

Female Genital Mutilation: A Conflict of Human and Cultural Rights

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Abstract

The practice of female circumcision, also termed as female genital mutilation, is a practice prevalent in many communities around the world. According to the United Nations and many proponents of human rights, this practice is a gross violation of the inalienable rights granted to every human being by the Universal Declaration of Human Rights. Rigorous attempts have been made to this day to eliminate this practice. However, these attempts are considered an infringement of the cultural rights of these communities and an unnecessary imposition of foreign values on their cultural lives by the proponents of the cultural rights or "group rights". Some even liken these attempts to cultural imperialism by the West. This paper endeavors to gauge to what extent the concepts of "human rights" and "cultural rights" clash in this matter and whether the triumph of human rights, in this case, would truly benefit these communities.

Introduction

Many traditional practices around the world are considered harmful to the individuals of the communities they are practiced in and yet are so deeply engrained in those societies that they are almost completely impossible to root out. These practices are an integral part of their cultural identity and these communities more often than not resist any attempt to change the status quo.

One such practice is female circumcision, more commonly known as female genital mutilation, which is widely practiced in many cultural communities around the world. This practice is seen as violating several human and individual rights and the United Nations as well as other NGOs and activists have been trying to put a stop to it for decades. However, the effort is seen as clashing quite horribly with the right to practice one's culture and pursue cultural development, a right enshrined in the same instruments that grant individual human rights. There have been many debates over time about which overrides which. This paper is an attempt to give an insight into this conflict and contemplate ways to reduce the practice to protect individual human rights while also keeping their cultural rights intact.

What Is Female Genital Mutilation?

Female genital mutilation (hereinafter referred to as FGM), also called female genital cutting (hereinafter referred to as FGC) or female circumcision (hereinafter referred to as FC), denotes the ritualistic tradition of partial or total cutting of external female genitalia. World Health Organization (hereinafter referred to as WHO) defines FGM as "all procedures involving partial or total removal of the external female genitalia or other injuries to the female genital organs whether for cultural, religious or other non-

therapeutic reasons.”¹ WHO has classified FGM into several types, including excision of the prepuce, excision of the clitoris, excision of the labia and – one of the most extreme – excision of part of or all external genitalia and stitching of vaginal opening (infibulation).² FGM is conducted anytime from infancy to puberty and beyond. In many communities, it’s done before girls reach the age of five.³

The practice is found around the world. FGM is found to be practiced in 29 countries of the African Continent. Some ethnic groups of Asian countries also practice FGM. The practice is also seen in some countries of the Middle East, South America and Eastern Europe. In western countries, FGM is found in diasporic groups from regions where the practice was commonplace.⁴ More than 125 million girls and women are reported to have gone through FGM across the Middle East and Africa. In the next decade, 30 million more girls are at risk.⁵

Consequences of FGM

The act of FGM has some serious consequences for the sexual and reproductive health of women. FGM is acknowledged as a shockingly cruel procedure that results in “short- and long-term physical and psychological consequences.”⁶ The consequences vary based on a number of factors, including the type of FGM, the expertise of the practitioner and the hygiene condition of the operation.⁷

Immediate problems are severe pain, shock, hemorrhage, wound infection, urinary infection, tetanus, fever, etc. Infection and hemorrhage may be bad enough to lead to death.⁸ FGM may result in the long term or permanent complications such as keloid scar formation, cysts, painful intercourse, and sexual dysfunction. The most extreme FGM such as infibulation may cause infertility. It can also increase the possibility of maternal deaths and stillbirths.⁹

FGM can cause psychological complications in children, including behavioral disorders and loss of trust in guardians. Adult women may suffer from mental problems like chronic irritability, frigidity, anxiety, depression, and may see marital conflicts due to these issues.¹⁰ Fear, inhibition, suppressed feelings of anger and bitterness and negative

¹ WHO, UNFPA & UNICEF, *Female genital mutilation: a joint WHO/UNICEF/UNFPA statement* (WHO, 1997).

² *ibid*

³ UNICEF, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change* UNICEF 2013, <www.unicef.org/publications/index_69875.html> last accessed on 4th January 2021.

⁴ UNFPA, *Female Genital Mutilation (FGM) Frequently Asked Questions* United Nations Population Fund, July, 2020, available at: <<https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions>> last accessed on 6th September, 2020.

⁵ *ibid*

⁶ *Benyamin vs. Holder*, 579 F. 3d 970 - Court of Appeals, 9th Circuit 2009

⁷ *Female Genital Mutilation (FGM) Frequently Asked Questions* United Nations Population Fund, 2020), available at: <www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#how_fgm_affects_health> last accessed on 6th September 2020.

⁸ *ibid*

⁹ *Nwaokolo v. INS*, 314 F. 3d 303 - Court of Appeals, 7th Circuit 2002

¹⁰ *ibid*

effects on self-esteem and self-identity¹¹ were also reported psychological effects of FGM

Violation of Human Rights

In June 1993, the World Conference on Human Rights officially recognized FGM as a violation of human rights¹² and, presently, it is widely considered as such. It is a gross violation of several well-established human rights of children and women. It violates several human rights enshrined in the Universal Declaration of Human Rights (UDHR),¹³ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁴ and the Convention on the Rights of the Child (UNCRC).¹⁵ Some of the main human rights violated by FGM are:

- Principles of equality¹⁶
- Freedom from sex-based discrimination¹⁷
- Right to life, liberty and security of person¹⁸
- Right to freedom from torture or cruel, inhuman or degrading treatment or punishment¹⁹
- Right to a standard of living adequate for the health and well-being of oneself.²⁰

The practice of FGM violates the principles of equality by endorsing gender discrimination and imposing a prejudiced and harmful practice on women, thereby infringing the underlying philosophy of CEDAW,²¹ which requires the party states to take measures to eliminate all customary practices grounded in gender-based discrimination.²² The women in FGM practicing communities do not have the liberty and control of their own lives and persons. FGM is mainly conducted by local circumcisers without the use of anesthetic or similar numbing drugs, which makes those undergoing the procedure bear unimaginable pain, violating their right to be free from torture and cruelty.

Both the short and long-term effects of FGM affect a woman's health and wellbeing severely, infringing the right to a healthy standard of living. The practice subjects women to a lifetime of pain and discrimination. It violates the right to life even outside of the immediate threat to body and life that it poses, as right to life means more than

¹¹ Center for Reproductive Law & Policy, '*Female Genital Mutilation: A Practical Guide To Worldwide Laws & Policies*,' Zed Books, 2000

¹² Michael Gyan Nyarko. and others, '*The Art Of Human Rights: Commingling Art, Human Rights And The Law In Africa*', Springer Nature, 2020

¹³ Universal Declaration of Human Rights (adopted on 10th December 1945) UNGA Res 217 (III) A (Universal Declaration of Human Rights)

¹⁴ Convention on the Elimination of All Forms of Discrimination against Women (adopted on 18th December, 1979, entered into force on 3rd September 1981) UNGA Res 34/180 (CEDAW)

¹⁵ United Nations Convention on the Rights of the Child (adopted on 20th November, 1989, entered into force on 2nd September, 1990) UNGA Res 44/25

¹⁶ Universal Declaration of Human Rights, article 1

¹⁷ *ibid.* art 2

¹⁸ *ibid.* art 3

¹⁹ *ibid.* art 5

²⁰ *ibid.* art 25

²¹ Patricia Broussard, '*The Importation of Female Genital Mutilation to the West: The Cruellest Cut of All*' (2009) 44 University of San Francisco Law Review 787, Available at: <<https://core.ac.uk/download/pdf/216984142.pdf>>

²² CEDAW, article 5

mere animal existence.²³ The right to life includes the right to life of dignity, the life of freedom from despotic control, torture and terror and life protected from cruelty, physical or mental violence, injury or abuse.

All of these rights and their violations, naturally, apply to the children and young girls that undergo this procedure as well. Besides these, the practice of FGM also violates not only the rights of children framed in the UDHR and the UNCRC but also hampers their mental and physical development and their ability to live a normal, healthy childhood. FGM constitutes discrimination, a threat to life and safety as well as torture²⁴ under CAT²⁵ – both physical and mental – and thus, violates a number of inalienable human rights of women and children.

Human Rights versus Cultural Rights

In most of the communities in which it is performed, FGM is considered a time-honored tradition and cultural practice with millennia's worth of history behind it, along with all the implications that come with such ancient practice. Though the origin of FGM is not quite known, the practice has been traced back at least 2000 years.²⁶ The practice is reinforced by traditional values, attitudes and beliefs. These communities see this practice as an imperative rite of passage to womanhood and a means of preserving virginity until marriage.²⁷ It is a pre-requisite for marriage²⁸ in most of the communities it is practiced in. Some of the staunchest supporters of this practice are the women of these communities, women who have gone through this procedure themselves.

However, no matter its validity and significance in tradition and culture, it is an undeniable fact that FGM has negative impacts on the bodies and minds of girls and women and violates each of their human rights as framed by the UDHR and other conventions. But many would argue that the cultural rights or "group rights" of these communities should be considered before individual rights, as individuals live in these communities. Complete eradication of FGM would deprive these communities of their rights to practice their culture as they see fit.

The reasons for supporting FGM include religious requirements and traditions, preservation and enhancement of fertility, coming of age rituals/initiation, preserving chastity and fidelity, and promoting social and political cohesion.²⁹ While there are ways to debunk the other arguments, the only one that stands firm against criticism is the argument of cultural tradition. The debate is ultimately one of health versus tradition

²³ *Munn v. Illinois* 94 US 113

²⁴ *Kone v. Holder*, 620 F. 3d 760 - Court of Appeals, 7th Circuit 2010

²⁵ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (adopted on 10th December, 1984, entered into force on 26th June, 1987) UNGA Res 39/46

²⁶ Katherine Brennan, 'The Influence Of Cultural Relativism On International Human Rights Law: Female Circumcision As A Case Study (1989) 7 *Law & Inequality*' A Journal of Theory and Practice 367

²⁷ 'FGM National Clinical Group - Historical & Cultural', Fgmnationalgroup.org, 2020, Available at: <www.fgmnationalgroup.org/historical_and_cultural.htm> last accessed on 11th September, 2020.

²⁸ *ibid*

²⁹ John Cantius Mubangizi, 'A South African Perspective On The Clash Between Culture And Human Rights, With Particular Reference To Gender-Related Cultural Practices And Traditions' 2012, 13 *Journal of International Women's Studies* 33, available at: <<https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1030&context=jiws>>

– the right to continue a tradition versus the right to protect girls’ health from unnecessary pain, damage, and complications.³⁰

The practice of FGM is a deeply rooted tradition in these communities and is part of their intricate cultural system. When a cultural practice such as FGM becomes so rooted in a society, it can work as a strength that binds the community and form a crucial cultural identity for the small rural communities it is performed in.³¹ To eradicate it would be to enforce foreign values that would disrupt this fragile cultural balance. Those of these communities that still support and perpetuate this practice argue that it is their cultural right to carry on this tradition. The attempts to change this custom are often seen by these people as an unwarranted imposition on their cultural ways.³²

The same conventions that ensure and expand on human rights include the right to pursue cultural development and the right to enjoy and participate in peoples’ respective cultures without any interference. Besides the UDHR, these rights are also ensured in International Covenant on Civil and Political Rights (ICCPR)³³ as well as International Covenant on Economic Social and Cultural Rights (ICESCR).³⁴ Regardless of the implications about individual human rights, the interference of and the attempt to eliminate FGM is seen as an infringement of the cultural rights of these communities.

So, where is the line drawn? Where do human rights start and cultural rights end? Is it appropriate for the United Nations to attempt to eliminate the cultural practices because they go against the concept of human rights? In a conflict between cultural and human rights, which prevails?

Human Rights and Multiculturalism

The idea of this conflict becomes both clearer and more complicated if we see it through the lens of multiculturalism - a policy that allows distinct and varied subcultures to exist within the same jurisdiction and society, allowing scope for a range of diverse cultural norms³⁵ - and how the proponents of “group rights” in multiculturalism see the clash of human and cultural rights. This can be illustrated by two of the leading ideas as perpetuated by Will Kymlicka and Chandran Kukathas, which happen to be opposing.

Kymlicka adopts the idea that group rights are derived from individual rights.³⁶ He says that an individual needs to reside in a strong and rich cultural society.³⁷ Kymlicka justifies granting of group rights but with limitations.³⁸ A group right must not suppress

³⁰ Alison T. Slack, ‘*Female Circumcision: A Critical Appraisal*’, 1988, 10 Human Rights Quarterly 437, available at: <www.jstor.org/stable/761916> last accessed on 11th September, 2020.

³¹ *ibid*

³² *ibid*

³³ International Covenant on Civil and Political Rights (ICCPR) (adopted on 16th December 1966, entered into force on 23rd March, 1976) 999 UNTS 171

³⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted on 16th December 1966, entered into force on 3rd January 1976) 993 UNTS 3

³⁵ Henriette Dahan Kalev, ‘*Cultural Rights or Human Rights: The Case of Female Genital Mutilation*’ (2004) 51 Sex Roles 339

³⁶ *ibid*

³⁷ Will Kymlicka, ‘*Multicultural Citizenship: A Liberal Theory Of Minority Rights*’, Clarendon Press 1995.

³⁸ *ibid*

or violate an individual right.³⁹ This theory would disallow the practice of FGM because it violates individual rights. However, Kymlicka's theory gives insufficient attention and autonomy to cultural minorities and their respective cultural differences.⁴⁰

Kukathas, on the other hand, debates that individuals must be allowed to live the way they prefer to.⁴¹ According to him, so long as participation and membership in a cultural community is voluntary and a member is allowed to leave when they desire, there should not be interference in the practices of the community.⁴² But this theory, when applied to a practice such as FGM, ignores that many voluntary members are unable to leave because of societal pressure and lack of financial stability. It also disregards children and infants who do not have enough understanding or maturity to voluntarily participate in these procedures.

The practice of FGM is such that it is almost impossible to favor individual rights over cultural rights, especially when the individuals themselves are quite willing. But the practice does, at times, severely violate individual rights of health, safety and life. Both of these theories, while not without merit, are difficult to apply in this situation. However, it is not impossible to take measures so that the harmful impact of FGM is reduced and cultural rights are preserved without infringing on individual human rights.

Human Rights or Cultural Imperialism

Then there comes the question of whether the attempts to impose change on the cultural tradition of these communities in the name of human rights amount to cultural imperialism by the West. And should such attempts be successful, would it open the way for more imposition on and distortion of these cultural communities?

The queries presented here calls into question the universality of the human rights enshrined in the UDHR. The debate often hinges on the origins of the concept of human rights. Though human rights are given universal legitimacy, they originated in the West and mirror Western interests. Thus, they can easily become a weapon of cultural hegemony or imperialism.⁴³ What the West considers a universal standard of human rights may not apply to other cultural communities.⁴⁴ The West is frequently accused of cultural imperialism in the guise of human rights.⁴⁵ There are mainly three reasons for this:⁴⁶

³⁹ *ibid*

⁴⁰ *Supra Note 35*

⁴¹ *ibid*

⁴² Chandran Kukathas, *The Liberal Archipelago: A Theory Of Diversity And Freedom* (OUP Oxford 2003).

⁴³ Ahmed Shaheed and others, 'Is "Human Rights" A Western Concept?' (*IPI Global Observatory*, 17th October 2018), Available at: <<https://theglobalobservatory.org/2018/10/are-human-rights-a-western-concept/>> last accessed 13th September 2020.

⁴⁴ *Ibid*

⁴⁵ Abdulmumini A. Oba, 'Female Circumcision as Female Genital Mutilation: Human Rights or Cultural Imperialism?' (2008) 8 *Global Jurist*

⁴⁶ *ibid*

Firstly, the West often denounces practices of other cultures when it deems them offensive.⁴⁷ When it comes to their dubious cultural practices or an equivalent of practice that exists in other culture, the West shows a double standard.⁴⁸

Secondly, whenever the West tries to eliminate a cultural practice it deems undesirable, it does so in the way of external force instead of encouraging internal appraisal within the local culture.⁴⁹

Lastly, the arguments of human rights of individuals become unsteady when the most widely used forms of FGM – that is, the excision of the clitoris – have not been medically proven to be harmful to health. Many of the frightening consequences listed in documents opposing FGM is said to be misleading.⁵⁰ Some scientists have censured these lists for not meeting the minimum scientific standards as well as for being unrealistic, exaggerated and misleading.⁵¹ Other arguments like male dominance and sexual control of women also fall apart when women themselves perpetuate, support and carry out these practices and the women who have undergone the procedure report no impairment of their sexual ability.⁵² In fact, most of these women encourage the practice among younger generations. Similar legalized procedures of the body and genital modification are common in the West for non-therapeutic reasons such as “aesthetic” and “sexual enhancement”.⁵³ However, these procedures have not been opposed by the proponents of human rights.⁵⁴ The arguments against FGM are themselves contradictory to human rights as they question peoples’ rights to participate and enjoy their cultural practices. These arguments can be seen as sex-based discrimination because we see nowhere near the backlash for male circumcision as we do for the female one. The West refuses to accept any practice that it deems “uncivilized” and “barbaric” and, more often than not, it attempts to eliminate such practices, completely disregarding the cultural differences, right to cultural autonomy as well as thousands of years of history behind cultural practices such as FGM.

Non-Western cultures do sometimes restrict the application of human rights, but only when these rights violate the cultural rights of their members.⁵⁵ It is quite clear that the attempts and arguments against FGM have been ineffective so far in even reducing the amount of practice in these communities, mainly because these communities see said attempts as an unnecessary imposition on their cultural lives. However, if these attempts were to one day succeed, then it will undoubtedly open the way for more external interference and attempts to eradicate the cultural ways of communities that the West considers unacceptable.

Recommendations

The measures that have been taken so far in an attempt to eradicate the practice of FGM do not seem to have been effective in eradicating or even reducing the practice

⁴⁷ *ibid*

⁴⁸ *ibid*

⁴⁹ Michael J. Perry, ‘Are Human Rights Universal? The Relativist Challenge and Related Matters’ (1997) 19 Human Rights Quarterly 461, Available at: <www.jstor.org/stable/762723>

⁵⁰ *Supra Note*, 45

⁵¹ *ibid*

⁵² *ibid*

⁵³ *ibid*

⁵⁴ *ibid*

⁵⁵ *Supra Note* 43

substantially. From what has been observed so far, it is almost impossible to completely eradicate the practice of FGM; it continues and most women participate willingly in these procedures. However, it is possible to reduce the amount of FGM as well as the harmful impacts the practice can have. A more cautious and sensitive approach seems to be more appropriate in a situation such as this. Some of the ways by which this approach can be implemented are as follows.

The practice of FGM continues despite the legislation against it. The criminalization of FC puts many poor and vulnerable women in danger of facing penal sanctions.⁵⁶ Laws that were put in place to stop FGM may at times even encourage the practice.⁵⁷ A better alternative would be to introduce legislation for the purpose of monitoring the practice in the relevant communities so that more harmful practices like infibulation can be stopped.

An age restriction should be placed. One aspect of this practice that cannot be excused is how it is performed on children and sometimes even on infants. These children do not have enough maturity and understanding to make an informed decision. Just like there are age restrictions for consent to sex, marriage and consumption of alcohol, an age restriction must be placed on when circumcision can be performed.

Measures should be taken to medicalize the process. Many health and hygiene risks associated with these procedures would be reduced if carried out by medical professionals. For example, after being declared a requirement for Muslim women through fatwa in Malaysia, many women are seeking a safe way to circumcise their daughters through the medical process.⁵⁸

There is an argument to medicalize FC so that it can be carried out in a proper environment by trained medical professionals.⁵⁹ There is a need for educative awareness programs that do not offend the communities they are trying to bring a change in. These programs can be ineffective and even counterproductive when they display the practice as a custom embedded in an unchanging and “primitive” culture.⁶⁰

Change starts at home. Any change induced has to come from within the community. This can be done with informative education about FC. One way to do that would be to stop generalizing all forms of FC and make an effort to educate women and especially young girls on what the harmful effects of various types of FC can be. Solid and scientific proof must be shown for any harmful effect listed.⁶¹

Conclusion

⁵⁶ *Supra Note 45*

⁵⁷ Anna Winterbottom and others, ‘*Female Genital Cutting: Cultural Rights and Rites of Defiance in Northern Tanzania*’ (2009) 52 *African Studies Review* 47

⁵⁸ Gabrielle Paluch, ‘*In Thailand’s Muslim South, Authorities Turn A Blind Eye To FGM*’, *The Guardian*, Pattani, 1st April 2015), Available at:

<<https://www.theguardian.com/global-development/2015/apr/01/thailand-muslim-south-authorities-blind-eye-fgm-who>> last accessed on 4th January 2021

⁵⁹ *Supra Note 45*

⁶⁰ Winterbottom (n 57)

⁶¹ *Supra Note 45*

The problem of FGM is a delicate and complex one. It is a practice deeply engrained as a tradition in the communities it is practiced in. Such a practice cannot be eliminated or, indeed, changed by the imposition of external values on them in the name of human rights. The human rights norms we attempt to use to change this practice may not be compatible with these communities' cultural rights. That kind of approach would be akin to taking a sledgehammer to it when it needs the delicacy and precision of a needle. Undeniably, some forms of FGM are clear and gross human rights violations. However, to eradicate those, change must be introduced first – slowly and cautiously – from within these communities. As such, measures should be taken towards such an approach.

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