

Persecution in the Home: An Overview of Harmful Traditional Practices

Cecilia M. Bailliet, Professor Dr. jur., Department of Public & International Law, University of Oslo, Norway

Lecture for INTACT-UNHCR Seminar on “La protection internationale face aux ‘pratiques traditionnelles néfastes’ 22 November 2011, Brussels, Belgium

Harmful traditional practices (HTP) are often linked to cultural and religious hierarchical/patriarchal orientations which perpetuate inferior roles of women and girls within the family and society. However, they also affect men and boys, for example in the context of honor related violence and sacrifice of children. HTP are cloaked in stereotypes regarding morality and gender biases. HTP is considered to constitute violence. The UN Declaration on the Elimination of Violence against Women, Article 2 defines violence as “any act of gender-based violence that results in, or is likely to result physical, sexual, and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation, and other traditional practices harmful to women.” Article 4 sets forth that States are required to condemn violence against women and should *not* invoke any custom, tradition or religions consideration to avoid their obligations. This has also been confirmed by the UN Committee of the Convention on the Elimination of Discrimination Against Women in its General Recommendation 19 (1992).

As a result of HTP, victims are denied reproductive autonomy, financial independence, employment, education, nutrition, health care, political participation, and civic rights.

Hence, HTP are undeniably **protection issues** given that they are considered to violate international human right laws, inter alia, the rights to life, physical integrity, security, freedom from torture, inhuman and degrading treatment, right to dignity, right to equality and non-discrimination and right to privacy (including identity, personal integrity, intimacy, autonomy, and body). Additionally, many forms of HTP are considered *gender related persecution* under the 1951 Convention on the Status of Refugees. UNHCR's Gender Guidelines set forth that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering-both mental and physical- and which have been used as forms of persecution under Article 1 of the 1951 Convention on the Status of Refugees, whether perpetrated by State or private actors. It is important to recall that cases often involve a combination of different harmful traditional practices.

Within the Council of Europe, the Convention on Preventing and Combating Violence against Women and Domestic Violence calls upon parties to ensure that gender based violence be recognized as

persecution and serious harm, guaranteeing non-refoulement protection and asylum.

Ability and Will of the State to Protect against HTP

When we discuss protection, it should be noted that the UN human rights system places great emphasis in seeking promotion of ratification and implementation of the CEDAW and the Convention on the Rights of the Child (CRC), as well as adoption or amendment of national legislation to condemn HTP practices. However, a state's ratification of a convention is no guarantee that HTP will be vanquished, on the contrary it indicates the beginning of a *long process of societal evolution*. Reform of cultural attitudes within a society requires extended educational initiatives in the field that are contingent on resources which are often difficult to attain.

In several countries, *legislation* may reflect *patriarchal religious/cultural perspectives on family law*, hence men may not be prosecuted for marital rape, and domestic violence may not be addressed in national penal codes, such as Lebanon. In spite of the Arab Spring, feminists are concerned that they are suffering setbacks in political representation which may result in a loss of gains within the legal protection arena.

The process of adoption of national legislation can often exclude consultation of the relevant interest groups, and the society's actual

knowledge about the relevant conventions and national legislation may be limited, if at all. National legislation may not be translated into local languages, and states may lack resources to train judges and police and disseminate the norms within the communities. Furthermore, there can also be a mis-match between national legislation and customs- as noted by Siobhan E. Laird in relation to Ghana's Children Act (1998) which addresses a Western nuclear family model, ignoring customary practices such as “polygamy, high fertility, split marital residence, separate purses for spouses among some ethnic groups, patrilineal inheritance and succession, matrilineal child maintenance norms, and inter-dependent material exchange family activities in lieu of cash economy.”¹ *When the law is not relevant to how traditional family life is lived, it limits the potential for actual protection.*

Women seeking protection from the State are often subjected to severe discrimination impeding access to justice. The most significant challenge to eliminating harmful traditional practices against women and girls is the phenomenon of dysfunctional state institutions that render implementation of legislation ineffective. *Corruption, delays, under-funding, non-responsiveness or gender bias of police, judiciary, and other institutions in charge of preventing, monitoring, and responding to HTP are revealed by low statistics of investigation and prosecution of perpetrators.* Furthermore, NGOs may have problems

¹ Siobhan E. Laird, “Enforcing the Law on Child Maintenance in Sub-Saharan Africa: A Case Study of Ghana”, 25 Int’l J. L. & Pol’y & Fam. 220 (August 2011).

determining the actual scope of HTP given its private nature, hence it may be difficult to establish a pattern of state failure to respond.

HTP are largely considered to be private family matters not meriting police response. Further, women are not likely to seek redress from a court or state institution due to lack of financial resources to pay fees, travel costs, geographic distance, or lack of witnesses, victim protection service, or legal aid. They may also fear reprisal (including physical assault, murder, eviction from the home, loss of custody of children, economic violence) or ostracism from their communities. Prosecution and incarceration of the family provider may not be pursued due to dependence on his income for maintenance of the family. Hence, *victims may be unable to demonstrate faulty law enforcement if they do not report their abuses. It is essential that caseworkers have a full understanding of the existence of discriminatory structures affecting women women's access to justice.* Additionally, the fact that applicants come from countries in which they face generalized oppression and violence should not be held against them when considering the evidence.

An innovative trend is that some countries have enacted legislation addressing economic violence, for example when the abusive husband of a woman wipes out her economic means of subsistence or deprives her of the property as part of the abuse. Women need protective orders that restore property, guarantee custody of children, and order the aggressor to leave the domicile.

HTP and Children

Since girls undergo discriminatory treatment on account of both their gender and age, it is important to take into consideration the Convention on the Rights of the Child as well as the CEDAW. Article 19 of the CRC protects children from physical and mental violence, exploitation, and sexual abuse.² Included within this category are: Female Genital Mutilation/Cutting, Forced/Child Marriage, Early Pregnancy, Honor/Dowry Killings and Maiming, Infanticide, Sex-Selective Abortion, Sex-Selective Neglect and Abuse, Forced Medical Treatment (Sterilization/Mandatory Virginity Testing), and denial of education and economic opportunities for women and girls. Harmful practices against children include these violations as well as corporal punishment, amputations, burning, branding, violent and degrading initiation rites, accusations of “witchcraft” and related harmful practices such as “exorcism”.

Female Genital Mutilation

FGM is practiced in 25 African countries, along with other regions. It entails the surgical removal of all or parts of the female genital organs. It includes the following variants:

- a) Circumcision: the removal of the prepuce and tip of the clitoris

² See also CRC Committee General Comment 8 on corporal punishment and other cruel or degrading forms of punishment, including physical and non-physical punishment which humiliates the child.

- b) Excision or clitoridectomy, removal of the clitoris and labia minora
- c) Infibulation: excision plus the removal of labia majora and stitching of two sides.

The intended purpose is to ensure virginity and chastity and it is performed on infants, children, adolescents, and adult women. *It is often performed by women within the family, tribe, clan, etc. This practice is conducted pursuant to the genuine concern of the family for the moral standing of the girl, her transition to womanhood, social integration, and economic security of the family through facilitation of marriage through compliance with cultural practices.*³

Complications include, infections, haemorrhage, infertility, obstructed labor, psychological trauma, chronic pain, and HIV infection.

FGM is considered to violate the right to be free from discrimination, torture, inhuman and degrading treatment, the right to life, to security, to physical integrity, health, and the right to privacy.

The UN Special Rapporteur on Violence against Women has characterized this type of violence as constituting *torture*. Similarly, rape, sexual abuse, incest, forced abortion, honor killings, dowry-related violence, forced marriages, human trafficking, and forced prostitution all fall within the realm of torture. Provision of asylum or humanitarian protection is an important tool in the response of the international community to violence against women and girls.

³ Jo Boyden, Alula Pankhurst, Yisak Tafere, "Harmful Traditional Practices and Child Protection: Contested Understandings and Customs of Female Early Marriage and Genital Cutting in Ethiopia" (Draft 24.08.11)

Forced Marriage

According to the Universal Declaration of Human Rights, ICCPR, IESCR, and CEDAW marriage shall be entered into only with the free and full consent of the intending spouses. Forced marriage is a violation of human rights and constitutes persecution.

Persons seeking asylum on account of forced marriage are fleeing either the threat of being forced to marry someone against their will or trying to escape a marriage they have already been forced to enter. *This must be distinguished from arranged marriages in which families assist in selecting spouses, but the latter retain ultimate choice and consent. Forced marriage denies consent to the potential spouse and involves duress.*

Girls may be sold by their fathers or other family members to settle debts or disputes, for financial gain or exchange of valuable goods (as families have pressing economic needs), or as a remedy in response to rape or sexual abuse (thereby sparing the victim of stigmatization). Families believe that they are guaranteeing the security of the daughter and the family.

Girls under the age of consent (identified as 18 by the CRC) are subject to early marriage, and this often results in vesico-vaginal fistulas, pregnancy related complications due to the immaturity of the reproductive organs, as well as illiteracy as girls are forced to abandon education. It has been estimated that 40% of girls in Western and Central Africa are married before they are 18, in some countries the

rate is 70%. Studies have demonstrated a correlation between low rates of education for girls and high percentages of early marriages.

Some forced marriages require female genital mutilation or cutting, virginity testing (resulting in beating or murder if negative) Other societies practice temporary marriages in which women are subject to sexual relations and then discarded. Forced marriage also includes wife inheritance, in which a widow is forced to marry an in law when her husband passes away. Women who identify themselves as lesbian may be subjected to forced marriage to cure them. Similarly, women who espouse feminist views or liberal perspectives regarding religious or cultural practices may also be subjected to forced marriage due to their challenge of social mores.

Some women are granted particular freedoms, such as permission to pursue education on condition that they return to forced marriage (in order to retain control of the woman). After marriage, women may be imprisoned, isolated, abducted, beaten, subjected to domestic violence, raped, or verbally/psychologically abused, or subjected to a severe economic disadvantage. Women who reject marriage proposals may be subject to reprisals, such as spraying of acid on their faces. Should they flee, family members often track them down, beat them, and subject them to confinement. In the context of war, forced marriage of women abducted by soldiers results in rapes, beatings, branding, forced domestic labour, and forced child bearing. The

Special Court for Sierra Leone found “forced marriage” to constitute a crime against humanity.

Credibility

Many of these experiences result in post-traumatic stress disorder affecting credibility determination.

In addition, because forced marriages may be customary, there may be no legal documentation of the marriage, hence asylum adjudicators would need to rely on the testimony itself and other types of corroborative evidence. Asylum adjudicators often make the mistake of addressing the concrete harm separately from the context of forced marriage or treating the marriage as a cultural arrangement, contractual matter, or private family issue unrelated to protection.⁴

Trafficking

It is important to keep in mind that women and girls may be subjected to HTP and then trafficked for prostitution or forced labour in the realm of domestic work, agriculture, industry, etc. Victims of trafficking risk being subjected to ostracism upon return to their countries of origin.

Domestic Violence

Domestic violence is also relevant as CEDAW has characterized this as linked to traditional attitudes by which women are regarded as

⁴ Kim Thuy Seelinger, “Forced Marriage and Asylum: Perceiving the Invisible Harm” in 42 Colum. Hum. Rts. L. Rev. 55 (Fall 2010).

subordinate to men (AT v. Hungary), further setting forth that states have a due diligence obligation to ensure that their institutions follow up preventing, investigating, and prosecuting domestic violence as well as providing compensation (Goecke v. Austria, GR no. 19, IntAComHR Jessica Lehanen Case). UNHCR Gender Guidelines set forth that if the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution under Article 1 of the 1951 Convention on the Status of Refugees.⁵ States are increasingly recognizing victims of domestic violence as refugees (Argentina, Australia, Canada, Ecuador, Germany, Hungary, Ireland, New Zealand, Romania, Spain, UK and USA) Furthermore, the European Court of Human Rights has held that return of a woman and her children subjected to physical and sexual violence by the husband/father would violate Article 3 of the European Convention of Human Rights and constitute refoulement to torture/inhuman treatment (Ahmadpour v. Turkey 2010).

Dowry Murder and Honor Killing

In many societies, the honor of a family/clan/tribe is defined in terms of women's assigned sexual and familial roles. Acid throwing and Honor Killings are oppressive cultural practices in which a woman/girl/boy/homosexual man/woman is beaten, stabbed, attacked with acid, stoned, shot, or strangled by family members as a response

⁵ See also UK Ex parte Shah.

to dishonoring the family or clan via communication, elopement/romantic involvement with a person not selected by the family, homosexuality, disobedience to cultural norms involving dress, or being victims of rape. Families are subject to social pressure by their tribe, clan, village, etc. to restore family honor by killing the person. Honor Killings occur in Pakistan, Turkey, Afghanistan, India, Jordan, as well as other regions, including Europe. Within Arab cultures, the woman is considered to hold all of the honor for the family and this in turn supports the social order, the honor code is called the *purda* and requires women to be protected against unauthorized social conduct. John Alan Cohan sets forth that “The disgrace of a family member is inevitably a humiliation to others in the family, despite their innocence of any wrongdoing. The negative feelings toward the child are, at least in some way, imputed to the parents. . . (restoration of honor) may require a performance of some act of penance to restore honor: apologizing, paying blood money, going to jail, moving to a different community and starting a new life, or just biding one’s time until the community gets over the dishonor.”⁶

In some countries, killing the offending woman is considered the duty of the aggrieved family in order to redeem the family honor. There is discussion, planning, and deliberation within the family, hence the action does not occur immediately after an alleged transgression.

⁶ John Alan Cohan, “Honor Killings and the Cultural Defense” in 40 Cal. W. Int’l. L. J. 177 at 184 (Spring 2010).

Dowry murder (including acid attacks) is the murder of a woman by her husband or in-laws because her family is unable to meet their demands for her dowry (common in South Asia).

Some persons are forced into exile as a result of dishonoring the family. This would be included within the realm of honor crimes, as well as physical/mental abuse, forced marriage, and murder. Police and other actors may ignore honor killings as “domestic issues” or “family matters” not meriting response. Penalization in some countries may be insignificant. Tribal rules are often granted priority over contrary legislation.

IFA

When conducting the IFA analysis in relation to women, it is essential to consider whether relocation be unreasonable and unduly harsh? Look at the position of women in society, the education and literacy of women, and the woman’s economic self-sufficiency. Assess the government’s ability to protect and reasonable relocation, are there shelters available? How long can she stay? Is there a restriction to age? Is there psycho-social support, health care? Can her children (including males) stay with her? How will she be able to support herself. Can the husband or his family reach her? Is entry into shelter considered taboo, will there be reprisal, stigma? Will she be able to divorce? Will she lose the children?

Conclusion

In conclusion, I wish to underline the importance of recognizing the protection interests of women and girls (as well as boys) as extending beyond the most egregious physical violations. The Inter-American Court of Human Right articulated the right to a life's project, in which a woman can aspire to achieve her personal and professional aspirations without interference. When girls and women are denied the opportunity to study, work, or even the possibility of imagining or articulating the aspiration of a life's project; this results in systematic oppression. It is essential that immigration authorities take a holistic approach when assessing the protection needs of the applicant, articulation of aspirations relating to education, work, family life should not be classified as "socio-economic" concerns unrelated to protection. They form an important part of the evaluation of the potential reparative impact asylum can offer- a best practice approach to enable persons to realize their potential, instead of submitting to harmful traditional practices.