

# INTERNATIONAL LAW AND THE FAMILY: DECONSTRUCTION, REAFFIRMATION AND HOPE

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## INTRODUCTION

The last half of the past century has manufactured more social change than perhaps any other period in world history. Social modifications are swiftly affecting all aspects of life – particularly the natural family: motherhood, fatherhood and childhood. While there are many causes for these rapid developments, I will focus on one particularly potent engine for social revolution: the creation and enforcement of international law.

For the better part of the past two decades, international conferences sponsored by the UN system have promulgated scores of documents calling for dramatic changes to – or, as academicians say, “deconstruction” of – marriage, parent/child relations and family life. But as serious deconstruction efforts gained momentum in the mid-1990’s, various groups around the world began to raise their voices in concern. With surprising frequency, sociologists and other academicians noted that, rather than perpetuating ancient injustices (as had been claimed by the deconstructionists), the long-established and natural institutions of marriage, motherhood, fatherhood and childhood seemed to provide the optimal environment for the social, economic, cultural and personal development of men, women – and particularly children. In addition, members of divergent faith communities discovered that, however different their doctrinal beliefs, they shared common understandings related to marriage, parenthood and childhood. This recognition was coupled with growing worries that deconstruction of these understandings might threaten their ability to pass religious and cultural beliefs along to future generations.

From these voices, an unusual international coalition of scholars, religious communities and ordinary citizens began to form around concepts and ideas that had been clearly and elegantly stated some 50 years earlier in Article 16 of the Universal Declaration of Human Rights: the “family is the natural and fundamental group unit of society.”<sup>1</sup>

The emergence of this coalition has prompted surprise – and occasional anger – on the part of some.<sup>2</sup> It has also produced some surprising results. At the concluding special session commemorating the 10<sup>th</sup> Anniversary of the 1994 International Year of the Family, the UN General Assembly noted the Doha Declaration.<sup>3</sup> The Doha Declaration is a remarkable reaffirmation of the original international understanding that marriage and family life are fundamental and “natural” relationships.<sup>4</sup> The Declaration gives reason to hope that societies around the world can turn their attentions from deconstruction to strengthening the family.

I have titled my remarks “International Law and the Family: Deconstruction, Reaffirmation and Hope.” First, I will explain the increasingly important connection between international law and family policy. Second, I will give a cursory overview of the still-potent deconstructionist agenda promoted by many within the international arena. Third, I will suggest that there is reason for hope: careful scholarship, sound reasoning and enlightened political action *can* result in reaffirmation of the values and policies that support rather than undo “the natural and fundamental group unit of society.”<sup>5</sup> I will conclude with a reminder that strengthening the family will require action.

## I. International Law and the Family

During the last two decades the United Nations System has taken on a surprising new role: that of world policymaker.<sup>6</sup> Declarations and pronouncements flowing from international meetings play an ever-growing role in shaping and solidifying the content of not only international – but national – policies. Lawmakers around the world face an unexpected reality: international norms – not national laws – may determine the ultimate legality of their official actions.

An extended analysis of how international law now controls national laws is beyond the scope of my limited remarks.<sup>7</sup> But I can sketch three developments that underlay the growing importance of international law. First, international treaties now deal – not only with the obligations of states – but with the rights of individuals.<sup>8</sup> Second, in addition to treaties, the UN system is generating a vast body of elastic norms – called “soft law” by the law professors – that (according to some) are quickly ripening into “customary international law.” Third, a growing number of national and international actors are willing to consider (and sometimes enforce) international norms in ways that were not widely anticipated prior to the end of the Cold War.

Treaty law – beginning with the Treaty of Westphalia – began as the primary fount of international law. For centuries, treaties dealt primarily with issues of war, peace, boundary disputes, navigation and commerce – questions fundamental to the relationship of one nation with another. Indeed, the word “international law” reflects this fact. International law governed conduct between – or “inter” – nations.

The importance of treaties in establishing the form and content of international law continues unabated. However, in a somewhat surprising development, numerous international treaties now purport to govern not only the reciprocal obligations of nations, but such important (and divisive) issues as gender equality, children’s rights and discrimination – sometimes in seemingly nonsensical ways. (Consider, for example, common attempts in such treaties to eliminate “all forms of discrimination.” We cannot, of course, eliminate “all” forms of discrimination unless we invalidate such commonplace regulations as speed limits – which, after all, discriminate against skilled drivers who own Porsches.)

In addition to the legal rules contained in international treaties and conventions, the UN system is turning out an expanding body of “soft law” norms at a rate never before seen in human history. Hundreds of UN conferences and negotiations are held each year on questions related to

virtually every question related to life on earth. As a result of these meetings – and the periodic 5, 10 and 15-year reviews of these meetings – various reports, platforms for action, agendas and declarations are issued, updated and expanded. Not long ago, these documents (classified as “soft law” by legal scholars) were considered mere “suggestions.” Nowadays, however, it is increasingly clear that they are more than merely advisory.

Over time, the norms generated at UN meetings become something more than words on paper. As a result of their constant negotiation, re-examination and reformulation, various actors in the international legal system – including national governments, non-governmental organizations and legal scholars – develop expectations that the norms will be respected.<sup>9</sup> If expectations related to enforcement are low, an international norm is truly “soft.” But expectations grow and norms harden. Eventually, what began as “soft” law may become enforceable “hard” law in the guise of “customary international law.” It once required centuries to create international customary law, because that law was developed through the uniform, consistent practice of nation states over time.<sup>10</sup> But, more recently, and largely because of the burgeoning number of international meetings, legal scholars have begun to argue that binding international norms develop (at least in significant part) through the mere repetition of agreed language at UN conferences. As a leading international scholar has asserted, negotiated language “repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain[s] the status of law.”<sup>11</sup>

This brings me to the third factor driving the expansion of international law: the willingness of an increasing number of actors to consult, consider and sometimes follow that law. For several decades, various influential non-governmental organizations (including prominent environmental and human rights groups) have argued that international norms should influence, if not govern, domestic legal policies. Scholars have made similar arguments in journals, as have litigants in the courts. These efforts are now bearing fruit in surprising ways.

Take the United States Supreme Court, for example.

Until recently, it was quite unlikely that any state or federal court within the United States would be willing to enforce the terms of a treaty that had not been ratified by the Senate. But this is no longer true. Last year, a majority of the Supreme Court cited a treaty *that the U.S. Senate had refused ratify* to support the Majority's "evolving" views regarding the meaning of the Equal Protection Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution.

"Soft" international law has also been found determinative in discerning the content of the 14<sup>th</sup> Amendment. In *Lawrence v. Texas*, a majority of the Supreme Court reversed its determination – announced a mere 16 years earlier – that the United States Constitution did not afford special protection for consensual acts of homosexual sodomy. The Court could not convincingly argue that either the words of the Constitution or the history and traditions of the American people had somehow changed in those 16 years. Instead, the Justice simply suggested that – 16 years ago – the Court "got it wrong." And, as evidence that the current Majority now "had it right," the Justices cited decisions from international tribunals that (prior to their citation) would have been considered by any dispassionate scholar as among the "softest" of all possible "soft law" relevant to the meaning of the Due Process Clause.

As a result of these factors – the growing reach of international treaties, the explosive growth of "soft" (and perhaps customary) international norms, and the willingness of judges and others to enforce these norms – individuals and groups interested in understanding and protecting the meaning of "marriage" and "family" must pay attention, not only to national laws, but to international treaties, conference declarations and the opinions of jurists from legal systems around the world.

## II. Deconstruction or “What’s Motherhood, Marriage or the Family, Anyway?”

How did the family become the subject of international deconstruction efforts? I believe it occurred in large measure because efforts to fundamentally alter long-standing family structures encounter substantial opposition when conducted under the full glare of public scrutiny. Equality for women, protection of children and elimination of unjust discrimination are vitally important and laudable goals. But despite the arguments of the most ardent “human rights” theorists, equality does not require that a woman’s social value be measured solely in economic terms, the protection of children is not necessarily furthered by granting them the full legal rights of adults, and the elimination of unjust discrimination does not mandate that electoral results be calculated so that legislative assemblies reflect precise racial and gender quotas.

The recent growth of international law may stem in significant measure from disappointments various advocacy groups have encountered in efforts to alter domestic legal rules. Social activists concluded that – just perhaps – international law could be harnessed to achieve results that had eluded nationally based efforts. For example, after the defeat of the Equal Rights Amendment in the United States, the women’s organizations that had worked for its passage did not disappear (as some might have thought). They simply retired to the basement of the United Nations Building in New York. There, in the basement rooms of the UN Building where treaties are debated and soft law norms are first generated, the social deconstructionists could work unimpeded by full public scrutiny and debate.

They invoked the lofty rhetoric of “human rights” in the pursuit of results that had proven impossible in domestic arenas. International conferences, human rights rhetoric, and the promulgation of ever-expanding “soft law” norms became the tools of choice in the deconstruction of “harmful traditional practices.”<sup>12</sup> Motherhood, childbearing, childhood and marriage were soon prime targets for these potent tools.

Consider, for example, the actions of the UN Committee charged with implementing the Convention on the Elimination of All Forms of Discrimination Against Women, or “CEDAW.” The goal of CEDAW – to eliminate injustice, persecution and abuse of women – is laudable. But, in the course of pursuing these laudable goals, the Committee labels motherhood a harmful stereotype and goes out of its way to discourage childbearing. When nations attempt to follow the admonition in Article 25 of the Universal Declaration of Human Rights that motherhood (and the correlative right of childbearing) deserve special protection and care, the Committee complains that such efforts are “paternalistic” and “oppressive” because encouraging motherhood discourages women from seeking (ostensibly more valuable) paid work. Similarly, the Committee instructs Western European countries with below replacement birth rates and imploding populations to work harder to get women into the full-time work force so as to “eradicate stereotypical attitudes.”<sup>13</sup>

Deconstruction continues with dramatic alterations to the historic understandings of childhood by the Convention on the Rights of the Child (or CRC). Rather than an inexperienced minor in need of care and direction, the child is “reinvented” as an “autonomous rights bearer” freed (to one degree or another) from parental control, guidance and support. The CRC asserts that its purpose is to ensure children’s well being – again a laudable goal. But, after reciting the special care and protection that children must be accorded, the Convention establishes – not protective rights – but autonomy rights (which may include free speech access to pornography and such “liberties” as “sexual expression”) that can harm rather than strengthen children.<sup>14</sup>

Perhaps the most controversial step in the international deconstruction of the natural family is the assertion that there is nothing unique about the relationship between a man and a woman; instead, there are “various forms of the family.” Numerous international documents recite that “[i]n different cultural, political and social systems, various forms of the family exist.” On one level such language is absolutely correct. The family has always included single-parent households, households

involving stepchildren, and those embracing aunts, uncles, grandparents and other inter-generational relationships. But the international assertion is more expansive – the very concepts of “family” and “marriage” have *nothing to do* with childbearing or procreation. So understood, any group can claim marital status.

To the extent that this deconstructionist agenda succeeds, there is good reason to believe that human suffering around the world will increase. Whether the measure used is physical and mental health, educational achievement, economic success, alcoholism and substance abuse, or average life expectancy, substantial evidence suggests that stable, natural marital unions promote the health, safety and social progress of women, men and children. There is *no* reliable evidence, furthermore, that the “alternative family forms” which have received so much attention reliably produce these same benefits – either for individuals or society as a whole. On the contrary, the available sociological evidence (considered as a whole) demonstrates that each deviation in family structure from life-long marriage between a man and a woman increases the likelihood of a broad array of negative outcomes for men, women and children.

Not every family (particularly through the generations) will be fortunate enough to be founded upon stable, natural marital unions – and in some circumstances, such as marriages involving serious forms of abuse, marital dissolution may be wise. But, despite deviations and human failures, the model itself (as shown by the course of history and mountains of current research) is the surest recipe for personal and social progress. Moreover, the negative consequences of departing from the model are particularly acute for women and children.

Accordingly, to decrease human suffering – particularly for women and children – we must halt further deconstruction of the family. And this brings me to my next topic: the possibility that we can alter the international community’s current course.

### III. The Doha Conference Reaffirms the Universal Declaration of Human Rights

I have explained that (1) the international norms are beginning to shape the content of national laws in countries around the world and (2) some of these new norms are being used to deconstruct longstanding notions of family life. These two points raise a very serious question indeed: How should we respond?

My experience as Managing Director of the World Family Policy Center during the past nine years suggests one possible answer. The family was subjected to deconstruction when academicians, activists and advocates of that approach vigorously engaged in international legal processes. The still-ongoing deconstruction can be slowed, and perhaps reversed, by similar action on the part of those who believe in – and understand – the meaning of Article 16(3) of the Universal Declaration of Human Rights. The Doha International Conference for the Family is an outstanding example of the possibilities of such efforts.

The Doha International Conference for the Family was a complex, year-long series of events organized by the World Family Policy Center with the assistance of various governmental and non-governmental partners. Meetings were organized and conducted by the Center in Geneva, Switzerland; Stockholm, Sweden; and Kuala Lumpur, Malaysia. The Center assisted with major events in Mexico City, Mexico; Cotonou, Benin; Baku, Azerbaijan; and Riga, Latvia. Declarations, papers, essays, personal statements, findings and proposals for action developed at these events were collected by the Center and two significant reports were prepared. The first, entitled *The World Unites to Protect the Family*, reports the results of over 200 community meetings in 34 nations. The second, entitled *The Family in the Third Millennium* provides an initial look at the more than 2,000 pages of global scholarship and academic findings developed during preparatory proceedings.

The Doha Conference culminated in an intergovernmental meeting in Doha, Qatar, on November 29-30, 2004. At that meeting, governmental representatives negotiated and adopted the

Doha Declaration – which reaffirms long-standing legal norms related to family life. On December 6, 2004, the UN General Assembly adopted a consensus resolution formally noting the Doha Declaration – but not without a few grumbles.

The European Union, in particular, was shocked that an actual international conference had reaffirmed such “outdated notions” as marriage, motherhood, the importance of encouraging child bearing, and the centrality of cultural and religious values. European diplomats bristled at the idea that Article 16 of the Universal Declaration of Human Rights had current relevance. This objection, of course, could not be put so explicitly. And, precisely because the Doha Declaration merely (albeit wisely) reaffirms long-standing fundamental understandings related to the family, the European Union – in the end – could not block the General Assembly from taking note of the Doha Conference. As a result, the outcomes of the Doha Conference, including the Doha Declaration, takes their place in the canon of declarations, platforms and agendas from which international legal norms are derived by political leaders, judges and lawyers.

The first International Year of the Family in 1994 ended with international assertions that were deeply troubling. The UN General Assembly concluded the 10<sup>th</sup> Anniversary Celebration of this Year in 2004 by taking note of a Declaration that charts a completely contrary course. This development is significant – indeed, astonishing.

The Declaration reaffirms commitments of the international community to the natural family, perhaps most importantly Article 16 of the Universal Declaration of Human Rights. Article 16 embodies fundamental truths that, for too long, have not been given their deserved attention and respect. It declares that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.” This short assertion expertly reflects wisdom distilled from the entire course of human history.

As reflected in the precise and elegant terms of the Universal Declaration, the family is not merely a construct of the human imagination. The family has a profoundly important connection to nature. This connection begins with the realities of reproduction, but extends to the forces that shape civilization itself. It encompasses, among other things, the positive personal, social, cultural and economic outcomes which current research suggests flow from a man learning to live with a woman (and a woman learning to live with a man) in a committed marital relationship. The family, in short, is the “natural and fundamental group unit of society” precisely because mounting evidence attests that the survival of society depends upon the positive outcomes derived from the natural union of a man and a woman.

The Doha International Conference for the Family has laid a much-needed foundation for future cooperative efforts by governments, non-governmental organizations, research institutions, academicians, faith communities and members of civil society. The extensive, interlocking activities of the Doha International Conference for the Family provided a broad range of actors in the international community with important opportunities for recommitment to “the natural and fundamental group unit of society.” The data, scholarship, legal analysis and ideas gathered during the Conference point to hopeful new policies for the families of the world. And, in a way that took such formidable opponents as the European Union by surprise, the Doha Declaration provides an important counter to the deconstructionist rhetoric that has prevailed in similar documents for the past two decades.

Perhaps most importantly, the Conference has demonstrated that men and women, fathers and mothers, from all cultures and from all political and religious backgrounds *can* come together to preserve society’s most fundamental unit. There is an astonishing amount of work yet to do, but the Doha International Conference for the Family provides clear hope that we can link arms with cultures around the world to successfully complete that work.

Which, of course, brings me to my final point, the need to take action.

#### IV. Take Action, “Stand Up to the Fire!”

The meaning of family in the international legal system has been revised and redefined because academicians, activists and advocates have vigorously engaged the international lawmaking process – usually without the knowledge of ordinary people who are busily engaged in rearing their families. This still-ongoing revisionist process can be slowed, and perhaps reversed, by similar action on the part of those who believe in – and understand – that the “family is the natural and fundamental group unit of society.” Universal Declaration of Human Rights, Article 16(3).

The situation reminds me of a story told by my Great Uncle Joseph Gundersen. His father, my Great-Grandfather Thomas Gundersen, was a blacksmith. He knew how to make useful things out of iron: nails, hinges, wheel rims and horse shoes – the simple things that improved the quality of ordinary life. Great-Grandpa taught Uncle Joe, who he called “Dodi Boy,” how to be a blacksmith. It wasn’t easy.

Uncle Joe didn’t like the heat and he was afraid of the fire. He had to stand by the hot oven, take the iron out of the fire and put it on the anvil. Then he had to strike the iron with a heavy hammer. Sparks would fly and burn his face and arms. The smoke would sting his eyes and the heat covered him in drenching sweat. When he would shrink from the pain, Great-Grandpa would shout, “Stand up to the fire, Dodi Boy! Stand up to the fire!”

Uncle Joe learned to stand up to the fire. When he did, when the sparks didn’t frighten him and the sweat was a sign of accomplishment and not oppression, he forged useful things out of iron: nails, hinges, wheel rims and horse shoes – the simple things that improved the quality of ordinary life.

We must stand up to an intensely hot, global furnace. The fire of academic debate is forging the international laws that will increasingly govern many aspects of ordinary human life. This forge,

left unattended, will almost certainly produce tools that will threaten not just the periphery, but the very core, of family life. Like Uncle Joe, we may not like the heat. We might be afraid of the sparks. We could prudently wish to shrink from the effort and the sweat associated with any approach to this furnace.

But failure to stand up to this fire will almost certainly result in the forging of dangerous tools indeed. Those who cherish the fundamental nature of the family, who understand the importance of preserving marriage and promoting the right of every child to have both a father and a mother, must forge an international legal system that respects and protects the “natural and fundamental group unit of society.” By doing so, we can produce results stronger and more precious than iron: generations of mothers and fathers, sons and daughters, grandparents and grandchildren, who will reap the blessings of life on this grand and great earth.

No task in this increasingly complex world is more important.

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<sup>1</sup> Universal Declaration of Human Rights, Article 16(3).

<sup>2</sup> See, e.g., Brian Whitaker, “Fundamental Union: When it comes to defining family values, conservative Christians and Muslims are united against liberal secularists,” *The Guardian*, January 25, 2005, <http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,1398055,00.html> (last visited on January 26, 2005).

<sup>3</sup> UN General Assembly Resolution 59/111 (December 6, 2004) (noting outcomes of the Doha International Conference for the Family).

<sup>4</sup> Letter dated 7 December 2004 from the Charge d’affaires of the Permanent Mission of Qatar to the United Nations addressed to the Secretary General, A/59/599 (December 8, 2004) at Appendix A (Doha Declaration).

<sup>5</sup> Universal Declaration of Human Rights, Article 16(1).

<sup>6</sup> Nafis Sadik, *Reflections on the International Conference on Population and Development and the Efficacy of UN Conferences*, 6 COLO. J. INT’L ENVTL. L. & POL’Y 249, 252-53 (1995) (“More than any previous events of their kind, these conferences have fostered the mobilization and participation of civil society and the private sector in the affairs of the international community. . . . This process has nurtured the growth of democracy at the national level and democratized processes at the international level, increasing their transparency and accountability”).

<sup>7</sup> For an extensive discussion of the growth and impact of international law and its influence on domestic policy, see ESTER RASBAND & RICHARD WILKINS, *A SACRED DUTY*, 111 (Bookcraft 1999).

<sup>8</sup> See, e.g., Convention on the Rights of the Child; Rome Statute of the International Criminal Court at art. 25 (“The Court shall have jurisdiction over natural persons pursuant to this Statute,” and such persons “shall be individually responsible and liable for punishment in accordance with this Statute”).

<sup>9</sup> Conference documents are viewed as significant international instruments because they are the result of consensus, following much debate and deliberation. Hurst Hannum, *Human Rights*, in 1 UNITED NATIONS LEGAL ORDER 319 & 336, note 77 (Oscar Schachter and Christopher C. Joyner, eds. 1995); see also James C.N. Paul, *The United Nations and the Creation of an International Law of Development*, 36 HARV. INT’L L.J. 307, 315 (1995) (“Because world conferences provide potential opportunities for global popular participation, expert consultations, and, sometimes, vigorous debate, they can in theory, become unique vehicles to elaborate norms [cast in the form of legal instruments] governing development.”) As such, conference declarations are imbued with a strong expectation that members of the international community will

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abide by them. As this expectation is justified by state practice, including activities within the UN organization, the principles of the document may – by custom – become binding upon a state. *Id.*

<sup>10</sup>Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, 10 (Hurst Hannum, ed. 1992, 2nd ed.). (Customary international law is defined as a consistent practice in which states engage out of a sense of legal obligation.)

<sup>11</sup>Higgins, *The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System*, quoted in Frederic L. Kirgis, Jr., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING, 341 (Second Ed. 1993).

<sup>12</sup>See, e.g., Richard G. Wilkins, *Bias, Error and Duplicity: Domestic Law and United Nations Conference Agreements*, THE WORLD & I, 287-305 (December 1996) (reprinted in 34 AUSTRALIA AND WORLD AFFAIRS 23 (Spring 1997); 35 AUSTRALIA AND WORLD AFFAIRS 38 (Summer 1998)) (noting the importance abortion and family structure arguments played in the negotiation of the Habitat Agenda).

<sup>13</sup>U.N. Docs. A/55/38 Part One, paras. 311-12 (Germany); A/54/38/Rev.1, Part Two, para. 259 (Spain); A/52/38/Rev.1, Part Two, paras. 215-17 (Luxembourg).

<sup>14</sup>The recommendations contained in the “Report of the Youth Forum ICPD +5” illustrate this point. The Report’s first recommendation for action calls for “instruction” before “the end of primary school” on “sexual and reproductive health and rights.” Under the heading of “Sexual & Reproductive Health, Human Rights,” the Report states that:

Comprehensive sexual education in schools should be mandatory at all levels. This should cover sexual pleasure, confidence and freedom of sexual expression and orientation.

Report of the Youth Forum ICPD +5, The Hague, Netherlands 7 (Feb. 1999).

“Mandatory” sexual education in such matters as “sexual pleasure” and homosexuality (encompassed by required training in “freedom of sexual expression and orientation”) runs counter to values of Islam and Christianity – which stress the importance of sexual chastity and forbid homosexual relationships. Qur’an 26:160-73; 1 Corinthians 6:9. Such “education,” furthermore, can be expected to undermine not only the moral authority of established religion, but the primary rights of parents who (confronted by “mandatory” sexual training) will face considerable restraints in passing on their own moral codes to their children.