When the Right to Marry Conflicts with the Right to Culture:

Examining Restrictions the Libyan Family Law Places on the Right to Marry

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I. Introduction

In its concluding observations on the Libyan report on Articles 1 to 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1] adopted in 1997, the Committee on Economic, Social, and Cultural Rights noted that Libya had advanced certain arguments against the enjoyment by women of certain family and civil rights on the basis of Islamic law.[2] Its response was to call for Libya to end all aspects of discrimination against women.[3]

Libyan Family Law represents the best example of legal inequality. The notion of sex bias against women is articulated in one main controversial aspect. While a woman has the right to obtain divorce, this right is not as wide in scope as that of a man. Restrictions imposed on this right are grounded in cultural practices dating back centuries. As cultural restrictions, their existence raises the question of the validity of the right to culture to justify them.

This paper shall address cultural interference in the right of women to dissolve marriage and examine its legality in light of the standards of the International Covenant on Civil and Political Rights (ICCPR)[4] and the ICESCR. Both of which include a clause guaranteeing the enjoyment of rights without sex-based discrimination. The paper, after due analysis, goes on to conclude that although Family Law does not treat men and women equally with regard to their ability to dissolve marriage, the restrictions imposed on the right of women to do so are permissible and consistent with both the ICCPR and ICESCR (the Covenants), as they serve a pressing social need for the protection of the right to culture.

To this end, the paper is divided into two main parts taking the following form: It will first present the restrictions that Family Law imposes on the exercise of the right to dissolve marriage for both men and women, it shall consider their grounds. The second part examines the considerations of those restrictions and studies them in order to conclude if they suffice to make the restrictions compatible with the Covenants' standards.

II. The Right to Marry under Libyan Family Law

It is worth mentioning that the right to marry recognized by both the ICCPR and the ICESCR encompasses, inter alia, the right to dissolve marriage. When it is used in this paper, it mainly refers to the right to dissolve marriage.

A. Historical Background of Family Law

The Libyan total population is entirely Muslim.[5] It has been this way for hundreds of years with some short-lived exceptions during the colonial period. For this reason, Islam has a pivotal role in all aspects of life in Libya, extending its influence to governmental systems and structures, a fact standing in the face of the secular principle of separation between

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1 UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966. United Nations, Treaty Series, vol. 993, p. 3.

2 UN Committee on Economic, Social and Cultural Rights, *Conclusions and Recommendations: Libyan Arab Jamahiriya*, 16 May 1997, U.N. Doc. E/C.12/1/Add.15 (1997), para. 14.

3 *Id*. para. 20.

4 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966. United Nations, Treaty Series, vol. 999, p. 171.

5 UN Committee on Economic, Social and Cultural Rights (CESCR), *UN Committee on Economic, Social and Cultural Rights: Addendum to the Second Periodic Reports Submitted by States Parties, Libyan Arab Jamahiriya*, 15 February 2005. E/1990/6/Add.38, para. 5(b).

Church and State. This is also clearly seen with regard to the current political system, which came into existence in 1969 and under which Islam enjoys a privileged status.

Article 2 of the Constitutional Proclamation[6] recognizes Islam as the official religion of the State, rendering Islamic law (Shari'a)[7] as the supreme law of the land. Islam and Shari'a enjoy the same status under the Declaration on the Establishment of the Authority of the People, which functions as a constitutional law.[8] Article 2 of the Declaration states that: "Quran is the Constitution of the Socialist People's Libyan Arab Jamahiriya.[9]" Due to this status, the constitutionality of any law contradicting with Shari'a can be challenged.

When it comes to the norms regulating marriage and divorce, Shari'a has been a particular shaping force. In Islam, both marriage and divorce are seen as religious matters, and that is the why Shari'a has been the law governing all familial issues concerning marriage and divorce in Libya. It should be mentioned that no codification of Shari'a with regard to those issues existed until Family Law No. 10 (hereinafter Family Law) was enacted in 1984. Prior to that, courts applied Shari'a directly on family matters interpreting relevant rules of the Quran and adopting opinions of certain Islamic scholars.

Family Law was enacted to regulate both the manner of entering into marriage and in which it is dissolved – and has ever since been the only law governing marriage and divorce and their effects. The main purpose of this codification of Shari'a rules of marriage and divorce was to lay down formulations common to the different schools of jurisprudence on similar cases. It is worth mentioning that, according to Article 14 of Libyan Civil Law, laws concerning family matters, which are based on Shari'a, are only applicable when, at least, one of the parties involved is a Muslim having Libyan nationality. Family Law as such is not applicable in cases where none of the parties is a Libyan Muslim.

B. Restrictions on the Right to Marry

Before the enactment of Libyan Family Law, applications of different precedents were taken into consideration so as to prevent inflexibility. Indeed, Family Law adopted the least restrictive norms to afford significant progress in favor of women, which the Committee on Economic, Social and Cultural Rights has noted with satisfaction. The Committee, however, concludes that fuller equality between men and women has yet to be achieved, as it noted that the Law still encompasses various sex-inequality aspects.[10] The ongoing inequality can be best illustrated through the restrictions on dissolving marriage.

Article 31(2) of Family Law gives the husband the absolute right to unilaterally end a marriage by proclaiming such words as "I repudiate thee," either orally or in writing. Such divorce is revocable and is not finalized until after the period of three months has elapsed, during which the couples may have worked out their differences. A husband does not have to show any reason for divorce. Yet, as soon as divorce becomes finalized, he is required by

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6 *Constitution Proclamation* [Libyan Arab Jamahiriya]. 11 December 1969, available online in UNHCR Refworld at: http://www.unhcr.org/refworld/docid/3ae6b5a24.html [accessed 2 March 2009].

7 Islamic religious law is commonly known as Shari'a. It includes a universal system of law and ethics and purport to regulate every aspect of public and private life. The power of Shari'a to regulate the behavior of Muslims mainly derives from its moral and religious authority. As such, Shari'a influences individual and collective behavior in Muslim countries through its role in the socialization processes of such nations regardless of its status in their formal legal systems. The sources of Shari'a in hierarchical order are Quran, Sunna, which is the record of the life experiences and the deeds of the Prophet Muhammad, and Qiyas, which an interpretation involving analogical reasoning. *See*, Henry J. Steiner and Philip Alston, *International Human Rights in Context* 389 (2000).

8 *Declaration on the Establishment of the Authority of the People* [Libyan Arab Jamahiriya]. 2 March 1977, available online in UNHCR Refworld at: http://www.unhcr.org/refworld/docid/3ae6b4ec14.html [accessed 18 March 2009]

9 "The Socialist People's Libyan Arab Jamahirya" is the official name of Libya.

10 UN Committee on Economic, Social and Cultural Rights, *supra* note 2, para. 8, 13.

Law to register it in the court and pay an amount that the court decides as an appropriate settlement to the divorced woman (Article 51(2)).

On the other hand, the wife is treated differently in that she does not have such scope of the right to dissolve marriage. In general, as stipulated in Article 39(a) for the wife to end a marriage, she has to bear some burden of proof before court, a legal justification such as the husband's abuse, absence without justification, or failure to perform his duties under the marriage contract. If she does bring to proof a valid justification, the court grants her divorce and compensation. If she cannot make her case, she may also obtain divorce if she insists, but in this case, with no compensation. There is only one mechanism provided for by Law whereby a woman may end a marriage on her own in the same way as a man does. That is if she stipulates in the marriage contract that she has the right to conduct divorce on her own (Article 3.)

In summary, although a woman may in all cases obtain divorce, she does not enjoy this right in an equal manner unless she stipulates her right to divorce in the marriage contract.

III. Are the Restrictions Permissible under the Covenants?

On May 15, 1970, Libya acceded to both the ICCPR and the ICESCR making no reservation.[11] This makes Libya bound under the ICCPR to refrain from the interference with the rights guaranteed therein in such a way not expressly allowed under the ICCPR itself.[12] It also has an obligation under the Covenants "to ensure" that all individuals, "within its territory and subject to its jurisdiction," fully enjoy the rights laid out in the Covenants, including the right to marry and the right to culture, "without distinction of any kind."[13]

In examining whether the restrictions that Family Law places on the right to marry are consistent with the Libyan obligation under the Covenants, it should firstly be determined if there is an interference with that right, and if so, is that interference justified?

A. State Intervention with the Right

International law recognizes the fact that the family plays an essential role in human society.[14] Both the ICCPR and the ICESCR provide for the right to family life deeming the family "the natural and fundamental group unit of society."[15] The right to family life encompasses the right to marry as marriage is universally the most common way to establish a family.[16] The right to marry includes, inter alia, the right of individuals to enter into marriage and to dissolve it on an equal basis.[17] For the purpose of this paper and in the light of the aforementioned restrictions imposed by Family Law, the focus will be on only one aspect of the right to marry, i.e. the right to dissolve marriage. As stated above, the process of examining those restrictions requires, first of all, deciding whether or not there has been interference on the part of the State with the right.

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11 *See*, the U.N. Human Rights website at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=321&chapter=4&lang=en.

12 Manfred Nowak, *U.N. Convention on Civil and Political Rights, CCPR Commentary* 37 (second revised edition 2005); *See* also, *Articles 2(1) of the ICCPR*.

13 Thomas Buergenthal, To Respect and to Ensure: State Obligations and Permissible Derogations. in Louis Henkin, *The International Bill of Rights* 77 (1981); *See* also, *Articles 2(1), 3 of the ICCPR, 2(2) and 3 of the ICESCR*.

14 Yuval Merin, *The Right to Family Life and Civil Marriage under International Law and Its Implementation in the State of Israel*, 28 B.C. Int'l & Comp. L. Rev, 79 (2005).

15 *Article 23 (1)* of the ICCPR and *Article 10 (1)* of the ICESCR.

16 Maja Kirilova, *The Right to Marry and to Found a Family* 25 (1990).

17 *Article 23 (1)* of the ICCPR and *Article 10 (1)* of the ICESCR.

It is noteworthy that Article 23 of the ICCPR differs from Article 10 of the ICESCR in that unlike this Article, the former expressly regulates dissolution of marriage. It refers to divorce as permissible[18] by stating in paragraph 4 that:

> "States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

The reference to dissolution of marriage in this Article, however, as the Human Rights Committee stresses, does not imply advocacy of divorce. Rather, it is intended to guarantee equal rights of spouses in the event of divorce.[19] In general, any discriminatory treatment with regard to the grounds and procedures for separation or divorce is contrary to Article 23(4) and must be prohibited.[20] Distinction based on the ground of sex is also prohibited by Articles 2(1), 3, 26 of the ICCPR, 2(2) and 3 of the ICESCR. Accordingly, States Parties are obliged to ensure that grounds for divorce or annulment are the same for men and women.[21]

It follows that, since Family Law grants a man wider scope to conduct divorce than that granted to a woman, it, therefore, treats married couples differently based on their sex and thus, it interferes with the right of women to dissolve marriage on an equal basis with men.

B. Is the Interference Justified?

Several provisions in the ICCPR state the right or freedom first, and then add that restrictions to the right or freedom may be justified if they are provided by law and "necessary to protect national security, public order, public health or morals or the rights and freedoms of others."[22] This is also the case in the European Convention on Human Rights[23] where not all provisions are formed as such. Only Articles from 8 to 11 of the European Convention encompass a limitation clause, yet the European Court of Human Rights has extended this clause to other rights and freedoms creating what can be called a general theory of restrictions.[24] This approach may also apply to certain rights guaranteed under the ICCPR where the permissibility of some limitations can be implied from the character of the right although no limitation is expressed.[25] The right to marry is one of those rights as Article 4 of the ICESCR supports this conclusion. It provides for a general limitation on the rights guaranteed therein by stating that:

> "The State Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

Based on that, in order for the restrictions imposed by the Family Law to be justified, they have to be prescribed by law and necessary to achieve a legitimate aim as explained in the following points:

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18 Manfred Nowak, *supra* note 20, at 530, 531.

19 A/C.3/SR. 1090-1095, in Manfred Nowak, *supra* note 20, at 531.

20 UN Human Rights Committee, *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, para. 9.

21 UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000. CCPR/C/21/Rev.1/Add.10, para. 26

22 *See*, Articles 12(3), 14(1), 18(3), 19(3), 21 and 22 of the ICCPR.

23 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950. ETS 5.

24 Olivier De Schutter and Francoise Tulkens, Rights In Conflict: The European Court of Human Rights as a Pragmatic Institution, in Eva Brems, *Conflicts Between Fundamental Rights* 169 (2008)

25 Oscar Schachter, The Obligation to Implement the Covenant in Domestic Law, in Louis Henkin, *The International Bill of Rights: The covenant on Civil and Political Rights* 291, 292 (1981).

1. Prescribed by Law

Any interference with the exercise of human rights and freedom must be prescribed by law, either legislation or an unwritten norm of common law.[26] The restricting provisions or norms must be as clear and precise as reasonably possible to declare exactly in advance the types of the limitations on the right.[27] Family Law was enacted by the legislative authority and made available through its publication in the Official Gazette. Moreover, the concerned restrictions were formulated with sufficient precision and clarity. As such, the formula of the restrictions imposed on the right to marry is sufficient to conclude that those restrictions are prescribed by law. Thus, the restrictions imposed on the right of women to dissolve marriage are in conformity with the first condition for permissible restrictions on human rights.

2. Pursuant to a Legitimate Aim (the Right to Culture)

For the restrictions imposed by Family Law to be legitimate, they need be aimed to protect one of the abovementioned interests, that is, national security, public order (order public), public health or morals or the rights and freedoms of others.

As already stated, Family Law is derived from the Islamic religion, which has been the religion of Libyan society for hundreds of years. Indeed, Islam constitutes a central element with special value in Libyan culture. When the State prescribes restrictions on the right to marry on an equal basis between men and women, its objective is to protect a cultural practice rooted in a religion sacred to society at large.

Culture means the "total body of tradition borne by a society and transmitted from generation to generation." [28] It is a basic and seminal aspect of any society[29] and refers to a way of life, norms, values, standards by which people behave to provide structure to society. Culture manifests itself in many forms[30] including, but are not limited to, "cultural artifacts, forms of expression, systems of knowing, […] historical understanding and religious experience."[31] In fact, Culture influences our understanding of society and reflects the manner in which a society might structure its values or make social decisions.[32] Its importance is internationally recognized and protected.

The ICESCR confirms the existence of the right to culture in Article 15(1) stating that "the State Parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life. ..." The right to culture is also protected under Article 27 of the ICCPR, which provides that members of "ethnic, religious, or linguistic minorities […] shall not be denied the right […] to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Even though the rights protected under those provisions could be seen as individual rights, "they depend in turn on the ability of the […] [society, to which those individuals belong,] to maintain its culture, language or religion."[33] As the Human Rights Committee

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26 Monica Macovei, *Freedom of Expression: A guide to the Implementation of Article 10 of the European Convention on Human Rights* 30-31 (2001), available at: http://www.coe.int/T/E/Human_rights/hrhb2.pdf, [accessed 25 March 2008].

27 Eur. Court H. R., *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49.

28 Marina Hadjioannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples under International Law*, 8 Chap. L. Rev, 204 (2005).

29 Leonard Hammer, *The Human Right to Culture and Migrant Workers in Israel*, 11 MSU-DCL J. Int'l L, 431 (2002).

30 UN Human Rights Committee (HRC), *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994. CCPR/C/21/Rev.1/Add.5, para. 7.

31 Yvonne Mokgoro, *The Protection of Cultural Identity in the Constitution and The Creation of National Unity in South Africa: A Contradiction in Terms?*, 52 SMU L. Rev, 1549 (1999).

32 Leonard Hammer, *supra* note 40, at 440.

33 The UN Human Rights Committee, *supra* note *41, para. 6.2.*

asserts in its General Comment No 23, State Parties have obligations to fully protect these rights for the sake of "ensuring the survival and continued development of the cultural, religious and social identity of the […] [group] concerned, thus enriching the fabric of society as a whole."[34]

Given the Islamic religion is a key element in the culture of the Libyan society, the State has an obligation to ensure its survival so that individuals within its jurisdiction can fully enjoy practicing it. In so doing, the Libyan State has protested conflicting values to this culture. That is reflected in the integration of Shari'a in Family Law and which is manifest in the said restrictions. Accordingly, the State prerogative to ensure the right to culture renders the aim of the interference with the right to marry legitimate. This conclusion, however, does not essentially entail that the restrictions imposed on the right of women to dissolve marriage are permissible. They also need to be proportionate to the legitimate aim sought as discussed in the following section.

3. Proportionality Analysis

a. Primarily Points

Many human rights can potentially be in conflict in certain situations. It is suggested that each of these situations should be evaluated on a case-by-case basis to determine which right prevails in the given situation.[35] Yet this solution appears to be rejected from some in cases where the right to culture is involved. This rejection is either wholly in favor of, or against, the right to culture. For this reason, the proportionality test in the view of both parties is not valid when the right to culture is involved.

While some insist that communities should identify rights based on their cultural, legal, and religious traditions,[36] and that human rights should not be promoted if their implementation may result in a change in a particular culture,[37] others believe that the right to culture should never assert a priority over other human rights.[38] The latter view tends to recognize the rights to culture only to the point where it infringes on another human. To this point of view, the right to culture may not be invoked to justify restrictions imposed on human rights.[39] This view might have some applications on the international level under the UNESCO Universal Declaration on Cultural Diversity 2002,[40] which disables state's ability to present culture as a legal defense to justify a violation of human rights.[41] Article 4 of the Declaration states that "[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, *nor to limit their scope* [emphasis added]."

As a result from these contradicting perspectives, if the right to culture is in conflict with the right to marry, the right to culture prevails according to the first point of view, whereas the right to marry prevails according to the second one. In both, there is no need for using any test other than determining the nature of the right. Such absolute superseding of either right seems to lack any foundation in the Covenants, since both, the right to culture and the right to marry on equal basis, are protected therein as human rights. In fact, the characteristics of all human rights deny prioritizing either right over the other without

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34 The UN Human Rights Committee, *supra* note 41, para. 9.

35 Yvonne Donders, A Right to Cultural Identity in UNESCO, in Francesco Francioni and Martin Scheinin, *Cultural Human Rights* 323 (2008)

36 Diana Wagner, *Competing Cultural Interests in the Whaling Debate: An Exception to the Universality of the Right to Culture*, 14 Transnat'l L. & Contemp. Probs., 845 (2004).

37 Simon S.C. Tay, *Human Rights, Culture, and the Singapore Example*, 41 McGill L.J. 751, 752 (1996).

38 *Id.* at 743.

39 Marina Hadjioannou, *supra* note 39, at 211.

40 UN Educational, Scientific and Cultural Organization, *UNESCO Universal Declaration on Cultural Diversity*, 2 November 2001.

41 Diana Wagner, *supra* note 47, at 831.

legitimate justification.

The argument of that there might exist a "hierarchy" of rights within the Covenants, which would allow ranking the rights against one another, is not convincing. This is particularly when we bear in mind the principles of interdependence and indivisibility both of which imply the "equal value" of human rights.[42] It is true that hierarchy has some plausibility with regard to the so-called absolute rights, which are not allowed derogation whatever the aim is, even in state of emergency.[43] Neither the right to marry on equal basis between men and women nor the right to culture is classified as an absolute right, a fact that lead to the conclusion that they enjoy the same hierarchy in the Covenants and both can be subjected to restrictions. In addition, the Covenants do not provide for a direct solution in cases where the right to culture clashes with another human right. This is not the case in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) where it is clear that Article 5(a) and Article 2(f) give "superior force to the right to sex equality" when it clashes with cultural practices or customs, including religious norms. In other words, contrary to the Covenants, CEDAW creates a clear hierarchy of values,[44] and has to be followed in cases of conflict between rights where the CEDAW not the Covenants are applicable.

Libyan Family Law obviously shows that those two rights are in conflict. For the sake of dealing with this conflict, the Law imposes the aforementioned restrictions giving precedence to the right to culture over the right to marry on an equal basis between sexes.

b. Proportionality Test

One solution to situations on conflicts is to use the proportionality test whereby the limitation to a right can be legitimate only if it is necessary to serve "a pressing social need," impairs the concerned right as minimally as possible, and is proportionate to the importance of an objective.[45] This solution has been criticized, in cases of conflict between human rights, in that it leads to prioritizing one right above the other. "The right that is invoked by the applicant receives most attention, because the question to be answered by the judge is whether or not this right was violated."[46] An alternative method that has been favored is to solve conflict between rights by using the balancing test.[47] The balancing test "consists of weighing the rights in conflict against one another and affording a priority to the right which is considered to be of greater value."[48] However, the reference in limitation clauses contained in some provisions of the ICCPR to the "rights and freedom of others," among the legitimate aims justifying imposing restrictions, implies that the use of proportionality test is preferable. Indeed, proportionality and balance in the case-law of courts of human rights are synonyms. A restriction is considered proportionate when a fair balance between opposing interests has been struck.[49] For this reason, it is the test to be adopted in the present analysis.

Proportionality test requires that, in order for an interference with the right to marry on an equal basis between men and women to be permissible, it is not enough that it is prescribed

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42 Olivier De Schutter and Francoise Tulkens, Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution, in Eva Brems, *supra* note 34, at 179.

43 Article 4 of the ICCPR allows for derogation of the rights in time of public emergency with exceptions of some rights like those guaranteed in Articles 6 (the right to life), 7 (the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment), 8 (paragraphs 1 and 2) (freedom of slavery), 15 (the right to fair trial) and 18 (the right to freedom of thought).

44 Frances Raday, *Culture, Religion, and Gender*, 1 Int'l J. Const. L, 678 (2003).

45 Waheed Amien, Muslim Personal Law in Canada: A Case Study Considering the Conflict between Freedom of Religion and Muslim Women's Right to Equality, in Eva Brems, *supra* note 34, at 416, 417.

46 E. Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms* 305 (2005)

47 Peggy Ducoulombier, Conflicts Between Fundamental Rights and the European Court of Human Rights: An Overwiew, in Eva Brems, *supra* note 34, at 227.

48 Olivier De Schutter and Francoise Tulkens, *supra* note 53, at 191.

49 Peggy Ducoulombier, *supra* note 58, at 228.

by law and intended to accomplish a legitimate objective – protecting the right to culture in the present case. Rather, necessity of the interference is also an essential element to justify the restrictions. The necessity of the interference, in the words of the Human Rights Committee, requires "an element of proportionality in the sense that the scope of the restriction imposed on […] [the right] must be proportional to the value which the restriction serves to protect."[50] This entails that the restriction corresponds to a "pressing social need" and that it is the less restrictive means to accomplish the aim pursued.[51]

i. "pressing social need"

It has been well established by the European Court of Human Rights that, in order for a restriction to be considered necessary, it is not sufficient to show that it is useful or desirable. Rather, it has to be a response to "a pressing social need,"[52] "which, because of its importance, clearly outweighs the social need for the full enjoyment" of the restricted right.[53] Accordingly, the social interest in protecting cultural practices - restricting the right of women to divorce - must outweigh the need for permitting women to fully enjoy the limited right. Determining that requires evaluating both interests in light of the provisions of the Covenants.

What the restrictions provide is that they ensure preservation of a Libyan cultural practice derived from religious norms which have formed an integral part of Libyan culture for a very long period of time. The significance of this practice in Libyan society has risen to the extent that it has become a framework for life not only accepted by all members of the community, but, more importantly, very valuable as it reflects these members' adherence and faith to the Islamic religion and their unconditional submission to God.[54] Muslims, Libyan people included, believe that the legal system comes directly from God and hence, all differences arising between men and women are matters of religion which must be complied with.[55] This can be noted, it terms of Libya, in the fact that Libyan women, in general, accept restrictions imposed on them as long as they were rooted in Islam. They do so because they believe that such restrictions are a matter of religion not of human choice.

The importance of the right to culture is unarguable and widely recognized. When this right is in conflict with another human right, a case-by-case basis should be the method of treating such conflict. This method comes in conformity with the above-mentioned characteristics of human right and with the fact that there is no general statement can be made on the acceptability of cultural practices and their relation to human rights.[56] An appropriate criterion could be that cultural practices should not be permitted when they are severely harmful, such as when they involve irreparable harm, violence or killing.[57] One example is the practice of female genital mutilation in some cultures[58] in that it is in clear violation of

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50 UN Human Rights Committee, *Rafael Marques de Morais v. Angola, Communication No. 1128/2002*, U.N. Doc. CCPR/C/83/D/1128/2002 (2005), para. 6.8.

51 Eur. Court H. R., *Refah Partisi (the Welfare Party) and Others v. Turkey*, judgment of February 13, 2003, App. No. 41340/98. paras 106, 134

52 Eur. Court H. R., The Sunday Times Case, judgment of April 26, 1979, Series App. No. 30, para. 59, pp. 35-36.

53 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights*), Advisory Opinion OC-5/85, November 13, 1985, para. 46.

54 Dr. Ahmed Aljlady, *supra* note 15, at 186, 187.

55 Joëlle Entelis, *International Human Rights: Islam's Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law*, 20 FDMILJ, 1268, 1269 (19970.

56 Yvonne Donders, *supra* note 46, at 323.

57 Alison Dundes Renteln , *Reflections on the Theory and Practice of Cultural Rights,* 100 Am. Soc'y Int'l L. Proc, 325 (2206).

58 Anna Funder, *De Minimis Non Curat Lex: The Clitoris, Culture and the Law*, 3 Transnat'l L. & Contemp. Probs. 418 (1993).

human integrity as implied in the international human rights norms.[59] Otherwise, careful balance between the opposing interests should be adopted.

As for the cultural practice embodied by the restrictions placed by Family Law, one argument in favor of those restrictions is grounded on an idea that men and women are naturally different and hence, should be treated differently. Preventing a woman from complete freedom to dissolve marriage serves an object namely to protect her from being affected by her emotional nature as a woman, which may lead to making decisions against her welfare. In addition, the restrictions, according to this view, work as a safeguard to social cohesion of a family since making access to divorce difficult for a woman serves a social purpose as an aid to lessen the possibility of breakup of marriage on part of women. Because of their nature, women are assumed more to likely to make hasty decisions and probably will use divorce too frequently if they were granted an easy right to it, and that would result in "chaos in society."[60] By contrast, men are naturally less likely to make hasty decisions and they tend to think twice before they decide to divorce. In reality, their decision to divorce is practically limited since they already know if they make such a decision, they will have to bear consequential financial obligations. Above all, the restrictions on women in this case are measures adopted for the purpose of ensuring the survival of on aspect of culture of the Libyan society.

On the other hand, there are other social interests protected by the Covenants that may be affected as a consequence of prioritizing the said interests. Those interests seem to include combating discrimination and inequality against woman, and ensuring that spouses' enjoyment of the right to marry is on an equal footing. Therefore, in order for the restrictions to be considered permissible, the value of those interests should be less important than the benefits sought through enjoying the right to culture. Explanations to these restricted interests as provided for by the Covenants are as follows:

1. The Right to Equality and Non-Discrimination

In its General Comment 18, the Human Rights Committee defined discrimination to mean "any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, […] or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[61] More specifically, the CEDAW defines discrimination against women as:

> "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[62]

It is worth mentioning that the right to gender equality and non-discrimination was given the widest range of protection in the Covenants. It seems that one main reason for that is to ensure the full enjoyment of all rights provided for by the Covenants for both sexes, particularly women. Inequality was of prior concern of State Parties to the Covenants because "[i]nequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. ..."[63]

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59 Yvonne Donders, *supra* note 46, at 323.

60 Abdur Rahman I. DOI, Women in Shari'a, 95, in Eva Brems, *Human Rights: Universality and Diversity* 233, 234 (2001).

61 UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989. para. 7.

62 Article I 0f the CEDAW.

63 UN Human Rights Committee, *supra* note 31, para.5.

Both the ICESCR and the ICCPR encompass a number of provisions proclaiming the prohibition against discrimination and guaranteeing gender equality. Those provisions were apparently designed to give legal effect to the concept of equality and non-discrimination as set out in the U.N. Charter[64] and the Universal Declaration of Human Rights,[65] and thus are said to incorporate the modern international law approach to equality and non-discrimination into the Covenants.[66]

The emphasis of State Parties to the ICCPR on the value of equality is shown in the very beginning of the Covenant. The Preamble states that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." This emphasis continues in many Articles of the ICCPR.

Article 2(1) imposes a general obligation providing that State Parties to the Covenant "undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex…."

Article 3 goes on to create a specific duty on the part of States to "ensure the equal right of men and women to the enjoyment of all" rights set forth in the Covenant. Although this Article overlaps with article 2(1), it was intended to reaffirm the fundamental principle of equal rights between men and women.[67]

Both articles 2(1) and 3 are not "stand-alone provisions."[68] They prohibit discrimination with regard to all the rights and guarantees enumerated in the Covenant.[69] As such, they should be read in conjunction with each specific right.[70] In addition to these Articles, the principle of non-discrimination and equality is also expressly referred to in articles relating to certain categories of human rights such as that found in Articles 4, 24, 25 and 26 of the ICCPR.[71] Similarly, the ICESCR emphasizes gender equality in its Preamble and Article 3. It also includes the principle of non-discrimination in other Articles - Articles 2(2), 7(a) and 13(2).

These guarantees of equality and non-discrimination underpinning the Covenants "reflect essential bases for the very concept of human rights."[72] They also implies the greater value that State Parties grant to the principle as "an aspect of the avoidance of arbitrariness"[73] and brings women to the same level of protection of rights that men enjoy. The Covenants clearly recognize the fact that the notion of equality and non-discrimination, as the Inter-American Court has stated, "springs directly from the oneness of the human family and is linked to the essential dignity of the individual."[74]

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64 United Nations, *Charter of the United Nations*, 24 October 1945. 1 UNTS XVI.

65 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, U.N. Doc A/810 at 71 (1948).

66 B.G. Ramacharan, Equality and Non-Discrimination. in L. Henkin, (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* 250 (1981)

67 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005. E/C.12/2005/4, para. 2.

68 *Id*.

69 I/A Court H.R., *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984, para. 54.

70 UN Committee on Economic, Social and Cultural Rights, *supra* note 82, para. 2

71 UN Human Rights Committee (HRC), *supra* note 76, para. 3.

72 Inter-Am. C. H. R., *Maria Eugenia Morales De Sierra v. Guatemala*, Case 11.625, Report Nº 28/98, OEA/Ser.L/V/II.95 Doc. 7 rev. at 144 (1997), para. 36.

73 Richard Plender, *Equality and Non-Discrimination in the Law of the European Union*, 7 Pace Int'l L. Rev, 64 (1995).

74 I/A Court H.R., *supra* note 84, para. 55.

Over 20 years ago, the European Court of Human Rights haheld that "the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe."[75] Today, the principle of equality and non-discrimination has become one of the best established principles in many international treaties. It is one of the universally shared ideals of our time as indicated by the fact that the vast majority of states have ratified the CEDAW,[76] which amplifies the legal content to the general prohibition of sex discrimination, and also provides the universal basis for interaction with the prohibitions of sex discrimination found in the Covenants as well as various regional human rights conventions.[77] The distinguished value of the principle of equality and non-discrimination makes some take up the possibility that the principle has even become part of the *jus cogens* of the international legal order.[78]

However, the right to equality and non-discrimination is not an absolute right. Not every distinction in treatment is in itself offensive to human dignity.[79] As the European Court of Human Rights asserts, discrimination is only prohibited if there is a difference in treatment without an "objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized."[80] The same approach is adopted by the Inter-American Court of Human Rights. It asserts that "no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things.[81] Nevertheless, given the mentioned value of the right to equality and non-discrimination, as the European Court notes, only "very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with" the Covenants.[82]

2. The Right to Marry and to dissolve marriage

It is widely agreed on that restrictions imposed on the right to marry do not only treat women on an unequal footing, but also could cause irreparable prejudice as they may result in their deprivation from the most important relation in life, i.e., marriage.[83] Marriage has long been recognized as one of the vital personal rights, fundamental to our "very existence and survival of the race."[84] It, therefore, should be of greater interest to the State than many cultural practices which could limit its pivotal role in life. Restrictions imposed on the right of women to marry could also affect the pressing social need, emphasized in Article 23 of the ICCPR and Article 10 of the ICESCR, to ensure the widest possible protection to the right to found a family as it is "the natural and fundamental group unit of society and is entitled to protection by society and the State." Indeed, marriage is "the foundation of the family and of society as a whole, [and] without [it,] there would be neither civilization nor progress."[85] For these reasons, the social need to ensure the enjoyment of marriage rights are compelling and of paramount significant interest compared to that of the protection of the exercise and

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75 Eur. Court H. R., *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, judgment of April 24, 1985, App. No. 15/1983/71/107-109, para. 78.

76 Frances Raday, *supra* note 55, at 697.

77 Rebecca J. Cook, *Women's Rights and International Law: A Bibliography*, 24 N.Y.U. J. Int'l L. & Pol, 858 (1992).

78 *jus cogens* are "a group of select rules of law that have become so fundamental that they cannot be abridged by individual states without seriously affecting the "very essence" of the legal system." *See*, McKean, *Equality and Discrimination under International Law* 277, 278 (1983)

79 I/A Court H.R., *supra* note 84, para. 56.

80 Eur. Ct. H.R., *Belgian Linguistics Case*, Judgment of 23 July 1968, Ser. A. No. 6, p. 34, para. 10

81 I/A Court H.R., *supra* note 84, para. 57.

82 Eur. Ct. H.R., *Abdulaziz, Cabales and Balkandali v. The United Kingdom*. Judgment of 24 April 1985, App. No. 15/1983/71/107-109, para. 78.

83 Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 Fordham L. Rev. 2487 (1998).

84 U.S. Supreme Court, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in Cass R. Sunstein, *The Right to Marry*, 26 Cardozo L. Rev. 2082 (2005).

85 U.S. Supreme Court, *Maynard v. Hill*, 125 U.S. 190, 205 (1888), in *The Right to Marry*, 26 Cardozo L. Rev. 2086 (2005)

survival of many cultural norms particularly those, which could suppress some marriage rights resulting in irreparable harm.

When hegemony of a particular cultural practice is pressed to the extent that it exerts a superseding effect on those rights, such a practice is arbitrary and irreconcilable with the value of the restricted rights under the Covenants and thus cannot be tolerated.

Although that is the case with many of marriage rights, it differs with regard to the restrictions limiting women from having as a wide range of grounds to obtain divorce as that of men. No doubt that those restrictions constitute different legal treatment between men and women. However, as previously discussed, differences in legal treatment are discriminatory *only* when they have no objective and reasonable justification. A closer look at the restrictions imposed on the right of women to dissolve marriage implies that the scope of the exercise of divorce granted to both sexes does not, in reality, vary. A woman seeking divorce may in *all* cases obtain it. If the spouses do not agree to divorce through mutual agreement, the wife still can dissolve marriage through the intervention of the court. The reason of stipulating that divorce being sought through the court, in this case, can be attributed to the grounds of divorce; the intervention of the court is essential in case the wife not only seeks divorce, but also claims that the husband abuses her or does not perform his duties under marriage contract and that compensation is due. Such a claim indicates dispute between the parties and involves allegations against the husband which need to be examined and decided by a court of law.

On the other hand, the intervention of the court where the wife does not claim damages is what seems to serve as a guarantee to protect the cultural practice sought through the restriction. As such, this need for the involvement of the court is what requires a balancing test with the social need for equality and non-discrimination.

The court's main role in this regard is to work as a mediator for the sake of reaching reconciliation between the spouses and avoiding divorce. If reconciliation efforts fail and the wife insists on divorce, the court shall grant it to her. No compensation in this case is granted (Article 51(2)). Based on that, this restriction serves not only a cultural practice important to the Libyan society, but also a social need to preserve the institution of marriage as a cornerstone in the society and to make all possible efforts to avoid its dissolution. This restriction does not seem to be attributed to an assumption of inferiority of women. As stated above, equality between sexes does not entail identical treatment between spouses in all matters. For this reason, placing restrictions on the right to dissolve marriage can be permitted when they are reasonable. Reasonable restrictions, however, do not have, in all cases, to be identical in the cases of both spouses. They could remain as such even in cases where they are imposed on only one spouse as long as they are based on an objective and reasonable justification. If this is met, a difference in treatment between spouses would not be discriminatory and therefore, it is permissible.

While Family Law requires the intervention of the court to minimize the possibility of dissolution on the part of the wife, it also places restrictions, although different in kind, on the husband's right to conduct divorce. The husband in *all cases,* where he divorces, will be liable to pay compensation to the wife even if there is no proof for damage, simply because damage is legally assumed. By contrast, when divorce has been sought by the wife, the husband may be awarded compensation *only if a material* damage has been proved. Above all, a woman has the absolute right to divorce in the stipulations of a marriage contract. If she makes such a stipulation, she may unilaterally exercise divorce in the same way as does the husband.

It follows that, the harm that the wife seeking divorce might suffer is minor. She is not the only party whose right to divorce is restricted. The right of husband is also restricted by a different kind of restrictions, i.e. in all cases, he has to bear certain consequences of his decision of divorce. Although different, both kinds of restrictions imposed on spouses are

rooted in the Islamic culture of Libyan society and, at the same time, play a role in limiting the scope of marriage. In other words, the restrictions serve a social interest to protect marriage as well as they are aspects of ensuring the right to culture. Therefore, restrictions on the right of women to dissolve marriage are a response to a pressing social need and cannot be deemed discriminatory nor do they prejudice the right to divorce in such a way that is harmful. Consequently, those restrictions should pass the first element of the proportionality test.

ii. Proportionality of the Measures

As the Inter-American Court states, in order for a restriction to be permissible, it has to be the least restrictive means possible to ensure the legitimate aim. There should be no other way available through which the same objective could be achieved which may not be as intrusive to the right or freedom which is infringed upon.[86]

As shown in the beginning, Family Law is a codification pertinent to interpretations of Shari'a norms as adopted by some Islamic scholars. Indeed, it has been the tendency of Libyan legislator to adopt the most lenient of those interpretations in all Libyan laws, which are rooted in Shari'a. Likewise, Family Law reflects the most lenient relevant norms derived from various scholars- representing the least restrictive means within the bounds of Shari'a. Any lesser restrictions in this regard would be in clear violation of explicit norms in Shar'a, and, therefore, would make the argument involving the protection of right to culture meaningless.

It follows that, the restrictions provided for by Family Law, limiting the right of women to divorce, are the least restrictive means to preserve a cultural practice and to protect and ensure the right to culture. Accordingly, the interference with the right of women to divorce is in conformity with the standards of the Covenants in that it is prescribed by law and necessary to accomplish a legitimate aim.

IV. Conclusion

A conflict between human rights occurs when the right or interest colliding with a certain human right is itself a human right.[87] The need to protect a human right then may lead to inevitable prioritization of it over another right so that the later right cannot be enjoyed in its totality. When the right to culture conflicts with another human right, it would be unreasonable to grant absolute priority to either one in all cases just because of the nature of the right. All are human rights and should be balanced on case-by-case basis to reach a conclusion of which right serves a more important interest in its context for the sake of prioritizing it.

It is true that human rights may be better respected when they coincide with the culture in which people believe in and with which they live.[88] Yet, when a State obliges itself to comply with international human rights standards through ratifying human rights treaties, it can rely on culture as a defense to restrict human rights only insofar as recognized by concerning treaties. In cases where a cultural practice advocates distinction in treatment between human beings just because of an alleged assumption of inferiority of one sex, such distinction in law of the Covenants suppresses a principal human right and is in itself offensive to human dignity. Because of that, norms advocating so are not tolerated neither under the ICCPR nor the ICESCR values. On the other hand, when such a cultural practice is of importance to the society in its effect and implications, and that the full and equal

[86] I/A Court H.R., *supra* note 64, para. 79.

[87] Evelyne Maes, Constitutional Democracy, Constitutional Interpretation and Conflicting Rights, in Eva Brems, *supra* note 34, at 69.

[88] Simon S.C. Tay, *Human Rights, Culture, and the Singapore Example*, 41 McGill L.J. 777, 778 (1996).

enjoyment of a certain right is minor and is irrelevant to human dignity compared with the need that the practice serves, reconciliation between the opposing values can be reached without relying on a strict priority of the right to non-discrimination in its absolute sense. In this case, such a practice should be tolerated as it is an aspect of the enjoyment of the right to culture.

Libyan Family Law's denial of the right of women to divorce on an equal footing with men is reconciled with the international norms of sex equality. Not only because it represents an exercise to the right to culture, but also due to the fact that it does not cause as much significant harm to women as that caused to the whole society's religious values if the restrictions are not respected. Therefore, those restrictions are legitimate and in conformity with the Covenants.