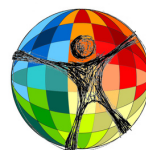


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# What's the Harm? CEDAW and the Relationship Between Human Rights and Culture

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# ABSTRACT

This paper explores the concept of harmful cultural practices and what it reveals about the underlying relationship between women's rights and culture. In the decades after states adopted the *Convention on the Elimination Against All Forms of Discrimination Against Women*, human rights advocates have aimed to eliminate so-called harmful cultural practices that discriminate against women or harm the physical and moral health of women. The *Convention* was a landmark in expanding the scope of discrimination to also recognize that social and cultural conditions affect the status of women and can contribute to discrimination. Yet the universalist aspirations of such human rights instruments obscures assumptions grounded in one geographically specific ideology—Western liberalism—to the exclusion of others. Human rights advocates and institutions often essentialize culture to a regressive obstacle, especially when encountering the exact non-Western cultures excluded from the process of creating human rights norms. As a result, states can be pitted between the international community and their own populations, and the supposed victims of harmful cultural practices are silenced and denied their agency. This paper supports a new approach that moves away from the harmful cultural practices construct towards a model that recognizes culture as a medium to facilitate gender justice aspirations in a manner that centralizes the role of women in shaping priorities and actions towards achieving those goals within their communities.

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## LIST OF ABBREVIATIONS

CEDAW = *Convention on the Elimination of All Forms of Discrimination Against Women*

CEDAW Committee = Committee on the Elimination of Discrimination Against Women

CRC Committee = Committee on the Rights of the Child

FGM = Female Genital Mutilation

GC = General Comment

GR = General Recommendation

UN = United Nations

UNICEF = United Nations Children's Fund

## I. Introduction

During the course of my internship,<sup>1</sup> I was confronted with cases related to so-called harmful cultural practices. One case that particularly struck me related to a customary belief around the River Ofin in rural central Ghana. According to this custom, a river god "banned" women and girls from crossing the river while menstruating and on Tuesdays, resulting *inter alia* in some girls missing significant portions of their education each month.<sup>2</sup> Media reports situated the custom within the broader context of female absenteeism during menstruation across sub-Saharan Africa and remarked upon the presence of "myths and taboos surrounding menstruation" in other parts of the world, like India.<sup>3</sup> The menstrual hygiene ambassador for UNICEF was even quoted as saying that "we need to ask for some form of accountability from these gods who continue to bar a lot of things from happening."<sup>4</sup>

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<sup>1</sup> The author would like to thank the Institute for Human Rights and Development in Africa for the opportunity to work on such matters and for providing inspiration and support for this paper. The views of the author are his own do not represent the views of IHRDA.

<sup>2</sup> See Varasha Saraogi, "No School, Period! Menstruating Ghanaian Girls banned from River Crossing", *Reuters* (18 January 2018), online: <[www.reuters.com/article/us-ghana-girls-menstruation-idUSKBN1F12BT](http://www.reuters.com/article/us-ghana-girls-menstruation-idUSKBN1F12BT)>.

<sup>3</sup> *Ibid.*

<sup>4</sup> See "Menstruating Girls banned from Crossing Ghana River", *BBC News* (11 January 2018), online: <[www.bbc.com/news/world-africa-42652314](http://www.bbc.com/news/world-africa-42652314)>. For the original untranslated quote in West African Pidgin English see "Ghana: River

On its face, the practice seemed strange to me and did not conform to my beliefs or way of seeing the world, and certainly, I thought, something needed to be done to ensure the girls' right to access education. But I also wished to be respectful of cultures and perspectives that are different from mine and wanted to at least be sure to not dismiss the custom out of hand. I then confronted several questions: For how long had these practices been enforced? Why doesn't the river god want women and girls crossing at those times? Is the ban enforced by a human authority, whether a traditional leader or any private actor, or is it that women and girls refrain entirely from crossing out of a deep-seated fear the river god will smite them? Is the belief tied to a particular ethnic group or is it just based on geography? Or a combination of both? To these, I was faced with a dearth of answers. For as many questions as I had, there was little record of this practice besides media coverage and non-profit reports mostly repeating the same Reuters and BBC reports cited above.<sup>5</sup>

Stranger yet, I ended up in the position of assessing the custom. I, a white man fresh out of my first year of law school, would judge a cultural practice involving women and girls whom I did not—and will likely never—meet living in a region of a country that I have never visited. I know next to nothing about their cultural context save for the existence of this custom, about which neither primary accounts nor secondary anthropological research is readily available. All of this, while I was physically located across an ocean, working only from a laptop in a small apartment in Philadelphia.

Luckily, I was only an intern! It is a heavy burden to pass judgement on the harmfulness of a practice when so removed from the situation. And yet, distance is part of international human rights law's structure. The international institutions have a mandate to receive reports from states, assess the sufficiency of efforts to advance human rights within the state, and offer recommendations.

This paper will examine the notion of harmful cultural practices, specifically as it is understood in the context of women's rights and, in so doing, interrogate the utility of making sweeping

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Gods say make School Girls no cross am if dem dey menstruate", *BBC News Pidgin* (11 January 2018), online: <[www.bbc.com/pidgin/tori-42653267](http://www.bbc.com/pidgin/tori-42653267)>.

<sup>5</sup> See e.g. Daniele Selby, "A Ban by a 'River God' May Keep Ghanaian Girls Out of School During Their Periods", *Global Citizen* (12 January 2018), online: <[www.globalcitizen.org/en/content/ghana-river-god-girls-period-menstruation-school/](http://www.globalcitizen.org/en/content/ghana-river-god-girls-period-menstruation-school/)>.

characterizations about culture *in abstracto* for achieving human rights goals.<sup>6</sup> After a brief historical overview of the term's development, I will discuss how the international system's normative and universalist approach to understanding the interaction between women's rights and culture undermines its own effectiveness. As support, I will employ examples of problems related to harmful cultural practices available in academic literature. Though most examples will arise from cases in sub-Saharan Africa, this is more a product of my internship experience having been in the region than of any intentional regional specificity. I will then seek to explore means of recontextualizing women's rights and harm to greater accommodate a cohabitation of human rights aspirations and cultural contexts, with the goal of understanding culture as a medium for women's empowerment instead of an obstacle.

Throughout the course of this paper, I will employ a term whose definition is amorphous, contested and controversial: the "West." In terms of geography, the West describes a location of Europe and its former settler colonies, such as the United States, Canada and Australia. However, an exact list of which countries would constitute the West is up for debate, particularly regarding the inclusion of Eastern Europe and Latin America. Roughly synonymous with terms like "first-world" and "Global North," it carries more explicitly cultural connotations. That is not to say that there is an inherent definition of what constitutes "Western culture" and its use in this analysis does not endorse an essential veracity of hard east-west-south divides. Edward Said<sup>7</sup> notably highlighted that this distinction between what he calls the "Occident" and the "Orient" (what I will call the "West" and "non-West") is not inherent and is instead a construct based on the latter's understandings of history and thought. While assuming an essential character to either the "West" or the "non-West" as fully distinct from one another would be factually false, this analysis will employ this framework to demonstrate that the logic underpinning how CEDAW and human rights actors interact with cultural considerations serve to perpetuate systems of power premised on such a distinction.

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<sup>6</sup> Provisions against harmful cultural practices also prominently feature in children's rights regimes and activism, and many of the practices deemed harmful are enacted upon girls under the age of 18. Given a different set of issues related to women's and children's rights, notably on the matter of consent and autonomy, this paper will only focus on the former.

<sup>7</sup> *Orientalism* (New York: Vintage Books, 1978) at 5.



## II. The International Women's Rights Framework and "Harmful Cultural Practices"

The issue of harmful cultural practices became prevalent following the *Convention on the Elimination of All Forms of Discrimination Against Women*<sup>8</sup>. Since its adoption in 1979, it has been nearly universally accepted as the leading authority for women's rights at the international level, with 189 United Nations member states ratifying the treaty.<sup>9</sup> At the time of its ratification, CEDAW was considered a breakthrough for women's rights and human rights generally because of its broader scope than instruments before it. The Convention recognizes that gender discrimination continues despite previous international instruments' anti-discrimination principles.<sup>10</sup> The previous, gender-neutral approach to gender discrimination enshrined in instruments like the *International Covenant of Civil and Political Rights* was deemed insufficient to addressing the full scope of the problems facing women globally, thus necessitating a new, gender-specific instrument.<sup>11</sup> CEDAW, therefore, envisages a framework for realizing substantive gender equality through a holistic approach that seeks not only to transform legal and political structures but economic and socio-cultural structures as well.<sup>12</sup>

CEDAW contains two important provisions regarding states' obligations to end gender discrimination as it relates to culture. The first, article 2(f), provides that states parties take "all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute

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<sup>8</sup> 18 December 1979, 1249 UNTS 13 [CEDAW].

<sup>9</sup> See "8. Convention on the Elimination of All Forms of Discrimination Against Women" (last visited 13 December 2021) at 1, online (pdf): *United Nations Treaty Collection* <[treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf](https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf)>.

<sup>10</sup> See CEDAW, *supra* note 8, preamble.

<sup>11</sup> Anne Hellum & Henriette Sinding Aasen, "Introduction" in Anne Hellum & Henriette Sinding Aasen, eds, *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge: Cambridge University Press, 2013) 25 at 2.

<sup>12</sup> See *ibid* at 2-3.

discrimination against women.”<sup>13</sup> The second, article 5(a), requires states parties to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”<sup>14</sup> These provisions are based on a fundamental assumption *a priori* that all human beings are rational actors seeking to control their own lives, and that institutions, including notably social and cultural institutions, limit women’s ability to achieve equal autonomy as compared to men.<sup>15</sup>

For as much as CEDAW recognizes the link between human rights and culture, the term “harmful cultural practices” or its synonym “harmful traditional practices” never appears in the text. The term itself rose to prominence in the decades after CEDAW came into force with campaigns by Western feminists, especially from the United States, against female genital surgeries—often termed “female genital mutilation”—practiced as a custom in some parts of Africa.<sup>16</sup> At first, the term was understood to apply to practices related to health or violence against women, though there was no one internationally accepted definition.<sup>17</sup> One of its most prominent uses in an international instrument, in the 1994 *Declaration on the Elimination of Violence Against Women*<sup>18</sup>, only mentions “female genital mutilation and other traditional practices harmful to women” as forms of violence within a list without providing any guidance as to what those “other” practices might be.

In practice, with no comprehensive definition for harmful cultural practices, international organizations began contributing

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<sup>13</sup> CEDAW, *supra* note 8, art 2(f).

<sup>14</sup> *Ibid*, art 5(a).

<sup>15</sup> See Rikki Holtmaat, “The CEDAW: a Holistic Approach to Women’s Equality and Freedom” in Anne Hellum & Henriette Sinding Aasen, eds, *Women’s Human Rights: CEDAW in International, Regional and National Law* (Cambridge: Cambridge University Press, 2013) 95 at 110–13.

<sup>16</sup> See Penelope Andrews, *From Cape Town to Kabul: Rethinking Strategies in Pursuing Women’s Human Rights* (New York: Routledge, 2016) at 64.

<sup>17</sup> See Chia Longman & Tasmin Bradley, “Interrogating the Concept of ‘Harmful Cultural Practices’” in Chia Longman & Tasmin Bradley, eds, *Interrogating Harmful Cultural Practices: Gender, Culture and Coercion* (New York: Routledge, 2016) 11 at 12.

<sup>18</sup> GA Res 48/104, UNGAOR, 48th Sess, Supp No 104, UN Doc A/RES/48/104 (1993).

piecemeal to a growing list of varied phenomena deemed culturally harmful.<sup>19</sup> As a result, the list of cultural practices deemed harmful began to expand beyond the original criteria of health or violence. Everything from polygamy<sup>20</sup> to food taboos and birthing practices<sup>21</sup> have been added to the growing list of harmful cultural practices, often without any specific reasons provided.

This was until 2014 when the Committee on the Elimination of Discrimination Against Women, the treaty monitoring body for CEDAW, and the Committee on the Rights of the Child issued *Joint general recommendation no. 31/18 on harmful practices*.<sup>22</sup> In addition to providing guidance on states parties' obligations to end harmful cultural practices, the Committees also provided criteria for determining when practices can be labelled harmful based on four criteria:

- a. They constitute a denial of the dignity and/or integrity of the individual and a violation of human rights and fundamental freedoms enshrined in the two Conventions;
- b. They constitute discrimination against women or children and are harmful insofar as they result in negative consequences for them as individuals or groups, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to fully participate in society or develop and reach their full potential;
- c. They are traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, based on sex, gender, age and other intersecting factors;

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<sup>19</sup> See Longman & Bradley, *supra* note 17 at 12.

<sup>20</sup> See CEDAW, *General recommendation No. 21: Equality in Marriage and Family Relations*, 13th Sess, adopted 1994 in UN Doc A/49/38 at para 12 [GR 21].

<sup>21</sup> See UN Fact Sheet No 23 OHCHR, "Fact Sheet No 23, Harmful Traditional Practices Affecting the Health of Women and Children" (August 1995) at 1, online (pdf): RefWorld <[www.refworld.org/docid/479477410.html](http://www.refworld.org/docid/479477410.html)>.

<sup>22</sup> CEDAW & CRC, *Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination Against Women and No. 18 of the Committee on the Rights of the Child on harmful practices*, 59th Sess, adopted 04 November 2014, UN Doc CEDAW/C/GC/31-CRC/C/GC/18 [GR/GC 31/18].

d. They are imposed on women and children by family, community members, or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent.<sup>23</sup>

This newer definition encompasses a broader scope for harm than simply health and violence by tying harm to the breach of a right or fundamental freedom and also cements the understanding of harm more clearly into a liberal framework for defining the relationship between human rights and culture focused abstractly on the individual autonomy of women.

### **III. Problematizing Harmful Cultural Practices**

#### *III.1 Human Rights v Culture*

International institutions and human rights advocates often address women's rights and gender equality issues under CEDAW in universalist terms. In documents like CEDAW and GR/GC 31/18, abstract terms like "dignity," "bodily integrity" and "fundamental freedoms" disseminate profusely without necessarily being defined. To the extent that a term like "harm" is defined, it rests on these abstractions without needing further justification, as if the terms are universally understood and to be taken for granted.

This universalism supposedly justifies transplanting Western liberal ideology around the world. Susanne Zwingel<sup>24</sup> highlights that the typical human rights narrative presumes norms, such as those on gender equality, to be formed at a high-level by international institutions and NGOs and adopted by a critical mass of states. These norms then trickle down to form national and local gender equality measures, where full internalization by a given locality is uniform and similar to that of a different locality the world over.<sup>25</sup> This assumption fails to recognize local dynamics that can affect the adoption of norms, and that such

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<sup>23</sup> See *ibid* at para 14.

<sup>24</sup> "How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective" (2012) 56 Intl Studies Q 115 at 118.

<sup>25</sup> See *ibid*.

dynamics can even percolate up to shape new international norms.<sup>26</sup> As such, there is no possible means under the trickle-down assumption to assess which localities have more sway in defining these “universalist” norms.

Postcolonial scholars have remarked that this facially universalist and neutral view of global values masks the Western liberal ideology grounding them. Makau Mutua contends that much of human rights terminology is incomprehensible without being understood in the Western context.<sup>27</sup> The fundamental assumption of human rights discourse is that of individual rightsholders. Notwithstanding that not every society views such an organization as natural, the ideals of “dignity” and “freedom” are context- and situation-sensitive.<sup>28</sup>

In the case of women’s equality activism, Chandra Talpade Mohanty<sup>29</sup> remarks that Western feminism at around the time of CEDAW’s adoption conceptualized women as a unified identity faced with fundamentally the same problem; they are subject to male power that seeks to ensure female dependence and subservience. This is especially acute when addressing women from decolonized countries, whom Western feminists group together on the basis of shared victimhood to colonial oppression.<sup>30</sup> Homogenizing and distilling women’s identity to their subordination *a priori* intends to create solidarity amongst all women around the world, but instead assumes women outside the West are subject to the same sexual politics as within the West and ignores how culture shapes sexual power dynamics.<sup>31</sup>

As values rooted in Western culture are upheld as the standard bearer for state, local and individual actions, non-Western cultures, particularly those with practices that do not align with Western expectations, become othered. This is akin to Said’s analysis on the construction of the “Orient” in which, entirely per a Western framing, the relationship between West

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<sup>26</sup> See *ibid* at 121

<sup>27</sup> See Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) 42:1 Harv Intl LJ 201 at 206.

<sup>28</sup> See Longman & Bradley, *supra* note 17 at 23.

<sup>29</sup> “Under Western Eyes: Feminist Scholarship and Colonial Discourses” (1984) 12:3/13:1 Boundary 2 333 at 339.

<sup>30</sup> See *ibid* at 339.

<sup>31</sup> See *ibid* at 339–40.

and non-West was always one of “a strong and weak partner.”<sup>32</sup> The non-West is subject to the assumption that it is “patently inferior to, then in need of corrective study by the West.”<sup>33</sup> In contrast to the progressive self-characterization of human rights, cultures are cast as irrational, immutable and frozen in a constructed past.<sup>34</sup> They are assigned a moral character as savage and evil, needing to be extirpated to ensure a universal dignity and equality.<sup>35</sup> Cultures in international human rights connote a “primitivist tinge” more associated with rural pastoral life than cosmopolitan urban life,<sup>36</sup> setting up a dichotomy between progressive human rights norms and “backwards cultural practices.”<sup>37</sup>

Unsurprisingly, non-Western cultures are subject to greater scrutiny when compared to Western cultures despite having played a negligible part in shaping the so-called universal norms.<sup>38</sup> Both Chia Longman and Tasmin Bradley<sup>39</sup> and Penelope Andrews<sup>40</sup> recognize, for example, that cosmetic genital surgeries in the West are not subject to the same level of ire from Western feminists as female genital surgeries in Africa, despite both having been, at least at one time or another, considered by some to be practices influenced by culture and enacted upon women in the context of a presumed inferiority. Whether the comparison is apt, it demonstrates that non-Western cultures are treated as static and existing contrary to the human rights regime. Non-Western cultural practices are assumed authoritarian and doctrinaire such that no one who considers themselves part of that culture could question it. They are deemed to enforce male superiority and stereotyped roles of women or paternalistic control in the guise of

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<sup>32</sup> Said, *supra* note 7 at 40.

<sup>33</sup> *Ibid* at 40–41.

<sup>34</sup> See Ellen Gruenbaum, “Epilogue: Harm and Well-Being: Cultural Practices and Harmful Global Practices” in Chia Longman and Tasmin Bradley, eds, *Interrogating Harmful Cultural Practices: Gender, Culture and Coercion* (New York: Routledge, 2016) 193 at 194–95.

<sup>35</sup> See Mutua, *supra* note 27 at 202–03, 205.

<sup>36</sup> Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (New Delhi: Oxford University Press, 2006) at 11.

<sup>37</sup> Zwingel, *supra* note 24 at 120.

<sup>38</sup> See Mutua, *supra* note 27 at 215–16.

<sup>39</sup> *Supra* note 17 at 20.

<sup>40</sup> *Supra* note 16 at 79.

“protection” as it would be understood in a normative liberal society, without any reference to the given cultural context.<sup>41</sup> If within the culture, no one could scrutinize the practices, then necessarily a human rights advocate must take up that mantle on behalf of women.

This (mis)characterization of culture turns human rights obligations and advocacy into a zero-sum game whereby culture is viewed as an inherent obstacle to the full realization of gender equality and non-discrimination. Where a cultural practice is deemed harmful, the impulse must be to eliminate it, often without consideration for the implications for those targeted by such a campaign. The campaigns by Western feminists in the 1980s and 1990s against FGM that brought harmful cultural practices into the zeitgeist have been criticized for ignoring the efforts by African feminists to address the issue while also trying to change the culture itself.<sup>42</sup> Instead of recognizing the existence of different viewpoints, whether compatible or incompatible with their goals, Western feminists instead used their own understandings to challenge male power in Africa without fundamentally abandoning the Western power structure.<sup>43</sup>

Beyond just campaigns, however, the essentialization of culture has found its way into the CEDAW Committee's practice. Both Celestine Nyamu Musembi<sup>44</sup> and Sally Engle Merry<sup>45</sup> have observed a tendency for the Committee to privilege decisive state actions to eliminate cultural practices totally and immediately. Nyamu Musembi noted that Kenya had reformed its laws related to marriage to recognize polygamous and monogamous marriages and provide a mechanism for converting polygamous marriages into monogamous ones, without providing the reverse.<sup>46</sup> Kenya also attempted to codify and regularize marital property rights in the polygamous context.<sup>47</sup> The purpose of these provisions was to recognize the factual presence of polygamy,

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<sup>41</sup> GR/GC 31/18, *supra* note 22 at paras 5–6.

<sup>42</sup> See Andrews, *supra* note 16 at 66.

<sup>43</sup> Mohanty, *supra* note 29 at 351.

<sup>44</sup> See “Pulling apart? Treatment of pluralism in the CEDAW and the Maputo Protocol” in Anne Hellum and Henriette Sinding Aasen, eds, *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge: Cambridge University Press, 2013) 183 at 186.

<sup>45</sup> See *supra* note 36 at 118.

<sup>46</sup> See *supra* note 44 at 189–90.

<sup>47</sup> See *ibid* at 190

ensure women in polygamous circumstances had rights that the legal system could recognize and encourage an incremental shift away from polygamous practices.

Notwithstanding the already essentialist assumption that polygamy is always and necessarily harmful and non-consensual,<sup>48</sup> Kenya's goals aligned with those of the CEDAW Committee. Yet, the Committee was still not pleased with Kenya's legislative actions, viewing it as an endorsement of polygamy.<sup>49</sup> It evokes a certain absolutism that denies states the flexibility to advance women's rights in a manner it believes most effective at addressing the particular concerns of its peoples.

In reality, culture is not static, nor can it be sheltered from exchange with influences beyond itself. That which is "local" is not simply culture without outside influence because cultures continually evolve; it is just as "traditional" as any long-standing cultural tenet for outside ideas and people to enter into the community and influence its culture and customs.<sup>50</sup> Though cultures are instrumental for circumscribing power relations within a community, they are not in and of themselves sole manifestations of the powerful.<sup>51</sup> For as much as culture legitimates power, it can be contested in a manner that allows the culture to change from the bottom up.<sup>52</sup> Ellen Gruenbaum relays the dismay of her Sudanese contacts about the West's fixation on FGM, given, by their assessment, the practice was already on the decline and would likely have likely petered out on its own without the need for outside intervention.<sup>53</sup> Similarly, campaigns in several African countries contesting bride price practices came as the result of efforts by African women themselves to bring about their end.<sup>54</sup>

### *III.2 Subjects and Objects in Human Rights: States and "Victims"*

Yet beyond merely mischaracterizing culture, the top-down liberal institutional understanding of human rights and harmful

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<sup>48</sup> See *ibid* at 187. See also GR 20, *supra* note 19 at para 14.

<sup>49</sup> See Nyamu Musembi, *supra* note 44 at 190–91.

<sup>50</sup> See Zwingel, *supra* note 24 at 122.

<sup>51</sup> See Engle Merry, *supra* note 36 at 9.

<sup>52</sup> See *ibid*.

<sup>53</sup> See *supra* note 34 at 200.

<sup>54</sup> See Andrews, *supra* note 16 at 76.



cultural practices also poses practical problems for those CEDAW is meant to address: states and women, particularly those in non-Western cultural contexts. Their roles in the human rights narrative can be best understood using Mutua's savage-victim-saviour metaphor.<sup>55</sup> This framework is a Eurocentric understanding of how human rights function that defines the human rights system itself as a benevolent, external force for progressing society.<sup>56</sup> It operates by saving innocent, powerless victims (in the context of women's rights, women in general) whose "dignity and worth" are violated and negated by the "evil," cruel, barbaric savage (approximately analogous to the state).<sup>57</sup>

### The State

States, under Mutua's metaphor, have a complex relationship with the savage role due, at least in part, to the structure of international human rights law. As both the "guarantor" and "target" of human rights law, they operate less as a true source of savagery and more as an instrument.<sup>58</sup> The true source of savagery is the culture that acts as an obstacle to human rights norms, and the state only becomes savage when its actions conform to that culture.<sup>59</sup>

Given these stakes, states have, since as early as the drafting stages of CEDAW, expressed some concern about their obligations to ensure gender equality in cultural situations. Sierra Leone observed, regarding what would become article 5(a), that customary practices would "have to be carefully studied to ascertain whether in fact they are based on the idea of inferiority of women, since it may very well be that certain roles performed by women are not based on the idea of inferiority of their sex."<sup>60</sup> Even Austria—a Western state—commented regarding what would eventually become article 2(f) that the terms "custom" and

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<sup>55</sup> See *supra* note 26 at 201ff.

<sup>56</sup> See *ibid* at 204–05.

<sup>57</sup> *Ibid* 202–03.

<sup>58</sup> See *ibid* at 203.

<sup>59</sup> See *ibid*.

<sup>60</sup> UNESCO, Commission on the Status of Women. Draft Convention on the Elimination of All Forms of Discrimination Against Women, UN Doc E/CN.6/591 (21 June 1976) at para 70.

“practices” were “extremely vague” and that public interference into social customs could only ever have limited impact.<sup>61</sup>

In being placed in their dual role, states, particularly those outside the West, are stuck between the international community and their own populations. The human rights regime places an obligation of due diligence on states to prevent violence and rights violations against women not only by its own institutions, but by private actors within them.<sup>62</sup> The whole point is that the state does not get to choose which norms to adopt, while still having the responsibility to implement those norms. The standard by which they are measured is the Western liberalism underpinning the universalist human rights system, but various value systems from the people within the state, each with varying degrees of overlap with so-called “global values,” act within and influence the state.<sup>63</sup> Simultaneously, it challenges state power while also reaffirming it.<sup>64</sup>

The international human rights system is biased, logically, towards favouring its own norms above all, even at the expense of those value systems more comprehensible to the populations inhabiting a given state. Given CEDAW is meant to address all aspects of discrimination without limit and culture and religion are not shielded from scrutiny, the CEDAW Committee will characterize any perceived delay or inaction on practices it deems harmful as an excuse.<sup>65</sup> A state wishing to abide by its international obligations and remain within the international community’s good graces is therefore expected to internalize these norms.<sup>66</sup> Yet, since such norms are a reflection of particular values rooted in Western liberalism, non-Western states will, in practice, feel pressure to eliminate practices that they fear would be perceived as “backwards” or “uncivilized.”<sup>67</sup> The state is meant to be almost embarrassed of its own people for their divergence from Western culture; actually listening to them and

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<sup>61</sup> *Ibid* at 54.

<sup>62</sup> See GR/GC 31/18, *supra* note 22 at para 10.

<sup>63</sup> See Zwingel, *supra* note 24 at 120.

<sup>64</sup> See Engle Merry, *supra* note 35 at 5.

<sup>65</sup> See GR/GC 31/18, *supra* note 22 at para 30.

<sup>66</sup> See Zwingel, *supra* note 24 at 120.

<sup>67</sup> See Shauna LaTosky, “Lip-Plates, ‘Harm’ Debates, and the Cultural Rights of Mursi (Mun) Women” in Chia Longman & Tasmin Bradley, eds, *Interrogating Harmful Cultural Practices: Gender, Culture and Coercion* (New York: Routledge, 2016) 169 at 172.

acting according to their logic and concerns would transform the state into a "vessel" of savagery.<sup>68</sup>

### The Victim

Women would most clearly occupy the role of victim, per Mutua's framework. They are understood to be passive. It is their place, if the state is to uphold its international obligations purely pursuant to "global norms," to have their practices and statuses changed through the state's projects. At its core, the international human rights system is designed to address and set the norms for state actions; though human rights norms are expressly intended to benefit the most disadvantaged in a state's society, they do so by presuming the "protected" group as objects. Especially for women in non-Western states, dually homogenized in their status as victims of patriarchy and of colonialism, they are more presented as having "'needs' and 'problems,'" but not "'choices' or the freedom to act."<sup>69</sup>

This non-recognition of agency is perhaps most striking in the last criterion the CEDAW and CRC Committees laid out for determining when there is a harmful cultural practice. Though framed as a requirement that a practice be imposed to be deemed harmful, it presumes that women are unable to offer consent to engage in the practice. To the extent that they supposedly can consent, it is discounted and considered imposed "regardless of whether the victim provides, or is able to provide, full, free and informed consent."<sup>70</sup> Further, the Committees state a strategy for addressing harmful cultural practices should be "well-defined, rights-based and locally relevant" and organized across sectors to include local, regional and national level actors as well as traditional and religious authorities.<sup>71</sup>

In the process of delineating which practices are harmful, human rights actors do not engage with the group of targeted women themselves. They compile lists of harmful cultural practices, often based on only a rudimentary understanding of such practices, without consulting or studying the affected population.<sup>72</sup> Because they are, at least in theory, based on internationally set norms, they serve as a manner through which human rights actors

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<sup>68</sup> See Mutua, *supra* note 27 at 203.

<sup>69</sup> Mohanty, *supra* note 29 at 344.

<sup>70</sup> GR/GC 31/18, *supra* note 22 at para 14.

<sup>71</sup> *Ibid* at paras 32–33.

<sup>72</sup> See LaTosky, *supra* note 66 at 170.

can insidiously interfere in women's lives—especially those within cultural minorities—without soliciting the input of those affected women.<sup>73</sup> Yet, they do not necessarily seek the perspectives of the particular women such a strategy is intended to protect nor elicit their understanding of a practice and whether they view it as harmful. Targeted women do not get to express “whether or not they wish to abandon these practices.”<sup>74</sup> There is not even any culturally sensitive social scientific research to sufficiently understand their context from a more “objective” lens.<sup>75</sup>

Presenting women as essential victims of harmful cultural practices goes beyond failing to recognize agency; campaigns and obligations targeting harmful cultural practices based on this assumed passivity can cause harm in and of themselves to the supposed victims. Shauna LaTosky provides an example related to the practice of wearing lip plates among the Mursi southern Ethiopia. The practice, in which adolescent girls and women pierce their bottom lip and insert disks of increasing size over the course of about a year to stretch the lip, has been targeted by international NGOs and the Ethiopian state itself as a harmful cultural practice.<sup>76</sup> Their claims of harm rest on claims that lip plates harm women's health through increased risk of infection,<sup>77</sup> impair women's ability to speak and eat, and are worn as the result of male pressure to show subordination.<sup>78</sup> These assumptions are not grounded in Mursi understandings about the practice, particularly those of Mursi women. Lip plates are instead understood as an aesthetic choice, a symbol of beauty and a projection of strength and status.<sup>79</sup> LaTosky notes that the Mursi women talk of lip plates, with their connotations of maturity, grant women a certain power that puts men in the subordinate position during courtship.<sup>80</sup>

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<sup>73</sup> *Ibid* at 170–71.

<sup>74</sup> *Ibid* at 170.

<sup>75</sup> *Ibid* at 171.

<sup>76</sup> See LaTosky, “A Form of Self-Harm? Opening the Dialogue on ‘harmful cultural practices’ in Southern Ethiopia” (2012) 58 *Paideuma* 229 at 230.

<sup>77</sup> LaTosky found that the claim of medical harm as a result of lip plates are unfounded and deny traditional Mursi medical knowledge to prevent infections (*ibid* at 234).

<sup>78</sup> See *ibid* at 230, 234, 239.

<sup>79</sup> See *ibid* at 239.

<sup>80</sup> See *ibid* at 229.

To the extent that lip plates have become viewed as harmful within the Mursi community, it is due mostly to the stigma accorded to it by those from outside the community. Pressure from human rights actors, NGOs and the state, to end the practice have created a common perception that wearing a lip plate is a sign of being “uneducated” and “backwards” that would damage the self-esteem and self-pride of Mursi women and girls if they were to wear the lip plates outside of their communities.<sup>81</sup> As a result, the practice has declined in prevalence, not because of an organic change, but out of a sense of fear, in particular that wearing a lip plate might restrict access to resources like education.<sup>82</sup> Parents of children in boarding schools have even gone so far as to discourage their children from piercing their lips out of concern that they will be teased.<sup>83</sup> It was not the practice itself that threatened gender justice, but instead the artificial circumstances created by campaigning against it.

Further, too heavy-handed a suppression of so-called harmful cultural practices on normative grounds can, especially in the many postcolonial states with personal or customary law regimes that handle certain private matters like family law, can constrain women’s ability to access legal recourse. Nyamu Musembi provides an example in discussing the 2011 *Monica Katam* case in Kenya.<sup>84</sup> The dispute in that case was regarding a claim to a right of succession based on a customary Nandi marital tradition known as “woman-to-woman marriage.” This practice involves “an intricate arrangement in which a man assists a chosen woman to bear heirs for an elderly, childless matriarch.”<sup>85</sup> The petitioner, a woman with two sons, entered into such an arrangement with the deceased, an elderly woman with no children of her own, and sought to claim the estate based on this custom.<sup>86</sup>

Under the CEDAW Committee’s normative standards, as expressed in its General Recommendation, this marital practice would likely have been characterized as a harmful cultural

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<sup>81</sup> *Ibid* at 231.

<sup>82</sup> See *ibid* at 230–32.

<sup>83</sup> See *ibid* at 237.

<sup>84</sup> See *supra* note 44 at 205ff.

<sup>85</sup> “Woman to Inherit Female Husband’s Assets”, *Nation* (October 18, 2011), online: <[nation.africa/kenya/news/woman-to-inherit-female-husband-s-assets-787236?view=htmlamp](http://nation.africa/kenya/news/woman-to-inherit-female-husband-s-assets-787236?view=htmlamp)>.

<sup>86</sup> See Nyamu Musembi, *supra* note 44 at 208.

practice.<sup>87</sup> Nyamu Musembi notes that “the whole institution is premised on valuing women only for their reproductive capacity” necessary for older, childless women only because of a “male-dominated inheritance system” and a stigma against childlessness and sonlessness.<sup>88</sup> Notwithstanding whether Nandi women would generally understand the practice in this way, the practical effects of not recognizing the practice could be significant and deleterious to the financial security of her and children.<sup>89</sup>

### III.3. *Synthesis*

Overall, this manner of defining culture and opposing it to human rights only serves to undermine the goals and legitimacy of instruments like CEDAW. For many, culture is, in itself, considered a right or of some standing similarly important.<sup>90</sup> If nothing else, it cannot be dismissed so roundly as a mere impediment to realizing the universal ideal of human rights when more local considerations hold enough sway to “contest” it in the hearts and minds of people the world over.<sup>91</sup> The human rights system ignores cultural context at its own peril. Insisting that the current framework continue as a reflection of one culturally hegemonic set of ideals and values does not endear the world to its goals. It undermines its legitimacy, especially when the main targets of scrutiny based on human rights instruments are those exact countries whose perspectives are excluded.<sup>92</sup>

To assume human rights can be instilled from above by educating people out of aspects of culture that are supposedly harmful is, at best, naïve and at worst counterproductive. More than forty years since CEDAW was adopted and after countless campaigns to end “harmful cultural practices,” most adherents to the targeted practices are well aware that they have been deemed discriminatory and contrary to human rights norms.<sup>93</sup> The continuation of such practices is not because of ignorance, but because the system of human rights, including as it applies to

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<sup>87</sup> *Ibid* at 209.

<sup>88</sup> *Ibid*.

<sup>89</sup> See *ibid*.

<sup>90</sup> See Andrews, *supra* note 16 at 72.

<sup>91</sup> See Zwingel, *supra* note 24 at 122.

<sup>92</sup> See Mutua, *supra* note 27 at 216.

<sup>93</sup> See Andrews, *supra* note 16 at 69–70.

women's rights, does not seek to engage cooperatively with people in respecting cultural differences—even those whom human rights advocacy is supposed to help. Indeed, while expecting people to accept human rights language in its current form, there is apparently not a reverse expectation that human rights meet people's diverse knowledges and contexts.

## **IV. Towards an Alternative to Harmful Cultural Practices**

### *IV.1. Reframing the Relationship Between Women's Rights and Culture*

What becomes clear from the current understanding of the CEDAW regime is a need to reconceptualize the relationship between women's rights and culture such as to recognize their complementarity. As an alternative to an understanding of human rights contingent on the enforceability of liberal norms, Zwingel conceives of a constructivist model for understanding human rights regimes in which CEDAW would be understood as a mechanism for community building and respecting each state's contribution to forwarding a set of shared values.<sup>94</sup> Instead of starting with an assumption that states perfectly follow all treaty provisions with those failing to do so being shunned for their transgressions, a constructivist understanding recognizes that most states want to be respectable members of the international community and are generally likely to follow most of the treaty.<sup>95</sup> With states viewed as contributors instead of subjects, there is greater space for a diversity of approaches, including those that are more sensitive to and incorporative perspectives from different cultures.

As such, the construction of "harmful cultural practices" as a quantifiable list of practices and customs applicable across cultural boundaries becomes less useful and indeed counterproductive in alienating culture from the process of advancing women's rights. Nyamu Musembi contends that the CEDAW Committee's preponderance towards expecting legislative abolition of practices it deems harmful fails to take

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<sup>94</sup> See *supra* note 24 at 117.

<sup>95</sup> See *ibid.*

advantage of the full range of flexibility article 5(a) offers.<sup>96</sup> The treaty's language calls for states to take "all appropriate measures" within the goal of eliminating practices based on stereotypical or subordinative roles of either sex.<sup>97</sup> The text implies that states need not be limited in the types of actions it may take in order to advance gender justice goals regarding custom and culture. What may be "appropriate" is not necessarily a wholesale rejection of culture, but instead an "obligation of positive transformation of customary and religious practices to align with gender equality."<sup>98</sup>

The need to accept cultural differences, broaden an approach beyond abolition of practices and make practical, situation-dependent compromises, as human rights actors in pluralist settings often must do, is necessary for a better understanding of human rights problems.<sup>99</sup> Mohanty demonstrates that indicia of "progress" on women's rights can produce contradictory results depending on broader contexts that can include economic, social and cultural differences over space, providing an example regarding the sexual division of labour in the United States and Latin America. She notes, like with much of human rights discourse, the concept of sexual division of labour is employed without cultural or historical specificity, with its "mere existence" often taken as a sign of oppression.<sup>100</sup> In the former, having a female head of household occurs in higher income middle-class households and is more associated with independence and autonomy.<sup>101</sup> In contrast, increase of female-headed households in Latin America is confined to more economically constrained social strata.<sup>102</sup>

Though Mohanty's point spoke more to the need for understanding differing economic contexts across space, a similar principle may apply to understanding differences in culture across space. Recognizing the need to understand context would not necessarily dismiss categorizing practices as harmful in general; it only recognizes that it is not possible to create a normative,

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<sup>96</sup> See *supra* note 44 at 185–86.

<sup>97</sup> CEDAW, *supra* note 8, art 5(a).

<sup>98</sup> Nyamu Musembi, *supra* note 44 at 213.

<sup>99</sup> See Engle Merry, *supra* note 36 at 25–26.

<sup>100</sup> Mohanty, *supra* note 29 at 347–48.

<sup>101</sup> See *ibid* at 348.

<sup>102</sup> See *ibid*.



objective definition that does not need to account for individual circumstances and differences across cultures. It is possible for FGM in parts of Africa to be considered harmful while cosmetic genital surgeries in the United States are not. Comparing their disparate treatments could only ever reveal hypocrisy when one accepts the existence of a dominating normative framework; without it, comparing FGM and cosmetic surgeries is comparing apples to oranges. However, such a determination could not be derived from an imposed norm but must arise organically from a slowly building consensus in a community—which itself could be challenged. FGM cannot be said to be harmful to women as a whole because it would be considered so by Western women, it would be harmful because it is considered harmful by the women who have or would potentially undergo it.

#### IV.2. Delimiting Universality

There is still a place for universality. Even Mutua, with his critiques of how universalist language has been employed to Western imperialist effect, recognizes some amount of universality is “inevitable and desirable.”<sup>103</sup> After all, “human” rights as an ideal aspires to recognize a baseline global commonality on the basis of shared humanity. The problem only arises when universality is overstated—when what is called universality only includes a limited set of perspectives from geographically constrained localities. As currently presented, universality is a mere reflection of Western history and norms; it excludes vast swathes of the world’s histories, traditions, norms and understandings.<sup>104</sup>

The world can still have a universal standard for ensuring equal justice for women without subjecting itself to one specific cultural model (i.e., the Western model).<sup>105</sup> A truly universal list of harmful practices, for example, would likely have to exclude practices which, though they might be harmful in in one cultural context, are valued and defended elsewhere.<sup>106</sup> Universality requires true consensus, or in practice, something approaching it. This would likely be a small core of norms or ideals that would be subject to vast interpretations.

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<sup>103</sup> Mutua, *supra* note 27 at 216.

<sup>104</sup> See *ibid* at 219.

<sup>105</sup> See Andrews, *supra* note 16 at 88–89.

<sup>106</sup> See Gruenbaum, *supra* note 34 at 202.

With this in mind, CEDAW's normative content *vis-à-vis* culture would have to be understood in a much more restrictive sense but would maintain a universalist core. The goals of CEDAW itself function as a starting point for ascertaining the appropriate level of universality. Fundamentally, the treaty represents a broad attempt to affirm and promote the equality of all regardless of sex and gender. It further seeks to recognize that bringing about this equality requires an approach that goes beyond the legal, recognizing that culture plays a vital role in determining the status of women. Where it oversteps is in its assumption that culture is essentially oppressive and that women can—and must—be freed from it. More properly recognizing that culture is not just its institutions, but a medium through which ideas and relations of power can be contested, implementing CEDAW's aspirational vision must be contextualized to account for these variations in framing.

Achieving these goals with an eye towards respecting cultural difference, according to Engle Merry, implies some difficulties at the level of norm-setting.<sup>107</sup> In particular, CEDAW's transformational aspirations mean standards must be translatable across diverse local cultures—already itself a difficult task—but still capable of effectively challenging existing cultural dynamics to advance gender justice.<sup>108</sup> In general, there may be a universal aspiration for change, but understanding what needs to change and how to bring about that change will require a multiplicity of approaches – including understandings about harm.

### IV.3. Reconceptualizing Harm

Andrews proposes the imperative to advance women's rights in the cultural sphere may be achieved through a two-tier categorization of sex discrimination. The first level would handle matters she deems generally uncontroversial freedom from violence; non-discrimination in education, healthcare, employment and resources; equal right to custody of children; participation in elections and governance, etc.<sup>109</sup> The second level pertains to “private choices and group imperatives” more directly and closely attached to questions of culture.<sup>110</sup> She contends that

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<sup>107</sup> See *supra* note 36 at 5, 25.

<sup>108</sup> See *ibid* at 5.

<sup>109</sup> See Andrews, *supra* note 16 at 87.

<sup>110</sup> See *ibid*.

matters falling within the first category find broad support among governments and are more explicitly addressed in international human rights instruments and that, as such, it would be unproblematic to subject culture to greater scrutiny when these matters are involved.<sup>111</sup> By contrast, the elements of choice present in the second level require a much greater degree of deference to women's autonomy and therefore be subject to less intervention.<sup>112</sup>

Andrews is correct to note that some of the less controversial acts on the harmful cultural practices list also tend to involve the violation of another right. Honour killings are still murder and a violation to the right to life and just about any practice—from FGM to forced marriage—can be or become a violation of the right to physical and moral integrity when it occurs without the woman's input. Her key addition is an acceptance of the capacity of women in all cultural spheres to offer consent, with concern more focused towards practices that limit or infringe that consent. Such an approach addresses concerns about states actively using culture as a shield from human rights scrutiny, when the underlying issue is not itself one of culture. The distinction, therefore, between her two levels ensures that the human rights system acts in a manner that focuses on and respects the consent and autonomy of women.

One can find an alternative approach by looking at regional human rights instruments, notably the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*<sup>113</sup>. Adopted in 2003, the Protocol, like CEDAW, intends to affirm principles of gender equality and the importance of a multi-faceted approach to realizing women's rights that includes addressing culture. In fact, it goes further in recognizing a link between human rights and culture. Though it provides a specific definition of harmful practices based on the "human rights and fundamental freedom" model the CEDAW Committee would adopt<sup>114</sup> and requires states parties to end practices that are

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<sup>111</sup> See *ibid.*

<sup>112</sup> See *ibid.*

<sup>113</sup> 01 July 2003, OAU/AU Treaties, Conventions, Protocols & Charters (entered into force 25 November 2005), online (pdf): <[au.int/sites/default/files/treaties/37077-treaty-charter\\_on\\_rights\\_of\\_women\\_in\\_africa.pdf](http://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf)> [Maputo Protocol].

<sup>114</sup> *Ibid.*, art 1(f).

“contrary to recognised international standards,”<sup>115</sup> it also enshrines cultural rights more explicitly than CEDAW. Article 17 provides that women have “the right to live in a positive cultural context” and that states parties must “enhance the participation of women in all forms of cultural policies at all levels.”<sup>116</sup>

The inclusion of article 17 corrects for the opening CEDAW created for interpretation of culture as an impediment by recognizing that culture can and ought to have a positive impact on women.<sup>117</sup> At minimum, the Maputo Protocol does not force a false choice between gender equality and cultural participation; it allows for a nuanced view of women’s rights that can accommodate different cultural understandings of what it takes to advance gender equality. The obligation of the state, therefore, is not to impose upon women and change culture from the top but act as facilitators for women to take an active role in promoting cultural change for the advancement of gender equality in their communities.<sup>118</sup> In this sense, Nyamu Musembi addresses an opposite concern from Andrews that states may use culture—or specifically the rhetoric of harmful cultural practices—as a sword to enact cultural changes incompatible with the culture targeted. Recognizing the role of women in shaping culture is meant to, at least in theory, mitigate the top-down hierarchical approach to advancing the status of women.

Yet any attempt to shift the relationship between women’s rights and culture from adversarial to collaborative would be ineffective without addressing how harm itself is defined. Even under the Maputo Protocol, the definition of harmful practices still reflects—and indeed goes further to codify—the notion that harm can be understood objectively and with reference to Western liberal norms. While article 17 would ascribe women an active role in shaping culture, article 5 defines when action must occur from the outset. The Protocol only goes so far as to give women a role in the implementation within their respective cultural spheres of norms around harm for which they had no role in forming. It, like CEDAW before it, does not fully accord with the notion that harm can come in the form of a loss of cultural autonomy and could promote a selection bias towards promoting the voices of women whose views, regardless of whether they conform with the

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<sup>115</sup> *Ibid*, art 5.

<sup>116</sup> *Ibid*, art 17.

<sup>117</sup> See Nyamu Musembi, *supra* note 44 at 196.

<sup>118</sup> See *ibid*.

general attitudes of their communities, align with the international standard.<sup>119</sup> In a sense, local women are only used as the face for the international human rights project, not as an independent voice capable of bringing their own understandings into the conversation.

The key problem of understanding harm in this subjective fashion, however, is who gets to speak for *the* community or *the* culture. The problem with an international standard for harm lies in its hidden Western liberal biases. Yet in deferring to the state, especially at the international level where individual officials are taken to represent the totality of a state's interests, it becomes easy to collapse the perspectives of such individuals to the whole of their state.<sup>120</sup> In general, there is no one person that sets culture, and even categories of "women within a particular state or community" can mask differences in economic status, social standing, language, religion, belonging to a majority or minority group within the broader community, etc.<sup>121</sup>

Neither of the international human rights legal order's two main actors—the international institution and the states—can set a clear definition of harm to guide states' obligations. Though there is no way to recognize one authority that can speak for "culture" or the "local," the intuitive perspective, particularly on the issue of harm, would be those of the women who are primarily by or likely to be affected by the practice—those that human rights actors supposedly seek to help. They are the group who have been least consulted about understanding harm, despite also being the ones for whom efforts to end harmful practices are meant to benefit. Instead of expecting communities to conform to the standards of human rights actors, these human rights actors would be expected to adapt to the women's needs.

While it would be ideal for an assessment of whether a practice is truly harmful at the international level to understand, there are significant practical constraints. Simply put, institutions like the 23-member CEDAW Committee do not have the funding, time, resources or expertise to so minutely assess each potentially harmful practice in each of the 189 states parties under its monitoring mandate.<sup>122</sup> Not to mention, addressing harmful cultural practices is usually only just one component of the vastly

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<sup>119</sup> See Gruenbaum, *supra* note 34 at 202.

<sup>120</sup> See Engle Merry, *supra* note 36 at 18.

<sup>121</sup> *Ibid.*

<sup>122</sup> See *ibid* at 118.

larger undertaking of assessing country reports.<sup>123</sup> Understanding harm for a given case should require as granular an understanding of the targeted women's views of harm as possible. If international institutions themselves are too far removed from the specific populations and too under-resourced to properly account for the wide variety of differing understandings, states are better—but far from perfectly—placed to ascertain harm. States are the more granular of the institutions tasked with protecting human rights and better placed to understand—or be brought to understand—their populations' wide arrays of cultural considerations.

That is not to say that states can be given full deference without any scrutiny. As reservations to the treaty can show, states may employ such deference to shield culture from any scrutiny based on gender equality principles. Conversely, Ethiopia's response to lip plates also shows states can be over-zealous in targeting minority women. The CEDAW Committee can take the role of checking states in their process to ascertain what harm means in a given cultural context. As it stands, international institutions, including the CEDAW Committee, are "ambivalent, evolutionary and sending incompatible normative signals" without subjecting themselves to any significant scrutiny.<sup>124</sup> Instead of taking this as evidence of withering influence of human rights norms, the CEDAW Committee could lean into this and embrace a complexity reflective of the diversity of women around the world. Instead of seeking to create more norms, the Committee can focus on best practices, ensuring that states are engaging with cultural considerations in good faith and doing their due diligence in facilitating women advocating for change within their own local communities.

## V. Conclusions

"Harmful cultural practices," as a manifestation of the broader relationship between women's rights norms and culture, should cease to be used. The assumptions underlying the term—the righteousness of liberal ideals, the universality of manifestly Western values, and the supposedly regressive nature of culture

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<sup>123</sup> See *ibid* at 130–31.

<sup>124</sup> Zwingel, *supra* note 24 at 123.

and tradition—limits the ability of CEDAW to realize its attaining global gender justice in all spheres, including within culture itself. Instead of the widespread adoption of CEDAW's norms, alienating culture with the goal of advancing gender justice has brought reactionary nationalism, traditionalist recalcitrance and an overall challenge to the human rights regime's legitimacy. Yet perhaps even more consequentially, efforts to implement and advocate for gender equality using harmful cultural practices discourses constitute a failure to rise to the standard CEDAW itself sets for both state obligations and the status of women.

For as much as the framers of CEDAW and, subsequently, the CEDAW Committee, have been concerned about states excusing continued discrimination against women by appeals to culture, it has not accounted for the inverse possibility where "harmful cultural practices" obscures a state's responsibility for a different rights violation. Returning to the River Ofin, one can see how the appeal to culture can muddy the waters on when the harm actually occurs. The focus on custom places the burden on the community to change its culture and in a sense blames the victim for taking custom seriously. Yet, it is more unambiguously Ghana's responsibility to ensure equal access to education and, regardless of the reason, the infrastructure for providing that access is insufficient. The state could attempt a years-long education campaign of unassured success to possibly meet its international obligations, or it could more rapidly and assuredly guarantee the right by building the necessary infrastructure.

Beyond inefficiency and errant focus, the employ of harmful cultural practices as a focus can also do damage to the women human rights actors are seeking to protect. As the treatment of the Mursi people's lip plate practice demonstrates, campaigns can create a stigma against practices through which women may be deprived of material rights as well as an avenue for realizing dignity as they themselves understand it. Generally, culture is not something separate from the individual that they can pack in a box and put away; it is the medium that shapes world views and ways of living and being. Insofar as CEDAW invites us to interrogate cultural institutions and their effect on gender norms, one must also recognize that women rely upon these institutions. Whether or not the practice upon which Monica Katam relied for her inheritance had a nexus with a presumption of male superiority, failure to recognize the practice would have done considerable damage to her economic well-being. Culture can both sustain and oppress; in addressing the latter, one must be careful to not also remove the former.

Fundamentally, the problem with harmful cultural practices goes beyond a broad assumption that culture is harmful; it is an assumption of one universally understandable way of understanding harm—specifically *how* concepts like discrimination, gender inferiority/superiority and stereotyping are understood. In reality, harm is a fluid concept that can change in different cultural contexts; though there may be some core of universality between cultures, the human rights regime has broadly overstated this in assuming Western norms to define abstract concepts like harm. This has encouraged human rights actors, especially those from the West, to expect attitudes to conform to theirs without taking the time to understand the cultures they are seeking to change. Outside the West, those best placed to bring about change—women within their own communities—are sidelined and ignored in a manner akin to more overtly imperialist projects of the past. Assumptions about harm remove the “victim” from the calculus and assume the women with the greatest knowledge of their own cultures are either unable or unwilling to advocate for the changes in their community that can improve their own situations.

Women around the world deserve the space within their cultures to determine which practices are harmful and which are not. As far as the international human rights system is justifiably concerned that traditional and religious authorities may not grant women that space, it is neither the international community’s nor the state’s place to replace them. Any approach to achieving gender justice, especially when one is unfamiliar with a given cultural context, should make great efforts to listen to those one is seeking to help. Not only should aid be culturally sensitive, but it should also take its directives from those exact people one seeks to help. Instead of imposing a will in service of “humanity,” human rights advocates and state and international institutions should understand their role as facilitative—to help women around the world to flourish as they would like to see themselves flourish.



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