



**THE INTERNATIONAL LAW COMMISSION**

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**EFFECTIVITY OF INTERNATIONAL CULTURAL PRACTICE AND  
THE MAINTANANCE OF REPSECT OF CULTURAL DIVERISTY**

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## **A. PREAMBULATORY CLAUSE**

### **I. Introduction**

Effective practice in a global world requires knowledge and understanding of diverse cultures and this also applies to the issue of human rights. It is possible for there to be a common global practice and culture while at the same time protect and respect cultural diversity. Recalling the then Secretary General of the United Nations, Ban ki-Moon's message in 2011, for World Day for Cultural Diversity for Dialogue and Development, where he posited, that a world of peace and solidarity could only be accomplished by acknowledging and celebrating people's diversity; and that all persons had a responsibility to speak up for the spiritual, social and economic wealth that they derive from cultural diversity.<sup>1</sup> He also urged on the strengthening of bonds, and deepening of our understanding of the value of cultural diversity that would help us live together.<sup>2</sup>

The topic at hand sets to ascertain whether the international community can formulate a universal cultural practise notwithstanding the existence of a well rooted cultural diversity amongst the people, and hence striving to accord recognition of the same cultural practices. It is therefore important to understand what cultural diversity generally entails.

Cultural diversity refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the varieties of cultural expressions but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used<sup>3</sup>.

Culture is an important factor in the progress and development of society in all facets. In order to internalize human rights, cultural values and beliefs must be clearly identified, contested, negotiated and eventually reconciled from within. The reality is that not all cultural practices place

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<sup>1</sup>United Nations, 'Secretary-General's message for World Day for Cultural Diversity for Dialogue and Development' (21<sup>st</sup> May, 2011) <<https://www.un.org/sg/en/content/sg/statement/2011-05-21/secretary-generals-message-world-day-cultural-diversity-dialogue-and>> accessed on 27<sup>th</sup> January, 2020.

<sup>2</sup> Ibid.

<sup>3</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 2005) article 4(1).

the same value on human rights and the protection of the minorities. The thorny issue of human rights is how it applies in different cultural contexts. Some contemporary cultural practices or state policies are still perceived as violating several fundamental human rights due to the varying values they place on human rights.

A follow up question that follows, is the linkage between cultural practices and human rights, or whether a cultural practice can be recognised as a human right, in that, a cultural right?

The nature of human rights has been largely defined by different scholars who seem to understand them on the premise of inherence, others as State granted, others as those talked about for a number of times, and while others as fought for. Marie Benedicte Dembour, in her quest to understand human rights, classified human rights into four schools of thought. Firstly, the natural school of thought which depicted human rights as rights which are given; secondly, the deliberative school depicted human rights as those which have been agreed upon by political and liberal societies; thirdly, the protest school which enunciates that human rights are those rights that have been fought for; and finally the discourse school which depicts human rights as those rights that have been talked about for a substantial amount of time.<sup>4</sup> It would be prudent to classify the topic at hand under the discourse school of thought, following the current debate on whether there should be the prescription of a universal cultural practise, the existence of a worldly cultural diversity notwithstanding.

However, the protection and promotion of the diversity of cultural expression presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous people<sup>5</sup>. The human rights discourse seeks to protect the cultural diversity and expression of the numerous societies in the world while at the same time protecting the dignity of the human being. This is evident in the numerous international laws that support the latter remark.

The International human rights discourse introduces the concept of universality principle of human rights, where the view is that, human rights are universal and inalienable; indivisible;

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<sup>4</sup> Marie Benedicte Dembour, 'Human Rights Quarterly' (2010) 32 Johns Hopkins University Press 1, 20.

<sup>5</sup> Convention on the Protection and Promoting of the Diversity of Cultural Expressions (adopted 21 October 2005) article 2(3).

interdependent and interrelated; it further contends that they are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background.<sup>6</sup> The International Bill of Rights consists of the Universal Declaration of Human Rights which was adopted in 1948, the International Covenant on Civil and Political Rights which was adopted in 1966, and the International Covenant on Economic, Social and Cultural Rights which was adopted in 1976. The aspect of universality of rights was introduced by article 1 of the Universal Declaration on Human Rights, where it states that all human beings are born free and equal in dignity and rights.<sup>7</sup>

Some of the treaties which provide for the promotion of cultural sensitization are; article 20 of the United Nations Convention on the Rights of the Child;<sup>8</sup> Another major treaty that highlights the promotion of cultural diversity, is the Convention on the Protection and Promotion of the Diversity of Cultural Expressions which was enacted in 2005, which deals with specific articles in the UNESCO Universal Declaration on Cultural Diversity which clarify three issues.<sup>9</sup> First, the relationship that identity has with cultural goods and services, which values and meaning should not be treated as economic goods; second, the States having the responsibility for the protection and promotion for the "diversity of cultural expressions and ensuring the free flow of ideas and works"; third, there needs to be international co-operation on the promotion of cultural practices within States.

State parties to International instruments and covenants are under an obligation to abide by them in good faith, and act accordingly towards realizing what is embedded in those statutes. Article 26 on the Vienna Convention of the Law of Treaties (VCLT) enunciates the principle of Pacta Sunt

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<sup>6</sup> United Nations Population Fund, 'Human Rights Principles' (UNPF, 1 March 2005) <[www.unfpa.org/resources/human-rights-principles](http://www.unfpa.org/resources/human-rights-principles)> accessed 27 January 2020.

<sup>7</sup> Universal Declaration on Human Rights (adopted 10 December 1948) article 1.

<sup>8</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1988, entered into force 2 September 1990) (UNCRC) article 20.

<sup>9</sup> UNESCO Universal Declaration on Cultural Diversity (adopted 2 November 2001) (UNDCD).

Servanda in that, ``Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’’<sup>10</sup>

The question is whether the international community can effectively prescribe a cultural practice while maintaining respect for cultural diversity? This is what I will seek to tackle in this article.

## **II. Issues**

### **a) The relationship between human rights and cultural diversity**

Everyone has the right freely to participate in the cultural life of the community and to enjoy the arts<sup>11</sup>. It is also recognized that every person has a right to freely pursue their cultural development and identify with a particular culture<sup>12</sup>. It is therefore important to acknowledge that culture is an important part of human existence and the law takes cognisance of that fact. The fundamental question that is raised however, is that of the nature of the relationship between human rights and cultural diversity.

Generally, human rights seek to protect the cultural diversity and expression of societies and communities around the world. This has been made possible by the formulation of cultural rights that specifically cater for matters dealing with culture. It is also evident that cultural rights have to and are enjoyed together with other rights and therefore are not mutually exclusive. This right is also to be enjoyed by both men and women<sup>13</sup>. The said protection has been achieved by ensuring that people in different states have access and enjoy cultural heritage without discrimination. These rights have ensured respect for cultural diversity of individuals and communities and that they are able to access cultural information and material in their preferred language.

Over the last decades, the international community has adopted several legal instruments on matters cultural diversity and human rights in order to enrich a pluralism approach and formulate

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<sup>10</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (VCLT) article 26.

<sup>11</sup> UDHR, article 27(1).

<sup>12</sup> ICESCR, article 1.

<sup>13</sup> CPPDCE, article 3.

mechanisms that seek to broaden and deepen a common perception.<sup>14</sup> It should be noted that the adoption of several international instruments that try to codify common cultural practices around the world, is a great step to effect a universal cultural relativism approach. However, these laws have a long way to go in terms of their effectiveness as they lack sufficient detail and this makes their intended goal not easily achieved.

This relationship has been subject to conditions according to international law. Cultural diversity can be protected and promoted only if human rights and fundamental freedoms are guaranteed. No one should invoke the provisions of any convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law or to limit the scope thereof<sup>15</sup>. From the foregoing, it is clear that any cultural practice that infringes on the human rights and fundamental rights of human beings cannot be protected under the law. This has been a huge topic of contention especially from states and societies that do not place the same value on human rights as the others.

The underlying purpose of human rights is to protect the minorities and the vulnerable, promote the principles of equality and non-discrimination and to limit the arbitrary exercise of government power that may be used as a vehicle for discrimination. This underlying purpose therefore informs the conditions set upon by international law for the protection of cultural diversity. However, not every state adhere to these human rights and many international examples depict practices and policies that essentially violate them. The following are the ways through which violations of human rights have been perpetrated through some cultural practices:

- The most prevalent one of all is the issue of women's rights which has created a lot of conflict in patriarchal societies. In some places like Pakistan, women have no right to control their own lives and are degraded to the status of property, to be exchanged for the financial benefit of their families. Domestic violence is rampant and commonplace in Pakistan and other societies alike. The battering of women is claimed to echo a sense of 'discipline' and in turn equates it to displaying respect for the man. The economic, social and legal rights and support to women

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<sup>14</sup> Joseph Yacoub, 'Cultural Diversity: A New Approach of the Concept of Culture' (Sens Public, 10 April 2010) <[www.sens-public.org/article765.html?lang=fr](http://www.sens-public.org/article765.html?lang=fr)> accessed on 28 January 2020.

<sup>15</sup> CPPCD, article 2(1).

are virtually non-existent. All this happens despite such countries regarding women as equal and embracing human rights.

- Female Genital Mutilation is another form of the violation closely related to the first. This occurs when the female's clitoris or entire clitoris and labia are removed and in some extreme instances, the closing of the vagina and leaving a tiny opening for urine. This is practiced in many parts of the world like; Somalia, Senegal, Yemen and other parts of the world. This happens in mostly a clandestine fashion or sometimes openly. This happens despite existing laws nationally and internationally banning the practice. It is a blatant violation of the girls' human rights in the name of cultural practice. The Committee on the Elimination of Discrimination against Women, General Recommendation 14 of 1990, recommended that female circumcision should be abolished and a number of states to this effect have taken measures to enact laws that eradicate the practice.<sup>16</sup> Additionally, article 18(3) of the International Covenant on Civil and Political Rights provides that the freedom to manifest one's beliefs shall be limited in order to protect public safety, public health and morals.<sup>17</sup> This is why the international community has formulated laws that impede the existence of cultures that contradicts public safety, public health and morals, and that is why States are called upon to enact laws that are in harmony with international law.
- Other acts like forced marriages of underaged girls and boys sometimes for money is also rampant. They are most of the time assaulted, and subjected to extremely early pregnancies which are very dangerous to their health.
- Child labour is also another form of violations which are exploitative, unhealthy and detrimental to the children. It deprives the children off of their childhood and keeps them from attending school<sup>18</sup>.

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<sup>16</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 14' in '*Female Circumcision*' (1990) A/45/38 and Corrigendum <[www.refworld.org/docid/453882a30.html](http://www.refworld.org/docid/453882a30.html)> accessed 28<sup>th</sup> January 2020.

<sup>17</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) article 18(3).

<sup>18</sup> Anna Katiuzhinsky, 'Human Rights, Cultural Practices, and State Policies: Implications for Global Social Work Practice and Policy' (2014) 23 IJSW

These acts listed above are atrocious and occur even when the law, both international and local, forbid them. It is a fragrant violation of human rights in the name of cultural practices and in that regard, the law cannot protect such practices as they demean the dignity of the human being and are against the basic principles of human decency.

**b) The contrasting views on the interaction between human rights and culture**

The question in this issue is of how human rights and culture should interact in a culturally diverse world. There are two major contrasting views on this issue.

Firstly, there is the deontological school of thought on human rights. It views human rights as universal and believes in fixed moral rules that actions are inherently right or wrong regardless of time, place or context. Human rights are based on the universal dignity of all human beings by virtue of their humanity<sup>19</sup>. Universalists conceptualize human rights as a universal moral right, something that all people, everywhere, at all times, ought to have and something of which no one may be deprived without a grave affront to justice<sup>20</sup>. This is something which is owing to all human beings simply because they are human.<sup>21</sup> In that regard, from a Universalist's point of view, some cultural practices can be deprived only when they do not conform to the principles of human rights and dignity.

On the other hand, we have the teleological school of thought on human rights, which views human rights as culturally relative. Relativists believe that ethical decision making should be based on context and consequences. They believe that each society should formulate their own human rights standards in their contexts and cultural expressions. Relativists have criticized human rights as a manifestation of western imperialism<sup>22</sup>. From the foregoing, it is clear that relativists believe that

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[www.researchgate.net/publication/259550280\\_Human\\_rights\\_cultural\\_practices\\_and\\_state\\_policies\\_Implications\\_for\\_global\\_social\\_work\\_practice\\_and\\_policy](http://www.researchgate.net/publication/259550280_Human_rights_cultural_practices_and_state_policies_Implications_for_global_social_work_practice_and_policy) accessed on 30 January 2020.

<sup>19</sup> Peace Review, 'Are Human Rights Universal or Culturally Relative?' (2016) 28 (2) A Journal of social justice <[www.tandfonline.com/doi/abs/10.1080/10402659.2016.1166756?src=recsys&journalCode=cper20](http://www.tandfonline.com/doi/abs/10.1080/10402659.2016.1166756?src=recsys&journalCode=cper20) > accessed on 30 January 2020.

<sup>20</sup> Anna (18).

<sup>21</sup> UDHR, article 1.

<sup>22</sup> Peace Review (n 19).



human rights should be interpreted within an individual society's context and with great consideration to the cultural practices.

The teleological view, however, is a fertile ground for widespread infringement of rights and oppression of minorities. If human rights and the acceptance of a common global culture is left to individual societies and states to decide, it defeats the purpose of having the human rights at all. It is true that the Universalist approach to human rights has its own shortcomings but the principles of human dignity and equal treatment of everyone are at least upheld. The Universalist view on human rights is more realistically applicable as compared to the relativist point of view.

**c) The risk posed on the rich cultural diversity and the duty of states in the laying out of a common acceptable cultural practice**

The rich cultural diversity is not jeopardised by the efforts of the international community in laying out a common acceptable cultural practice. The human rights discourse does not seek to dictate to states and societies on what to do and how to practice their cultures but it is a mere guide and in some instances it does seek to forbid only those cultural practices that are oppressive. The international community merely seeks to protect and promote the diversity cultural expression as it is what makes the world what it is<sup>23</sup>.

In a nutshell, the rich cultural diversity is definitely not in jeopardy from the actions of the international community. Many have argued that a universal culture may wipe out the cultural diversity of the world but that could not be further from the truth. The laying out of a common cultural practice only seeks to eliminate those bad elements in the diverse cultures and promote the good.

States should aim to fully embrace human rights and realize that they protect their citizen's cultural diversity. Human rights to most people especially in the developing world and also sometimes in the developed world seems like an abstract far off notion. It is therefore the duty of the state to simplify and make their citizens understand human rights and that they don't seek to undermine their cultural heritage. To create a truly universal and effective human rights scenario, the

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<sup>23</sup> CPPDCE, article 1(a).

participation of the people is required; otherwise, this obligation may be seen as a top down imposition.

There should be international solidarity and cooperation which is aimed at enabling countries, especially developing countries, to create and strengthen their means of cultural expression<sup>24</sup>. When states adopt measures to support the diversity of cultural expressions, they should seek to promote openness to other cultures of the world and to ensure that these measures are geared to objectives pursued under the present convention<sup>25</sup>.

The Universal Declaration on Cultural Diversity that was adopted by UNESCO in 2001, recognizes cultural diversity as the common heritage of humanity.<sup>26</sup> It was adopted to respond to the growing pressure burdened on countries to waive their right to enforce cultural policies and consider the cultural sector while engaging in bilateral talks with other countries.

The reasons for enhancing cultural uniformity in western countries are such as; to minimize the disappearance of many languages and dialects, such as in France, without legal status or protection, examples being Breton, Corsican, Occitan, among others. However, the foregoing does not necessarily extend to African countries due to the nature of their cultural practices being distinct and unique. If a common resolve of cultural uniformity that covers all the cultures in the world can be implemented, then it would be a huge step to mitigate the aspect of how these cultural practices have been sidelined by the implementation of cultural uniformity.

Therefore, states have an active role in the laying out of an acceptable cultural practice.

### **III. Conclusion**

It is possible for the international community to effectively prescribe a cultural practice while maintaining respect for cultural diversity. This endeavour may encounter challenges and problems along the way but it is possible. Cultural diversity cannot be jeopardized by these actions but there is still room for improvement and achieving both goals at the same time which will and must take

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<sup>24</sup> CPPDCE, article 2(4).

<sup>25</sup> CPPDCE, article 2(8).

<sup>26</sup> UNESCO UDCD, article 1.

the concerted effort from both the international community as a whole and the individual states and their people. Through this, greater good is to be achieved than when we adopt a relativist approach to human rights.

## **B. RECOMMENDATIONS**

It is undoubtedly unequivocal that the universality of a cultural practice mechanism would be a daunting task. The international community ought to promote the principle of self-determination, and respect countries' discretions with the implementation of their municipal laws and internal dealings within their territories, so long as they are in harmony with international law principles. The international community should only come in to find a state responsible if it breaches its international law obligations. Therefore, cultural practices that are practiced in States that are in disharmony with international law, such as Female Genital Mutilation, should be outlawed to its entirety. That is why the Committee on the Elimination of Discrimination against Women, General Recommendation 14 of 1990, recommended that female circumcision should be abolished. A number of states to this effect have taken measures to enact laws that eradicate the practice.<sup>27</sup> Furthermore, article 18(3) of the International Covenant on Civil and Political Rights provides that the freedom to manifest one's beliefs shall be limited in order to protect public safety, public health and morals.

The laws that outline and protect the cultural rights of states and individuals should be aligned and made consistent with general human rights in such a way that there is no confusion in their interpretation.

Awareness to be made to states and their citizens on the basic rights and how they work so that they understand their various principles. This in turn will enable them to understand and embrace human rights and not see them as eroding their rich culture.

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<sup>27</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 14' in '*Female Circumcision*' (1990) A/45/38 and Corrigendum <[www.refworld.org/docid/453882a30.html](http://www.refworld.org/docid/453882a30.html)> accessed 28<sup>th</sup> January 2020.

In the implementation of the human rights, a holistic approach should be taken and thus must take into consideration the various cultures. The diversity in cultures seeks to enhance and enrich the universal meaning of human rights and thus approach would be able to resonate with everyone even though we are from very diverse backgrounds.

The UN should continue setting standards for human rights tailor made to further promote, protect and realize the rights of the socially disadvantaged such as indigenous people and minorities and their cultures. This flexibility will ensure that the cultural diversity is protected as well as human rights are upheld.

The existing United Nations mechanisms and procedures for the promotion and protection of cultural diversity should be further strengthened and made more effective.

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