Violence against Women and the Special Rapporteur on Traditional Practices affecting the Health of Women and the Girl Child

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The UN Special Rapporteur on Violence against Women and the Special Rapporteur on Traditional Practices affecting the Health of Women and the Girl Child, jointly made the observation (in UN Doc. E/CN.4/Sub.2/1999, para. 75) in the case of a woman of Malian origin who had been sentenced to prison in France for Female Genital Mutilation that;

‘the importance attached to certain traditional practices in some communities must be taken into account … [the Rapporteurs] firmly and unequivocally condemned all practices that violate individuals' physical integrity … [but] felt nevertheless that punishments and sentences based on value judgments could sometimes be counter-productive and encourage communities to close ranks and cling to practices which ... are the only means they have of expressing their cultural identity. Such practices should not be condemned in the courts except as a last resort when education, information and the proposal of alternative rites ... have not been successful.’

What measures should governments take to fulfill their international obligations in such cases?

Should they consult with affected ‘traditional communities’ and, if so, with which persons in those communities?

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Critical Reflections over the Joint Observation

The context in which the two UN Rapporteurs made their observation clearly indicates the practical predicament that western liberal democracies, with well-established legal systems and elaborate notions of citizenship resting on individual rights and obligations, face when called to serve justice in cases presenting alien cultural practices. Scholarly literature has translated this predicament as a conflict between the universality of human rights, enshrined in a variety of international documents, and cultural relativity – in ethno-cultural, religious or ‘racial’ terms. While numerous scholars have attempted to offer solutions to the dilemma that increasingly more states face in the context of the global movement of persons, the latter have remained bound to act within specific legal frameworks. The focus of this section is to highlight the ways in which states observe human rights standards and apply them to individual cases of human rights violations.

The case involved a woman originally from Mali, sentenced to prison in France for female genital mutilation. The observations of the UN Rapporteurs revealed a whole series of legal principles. First of all, they advocated the need to observe cultural specificities, i.e. acknowledge the importance of tolerance of cultural differences and, inherently, refrain from racism\(^1\): “the importance attached to certain traditional practices in some communities must be taken into account”. However, they did not explain the ways in which and the extent to which these “traditional practices” should affect the outcomes of the legal proceeding.

Secondly, the Rapporteurs upheld the inviolability of (some) fundamental human rights, in this case the right to remain free from cruel treatment\(^2\). According to some, the “special protection of non-derogable rights”, among which the aforementioned one, is a prime criterion in the development of conditions that could potentially legitimate the recognition of regulatory powers held by minority cultural and religious communities\(^3\). In other words, the supreme status of certain human rights, deemed universal and inviolable, is to be observed irrespective of cultural specificity and practices.

Thirdly, the sentence was deemed to have been grounded in “value judgements” and the Rapporteurs drew attention to the fact that such legal proceeding “could sometimes be counter-productive”. In other words, the Rapporteurs pointed to the fact that cultural insensitivity to the importance that certain customs retain, sometimes instrumental in maintaining boundaries of minority identities, may engender stronger attachments to such practices. The obvious question is whether and to what extent female genital circumcision performed on girls in Mali is instrumental in maintaining a distinct ethno-cultural identity. Should cultural sensitivity be set aside if proven that female genital mutilation was not key in maintaining a distinct cultural identity? The observation explicitly stated the culturally biased character of the French legal system, pointing out cultural insensitivity, thus reiterating the importance of cultural relativism and making the assumption that the procedure is intimately related to a distinct Malian identity.


Fourthly, however, the Rapporteurs revealed a highly problematic agenda of nation states: assimilation. Condemnation in cases of (in this case) genital mutilation should be a last resort after “education, information and the proposal of alternative rites ... have not been successful.” In other words, such practices should be eradicated among members of immigrant communities through the “civilising” potential of education, information and the proposal of alternative rites, in brief, assimilation.

What do these observations communicate about the place of cultural difference in the context of a universal human rights regime? (1) Nation states must be culture-sensitive and observe cultural relativism in legal proceedings. (2) There exists a list of individual rights, applicable to everyone, and which ethno-cultural and religious minority communities must observe, even against their customs. (3) Assimilation is a legitimate process targeted at nationals/residents with immigrant backgrounds, and the aim of which is, among others, to do away with customs that breach these universal and inviolable human rights.

**Obligations and Dilemmas of Nation States: Universalism versus Diversity**

The provisions of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) target – overall – the equal treatment of men and women

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4 The issue of assimilation is highly problematic because – as Volpp points out – it has been seen as an oppressive practice performed by governments. In addition, however, Okin’s argument that women’s situation in “more patriarchal minority cultures” would improve if this culture withered away is also problematic, as Volpp points out, due to its assumptions about women and their fate in such cultures, as constructed by Western (American) feminists. See L. Volpp, Feminism versus Multiculturalism. *Columbia Law Review*, 101 (5): Jun. 2001, 1181-1218.
in a variety of domains (politics\textsuperscript{5}, paid labour\textsuperscript{6}, education\textsuperscript{7} etc.) and stipulate the ban on activities that disproportionately affect women globally and violate their fundamental human rights, e.g. trafficking and forced prostitution\textsuperscript{8}. Most importantly, however, the Convention highlights the obligation of states to “modify the social and cultural patters of conduct of men and women” to address sexism and gender discrimination, as well as to enhance paternal involvement in child-raising\textsuperscript{9}. This article eloquently portrays a facet of the conflict between the universalism of human rights, inspired by western liberal thought and grounded within \textit{ethnical communities’} void of perpetual threats at the lives of individuals, and ethno-cultural and religious diversity, as this article in particular calls for a specific model of social engineering to tackle patriarchy\textsuperscript{10}. As Volpp points out, the notion that immigrant and Third World women live in more oppressive and patriarchal societies than their western sisters is a western construction and obscures not only feminist dimensions of these societies and women’s agency in general, but phrase such women’s oppression in cultural terms \textsuperscript{11}.

The Convention (no. 169) concerning Indigenous and Tribal Peoples in Independent Countries\textsuperscript{12} fuels another facet of the discussion regarding universal human rights, individual in nature, and diversity, i.e. the legitimacy and desirability of collective rights for minority groups. Governments have a mandate to intervene in a variety of ways to ensure “the full realisation of the social, economic and cultural rights of these

\textsuperscript{5} The United Nations Division for the Advancement of Women, \textit{The Convention on the Elimination of All forms of Discrimination against Women}, art. 7-9, 1979, retrieved March 2\textsuperscript{nd} 2008, \url{http://www.un.org/womenwatch/daw/cedaw/text/eConvention.htm#intro}.
\textsuperscript{6} Idem, art. 11.
\textsuperscript{7} Idem, art. 10.
\textsuperscript{8} Idem, art. 6.
\textsuperscript{9} Idem, art. 5.
\textsuperscript{11} Volpp, \textit{op. cit.}, pp. 6-16 and 25-35.

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peoples,”\textsuperscript{13} and on of the ways to ensure this is by consulting “the peoples concerned, … and in particular through their representative institutions”\textsuperscript{14}. Beyond the question of how these peoples are to be defined\textsuperscript{15}, the problem of representation arises. Are women and issues that concern them included here? Furthermore, the Convention also stipulates that such people may – within the limits of universal human rights – exercise the (collective) right to punish offences according to “methods customarily practices by the peoples” and that their customs in criminal cases shall inform legal proceedings\textsuperscript{16}. The former principle, i.e. that of “\textit{shared} jurisdiction” between the state and minority groups, is advocated by Shachar as a way to empower women, in other words conferring enhanced agency to minority women\textsuperscript{17}. However, as Scheinin points out, the practicalities of this notion of “\textit{shifting} jurisdictions” are unclear\textsuperscript{18}. The latter principle is the formulation of what was advocated by the two Rapporteurs, discussed in section I., i.e. sensitivity towards the meanings and significances that customs carry in minority cultures. The dilemma is the same: how is cultural sensitivity to affect in practice the outcome of criminal cases? Also, should these principles apply in the case of non-indigenous groups, e.g. immigrant communities? The Declaration on the Elimination of Violence against Women stipulates that “states should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.”\textsuperscript{19}

\textsuperscript{13} Idem, \textit{art. 3}.
\textsuperscript{14} Idem, \textit{art. 6}.
\textsuperscript{15} Scheinin, \textit{op. cit.}, p. 223.
\textsuperscript{16} The United Nations Office of the High Commissioner for Human Rights, \textit{op. cit.}, \textit{art. 11-12}.
\textsuperscript{17} A. Shachar, Multicultural Jurisdictions: Cultural Differences and Women’s Rights, cited in M. Scheinin and R. Toivanen, \textit{op. cit.}, pp. 224-226.
\textsuperscript{18} Idem, p. 225.
This document reflects the conditional nature of cultural sensitivity behind the universalism of human rights as enshrined in international covenants today, pointed out in section I. Violence against women, as an act that violates some fundamental human rights, is intolerable on grounds of cultural difference and specificity, and cannot be enacted as punishment, even if congruent with customs of the “people” the woman belongs to.

Not surprisingly, the various provisions regarding minority groups in nation states reflect the observations worded by the two Rapporteurs, discussed earlier. It is also no surprise that these provisions reflect the contradictions and difficulties revealed in the observations: while cultural practices and customs of minority groups are to be observed, even included in the framework of a shared jurisprudence, they are limited to those practices that do not violate fundamental human rights, e.g. the right to life or the right to be free of torture and cruel behaviour. The origins of these contradictions and dilemmas are explored in the subsequent section.

**Contradictions and Dilemmas of the Contemporary Human Rights Regime**

The issue of difference within (political) societies is not a new phenomenon. However, the ways in which contemporary nation states tackle ramifications of ethno-culturally and religiously diverse societies are unprecedented. The contemporary human rights regime, some of its stipulations exposed in earlier sections, has been facing various dilemmas originating in difference, often responding with contradictory provisions. The present discussion aims to elicit some dimensions of these dilemmas pertaining to women in a variety of settings.
One contentious issue is the notion of universalism of human rights, overwhelmingly individual. This has been seen as problematic, historically, by anthropologists, who early pointed to the need to tolerate a diversity of cultural norms and practices and abstain from generating hierarchies among cultural ideals. Moreover, scholars of the discipline also pointed out the different significance of the individual in the wider collective context: some cultures valued the community over the individual. Human (individual) rights cannot be applied universally because life, the individual and painful customs carry different significances cross-culturally.

However, there is another argument against universalism: it is not individual rights governing relationships among individuals and those between individuals and the state, respectively that have generated the ‘most’ civilised societies on the face of the planet, but rather the underlying “ethical communities” that subsequently generated inclusive sets of rights. Where “ethical communities” resonate different values, different notions of the Good govern relationships among individuals, and those between individuals and the state. It is the tacit recognition of this fact that resonates in the recommendations concerning the options for the future of minority religious groups in the Muslim Middle East. International (liberal western) standards for minority rights, including women’s rights, remain redundant when the teaching of the Qur’an define what Good means in these societies. As a result, the solution lies in the emancipatory potential of Islamic religious teaching rather than the contemporary international human rights regime.

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21 Brown, op. cit., pp. 111-114 and 117-120.
23 Idem, p. 725-726.
In a narrower sense, the issue of universalism versus cultural specificities translates – as pointed out in section II. – into the clash between particular cultural practices concerning women (e.g. genital mutilation, violence against women, women’s ‘murder’, control of their sexuality, trafficking etc.) and human rights norms concerning the individual, in particular in the context of liberal democratic states. How are these to be negotiated? The UN Rapporteurs, reflecting considerations formulated in the Declaration on the Elimination of Violence against Women, as well, observe that cultural specificities are to observed, but not at the expense of fundamental human rights violations. Kymlicka’s liberal understanding of multiculturalism rests upon such an “abridged” notion of multiculturalism, solving the dilemma: only groups internally liberal may enjoy collective rights\(^\text{24}\). Western feminists have been historically critical of cultural sensitivity because they have argued that it occurred at the expense of immigrant and Third World women’s welfare\(^\text{25}\). Their activism in the Third World, in particular, does carry the flag of universal human rights\(^\text{26}\). However, women’s movements in the Middle East for instance, have recognised the feminist potential of Islamic teachings, a finding demonstrating that such western perspectives do in fact obscure feminist agency in non-western parts of the world\(^\text{27}\).

The genuine debate between ‘universalists’ and ‘multiculturalists’ can be best understood in terms of agency – its potency, its conditionality, the levers conditioning it – in sanctioning behaviour. The focus on the ability to act in particular (culturally legitimate) ways and the sanctions applicable to actions not legitimated provides a


\(^{25}\) Volpp, op. cit., pp. 1185-1195.

\(^{26}\) Brown, op. cit., p. 104.

\(^{27}\) Volpp, op. cit., pp. 1192-1194.
clear image of where the fault lines between rights and cultural specificities is. In this sense, the Universalist project of human rights, enshrined in UN conventions and declarations, has explicit aims to confer individual agency to women, extracting them from their cultural milieux. The culture-sensitive project, whose most prominent legal expression is the granting of collective rights, aims to confer enhanced agency to collective entities, although it is unclear whether at the expense of individuals. The question begging for an empirically grounded answer is whether the latter affects women’s agency as individuals, as well as a group inside a collective entity across countries, and if so, in what ways.

**Conclusion**

The contentious issue of culturally legitimated practices violating fundamental human rights has been engaged with across disciplines for over half a century. It is becoming increasingly more important given the degrees of individual mobility. However, the international human rights regime, inspired by western liberal thought, has remained lamentably unsuccessful in ensuring individual welfare across the world. Alternative options seem to lie in local solutions and greater sensitivity to local “ethical communities”, as universalism has no purchase across all cultural specificities and – as Brown demonstrates – there is no legal possibility to generate a universally accepted set of claims for individuals and / or collectivities.

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