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Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 16

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Article 16: Right to Marry and to Found a Family

Most of the 30 Articles in the Universal Declaration of Human Rights (UDHR) begin with gender-free language: "Everyone," "All" or "No One. But Article 16 states that "men and women" have the right to marry, with the women drafters of the UDHR succeeding in their determination that it should spell out clearly that women had equal rights in marriage, given there was still very widespread discrimination in matters relating to marriage at the time.

Some subsequently interpreted the wording as limiting marriage rights to heterosexual couples, although nowadays it is increasingly interpreted as simply referring to both sexes having an equal right to marry, rather than stipulating they must marry someone of the opposite sex. Various UN human rights mechanisms have urged all States to legally recognize same-sex unions – whether by making marriage available to same sex couples or through other arrangements, such as civil partnerships – and have also called for the same benefits and protections for all. And an increasing number of states are bringing in legislation along these lines.

Article 16 delves into the intimate lives of humans. It says every adult has the right to marry and have a family if they want to. Women and men also have the same rights during their marriages, and if they divorce. In addition, for the only time in this document, it explicitly invokes the duty of the State to provide protection, underscoring the high regard the drafters had for the family.

"Denying people access to marriage ...it's denying them the status and dignity of being ordinary citizens in society."

–South African Judge Albie Sachs, in Constitutional Court decision striking down statute defining marriage as "between one man and one woman."

As Pakistani drafter Begum Shaista Ikramullah put it, "it was imperative that the peoples of the world should recognize the existence of a code of civilized behaviour which would apply not only in international relations, but also in domestic affairs."

These rights have cascaded down and been amplified in a number of other UN instruments: The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights as well as the Conventions that protect women, people with disabilities and migrant workers.

The drafting of Article 16 involved reconciling different world views (the Communist bloc was critical of what it saw as U.S. restrictions on women's rights at the time) and overcoming religious objections.

World War II, just ended, "had shown the equality of the sexes," said Polish drafter Fryderyka Kalinowska, and it was important to reflect that.

The Article was also a response to Nazi laws prohibiting inter-racial marriage, bestowing the right to marry and to found a family on "men and women of full age without any limitation due to race, nationality or religion." Equal rights are guaranteed "during marriage and at its dissolution." This was a milder word for "divorce," which had caused heated debate during the drafting. Some argued including it would send a signal to the general public that the UN "approved of divorce on the same footing as marriage." In the end, divorce was treated as an issue of non-discrimination rather than as a basic human right. As one commentator put it: "No one has to contract marriage, but once one is in that state, certain rights become operative."

Paragraph 2 of Article 16 says "marriage shall be entered into only with the free and full consent of the intending spouses." This, together with the phrase "of full age" in Paragraph 1, amounts to a ban on child and/or forced marriage because children may not be in a position to give free and full consent. However, child marriage continues to be a problem affecting huge numbers of girls, with around one million girls under 18 getting married every month.

Closely related is the issue of forced marriage, where girls are married off to a man, often much older, for a "bride price." Faced with international outrage, in June 2018, Sudan overturned the death sentence on Noura Hussein for killing her husband, who was some 16 years older than her. The man had approached her parents when she was just 15 and in Grade 8. On their "honeymoon," the court heard, the husband raped her while three of his male relatives pinned her down. When he tried to rape her again, she killed him with a knife – in self-defence, she argued.

In neighbouring South Sudan, in November 2018, the father of a 16-year-old girl auctioned her off to the highest bidder on Facebook. The sale provoked a storm of condemnation, including against Facebook, with many people afraid the record amount paid for the girl would stimulate more sales of child brides via social media.

"That a girl could be sold for marriage on the world's biggest social networking site in this day and age is beyond belief."

– **George Otim, director of Plan International in South Sudan**

A recent ruling by the International Criminal Court (in the case against Dominic Ongwen of the Lord's Resistance Army) that forced marriage, when part of a widespread or systematic attack against civilians, may amount to a crime against humanity was, for many, a welcome development in jurisprudence.

In a 2018 report on the Kyrgyz Republic, the Committee on the Elimination of Discrimination against Women concluded the Government had failed to protect women and girls from abduction for forced marriage and related sexual violence, thus violating their right to enter into marriage only with their free and full consent. It also found that the Kyrgyz Republic had knowingly failed to take effective measures to address discriminatory stereotypes and norms that legitimize bride kidnapping, as well as to enforce existing laws criminalizing the practice alongside child marriage.

On another topic, Article 16's language on the "right to found a family" reflects the prevailing morality of the time associating families with marriage. Since then, it has been argued that the right to "found" a family implies a conscious decision, so it should extend to rights to plan births and control one's reproduction – and even to a "right" to in-vitro fertilization, as the Inter-American Court of Human Rights held in the 2012 case of *Artavia Murillo v. Costa Rica*. Also more recently, the rights laid down in Article 16 have been re-interpreted to try to ensure equality and non-discrimination for all people who want to marry, and all families, however they are constituted.

In 2012, then UN Human Rights Chief Navi Pillay discussed how sexual violence and denial of contraception are frequently used against women. "Ensuring that women have full autonomy over their bodies is the first crucial step towards achieving substantive equality between women and men," she said. "Personal issues – such as when, how and with whom they choose to have sex, and when, how and with whom they choose to have children – are at the heart of living a life in dignity."

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