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Perspective

International human rights standards versus cultural practices: a case against harmful cultural practices in Sub-Saharan Africa, with a specific reference to FGM

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Abstract
One of the major limitations of the cultural relativist contention is its property to rank group rights above and beyond individual rights. This paper, however, contends that such a postulation is utilitarian in character. It suggests that what is good for the many is conclusive as to the justness of an outcome. The paper further underscores that IHRs regime must be seen as an indivisible structure of interconnected sets of rights and freedoms within which the significance of each right and/or freedom is augmented or guaranteed by the synchronous protection of all other rights and/or freedoms. This proposition is pertinent to the enduring tension between IHRs standards and cultural practices in the African debate on human rights. Indeed, when juxtaposed against IHRs standards, certain cultural practices are evidently inimical to the inherent human dignity, contrary to the universal vision for the human rights regime. It stands to reason that, in the event of an irreconcilable friction between individual and group rights, the former must supersede the latter. The paper concludes that the long-standing normativity of specific traditional or cultural practices cannot plausibly be invoked as a defense for the continuation of harmful cultural practices, such as FGM, considering that such practices hardly ever fall within the meaning of the group right to culture under IHRL and are, therefore, pernicious to the IHRs standards as culturally constituted.

1 Introduction

The enduring tension between international human rights (IHRs) ideals, on the one hand, and local cultural norms and/or practices, on the other, is one of the defining features of the universalism versus relativism debate in international human rights law (IHRL), especially as regards the African debate on human rights. While universalists see the continuation of certain cultural practices as inimical to the inherent dignity and autonomy of the human person, relativists consider such practices as legitimate as well as morally valid within the meaning of each cultural tradition [1, pp. 615–676] [2, p. 5] [3, pp. 302–329] [4] [5, p. 124] [6, p. 5] [7, pp. 1–19] [8, p. 514] [9, p. 77] [10, p. 420] [126 p. 26]. The paradox is that, as currently constituted, IHRL strives to protect both individual and the group rights. The latter is synonymous with the communal right to culture as that term is construed under IHRL.

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2 Research questions

In light of the foregoing, a fundamental concern organically arises in relation to when or whether the community's right to culture is permissible under IHRL, especially when such permission substantially interferes with—or even injures, both physically and psychologically- the exercise of individual rights and freedoms. Put differently, does the idea of the group human right to culture, under Article 27 of UDHR and Article 27 ICCPR, permit the imposition of harmful cultural practices in the name of group right? This article posits that the concept of group or communal right to culture precludes the continuation of all forms of harmful cultural practices, such as female genital mutilation (FGM).

3 Methodology

The dichotomy between universalism and cultural relativism is a debate that spans many academic disciplines, having regard to the fact that legal scholars, philosophers, political scientists, anthropologists, and sociologists, among others, continue to grapple with this discourse. The data and information used in this article, therefore, rely on authorities from within and outside the field of IHRL to flesh out its contribution. This is the essence of the *doctrinal approach to research*, which exclusively relies on primary and secondary sources of IHRL [11] [12, pp. 93–119] [13, p. 291].

Besides secondary sources such as books and journal articles, the article uses primary sources of IHRL which includes but are not limited to IHRs documents such as the UDHR, ICCR, ICESCR and other relevant IHRs documents.[1] While all IHRs instruments are important, the first three instruments, known as the international bill of human rights (IBHR), are the most important sources of IHRL, having the capacity to provide the most authoritative statements on the interpretation of IHRs standards [14, pp. 254–260]. It also makes use of other primary sources such as IHRs jurisprudence, including the rulings of the international Human Rights Committee. Such rulings deal with the interpretation of the Common Article 27 of the UDHR and ICCPR as well as Common Article 1 of the ICCPR and ICESCR. As well, the article uses the case law to highlight the Committee's view on the distinction between individual and collective rights under IHRL. The interpretive guidance of IHRs jurisprudence is, therefore, critical in the context of the universal versus relativism debate. More importantly, this article deploys *reform-oriented legal research* [12, p. 102]. Part of this article's objective is to foster the debate on critical day-to-day human rights issues especially in Sub-Saharan Africa. This debate can help bring about a fundamental change in social and cultural attitudes towards certain cultural practices that are deemed to be harmful to individuals, especially women.

4 The structure and objectives of the article

This article consists of two main sections. Section 5. critically examines the tenuous relationship between individual and group human rights, as well as why their concurrent protection makes the relationship between the two interests an object of robust debate under IHRL. This tension partly arises from the fact that some scholars specifically see the concept of minority rights under IHRL as an idea that serves to frustrate international aspirations to protect human rights. In this regard, the article specifically highlights the concerns raised by Patrick Macklem, especially his claim that the best way to protect minority rights is to articulate them in the form of *distributive justice* as an exception to the general principles of IHRL [15] [16, pp. 531–552] [17, pp. 576–81]. Macklem's claim is also supported by scholars such as Jack Donnelly and Robert Alexy. As well, this section also examines the position of the IHRs Committee on the interpretation of the Common Article 27 of the UDHR and ICCPR, which arguably guarantees the protection of minority rights. It also underscores the views of scholars who, although are sympathetic to the protection of minority rights under IHRL, claim that the plain reading of Article 27 does not support the concept of collective rights under IHRL. Finally, this section examines the flip side of the debate as presented by scholars such as Will Kymlicka, Charles Taylor, and Gaetano Pentassuglia, all of whom maintain that the protection of minority rights under IHRs instruments promotes respect for characteristics that are shared by all human beings, irrespective of whether they are members of minority or majority populations [18, 19] [20, p. 25]. Section 6.2 examines the general concept of "harmful cultural practices" [21, p. 337]. It underscores that while there

[1] For instance, see the *African Charter on Human and Peoples' Rights ("Banjul Charter")* (1982) OAU, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

exists a plethora of *harmful cultural practices* in Sub-Saharan Africa—including early child marriage, forced marriage (or *ukutwada*), and virginity testing, etc. [22, p. 380]. It is least disputable that FGM is one in which the dichotomy between universalism versus relativism debate is heightened at IHRL. Sections 6.3 and 6.4 analyze the legal instruments and literature on the debate on harmful cultural practices while Sects. 6.5 focuses on the synthesis of FGM as an example of harmful practices and especially its impacts on individual human rights. The paper concludes that in the likely event of an irreconcilable conflict or friction between individual and group rights, the former must supersede the latter, especially in situations in which such practices undermine the dignified existence of the individual. In such circumstances, an appeal to tradition and culture cannot be a valid defense for the continuation of cultural practices, such as FGM [23, p. 304].

5 The tension between individual and group rights at IHRL: a theoretical framework

Although contemporary IHRL protects the right to culture as a fundamental freedom, this is not the first time that international law has sought to protect the right to culture. The 1919 Paris Conference was the first of its kind in modern history to broach the idea. This initiative was, in fact, a key concession to the nationalist movements which were sphereheaded by various ethnic and religious minorities of Eastern Europe. The Conference, which also established the League of Nations following the end of WW I, envisioned the concept of the right to culture with the view to protecting the right of aggrieved minorities as distinct nations within their respective nation-States [24, p. 8] [25, p. 625–651]. Ultimately, the idea found its way into Article 27 of the UDHR in 1948. This provision would later receive its obligatory form in 1966, when the United Nations (UN) finally adopted the two IHRs Covenants, following many years of a grinding stalemate on the contents of these human rights Covenant [26, pp. 7–30].

In the context of contemporary IHRs, thus, the then UN member States adopted Article 27 of the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) as well as Article 15 (1) (a) of International Covenant on Economic, Social and Cultural Rights (ICESCR) with the view to guaranteeing group right to culture as a "human right." Article 27 of UDHR specifically provides that everyone has the right to freely take part in the cultural life of his or her community whereas Article 27 of the ICCPR states that persons belonging to cultural, linguistic or religious minorities are entitled "to enjoy their own culture, to profess and practice their own religion or to use their own language" (UDHR, Art. 27, ICCPR, Art. 27), Article 15 (1) (a) of the ICESCR further provides that "the States Parties to the Present Covenant recognize the right of everyone to take part in cultural life" [ICESCR, Art. 15 (1) (a)].

The most relevant element for discussion in this paper is the concept of the group human right to culture and its tenuous relationship with individual human rights. This is because the concurrent protection of both rights makes the idea of individual and group rights an object of robust debate under IHRL. This relationship is "tenuous" because in one sense, both rights may be seen as "allies" and in yet another, they may be viewed as "enemies" [27, p. 31], depending on the context at issue. In one context, the fact that IHRL guarantees the group human right constitutes a form of community empowerment. This protection proffers cultural, linguistic and religious minorities the necessary tools with which to affirm and assert their identities, at least, as nations within nations. In this sense, the language of the right to culture becomes inseparable from that of internal resistance within modern nation-States. [24, p. 10] (Cowan, Dembour and Wilson, p. 10).

A number of Western liberal scholars, however, remain apprehensive, even unreceptive, to the notion of minority or collective rights within the framework of IHRL [28, p. 39] [29, 30] [31, p. 186] [32, pp. 80–106] [33, p. 195] [34, p. 3] [35]. This lackluster view stems from an underlying concern that recognizing such rights would amount to an extension of utilitarian principles to IHRL.

In the face of the dichotomy between the international aspiration to protect individual and the group rights under IHRL, there has emerged a fierce debate on whether the right to culture is, in the main, a human right to begin with. That is, "Are the rights that are held by individuals jointly (as corporate entities) rather than held by individuals severally (separately) to be recognized as human rights under IHRL"?

For some scholars, the concept of the right to culture does not auger well with the liberal vision of rights. This vision holds that no particular identity or interest should be accorded special protection beyond that which revolves around protecting an individual's human dignity. This view maintains that the IHRL is envisaged to protect characteristics that are shared by all members of humankind. Such characteristics define what it means to be a human being. It is that essence that should be protected from the intrusive exercise of sovereign authority vested in nation-States. In their view, thus, minority rights do not protect these characteristics [36, p. 215] [15, p. 114] [17, p. 576] [27, p. 32].

This begs the question of whether the idea of group human right to culture possesses, promotes and/or protects universal human characteristics or only promotes characteristics limited to a particular group. The guiding principle to answering this question consists in what is actually protected. This article posits that *where a putative IHRs norm protects or purports to protect attributes that are universal*, it is a subject of protection under IHRL. Otherwise, it falls outside the conceptual framework of IHRs [15, pp. 37, 114] [37, pp. 44–59].

According to Patrick Macklem, minority rights protect limited characteristics of human identities. In his view, not all human beings share minority identities. That is because not everyone is a member of a minority group. In this regard, Macklem reasons that minority or group rights tend to create two groups of insiders and outsiders: one either belongs or does not belong to a group. Because minority rights protect in-group rights to the exclusion of others, they operate to undermine the very foundation of the IHRs regime. One is either protected or not [38, p. 124] [15, p. 104].

To overcome this impediment in the universal resolve to promote human rights, Macklem proposes the protection of minority rights in the form of *distributive justice*. He posits that while international law vests sovereignty in entities known as nation-States in order to enhance their ability to protect the rights of their people, such vesting tends to produce "adverse consequences" on the rights of minorities. It is against this backdrop that he contends that since there exist unjust law enforcement procedures against minorities in most countries, the civil and political rights (CPRs) of minority populations are more likely to be violated than those of the members of the mainstream society. Such a state of affairs, he posits, exposes minorities to various forms of discrimination on account of their minority status. It is for this reason that Macklem proposes the idea of *distributive justice* as an exception to the general principles of IHRL. In his view, *distributive justice aims at protecting the interests of minorities as nations within nation-States* [15, pp. 104–5] [39, p. 163].

Macklem's theory of distributive justice, therefore, revolves around the commitment to enhancing equal protection of the law [40, p. 206] [41, p. 126]. Human rights are able to achieve this objective because they are, in his view, designed to promote universal principles of justice both within the framework of international and domestic legal orders. In this vein, the group human right to culture merits protection as a matter of rights even if it may be lacking in at least some of the properties of universal human characteristics under IHRL. Distributive justice, as such, serves to mitigate various forms of harms associated with the manner in which international law distributes sovereign power to bureaucratic modern nation-States [15, p. 109] [17, pp. 576–81], [42, p. 136].

Jack Donnelly and Robert Alexy concur with Macklem that the threats—including physical and material destruction—to the rights of various ethnic, racial and social minorities constitute an extreme form of injustice. Such a situation warrants the need for protecting minority rights under IHRL [127, p. 230] [43, p. 7]. Donnelly specifically argues that some ways by which the modern State structures interfere with indigenous and minority rights include but are not limited to the alienation of their rights in land. For this reason, he argues that IHRL must recognize the group human right, especially of indigenous peoples and minorities, as an exception to the general argument against collective rights. In this regard, Donnelly agrees with Macklem's theory of distributive justice as a means with which to prevent States from perpetuating systemic human rights abuses against minorities since minorities are often targeted on account of their being different. Donnelly particularly identifies discrimination against sexual minorities, arguing that this group is more often treated as if they are somehow less deserving of respect and consideration and, thus, nor entitled to the same legal protection as "normal" people in many countries around the world today [44, p. 22] [36, pp. 215–230, 237].

Against this backdrop, it is worth adding that the claim of unmerited targeting of social minorities is quite evident in Africa. For instance, former President of Zimbabwe, Robert Mugabe, once described gays and lesbians as responsible for importing undesirable Western values to Africa. For Mugabe, gays and lesbians "are worse than dogs and pigs."[2] This language wantonly disregards the fact that these individuals are human adults who are entitled to make independent choices and associate with whoever they so choose and as they wish, whether in public or private. This freedom is unlimited, insofar as such choices do not interfere with the exercise and enjoyment of the rights and freedoms of others [36, p. 237].

In addition, it is also true that, in many countries around the world today, the interests of women, racial, and religious minorities are often swept under the carpet. A good example is that of Asian minorities in Kenya who, after more than 100 years of struggle and living under conditions of "statelessness", were finally recognized and given full constitutional

[2] Max Fisher, "Mugabe says of Obama's gay rights push, 'We ask, was he born out of homosexuality?'" (2013) *The Washington Post,* available online at: https://www.washingtonpost.com/news/worldviews/wp/2013/07/25/mugabe-says-of-obamas-gay-rights-push-we-ask-was-he-born-out-of-homosexuality/?utm_term=.9b4a0137c86e (accessed on April 15, 2018).

rights as Kenyan citizens in 2017.[3] They are now able to vote, work or go to school as well as engage in activities or have access to opportunities that fell beyond their reach in the past.

In response to Macklem's argument that minority rights do not protect universal human characteristics, proponents of group rights contend otherwise. Charles Taylor, for instance, claims that the protection of group rights is a legitimate cause for IHRs on account of the fact that it promotes global unity in diversity [20, p. 25]. Gaetano Pentassuglia similarly argues that minority features are essential human characteristic and must, as such, be part and parcel of the framework of IHRL. In his view, group rights shield members of minority groups from undue "assimilative tendencies" of the members of the mainstream society [19]. In the same vein, Will Kymlicka specifically contends that Article 27 of ICCPR, which makes the protection of minority and group rights a cornerstone of IHRL, is a legitimate part of the moral project of IHRs because it protects attributes (religious, ethnic and linguistic identities) that define what it really means to be a human being. Such features are universal considering that they are shared by both majority and minorities alike [18, p. 3] [45, p. 9]. For instance, in one way or another, everyone subscribes to some religion (even atheists need protection from religion), culture or language. Yoran Dinstein advances a similar argument [46, p. 155].

Other scholars, however, contend that even though there is nothing inherently wrong with protecting group rights under IHRL, the interpretation given to the relevant provisions on the right to culture is problematic, owing to the fact that, in their view, Article 27 of the UDHR and ICCPR as well as Article 15 of the ICESCR are individualistic in nature and, therefore, cannot be viewed as collective rights. Patrick Thornberry, for instance, contends that this individualistic element is evident from the plain reading of the text of Article 27 of both the UDHR and ICCPR. He claims that Article 27 guarantees the right to culture for every *individual member* of a linguistic, ethnic and religious communities [47, p. 20]. This argument is plausible in light of the fact that the majority of human rights communications brought under Article 27 of the ICCPR assume the form of individual—not collective—complaints to the Covenant's Human Rights Committee (the Committee). Nevertheless, IHRs jurisprudence suggests that the provision of Articles 27 can be read as a collective guarantee. In *Ivan Kitok v. Sweden,* for instance, the Committee disregarded the plain reading of this provision and expressed, instead, its willingness to interpret it with the view to protecting group interests. This reading empowers the Committee to apply the provision in a way that provides legal redress for violations of the human rights of vulnerable groups [15, p. 110].

Communications brought under Article 27 are distinguishable from those brought under Common Article 1 of the ICCPR and ICESCR. The latter guarantees the right of peoples to self-determination. For instance, in *Lubicon Lake Band v. Canada,* the Committee opined that Common Article 1 cannot be a subject of individual complaints *(Lubicon Lake Band v. Canada, Communication No. 167/*1984). The Committee further reaffirmed this position later in *J.G.A. Diergaardt* et al. *v. Namibia,* noting that *no single individual* can claim to be a victim of the violations of the guarantee of self-determination.

While the concurrent protection of individual and group rights under IHRL may be seen as a hurdle in respect of articulating and promoting universal human rights [24, p. 4], this hurdle can be resolved in at least two interrelated ways. First, the tension between right and culture can be viewed as a conflict between two competing human rights—not mutually exclusive—values. This would require one to strike a fair and reasonable balance in appropriate circumstances. Second, one may adopt a purposive approach to the debate between and the interpretation of individual and group rights so that in a more pressing context, we can design one right as a legal right and the other as a reasonable basis for internally limiting the extent to which the other right can be enjoyed without substantially impairing the enjoyment of the other [48, p 161]. The latter necessitates the moral reading [49] of IHRL with view to affirming that IHRs protect both individuals and groups on account of their status as human beings. Where both rights cannot concurrently be protected, it is important to contextually determine which right must be urgently guaranteed, so long as the other right will be minimally impaired. In this regard, the protection of group rights should be seen as a legitimate objective of IHRL. The question is whether the idea of group rights is also reasonable in the face of harmful cultural practices, such as FGM.

[3] Rael Ombuor, " Kenyans of Asian Descent Become Nation's 44th Tribe" (2017) *Voice of America,* available online at:https://www.voanews.com/a/kenyans-asian-descent-nations-newest-tribe/3963971.html (accessed on April 15, 2018).

6 Harmful cultural practices: the case of FGM in Sub-Saharan Africa

6.1 Introduction

Having established that the protection of groups rights is consistent with purposes and objectives of IHRs, the next inquiry is whether certain cultural practices, such as FGM, are consistent with the provisions of Article 27 of both the UDHR and ICCPR as well as Article 15 of the ICESCR. In an effort to answer this inquiry, Sect. 6.2 looks at the concept of culture in relation to indigenous identity as well as divergence and convergence among various cultural traditions. Section 6.3 provides the working definition for the concept of "harmful cultural practices." It further examines the case of FGM as an example of harmful cultural practices in Africa. It also deals with measures that some Sub-Saharan African governments have taken to eradicate the practice. It then examines the delicate balance between the human right to culture and individual human rights in the context of FGM and argues that FGM is a very serious violation of IHRs standards, having regard to the manner in which it substantially interferes with human dignity as well as bodily integrity of its victims. Section 6.4 relies on legal feminist scholarship as well as on the guarantees of IHRs instruments. Section 6.5 concludes that in light of the harmful effects of FGM, IHRs standards must place internal limits on the concept of the right to culture. This suggests that in the event of irreconcilable conflict between individual and cultural rights, individual rights must govern especially in situations in which the dignified existence of the individual is at stake [36, p. 304]. After all, it is not the group but individual human persons who ultimately suffer the adverse consequences of FGM. Attention must, therefore, be given to the most direct victim of FGM: the individual.

6.2 Culture and harmful cultural practices

6.2.1 Culture: indigeneity, divergence and convergence

Until recently, most anthropologists defined "culture" as a homogenous set of fixed societal beliefs, patterns, representations, symbols, norms, values and practices that distinguished one society from another [50, pp. 9–24] [27, p. 32] [51]. However, in light of the sweeping impacts of societal transformations that have taken place as a result of interactions among different cultural traditions, the adoption of modern nation-State system, technological advancement, migrations and commerce across national frontiers, among others, the definition of culture has dramatically been overtaken by global and local events, which have now redefined cultural boundaries [52, p. 27].

Culture is now better described in terms of a dynamic set of beliefs, practices, norms, structures, symbols or value judgments that are in a constant State of modifying and being modified by forces of modernity and changes that have barreled down on different societies and people for the last 200 years [53, p. 11]. The result has been a situation in which no culture is entirely independent from the reach and impacts of other cultures. Consequently, ideas produced in one culture are now directly transferrable to, and translatable into, other cultures. As well, societies which were once isolated and separate from one another have now been catapulted into the orbit of global culture [54, pp. 26–9]. The term "global culture" refers to a wide range of cross-cultural elements such as music, trade, systems of governance, international law, etc.—and all forms of common interests among nations. Such interests tend to establish the need for global rules and standards among different institutions, societies, nation-States and individual actors [55, pp. 395–407].

This makes the nature of "culture" something that is inherently dynamic, unbounded, contested and embedded in the structures of political, economic, and social power. Culture is rooted in practices, norms, symbols, patterns and habits. It is negotiated as well as constructed by means of human actions, such as conventions, rather than something that is solely determined by organic forces.

Consequently, the concept of culture has now taken the meaning of creative cross-cultural exchanges and transformations [27, pp. 5, 43] [6, p. 5]. Furthermore, since culture generates impacts, not just on how a society sees itself but also on how it defines legal rights, it stands to reason that as culture changes, so does a society's conception of legal rights. In a landmark ruling on same sex relationship, the South African Constitutional Court rightly underscored that our understanding of what is right or wrong and just or unjust, follows the patterns of culture so that what is repugnant to the moral conscience of this generation may be understood very differently by the next generation. A conception of rights will cease to be relevant if it is frozen in time and space [56].

Moreover, culture is not a monolithic state of affairs. It is contested by different forces even within the same society. Indeed, "cultures are anything but homogenous. In fact, differences within civilizations are as striking and important as those between civilizations" [36, p. 100]. For instance, a Catholic in Cape Town in South Africa may have similar views on reproductive freedoms as a Catholic from Halifax in Canada. This underscores the limitations of the relativist essentialization of culture with reference to geographical confines. Seen as such, cosmopolitan culture has increasingly replaced cultural indigeneity.

The direct correlation between culture and a societal conception of legal rights arises from the conventional view that culture is the primary source for society's as well as its members' worldview or *weltanschauung*. This view is in tandem with the claim that culture has the capacity to define interests which are important in the life of individuals. It is also a means with which to pursue them. In this sense, culture determines beliefs, norms and values that contribute to how people perceive of themselves as well as their collective and individual struggles, both internally and externally. What stabilizes over the course of time ultimately becomes the acceptable normative standards of that society—its culture [57, p. 23].

Yet, while it may be too strong an argument to contend that "all forms of cultural relativism fundamentally fail to recognize culture as an ongoing historic and institutional process where the existence of a given custom does not mean that the custom is either adaptive, optional or consented to by a majority of its adherents" [36, pp. 232–233], there is merit to this claim. That is because some relativists tend to reduce the universalism versus relativism debate to mere cultural distinctions between the West and non-Western societies in order to justify why IHRs standards are not universal.

Of particular interest is the way some relativists tend to place significance on cultural practices of the past to the extent of ignoring contemporary cultural values and societal changes. E-Obaid and Appiagye-Atua note that cultural values may not outlive their usefulness in the face of the sweeping vicissitudes of modernity. Such vicissitudes have rendered the continuation of certain cultural norms and practices unreasonable. Among such practices include FGM and other traditional practices often referred to as *harmful cultural practices* [58, p. 850].

Chia Longman and Tamsin Bradley define the concept of "harmful cultural practices" as a form of violent traditional practice committed against girls and women for so long that they are considered to be normal by the cultures within which they take place [59, p. 1]. The idea of "harmful cultural practices" originated in the United Nations circles in early 1950s when the Organization adopted a series of resolutions on matters regarded as consisting of customs, ancient and traditional laws and cultural practices respecting marriage and the family.[4] The United Nations views the continuation of such practices as inconsistent with the purposes and objects of the UDHR. For this reason, these resolutions called upon all States to take reasonable steps to eradicate such customs and laws in order to ensure complete freedom with respect to the choice of a partner, bride-price; protection of the rights of widows respecting inheritance, remarriage, early marriages and child custody [59, p. 1].

Before the idea of harmful cultural practices attracted serious human rights scrutiny, both at domestic and international levels, however, such practices were assumed to be normal, hence accepted by all members of society. However, in a world that has changed so much structurally, socially, economically and politically and one in which values and ideas of one society make inroads in yet others, it is not uncommon to see "modern" individuals asserting their personal autonomy by rejecting the imposition of traditional or religious practices upon them as part of cultural rituals or rites of passage.[5]

The paramount concerns in this respect is, (1) whether we should give priority or preference to the community's right to culture or self-determination in the form of permitting the community to impose its customary practices and rituals upon its members even when such practices evidently violate universal human rights standards or are perceived to be harmful by "deviant" individuals; or (2) whether we should empower individuals to reject and opt out of such practices.

While there is a plethora of harmful cultural practices in Africa, including early marriage, wife inheritance, virginity testing and abduction marriages (*ukutwada*) [22, p. 380] etc., FGM highlights a situation in which the dichotomy between universalism and cultural relativism is heightened. For this reason, the following discussion focuses on FGM as a prototype of harmful cultural practice in Sub-Saharan Africa.

[4] See UN Resolution 843, *Status of Women in Private Law: Customs, Ancient Laws and Practices Affecting the Human Dignity of Women* (1954). UNTS, A/RES/843.

[5] See the story of Ayaan Hirsi Ali who was forced to undergo the procedure at the age of five but is now campaigning against the practice as she goes around the world to, among other things, promote awareness as to harmful nature of the practice, both psychologically and physically, *Evening Standard*: "Ayaan Hirsi Ali: 'FGM Was Done to Me at Age Five. Ten Years Later, Even 20, I would have not Protested Against My Parents" (2013) online at: https://www.standard.co.uk/lifestyle/london-life/ayaan-hirsi-ali-fgm-was-done-to-me-at-the-age-of-five-ten-years-later-even-20-i-would-not-have-8534299.html (accessed on April 15, 2018).

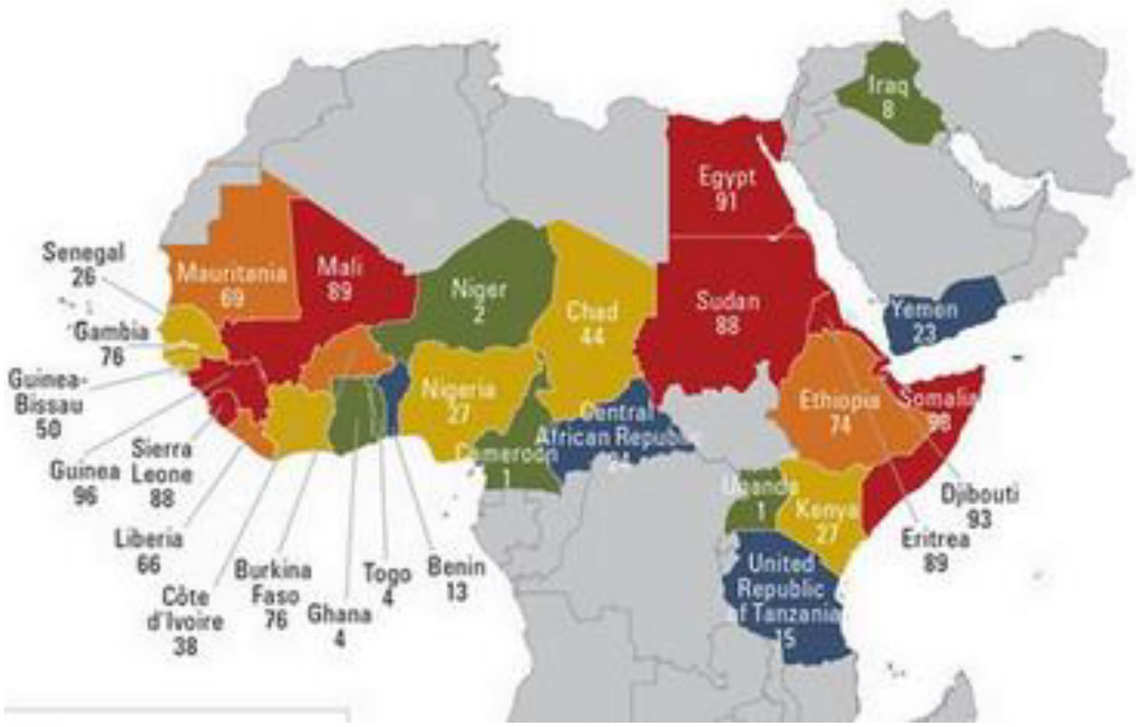

Fig. 1 Map of Africa showing the prevalence of FGM. Source: 2013 UNICEF Study on the prevalence of FGM in about 30 countries in Africa and the Middle East. See also UNICEF: *FemaleGenital Mutilation/Cutting: A Global Concern* (New York: UNICEF; 2016). Note that this survey/study was made before the Sudan split into two countries (South Sudan and the Sudan) in 2011. South Sudan, which does not practice FGM is, therefore, missing in this map

6.2.2 Female genital mutilation in Sub-Saharan Africa

a) Definition and Prevalence

The female genital mutilation (FGM), also known as female genital surgery or modification [43, p. 50] is a customary (traditional or religious) practice involving "the removal of a variable amount of tissue from the female external genitalia" [60, p. 220] [61, p. 58]..[6] In the majority of approximately 20 African countries (see the map below) where the practice occurs, FGM is predominant among Moslem communities, particularly those on the northern side of the Equator. For this reason, some argue that the practice originated from Ancient and medieval Arab tradition in the Middle East where a debate still reigns as to whether the practice is Islamic or cultural in its origin [62, pp. 29–36]. It is for the same reasons that some African scholars claim that, while the practice has been in Africa for centuries, most practicing African communities might have borrowed it from immigrants to their communities [63, p. 158]. Whatever its origin, FGM aims at aligning the female private part for non-medical purposes [64, p. 56] [65, pp. 252–272] [66, pp. 4–8] (Fig. 1).

In many practicing Sub-Saharan African communities, women have to undergo infibulation procedure throughout their lifetimes. That is, once cut and sown or stitched for the first time, a young woman must be cut again for other reasons such as facilitating sexual intercourse. They may have to be cut again for the purpose of facilitating child delivery. They may be stitched again after delivery at the whims of their husbands. This gruesome cycle is repeated throughout a woman's reproductive life [67, p. 57].

[6] See also especially, Dara Carr, Female Genital Cutting: Findings from the Demographic and Health Surveys Program (Calverton, Md.: Macro International, 1997). See also Sects. 5.3.3.2, for the rationale for adopting the terminology "mutilation" rather than "cutting" surgery or modification.

b) FGM as a Symbol of Indigenous Identity: Justifications/Reasons for FGM

There are as many defenders of FGM as there are critics in Africa. For defenders, FGM is justified on many grounds. First, it is argued that FGM is not as harmful as critics claim it is. Practicing communities have done this for centuries, they say. It is also alleged that cutting ensures that the baby does not come into contact with infected female parts during childbirth [128, p. 60]. Others yet argue that FGM is justifiable on the ground that it trains young women to understand the virtue of perseverance and endurance which prepares them for major tasks and challenges in the life ahead [68, pp. 223–234]. Kenya's founding President, Jomo Kenyatta, for instance, once defended his ethnic Kikuyus' practice of FGM against attacks by Christian missionaries. He claimed that the Kikuyus perceived of FGM as part of their cultural identity or heritage that manifests itself in the form of initiation rite. As part of cultural heritage or identity, Kenyatta contends that FGM is an integral element of the Kikuyu (a) social life; (b) is part (b) educational curriculum; and (c) ritual cleansing [69, p. 133].

While the term "mutilation" describes the physical effect of the procedure, some relativists rail against the use of this term, claiming that it is a Western design intended to willfully and inappropriately create a revolting image in the minds of human rights advocates [66, pp. 4–8].The goal of such a description is to portray FGM as a practice celebrated by culturally sadistic natives who eagerly celebrate the destruction of their own women [70, p. 225].

For some relativists, FGM is not any different from different types of tattoos that Westerners perform on themselves. Micere Mugo, for instance, vigorously defends FGM in a comparative sense, arguing that when Western women pierce themselves, including "their tongues, bellybuttons, [or] their labia majora in order to place rings there, nobody calls such a practice *mutilation*" [71, p. 466]. Such a demeaning approach, Mugo contends, only serves to stifle any meaningful intercultural dialogue that could be had, were the Western approach and attitude toward FGM more courteous and respectful of practicing cultures [71]. Furthermore, it is claimed that most African women who undergo FGM procedures do not see themselves as "mutilated" [72, p. 50],

It is partly for these reasons that some FGM defenders prefer to, instead, use expressions such as "external female genital modification" (EFGM), "cut," or "female genital surgery" (FGS) [72], in order to mitigate the intensity of the negative connotation which the word "mutilation" creates or conjures in the minds of outsiders.

To this claim, however, this article contrarily maintains that one of the best ways of dealing with harmful cultural practice is to have an honest and frank conversation about it. This conversation must include describing the practice *as is*, however, gruesome that description might be.

FGM is also defended on account of its ability to enhance procreative capacity of women. Defenders claim that cutting makes copulation more exciting. Maximum satisfaction of the sexual act, they argue, does not only increase chances of reproductive success. It also, arguably, improves the overall woman's health and enhances her sexual purity [72] p. 52]. This contention is, however, biologically indefensible. If the most sensitive part of a woman's organ is excised, an argument can be made that FGM creates the opposite effects and thereby decreases the rate of procreation. This is because, as Abdul-Azim observes, excision reduces a woman's sexual responses. It may as well lead to anorgasmia—caused by painful frictions during a sexual conduct—as a result of tight infibulations. The net result is that of making copulation virtually impossible for several weeks and even months. Since the psychological impact of being sterile in most African cultures is extremely adverse, the inability to bear children can cause serious family discord, leading ultimately to divorce [73, p. 143] [74, pp. 11–15, 30–35].

Finally, FGM is justified on account of being a voluntary practice. Defenders argue that women are not forced to undergo FGM. Instead, young girls from practicing African communities often eagerly look forward to the procedure prior to marriage. It is further argued that the process is carried out by women. Arguably, this serves to debunk the myth that men are responsible for the continuation of the practice [75, pp. 686–691] (Renteln, Ibid, p. 57). This argument is, however, problematic for many reasons. First, it ignores the dimension of social pressures that girls experience if they are not cut. Young girls who are eligible for marriage know too well that if they were not cut, it would be near impossible for them to get married. This is simply because an FGM procedure is a prerequisite for marriage in most practicing cultures [72, p. 50]. Second, most girls have no ability to resist a culturally entrenched custom that most people in society may accept at face value. Many often gang up against girls who seek to resist. Furthermore, girls may be too young to give any informed consent. There have been accounts and testimonies in which individual victims, who were pressured to undergo FGM against their will or were too young to understand the ramifications of the operations on themselves, have come out to condemn it in the strongest possible terms especially at a later stage in the lives [76, p. 14].

On account of age, for example, it is often the case that by the time young girls come of age or acquire an education, they tend to come to the conclusion that they would have not consented to the procedure had they known the health,

psychological and reproductive consequences of FGM. It follows that, instead of improving women's health or facilitating a healthy childbirth as alleged, the consequences of FGM may be the exact opposite, including even death. It affects the reproductive wellbeing of girls and women and increases chances of complications during delivery [77, pp. 146–7]. Finally, like any other harmful cultural practices, FGM wears down on both the physical and psychological wellbeing of individual victims. It not only causes excruciating physical pain. It also objectifies and subjects women and girls to humiliation, subordination and ultimately hampers their sense of self-worth. A 1996 World Health Organization (WHO) study found that victims "sometimes express feelings of humiliation, inhibition and fear that have become part of their lives as a result of enduring genital mutilation" [78, pp. 3, 94]. In this sense, FGM tends to legalize or perpetuate gender-based violence or domination [79, p. 121].

c) Public legal measures against FGM in Sub-Sharan Africa

Since the end of colonial era, a number of women and human rights advocates have made concerted efforts to combat the practice [76, p. 14]. These efforts have, however, generated lackluster public responses in relation to the local measures to combat the continuation of the practice in Africa. These measures take the forms of public policy statements or pieces of legislation aimed at instituting mechanisms to at least mitigate the adverse effects of FGM especially in rural communities. The measures vary from one country to another.

In South Africa, for instance, the Bill of Rights guarantees sexual and reproductive freedoms of women, even though the same Constitution provides for the protection of "traditional and cultural practices" [63]. Other countries such as the Sudan have passed laws to combat FGM. For instance, since 1974, the Sudanese Government has—but unsuccessfully—labelled FGM as a repugnant practice that warrants eradication. To that end, the country has passed a piece of legislation banning FGM, precisely infibulations [80, p. 11]. This legislation amended a provision in the Sudan's Penal Code under the then *Condominium Rule*[7] which provided for "a term of imprisonment for up to five years and/or a fine" [81, p. 245]. Furthermore, after independence, the Sudan Government adopted a new *Penal Code* which makes it a serious "criminal offence," under Article 248, for anyone who engages in FGM or merely removing any part of the female private parts [81]. It remains unclear why anyone has never been charged and/or convicted for violating the law despite the ubiquity of the practice.

Recent studies on the attitude towards FGM show that not much has changed in the Sudan. For instance, a study involving 3210 Sudanese women and 1545 Sudanese men revealed that those who still value the continuation of FGM clearly outnumbered those who thought that the practice was outdated. What majority of the participants disagreed with, was, however, the pharaonic type of FGM [60, p. 220–233].

In Kenya, former President Daniel arap Moi moved to ban FGM in 1982. The move was inspired by the occurrence of FGM related fatalities in the Kenya's region of Machakos County after 14 girls were "crudely circumcised" [82, p. 80].[8] Under a policy instituted following the passing of the *Chiefs Act*, any individual, whether a traditional practitioner or group, found performing FGM in whole or in part, commits an indictable offence under the law [81, p. 246]. Other African countries such as Tanzania and Uganda have also taken measures to eradicate FGM [83] [84, pp. 324–355]. These African efforts have, however, done little, if any, to mitigate the problem because they have not either been enforced or because much of the practice takes place clandestinely in isolated rural African communities.

In the context of the foregoing and in light of the idea of the evolving standards of moral decency, respect for, promotion of equality between men and women and in the interest of justice, it should strike one with horror that anyone, in the twenty-first century and in the name of culture, still believes that FGM, a practice carried out on minors and disadvantaged women and girls, still has moral purchase in Africa (Dembour Ibid, p. 60). Not only does FGM deny girls and women the right to determine their own sexual destiny. It also deprives them of the full enjoyment of their individual autonomy, physical and psychological wellbeing (Serour Ibid, p. 86). In essence, FGM is a weapon with which men tend to assert and perpetuate their dominance over women and girls. It enables men to control and regulate women's sexual lives and/fertility [46, pp. 13–17]. In traditional African societies, men wielded nearly absolute power which they used to control women for self-seeking ends. This dominance is understandable in light of the fact that "power creates law and law creates rights" [85, p. 164].

[7] The "term condominium rule" is used to refer to a type of colonial administration in which a territory is jointly colonized by two sovereign countries. In the case of the Sudan, the country was jointly by Great Britain and Egypt. The Condominium Agreement between Great Britain and Egypt to jointly colonize the Sudan was entered into by the two countries on January 1, 1899. This led to the appointment of Herbert Kitchener as the first Governor General of the Sudan. While the British was effectively the colonial authority, Egypt supplied administrators. For more on this, see M. W. Daly, *Imperial Sudan: The Anglo-Egyptian Condominium 1934–1956* (Cambridge: CUP, 1991).

[8] See also USA, *Country Reports on Human Rights Practices* (Washington D.C.: U.S. Govt Printing Office 2000).

d) International human rights law on FGM

6.3 Critical Feminist View on FGM

FGM is a very serious violation of IHRs standards, having regard to the manner in which it substantially injures human dignity as well as the level of its interference with the bodily integrity of its victims. Until women's rights issues became a major theme in IHRL, however, human rights advocates were often extra cautious in respect of how they chose to engage the FGM debate. This was because external interventions in matters relating to customs and culture were largely relegated to local contexts not only because of their sensitivity but also because of what anthropologists considered to be a lack of foreign insights into the moral logic of different cultures. For this reason, advocacy by outsiders against the continuation of certain cultural practices in "alien cultures" bore little success, if any, in societies in which they intended to change institutions and attitude toward those practices [57, p. 20].

Furthermore, matters of FGM were largely relegated to private sphere because they allegedly fell within the domestic authority of States. Consequently, they were thought to be matters that could appropriately be dealt with through narrow and well-defined channels, such as public health centers [63, p. 158]. This hands-off approach is/was advocated by some relativists. For instance, Abdullahi An-Na'im views the manner in which some outsiders tend to challenge cultural practices they deem inconsistent with IHRs values to be condescending [21, p. 343]. Makau Mutua, similarly, argues that the idea of offending social and cultural practices or patterns in IHRs documents is often a reference to non-Western cultures. In his view, IHRL obligates the West in particular to undertake all necessary measures to transform social and political attitudes towards practices they see as inimical to the rights of women in developing countries [70, p. 225].

While the reluctance on the part of IHRs advocates to intervene in the cultural affairs of other traditions had been the hallmark of international approach to FGM for many years, it is worth noting that, in recent years, feminism has posed a serious challenge to the prevailing assumptions that domestic violence and violations of women's sexual and reproductive freedoms fall within the precinct of private domain. A key tenet of the feminist tradition has, therefore, been that of challenging the traditional distinction between public and private domains in IHRs discourse. In their view, such a distinction serves as a wedge for excluding vital women interests [86]. Moreover, since studies have found that FGM is a practice that deeply humiliates and denigrates women, treating them as if they are an inferior group of human beings who exist for the service and pleasure of men, feminists have also sought to challenge the elevation of communal culture over and above individual rights. From a feminist perspective, traditional cultures inherently marginalize the concerns and human rights of women [18, p. 149].

These feminist efforts have led to the adoption of a number of IHRs documents on the rights of women worldwide. The most important of these instruments is the 1979 *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), a document considered by some scholars to be an International Bill of Women's Rights (IBWR).[9] The CEDAW consists of 30 Articles that aim at eliminating any and all forms of discrimination against girls and women. At its core, CEDAW mandates States to translate women's rights into public policy programs. Some of these mandates include but are not limited to the promotion of the principles of equality between men and women in their national constitutions or legislation [Article 2 (a)], establishment of national tribunals and other human rights institutions with the sole intent to ensuring effective protection of the rights of girls and women, both in public and private enterprises as well as providing access to equal health services [Art. 12 (c)]. CEDAW also promotes access to equal employment opportunities (Art. 11), education, economic and social benefits and sexual and reproductive rights of women (Arts, 10 & 13).

S*exual and reproductive rights* are human rights claims that recognize the basic freedoms of all couples and individuals to decide for themselves freely and responsibly, the number, spacing as well as the timing of their children. They include the rights to receive adequate information about sexual and reproductive health. These encompass not just the right to healthcare but also, and more importantly, the right of women to *sexual and reproductive self-determination*. These rights and freedoms empower women to exercise control over their bodies, decide for themselves whether, when and with whom to engage in sexual relations, receive and determine modern family planning methods, maternal health and childcare services, the right to procure safe abortion services, receive appropriate medical counselling and sexual education information. The principal elements of sexual and reproductive rights, thus, include the right of a woman to

[9] See, for example, Jeffrey R. Borup,"International Bill of Rights of Women?: Why the United States Refuses to Ratify the Convention on the Elimination of all Forms of Discrimination Against Women" (2005) available at *SSRN* online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875830 (accessed on March 28, 2018).

choose her own sexual partner or abstain from any sexual relations, and the right of women to pursue what they believe to be a satisfying, safe, meaningful, pleasurable, and fulfilling sexual life [87, p. 36] [88, p. 2].

In relation to the tension between the group human right to culture and individual human rights, the most important objective of CEDAW is its determination to eliminate all forms of discrimination against women in order to promote both procedural and substantive equality between men and women. Article 5 (a) of CEDAW specifically mandates States "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes" (CEDAW, Art. 5).

In light of this provision, feminists see FGM not just as a violation of CEDAW but also of Articles 5 of UDHR and 7 of the ICCPR, both of which prohibit torture, cruel, inhuman or degrading treatment (UDHR, Art. 5, ICCPR, Art. 7). While some progressive relativists, such as An-Na'im [57, pp. 19–43]. wonder whether it is reasonable to view FGM as falling within the meaning of UDHR's Article 5 or ICCPR's Article 7 due to differences in cultural interpretation, the definition of torture, as provided by Article 1 of the *Torture Convention,*[10] is not limited to the conduct of State. This is because, in recent years, the scope of "torture" has sought to capture conduct of private persons and/or non-State actors who engage in acts of torture with indifference, inaction or acquiescence of the State. Indeed, the UN Committee Against Torture has clarified that:

> where State authorities or others acting in official capacity or under the color of law, know or have reasonable grounds to believe that acts of torture or ill- treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with this Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise, responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission[11]

It follows that failure of the State to provide protection to victims of gender-based violence, such as FGM, would directly be attributable to the State.[12] States that have ratified CEDAW are legally bound to periodically submit national reports, at least every four years, on measures they have taken to comply with their obligations as stipulated. This underscores the significance of the claim that "the central function of human rights is to set limits on the State and its laws" [36, p. 113]

Finally, FGM is a violation of the *Convention on the Rights of the Child*. Ratified by the largest majority of States worldwide, this Convention calls upon and mandates States to accord special protection to children with the view to preventing exploitation and abuses against them. The Convention, thus, commits States, within the limits of their economic resources or capacities, to promote the right of children to education so as to enable them to live in an environment of peace and security (*Children Convention*, Preamble)

The fact that FGM is carried out on innocent children who are too young and have no requisite capacity to give any meaningful or informed consent is a violation of the rights of the girl-child within the meaning of the convention [64, p.

[10] The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) 1465 *UNTS.,* at 85. Art. 1. This Article defines torture as "act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from the person or a third person information or a confession, punishing the person for an act that person or a third person has committed or is suspected of having committed, or intimidating or coercing the person or a third party, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.".

[11] UN Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), *Human Rights Library*, available online at: http://www1.umn.edu/humanrts/cat/general_comments/cat-gencom2.html [retrieved on May 28, 2018]. Part IV at 2.

[12] While this is generally true, Chapter V of the Draft Articles on the State Responsibility for Wrongful Conduct Under International Law sets out at least six circumstances that may insulate or preclude the State from what would otherwise not be in conformity with its international obligations. If at least one of these six circumstances is found to exist, it would shield the State from being held responsible for wrongfulness arising from the breach of its international obligation. These circumstances are found in Articles 20 (consent), 21 (self-defense), 22 (countermeasures), 23 (*force majeure),* 24 (distress) and 25 (necessity). Article 26 adds an important caveat to the effect that the State may not rely on any of these circumstances if doing so would lead to conflict with a peremptory norm of international law generally. Article 27, meanwhile, deals with certain consequences in the event that the State invokes any of these circumstances.

67]. Furthermore, since children are given special protection under the Convention, there is no *margin of appreciation* accorded to States in relation to the rights of children

That is, the rights of children are non-negotiable and cannot be determined at local levels. This clearly demonstrates that differences between cultures or civilizations or diversity of opinions within the same culture on the rights of children are immaterial. They can safely be ignored [129, p. 82]. So construed, the Children Convention seeks to fix the boundaries of childhood across national boundaries so that the standards of a normal childhood are no longer left to the discretion of States or local cultures. That is because the Convention has "laid down guidelines for what is and is not acceptable for children" (Montgomery Ibid, p. 82). It also establishes the boundaries pertaining to what parents—or anyone standing in place of the parent (*loco parentis)*—can or cannot do. For these reasons, some scholars think that FGM should not be a subject of debate: all forms of harmful cultural practices, especially FGM, should be eradicated at once "without any need for further discussion" (Cowan, Dembour and Wilson Ibid, p. 28)

Construed in the context of the foregoing, it is plausible to contend that FGM procedure on children is inconsistent with the object and purposes of the Children Convention

6.4 The African Human Rights Perspectives on FGM

Both the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women* (known as the Kigali Protocol*)* as well as the *Protocol on the African Charter on Human and Peoples' Rights on the Rights and Welfare of the Child* have laid down guidelines on the extent to which the rights to culture may be exercised. This delineation is part of the effort to ensure that offensive social and cultural patterns that discriminate against women and girls are eradicated.

The Kigali Protocol is, for instance, quite emphatic on the existence of harmful cultural practices on the continent. It views them as forms of "violence against 'women'" (and the Protocol defines the 'women' category as including girls) that must be eradicated. The term "violence against women" includes:

> all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.[13]

Parallel to Article 5 (a) of CEDAW, Article 2 (2) of the Kigali Protocol mandates States to modify certain social and cultural practices through public education, dissemination of information and communication with society as a whole, and especially the victim populations, with a view to achieving an effective elimination of such practices *(Protocol to the African Charter on the Rights of Women…,* Art.2). To achieve this, the Protocol commits States Parties to take reasonable steps to punish violators. State must also take measures through means such as legislative initiatives and any other forms of awareness campaigns to protect women's rights from cultural abuses (*Protocol to the African Charter on the Rights of Women…,* Art.4).

Finally, the Protocol provides for sexual and reproductive rights of women by mandating States to "ensure that the right to health of women, including the right to sexual and reproductive health, is respected and promoted" (*Protocol to the African Charter on the Rights of Women…,* Art. 14).

It is in this regard that some scholars see the Kigali Protocol as the first, and so far, the only human rights instrument to grant women full rights to control their own fertility as well as the ability to choose any means of contraception, considering that it includes the power of women over decisions on matters of family planning and when to procure abortion [89, p. 70]. All these ideals have, however, not mitigated the adverse effects of cultural practices, such as FGM in Africa.

6.5 Framing the FGM debate on the individual versus group rights: synthesis and conclusion

One of the strongest arguments for cultural relativism in Africa is that the African concept of legal rights is predicated on the enduring ideals of preserving the corporate character of a society or community, of which the individual is a part [90] [91, pp. 25–27]. Relativists claim that these ideals—often identified as comprising communal ties, consensus and duties, whether collective and individual—explain why African societies exhibit strong social cohesiveness [92] [93, p. 539], [94, p. 91]. This leads the proponents to conclude that, because the individual does not exist on his or her own but

[13] *Protocol to the African Charter on the Rights of Women…,* Art.1 (b).

only corporately, his or her significance cannot be considered in isolation from that of society. In this respect, a major relativist objection to the current conception of IHRS is that it ignores the distinct communal character of African societies [95, p. 12] [96, p. 328].

A strong African relativist charge against universality is, thus, that the current IHRs standards are infused by Western liberal individualism [97, 98] that makes IHRs standards unable to adequately incorporate communal elements of human existence in African cultural milieux. In a typical African society, therefore, individuals are not separate from the community because the African concept of humanism does not alienate the human person by seeing him or her as an atomized entity—separate and apart from society. He or she neither stands in contradistinction to, nor is at war with the community but an inseparable part of the whole [3] [99, p. 155] [100] [101, pp. 2, 5] [102, pp. 705–102], [9, p. 162]. The wellbeing of the community, therefore, trickles down to the individual. This also suggests that in the event of an irreconcilable friction between individual and communal interests, the latter must supersede the former [103, pp. 30–31], [104, p. 11].

Juxtaposed against the foregoing, the debate over the practice of FGM underscores the intensity of both the conflict between universalism and relativism as well as that between individual rights and group human right to culture. This is especially the case in situations in which individual members have come to reject the validity of certain cultural practices of their own accord. The essential questions to consider are twofold: (1) Should we accord priority to the idea of group human right to culture? Doing so will most likely permit a community to impose its views of culture, including cultural practices, upon individual members, even if such practices are inconsistent with "universal" human rights standards. Or (2), should we empower individuals to opt out of communal cultural practices with which they disagree?

As part of this paper's attempt to answer these questions, it is worth reiterating that the ability of individuals to elect their own mode of life, including participating in cultural practices as they deem fit, is a founding principle of IHRL. Individual liberty or autonomy entitles the human person the freedom to elect how he or she would like to lead his or her life. This right is virtually unlimited unless its exercise substantially interferes with the rights and freedom of others [105, p. 106]. That is, while it is true that individuals are part of society, they must also be recognized as autonomous beings, having their own agency or capacity to make choices that are independent of collective interests. So construed, the law permits individuals to cultivate for themselves the conditions in which they can live and flourish. This recognition ties into the concept of human dignity, which protect the inherent worth of all human beings as self-determining agents and, thus, authors of their own destinies [106, p. 64, and Chap. 3–6].

IHRL, therefore, provides two major guarantees. First, it protects group rights (such as the right of people to self-determination); and second, it protects individual rights (such as the right to life, for example). Human rights achieve this dual protection by treating each person as a free and equal rights-bearing citizen and by limiting what would otherwise amount to unfettered exercise of communal authority. Importantly, IHRL also promotes the rights of those who, in many respects, define themselves by reference to group membership [107, p. 104] [3] [5, p. 124] [108, pp. 105–108].

The fact that IHRL protects both individual and group human rights demonstrates that individual and group rights are organically complementary. This complementarity underscores why neither individual nor group rights should be sacrificed for purposes of protecting the interests of one over the other. Similarly, neither individual nor group has an absolute right to impose its views on the other [36, p. 27] and Art. 5 of the *Vienna Declaration*). The moral project of human rights should not be limited to that of protecting the interests of one or those of the other entity. Instead, the IHRs regime must be seen as an indivisible structure of interconnected sets of rights and freedoms within which the significance of each value is augmented by the concurrent protection of all other values [109, p. 46] [110, pp. 209–243] [111, pp. 769–879].

One of the major limitations of the relativist argument consists in its propensity to rank group rights above and beyond those of the individual such that, in the event of a conflict between the two, group rights must govern [112, p. 1983]. This view is inherently utilitarian. It suggests that what is good for the majority is conclusive as to the justness of an outcome, irrespective of how that end is pursued [113].This also implies that an individual's wellbeing, or that of the few individuals, should be sacrificed on the altar of the many or "the common good" [44, p. 23].

Against this backdrop, however, a plausible argument may be made that there is no such a thing as many (community) unless there are ones (individuals). That is because the many is the sum of the ones. The synchronous recognition of the ones or of the many explains why certain rights (such as the right to life) are assigned to the individual while others (such as the right of self-determination) are assigned to the group [114, pp. 115–6]. Along this spectrum lies a set of other legal guarantees: the aggregates of individual rights. The term "aggregate rights" connote rights that can only be meaningfully exercised and enjoyed in the form of group rights [115, pp. 217–223]. Examples include, *inter alia*, the right to protect

culture and distinctive identities (under Common Article 27 of UDHR and ICCPR, and Article 15 of ICESCPR, discussed above), and the right of trade union (Arts. 22 (1) of ICCPR and 8 (1) (a) of ICESCPR.

The paper, thus, seeks to advance a contention that aggregate rights arise from the claim that, even in a context "where group membership is essential to the definition of human rights…, the[se] rights are held by individual members of protected groups and not by the group as a collective entity," [127, p. 26]. In this respect, an argument can be made that even the right to culture falls under the rubric of aggregate rights, which are valid and reasonable if their enjoyment advances the interests of the individual in a group setting.

This background also germane to the context of the African debate on FGM. In light of the harmful effects of FGM, universal human rights standards operate to place internal limits on the group human right to culture. That is, while the provisions on the right to culture guarantee the right of the group, the universal vision for human rights precludes the protection of all harmful cultural practices including, but not limited to, FGM. In the event of a conflict, therefore, individual rights must supersede group rights, especially in situations in which the dignified existence of the individual is at stake and insofar as group rights are impaired minimally. It stands to reason that tradition and culture cannot be invoked as a defense for the continuation of harmful cultural practices [23, p. 304].

The overriding objective of the moral project of IHRs is to allow all human beings, individually and collectively, to give meaning and purpose to their own life. Achieving this goal entails granting each person the liberty to pursue his or her own individual or group vision about what constitutes free and dignified human life, without societal or State interference [48, p. 147] [23, p. 303].

To allow an unfettered exercise of the group human right to culture—including permitting the community to impose its own view of culture and practices upon the individual—is not only to wantonly disregard and violate the right of individuals to determine their own destiny, it also interferes with the individual's bodily integrity and human dignity. Cultural values are only important to the extent that they enhance human dignity. That means that individuals must be accorded greater latitude in electing what is best for themselves. After all, the experience of human rights violations is individualized in the sense that it is individual human beings—not their communities or groups—who feel the affliction or agony arising from human rights violations [116, pp. 1–18] [117, p. 320]. A defense for cultural relativism that excuses the violation of human dignity is, thus, clearly an abuse of the group human right to culture [130].

In this respect, this article contends that the criteria for protecting group rights is whether a given cultural practice is permissible under IHRL [118, p. 45]. Where a practice violates the physical and psychological wellbeing of an individual or substantially interferes with his or her bodily integrity, such a practice cannot be saved or justified under the relevant provisions on the group human right to culture.

In evaluating whether FGM is a cultural practice that is defensible within the framework of both cultural and IHRs standards, the above criteria should be used. FGM is both physically and psychologically harmful to those upon whom the procedure is performed. It also violates the bodily integrity of the individual as well as his or her autonomy. It also violates the sexual and reproductive freedoms of women by reason of its interference women's rights to "equality, human dignity, privacy, bodily and psychological integrity, and health care" [63, p. 159]. FGM can, as such, be saved neither under Article 27 of the UDHR and ICCPR, nor under Article 15 of the ICESCR.

In sum, FGM qualifies as a harmful cultural practice because it is inconsistent with universal human rights standards for three main reasons. The first relates to the health consequences or complications suffered by victims. Such consequences may include victims bleeding to death during the operation or suffering from serious infections due to the use of crude and contaminated instruments. It may also result in sterility, just to mention but a few. The second is that it is a violation of IHRs standards. FGM in Sub-Saharan Africa is performed on non-consenting individuals, especially minors [105, p. 107] [119]. When children as young as one month-old [120, pp. 509–515] are forced to undergo FGM procedure, their inability to give informed consent is clearly inconsistent with the meaning of valid consent. Even in cases where girls have the capacity to give consent, such consent is rarely informed, especially in relation to the long-term health consequences of the procedure. Furthermore, in some cases, the procedure is performed against the will of recipients or "receiving participants."[14] The third and final reason for why FGM is inimical to IHRs standards relates to the violation of the victims' bodily integrity. IHRs standards forbids any individual, or group, from interfering with another individual's bodily autonomy, save with his or her informed consent [105, p. 107] [119].

[14] By "receiving participants," I am referring to individuals on whom the procedure is performed. This label distinguishes this group from other participants such as surgeons ("operation participants")s and cheering crowds ("cheering participants").

For this reason, this paper submits that the universal vision for human rights operates to place internal limits on the extent to which the right to culture can be exercised [121, p. 3]. A good number of African scholars and political leaders, however, continue to view universal human rights standards with suspicion. Such suspicions arise in part from the concern that IHRs ideals tend to masque Western "conceptions of paternalism and infantilization and entitle large and powerful nations to intervene in the affairs of small and vulnerable countries" [114, p. 135] [122, pp. 27–28].

While such concerns can be legitimate in some contexts, this paper argues that the IHRs movement must not always sacrifice its core principles on the altar of respect for all cultures. The IHRs regime must spell out the limits of the exercise of the group right to culture in order to ensure effective protection of women and girls against abusive cultural practices, such as FGM. Furthermore, human rights advocates must be attentive to the ways in which cultural relativism can be complicit not only in perpetuating such abuses but also in the commission of mass crimes such as genocides. Indeed, as some progressive relativists note, arguments for cultural relativism "have been used, explicitly or implicitly, to justify even the most blatant human rights violations that could not be defended on any moral grounds" [21, p. xxi]. The relativist claim that universal standards ought to yield to internal standards of moral judgment in the event of conflict must, therefore, be *evaluated against the severity of the potential consequences of inaction in a particular instance* [123, pp. 281–289] [8, p. 514].

More importantly, in light of the fact that post-colonial Africa has undergone a tremendous amount of change, the past cannot be used to adjudge the validity of present practices. Such reasoning would undermine the reality of the vicissitudes that have taken place in post-colonial Africa. The past and the present are clearly not structurally the same [124, p. 101]. It is against this backdrop that '*past tense* is used to indicate that this system *no longer operates*, although in reality, the *past has merged with the present* in a dynamic interplay *between change and continuity*' [125, p. 150].

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