all cultures, western and non-western, to varying degrees, there is good reason for concern about the lack of representation of feminist perspectives in the present formulations of internationally recognized human rights stan-

dards. Although I am not competent to address the substance and implications of this concern, I believe that it is at least as important as, and often overlaps with, the question of cultural legitimacy as such.

But raising these concerns in general terms, from either a cultural or feminist perspective, cannot justify a blanket condemnation and rejection of all international human rights standards, or even of a particular one, without very careful inquiry and substantiation of the alleged objections. It is true that, at least in the interest of further refinement and elaboration, the opportunity to challenge any present international human right should remain open. Otherwise, the international human rights movement will be condemned to its present state or course of development, without allowing for future needs and opportunities for change or modification. From this perspective, a culturally based (or feminist-based) challenge should be investigated in good faith. However, the case against any specific international human right must be extremely strong in order to justify discarding or reformulating the right in question.

The reasons for requiring a very high standard of proof from those who mount a challenge to an internationally recognized human right include the following. First, there is already significant consensus on internationally recognized human rights through the very deliberate and settled process by which they were articulated and adopted over the course of several decades, as well as the wide ratification of most international treaties on the subject. Second, however one may feel that these rights, or aspects thereof, are inadequate, they do provide a level of protection. Even those who object to these rights in their present formulation need the protection afforded by them in making their case. Third, if the right is set aside, or its present formulation changed, too lightly or prematurely, there is the risk of failing to achieve even the level or type of human right one is objecting to.

Furthermore, and in relation to culturally based challenges in particular, I wish to recall and explain some aspects of the politics of culture referred to earlier. In addressing these questions, it should first be emphasized that the cultural legitimacy or illegitimacy of any thing or matter is necessarily problematic in that it can only be considered within the framework of a number of vague and contestable variables. To claim that something is culturally legitimate or illegitimate presupposes a settled and well-defined set of standards and a fair and consistent process by which those standards are applied. Both aspects, I would add, should themselves be culturally legitimate. Many difficult and inherently political questions are raised by this scenario. Which standards of cultural legitimacy should apply? Who selects them and

how? What about alternative or competing standards of cultural legitimacy? What is the nature and dynamics of power relations among the holders of various views or positions, and how are their interests affected by the issues in question? Who adjudicates the process of selecting applicable standards and ensures the fairness and consistency of their application in practice?

Although it is not possible to resolve any of these questions and concerns here, I suggest that responses to the question of the cultural legitimacy of the international human rights of women, and what can be done about such claims, should be cast against the background of the problematic nature of what might be called the politics of culture. The politics of culture, in turn, should be seen in light of what I call the ambivalence and contestability of cultural norms and institutions, which permits a variety of interpretations and practices. Since culture needs to respond to different and competing individual and collective needs and aspirations, it tends to combine stability and continuous change, offer its adherents a range of options, and seek to accommodate varying responses to its norms.[16] These features reflect the fact that culture is constantly contested in a political struggle between those who wish to legitimize their power and privilege and those who need to challenge the status quo in order to redress grievances, realize their human dignity, and protect their well-being. Cultural symbols and processes are constantly used in this struggle at the local, national, or international levels. Therefore human rights advocates need to understand the process of cultural legitimacy and change, and utilize that process effectively in their efforts to enhance the implementation and enforcement of human rights standards throughout the world.

In light of the preceding remarks and reservations, I now turn to the question of universal cultural legitimacy of human rights. It is neither possible, nor desirable in my view, for an international system of human rights standards to be culturally neutral. However, the claim of such an international system to universal cultural legitimacy can only be based on a moral and political "overlapping consensus" among the major cultural traditions of the world.[17] In order to engage all cultural traditions in the process of promoting and sustaining such global consensus, the relationship between local culture and international human rights standards should be perceived as a genuinely reciprocal global collaborative effort.

Rather than an "all-or-nothing" approach to the relationship between local culture and international human rights standards, I would recommend the intermediatory approach suggested by Richard Falk, who argues that

without mediating international human rights through the web of cultural circumstances, it will be impossible for human rights norms and practice to take deep hold in non-Western societies except to the partial, and often distorting, degree that these societies—or, more likely, their governing elites—have been to some extent Westernized. At the same time, without cultural practices and traditions being tested against the norms of international human rights, there will be a regressive disposition toward the retention of cruel, brutal, and exploitative aspects of religious and cultural tradition.[18]

Thus the process of promoting and sustaining global cross-cultural legitimacy for an international system of human rights can work in the following manner.[19] Since we already have an international system of human rights law and institutions, the process should seek to legitimize and anchor the norms of this established system within, and between, the various cultural traditions of the world. In other words, the norms of the international system should be validated in terms of the values and institutions of each culture, and also in terms of shared or similar values and institutions of all cultures. This can be achieved, I suggest, through what I call "internal discourse" within the framework of each culture, and "cross-cultural dialogue" among the various cultural traditions of the world.

I believe that it is of vital importance that internal discourse should be undertaken within each and every cultural tradition for at least two main reasons. First, internal validation is necessary in all cultural traditions for one aspect or another of the present international human rights system. It might be necessary for civil and political rights in one culture, economic and social rights in another, the rights of women or minorities in a third, and so forth. Second, for such discourse within one culture to be viable and effective, its participants should be able to point to similar discourse which is going on in the context of other cultures.

A parallel process of cross-cultural dialogue is also important for two main reasons. First, from a methodological point of view, all participants in their respective internal discourses can draw on each other's experiences and achievements. Second, cross-cultural dialogue will enhance understanding of, and commitment to, the values and norms of human dignity shared by all human cultures, thereby providing a common moral and political foundation for international human rights standards. In this way, the combination of the processes of internal discourse and cross-cultural dialogue will, it is hoped, deepen and broaden universal cultural consensus on the concept and normative content of international human rights.

It should be emphasized, however, that the proposed approach is methodological and not substantive: it prescribes a methodology of

internal discourse and cross-cultural dialogue on reciprocal, dynamic, and sensitive terms, but it does not otherwise anticipate or restrict the arguments to be used, or the manner in which discourse(s) and dialogue(s) are to be conducted in each situation. It would therefore be possible to consider and analyze experiences in various cultural or country-specific contexts as a means of informing and promoting more constructive discourse and dialogue.[20]

In the next section, I highlight some issues relevant to the application of this approach to the responsibility of states to change religious and customary laws that violate internationally recognized standards of human rights. As I indicate at the end of that section, the proposed approach might also help resolve conflicts between national fundamental or human rights standards, on the one hand, and communal (religious, customary, or traditional) standards within a nation state, on the other. The last section is devoted to a brief illustration of a possible application of this approach to changing Islamic religious laws in relation to the international human rights of women.

Changing Religious and Customary Laws

It is true, from a legal point of view, that international law can only address states with due regard for their sovereignty, and that it does not have the authority, concepts, or mechanisms for achieving compliance with its norms except through the agency of the state in question. This does not mean, however, that nothing can be done to encourage and support states in their efforts to comply with international human rights law. In this light, it would be useful to explore possible strategies for changing religious and customary laws in order to bring them into conformity with international human rights law. Integral to this inquiry is the question of how such strategies may be employed by internal actors, and how external support and assistance can be rendered without undermining the integrity and efficacy of the process as a whole. It is necessary for both aspects of the process to be grounded in a clear understanding of the nature and operation of religious and customary laws in relation to what the state can realistically be expected to do. Although it is not possible to present here a comprehensive treatment of this matter, some tentative remarks might be helpful.

On the Nature and Operation of Religious and Customary Law

The authority of religious and customary laws is commonly perceived to derive from either the people's religious beliefs or their communal practice from time immemorial. That is to say, the common perception

is that the validity of religious laws is ensured by divine sanction, while the utility of customary laws is assumed to have been proven through long experience. Since the two sources of authority overlap, they can be invoked interchangeably or in combination. In the case of Islamic societies, for example, local custom is assumed to be sanctioned by divine authority, provided that such custom does not contradict the explicit dictates of religious law, commonly known as "Shari'a." The validity of religious law, on the other hand, is believed to be vindicated by practical experience, as well as being supported by divine sanction. To the extent that traditional religions still prevail in some parts of Africa, it may be difficult to distinguish between divine sanction and communal authority.[21]

This common perception of the authority of religious and customary laws is founded on a complex web of economic, social and political factors, and tends to reflect existing power relations within the community. The perception is also maintained and promoted through processes of individual socialization and communal identification. While it is useful to understand its basis and dynamics, it may not be necessary or desirable to challenge or repudiate the perception itself in order to change the religious and customary laws it legitimizes. It is important to remember that the objective is to bring religious and customary laws into conformity with international human rights law, not to extinguish religious and customary laws themselves or transform their jurisprudential character. In any case, whether, to what extent, and how indigenous perceptions about religious and customary laws should and can be challenged, changed, or modified should be left to the process of internal discourse indicated earlier. An external effort to impose change would probably be perceived as an exercise in cultural imperialism, and rejected as such.

It should also be emphasized that religious and customary laws can, and usually are, implemented independently of the structures and mechanisms of the state. The state might try to regulate the operation of these laws, for example, by providing for procedural safeguards to be enforced by administrative organs or tribunals. But it can neither immediately eradicate the practice of these laws altogether, nor transform their nature and content, at least not without engaging in massive oppression and intimidation of the particular population over a long period of time. Even if the state were able and willing to maintain such a program as a high priority in its domestic policies, such policy or practice would be totally unacceptable from a human rights point of view.

An effort to change religious and customary laws in accordance with

international human rights law should seek to persuade people of the validity and utility of the change. Such persuasion must, of course, be grounded in a complete and realistic understanding of the rationale or authority of these laws, and of the way they operate in practice. For example, customary land tenure practices that assign ownership or possession of land to men rather than women might be apparently justified or rationalized on the ground that only men can cultivate or otherwise use the land in order to support their families. Beyond that apparent rationale, however, such practices will probably also rely on assumptions about the competence and "proper" roles of men and women in society. This type of underlying rationale can be strong enough to override or negate efforts by the state to change or regulate customary land tenure practices.

For instance, the state may introduce a different land distribution scheme in order to give women their share, and seek to enforce this through an official land registration system. Nevertheless, previous customary land tenure practices may persist "off the record," with the apparent acquiescence of the women who are supposed to benefit from the enforcement of the new system. An effort to change this aspect of customary law must take into account and address not only apparent economic and sociological factors or justifications, but also the circumstances and underlying rationales that might cause the practice to continue despite attempts at legal regulation or change by the state.

Similarly, one or more justifications may be given for the practice of female genital mutilation. A more sophisticated inquiry, however, may reveal other rationales or underlying assumptions, for example, about male/female sexuality and roles, power relations, and economic and political interests. Moreover, this practice can be attributed to customary sanction, but not to customary law in a jurisprudential sense. The customary sanction in this case is not enforced in any judicial or public setting. Rather the sanction operates through the socialization or conditioning of women in order to induce them to "consent" to such mutilation being inflicted on their young daughters. Again, customary sanction for this practice may be strong enough to override state efforts to eradicate it, even through the imposition of criminal punishment, as in the Sudan, where the practice has been a criminal offense punishable by up to two years of imprisonment since 1946.[22] An effort to eradicate genital mutilation must take into account and address not only every and all types of justifications, but also the cultural circumstances and underlying rationales that might cause the practice to continue in the particular community.

Toward Coherent Strategies for Change

In view of these factors, it is clear that the only viable and acceptable way of changing religious and customary laws is by transforming popular beliefs and attitudes, and thereby changing common practice. This can be done through a comprehensive and intensive program of formal and informal education, supported by social services and other administrative measures, in order to change people's attitudes about the necessity or desirability of continuing a particular religious or customary practice. To achieve its objective, the program must not only discredit the religious or customary law or practice in question, but also provide a viable and legitimate alternative view of the matter. Such an alternative view of an existing practice can be either the simple discontinuation of the practice in question or the substitution of another.

Since the original practice derives its authority from religious or customary sanction, an effort to discredit it (and to substitute another where appropriate) must draw its authority from the same source on which the original practice was founded. This effort must also be presented through a reasoning or rationale intelligible to the affected population. For example, efforts to change customary land tenure practices must seek to challenge and discredit whatever economical, sociological, or other rationale is perceived by the population at large to support or justify those practices. Such efforts must also seek to challenge and discredit the original practice in ways that are relevant to, and understood and accepted by, the population in question.

It is difficult to envision the application of the proposed approach in abstract terms, without reference to the nature and operation of a specific religious or customary law system in the context of a particular society. Generally speaking, however, it is possible to identify some internal requirements for a successful process of changing religious and customary laws to ensure their compliance with international human rights law. In an ideal scenario, there are two levels of requirements that need to be satisfied. First, the state in question must be legally bound by the relevant principle of international human rights law. It should also have committed itself to effectively discharging its responsibility to bring domestic religious and customary laws into conformity with the requirements of international human rights law. Second, there is a need for broadly based political support for the official commitment of the state. Moreover, a strongly motivated and well-informed local constituency, willing and able to engage in organized action, is needed to mobilize political support and press for the implementation of policies and strategies for change.

However, these ideal requirements are neither likely to be imme-

diately and fully realized all at once, nor to be completely lacking when the issue of changing religious or customary law arises in a given situation. In all probability, there would be some level of official obligation and commitment to change, some degree of broad political support, and some sort of constituency willing to work for it. Otherwise the issue would not have arisen in the first place. If there is no political support for, or official commitment to, changing religious or customary laws in order to ensure their conformity with international human rights law, then the question will not arise at all in the particular country.

Moreover, a dynamic relationship exists between and within each level of requirement. A highly motivated and capable constituency, for instance, can cultivate popular political support for change, and pressure the state into ratifying the relevant treaty or into increasing or effectuating its commitment to implement change in accordance with international human rights law. Conversely, the existence of an official commitment can encourage the growth of an active local constituency, or facilitate the development of broadly based political support for change. This dynamic is part of the process of internal discourse whereby the proponents of an internationally recognized human right seek to justify and legitimize that right in terms of their own culture, as explained above.

In addition to these internal aspects, there is also the external dimension of the process of changing religious or customary laws. External actors can support and influence the process of internal discourse through cross-cultural dialogue, as explained above. However, it is crucial that external support and influence be provided in ways that enhance, rather than undermine, the integrity and efficacy of the internal discourse. The process of cultural legitimation will be undermined, if not totally repudiated, by even the appearance of imposition of extra-cultural values and norms. External actors should support and encourage indigenous actors who are engaging in internal discourse to legitimize and effectuate a particular human right. However, external actors must not, in any way, attempt or appear to dictate the terms of internal discourse or pre-empt its conclusions. Possible ways and means of external support include international action to protect the freedoms of speech and assembly of internal actors, the exchange of insights and experiences about the concept of the particular human right and the sociopolitical context of its implementation, and assistance in developing and implementing campaign strategies.

The need for cultural sensitivity and discretion in providing external support is underscored by the fact that those acting as internal agents of change are liable to be regarded by local religious or political forces

as subversive elements acting on behalf of the imperial interests of alien powers and cultures. This may appear obvious and elementary in such a political struggle, where the internal "guardians" of tradition and the status quo would want to seize on every opportunity and pretext in their efforts to undermine the credibility of the proponents of changing religious or customary laws. However, the subtle dangers of ethnocentricity and bias should not be underestimated in this connection. Cross-cultural dialogue should enhance the ability of internal actors to understand and address the nature and operation of cultural and political factors in their own context, not to press them into understanding and addressing these factors in terms of the experience of other societies.

As indicated above, the proposed approach might contribute to resolving conflicts between national fundamental or human rights standards, on the one hand, and communal (religious, customary, or traditional) standards within a nation state, on the other. The *Lovelace* case in Canada[23] and the *Shah Bano Begum* case in India[24] reflect such situations of conflict within a single nation state. Similar issues may arise in many other settings. Although each situation should be discussed in its own context, I believe that such situations raise the same basic set of dilemmas.

For instance, the dilemma confronting national policy-makers would be how to respect and protect the integrity (and independence, where relevant) of the community in question without allowing or tolerating violation of fundamental or human rights norms that are binding on the state as a matter of constitutional or international law. Such a dilemma would be particularly acute where the integrity and independence of the community in question is also dictated by constitutional or political imperatives.[25]

At a personal level such situations face women, for example, with a difficult choice between enduring inequality and discrimination in order to enjoy many vital benefits of membership in their own communities, or abandoning all that by opting-out of the community in order to enjoy equality and freedom from discrimination within the wider state society. I suspect that the dilemma would be even more cruel and traumatic for women who are aware of the choice, and are capable of exercising the right to opt out, than for those who are not so aware. On the one hand, they are likely to be castigated or harassed within the community because of their attitudes and life-style, thereby diminishing the benefits of belonging to the community. They would also be aware, on the other hand, of the limitations or inadequacy of equality and nondiscrimination promised by the wider society, especially to women of their status and background.

Such dilemmas would be resolved, I suggest, by transforming the internal communal (religious, customary, or traditional) standards relating to the status and rights of women and bringing them into conformity with the norms of equality and nondiscrimination prevailing in the wider state society through the processes of internal discourse and cross-cultural dialogue described above. In the absence of a better alternative, I would suggest that this approach should be tried by both official agencies and private actors as a way of resolving conflicts between national and communal standards. Although space does not permit further elaboration, it bears repeating that the proposed approach is methodological and not substantive. Full consideration can therefore be given to insights gained from other experiences of discourse and dialogue in adjusting and adapting the proposed approach to the circumstances and context of each case.

Islamic Religious Laws and the Rights of Women

In light of the above remarks about developing general strategies for changing religious and customary laws, I wish now to illustrate how the process might operate in relation to changing Islamic Shari'a laws in particular. It is not possible here either to explain the nature and development of Shari'a, or to discuss the many human rights problems raised by its application in the modern context.[26] In this brief section, I will present a theoretical discussion of the process of changing Shari'a family law, which, in my view, violates the human rights of Muslim women in even the most "secularized" Islamic societies.[27] This branch of Shari'a is enforced as the official law of the great majority of predominantly Muslim countries today, and even in some non-Muslim countries, like India as noted earlier,[28] where Muslims are a minority. Moreover, the underlying assumptions and norms of this branch of Shari'a have a negative impact on the human rights of women in broader sociopolitical terms.

The basic problem can be outlined as follows. Shari'a family law is fundamentally premised on the notion of male guardianship over women (*qawama*), and is consequently characterized by many features of inequality between men and women in marriage, divorce, and related matters. Thus, for example, as a general rule, a man may take up to four wives, and divorce any of them at will, and without having to show cause or account to any judicial or other authority for his decision. In contrast, a woman can only be married to one man at a time, and is not entitled to obtain a divorce except through a judicial ruling on a few specific grounds.[29] Although there are differences between and within the major schools of Islamic jurisprudence, as applied by

the judicial systems of various countries, the above-mentioned premise and characterization are true of all situations where Shari'a family law is enforced today.

The notion of male guardianship has serious implications for the marriage relationship as a whole, and for the economic and social rights of married women. According to most jurists, a husband is entitled to the obedience of his wife, and can prevent her from taking employment, if he wishes. A wife who is disobedient to her husband (*nashid*) is not entitled to maintenance. Consequently, a woman can be forced to submit to her husband's will when she cannot obtain his consent in order to be able to work and thereby support herself, receive maintenance from him, or obtain a divorce. In some jurisdictions, a wife who leaves the matrimonial home can be physically forced to return through the execution of a judicial "obedience decree." Moreover, as noted earlier, this and other features of Shari'a family law have serious political and social consequences for women, in that their freedom to engage in activities outside the home is inhibited by the legal control men are entitled to exercise over their female "wards." These aspects of Shari'a also reinforce and sanction the socialization of women, who are conditioned, from early childhood, into submission, learned helplessness and dependency.

It is obvious that these principles of Shari'a family law violate the fundamental human right of nondiscrimination on grounds of gender. In some situations, these principles are used to justify cruel, inhuman, or degrading treatment. Most Islamic states are parties to international treaties that provide for a wide range of human rights that are violated by Shari'a personal law applied by the official courts of the same countries. A few Islamic states are even parties to the 1979 International Convention on the Elimination of All Forms of Discrimination Against Women, which is clearly violated by all these aspects of Shari'a family law. In other words, it is not difficult to establish the responsibility of many Islamic states to change these aspects of religious law in accordance with their obligations under international human rights law. The question is how to effect such change in practice. I will first address this question from an Islamic jurisprudential point of view, and then consider the role of internal and external actors in the process of change.

Two fundamental points to note about the jurisprudential question are (1) that Shari'a was constructed by early (male) Muslim jurists, and (2) that they acted in accordance with their historical context.[30] Whether through the selection and interpretation of the relevant texts of the Qur'an and Sunna (traditions of the Prophet), or through the application of such techniques as consensus (*ijma'*) and analogy (*qiyas*),

the founding jurists of Shari'a constructed what they believed to be an appropriate legal and ethical system for their communities in very local terms. Clearly, the jurists were not engaged in the construction of a "divine and eternal" Shari'a, as claimed by many Muslims today. In fact, the most authoritative jurists expressed their views as individual theoretical derivations and cautioned against codifying or implementing them as the only valid version of Shari'a. Given this state of affairs, it is perfectly legitimate, indeed imperative in my view, for modern Muslim jurists and scholars to construct an Islamic legal and ethical system that is appropriate for the present historical context of Islamic societies.

In constructing Shari'a, the early Muslim jurists emphasized certain texts of the Qur'an and Sunna as relevant and applicable to the issue at hand, and de-emphasized or excluded others. This process was taken by the majority of succeeding generations of jurists to mean that the de-emphasized texts were repealed or abrogated (*nusikhat*) for legal purposes, though they remain part of the tradition in other respects. Moreover, the technical rules employed by the early jurists in constructing their visions of Shari'a, known as "the science of foundations of jurisprudence" (*'ilm usul al-fiqh*), were entrenched by subsequent generations of Muslims as the only valid way of deriving principles and rules of Shari'a. Given the fact that both aspects of this process were the work of the early Muslim jurists, it is obvious that they are open to question and reformulation by contemporary Muslims.

In light of these considerations, Ustadh Mahmoud Mohamed Taha, the late Sudanese Muslim reformer, developed a coherent methodology for what he called "the evolution of Islamic legislation," that is, the reconstruction and reformulation of the constitutional and legal aspects of Shari'a.[31] Through the application of this methodology it is possible, indeed imperative, he argued, to abolish the principle of male guardianship over females, and to remove every feature of inequality of women or discrimination against them, as a matter of Islamic law. This theological and jurisprudential framework will, in my view, achieve complete consistency between Shari'a religious laws and international human rights law. Taha's methodology of Islamic law reform is readily available now and is, I believe, fully substantiated in Islamic terms. The remaining issue is how to implement this methodology in order to transform the principles and rules of Shari'a in concrete practical terms.

As indicated earlier, this is the role of internal discourse, as supported by cross-cultural dialogue. It is up to Muslim women and men to engage in a political struggle to propagate and implement reform of Islamic law (whether on the basis of Taha's methodology or another adequate Islamic alternative to it) in their own communities and coun-

tries. These internal actors may indeed receive external support and assistance, but only in accordance with the guidelines emphasized above. This is particularly important in view of the recent and current experience of Muslim peoples with western colonialism and domination. Islamic human rights advocates in general are already suspected of subverting their own cultures and traditions in favor of western values and institutions. It is therefore imperative that both the internal actors and their external supporters should avoid acting in a way that might be used as a pretext for undermining the credibility and legitimacy of the process of changing Shari'a laws.

I am not underestimating the difficulty and complexity of the task. Speaking from personal experience, I can say that prevailing conditions of political repression and social authoritarianism are hardly conducive to human rights organization and activism. Moreover, human rights advocates in Islamic countries are few and disorganized, their resources and experience are limited, and the demands on their time and energy are many and complex. Nevertheless there is no substitute for internal discourse for transforming attitudes and perceptions about the nature and implications of Shari'a, and for achieving the necessary legal reform and change. It is primarily the task of internal actors, supported and encouraged by external allies, to promote and sustain the necessary degree of official commitment and popular political support for a program for changing Shari'a laws.

Finally, I should indicate that while Taha's methodology has its limitations,[32] I believe that it can at least be useful as an initial framework for an internal discourse, which can then continue to seek other Islamic reform methodologies to supplement or replace it. I also believe it is important to note that international human rights law itself is not immune to critical examination and reformulation.[33] Unless human rights advocates in all parts of the world are open to this possibility, it would be unrealistic to expect Muslims to be open to critical examination of their religious law.

Conclusion

It is not possible accurately to evaluate the potential of the approach to changing religious and customary laws presented here until it is applied to specific situations of conflict and tension between such laws and international human rights law. However, judging by my knowledge of the possibilities for Islamic law reform, I envision a far-reaching potential for the proposed approach in relation to other systems of religious and customary law. I find this approach useful not only for maximizing the possibilities of resolution within the existing

framework of a religious or customary law system, but also for expanding or transforming that framework itself. This is what I would regard as a proper or legitimate internal (within the culture or tradition) challenge and change of a people's perceptions about the nature and implications of their religious beliefs or long-standing communal practice. However, one must expect strong and sustained opposition or resistance from those whose vested interests are threatened by any change in the status quo.

As indicated at the end of the last section, a given reform methodology might not succeed in achieving the required reform of one or more aspects of a system of religious or customary law. In such a case, I suggest, that would be a failure of the particular methodology, and not necessarily of the internal discourse/cross-cultural dialogue approach as a whole. Other methodologies can and must be found by the people themselves, through internal discourse, supported by cross-cultural dialogue.

I am grateful to Tore Lindholm and Shelley Cooper-Stephenson for their very helpful comments and suggestions on an earlier draft of this paper.

Notes

1. As explained below, religious and customary laws come in a wide variety of forms and operate in many different ways. It might, therefore, be inappropriate or misleading to describe all of them as "law" in a coherent jurisprudential sense. They are referred to here as "laws" in the plural because there is usually more than one religious or customary law "systems" in a country, and also in order to distinguish them from the formal or official state law.

2. Some of the problems of custom as a source of international human rights standards are highlighted below. Arts. 1.3, 55, and 56 of the United Nations Charter impose an obligation of respect for, and observance of, "human rights and fundamental freedoms." But since that treaty does not define this clause, it is necessary to find another source for any particular or specific human right that states parties to the UN Charter are obliged to respect and protect.

3. For a brief review of the requirements and qualifications of custom as a source of international law, see Ian Brownlie, *Principles of Public International Law,* 3rd ed. (Oxford: Clarendon Press, 1979), 4–12.

4. See, for example, Louis Henkin et al., eds., *International Law: Cases and Materials* (St. Paul, MN: West Publishing, 1987), 998; and David J. Harris, *Cases and Materials on International Law,* 4th ed. (London: Sweet & Maxwell, 1991), 696. Cf. Isabelle R. Gunning, "Modernizing Customary International Law and the Challenge of Human Rights," *Va. J. Int'l L.* 31 (1991): 301–42.

5. G.A. Res. 34/180 U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979). As of January 1992, 131 states have ratified this Convention; see Appendix A, p. 585.

6. For the text of Egypt's reservations, see Richard Lillich, ed., *International Human Rights Instruments* (Buffalo, NY: W.S. Hein, 1985), 11. Other Islamic countries have also entered similar reservations. See Donna J. Sullivan, "Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution," *N.Y.U. J. Int'l L. & Pol.* 24 (1992): 835–45.

On the question of reservations to this Convention in general, see Rebecca Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women," *Va. J. Int'l L.* 30 (1990): 643–716.

7. On the issues that might arise in this connection see generally Daniel P. O'Connell, *International Law,* 2d ed. (London: Stevens & Sons, 1970), 1:246–80; or Harris, *Cases and Materials,* note 4 at 729–816.

8. For such an argument see Anna Jenefsky, "Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women," *Md. J. Int'l L. & Trade* 15 (1991): 208–13, 226–31.

9. See generally Hurst Hannum, ed., *Guide to International Human Rights Practice,* 2d ed. (Philadelphia: University of Pennsylvania Press, 1992).

10. For a recent collection of studies on relevant issues from a variety of perspectives, see Martin Koskenniemi, ed., *International Law* (Aldershot, England: Dartmouth Publishing Co., 1992), 3–60.

11. The fact that changing religious and customary laws is made the subject of "state responsibility" raises issues of sovereignty and indicates the limitations on direct enforcement in international law. On the nature and scope of state responsibility in international law see Brownlie, *Principles of Public International Law,* note 3 at 431–35. For a more comprehensive treatment of relevant issues see Harris, *Cases and Materials,* note 4 at 460–93.

12. Although I will refer to these two examples to illustrate my argument in some parts of this paper, it is not possible to discuss these practices in detail here. On land tenure issues in Africa see generally Richard G. Lowe, *Agricultural Revolution in Africa? Impediments to Change and Implications for Farming, for Education, and for Society* (London: Macmillan, 1986); Jean Davison, ed., *Agriculture, Women, and Land: The African Experience* (Boulder, CO: Westview Press, 1988); R. E. Downs and Stephen P. Reyna, eds., *Land and Society in Contemporary Africa* (Hanover, NH: University Press of New England, 1988); James C. Riddell and Carol W. Dickerman, *Country Profiles of Land Tenure: Africa 1986* (Madison: University of Wisconsin-Madison Land Tenure Center, 1986); and Carol W. Dickerman, *Security of Tenure and Land Registration in Africa: Literature Review and Synthesis* (Madison: University of Wisconsin-Madison Land Tenure Center, 1989).

On female genital mutilation see generally, Fran P. Hosken, *The Hosken Report,* 3rd rev. ed. (Lexington, MA: Women's International Network News, 1982); and Fran P. Hosken, *Female Sexual Mutilation: The Facts and Proposals for Action* (Lexington, MA: Women's International Network News, 1980). These two sources contain useful bibliographies.

13. See, generally, Abdullahi An-Na'im and Francis M. Deng, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington, DC: Brookings Institution, 1990); and Abdullahi An-Na'im, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992).

The question of the legitimacy of internationally recognized standards of human rights should be seen in the context of the broader issue of the legitimacy of international law itself. On this broader issue see Thomas M. Franck, "Legitimacy in the International System"; Martin Koskenniemi, "The Norma-

tive Force of Habit: International Custom and Social Theory"; and Surakiart Sathirathai, "An Understanding of the Relationship Between International Legal Discourse and Third World Countries," all in *International Law,* ed. Koskenniemi, note 10 at 157, 213, and 445 respectively.

14. See, for example, Virginia A. Leary, "The Effect of Western Perspectives on International Human Rights," in *Human Rights in Africa,* ed. An-Na'im and Deng, note 13 at 15–30.

15. For an elaboration on these remarks see Abdullahi A. An-Na'im, "Problems of Universal Cultural Legitimacy for Human Rights," in *Human Rights in Africa,* ed. An-Na'im and Deng, note 13 at 346–53.

16. For an elaboration of these remarks see Abdullahi A. An-Na'im, "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights," in *Cross-Cultural Perspectives,* ed. An-Na'im, note 13 at 27–28.

17. The concept of global overlapping consensus is similar to that proposed by John Rawls for social justice at the domestic level. See Tore Lindholm, "Prospects for Research on the Cultural Legitimacy of Human Rights," in *Cross-Cultural Perspectives,* ed. An-Na'im, note 13 at 400; and John Rawls, "The Idea of an Overlapping Consensus," *Oxford J. Legal Stud.* 7 (1987): 1–25.

18. Richard Falk, "Cultural Foundations for the International Protection of Human Rights," in *Cross-Cultural Perspectives,* ed. An-Na'im, note 13 at 45–46.

19. For further explanation of the proposed approach, see Falk, "Cultural Foundations," note 18; and An-Na'im, "Universal Cultural Legitimacy," note 15 at 339–45 and 361–66.

20. See, for example, Sullivan, "Gender Equality," note 6, especially 848–54.

21. For a general explanation of what are known as African traditional religions, and a critique of terms and classifications applied to them in earlier western scholarship, see, Berta I. Sharevskaya, *The Religious Traditions of Tropical African in Contemporary Focus* (Budapest: Center for Afro-Asian Research of the Hungarian Academy of Sciences, 1973), 13–66.

See generally Terence O. Ranger and Isaria N. Kmambo, eds., *The Historical Study of African Religions* (Berkeley and Los Angeles: University of California Press, 1972); Charles E. Fuller, "Native and Missionary Religions," in *The Transformation of East Africa,* ed. Stanley Diamond and Fred G. Burke (New York: Basic Books, 1966), 511–35; Matthew Schoffeleers and Wim Van Binsbergen, eds., *Theoretical and Methodological Explorations in African Religions* (London: Kegan Paul International, 1985); and Thomas D. Blakely et al., eds., *Religion in Africa: Experience and Expression* (London: James Currey, 1991).

22. On the case of the Sudan, see Hosken, *Hosken Report,* note 12 at 95–119.

23. In this case, a native (Indian or Aboriginal) woman challenged before the UN Human Rights Committee a Canadian statute that discriminated against female members of native bands in Canada. See *"Lovelace v. Canada,* 1983," *Can. Hum. Rts. Y.B.* 1 (1983): 305–14; and William Pentney, *"Lovelace v. Canada:* A Case Comment," *Can. Legal Aid Bull.* 5 (1982): 259.

24. For brief comments on *Shah Bano Begum,* see my chapter, "Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights," in *Asian Perspectives on Human Rights,* ed. Claude E. Welch, Jr. and Virginia A. Leary (Boulder, CO: Westview Press, 1990), 43–46; and Sullivan, "Gender Equality," note 6 at 849–52.

25. See, for example, Allan McChesney, "Aboriginal Communities, Aboriginal Rights and the Human Rights System in Canada," in *Cross-Cultural Perspectives,* ed. An Na'im, note 13 at 221–52.

26. I have explained and discussed these and related matters in detail in *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse, NY: Syracuse University Press, 1990).

27. For a general discussion of Shari'a and the human rights of women, see Abdullahi A. An-Na'im, "The Rights of Women and International Law in the Muslim Context," *Whittier L. Rev.* 9 (1987): 491–516. A more empirical discussion of the process of changing Shari'a law from a human rights point of view can be found in my "Human Rights in the Muslim World: Socio-political Conditions and Scriptural Imperatives," *Harv. Hum. Rts. J.* 3 (1990): 13–52.

28. An-Na'im, "Dilemma of Cultural Legitimacy," note 24.

29. There are some theoretical exceptions. For instance, according to some jurists of Shari'a, a woman can stipulate in the contract of marriage that the man may not take another wife while married to her, and can "persuade" her husband to divorce her on the payment of monetary compensation known as *khul'*. However, in practice few women know about these exceptions or can afford to exercise them. Moreover, the terms of the exceptions themselves are premised on male guardianship of women and the inferior status of women in the relationship, rather than as a challenge or repudiation of those principles of Shari'a.

30. On this point and the following methodology of Islamic law reform, see An-Na'im, *Toward an Islamic Reformation*, note 26, especially chapters 2 and 3.

31. See generally my translation of his major work, Mahmoud M. Taha, *The Second Message of Islam* (Syracuse, NY: Syracuse University Press, 1987). It is important to note that Taha's methodology does not affect the devotional and ritual aspects of Shari'a, known as *'ibadat*.

32. See my chapter, "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment," in *Cross-Cultural Perspectives*, ed. An-Na'im, note 13 at 29–39.

33. It is not possible to discuss here the question of when and how international human rights law might be subjected to critical examination and reformulation. In any case, it is too early for me to express definite views on this aspect of the intermediatory or cross-cultural approach to human rights. For a brief review of my tentative thinking, and proposals for research, on this and other relevant issues, see An-Na'im, "Cross-Cultural Approach," note 32 at 427–35.