

Cultural Relativism and Harmful Traditional Practices

A consideration of the efforts to eradicate FGM

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Chapter 1 – Introduction

*‘The battle for the individual rights of women is one of long standing
and none of us should countenance anything which undermines it.’*

~ Eleanor Roosevelt

In the Netherlands an internist wrote an article in 2008 in which he declared that he thought a form of circumcision should be allowed in special clinics. He pleaded for a symbolic circumcision, a small puncture that is called a ‘sunna light’. Obviously this evoked strong reactions as female circumcision is considered a criminal act under the Dutch penal code. After that, a legal magazine published an article that defended this symbolic procedure. In the author’s view this is not a criminal act at all. He agrees that the other types of procedures that are used for circumcision are obvious criminal acts but this procedure could be allowed under Dutch criminal law. He draws an analogy to piercing ears, something that also means actually harming someone but is socially accepted.¹ He finds that on the grounds of cultural freedom, perhaps under some rules this should be allowed. He also spends some words on the cultural context of the custom. He thinks that allowing this symbolic procedure would not mean that it would support any underlying discriminatory factors; nor does he believe that a circumcision could have negative effects on the personal freedoms of the girls and women in question.² This article was faced with strong criticism in a later number of the publication.³

This article is just one of many examples of how primarily western countries are currently confronted with a practice alien to their own societies, but finding their way into the societies via immigration. In other parts of the world, this has been a longstanding practice, which has been legislated against, internationally in recent years.

¹ Under Dutch criminal law it would mean that there is no ‘unlawfulness’ (wederrechtelijkheid) in the act committed, which is a requirement for there to be a physical abuse following articles 300-301 Penal Code.

² W. Limborgh, ‘Dient meisjesbesnijdenis op culturele gronden te worden getolereerd?’, *Nederlands Juristenblad*, 2008, number 40, p. 2514

³ For example in the reactions section of *Nederlands Juristenblad* (2009), volume 84, issue 5 it featured 3 responses; W Thomassen, H Holtmaat, J van Duin, 233 - *Het toelaten van symbolische meisjesbesnijdenis: een slecht teken*; **M van Berkum, M exterkate, Z Naleie, 234 - Meisjesbesnijdenis dient nooit te worden getolereerd!**; K, Bleeker, 235 *Reactie op het artikel van Wouter Limborgh: ‘Dient meisjesbesnijdenis op culturele gronden te worden getolereerd?’*, *NJB 2008, 1970, afl. 40, p. 2514 e.v.*

Legislation against this practice can also be found regionally and often nationally yet it continues to be practiced and, as the example above describes, has even spread to a bigger geographical scope. The arguments for the continuance of this practice are often based on the cultural freedom of the societies in which it finds its origin.

In this thesis I shall research the harmful traditional practice that is female genital cutting/mutilation and the attempt to eradicate this practice, both by means of a human rights and thus legal approach as well as other non-legal approaches. Besides that, I will look into the concepts of universality and cultural relativism to try and explain why this practice continues despite the international and local efforts and if any lessons from this can be learned from this for the future. The question that I shall answer at the end of this paper will be: if and how does the call for cultural relativism influence the application of rights of women in an African context, especially with regard to the protection of women in cases of harmful traditional practices such as FGM? And can any recommendations be made with regards to improving the situation?

Chapter 2 – Female Genital Mutilation/Cutting

There are a number of traditional practices that are considered harmful to the health of women and children. These practices often take place in order to benefit the position of men, either by establishing male domination in an economic and political sense or control of the female sexuality. This leads to a factual inequality between men and women. For a long time these practices were disregarded by the international community, as they were considered subject to national jurisdiction because of their sensitive cultural nature. However, since the 1950s they have become part of an international dialogue and attempts to protect women and children from these practices.⁴ Female genital mutilation is the most known, discussed, documented and legislated type of these practices.⁵ However, this practice does still continue to take place, which makes it an interesting subject for research to see how forbidding these practices by means of legislation might not be most successful strategy for eradication. In this chapter, I shall first provide a factual background to this practice and discuss some recent developments that clearly establish the theory of the practice in question but also show the problems that make the effort to eradicate the practice a difficult one.

2.1 What is female genital mutilation?

The practice is called different things, depending on what perspective the authors have. Most western authors would describe it as ‘female genital mutilation’ (hereafter: FGM). But others prefer to use the word ‘female genital cutting’ (hereafter: FGC) as it would be more neutral and sensitive to local beliefs. And to even be more sensitive to the culture of the people that this practice stems from makes some even use the term ‘female circumcision’, also because this would be a more direct translation of the terminology used in the African languages.⁶

The World Health Organisation (hereafter: WHO), United Nations International Children Education Fund (hereafter: UNICEF), United Nations Population Fund (hereafter: UNFPA) use the term FGM and have jointly declared in 1997: ‘ it comprises all procedures involving partial or total removal of the external female genitalia or other

⁴ United Nations, *Factsheet 23*, p. 2

⁵ C. Packer, *Using Human Rights to Change Tradition*, Antwerpen: Intersentia 2002, p.17

⁶ R. Abusharaf, “Introduction: The custom in question” in *Female Circumcision: multicultural perspectives*, Philadelphia: University of Pennsylvania Press, 2006, p. 6

injury to the female genitalia or other injury to the female genital organs whether for cultural or non therapeutic reasons.’⁷

Facts and figures

There is not one single method that is used that can describe FGM. What the rite entails depends on many different factors.

The most reliable data on this practice are provided by the Demographic and Health Surveys (hereafter: DHS) and the Multiple Indicator Cluster Surveys (hereafter: MISC).⁸ These have shown that the majority of girls that are at risk of undergoing this female circumcision live in about 28 countries spread out over both Africa as well as the Middle East.⁹ These data also show the many variations in the practice. For example the age at which the girls are cut can vary as young as an infant of two weeks in Yemen but can also go up to 14 years in Egypt (however in Egypt it even varies in different parts of the country as data shows it happens somewhere between the age of 5 and 14).¹⁰

There are different reasons that different groups apply to the, in their view, necessary cutting. These include reasons dealing with health and hygiene; as it is in some groups the believe a girl is dirty and polluted otherwise. Or that it could damage the husband’s genitalia and with that make him infertile. But it can even go as far as the argument that the clitoris is such a dangerous organ that it could kill a baby during childbirth. Another group of reasons finds its common factor in the physical necessity, meaning that it will improve the aesthetics, possibly prevent the protrusion of the genitalia. It is believed that it will improve the male sexual performance and pleasure. It is also done to make certain that these girls preserve their virginity until they are married. Or it is blatantly intended to take away the female sexual satisfaction. Next, there is a grouping of social necessity to undergo the procedure as a rite of passage. This also places a woman in a specific place in the community and, as a result, prevents promiscuity. This also means that they are more eligible for marriage. The procedure would supposedly protect women against rape and sexual assault. And last, there are

⁷ R. Abusharaf, “Introduction: The custom in question” in *Female Circumcision: multicultural perspectives*, Philadelphia: University of Pennsylvania Press, 2006, p. 5

⁸ DHS done and/or assisted by the MEASURE DHS program and the MISC done in assistance with UNICEF

⁹ M. Pais, “Promoting the abandonment of female genital cutting” in *Realizing the rights of the child*, Italy: rüffer&rub, 2007, p. 224

¹⁰ M. Pais, “Promoting the abandonment of female genital cutting” in *Realizing the rights of the child*, Italy: rüffer&rub, 2007, p. 225

religious reasons; this is primarily following the Qur'an to seek a guarantee for chastity.¹¹

Procedures and effects

Besides the variety in age and reasons for the cutting it depends on the custom what kind of surgery these women undergo. The WHO has grouped it into three categories: clitoridectomy; which is the partial or complete removal of the clitoris; an excision, which means a complete or partial removal of the clitoris and the inner lips are excised; and an infibulations, where both the clitoris and the inner lips are removed and the outer lips are stitched together to cover the urethral and vaginal entrance and a new opening is created to pass urine and menstrual blood.¹²

These surgeries can have immediate effects on the health of these girls including bleedings and blood poisoning. Effects can become more visible on the long term, which include infections, problems upon consummation, or extreme difficulties upon delivering a baby.¹³ But the effects are not only physical; shock can occur which can eventually even mean posttraumatic stress. Next to that it could also have a more secondary effect. Figures have shown that it affects the education of these young girls and thus influences the potential of these children to develop to the fullest of their abilities, because the drop-out rates amongst these girls are higher. This occurs because in the countries where this is a custom it is often part of a rite, which involves long preparation and therefore means they are absent more often. However, the absence from school often continues after the surgery, they often have health problems which makes it more difficult to continue to participate. The fact that they miss out means their level of motivation drops and they no longer wish to continue their education. But as the surgery also is part of the rite of passage, this is often seen as the moment from which these girls are eligible for marriage and thus are they pulled out of school by their parents. All this means that they cannot develop themselves and will in the end not have the knowledge or the means to remove themselves from possible discriminatory

¹¹ These groupings and reasons following the list compromised by C. Packer in the book *Using Human Rights to Change Tradition*, Antwerpen: Intersentia 2002, p.20-21

¹² R. Abusharaf, "Introduction: The custom in question" in *Female Circumcision: multicultural perspectives*, Philadelphia: University of Pennsylvania Press, 2006, p. 4

¹³ C. Packer, *Using Human Rights to Change Tradition*, Antwerpen: Intersentia 2002, p.22

circumstances.¹⁴ The data provided by the DHS and MISC also show that when a higher educated woman has children, they are less likely to be circumcised.¹⁵

2.2 Recent developments

A rather worrying development is that western states are increasingly confronted with the reality of FGM. For example, the UNICEF National Committee in Switzerland estimates that around 7,000 girls and women that live in the country are circumcised, however none of these actually hold a Swiss passport.¹⁶ But the girls and women do not all enter the country already circumcised. It is not only the confrontation with doctors, who for example face the complications with childbirth. But also in several countries there have been initiatives that request doctors to cooperate in some form of circumcision.

In Seattle in 1996 the Harborview Medical Centre attempted to be sensitive to the culture of Somali immigrant women. They wished to prevent that they would be confronted with the complications of these procedures, if licensed medical personnel did not perform them. For this purpose they worked out a compromise: adolescent girls could undergo a symbolic procedure that meant a minimal cut with tiny bloodletting, but all this in hygienic conditions. When this compromise became public there was an outrage, even though it would improve the conditions under which it happened it still meant that the symbolic effect of the procedure, the subordination of women, would be supported. This led to the compromise being dismissed.¹⁷

A couple of years ago a similar incident occurred in Florence. The Carreggi Public Hospital considered allowing a symbolic circumcision; this would be a little cut performed under medical supervision and in hygienic conditions. This would mean that the girls would not be in any danger from the procedure and would in the end still meet the community's requirements to get married. At the suggestion of a gynaecologist of Somali origin and the request of a group of adult Somali women, this proposal was put before the bioethics committee which approved it after much discussion. But this

¹⁴ M. Pais, "Promoting the abandonment of female genital cutting" in *Realizing the rights of the child*, Italy: rüffer&rub, 2007, p. 221

¹⁵ M. Pais, "Promoting the abandonment of female genital cutting" in *Realizing the rights of the child*, Italy: rüffer&rub, 2007, p. 225

¹⁶ M. Pais, "Promoting the abandonment of female genital cutting" in *Realizing the rights of the child*, Italy: rüffer&rub, 2007, p. 224

¹⁷ A. Galeotti, 'Relativism, Universalism, and Applied Ethics: The Case of Female Circumcision', *Constellations*, Volume 14, number 1, 2007, p. 91

proposal became known to the public and received much protest from women's organisations and also caused a scandal in both the government and the opposition. So after some months, a completely opposite policy was accepted that banned any form of this procedure with severe punishments for all involved, not just the doctors but also the parents and the women themselves.¹⁸

Even more recently, last April, there was a policy statement released by the American Association of Paediatrics (hereafter: AAP) in the specialist journal.¹⁹ Even though the AAP underlined the dangers of female circumcision in forms of the clitoridectomy, excision and infibulation, it does also come with the suggestion of a little prick. Although everything shows that those three procedures are dangerous, the international community, in their view, has not made a clear statement with what can be regarded a new type of circumcision. They do not consider it physically harmful and see it as even less extensive in comparison with male circumcision. With that the suggestion is made whether or not it should be considered as a procedure that could be legal, as such a procedure would be protecting the girls more rather than forbidding it by law. As long as it is illegal it will still happen but by offering this compromise girls would not be faced with the disfiguring and life-threatening procedures as they do now.²⁰ This statement was rather quickly met with a joint response from the WHO, United Nations Development Fund for Women (Hereafter: UNIFEM), UNICEF and UNFPA.²¹ In this statement the UN agencies contradict the statement that nothing has been said about this 'new' type of circumcision, as it has been addressed in 2008 by a statement signed by ten UN agencies.²² In this statement it was concluded that the practice of piercing, incision, scraping and pricking could be considered to be a type IV of female circumcision and that the terminology could be used as a cover up for more invasive procedures. And with this the agencies sought to reaffirm their call to eradicate all forms

¹⁸ A. Galeotti, 'Relativism, Universalism, and Applied Ethics: The Case of Female Circumcision', *Constellations*, Volume 14, number 1, 2007, p. 91

¹⁹ Policy Statement Ritual Genital Cutting of Female Minors, COMMITTEE ON BIOETHICS, *Pediatrics*, published online Apr 26, 2010; DOI: 10.1542/peds.2010-0187, consulted online at WWW < <http://pediatrics.aappublications.org/cgi/reprint/peds.2010-0187v1> >

²⁰ Policy Statement Ritual Genital Cutting of Female Minors, COMMITTEE ON BIOETHICS, *Pediatrics*, published online Apr 26, 2010; DOI: 10.1542/peds.2010-0187, consulted online at WWW < <http://pediatrics.aappublications.org/cgi/reprint/peds.2010-0187v1> >

²¹ Joint Response by UN Agencies to a Policy Statement on Ritual Genital Cutting of Female Minors from the American Academy of Pediatrics, By WHO, UNFPA, UNICEF and UNIFEM, Date: 20 May 2010, Consulted online at WWW < http://unifem.org/news_events/story_detail.php?StoryID=1092 >

²² Eliminating Female Genital Mutilation: An Interagency Statement to be found at WWW < http://www.unifem.org/materials/item_detail.php?ProductID=110 >

of circumcision. Also, by allowing this procedure a loophole would be created in the existing determination to fight all forms of female circumcision. This could possibly mean that it would create an opening to allowing more invasive and thus harmful procedures. In addition, it would send out a completely wrong signal that the underlying discrimination of equality on the base of sex is allowed. But perhaps an even more important fact is that studies have shown that in cases where this little cut is performed, at a later age it is found insufficient to comply with the norms in the family and social network. This means that these girls will in the end have to undergo a more severe procedure, which brings along the well-known risks. So the thought that this small prick could be a procedure done by trained medicals in order to prevent a more invasive procedure from happening is a wrong assumption.

Following the joint statement the WHO has recently released a '*Global strategy to stop health-care providers from performing female genital mutilation*'. This document first sets out the types of FGM, which explicitly includes a fourth type that is 'unclassified' and could mean any type of harmful other procedure to counteract all the discussion about these small procedures.²³ But the main aim of the document is to combat what they refer to as 'medicalisation'; the fact that FGM is done increasingly by professional healthcare personnel in order to reduce the risks and the extent of the procedures. The document was drawn up to make it clear to all medical personnel that the procedures go against the medical obligation to do no harm and are thus unethical, that they are in violation of human rights and often also national legislation. But one of the more risky effects from the medicalisation is that it could create some sort of legitimacy for the supporters of this practice and could very well undo much progress that has been made in the process of eradication to the practice.²⁴

This last development perhaps shows the underlying dilemma the best. Doctors are increasingly confronted with the reality of female circumcision, both with parents who wish their children to be circumcised in order to fulfil the social norms of their culture, or at a much later stage in life when the women are faced with the long-term negative effects of their circumcision when attempting to get pregnant or give birth. So it is understandable that they wish to prevent physical harm and later on being faced with

²³ WHO, *Global strategy to stop health-care providers from performing female genital mutilation*, 2010, p. 2

²⁴ WHO, *Global strategy to stop health-care providers from performing female genital mutilation*, 2010, p. 17

these effects in the future. The Dutch author mentioned in the introduction also pointed out that even though it is illegal, it is estimated that there are still around fifty girls circumcised yearly in The Netherlands.²⁵ So despite the attempt to prevent it happening by making it a crime, it is a fact that girls get circumcised regardless. So regulating it could possibly mean that there can be some control over exactly what happens in order to protect these young girls.

However, the other end of the spectrum of this would be whether as a state you should allow a practice to go on if the nature goes against the values of your society. Circumcision is considered to be a practice that discriminates against girls and women based on their sex; moreover it is a dangerous practice. So allowing it could send out a completely wrong signal to the supporters of this practice that it is all right to discriminate and harm and could possibly even become a slippery slope in the future for attempts to get other procedures legalised. Considering the reason for allowing it would be that you have some control over the events is in my view not the right reason to legalise something, because in fact the state will still be against all the underlying principles of this practice. And the fact that people might demand more invasive procedures later on, because the legalised procedure does not meet the norms demanded in those groups for the girls to be good candidates for marriage, should be a factor that weighs heavy. Does this possibility not completely defeat the purpose of allowing it, since at the time that such more invasive procedures start happening you will not have no control over it anymore?

2.3 Conclusion

It may be evident that the practice of female circumcision is harmful towards women and strong efforts should be undertaken to eradicate this practice. Although there is a legally well-established system to eradicate this practice, which shall be discussed in the next chapter, the reality still shows that a fair number of women are still subjected to it. Even with some small progress toward success in this area, there are some rather worrying developments in other parts of the world where this practice does not originate. Initiatives have been started amongst immigrant populations to allow them to have the practice performed in hospitals in the western countries to which they have

²⁵ W. Limborgh, 'Dient meisjesbesnijdenis op culturele gronden te worden getolereerd?', *Nederlands Juristenblad*, 2008, number 40, p. 2515

emigrated. They have had some support from doctors who would rather perform a small symbolic surgery than be met with the effects of the extensive surgeries that would be performed illegally. But considering the fact that the underlying discriminatory elements of these practices go against the values and morals of the western societies, these initiatives have been met with thorough resistance of the populations in these countries.

Chapter 3 – Legal Approach

In this chapter I shall set out how the practice of FGM has been recognised by the international community and has become subject to international, regional and often national legislation.

In 1979 the WHO organised a regional seminar on Harmful Traditional Practices Affecting the Health of Women; during this conference all types of the practice were condemned even if professionals under hygienic circumstances perform it.²⁶ One of the recommendations of the conference was to establish an organisation, so in 1984 the non-governmental organisation The Inter-African Committee on Traditional Practices Affecting the Health of Women and Children (hereafter: IAC) was established. Since then this organisation, consisting of 28 African countries, has worked hard to eradicate several harmful practices. Based on the activities it might be concluded that it has made female circumcision one of the priorities.²⁷ Following this call from a UN body to create an NGO, the IAC managed to gain a consultative status with the Economic and Social Council (hereafter: ECOSOC)²⁸, an observer status with the regional ECOSOC from the African Union (hereafter: AU)²⁹ and has an Official Relations status with the WHO.³⁰ The work that this organisation has done to eradicate the harmful traditional practice has also been recognised by the General Assembly (hereafter: GA) by specifically mentioning it and basing their decision partly on this work in their resolution on '*Traditional or customary practices affecting the health of women and girls*'.³¹ In 2003 the IAC organised a worldwide conference during which the objective was adopted to have zero tolerance for FGM and to establish an even greater commitment by both the organisation and states to attempt to eradicate the practice.³² By looking at the IAC's annual report it

²⁶M. Pais, "Promoting the abandonment of female genital cutting" in *Realizing the rights of the child*, Italy: Rüffer&rub, 2007, p. 221

²⁷ R. Abusharaf, "Introduction: The custom in question" in *Female Circumcision: multicultural perspectives*, Philadelphia: University of Pennsylvania Press, 2006, p. 20

²⁸ Following article 71 of the UN Charter

²⁹ Following article 22 of the Constitutive Act for the African Union and the established criteria by the executive council, EX.CL/195 (VII)

³⁰ Following resolution WHA.40.25 "Principles governing relations between WHO and NGOs"

³¹ 'Recalling' sub (I), UN General Assembly Resolution, [Traditional or customary practices affecting the health of women and girls A/RES/52/99], 9 February 1998

³² IAC, '*International Day of Zero Tolerance*', consulted online at WWW <http://www.iac-ciaf.net/index.php?option=com_content&view=article&id=87&Itemid=63>

might be clear that primarily, but not solely, the activities of the organisation lie in the effort to eliminate FGM.³³

The year 1979 was also important because the Convention on the Elimination of All Forms of Discrimination against Women (hereafter: CEDAW) was signed, which played a big role in recognising female circumcision to be a human rights violation. This recognition has been reinforced in several other instruments such as the Convention on the Rights of the Child (hereafter: CRC). Considering that the majority of girls undergoing these procedures are obviously still considered to be children, this is a useful tool as it is the most widely ratified human rights treaty.³⁴

From a universalistic point of view female circumcision is seen as a form of violence against women because it transgresses three primary accepted rights. First, the Right to Health as stated in article 25 of the UCHR. The outcome of the procedure highly depends on the type, the level of hygiene and the proficiency of the person performing the procedure. As described above, the effects can occur immediately or at some point in the future. But more often than not the procedure is performed by people with no medical training and thus the risk of any negative effect is high.³⁵ Second, the Rights of the Child as laid down in the CRC. There are several violations of this; the procedure is considered child abuse because the girls have no say in what happens to them as it is forced upon them. And as the 1959 UN Declaration on the Rights of the Child already clearly declared '*children must be guaranteed the opportunity to develop physically in a healthy and normal way*'.³⁶ Besides the obvious violations of the protection of life and physical integrity, the procedure also as described above, although more indirectly, interferes with the right to education. Last, it transgresses the Right to Corporeal and Sexual Integrity. It is evident how such a procedure violates the corporeal integrity of a woman. However, the sexual integrity is a subject of discussion, where studies have shown that it affects the sexual desire and pleasure of a woman there is still a strong

³³ IAC, *Annual Activity Report 2009*, to be found at WWW <http://www.iac-ciaf.net/index.php?option=com_rubberdoc&view=category&id=45%3Aannual-reports&Itemid=11>

³⁴ M. Pais, "Promoting the abandonment of female genital cutting" in *Realizing the rights of the child*, Italy: Rüffer&rub, 2007, p. 221

³⁵ R. Abusharaf, "Introduction: The custom in question" in *Female Circumcision: multicultural perspectives*, Philadelphia: University of Pennsylvania Press, 2006, p. 11

³⁶ R. Abusharaf, "Introduction: The custom in question" in *Female Circumcision: multicultural perspectives*, Philadelphia: University of Pennsylvania Press, 2006, p. 11

notion among the members of the communities where circumcisions are common that there is no such effect.³⁷

The practice is not explicitly mentioned in any of these documents. The UN has called for action through means of a resolution adopted by the General Assembly in February 2000.³⁸ But this resolution is limited to reminding states of their obligations regarding the protection of women and children as laid down in the before mentioned documents and besides that only calls for action in terms of raising awareness by means of education.

On a regional level, Africa has the African Union (hereafter: AU) with the African Commission on Human Rights and Peoples' Rights (hereafter: ACHPR), as the human rights supervisory body. This organisation has its own legal instruments, several of which reaffirm the general rights laid down in the international instruments. However, the practice of female circumcision is more clearly addressed at the regional level. In July 2003, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, better known as the Maputo Protocol, was adopted. This protocol entails the general safeguards such as the Right to Life, Integrity and Security of the Person and the Right to Health and Reproductive Rights.³⁹ But in addition, article 5 specifically calls for the Elimination of Harmful Practices and thus lays an explicit obligation upon the signature states. However, out of the 53 states that are a party to the AU, 43 have signed the Maputo Protocol and only 21 have actually ratified it.⁴⁰

States often pledge to take measures and it is evident that often nationally there is often some sort of legal instrument in place. But the law enforcement is often weak and leaves room for improvement. Other ways of approaching this problem might be helpful to eradicate it.⁴¹ By looking at the problems that have arisen in the reality of the

³⁷ R. Abusharaf, "Introduction: The custom in question" in *Female Circumcision: multicultural perspectives*, Philadelphia: University of Pennsylvania Press, 2006, p. 12

³⁸ UN General Assembly, 54th Session, "Resolution 133 [Traditional or customary practices affecting the health of women and girls](A/R es/54/133)", 7 February 2000

³⁹ Respectively, art. 4 and art. 14 of the Maputo Protocol, to be found at WWW < http://www.achpr.org/english/info/women_en.html >

⁴⁰ List of Countries which have signed, ratified/acceded to the African Union Convention on Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, to be found at WWW < http://www.achpr.org/english/info/index_ratifications_en.html >

⁴¹ M. Pais, "Promoting the abandonment of female genital cutting" in *Realizing the rights of the child*, Italy: Rüffer&rub, 2007, p. 222

application of these legal instruments, it might become clearer how specific contexts influence the possibility for them to succeed. In the following chapters I shall therefore look first at the theoretical challenges to the legislation, by looking at the tension between the universality of human rights and the call for cultural relativism. Following that, I will look at the practical challenges that arise from the application (or lack thereof) from these rights because of the way specific societies view human rights. And last, I shall take a closer look at the status of women rights in terms of evaluating the CEDAW convention.

Chapter 4 – Theoretical challenges

It is presumed that the international human rights documents apply to all people equally. For example, this can be seen in article 1 of the Universal Declaration of Human Rights: *All human beings are born free and equal in dignity and rights*. In addition, the first paragraph of article 2 declares a prohibition on discrimination.⁴² These statements mean that there is a theoretical equality in the way all human rights apply to all individuals. However, practice shows that the reality is much different than this drawn picture. When states, or at a lower level, just people amongst each other, derogate from human rights they often call upon cultural relativism.

In this first section the concept of universality will be looked at; the thoughts behind this idea, the criticisms and the reality. In the next section the concept of cultural relativism will be discussed. And in the last part I shall look at whether a balance can be struck between the two concepts.

4.1 Human rights and universality

Human rights are considered to be rights that one has, simply for being a human being. There are not other requirements for these to apply.⁴³ It is accepted that the modern concept of human rights is based upon the theory by John Locke. His views on the origination of the state play an important role in this concept. In his theory a state is formed by a collective of people, who together enter into what is called a ‘social contract’, this contract includes the rules that people in the state should abide by. They enter into this contract to protect themselves from uncertainty and possible danger, thus the rules also include safeguards that limit the powers of the state. Such limitation is based on the idea that if a state interferes with these rights, then the state would be acting contrary to the rights it has been attributed. And thus the conclusion is that human rights are rights that exist before the state does.⁴⁴ It is also this very idea that explains the concept of universality; if the rights exist prior to the state and are inherent to every human being, it means that these rights should be the same for everyone everywhere.

⁴² C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 69

⁴³ J. Donnelly, “Human rights, Individual Rights and Collective Rights” in *Human Rights in a Pluralist World – Individuals and Collectives*, The Hague: Meckler, 1990, p. 39

⁴⁴ P. Kooijmans, Human Rights – Universal Panacea? Some Reflections on the so-called Human Rights of the Third Generation, *Netherlands International Law Review*, 1990, p. 317

This view on human rights does however have a flaw. The heavy focus on how the state should refrain from interfering in the life of people means that not all rights that are nowadays considered human rights fall under this definition. One could place human rights in the tension field that exists between the state and the individual.⁴⁵ But the question that rises is whether or not the role of the state really should be limited to non-interference in the lives of its people or whether the role could be more extended and the state has a duty to assist in certain situations. For this purpose it is relevant to briefly look at the characteristics of the human rights, divided in so-called generations. Human rights initially often already existed on a national level in constitutions. The intention of putting these rights in an international system is to increase the protection both by strengthening and by complementing the already existing system of rights.⁴⁶ For a rather long time there were only the so-called first generation rights, which are considered the negative rights covering the civil liberties. These rights generally entail the prohibition for states to interfere. The purpose of these provisions was to give people physical security and a good functioning judicial system.⁴⁷ The theory described above does fit this generation. However, at the beginning of the twentieth century the idea started to arise that the responsibility of the state exceeded the protection of its people and also consideration should be given to growing social questions.⁴⁸ These ideas marked the beginning of the development of the second generation rights, which are the so-called positive rights, that call for affirmative actions by a state. They cover economic, social and cultural rights.⁴⁹ This generation has some problematic elements, because even though these rights are set out there is no agreement about how and by what means they should be fulfilled by a state. They are considered to rely heavily on the context of the specific society in which they ought to work in.⁵⁰ This is where it becomes more difficult to see human rights function universally in exactly the same way. First, the role of the state becomes bigger than the one attributed to it. And second, if they link

⁴⁵ P. Kooijmans, Human Rights – Universal Panacea? Some Reflections on the so-called Human Rights of the Third Generation, *Netherlands International Law Review*, 1990, p. 319

⁴⁶ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 26

⁴⁷ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 25-27

⁴⁸ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 28

⁴⁹ C. Flinterman, Three Generations of Human Rights in ' *Human Rights in a Pluralist World*', Westport: Meckler, 1990, p. 76

⁵⁰ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 29

these rights to the specific societies, it means that the rights will not entail exactly the same thing for everyone, everywhere. The third generation of rights poses even more problems. This generation is often referred to as solidarity rights. Until thus far these rights have not been placed into any document from which obligations could be derived. This generation covers three rights, right to development, right to peace and the right to a clean environment.⁵¹ However, there are a number of uncertainties concerning these rights, which is the reason why they are not of the same standing as the first and the second generation. There are several factors that need to be defined to make it possible for rights to work, yet none are in this case clear. There is no consistency as to who exactly would hold these rights, human beings or peoples. Regarding who are the ones that should bear the duty arising from the right, the question namely is whether it would be the national governments or more broadly the international community. But the latter is even trickier because the question then arises what exactly is the international community; is it defined by just taking the richer states and hold them to have a duty versus the poorer states, or should there be another criteria? And last, there has to be an actual substance to these rights that is defined. In this case, the rights are rather wide in their scope and it has been proven difficult to define steps to take in order to achieve enjoyment of these rights. These rights are therefore often more seen as goals that states have set out to work toward, but they are not considered to be rights.⁵²

4.1.2 Universality called into question

As said in the previous section, all the human rights documents are presumed to mean the same for all people anywhere. The reason for this can be found in the time and way the documents known as the 'International Bill of Human Rights' were drafted. This 'Bill' consists of the 1948 Universal Declaration of Human Rights (hereafter: UDHR), the 1966 International Covenant on Civil and Political Rights (hereafter: ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereafter: ICESCR).

After World War II, the way people viewed the world changed significantly from a strong focus on the state and state sovereignty to the protection of the individual, strongly motivated by the memories of the atrocities from the war. The United Nations was created, which formed the platform for the drafting of these documents.

⁵¹ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 54-56

⁵² C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 58

One strong point of criticism is whether or not these rights can truly be universal. By looking at the 56 states participated in the drafting and considering their geographical and economic status, one can conclude that these are primarily western states. Their ideas on the political and socio-economic state of affairs were rather similar. Whereas nowadays there is a bigger diversity amongst states; there are now 192 member states in the UN and a large number of these took no part in the drafting process.⁵³

The idea behind the drafting process of the 1948 UDHR was not to create a document only applicable to the 'Western' individual, but rather a document applying to all men. Those involved in this process did in fact also include socialist states. The idea behind this document was to provide people the guarantee of protection using the 'Four Freedoms' that Franklin Roosevelt had declared in his 1941 speech.⁵⁴ So the idea behind it was not to be limited to a specific part of the world but to function globally. But the focus on how the documents came into existence should be shifted to the current status of these documents is today. In particular, the UDHR has been brought into many other international conferences and the concluding documents following these, such as the Vienna Declaration and Programme of Action after the Vienna Declaration on Human Rights in 1993.⁵⁵ Even more recently, during the World Summit in 2005 and its outcome the UDHR was acknowledged as the cornerstone of human rights in the world.⁵⁶

Signatories of these documents include many more states than the 56 that created the UDHR; thus one can conclude that the principles laid down are in fact now widely accepted even among the non-western states. And it is in fact the Third World countries that are currently calling upon a strong emphasis on the universality of human rights.⁵⁷ This would make the argument concerning the drafting process void.

The current diversity in states in the UN does not pose the only problem. A large number of states were at time of drafting still under the rule of colonial powers. Thus, the acceptance of these documents would mean giving in to external rule, as a number of states that later on accepted the UDHR in their national constitutions did so under

⁵³ P. Baehr, *The Role of Human Rights in Foreign Policy*, London: MacMilan, 1996, p. 14

⁵⁴ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 70

⁵⁵ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 74

⁵⁶ UN General Assembly, 60th Session, *Resolution 60/1. 2005 World Summit Outcome (A/Res/60/1)*", 24 October 2005, paragraph 121

⁵⁷ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 70

western pressure.⁵⁸ These documents were adapted into the national constitutions,; however, they had a strong reflection of liberal ideas that often conflicted with the traditional cultural beliefs.⁵⁹ After their independence, many African states have worked to end this conflict. Often their national constitutions were modified or even completely rewritten. However, these new constitutions do include the provisions of the UDHR and the African Charter on Human and Peoples' Rights (also known as the Banjul Charter, AfCHPR).⁶⁰ Therefore, even though originally these documents could be seen as forced upon these states, it is clear that they themselves now embrace the principles laid down in the basic human rights documents. These national constitutions are often enriched by their own cultural experiences.⁶¹

One could conclude from this that originally there were indeed some problems with the drafting, which could possibly influence the legitimacy of the documents in these regions. But this flaw in the historic development could possibly be regarded as irrelevant because of the later acceptance of the human rights regime.

Another issue that has been raised is the individualistic approach concerning human rights. This approach would not be suit communities in which the emphasis lies upon the collective rather than the individual person.⁶² Of the three main criticisms of human rights regime, this might be the one posing the biggest challenge. Two parts of the world in particular challenge this notion, namely Asia and Africa. Asia does not have its own interstate regional human rights document. It has been a rather challenging undertaking to attempt to create such a document. Several workshops have been arranged in order to attempt its creation. To date, the main results are sub-regional organisations establishing several initiatives that are considered valuable. For example, the Association of Southeast Asian Nations (hereafter: ASEAN) has a rather powerful Working Group for ASEAN Human Rights Mechanisms which aims to create a

⁵⁸ P. Baehr, *The Role of Human Rights in Foreign Policy*, London: MacMilan, 1996, p. 13

⁵⁹ B. Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State, *Human Rights Quarterly*, Volume 22, number 3, 2000, p. 846

⁶⁰ B. Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State, *Human Rights Quarterly*, Volume 22, number 3, 2000, p. 847

⁶¹ B. Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State, *Human Rights Quarterly*, Volume 22, number 3, 2000, p. 843

⁶² P. Baehr, *The Role of Human Rights in Foreign Policy*, London: MacMilan, 1996, p. 14

commission.⁶³ Even though this initiative is highly regarded, it must be noted that there is some concern that some of the states might be uncomfortable and not ready to be bound by a human rights body.⁶⁴ Other important initiatives come from NGOs; a prime example is the Asian Human Rights Commission, based upon the Asian Human Rights Charter for which was drafted by approximately 200 NGOs.⁶⁵

In Africa another approach has been taken. As said before, the national constitutions re-affirm the core of the international documents. In addition the Banjul Charter reflects upon the human rights approach; it covers the individual human rights but also deals with the collective rights of peoples.⁶⁶ This can be seen, for example, in article 19 which declares that 'all peoples' are equal, they have the same rights and freedoms, and domination by others is unjustifiable. Yet on the international level there is very little recognition of the rights of 'peoples'. This recognition is increasing because members of the international community have separately recognised the rights of people, as is laid down in article 27 ICCPR. However, self-determination, often a primary desire of these groups is not yet recognised.⁶⁷

It is unmistakable that most states have a positive attitude towards human rights. This acceptance of universality in theory does not, however, guarantee how universality will be dealt with in practice. The discussion in relation to a fair number of rights and their documents remains, but there seems to be an agreement that there is at least a core of human rights, which should be applied to everyone and cannot be derogated from.⁶⁸

4.1.3 Universalisation

Even though the human rights documents are generally rather widely accepted, a gap remains between the theoretical acceptance and the reality of how the norms take their

⁶³ S. Chiam, 'Asia's Experience in the Quest for a Regional Human Rights Mechanism' in *40 Victoria U. Wellington L. Rev* 127 2009-2010, p. 137

⁶⁴ S. Chiam, 'Asia's Experience in the Quest for a Regional Human Rights Mechanism' in *40 Victoria U. Wellington L. Rev* 127 2009-2010, p. 139

⁶⁵ S. Chiam, 'Asia's Experience in the Quest for a Regional Human Rights Mechanism' in *40 Victoria U. Wellington L. Rev* 127 2009-2010, p. 139

⁶⁶ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 35

⁶⁷ P. Baehr, *De rechten van de mens: universaliteit in de praktijk*, Amsterdam: Boom, 1998, p. 33

⁶⁸ B. Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, *Human Rights Quarterly*, Volume 22, number 3, 2000, p. 838

place in societies.⁶⁹ The Dutch Advisory Council on International Affairs (hereafter: AIV) published a report on the topic of universality in 2008. In this report they underline the fact that *universality can be seen as a cornerstone of the human rights system, but this does not mean that it is a foregone conclusion and a matter of course*.⁷⁰ To address the most recent challenges, they propose an approach that does not only focus on the governments but on a variety of actors. Instead of stopping at the acceptance, signing and ratification of human right documents by states, the AIV suggests a process they call ‘universalisation’. This should take place by the use of all the various actors and not just in the obvious political context but also in cultural, religious and social contexts. Several actions should be started. First, it is important that people are aware of their rights and what they entail; this should not be limited to government circles and a priority should be that this knowledge gets to absolutely all the ethnicities in a state. Second, people should not shy away from looking at issues in society from a human rights perspective. Third, it is important that ratification of these documents is not the end of the acceptance. States should implement these in their national legislation and make certain that they are enforced and not left as a set of symbolic laws. Also, when there are social concerns human rights should be mobilised, but that can only happen if there is a widespread acceptance of them. Finally, governments should make certain that the human rights are actually realised and thus should they use all means, whether economic, political or legal, to adopt policies that guarantee this realisation.⁷¹

These suggested processes and actions might seem rather obvious, yet it does not appear to be an automatically started process. Even though there is a presumed universality to these rights in terms of their pre-existence to states, it now appears to be dealt with in the opposite way with rights declared to exist by states. Individuals should be capable of enjoying their rights to the fullest, and thus would it be desirable that more attention should be given to them. This process of so-called ‘universalisation’ would be beneficial to increase knowledge and awareness, both for individuals so that they have the opportunity to claim their rights, but also for governments so that they

⁶⁹ Advisory Council on International Affairs (AIV), *Universality of Human Rights: principles, practice and prospects*, Advisory Report no. 63, The Hague, 2008 p. 10

⁷⁰ Advisory Council on International Affairs (AIV), *Universality of Human Rights: principles, practice and prospects*, Advisory Report no. 63, The Hague, 2008 p. 8

⁷¹ Advisory Council on International Affairs (AIV), *Universality of Human Rights: principles, practice and prospects*, Advisory Report no. 63, The Hague, 2008 p. 11

increase their efforts to ensure that citizens can enjoy these rights without actually needing to claim them.

4.2 Cultural Relativism

As described in the last section, when talking about human rights the universal character of these rights is often presumed. However that is often not the entire reality. There seems to be an agreement about a core of rights that cannot be derogated from. This argument concerns mainly the rights that guarantee that people can live their life in dignity. However, how these rights are achieved is subject to much discussion. The agreement on civil and political rights appears to be somewhat easier, although there is still not a single conclusive agreement on these. However, the other types of rights still pose much more difficulties.⁷² These rights are more dependent on the context of the society in which they must function and this is where the diversities in culture come into play.

The concept of cultural relativism will be looked at in this chapter: what this exactly entails, why it is an inevitable reality and in what way room should be given to freedom of interpretation of rights.

4.2.1 The concept of cultural relativism

When presuming human rights should mean the same to all people over the world and the claims they can make following these rights should lead to the same result everywhere, there is one factor that is not completely taken into consideration. There are no two states in this world that are exactly the same and thus it would seem that actual universality remains a fiction. It is underlined that universality is a presumption, a point to start from before you give room to possible deviations. Some of these deviations may very well be justifiable and possibly even necessary.⁷³

Cultural relativism can be looked at from several perspectives depending on how one would value either the universality or the cultural freedoms. If culture is seen as the absolute source of all values, then this is called radical relativism. This line of thinking would completely disregard the notion of human rights. If any types of rights would

⁷² C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 95

⁷³ J. Donnelly, *International Human Rights*, Boulder: Westview Press, 1993, p. 37

exist, these would be the result of development in society and not be the types of rights described above, namely rights that people have merely because they are human beings. Since it might be clear that human rights do exist, this line of reasoning seems unrealistic.

The complete opposite of this is radical universalism. This only gives room to a complete universal existence and application of all human rights. The application would be the same no matter the place or time. International documents often require implementation at state-level and during this process national values will find their way into the adopted legislation. And thus is it highly unlikely that there can never be room for cultural influences.

Given that the two extreme approaches are both unrealistic, it is unmistakable that a view balancing both should be taken. It is clear that some room should be given to cultural relativism. This can then be a strong or a weak relativism. The strong relativism approach would mean that cultural values are still given a strong appreciation and that the human rights regime would merely function as a check upon these values. The focus then still would be the diversity of cultures. On the other hand, the weak relativism view puts the primary emphasis on human rights and their initial universal character. It provides room for cultural influences but only as a secondary position.⁷⁴

This last approach of a weak cultural relativism is the most desirable route to be taken.⁷⁵ The basic view that human rights are universal by their nature remains the main focus. However, it leaves the option for states to bring in some of their national cultural values.⁷⁶ But this must be approached with a certain caution, to make certain that the nature of these rights is protected. If a creative use of these deviations prevents that protection, rights would *de facto* not be guaranteed anymore.

⁷⁴ J. Donnelly, *International Human Rights*, Boulder: Westview Press, 1993, p. 36

⁷⁵ J. Donnelly, *International Human Rights*, Boulder: Westview Press, 1993, p. 36 But this approach has later also been confirmed by P. Baehr in his book *The Role of Human Rights in Foreign Policy*, London: MacMilan, 1996, p. 15

⁷⁶ J. Donnelly, *International Human Rights*, Boulder: Westview Press, 1993, p. 37

4.2.2 Inevitability of cultural relativism

It might be evident that with the differences among all the states in the world it is no longer a question whether there is, or whether there should be cultural diversity. It is an unmitigable fact.⁷⁷ Why it is inevitable will be explained below.

First, there are some significant differences in the way human rights are perceived in societies. The approach that has been taken is that of the protection of the individual human being. The criticism of this being a very Western approach has already been discussed with regards to universality. However, it is also relevant in this instance. In different parts of the world the societies are not so much considered to be a collective of individuals that form a community but they rather consider it a close-knit community that happens to consist of individuals.⁷⁸ The actual difference with regard to human rights is that the first type of society sees the individual rights to be the most important; while in the second view the collective rights are highly regarded. They do not consider there to be merely rights that the individual can claim vis-à-vis the society but they also place duties upon the individual vis-à-vis the community. This notion is not found in the international documents. States that attach much value to this second view have included it in their own regimes. But even at a regional level this characteristic has found its way into documents. For example, the Banjul Charter includes the idea of duties toward society in addition to the attribution of rights to the individuals.⁷⁹

In addition to the perception, there are also big differences in how states implement the human rights. As said before, the nature of the rights are relevant with regard to the level of agreement upon them, not only in definition but in the way and by what means they should be implemented by states. This is clearly visible with regard to the social, economic and cultural rights.⁸⁰ There is not a single morality in the world since it has always been characterised by many different cultures, each of these functioning in their very own local cultural context. As societies can differ in the way they value certain rights, it is a simple conclusion that by giving room for implementation at a national level a different assessment will be made as to where the emphasis should lie and in what way this needs to find its way into the national policy.

⁷⁷ J. Donnelly, *International Human Rights*, Boulder: Westview Press, 1993, p. 35

⁷⁸ P. Baehr, *De rechten van de mens: universaliteit in de praktijk*, Amsterdam: Boom, 1998, p. 32

⁷⁹ P. Baehr, *De rechten van de mens: universaliteit in de praktijk*, Amsterdam: Boom, 1998, p. 37

⁸⁰ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 95

Through this valuation it is unlikely that the balance will be struck in the same way in every state, and thus can there never be an absolute universality in rights.⁸¹

If there was be no room for cultural influences in the human rights regime, the result would be a large discrepancy between the theoretical system and the reality of the application. If states were obligated to adopt national legislation that would guarantee a singular application of human rights across the globe, then this would not mean that this would in fact happen. It could very well be that a country has fulfilled its duties and implemented the rights into national system, but that it stalls at the level of application on a lower level. In several countries the local authorities are more powerful than the national government and people are more inclined to follow whatever these declare.⁸² And it might be that these authorities that consist out of dominating groups or classes that will continue to stick to their beliefs as it serves their best interest.⁸³ The fact that there is formal legislation in place does not guarantee that changes will take place in the cultural attitudes, and thus it might effectively not make much of a difference to the people that this legislation is in fact trying to protect.⁸⁴

4.2.3 Boundaries to cultural relativism

The above makes it evident that cultural relativism exists. It is something that should be accepted and in some ways even be truly welcomed and protected. It is after all also a right for people to live in a freedom of culture even though it cannot be absolute but only as long as it is in terms of human rights of others.⁸⁵ In fact it might even be so that culture could enrich human rights. Or as Bonny Ibhawoh rightly describes, *the challenge is to seek ways in which culture, through change, adaptation and modification can be made to serve as a complement rather than a constraint to specific national human rights aspirations*.⁸⁶ Also, it can also be a valuable asset in cases where the acceptance of the human rights regime is still low due to dominating local authorities. If these authorities

⁸¹ P. Baehr, *The Role of Human Rights in Foreign Policy*, London: MacMilan, 1996, p 14-15

⁸² Advisory Council on International Affairs (AIV), *Universality of Human Rights: principles, practice and prospects*, Advisory Report no. 63, The Hague, 2008 p. 15

⁸³ B. Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, *Human Rights Quarterly*, Volume 22, number 3, 2000, p. 854

⁸⁴ B. Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, *Human Rights Quarterly*, Volume 22, number 3, 2000, p. 857

⁸⁵ Advisory Council on International Affairs (AIV), *Universality of Human Rights: principles, practice and prospects*, Advisory Report no. 63, The Hague, 2008 p. 9

⁸⁶ B. Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, *Human Rights Quarterly*, Volume 22, number 3, 2000, p. 856

feel that some room has been left for cultural interpretations and that the documents do not merely mean an imposition of rules by a specific politically elite group, then the legitimacy and acceptance of these rights could increase.⁸⁷ The local population would be placed in a position where they feel they took part in the acceptance and developments of these rights and they are then more likely to abide by them.⁸⁸

It must be noted, however, that making room for cultural diversity should not mean that unjustifiable distinctions are made in the human rights regime that then are defended to fall under the protection of culture. Often the diversity is being used to defend harmful practices.⁸⁹ Female genital mutilation is a prime example of this. But the argument of cultural diversity is also sometimes used to declare that some groups in society have a different position and that therefore the rights apply to them differently or less. But such a concept of cultural diversity does not correspond with the notion of human right. In fact it could even be considered to be a partial rejection of the whole idea because this concept denies certain groups their rights. It must be evident that cultural diversity is not the same as inequality between different groups in a single society.⁹⁰

Another factor that stands in the way of full application of human rights is that leaders of a state declare that the specific characteristics of their society call for the excuse that countries are quite simply not ready for freedom of rights. This refers mainly to developing countries where the regimes often declare that first it should be made certain that people have their primary need fulfilled and that civil and political rights come secondary after that. It is typical of oppressing regimes that there is a certain safeguard for the social and economical rights, because these would contribute to the development of a state and only when a country is in a financially stable situation will there be attention for civil rights. It has, however, never been proven that there is a link between the restriction of human rights and a prosperous development of the economy of a state.⁹¹

⁸⁷ B. Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State, *Human Rights Quarterly*, Volume 22, number 3, 2000, p. 839

⁸⁸ B. Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State, *Human Rights Quarterly*, Volume 22, number 3, 2000, p. 856

⁸⁹ Advisory Council on International Affairs (AIV), *Universality of Human Rights: principles, practice and prospects*, Advisory Report no. 63, The Hague, 2008 p. 19

⁹⁰ J. Donnelly, *International Human Rights*, Boulder: Westview Press, 1993, p. 38

⁹¹ P. Baehr, *De rechten van de mens: universaliteit in de praktijk*, Amsterdam: Boom, 1998, p. 36

Cultural diversity should thus not be left unrestricted. But it does pose a big challenge to how these boundaries should be defined and how the compliance of states will be supervised.

To mark some boundaries, Jack Donnelly suggests an interesting approach to defining human rights. He suggests looking at human rights on three different levels. First there is a top level that should be called the 'concepts'; these are the general formulations of rights and at such a level there is very little room left for variation. Beneath this there is the level called 'interpretations'; this means that there can be some variety to a right in terms of interpreting it, this goes for the majority of the internationally described human rights. And the last level there can be a variation in the form in which the accepted interpretation of a right can be implemented.⁹² The concepts will remain the same if they are internationally defined. It is the interpretation and later the implementation that would give an opening to cultural diversity. But as been said before, there is growing consensus of human rights that cannot be derogated from. Under this approach, that would mean that these rights are thoroughly defined at the level of the concept but there would be little to no room for interpretations in order to guarantee their effectiveness. While rights such as social, economic and cultural rights would be defined at the level of the concept, the way a state wishes to protect these rights is then left to its own interpretation and implementation. This approach would give room to the call for cultural diversity, but on the other hand would mean that the rights are being made effective.

4.3 Balancing universality and cultural relativism

The actual enjoyment and application of human rights sometimes seem to be far from universally equal. However, there seems to be a growing consensus that there is at least a core of human rights that cannot be derogated from.

However, it is also an undeniable fact that cultural relativism exists. Several approaches could be taken to give room to this concept, but the most realistic is that of a weak cultural relativism. This would still place the main focus on the universality of the human rights but gives room for modifications on cultural grounds. However, these modifications should be small in number and should not undermine the basic principle

⁹² J. Donnelly, *International Human Rights*, Boulder: Westview Press, 1993, p. 37

of the specific right. In that way, cultural differences could very well become a valuable asset to the human rights system. Culture is not a static thing; it develops and, much like rights, it can grow or change in meaning during time. A way should be sought for these two to complement each other. All this does not mean that cultural diversities should be given free reign. It is important that limits are set. After rights are defined and implemented in national legislation, it is then important that these are also actually lived up to in societies. This creates the challenge of how to supervise states, to see how they balance the universal character of rights and to what extent they give room to their own cultural influences.

For this question, it is interesting to look at the Council of Europe (hereafter: CoE) and the supervision by the European Court of Human Rights (hereafter: ECtHR) of the European Convention of Human Rights (hereafter: ECHR). The ECHR and its supervision by the ECtHR is often considered a prime example of the functioning of a human rights regime. In the groundbreaking case of *Handyside v. United Kingdom* the Court developed a concept that is called the margin of appreciation.⁹³ This entails that states can have a small or big discretionary competence to intervene in the freedom of its people when they are exercising their rights. That case dealt with schoolbooks that had been forbidden as they were seen to be immoral; the producer claimed it to be a violation of the freedom of expression. It was decided that because of the close connection of a national judge with the population of a country, he or she would have a better view of how a national limitation to rights should be judged.⁹⁴ This has not subsequently led to a singular approach later on in terms of defining exact boundaries. The width of the margin heavily depends on the nature of the rights and how the competing rights should be balanced.⁹⁵ Even though there is no clear definition of this concept, it has become clear that in cases concerning public morality the margin will have a wider scope and seems almost to be determined on a case-by-case base. Yet, when it concerns a very basic principle of democracy and the rule of law, the margin of appreciation will be very narrow and the answer to the legal question at hand will be based on generalities and the Court's case law.⁹⁶

⁹³ ECtHR *Handyside v. United Kingdom*, 7 December 1967, Application no. 5493/72

⁹⁴ ECtHR *Handyside v. United Kingdom*, 7 December 1967, Application no. 5493/72, par. 48

⁹⁵ R. White, *The European Convention on Human Rights*, Oxford: Oxford University Press, 2006, p. 233

⁹⁶ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2008, p. 80

Such a discretionary competence for states is an interesting concept to give room to the cultural diversity. Defining human rights with basic concepts and letting states have the freedom to choose a way of implementing these rights would also complement the rights because it increases legitimacy and most likely the willingness of people to accept them. So it would be very interesting to research the possibility for a universal equivalent of a margin of appreciation.⁹⁷ The High Commissioner for Human Rights has declared that with regard to the ICESCR, states would enjoy a broad 'margin of appreciation', considering the nature of the obligations laid down in the covenant.⁹⁸ Considering the nature of other human rights, such as the civil and political rights, it is often not desirable to give much room to states to have a larger margin for interpretation. So it must be noted that it could become a very tricky venture. The states that are party to the ECHR are considered to be a rather homogenous group of states, yet the differences in opinions in these states can vary extensively. Further, if you were to place this concept in an even bigger setting with more diversity in cultures and thus opinions, it might mean that the level of application of people's rights becomes tainted and ineffective.⁹⁹

⁹⁷ Advisory Council on International Affairs (AIV), *Universality of Human Rights: principles, practice and prospects*, Advisory Report no. 63, The Hague, 2008 p. 23

⁹⁸ "High Commissioner backs work on mechanism to consider complaints of breaches of economic, social and cultural rights", consulted at WWW <
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6155&LangID=E> >

⁹⁹ Advisory Council on International Affairs (AIV), *Universality of Human Rights: principles, practice and prospects*, Advisory Report no. 63, The Hague, 2008 p. 23

Chapter 5 – Practical challenges

Bearing in mind the general remarks made above concerning universalism and cultural relativism and how they challenge the existence and application of human rights, a closer look will now be taken to two relevant areas and their valuation of human rights. Firstly, the geographical area of Africa will be discussed because that is where the majority of the FGM takes place. And following that a thematic approach will be taken, namely a focus on women's rights, primarily through looking at the CEDAW, which specifically aims to protect women and achieve gender equality, yet the convention carries the burden of many reservations, which might put its credibility at stake. Both of these topics will consist of a consideration linked the concepts described above.

5.1 Human rights in Africa

The notion in the UDHR that all human beings are born free and equal in dignity and rights is not something that has been fabricated.¹⁰⁰ Every single culture has certain morals and values that often include similar ideas. People should, therefore, be capable of agreeing upon the ideas that form the underlying concepts of the UDHR. Even if the human rights regime would not be explicitly accepted, the underlying principles can still be found in people's culture.¹⁰¹ An African judge in the ICJ has stated that he believes that even though human rights might not entirely be consistent with the African views as such, it does not take away the fact that the values and ethos they concern are not part of the traditional African value system.¹⁰²

First, a couple of remarks will be made concerning an African culture. Following that, a closer look will be taken at the regional protection of human rights, by means of the African Charter on Human and Peoples' Rights.

¹⁰⁰ Article 1 UDHR

¹⁰¹ N. Pityana, 'The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context', in *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000*, Cambridge: Cambridge University Press, 2002, p. 220

¹⁰² N. Pityana, 'The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context', in *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000*, Cambridge: Cambridge University Press, 2002, p. 222

5.1.1 African Culture?

The regional organisation for cooperation is the African Union, which consists out 53 member states. Every one of these has its own population with its own culture; some states even include many different ethnicities, each with its own morals and values. It would therefore be difficult to consider the continent to have one singular culture. Even a considerable homogenous continent such as Europe cannot be defined as having its own collective culture. But that does not put aside that some communal elements can be found among all these cultures. It must be noted, however, that to give room to all these different cultures the approach has been taken in the Banjul Charter, in article 29 (7) to give individuals enough room to preserve and strengthen African cultural values.¹⁰³

To draft the Banjul Charter, the drafters had to look closely at the African civilisation in order to make it a realistic document. There are four characteristics that could play a role in the acceptance and valuation of human rights in general, but even more specifically in policies that would eradicate a practice that is considered to be a part of the culture.

A first general characteristic of African cultures is the heavy emphasis that it places upon the collective as opposed to the individual. A well-known African proverb states that I am because we are, and since we are therefore I am.¹⁰⁴ This shows how the individual is not seen a separate being but rather as a part of the group. There is a close link between loyalty towards others, the family and the community.¹⁰⁵ Therefore, being excluded from the collective is seen as a severe punishment.¹⁰⁶ Second, a family is also considered differently in many African cultures. Family ties are not necessarily limited to the mother, father and siblings to whom someone is biologically related. Some communities, for example, do not even have equivalents in their language for 'aunts' or 'cousins' but they are just considered mother or brother and sister. These extended family members play a close role in the economical and social settings of their particular

¹⁰³ B. Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, *Human Rights Quarterly*, Volume 22, number 3, 2000

¹⁰⁴ E. Ankumah, 'Universality of Human Rights and the African Charter on Human and Peoples' Rights' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p. 29

¹⁰⁵ F. Viljoen, *International Human Rights Law in Africa*, Oxford; Oxford University Press, 2007, p. 248

¹⁰⁶ E. Ankumah, 'Universality of Human Rights and the African Charter on Human and Peoples' Rights' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p. 29

family.¹⁰⁷ Last, it is essential to contribute towards your own society and keep its traditions and values alive.¹⁰⁸ The enjoyment that an individual can have in terms of personal rights is something that is considered to go through the group. This provides certain safeguards so that in times of need, people can rely on their community. In relation to this characteristic, it must be noted that the intentions and judgements of legal proceedings in such societies are not merely aimed at resolving the legal dispute. These proceedings are also meant to restore the peace and harmony in a community.¹⁰⁹

It might be clear from this that it is important for people to be a part of a society and act as much in the benefit of the community as they can. As a result, it would not be easy for a woman to stand up for herself and refuse to undergo FGM. This refusal would be seen as harmful towards the community, as it is denying and refusing to take part in the societies culture, and could ultimately lead to her being excluded from the community. Exclusion would be bad for her both in terms of the social consequences and in terms of the economic position. Since a woman often relies on the community or her families, it could mean that she would have to find other ways of providing for herself.

The strong sense of communalism is evidently present in African societies. However, this also means that there is a heavy reliance on the old traditions of such communities, which means that the inequality in rights is still very much present.¹¹⁰

In addition to this reliance on old practices and traditions there is also a sense of non-absolutism. Some rights are indeed considered to be non-derogable. However, a unique trait of the Banjul Charter is that it does not contain a specific article on derogation. The confirmation that some rights are indeed non-derogable, comes from the cases before the African Commission.¹¹¹ In addition, the acceptance of completely controlling regimes

¹⁰⁷ E. Ankumah, 'Universality of Human Rights and the African Charter on Human and Peoples' Rights' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p. 30

¹⁰⁸ F. Viljoen, *International Human Rights Law in Africa*, Oxford; Oxford University Press, 2007, p. 249

¹⁰⁹ E. Ankumah, 'Universality of Human Rights and the African Charter on Human and Peoples' Rights' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p. 30

¹¹⁰ E. Ankumah, 'Universality of Human Rights and the African Charter on Human and Peoples' Rights' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p. 30

¹¹¹ F. Viljoen, *International Human Rights Law in Africa*, Oxford; Oxford University Press, 2007, p. 252

is not a given in all societies; there are in fact communities in which it is possible to remove a Chief if his actions would have negative effects on the interest of the people.¹¹²

5.1.2 The African Charter on Human and Peoples' Rights

Despite the many varieties in cultures, the corresponding characteristics of all these cultures did provide sufficient basis for the Banjul Charter to be drafted. First, the special characteristic elements of this treaty will be pointed out. And next a consideration will follow as to whether these are to be seen as positive or negative additions to the traditional human rights regime. The two most distinguishing features of the Banjul Charter are those of the duties of the individual and the rights of the collective.

Duties of people

As described before, some states' views of society differ with regard to individuals in a community.¹¹³ This is very much the case for African states. There is a strong sense of reliance on each other; this sense of community can be specified in what could be called the four R's: respect, restraint, responsibility and reciprocity.¹¹⁴ Respect is defined by the fact that there is a duty to respect ones parents, but as said, the notion of family and parents is much more extended and such a duty does thus entail that respect is obligated toward all elders in a society. Restraint is shown in the fact that individuals can act as they wish but they ought to keep in mind that their actions cannot interfere with the best interest of the community. All this has to be done to the fullest of someone's abilities, which places the responsibility with the individual. Last is reciprocity, the notion that if someone does something for you it gives you a duty to repay the favour. This is specifically notable in the fact that young people eventually take on the task of caring for their parents, who after all nursed them.¹¹⁵

¹¹² E. Ankumah, 'Universality of Human Rights and the African Charter on Human and Peoples' Rights' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p. 31

¹¹³ F. Viljoen, *International Human Rights Law in Africa*, Oxford; Oxford University Press, 2007, p. 248-249 in reference to a speech by former President of Senegal, Senghor in 1979, who described that 'a person and his rights are interlinked with the protection of family and other communities' as opposed to the European tradition where human rights are used as a 'weapon' by individuals to defend themselves against a group or entity.

¹¹⁴ E. Ankumah, 'Universality of Human Rights and the African Charter on Human and Peoples' Rights' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p. 32

¹¹⁵ E. Ankumah, 'Universality of Human Rights and the African Charter on Human and Peoples' Rights' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p. 33

The idea of duties can also be recognised to a very small extent in international treaties; however the Banjul Charter describes them much more thoroughly than any other document. But it must be noted that the articles, which describe the rights that the individual has, often also include so-called 'clawback' clauses.¹¹⁶ These clauses cover the limits of the rights by referring to what is in the best interest of the community, which means that the room for derogation of these rights is much more broadly and vaguely defined. As a result, the actual outcome might very well be that the interference of the state into the rights of individuals is easier and could even be seen as unrestricted.¹¹⁷ The African Commission has interpreted the clauses in such a way that the restrictions must refer to 'law', which in the Commission its view exceeds national legislations, this means that the limitation must thus be in conformity with international human rights standards.¹¹⁸ After it is clear that a limitation is allowed under 'law', the African Commission applies a proportionality test to weigh both interests. However, the application of this has been inconsistent, which means that there still remains a risk of the clawback clauses to be open-ended.¹¹⁹

Another difficulty with the fact that things are described as a duty is that often the norms are not specified in great detail. This lack of specificity means that it heavily relies on what a community considers to be a duty of a person, which can differ amongst communities. This generalisation poses problems if someone were to attempt to enforce a duty.¹²⁰

Collective rights

The emphasis on commonalty is a strong and natural notion in African societies. It would therefore have been unusual if the drafters of the Charter had taken the Western approach and put the main focus on the rights of the individuals. It is typical that these collective rights explicitly include the so-called third generation of rights and the right to

¹¹⁶ N. Pityana, 'The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context', in *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000*, Cambridge: Cambridge University Press, 2002, p. 229

¹¹⁷ E. Ankumah, 'Universality of Human Rights and the African Charter on Human and Peoples' Rights' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p. 29

¹¹⁸ F. Viljoen, *International Human Rights Law in Africa*, Oxford; Oxford University Press, 2007, p. 349

¹¹⁹ F. Viljoen, *International Human Rights Law in Africa*, Oxford; Oxford University Press, 2007, p. 352

¹²⁰ N. Pityana, 'The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context', in *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000*, Cambridge: Cambridge University Press, 2002, p. 230

peoples' self-determination.¹²¹ These are rights that the Western human rights regime is reluctant to accept.

The creation of what is called a nation-state is a very Western concept. The very nature of African societies does not lend itself to apply such an approach. African states often have a number of indigenous population and ethnic communities who wish to make certain their rights as a collective are recognised.¹²² With regard to the application of group rights, the Commission has declared that international and human rights ought to be responsive to the specific context of states. Where necessary, however, African states should make their own legislation that reflects the society better. And collective, environmental as well as economic and social rights are essential to African communities and thus should these be addressed with legislation.¹²³ That would mean that the specific country could provide a better balance between the general rights regime and the special characteristics of the culture. However, the legislation should still cover the basic protection and leave room for cultural influences when those are fulfilled, in order to prevent culture or the collective from being placed before the protection of the rights of the individual person.

However, it must be noted that much like the Western approach, the Charter does not define what 'people' exactly are. Even though it shows a more extended acceptance of self-determination, it is still limited to such an extent to prevent secession.¹²⁴

5.1.3 Effects on FGM legislation

It might be evident that there is not a singular way to describe an 'African culture'. However, there are sufficient corresponding elements that made it possible for the drafters of the Banjul Charter to create a document that reflects the general notion of African societies. However, in this document it has been established that there should be enough room, if not an obligation, for people to enjoy their own culture and to a bigger

¹²¹ E. Ankumah, 'Universality of Human Rights and the African Charter on Human and Peoples' Rights' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p. 31

¹²² N. Pityana, 'The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context', in *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000*, Cambridge: Cambridge University Press, 2002, p. 232

¹²³ N. Pityana, 'The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context', in *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000*, Cambridge: Cambridge University Press, 2002, p. 233

¹²⁴ E. Ankumah, 'Universality of Human Rights and the African Charter on Human and Peoples' Rights' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p. 32

extent, even have the duty to preserve it. What makes the document rather unique is that it explicitly lays down the rights of the collectives in the society and with this recognises some rights and principles that western states have been very reluctant to include. In addition, it covers duties of people towards their communities much more thoroughly than any other document has done thus far. However, because the document adopts this by means of 'clawback' clauses, the restriction of rights is much more vaguely defined and thus the risk exists that these become unrestricted.

Specifically, the strong notion of community and the obligations that people feel towards their community could be a reason that the efforts to eradicate these harmful traditional practices should not be merely taking a legal route. If the national legislature decides on policies that do not reflect the culture and traditions of societies, they are not likely to just accept and follow them without additional measures. The fact that these are communal values would mean that it would not be sufficient for one person to accept and follow the policies, but it would require the whole community to do so. In this instance, the regional and national legislatures have often embraced the universality of human rights in protecting the women that would be subjected to these harmful traditional practices. However on a much smaller level, the local communities in which these practices actually take place continue to call upon their freedom to experience their own culture in whatever way they wish. Since the most used route for eradicating FGM is forbidding it by law, it would mean that people would have to get arrested and prosecuted. However, if the people who are responsible for arrest and prosecution do not accept these policies, because they are often part of the communities that continue to follow the tradition, it is unlikely that it will happen and thus merely introducing legislation will be an ineffective measure.

5.2 Women's rights

Many of the countries in which harmful traditional practices take place are by nature patriarchal societies, which place the male members of a family in a more favourable position than the females and such a hierarchy within families thus disempowers the women.¹²⁵ In addition, the women are required to take on a submissive role, as men are

¹²⁵ UN Study of the Secretary General, *Ending Violence Against Women – From Words to Action*, United Nations Publication, 2007, p. 29

also the primary, and often sole, providers for the household in terms of income.¹²⁶ This affects the harmful traditional practices, more specifically FGM, because it places the general control over whether or not it happens in the hands of the male members of the family. The honour of the family often depends on the chastity of women and thus is it the role of the male members of the family to protect this and is FGM is often a measure to ensure the virginity of the these women.¹²⁷ In addition to honour, there is also an economic reason for the male members to protect virginity; it makes a woman a more eligible candidate for marriage, which could place the whole family in an economically better position.¹²⁸

Thus, it might be clear that there often is a big inequality between men and women in these societies, which is why it is relevant to look at women's rights. FGM is affected by the lack of equality in the position of men and women; it is believed that women in a more favourable position and with more influence in the decision-making would be less likely to fall victim to it. FGM is considered to be a type of violence with a discriminatory element to it and thus the relevancy of women's rights increases.¹²⁹ After some general remarks the main focus will be the Convention on the Elimination of All Forms of Discrimination Against Women (hereafter: CEDAW) and what the convention deals with, but more specifically the concern of the many reservations be raised. Next, some things will be said about the actual application of human rights documents concerning women in Africa. Last, a closer look will be taken at an expert group meeting on harmful traditional practices.

The principle of equality and thus the application of human rights should apply to everyone in the same way. Article 2 of the UDHR reads that this should mean without distinction of any kind, such as race, colour, sex, language, religion, political or other

¹²⁶ T. Wilson, 'Pharaonic Circumcision Under Patriarchy and Breast Augmentation Under Phallocentric Capitalism : Similarities and Differences', in *Violence Against Women*, volume 8 number 4, 2002, p. 503

¹²⁷ T. Wilson, 'Pharaonic Circumcision Under Patriarchy and Breast Augmentation Under Phallocentric Capitalism : Similarities and Differences', in *Violence Against Women*, volume 8 number 4, 2002, p. 503

¹²⁸ T. Wilson, 'Pharaonic Circumcision Under Patriarchy and Breast Augmentation Under Phallocentric Capitalism : Similarities and Differences', in *Violence Against Women*, volume 8 number 4, 2002, p. 504

¹²⁹ Report of the expert group meeting organised by the United Nations Division for the Advancement of Women and United Nations Economic Commission for Africa, 'Good practices in legislation on 'harmful practices' against women', 2009, p. 6

opinion, national or social origin, property, birth or other status. However, the reality differs and discrimination still very much plays a role in the application of human rights.

5.2.1 Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW expands on the 1976 Declaration on the Elimination of Discrimination against women.¹³⁰ A large number of states have taken part in the drafting process of this convention. With the aim to reach as much agreement as possible, the approach has been taken to give room to general formulations and giving states the option to opt out; some argue that this has influenced the integrity of the document and its aims.¹³¹

There is a difference between *de iure* and *de facto* equality. *De iure* equality concerns the legal position but the actual equality means that it is not only the same treatment but that there is an equal outcome. The *travaux préparatoires* show that there was much disagreement among states as to what equality in terms of CEDAW would entail. However, it would seem that the majority of the states intended to create *de iure* equality, while the initial objective behind the drafting process was to create an absolute and actual equality for women under the Convention.¹³²

The first five articles give overriding obligations to the state that they must fully accept. Articles 6 to 16 define the specific rights of women that ought to be protected. But it is clear that CEDAW has a single objective, namely to achieve equality. The Convention moves from just mere prohibition of discrimination to provisions that place the obligation on states to guarantee specific provisions. It must also be noted that CEDAW does not provide for a complaint procedure, be it individual or inter-state.¹³³

Reservations, responses and effects

It must be noted that CEDAW is one of the conventions with the most reservations to it.

¹³⁰ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 65

¹³¹ J. Parlevliet, 'Universaliteit van vrouwenrechten' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p.19

¹³² J. Parlevliet, 'Universaliteit van vrouwenrechten' in *Universaliteit van mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1992, p.21

¹³³ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 66-67

The Vienna Convention on the Law of Treaties prohibits reservations that are contrary to the object and purpose of the concerning treaty.¹³⁴ It has been determined in the Reservations Case¹³⁵, which formed the basis for article 19(3) VCLT, that even if a treaty is silent on the topic of reservations, states may make reservations but even these are limited to this 'object and purpose'-test because at least those two elements will be evident from the treaty itself.¹³⁶ It can be concluded that both these elements are clearly recognisable in the CEDAW. Article 28 (2) CEDAW does reaffirm this prohibition on incompatible reservations, but it is not specified whether or not some of the rights laid down would be non-derogable. The reservations that have been made are either related to specific articles or are general in their nature. Reservations should be looked at individually to determine their compatibility with the convention and its objective for legal, social and economic equality.¹³⁷

A certain number of Islamic states have made reservations that provisions that would be contrary to their Sharia Law would not apply and that the obligations that are laid down are fulfilled to the extent that Sharia would allow it. This is a direct contradiction to article 27 of the Vienna Convention, which declares that a state cannot invoke domestic legislation to defence a breach of its international obligations. However, these Islamic states consider the principles of their religion and subsequently the Sharia law to be superior to international law.¹³⁸ It must be noted that not only Islamic states have made reservations with regards to the Convention. The reservations are extremely diverse; some explicitly exclude the application of certain rights, while others are vaguer in general to prevent any obligation to be placed upon the state that it does not wish to fulfil. Some of the reservations have explanations attached to them, but these do not always clarify the scope. And even though clarifications are offered to describe why they made the reservation, this does not mean that these clarifications are a validation and

¹³⁴ Article 19 (c) VCLT

¹³⁵ ICJ, Advisory Opinion Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, May 28th 1951

¹³⁶ J. Klabbers, *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press, 2002, p. 84

¹³⁷ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 68

¹³⁸ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 69

therefore would make these reservations legitimised.¹³⁹ Some of the reservations may in fact rest upon outdated morals of protectionism, which reinforce sexist stereotypes and would thus establish the complete opposite of the purpose and objectives of the CEDAW.¹⁴⁰

One problem does remain, which is that the Convention foresees primarily in the protection of people in a state-civilian relation yet the violations of the equality principle often do take place in a private sphere. CEDAW does indirectly give states the obligation to also intervene in these instances but it is evident that a gap exists.¹⁴¹ The intention of the Convention remains to provide equality, whether in a public or private sphere. But equality does not necessarily mean it is required to treat people in the same way as long the goal is achieved.¹⁴²

The reservations have not been gone by unnoticed; other state parties to the Convention have responded to this. Responses have been made in two ways; unilaterally and institutionally through the framework of the United Nations.

There are only seven states that have made use of the option under the Vienna Convention to object to reservations.¹⁴³ Objecting to a reservation creates a bilateral agreement between the reserving state and the objecting state. The outcome of this objection would be that the articles on which the reservations are made do not apply in the interstate relationship.¹⁴⁴ It seems that the general reservations have been more accepted than the specific ones. One could speculate as to why there is so little objection to the reservations, but it is highly likely that they are tolerated in order for the Convention to continue to exist and to attempt to achieve change this way. Objections also have the risk to work counterproductively. Since the specific articles will not apply between the two states, it means that this is only a symbolic procedure to follow. It could

¹³⁹ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 71

¹⁴⁰ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 72

¹⁴¹ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 74

¹⁴² M. Sepulveda e.a., *Human Rights Reference Handbook*, Costa Rica; University for Peace, 2004, p. 326

¹⁴³ Article 20 VCLT

¹⁴⁴ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 75

also be considered an unfriendly thing to do in an interstate relationship. It is therefore notable that fewer objections have been made against a state such as The United Kingdom.¹⁴⁵ The conclusion could be drawn that the lack of objections to these, often questionable, reservations undermines the integrity of the Convention and that states now have the impression that the obligations under the CEDAW are less binding than those under other treaties.¹⁴⁶

With regard to institutional responses the same could be said, there are little notable efforts to be found. The CEDAW itself has raised the issue on several occasions but it has had very little support from other institutions. The Committee has, for example, purposed thorough research between the Islam and the women's rights. For that to be started it needed the support of ECOSOC and the General Assembly, but these institutions have not assisted in this effort and that was the end of that suggestion. CEDAW does not have a competence to rule upon the compatibility of these reservations.¹⁴⁷ Another suggestion has been made that the CEDAW should perhaps seek the advisory opinion of the ICJ to come up with a conclusive and hefty response to these reservations. Again this is something for which the Committee does not have the competence so it would have to seek support, either from ECOSOC or the General Assembly and considering what happened with their last proposal assistance seems highly unlikely.¹⁴⁸

Besides the, be it limited, responses by other state parties and through institutions has the CEDAW Committee has itself responded regarding the amount of reservations.¹⁴⁹ It has repeatedly called upon the states to review their own reservations and whether or not they are permissible. In a report on the CEDAW, the Committee has made a statement with regard to these reservations. The numbers, they point out, come down to

¹⁴⁵ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 76

¹⁴⁶ M. Sepulveda e.a., *Human Rights Reference Handbook*, Costa Rica; University for Peace, 2004, p. 321

¹⁴⁷ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 78

¹⁴⁸ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 81

¹⁴⁹ *Statements on the reservations to the convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women*, Excerpt A/53/38/Rev.1

the fact that 1 in 5 states that are party to the convention have made one or more reservations and that some even concern the articles that are considered to be the core of the convention.¹⁵⁰ In several recommendations before this Statement, the Committee has commented on the permissibility of reservations and an analysis of the core articles.¹⁵¹ With this statement, the Committee wishes to reaffirm their worries and call upon the states to reconsider their reservations, most specifically if the reservations concern the core articles. They call upon them to also attempt to bring the role-division in the private family sphere into a public debate in order to make equality more sociably acceptable.¹⁵² And they explicitly declare that *neither traditional, religious nor cultural practice nor incompatible domestic laws and policies can justify violations of the Convention*.¹⁵³ The Committee does recognise the fact that the system in which states can put objections forward only has limited results in terms of other state removing the reservations, but sees a positive point in the fact that it exercises pressure and it gives a good assessment of the permissibility of reservations in the views of other state parties.¹⁵⁴

Despite the impressive intentions of the Convention, the reality is that they are not very much observed. Even though some states might have only made a single reservation to the CEDAW, the effect of the bulk of the reservations cannot be underestimated. It results in an impression that the obligations under the convention are less binding and thus the true object and purpose of the document will not be achieved. This calls for stricter actions to counteract the position of states with regard to this convention.

¹⁵⁰ Articles 2 and 16 are considered to be the core provisions of the convention, *Statements on the reservations to the convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women*, Excerpt A/53/38/Rev.1, paragraphs 5-6

¹⁵¹ Respectively these are recommendation 20 and 21

¹⁵² *Statements on the reservations to the convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women*, Excerpt A/53/38/Rev.1, paragraph 12

¹⁵³ *Statements on the reservations to the convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women*, Excerpt A/53/38/Rev.1, paragraph 17

¹⁵⁴ *Statements on the reservations to the convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women*, Excerpt A/53/38/Rev.1, paragraphs 18-21

However, such a task should be undertaken with caution in order to calculate the risk that it will make states withdraw from the Convention.¹⁵⁵

5.2.2. Application of Women's Rights in Africa

N. Pityana mentions two examples in his writing that clearly show, that the actual application of human right documents with regards to women still violates the equality principle. In Zimbabwe for instance, there are clear rules that aim to fulfil the international obligations. The Human Rights Committee has declared with regard to this that the rights of women should, under national legislation, not be subject to discrimination and equality with men should be ensured.¹⁵⁶ So even though these legislative safeguards do exist, the reality is far from that as discrimination against women in a private setting is still allowed. The Supreme Court has decided in a ruling that the customary law takes precedence over statutory law, because the rural communities still very much practice the traditional law primarily and it would thus offend them to apply other rules.¹⁵⁷

Also, in South Africa some cases have been brought before the South African Human Rights Commissions that show the continuance of discriminatory legislation. When a woman sought judicial proceedings, the tribal court still applied the discriminatory law and the assistance of the Human Rights Commission was necessary for this to be reversed. Therefore, it may be evident that the South African case law is now moving towards a better implementation and interpretation of the human rights regime.¹⁵⁸

The CEDAW has not explicitly commented on either the case in Zimbabwe or in South Africa. After these cases came before the national courts, however, the states have both submitted their First Periodical Report to the Committee under the obligation of article

¹⁵⁵ C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in *Human Rights as General Norms and a State's Right to Opt Out*, London: B.I.I.C.L, 1997, p. 82

¹⁵⁶ N. Pityana, 'The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context', in *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000*, Cambridge: Cambridge University Press, 2002, p. 237

¹⁵⁷ N. Pityana, 'The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context', in *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000*, Cambridge: Cambridge University Press, 2002, p. 238

¹⁵⁸ N. Pityana, 'The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context', in *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000*, Cambridge: Cambridge University Press, 2002, p. 240

18 CEDAW. In reviewing the report of Zimbabwe, the Committee expresses its concern regarding the fact that preference still lies with customary law, especially in cases of codified contrary legislation; this preference effectively means a continuance of the old traditional and socio-cultural attitude towards women and that discrimination is continued.¹⁵⁹ Therefore, there is still a strong acceptance of the old traditional practices that are harmful towards women and children, such as FGM. The Committee also recognises that women in rural areas are affected more because the traditional cultural values are strongest there. Another strong point of concern is that much of the violence against women is not recognised by law, especially violence which takes places in the private sphere.¹⁶⁰

With regard to South Africa the general thought comes down to something similar. There is legally equality between men and women. However there are still conflicts between the legislation and the religious and customary laws. And the review of the situation shows that the discriminatory laws generally still take preference.¹⁶¹ In its recommendations, the Committee calls upon the states to take a more active role in abolishing all discriminatory practices and improving gender equality also in the private sphere.¹⁶²

5.2.3 Women's rights and FGM legislation

In 2009, an expert group meeting was held in order to review legislation concerning harmful traditional practices organised by the United Nations Division for the Advancement of Women and United Nations Economic Commission for Africa. Among the participants were representatives from IAC and the CEDAW Committee.

The expert paper put forward by the CEDAW Committee points out that the Committee has addressed the issue of FGM several times, most explicitly in their General Recommendation 14, in which it calls upon the state parties to take appropriate and

¹⁵⁹ *Report of the Committee on the Elimination of Discrimination against Women 18th and 19th Sessions*, A/53/38/Rev.1, paragraph 139

¹⁶⁰ *Report of the Committee on the Elimination of Discrimination against Women 18th and 19th Sessions*, A/53/38/Rev.1, paragraph 141-142

¹⁶¹ *Report of the Committee on the Elimination of Discrimination against Women 18th and 19th Sessions*, A/53/38/Rev.1, paragraph 117

¹⁶² *Report of the Committee on the Elimination of Discrimination against Women 18th and 19th Sessions*, A/53/38/Rev.1, paragraph 150-157

effective measures not limited to merely legal measures.¹⁶³ Also, General Recommendation 19 covers it; this recommendation deals with the general topic of violence against women, but makes it clear that traditional harmful practices such as FGM are considered as such.¹⁶⁴

The expert papers put forward by the members of the IAC show similar findings. One gives an overview of the national legislation, or lack thereof, and whether these can be considered successful. It becomes clear that in a country such as Ghana the efforts have been effective, legislation is followed and people are prosecuted, and trained groups of former exercisers check upon communities and report on their findings.¹⁶⁵ But in Niger, legislation has been introduced which appears to be merely a piece of paper, since it has not been implemented.¹⁶⁶ On the other hand, community-based actions in Senegal been very successful without even needing the threat with legislation, but that is also being drafted in the country.¹⁶⁷ The other paper gives more a general overview of international, regional and national and socio-communal legislation. However, the conclusions of both papers have the same general thought. Namely, legislation alone is not the only solution but neither is leaving it up to the community. It should be a mixture of the two approaches. As one of the papers puts it, *protection of the rights of women cannot be left to the whim or compassion of society; more than that, it must be a legal obligation which is binding for all, at all levels.*¹⁶⁸

The final report of this expert group meeting shows concerns with regard to the previously mentioned 'medicalisation' of FGM, but also that at times communities adapt their methods in response to legislation, such as changing between the four types or performing the procedure on younger girls because they are less likely to report.¹⁶⁹ However, the report also provides several recommendations in terms of introducing legislation, defining the practices by law and implementing the legislation. In addition, it also suggests measures such as shelters for victims or those fleeing before they fall

¹⁶³ The suggested measures under sub (a) to (c) suggest that legislation should be supported by other initiatives. CEDAW Committee, *General Recommendation 14*, 1990

¹⁶⁴ CEDAW Committee, *General Recommendation 19*, paragraph 11 and 20, 1992

¹⁶⁵ B Ras-Work, *Legislation to address the issue of female genital mutilation (FGM)*, EGM/GPLHP/2009/EP.01, p. 10

¹⁶⁶ B Ras-Work, *Legislation to address the issue of female genital mutilation (FGM)*, EGM/GPLHP/2009/EP.01, p. 13

¹⁶⁷ B.Ras-Work, *Legislation to address the issue of female genital mutilation (FGM)*, EGM/GPLHP/2009/EP.01, p. 14

¹⁶⁸ M Kouyate, *Harmful traditional practices against women and legislation*, EGM/GPLHP/2009/EP .07, p. 9

¹⁶⁹ Report of the expert group meeting, Good practices in legislation on 'harmful practices' against women, 2009, p. 7-8

victim to such practice, and providing support for community-based initiatives that promote the abandonment of this practice.

5.3 Conclusion

The regional African human rights regime has several unique characteristics. The aim of some of these characteristics is to give room to protect the culture of a community. In fact, it could even be said that under the Banjul Charter, people have the duty towards their community to preserve their culture. A number of rights laid down in the Charter are limited by so-called 'clawback' clause, which means that the limitations could be interpreted as vague and possibly even unrestricted.

This strong sense of communalism and the obligation that people feel towards their own society effects the application of human rights. Preserving the traditions takes preference. Thus the eradication of harmful traditional practices merely by legal measures would not be effective.

The CEDAW should have made major improvements in the position of women. But the reality is that the Convention is subject to so many reservations that its actual effectiveness is rather limited. However, it cannot be said that there is absolutely no difference. The CEDAW Committee is bringing up the reservations repeatedly, and hopefully with some assistance of state parties more will be removed or at least become more specific.¹⁷⁰

The actual application of CEDAW, along with the regional and national legislation to promote gender equality and eradicate traditional practices harmful to women and children, still remains a desirable area for improvement. In the rural areas it is evident that the customary law, and thus the discriminatory customary practices, still takes precedence over the protection of the international human rights regime with regard to the protection of women.

¹⁷⁰ D. Coker-Appiah, *The CEDAW Convention and harmful practices against women: the work of the CEDAW Committee*, EGM/GPLVAW/2009/EP.05, p. 4

Chapter 6 – Different approaches

Since FGM still continues despite legislation, it is clear that perhaps solutions should be sought through other measures or other measures could at least compliment the chosen approach. Specifically, the legal human rights approach is disputed because it does not take into account the traditions and cultures of these groups. On top of that, this approach also neglects looking at the socio-economic position of these girls and women.¹⁷¹ As a result, the social pressure on them remains, as described earlier for reasons including their eligibility for marriage.¹⁷² However, the practice is also considered something that affects the community as a whole. The practice is a rite of passage; in some communities, that goes along with mystical and spiritual elements such as masks and masquerades that represent spirits to protect the practitioners and circumcised girls. Banning this ritual might mean a spiritual unbalance that could, in the community's view, affect more than just the girls.¹⁷³ Many examples of people trying to eradicate this practice show that by demonstrating some sensibility to the believers' ideas, much can be achieved. This method makes people take matters into their own hands in order to adopt changes. Thus there is a call for a multidisciplinary approach.¹⁷⁴

National and international NGOs can play a valuable role in this approach. The organisation most prominent in the struggle to eradicate female circumcision is the IAC, from the legal perspective it played part in getting the practice included explicitly in the Maputo Protocol. But the focus lies on programs that will influence policy and action and create positive attitudinal change through the implementation of projects at the community level.¹⁷⁵

Based on several experiences and academic research, the UNICEF Innocenti Research Centre has created a set of recommendations.¹⁷⁶ First, in the communities in

¹⁷¹ R. Abusharaf, "Introduction: The custom in question" in *Female Circumcision: multicultural perspectives*, Philadelphia: University of Pennsylvania Press, 2006, p. 14

¹⁷² M. Pais, "Promoting the abandonment of female genital cutting" in *Realizing the rights of the child*, Italy: rüffer&rub, 2007, p. 225

¹⁷³ R. Abusharaf, "Introduction: The custom in question" in *Female Circumcision: multicultural perspectives*, Philadelphia: University of Pennsylvania Press, 2006, p. 9

¹⁷⁴ R. Abusharaf, "Introduction: The custom in question" in *Female Circumcision: multicultural perspectives*, Philadelphia: University of Pennsylvania Press, 2006, p. 15

¹⁷⁵ Inter-African Committee on Traditional Practices, *Programs*, Available at WWW < http://www.iac-ciaf.net/index.php?option=com_content&view=article&id=52&Itemid=18 >

¹⁷⁶ M. Pais, "Promoting the abandonment of female genital cutting" in *Realizing the rights of the child*, Italy: rüffer&rub, 2007, p. 226; *Changing A Harmful Social Convention, Female Genital Mutilation/Cutting*, The Innocenti Digest, issue 12, 2005

question discussions should be raised in order to recognise the harm of the practice but, in addition, to promote the rights of those girls and women and collectively attempt to empower them. Next, there should be a communal decision to abandon the practice. This decision should be followed by a public commitment, because if they do not openly declare it chances still are that the girls who break with the traditions will be stigmatised, discriminated against and perhaps even excluded. Third, the whole process needs to be supported by legislative and policy reforms framed by the already existing international standards. There should be adequate resources and culturally sensitive advocacy campaigns, as opposed to just expecting states and communities to adopt these reforms. The actual reforming should take place with the involvement of not only government and civil society representatives, but also the community and religious leaders. Last, it is essential for an inter-generational dialogue to take place. Involvement of the young people is important to make them understand the risks of the practice, make certain they are engaged in the safeguard of their rights and make sure that they are committed to also promote the abandonment of the practice. These are all essential to success in eradicating the practice and achieving a lasting change.¹⁷⁷

6.1 Millennium Development Goals

A collective international undertaking that could very well influence the success that all the initiatives have is the Millennium Development Goals (hereafter: MDGs). In 2000 the GA accepted the United Nations Millennium Declaration¹⁷⁸, a document in which eight goals are set. These targets are meant to lead to the development of policies, be it international or national, to improve the situation with regard to these goals. They do not have a binding nature; they are just targets that states hope to achieve in order to improve the lives of many in the world, a key element to these being the eradicating poverty. Nevertheless, a number of states do take these goals seriously and they are under constant attention.¹⁷⁹ The director of the Millennium Development Project, Jeffrey Sachs, has stated in his reports that the MDGs matter because they promote basic human

¹⁷⁷M. Pais, "Promoting the abandonment of female genital cutting" in *Realizing the rights of the child*, Italy: Rüffer&rub, 2007, p. 226

¹⁷⁸ *United Nations Millennium Declaration*, A/Res/55/2

¹⁷⁹ W. Van Genugten et al., *The United Nations of the Future: Globalization with a Human Face*, Amsterdam: KIT Publishers, 2006, p. 94

rights.¹⁸⁰ This is partly why they could play a positive role in the eradication of harmful traditional practices.

As said above, there are eight MDGs, namely eradicate extreme poverty and hunger; achieve universal primary education; promoting gender equality and empowering women; reducing child mortality; improving maternal health; fighting HIV/AIDS, malaria and other diseases; ensuring environmental sustainability and developing a global partnership for development.

The goals that are most relevant to the subject at hand are goals two and three. As described in the chapter on the practice of FGM, girls are often considered to be eligible for marriage after the procedure and the lengthy preparation for the process often leads to them dropping out of school. If it would be possible for them to get some education and develop themselves, they might be in a more suitable position to remove themselves from their discriminatory circumstances. Numbers do in fact show that when a higher educated woman has children, these children would be less likely to be circumcised; thus the effect of education is one that could in the long-term benefit more young girls.¹⁸¹ Closely linked to all this is development goal three: promoting gender equality and empowering women. One of the starting points in that process has been the attempt to make certain that women did not only receive primary, but often also secondary and even tertiary education.¹⁸² Receiving more education places them in a situation where they have more choices in life, which does not necessarily mean that they will follow the old traditions. In addition, having more women in higher placed political positions would be a positive influence. It would not only have to be in national governments; it could also be in lower political organs such as local governing bodies.¹⁸³ The societies in which harmful traditional practices such as FGM take place are often male dominated societies, as described earlier; it would therefore be a step in the right direction, especially if the aim is to introduce local legislation or policies. Having women take part in decision-making at such levels might be an eye opener with regard to what the

¹⁸⁰ W. Van Genugten et al., *The United Nations of the Future: Globalization with a Human Face*, Amsterdam: KIT Publishers, 2006, p. 95

¹⁸¹ M. Pais, "Promoting the abandonment of female genital cutting" in *Realizing the rights of the child*, Italy: Rüffer&rub, 2007, p. 225

¹⁸² United Nations Development Group, *Thematic Paper on MDG3: Promote Gender Equality and Empower Women*, 2010, p. 13

¹⁸³ United Nations Development Group, *Thematic Paper on MDG3: Promote Gender Equality and Empower Women*, 2010, p. 21

procedures actually do to women, and it could mean that men would be more willing to step aside from these practices.

The success of the MDGs has been mixed and some of the targets might not be met. But progress seems to be visible. Looking at the 2008 progress report of the area most relevant for the topic of this thesis, Africa, it can be said that the average growth with regard to poverty, for example, is not yet where it should be.¹⁸⁴ However, looking at goal two shows that significant progress has been made in the enrolment of children in primary education, and if that trend keeps up the target set for 2015 might be met.¹⁸⁵ Progress for the third goal is measured in school enrolment on three levels and women's political participation on a national level. The progress in primary education is positive, unfortunately the same cannot be said about secondary education and even less so for tertiary education. However, representation in the parliament does show positive progress although this differs significantly between states.¹⁸⁶

The current progress shows that the targets might not all be met in 2015, but this does not mean that states should abandon all their efforts and stop supporting the project. At the end of September 2010, a meeting was held in order to review the current status of the MDGs. This meeting has led to a re-affirmation by the GA of the resolve to promote the social and economical advancement of all people, just as the intention was of the initial declaration.¹⁸⁷ More specifically, they added with regard to the two relevant goals that in terms of education, at any level, all obstacles should be removed in order to make it accessible for all.¹⁸⁸ Next, states should promote women's participation in all types of labour by introducing positive government policies. In addition, they ought to improve the number of women participating in policy and decision-making processes.¹⁸⁹ Most specifically relevant to directly eradicating traditional harmful practices, states

¹⁸⁴ UN Economic and Social Council and Economic Commission for Africa, *Assessing Progress in Africa towards the Millennium Development Goals Report 2008*, E/ECA/COE/27/10, AU/CAMEF/EXP/10(III), p.1

¹⁸⁵ UN Economic and Social Council and Economic Commission for Africa, *Assessing Progress in Africa towards the Millennium Development Goals Report 2008*, E/ECA/COE/27/10, AU/CAMEF/EXP/10(III), p.4

¹⁸⁶ UN Economic and Social Council and Economic Commission for Africa, *Assessing Progress in Africa towards the Millennium Development Goals Report 2008*, E/ECA/COE/27/10, AU/CAMEF/EXP/10(III), p.8-9

¹⁸⁷ GA, *Draft outcome document of the High-level Plenary Meeting of the sixty-fifth session of the General Assembly on the Millennium Development Goals*, A/64/L. 72, 2010, p.1

¹⁸⁸ Paragraph 71 (d) and 72 (b), GA, *Draft outcome document of the High-level Plenary Meeting of the sixty-fifth session of the General Assembly on the Millennium Development Goals*, A/64/L. 72, 2010, p.16

¹⁸⁹ Paragraph 72 (d), GA, *Draft outcome document of the High-level Plenary Meeting of the sixty-fifth session of the General Assembly on the Millennium Development Goals*, A/64/L. 72, 2010, p.18

should raise awareness, increase accountability and prevent and combat all types of violence against girls and women.¹⁹⁰ The Thematic Paper on MDG three identifies that poverty still remains a primary reason why girls do not have access to education,¹⁹¹ considering that it all starts with the primary education of girls, perhaps it would be wise to place and emphasis on assuring that they receive this education.

¹⁹⁰ Paragraph 72 (g), GA, *Draft outcome document of the High-level Plenary Meeting of the sixty-fifth session of the General Assembly on the Millennium Development Goals*, A/64/L. 72, 2010, p.18

¹⁹¹ United Nations Development Group, *Thematic Paper on MDG3: Promote Gender Equality and Empower Women*, 2010, p. 13

Chapter 7 – Conclusion

Before starting this paper I set out the goal to answer this question; how the call for cultural relativism influences the application of women's rights in an African context, especially with regard to the protection of women in cases of harmful traditional practices such as FGM? And can any recommendations be made with regard to improving the situation?

To answer this question first a closer look was taken at the practice of FGM and why it is particularly harmful. A strong movement has arisen over the years with the intention to eliminating this practice, and it has been a mixed success story. Legislation has been developed on many levels. This legislation includes the regional approach by means of the Maputo Protocol, the national approach or even local legislation that either generally forbids harmful traditional practices or that specifically mentions FGM as such. On the international level a human rights based approach has been used. The practice violates several human rights, yet statistics clearly show the practice still continues. In fact, there have been recent developments that show a rather worrying picture of the so-called medicalisation of the practice. In addition, the practice seems to have spread to parts of the world that originally were not familiar with this practice, but it has found its way there through immigrant communities.

To identify why the legislation has been unsuccessful I first looked at some theoretical challenges, namely the topics of human rights, universality and cultural relativism. One of the excuses used to continue FGM is that it is part of a culture and people should have the freedom to practice their own culture. However, human rights have been set up to have a universal character. Nevertheless it is unmistakable, and in my view inevitable, that a level relativism exists. The difference between the current and a more desirable situation is to what extent cultural relativism should exist. In the cases where the harmful traditional practices continue there exists a strong cultural relativism, which emphasise the culture of a group and uses the human rights regime as a check upon these cultural values. However the approach that should be taken, is in my view that of a weak cultural relativism. This puts the primary emphasis on human rights and their initial universal character. It then provides room for cultural influences but only as a

secondary position, which would mean that the protection of the basic human rights would be more effective. A decent balance should be struck and this is where the challenges lie. Perhaps this could be made easier by defining human rights on different levels, such as Jack Donnelly suggests. To start with a general 'concept', which leaves little room to deviate from. Below this concept, lies the 'interpretation', the level where states can interpret things in a more desirable way for their specific society. And, as a last level, there is variation in the way the accepted interpretation is then implemented into society. This last level leaves room for most cultural influences. By defining human rights in such a way the basic concepts of these rights would mean the same on the international level, yet it would satisfy the desire of states to have some control over their obligations. But the core of human rights that are considered to be non-derogable would remain. These rights would be defined mostly at the level of 'concept' and thus there would be little room for interpretation. Whereas states would have more room for interpretation when implementing rights, such as social and economic rights. Such an approach would give room to the desired cultural relativism, yet it would prevent that human rights would be ineffective due to the culture relativism. To monitor this it would be interesting to research the possibility of a universal equivalent of a 'margin of appreciation' as has been developed by the ECtHR. This in order to give both room to culture but on the other hand make certain that it would not be used to infringe on human rights.

However, it must be noted that a call upon cultural relativism can never be an excuse to infringe on a human right. It is therefore clear that the practice of FGM violates human rights and a defensive argument of cultural relativism remains invalid.

Along with these theoretical discussions, I took a closer look at the challenges that exist for the FGM legislation on a more practical level. First, the acceptance and application of human rights in Africa is relevant as that is the main geographical area where this practice takes place. Africa has its own human rights document, which has several distinguishing characteristics. It includes the 'rights of the collective', this provides for a need that has not been met in the international human rights documents because the sense of commonality is a strong and natural notion in most African societies. Besides this characteristic, the document includes 'the duties of people'. The strong sense of community means that people do not only have rights as an individual but, even more

so, have a duty to act in the best interest of the community. The articles that describe the rights of people often include so-called 'clawback' clauses, these clauses mean that a person can enjoy their rights but that this is limited by the standard of 'what is best for the community'. These clauses could be considered to be vaguely defined and have the risk of resulting in unrestricted limitations. The African Commission has in some ways taken control over these by applying a test, however the application of this is inconsistent and thus leaves room for improvement.

Even though regional and in some cases national legislation exists, problems arise mostly at a lower level. The communities in which the harmful traditional practices take place do not just accept these laws, so frequently the people who should arrest and prosecute perpetrators do not accept them either and thus the law remains ineffective.

Next, the area of women's rights and their application is interesting to look at with regard to FGM. These rights are primarily defined in CEDAW. Even though this is, after the Children's Convention, the Convention with most signatory states, a heavy strain is put on this document because of the many reservations made by state signatories. Some states even go so far that they seem to go in against the object and purpose of the Convention, and would thus be in contradiction to the VCLT. The Committee can only express its concerns with regard to these reservations but other than that it has to rely heavily on the other state-parties to object. Some success is noticeable but many reservations do remain. In terms of actually applying the Convention and giving way to women's rights, the Committee has observed in some state reports that despite legislation on a national level, in cases of conflicting customary and religious laws the preference is given to these customary laws. The Committee strongly calls upon states to take measures to improve application of these women's rights.

The fact, that states lack political will to comply with the norms laid down in the CEDAW and the limited means of the Committee to effectively address this, means that there is much room for improvement in the area of women's rights. However, for this to be realised a change of attitude with regard to the reservations is mostly needed.

To answer the question I set at the beginning. It is evident that the call on cultural relativism does influence the application of women's rights because it is used as an excuse to continue traditional harmful practices and to disregard international, regional

and national legislation. The old customary and religious practices and law continue to take precedence over this legislation. Even though introducing legislation has resulted in some successes, for the majority it has proven to be insufficient. Below I shall make some recommendations that I think, based on the above research, could be helpful in achieving the desired Zero Tolerance for FGM.

7.1 Recommendations

In addition to the legal approach, other initiatives have been established to support the fight against FGM. Since the legal approach has not proven to be as successful as hoped, it would be tempting to abandon it all together and look for other options. However, leaving it to the whim of the people in the societies in which this practice takes place would not be ideal either, because that might lead to slow progress or no progress at all. I would therefore plead for a combination of both approaches, which could speed up the process of elimination of the practice.

First, I think it would be valuable to evaluate the current situation, by taking a closer look at the legislation or other measures that have been introduced on a country-by-country level, much like the paper put forward by the IAC expert for the expert group meeting on harmful traditional practices. This observation would contribute to identifying the factors that played a role in the effort either succeeding or failing. As a result, lessons could be learned that could improve the situations in states where, thus far, there has not been much success. However, this should not mean that a one-size-fits-all solution should be created. The characteristics of these societies can differ significantly, so such a solution would not lead to improvement. This intent would be to identify contributing factors that could be used in a case-by-case situation.

However, the solution should not be merely sought in introducing new or more legislation. It might be evident that the top down approach does not necessarily mean acceptance of what people are told to do, or in this case are forbidden to do. Therefore would it be desirable to start initiatives on a community level. These practices are so deeply rooted in those societies that unless these social conventions can be changed, no amount of legislation can contribute to actual elimination. NGOs can play a key role in this process. By means of education and starting a discussion within the society, much can be achieved. A prime example for this success is Senegal, where many initiatives

have been started that have led to abandonment of the practice but legislation still has to be introduced.¹⁹²

Also, the MDGs can take a significant role in improving the social and economic position of women in these, often, patriarchal societies. Because women often need to rely heavily on their families and particularly the male member of a society, they are less likely to speak up. If their situation could be improved through education, access to employment and political representation, it would give them a stronger voice. Eradication poverty will be an important part of this process, because poverty often has a greater effect on women.

¹⁹² B.Ras-Work, *Legislation to address the issue of female genital mutilation (FGM)*, EGM/GPLHP/2009/EP.01, p. 14

Abbreviations

AAP	American Association of Paediatrics
ACHPR	African Commission on Human Rights and Peoples' Rights
AfCHPR	African Charter on Human and Peoples' Rights
AIV	Advisory Council on International Affairs
ASEAN	Association of Southeast Asian Nations
AU	African Union
CEDAW	Convention on the Elimination off All Forms of Discrimination against Women
CoE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	European Convention of Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
DHS	Demographic and Health Surveys
FGC	Female genital cutting
FGM	Female genital mutilation
GA	General Assembly
IAC	The Inter-African Committee on Traditional Practices Affecting the Health of Women and Children
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
MDG	Millennium Development Goals
MISC	Multiple Indicator Cluster Surveys
UDHR	Universal Declaration of Human Rights
UNFPA	United Nations Population Fund
UNICEF	United Nations International Children Education Fund
UNIFEM	United Nations Development Fund for Women
VCLT	The Vienna Convention on the Law of Treaties
WHO	World Health Organisation

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