

## Abstract

*This article addresses the extent to which provisions within Article 16 of the Universal Declaration of Human Rights have influenced subsequent developments in the field of sexual and reproductive health and rights. In particular, it assesses how the right to marry and to found a family, the requirement of free and full consent of intending spouses, and recognition of the family as the “natural and fundamental group unit of society” have affected service provision in this field. Other human rights instruments, such as the Women’s Convention, have amplified these rights, but some issues within reproductive health continue to be limited by conventional interpretations of the family, as identified in the UDHR. While the language within Article 16 was clearly molded by the morality of the 1940s, it has, so far, proven to be flexible enough to encompass both social change and technological innovation.*

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*Cet article traite de l’impact des dispositions de l’Article 16 de la Déclaration Universelle des Droits de l’Homme dans les développements postérieurs dans le domaine de la santé et des droits sexuels et reproductifs. Il évalue particulièrement la façon dont le droit au mariage et à fonder une famille, la nécessité du libre et plein consentement des fiancés ainsi que la famille conçue comme “l’élément naturel et fondamental de la société” ont affecté la mise à disposition de services. D’autres instruments de droits humains, tels que la Convention sur les Femmes, ont étendu ces droits, mais certains aspects de la santé reproductive continuent d’être limités par des conceptions conventionnelles de la famille, telles que stipulées dans la Déclaration. Alors que le langage de l’Article 16 a clairement été façonné par la moralité des années 1940, celui-ci a démontré jusqu’à présent sa flexibilité, lui permettant de tenir suffisamment compte de l’innovation technologique ainsi que le changement social.*

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*Este artículo trata sobre la repercusión de las provisiones del Artículo 16 de la Declaración Universal de Derechos Humanos en los desarrollos posteriores llevados a cabo en el campo de la salud y los derechos reproductivos y sexuales. En particular evalúa cómo el derecho al matrimonio y a crear una familia, el requisito de un consentimiento libre y pleno de los/as cónyuges, y la familia como “el elemento natural y fundamental de la sociedad” afectan la disposición de servicios en este campo. Otros instrumentos de los derechos humanos, como la Convención sobre la Mujer, han ampliado estos derechos, pero algunos aspectos de la salud reproductiva, siguen estando limitados por ideas convencionales sobre la familia, tal como se identifica en la Declaración. Mientras que la redacción del Artículo 16 de la Declaración estuvo moldeada por la moralidad de los años cuarenta, ha demostrado, de momento, ser suficientemente flexible como para adoptarse a las innovaciones tecnológicas y los cambios sociales.*

# FOR BETTER, FOR WORSE

*Ingar Brueggemann and Karen Newman*

## **UDHR Article 16**

- 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*
- 2. Marriage shall be entered into only with the free and full consent of the intending spouses.*
- 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

**A**s this Journal marks the fiftieth anniversary of the Universal Declaration of Human Rights (UDHR), it is a great privilege for the International Planned Parenthood Federation to contribute its reflections on the influence that Article 16 of the UDHR has had on the evolution of work in the field now known as sexual and reproductive health and rights. Article 16 establishes the right of men and women to marry and to found a family, and recognizes the family as the “natural and fundamental group unit” within society. For those working in the field of sexual and reproductive health and rights, it is among the most significant provisions of the UDHR.<sup>1</sup> This provision has been further amplified and clarified in subsequent human rights treaties including, in particular, the International Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Discrimination Against Women (the Women’s Convention). Article 16 illustrates both the enduring relevance of the values enshrined in human rights documents, and the extent to which all normative statements reflect the contexts in which they were created. Fifty years later, marriage and family issues are still hotly debated, but in terms which could

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not have been anticipated in 1948. This article will assess the extent to which the language of Article 16 has influenced developments related to sexual and reproductive health and rights by examining the three key elements of Article 16: the rights to marry and found a family; the requirement of consent of the intending spouses; and the recognition of the family as the “natural and fundamental group unit of society....”

### **The Right to Marry**

The guarantee of the right to marry without restrictions based on race, nationality or religion was drafted in the aftermath of the events of the Second World War — from which, in 1948, the international community had recently emerged — and in particular, in response to the laws of Nazi Germany which had prohibited inter-racial marriage.<sup>2</sup> Among current practices related to the right to marry, which are of concern to human rights advocates, are child marriage and social stigmas that render women “unmarriageable.” Child marriage, which is still prevalent in many countries, constitutes a major risk to the sexual and reproductive health of girls, and is particularly common in Africa and Asia. Early sexual activity exposes young women to much higher risks of maternal mortality or morbidity than those faced by older women, and to sexually transmitted diseases, including HIV/AIDS.<sup>3</sup> Paragraph 1 of Article 16 implicitly acknowledges that child marriage is inconsistent with human rights by stating that the right relates to men and women “of full age.” Because “full age” is not defined, however, it can be interpreted differently in different contexts. The second paragraph, which refers to the “free and full consent of the intending spouses” also has implications for child marriage since minors may not be in a position to give “free and full” consent.

Article 16(2) of the Women’s Convention states that “[t]he betrothal or marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.” The Committee on the Rights of the Child, which monitors compliance with the Convention on the Rights of the Child, has also indicated that the issue of child marriage is covered by that Convention.

It has been argued that the right to marry implies an obligation to modify social and cultural norms that render individuals — usually women — “unmarriageable.”<sup>4</sup> Cultural norms may stigmatize women because they are no longer virgins, or because they have become pregnant out of wedlock. These examples underscore the indivisibility of human rights, as they demonstrate that the denial of one right often has political, social and other consequences which manifest themselves in the denial of other human rights. Women who are considered unmarriageable often have so few alternatives that they are vulnerable to sexual or economic exploitation, which entails further human rights violations.

The UDHR guarantee of the right to marry and to found a family has provided a basis for recent international consensus—building on the importance of sexual and reproductive health and rights. The Program of Action adopted by the United Nations International Conference on Population and Development (ICPD) in 1994 states that:

4.21. Governments should strictly enforce laws to ensure that marriage is entered into only with the free and full consent of the intending spouses. In addition, Governments should strictly enforce laws concerning the minimum legal age of consent and the minimum age at marriage and should raise the minimum age at marriage where necessary. Governments and non-governmental organizations should generate social support for the enforcement of laws on the minimum legal age at marriage, in particular by providing educational and employment opportunities.<sup>5</sup>

Although the documents emerging from international conferences such as ICPD and the Fourth World Conference on Women, which took place a year later, do not have the legally binding force of human rights treaties, they represent the political consensus of the international community regarding the context within which human rights guarantees are interpreted and applied. The 1993 World Conference on Human Rights, which urged, “the full and equal enjoyment by women of all human rights,”<sup>6</sup> gave impetus to this trend, which has continued throughout the 1990s.

Article 16 directly associates the right to marry with the right to “found a family.” This link reflects the prevail-

ing morality at the time of its adoption, but the continued association of marriage with the right to found a family has led to practices which are potentially damaging to reproductive health. For example, many family planning services are available only to married couples. In a number of settings, clinics insist on spousal consent before giving women access to methods of fertility regulation. Such restrictions limit women's choices in ways which are potentially damaging to their reproductive health. This is particularly true for women who are at risk of sexually transmitted diseases, but have no access to condoms or other barrier methods which would afford them protection against infection. The sexual and reproductive health of adolescents is also greatly compromised where services are oriented towards married women or couples. In settings where sexual activity among young people is not socially accepted, those who are sexually active, whether as a result of choice, coercion or violence, encounter serious difficulties in accessing the services they need to prevent sexually transmitted diseases and unplanned pregnancies. Such restrictions have particularly damaging effects on responsible young people, whom we know do use such services if confidentiality is respected and service providers place a priority on empowering them to make responsible decisions for themselves.<sup>7</sup> The Women's Convention does qualify the link between marriage and the family, by including non-discrimination on the basis of marital status in the definition of discrimination.<sup>8</sup> The prohibition of discrimination "irrespective of marital status" permits a separation of the right to marry from the right to found a family.

Cook has argued that the right to "found" a family implies an element of conscious decision-making that extends to family planning.<sup>9</sup> The Women's Convention amplifies this principle; Article 16(1)(e) requires States Parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure, on a basis of equality of men and women:...[t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights...."

Tomaševski has noted that human rights language re-

lated to the right to found a family initially referred to the couple, then shifted to a focus on the individual and is now increasingly linked back the couple, but in the context of the rights of men and women "on an equal footing."<sup>10</sup> Other developments in this direction include General Recommendation Number 21 of the Committee on the Elimination of Discrimination Against Women regarding "equality in marriage and family relations," which addresses the extent to which the responsibilities women bear in raising children affect their rights related to education, employment and other fields of activity linked to their personal development.<sup>11,12</sup>

In practice, physiological factors affecting the ability to procreate can also restrict the exercise of the right to found a family. In many parts of the world, sexually transmitted diseases are a major cause of infertility. The UDHR can offer a basis for advocacy concerning prevention and treatment for sexually transmitted diseases as a necessary means of promoting and protecting this right to found a family.

The right to marry and found a family remains an enduring subject of social and political debate. A review of Internet web-sites indicates that today the right to marry continues to generate debate, particularly in relation to the possible legal recognition of same-sex marriages in some countries. The right to found a family is also being cited with increasing frequency to justify access to in-vitro fertilization technology, where such access is the only option for founding a family. The advances in reproductive health technology were obviously not anticipated in 1948, but it is interesting to note that the language of Article 16 is sufficiently broad to incorporate these developments, a flexibility which is a tribute to those who drafted the UDHR.

Article 16 also entitles men and women to equal rights during marriage and at its dissolution. This guarantee highlights both the far-sighted and aspirational character of the UDHR and the centrality of the principle of equality. Serious obstacles, however, must be overcome to achieve what is still only experienced as an aspiration for many girl-children, women, brides, wives and widows. Many women are trapped in unhappy, sometimes violent marriages because they do not have equal rights to men with regard to the termination of marriage and for other legal or economic reasons.

## **Free and Full Consent**

The UDHR states that marriage shall be entered into only with the “free and full consent of the intending spouses.” This paragraph protects individuals from being forced into marriage against their will. It therefore also has implications for child marriage, since the extent of freedom that a child can exercise in this context is necessarily limited. Full consent also implies choice from a range of alternative options. In many societies, marriage may be the only possibility for women once their families can no longer support them, particularly in situations in which the education of girl-children is not a priority and economic options are consequently limited. The extent to which consent can be seen as “free and full” should be assessed in the context of the alternatives to marriage that are available to women. Efforts to give effect to this guarantee should focus on expanding the options available to women, so that they can consent to marriage in a meaningful way.

In the field of sexual and reproductive health, the consent requirement is vital to protect against coercion within family planning programs. It supports the principle that women and men must be empowered to make decisions about fertility regulation for themselves. The language of Article 16, which refers to the “free and full” consent of intending spouses, has been echoed in safeguards relating to consent to the use of family planning methods.<sup>13</sup> The primary development since 1948 has been the evolution of the concept of “informed” consent, which reflects an understanding that free and full consent is predicated on the availability of reliable information on which to base decision-making. Informed consent is particularly important in the field of reproductive health, where balancing risks and benefits requires that complex information be made available in a manner that is understandable to women and men seeking to make choices involving a range of contraceptive methods and other options related to their sexual and reproductive health.

## **The Family**

Article 16 enshrines the family as “the natural and fundamental group unit of society.” During World War II, the totalitarian regime in Germany had used the family as a con-

venient structure through which the State imposed its domination through enforced group conformity with totalitarian ideas. The UDHR's emphasis on the family as a separate independent entity, appears to provide a small counterweight to the power of the State to control the lives of its citizens.

Fifty years later, particularly in the field of sexual and reproductive health and rights, the goal of protecting the "family" is increasingly invoked in many societies as a justification for denying the rights of individuals within the family. Young people, and sometimes women, whose lives are to a significant extent controlled by other members of the family, are particularly vulnerable to abuse within the family. Although the family can provide a secure, caring and nurturing environment for family members, it can also be an environment in which relatively powerful family members dominate or abuse other family members with impunity — an impunity which the special "protected" status of the family helps to maintain. Another aspect of this tension is the location of the family at the intersection of political and social debates over what constitutes the realm of legitimate public interest and what falls within the sphere of private life. Efforts to combat gender-based violence in the family are often hampered by the unwillingness of law enforcement agencies to intervene in such cases. Similarly, investigations into allegations of child abuse are hampered by those who seek to "protect" the family from outside "intrusion."

In the field of sexual and reproductive health and rights, those who champion "the family" often oppose the right of young people to have access to services, including services related to contraception, without parental consent. Since it is often the case that the parents who demand this right are those most likely to withhold consent, it can be seen that protection of the family can be invoked in ways which are potentially harmful to the well-being of some family members.

Since 1948, changes in the structure of the family have occurred within many societies, including a decline in the prevalence of the "nuclear family," comprised of a married couple living with their biological children. Households are constructed in many complex ways. In some societies, the increasing incidence of divorce has led to a proliferation of



one-parent families. In others, the extended family is a common form of family. Economic and other factors mean that many people live in households with others to whom they are not biologically related, but with whom they consider themselves to have a familial relationship. As Huston has noted "each family is different, the sum of its individual members, their life paths and the social, cultural systems in which they live. When successful, families respect a balance of power among its individuals and nourish them physically, emotionally and spiritually. At their worst, they exploit, mistreat or abandon their own."<sup>14</sup>

The question of terminology surrounding issues related to the family is of particular significance to the field of sexual and reproductive health and rights. Advocates have learned that the term "family planning" is potentially alienating, especially to young people who are sexually active and need access to relevant information and services, but who do not see themselves as "planning families." Yet no satisfactory alternative term has been identified, other than "planned parenthood," which similarly links sexual activity to family structure.

## **Conclusion**

The UDHR was a ground-breaking, inspirational document, which stimulated the development of a range of human rights instruments and implementation mechanisms. In addition to treaties, there have been international conferences which contextualize these rights and generate consensus on how relevant issues are perceived by governments and civil society throughout the world. In the field of sexual and reproductive health there have been international conferences each decade since 1974, the most recent of which was the ICPD in Cairo in 1994. Each of these conferences has increasingly sought to place sexual and reproductive health issues within a human rights context.

Recently, the International Planned Parenthood Federation developed the IPPF Charter on Sexual and Reproductive Rights which correlates many of the rights identified in the UDHR and other international human rights instruments to current sexual and reproductive health and rights issues.<sup>15</sup> The Charter demonstrates the extent to which sexual and

reproductive rights have already been recognized as human rights. It clarifies the connection between human rights and specific aspects of service delivery, such as the connection between the right to privacy and the right of family planning clients to receive services which afford privacy and respect confidentiality. The Charter was designed to influence governments to promulgate related legislation, as well as to assist people in claiming their rights and interacting more effectively with human rights institutions.

In many ways, the proliferation of human rights activities by a range of governmental and nongovernmental organizations across the globe can be traced back to the UDHR and to an enduring commitment to give effect to the rights it enshrined. After 50 years, two seemingly contradictory impressions are apparent and are particularly well-demonstrated by an analysis of Article 16. While the UDHR is very much a product of its time, providing a snapshot of preoccupations and themes relevant to a world emerging from war, the rights it enshrines continue to form a framework flexible enough to accommodate the ever-evolving range of themes and preoccupations which form part of the social and cultural environment of the 1990s. We will continue to monitor how well the UDHR stands up to the next 50 years of human rights campaigning. We are likely to test further the extent to which concepts and language developed in the middle of the twentieth century can encompass new political, cultural and technological developments and challenges as we enter the new millennium.

## References

1. We have focused on Article 16, and the issues of marriage and the family raised within it. Clearly other articles within the UDHR, especially Article 25, which includes the right to a standard of living adequate for the health and well-being of...family, including...medical care and necessary social services," also provide a sound basis for sexual and reproductive health and rights work.
2. M.K. Eriksson, *The Right to Marry and to Found a Family: A World-Wide Human Right* (Uppsala: Justus Forlag, 1990).
3. United Nations Population Fund, *The New Generations: State of World Population 1998* (New York: UNFPA, 1998).
4. R.J. Cook, "Human Rights and Reproductive Self-Determination," *American University Law Review* 44(1995): 975-1016.
5. United Nations Population Fund, Report of the International Confer-

ence on Population and Development, Cairo, 5-13 September 1994, U.N. Doc. A/CONF.171/13.

6. United Nations General Assembly, Vienna Declaration and Programme of Action, Paragraph 36, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/23.

7. Alan Guttmacher Institute, *Into a New World: Young Women's Sexual and Reproductive Lives* (New York: AGI, 1998).

8. Article 1 of the UN Convention on the Elimination of All Forms of Discrimination Against Women states:

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 the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

G.A. Res. 34/180 U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46(1980).

9. R.J. Cook, *Women's Health and Human Rights: The Promotion and Protection of Women's Health Through International Human Rights Law* (Geneva: WHO, 1994).

10. K. Tomaševski, *Human Rights in Population Policies: A Study for SIDA* (Lund: Swedish International Development Authority, 1994).

11. The Committee on the Elimination of Discrimination Against Women (CEDAW) is the body charged with monitoring the implementation of the Women's Convention.

12. C. Bustelo, "Reproductive Health and CEDAW," *American University Law Review* 144(4)(1995):1145-51.

13. International Planned Parenthood Federation, *Family Planning Handbook for Health Professionals: The Sexual and Reproductive Health Approach* (London: IPPF, 1997).

14. P. Huston, *Tough Crocodiles and Other Family Stories from the End Century* (New York: The Feminist Press, in press).

15. International Planned Parenthood Federation, *IPPF Charter on Sexual and Reproductive Rights* (London: IPPF, 1996).