



## **Introduction**

We welcome the initiative of both Committees in elaborating a joint General Recommendation/General Comment on this crucial topic. International law has not yet clearly addressed in one authoritative document the apparent tensions between cultural relativism and universality and the impact on women's human rights. This GR/GC will therefore be an important opportunity to consider state obligation in the context of the two Conventions and to set out clear guidance for states by addressing the underlying cultural and traditional assumptions, including gender stereotypes, that legitimize harmful practices. Rather than just addressing harmful practices in isolation, the GR/GC should place these cultural assumptions and patterns of conduct in the larger political and economic context in order to expose the links between violations of women's human rights, including violence, and maintenance of existing imbalances in power structures. The GR/GC will also provide an excellent space to engage with the frameworks of both Conventions simultaneously to highlight and ensure that they are complementary and do not undermine or conflict with each other.

## **The nature and use of culture**

We particularly welcome the focus of the GR/GC on both harmful 'traditional' practices and newly emerging harmful practices that have perhaps not received as much international attention. Whether a harmful practice is well-established or newly emerging does not detract from the fact that all practices which are harmful to women arise from social norms, frequently disguised as cultures, customs, traditions and/or beliefs, that construct gender to the disadvantage of women. As such, it will be essential for this GR/GC, drawing, *inter alia*, on CEDAW's interpretations of Articles 2, 5 and 16, to examine the nature of culture and tradition and clarify states' obligations to modify social and cultural patterns of conduct that perpetuate inequality and discrimination.

### *Culture as a construct*

Culture is an expression of a collective identity and a shared understanding of acceptable ways of interacting. Use of the term culture or tradition lays claim to an authenticity and authority which assumes that those who belong to that culture and practice those traditions are a homogenous group. What is often espoused as culture, however, whether by states or local communities, is



based on the identity of the dominant elements of a given society. This inevitably subjugates and marginalizes the cultures and identities of those who do not belong to the dominant social group. It also denies the role of those who do belong to the dominant culture but, for a variety of reasons, are not active in shaping that culture. More often than not this includes women. In fact, since culture is an expression of identity – and the identity of only some elements of society – it is open to being deconstructed, reconstructed and constantly modified as identities change, dominant groups gain or lose power and other actors become empowered to shape it.

This can clearly be seen in activism and strategies to eliminate FGM. A comprehensive UNICEF study in several countries examined the strategies used to combat the practice and identified a range of successes<sup>1</sup>. The successes showed that involvement of all sectors of society, particularly women and girls, had the effect of reshaping the community's understanding of the practice and lead ultimately to their rejection of it. It can also be seen through the historical evolution of what are often now referred to as 'traditional' or 'customary' practices and values. Many are in fact either direct imports from colonial cultures (for example, the sodomy laws which existed in every post-British colonialism state) or are distorted versions of earlier practices which were manipulated by colonial powers to enforce their own values in new contexts or as tools to ensure subjugation of conquered peoples.

#### *Culture as a political and economic tool*

Because of the nature of culture as an expression of the identity of those dominant social elements who shape it and because of the authority which use of the term accords to those who conform to the accepted norms of that culture, culture and tradition are very effective political and economic tools for entrenching the power status quo. It is therefore very much in the interests of those in power to portray culture and tradition as static and immutable.

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<sup>1</sup> [http://www.unicef-irc.org/publications/pdf/iwp\\_2009\\_07\\_rev.pdf](http://www.unicef-irc.org/publications/pdf/iwp_2009_07_rev.pdf)



Increasingly, cultural relativist arguments and calls for ‘cultural sensitivity’ are threatening to undermine the established universality of human rights. States are increasingly supporting concepts such as ‘traditional values’. Debates at the Human Rights Council are illustrative of this. For example, during negotiations on Resolution 15/23 which set up the Working Group on Discrimination against Women in Law and Practice, Saudi Arabia attempted to replace the established language of ‘universal human rights’ with ‘universally agreed human rights’. The HRC recently adopted a Resolution tabled by Russia which mandates the HRC Advisory Committee to undertake a study on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind<sup>2</sup>. Many states and other actors on the international scene are arguing that international human rights standards were negotiated by Western states in the context of a power imbalance between states and thus are representative only of Western values and not represent those of other states. In the ASEAN region, for example, there are strong calls for the ASEAN Human Rights Declaration which is currently being drafted to enshrine ‘ASEAN values’ rather than universal human rights norms. NGOs have expressed serious concerns about this new consideration of ‘traditional values’ as the rhetoric of culture and tradition is increasingly being used to justify violence against women and sanction limitations on the freedom of women in violation of their international human rights e.g. through the enactment of laws on blasphemy or bans on the wearing of the headscarf. Cultural relativism has at times frustrated consensus on issues which strengthens fundamentalist and conservative lobbies opposed to women’s human rights.

A common understanding of the principle of the universality of human rights has been established, and reinforced repeatedly in instruments and conferences such as the UDHR and the 1993 Vienna conference. Both Committees and particularly the CEDAW Committee have interpreted many provisions in their respective Conventions in a manner which implicitly supports and relies on the principle of universality. The outcome of the 2005 World Summit states unequivocally that “While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States,

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<sup>2</sup> Resolution 16/3 of 24 March 2011.



regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms”<sup>3</sup>. A universalist approach does not therefore exclude the importance of ensuring that universal standards are applied in a manner which is relevant to particular contexts and respects pluralism and diversity as well as religious belief but it does prohibit these considerations from undermining the principle values underpinning international human rights norms such as equality and freedom from violence. A universalist approach therefore requires dialogue between cultures in order to reach understanding and consensus rather than conflict.

The GR/GC must reinforce the universality of the values underpinning international human rights law: equality, freedom and human dignity as set out in the Universal Declaration of Human Rights and other international human rights instruments. It must expose the power dynamics behind the perpetuation of harmful practices and clearly illustrate the nature of culture as fluid and changeable rather than static and immutable. The CEDAW Committee’s approach of identifying harmful practices as gross forms of violence against women and violations of the right to bodily security rather than as cultural or traditional practices has been particularly useful and should inform this GR/GC. The Committee takes the violent practice as the focus point and highlights how discriminatory social, cultural and religious norms contribute to families and communities condoning the practice and to states’ failure to hold the perpetrators legally accountable. The GR/GC must draw strongly on the CEDAW Committee’s Concluding Observations and previous General Recommendations, especially GRs No. 14 on Female Circumcision, 19 on Violence against Women and 28 on State Obligation. The GR/GC should also strengthen the CEDAW Committee’s application of the life cycle approach, particularly as applied in GR 24 on health, and harmonise this with the approach of the CRC to ensure that no conflict arises between the frameworks of the two Conventions.

### **Types of harmful practices**

The GR/GC must be framed broadly enough to provide guidance to states on their obligations relating to existing harmful practices as well as being capable of evolving to prohibit new

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<sup>3</sup> 2005 World Summit Outcome Document United Nations General Assembly , 60th Session 20 Sept.2005 A/60/150 paras 13 and 121



practices as they emerge. However, certain harmful practices deserve explicit mention and should be directly addressed by the GR/GC either because they are prevalent across a range of cultures or because are not often recognized and/or addressed by the international community:

- Rape and sexual violence as weapons of war: it is increasingly widely acknowledged that rape and sexual violence are a regular part of conflict situations and are used to suppress resistance as well as to conduct ethnic cleansing.
- Sex-selective abortion, foeticide and infanticide: this has given rise to adverse male/female ratios in regions such as South Asia where sixty million girls are considered 'missing' due to mistreatment, foeticide or infanticide.
- Curative/corrective rape: statistics on the prevalence of this practice are non-existent because it has not received significant attention as a human rights violation until very recently. However, accounts are frequent and often highly violent.
- Medicalisation of sexual orientation and gender identity: rights violations flowing from this include forced sterilization of transgender persons, genital mutilation of intersex persons and forced psychological 'treatment' to cure sexual orientation which has serious psychological health implications.
- Chaupadi: This is the practice in Nepal of banning women and girls from the house and from touching water and milk for 4 to 7 days during their menstruation period. They are confined to a Chaupadi house or Chaupadi goth where they must live and sleep for the duration of the ostracisation. A Chaupadi goth is a hut 2 – 3 feet high and 2 – 3 feet wide which is made of mud, straw and wood.
- Son preference: this is prevalent across a wide range of cultures and contexts and results in serious consequences for the girl child impacting on her rights to health, education, employment etc. For example, health indicators in Asia and Africa consistently show that girls fare worse than boys and girls are all too frequently denied inheritance, including to land required for their livelihoods while underpinning assumptions about the lower importance of girls often manifest themselves in domestic and intra-family violence and sexual and economic exploitation.



## **Obstacles to the elimination of harmful practices**

### *Lack of implementation of measures*

FGM, for example, is prohibited in law in many jurisdictions yet continues to be widely practiced. Lack of implementation may be due to lack of measures to address the underlying causes of the practice e.g. the social and cultural beliefs and gender stereotype; it may be that there is a lack of enforcement because there is a lack of resources or capacity of enforcement personnel; it may be because of a duplication of mechanisms and institutions accompanied by complex administrative procedures which make it impossible or highly difficult for victims of violations to seek protection or enforce their rights. There must be sufficient investment by the state of human, financial and other resources to ensure that a measure to eliminate a harmful practice is effective. A co-ordinate response among implementing institutions is also essential.

Plural legal systems can also create a challenge for implementation of measures to eliminate practices. Sensitisation of the legal profession can aid in equipping them to use the concepts of CEDAW in local and tribal courts to create jurisprudence at that level. The state is also under an obligation to undertake community and local initiatives to modify the cultural and traditional beliefs which support the application of discriminatory norms by such tribunals. It is further under an obligation to provide alternative avenues for victims to access justice and to regulate parallel legal systems where their application results in violations of human rights. Strategies implemented by states may include increased support to NGOs and local and community groups that conduct advocacy and awareness raising activities at the local level directly with those who administer and engage with such plural systems. The recommendations below regarding reservations are particularly relevant in this context.

### *Reservations*

Articles 5 and 16 of the CEDAW Convention are frequently the subject of reservations based on culture or religion. States argue that it is not within their jurisdiction to change religious laws without the support of the local communities. However, the CEDAW Committee has frequently noted in its Concluding Observations that inequalities in personal laws based on religion reinforce discriminatory culture, tradition and stereotypes, contravene the Convention and cannot



be excused or justified in the name of respect for religion or culture. It has also stated that reservations for traditional, religious or cultural reasons are incompatible with the Convention and encouraged states to withdraw them. It urges states to use the Convention as a lens through which customs, practices and laws should be studied to ensure they are not discriminatory. It consistently recommends to states that they use the comparative experience of other states with diverse religious and ethnic groups to revisit interpretations of religious doctrine that infringe on women's human rights. In particular, they have urged comparative analysis of personal laws based on Islam in different countries to share experiences of how CEDAW compliant interpretations have been incorporated into modern laws. Its Concluding Observations also call on states to enact specific legislation to combat the effects of stereotypes and discriminatory cultural and religious norms and practices.

Savitri Goonesekere puts it thus:

*“The right to freedom of conscience and religion as a human right might then compete with the norm of gender equality and freedom from violence. However, women’s groups have lobbied for change in Islamic laws through a feminist deconstruction of their own religious tradition. They have demonstrated how stereotypical attitudes and customs rather than religious doctrine have influenced negative interpretations, denying women and girls their human rights in the family and community. Some Islamic countries have amended their nationality laws... A State party’s obligation in human rights law to respect freedom of conscience and religion does not extend to condoning practices and manifestations that are contrary to public interest. This provides a basis for State intervention through legal and policy measures against practices that deny women equality and the right to freedom from violence. Domestic violence legislation, and laws against practices such as honour crimes in Islamic countries, can be justified based on that principle, or through a deconstruction of religious tradition.”<sup>4</sup>*

She then references the example of Pakistan which limited the scope of application of the Hudood Ordinance, making it possible to prosecute cases of sexual violence against girls and women under ordinary criminal law. One of the successful measures analysed in the UNICEF

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<sup>4</sup> “The Elimination of All Forms of Discrimination and Violence against the Girl Child: Background paper to the EGM”, Savitri Goonesekere, September 2006, EGM/DVGC/2006/BP.1



study on FGM illustrated that, through engagement with and support from sensitive religious leaders, FGM was actively separated from religious doctrine and established as a form of violence which was not supported by religious imperative or sanction.

### **State obligation**

Harmful practices are most often perpetuated because of the systems of social pressures and rewards that accompany them. Those that practice them gain social status and respect while those that reject them are excluded and ostracized<sup>5</sup>. This requires that measures to eliminate such practices address core beliefs and social relations and provide alternatives to the practice in question by creating social status and respect in an alternative manner. This involves addressing not just the practice itself but working to modify the gender stereotypes and roles that underpin it.

It is therefore imperative that any strategy to eliminate a harmful practice have at its core the objective of empowering women, through realization of the full range of their human rights, to contribute to and shape the culture, societal attitudes and gender constructions in a positive manner. This includes, but is not limited to, acknowledgement on the part of the state of and the implementation of measures to ensure the right of women to participate fully in and contribute to their culture, to choose the culture in which they wish to live and to reject cultures and cultural practices and beliefs with which they do not agree. For example, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa states that "women have a right to live in a positive cultural context and participate in the formulation of cultural policies at all levels."

The Concluding Observations and GRs of the CEDAW Committee have repeatedly emphasized that culture and tradition cannot be used to justify a state's failure to prevent harmful practices. The principle of due diligence requires the state to prevent such practices, not just by state but

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<sup>5</sup> [http://www.unicef-irc.org/publications/pdf/iwp\\_2009\\_07\\_rev.pdf](http://www.unicef-irc.org/publications/pdf/iwp_2009_07_rev.pdf)





also by private or non-state actors. The CEDAW Committee has recommended particular measures to address underlying gender roles and stereotypes and modify social and cultural patterns of conduct which give rise to violations of women's human rights. The Committee has recommended that states deconstruct the diverse influences that contribute to discriminatory cultural practices and bring national laws and policies into harmony with international standards. It frequently recommends amending school curricula and textbooks in order to eliminate instances which reinforce stereotypes and promote discriminatory treatment and/or particular practices.

Some measures to modify discriminatory stereotypes, cultures, practices and traditions which the CEDAW Committee has already recommended include:

- Repeal discriminatory laws. The State must assess laws and amend or repeal laws which perpetuate inequality between women and men, including personal laws that perpetuate traditions and cultures that are discriminatory;
- Enact appropriate and specific legislation and policies that address the effects of discriminatory stereotypes, cultures, practices and traditions in all areas of life. It is important that punishments for breaking the law are consistently applied and are not excessively severe and thus deter women from bringing charges or make the mechanism for punishment ineffective;
- Ensure effective implementation of existing legislation through gender sensitising and training relevant public officials in various sectors and levels to raise their awareness of the importance of women's full and equal participation in all areas. In this, the State has the obligation to ensure that private actors also comply with such legislation; and
- Any other appropriate and concrete measures to create an enabling environment for women to access, claim and enjoy their rights. This includes:
  - Raising public awareness;
  - Reviewing and revising curricula and textbooks to eliminate gender stereotypes and include gender sensitivity training in all teacher training programmes; and
  - Encouraging the media to portray women positively and promote the message that men and women have equal status, roles and responsibilities in both private and public spheres.



The GR/GC should be strongly informed by the CEDAW Committee's Concluding Observations relating to Articles 2, 5 and 16 in this regard. It must create clarity for states on the nature of the principle of universality and encourage them to include awareness raising and training on this principle for all relevant stakeholders in strategies to eliminate harmful practices.

A range of measures which have proven successful in eliminating FGM can be identified from the study conducted by UNICEF<sup>6</sup> and might usefully be applied in identifying state obligation in relation to harmful practices in general. In particular, some critical considerations and measures can be identified from the study which were necessary in changing attitudes towards the practice:

- Community conversation and community decision within the process of abandonment;
- Provision of innovative, integrated health, vocational and environmental programmes;
- Mobilisation of diverse elements of the community, including mainstream and marginalized groups<sup>7</sup>;
- Provision of information to increase knowledge of the practice and of possible alternatives;
- Building trust in the community, including with the aid of a trusted community leader;
- Creating public pressure against the practice through events and rallies, public declarations, rescue actions etc.
- Involving schools and students through awareness raising, clubs, groups, workshops and student media;
- Targeting perpetrators of the practice to sensitise them to the impacts of the practice and provide viable alternatives;
- Creating ownership and investment amongst the community in the process of eliminating the practice; and

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<sup>6</sup> ibid

<sup>7</sup> In Ethiopia strategies included mobilising elders, women and youth, uncircumcised girls, Fuga artisans, sub-district and religious leaders and edir among others.



- Placing reliance on local community structures.

The UNICEF study clearly shows the critical importance of community and local based initiatives. However, these strategies must form part of a larger national and sometimes regional strategy. At the national level strategies developed by states to address these practices should include consideration of Constitutional and legislative reform to prohibit the relevant practice and enshrine effective guarantees of equality and non-discrimination. Legislation must take into account the obstacles referred to above and measures to overcome them, such as by including in the legislation effective implementation and coordination measures. In order to make these reforms effective, they must be accompanied by comprehensive, complementary social policies regarding e.g. health, education, resources and sensitization for law enforcement and local level policies to implement the above recommended measures. Awareness raising and training programmes should be implemented to support legislative measures, including for implementers such as law enforcement, local and government actors and judiciary but also of relevant professions such as the medical, legal, educators, media and advertising. Professional networks should also be encouraged to contribute to initiatives to eliminate the practice. Frequently there will be a need to introduce temporary special measures to ensure progress and reduction in the practice and its effects while more comprehensive and long-lasting measures are put in place. TSMs can be particularly useful in facilitating visibility of real alternatives to the social pressures and rewards which legitimate and perpetuate the practice. They can open spaces for visible, practical challenges to stereotypes and the belief in the immutable and essential nature of the practice. Measures to ensure elimination will also require the creation/reform of effective remedies and complaints mechanisms. The state will be obliged to collect adequate quantitative and qualitative disaggregated data to inform and support the measures and ensure on-going, effective monitoring. Strategies for eliminating a given practice should also take into account the need for global support through resource sharing and support and partnerships, including with UN and other international and regional agencies and institutions as well as with international and regional NGOs.



Strategies to eliminate harmful practices must also take particular account of the needs of minority and disadvantaged communities and of the relevance of intersecting identities. The elimination of many harmful practices may require discrete measures targeted at particularly vulnerable groups such as indigenous, poor, ethnic, religious and sexual minorities, immigrants, women and girls with disabilities, transgender and intersex women and girls, rural women and girls. This could include measures to address any specific beliefs or stereotypes within these communities which reinforce the practice and measures to address their particular vulnerability to the practice. For example, indigenous women and girls are often particularly vulnerable to rape and sexual violence. Indigenous lands are frequently subject to militarization because of their rich resources and a conflation of the right to self-determination with secession. Rape and sexual violence then become a tool to suppress calls for self-determination and indigenous rights, such as over their territory and resources. They have also been known to be used in inter-tribal conflicts. The intersection of identity as indigenous (and/or other identities) and as women must be respected and understood so that measures that are suitable for use in the mainstream community can be appropriately modified for use in other communities. It is especially important in this case that the measures aim to ensure realization of the rights of women and girls to shape their own culture and community. This requires taking cognizance of the fact that change will not be effective if imposed on a community from external sources and that there are indigenous practices and ways of being that are not harmful to human rights and to which indigenous peoples have their own rights.

## **Conclusion**

The joint GR/GC must address directly the concepts of culture, tradition, gender stereotypes and their fluidity. It must place them in the political and economic contexts in which their development occurs and reinforce the basic principle of the universality of human rights. The GR/GC must clearly set out states' obligations in terms of the practical measures they must put in place to ensure the elimination of all harmful practices so that states' are fully informed of how they are required to ensure women's human rights in this regard.