UvA-DARE (Digital Academic Repository)

The Enjoyment of Cultural Rights by Women on an Equal Basis with Men

Report 2012 (A/67/287)

Donders, Y.

DOI

[10.4337/9781786435422.00011](https://doi.org/10.4337/9781786435422.00011)

Publication date

2017

Document Version

Final published version

Published in

Negotiating Cultural Rights

License

Article 25fa Dutch Copyright Act

[Link to publication](#)

Citation for published version (APA):

Donders, Y. (2017). The Enjoyment of Cultural Rights by Women on an Equal Basis with Men: Report 2012 (A/67/287). In L. Belder, & H. Porsdam (Eds.), *Negotiating Cultural Rights: Issues at Stake, Challenges and Recommendations* (pp. 100-119). Edward Elgar. <https://doi.org/10.4337/9781786435422.00011>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

5. The enjoyment of cultural rights by women on an equal basis with men – Report 2012 (A/67/287)

Yvonne Donders

---

1. INTRODUCTION

For a long time, cultural rights were considered the ‘Cinderella of the human rights family’;¹ neglected by States, academics and other stakeholders. The establishment of the mandate of the Special Rapporteur on Cultural Rights formed an important catalyst for the further elaboration of these human rights. One of the reasons why cultural rights were neglected or addressed with a considerable amount of reserve or skepticism was that these rights were considered to protect and promote, apart from the positive dimensions of cultures, also cultural activities and practices that are very questionable from a human rights perspective. Many of such harmful cultural practices particularly affect women. Examples are female genital mutilation (FGM), widow cleansing, forced marriage and forced prostitution.²

---

¹ H. Niec, ‘Casting the Foundation for the Implementation of Cultural Rights’ in H. Niec (ed.), *Cultural Rights and Wrongs, A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights* (Paris: UNESCO Publishing, 1998) 176; P. Meyer-Bisch (ed.), *Les Droits Culturels, une catégorie sous-développée de droits de l’homme, Actes du VIIIe Colloque interdisciplinaire sur les droits de l’homme* (Editions Universitaires Fribourg Suisse 1993).

² Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (UN Doc. CEDAW/C/GC/31-CRC/C/GC/18 14 November 2014).

In other words, culture is often seen as an obstacle to the enjoyment of human rights by women.³ The report by the Special Rapporteur called 'Enjoyment of cultural rights by women on an equal basis with men'⁴ shows that, but it also focuses on a more positive role of culture for women. Culture is not only an impediment to, but also an important instrument for, the realization of their human rights.⁵ This report thereby fits in the more general approach taken by the Special Rapporteur to emphasize the importance of cultural rights for the enjoyment of other human rights.

The title of the report suggests that it is mainly about the equal enjoyment of cultural rights by women and men.⁶ The report deals, however, with much more than that, notably it elaborates on the *role of women* in the development, preservation and decision-making in relation to culture. In other words, the report is not only about the (cultural) rights of women, but about the complex and dynamic relationship and interaction between cultural rights and gender.

Paragraph 3 of the report of the Special Rapporteur seems to capture the crux of the matter:

Gender, culture and rights intersect in intricate and complex ways. The tendency to view culture as largely an impediment to women's human rights is both over simplistic and problematic. By attributing self-propelling agency to 'culture' independent of the actions of human beings, it diverts attention from specific actors, institutions, rules and regulations, keeping women subordinated within patriarchal systems and structures. It also renders invisible women's agency in both reproducing and challenging dominant cultural norms and values. Nevertheless, many practices and norms that discriminate against women are justified by reference to culture, religion and tradition, leading experts to conclude that 'no social group has suffered greater violation of its human rights in the name of culture than women' and that it is

---

³ Susan Moller Okin, 'Is Multiculturalism Bad for Women?' (1999) *Boston Review*; Yvonne Rafferty, 'International Dimensions of Discrimination and Violence against Girls: A Human Rights Perspective' (2013) 14(1) *Journal of International Women's Studies* 1–23.

⁴ Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, 'The enjoyment of Cultural Rights by Women on an Equal Basis with Men' (UN Doc. A/67/287 10 August 2012).

⁵ This is also the approach in the book by Rikki Holtmaat and Jonneke Naber, *Women's Human Rights and Culture – From Deadlock to Dialogue* (Antwerp: Intersentia, 2010).

⁶ It could be noted that on the website of the Office of the High Commissioner for Human Rights the report is announced as 'Cultural Rights for Women'.

'inconceivable' that a number of such practices 'would be justified if they were predicated upon another protected classification such as race'. The use of discourses of cultural relativism to challenge the universal legitimacy and applicability of human rights norms is a serious concern.

In the following sections, different parts of this statement are discussed and placed in the broader context of the advancement of cultural rights within international human rights law.

2. 'THE USE OF DISCOURSES OF CULTURAL RELATIVISM TO CHALLENGE THE UNIVERSAL LEGITIMACY AND APPLICABILITY OF HUMAN RIGHTS NORMS IS A SERIOUS CONCERN'

When the mandate of the Special Rapporteur (then independent expert) was established, there were many States (among which was The Netherlands) that were hesitant about a mandate on cultural rights. They feared that this mandate would promote cultural relativism at the expense of the idea of the universality of human rights. One of the main achievements of the Special Rapporteur is that with her country visits and reports she has shown that it is possible to reconcile the universality of human rights with the promotion and protection of cultural rights and cultural diversity.

This report rightly emphasizes that respect for cultural rights or cultural diversity may not undermine the universality of human rights (para. 57) and that (respect for) cultural diversity is not to be confused with cultural relativism (para. 70). Indeed, respect for cultural diversity can be consistent with the notion of the universality of human rights. Cultural relativism, in the sense of asking for respect for cultural diversity, not of challenging the legitimacy of international human rights norms as such, and universality do not have to mutually exclude each other. The dichotomy can be overcome by making a distinction between formal universality and substantive universality, between universality of application and universality of implementation and between universality of the subjects (beneficiaries) and universality of the norms (content).⁷

---

⁷ Yvonne Donders, *Human Rights: Eye for Cultural Diversity*, Inaugural lecture delivered upon appointment to the chair of Professor of International Human Rights and Cultural Diversity (29 July 2012 University of Amsterdam) available at <http://dare.uva.nl/record/1/373400>.

The idea that human rights should be universally enjoyed – by all persons on the basis of equality – is not very controversial. In general, formal universality, or the universality of the subjects of human rights, does not present problems. No one will seriously argue that some people in the world do not *have* human rights. International human rights instruments clearly endorse this universal approach. The Universal Declaration of Human Rights (UDHR), for example, not only refers to universality in its title, but also states in Article 1 that ‘all human beings are born free and equal in dignity and rights’. The UDHR as well as the international human rights treaties speak of ‘everyone’, ‘all persons’ or ‘no one’, affirming that *all* human beings have these rights and freedoms, no matter where they were born or to which (cultural) community they belong.

The universal value and application of human rights does, however, not necessarily imply the *uniform implementation* of these rights. In other words, while human rights apply universally to everyone on the basis of their human dignity, the implementation of these rights does not have to be uniform. The European Court of Human Rights (ECtHR) has adopted this approach by stating that, while the purpose of the European Convention on Human Rights (ECHR) was to lay down international standards, ‘this does not mean that absolute uniformity is required’.⁸ Scholars have called this the ‘relative universality of human rights’,⁹ ‘inclusive universality’¹⁰ or the ‘culturalization of human rights’;¹¹ the main idea being that while human rights apply universally, they do not have to be implemented in a uniform way. Human rights promotion and protection imply respect for and advancement of cultural diversity. Such diversity should be determined in close cooperation with different stakeholders and their interests have to be balanced. The report by the Special Rapporteur also endorses this approach by stating that universality should be understood as a transformative dialogue (para. 65).

---

⁸ ECtHR, *Sunday Times v. United Kingdom*, Appl. No. 13166/87, decision of 26 November 1991, para. 61.

⁹ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281–306, 281, 300.

¹⁰ Eva Brems, ‘Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam’ (April–June 2004) 5(3) *Human Rights Review* 5–21, 11–12; Eva Brems, ‘Reconciling Universality and Diversity in International Human Rights Law’, in Andras Sajó (ed.) *Human Rights with Modesty: the Problem of Universalism* (Koninklijke Brill 2004) 213–30, 223–5.

¹¹ Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford: OUP, 2014).

3. 'GENDER, CULTURE AND RIGHTS INTERSECT IN INTRICATE AND COMPLEX WAYS'

The complex intersection or interface between gender, culture and rights is highlighted in several parts of the report. There is indeed important interaction between gender and cultures; gender identities and gender relations are crucial aspects of cultures and cultures are (partially) shaped by gender. In other words, gender 'functions as an organizing principle for society because of the cultural meanings given to being male or female'.¹²

The concept of gender concerns more than the rights of women. It is a social concept referring to the social meanings given to biological sex differences. Gender 'refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women'.¹³

While people are born either male or female (biological sex), they are taught appropriate behaviours for males and females (gender norms) – including how they should interact with people of the same or opposite sex within households, communities and workplaces (gender relations) and which functions or responsibilities they should assume in society (gender roles).¹⁴

Gender roles and especially gender stereotypes play an important role in the (lack of) advancement of women's cultural rights and in the defense of cultural practices harmful to women. A gender stereotype is 'a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women'.¹⁵ Gender stereotyping refers to:

---

¹² Johanna Schalkwyk, 'Culture, Gender Equality and Development Cooperation', paper prepared for the Canadian International Development Agency (Cida) (June 2000) available at www.oecd.org/social/gender-development/1896320.pdf, p. 1.

¹³ CEDAW Committee, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (UN Doc. CEDAW/C/GC/28 16 December 2010) para. 5.

¹⁴ World Health Organisation, 'Fact sheet N°403, Gender' (August 2015).

¹⁵ Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010) 20; as

the *practice* of applying a stereotypical belief to an individual member of the subject group; that is to say, the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men.¹⁶

A gender stereotype is harmful when it limits women's or men's capacity to develop their personal abilities and make choices about their lives; gender stereotyping is wrongful when it results in a violation of human rights.

Sex and gender are both important factors determining personal cultural identity, but they play a different role. Sex is certainly part of one's personal identity, but it is less self-evident what role it plays in the development of one's *cultural* identity. Sex may be an important factor in the personal perception and interpretation of culture, but such perception seems to refer more to and be determined by *gender*. It concerns not merely objective differences between biological sexes, but in particular the roles assigned to the different sexes, the interrelationships with other individuals and communities and power structures in these relationships. Gender and culture have a multi-dimensional relationship. A crucial feature of any culture is the way a culture perceives the different characteristics of the two biological/physical male and female sexes resulting in ideas and constructs relating to gender, possibly leading to gender stereotypes.¹⁷

Gender is moreover a complex and dynamic notion. Unlike sex, which is for most people an un-chosen and un-changeable factor, gender is context and time-specific and changeable. Gender expectations vary between cultures and can change over time.¹⁸ The report rightly emphasizes that it is of vital importance that individuals are not forced to identify themselves in terms of a singular aspect of their identity, such as being female, or of a particular ethnic, religious or linguistic background. Gender aspects, including possible stereotypes, are important factors informing the development of cultural identities of individuals as well as communities.

---

referred to in OHCHR commissioned report, *Gender Stereotyping as a Human Rights Violation* (2013) 8.

¹⁶ Cook and Cusack, *ibid.*, 20; OHCHR, *ibid.*, 9.

¹⁷ Holtmaat and Naber, note 5, 52; Schalkwyk, note 12, 1–2.

¹⁸ World Health Organisation, note 14, Introduction.

The Special Rapporteur rightly indicates in this report that many different factors inform the development of personal cultural identity. Cultural identity is not a simple, uniformly consisted entity given from birth. Cultural identity is not homogeneous; it is not created within bounded areas, but within spaces of interaction. According to the report, important factors include, for instance, 'values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life, but equally by other aspects of human life, such as professional training; economic, social and political engagements; urban or rural environments; wealth or poverty; or, more generally, the particular geographical, socio-economic and cultural context of a person's life' (para. 11). Indeed, personal cultural identities are made up of participation (or non-participation) in different (cultural) communities.

4. 'BY ATTRIBUTING SELF-PROPELLING AGENCY TO 'CULTURE' INDEPENDENT OF THE ACTIONS OF HUMAN BEINGS, IT DIVERTS ATTENTION FROM SPECIFIC ACTORS, INSTITUTIONS, RULES AND REGULATIONS, KEEPING WOMEN SUBORDINATED WITHIN PATRIARCHAL SYSTEMS AND STRUCTURES. IT ALSO RENDERS INVISIBLE WOMEN'S AGENCY IN BOTH REPRODUCING AND CHALLENGING DOMINANT CULTURAL NORMS AND VALUES.'

The report by the Special Rapporteur naturally pays a lot of attention to equality and non-discrimination. In paragraph 6 it is stated that the principle of non-discrimination has, according to some, attained the status of *jus cogens*.¹⁹ Although equality and non-discrimination are recognized as crucial human rights principles and as such cut across the whole spectrum of human rights, it is more doubtful whether they are norms of *jus cogens*. Although some authors have strongly advocated for the

---

¹⁹ Report of the Special Rapporteur in the field of cultural rights, para. 6, p. 5.

recognition of the prohibition of sex discrimination as *jus cogens*,²⁰ others have just as strongly expressed that currently it is not.²¹

Jus cogens is a norm 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'.²² Non-discrimination on the basis of race has indeed been accepted as a norm of *jus cogens*,²³ but it is more doubtful that non-discrimination on the basis of sex has also gained that status. It does not seem that the 'international community of States' has 'accepted and recognized' it as a norm from which no derogation is permitted. Although most States have formally outlawed discrimination on the basis of sex, there continues to exist widespread discrimination of women in many States. The fact is also that while almost all States have ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), many of them have filed reservations to this treaty precisely on issues related to sex equality and the equal enjoyment of rights by women and men.²⁴

Some authors have rightly pointed at the necessity to take women's experiences more into account in the development of *jus cogens* norms, eventually leading to the recognition of sex discrimination as *jus cogens*.

---

²⁰ The report of the Special Rapporteur refers to Christine Chinkin, Marsha Freeman and Beate Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford: OUP 2012). See, also, Christine Chinkin, 'The Gender of *Jus Cogens*' (February 1993) 15(1) *Human Rights Quarterly* 63–76, 70; Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles' (1992) 12 *Australian Yearbook of International Law* 82–94, 95.

²¹ Alain Pellet, 'Comments in Response to Christine Chinkin and in Defense of *Jus Cogens* as the Best Bastion against the Excesses of Fragmentation' (2006) XI/II *Finnish Yearbook of International Law* 84–90, 85. He argues that:

the condemnation of gender discrimination is still limited to certain parts of the world ... which prevents it to be considered as 'a norm accepted and recognized by the international community of States as a whole as a whole as a norm from which no derogation is permitted'.

²² Vienna Convention on the Law of Treaties, art. 53. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

²³ Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford: OUP 2003), 488–9.

²⁴ Yvonne Donders, 'Cultural Pluralism in International Human Rights Law: The Role of Reservations' in A. Vrdoljak (ed.) *The Cultural Dimension of Human Rights*, Collected Courses Volume, European University Institute (Oxford: OUP, 2013) 205–39.

An indication of this development is an advisory opinion by the Inter-American Court of Human Rights in which it held that 'at the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*'. In the same opinion it stated that the principles of equality and non-discrimination, without specifying the prohibited grounds, belong to *jus cogens* 'because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws'.²⁵ However, this is a non-binding advisory opinion and the court does not seem to have given this more concrete substance. It seems that the court has used the concept of *jus cogens* as a tool to make a choice between conflicting principles.²⁶ It may therefore be too early to consider non-discrimination on the basis of sex an accepted norm of *jus cogens*. This does however not diminish the importance of equality and non-discrimination as principles of human rights and binding treaty norms.

Cultural rights, by promoting and preserving cultural differences, have often been accused of being against the idea of equality. This statement is however based on an incomplete interpretation of the rights to equality and non-discrimination. The right to equality namely also means the right to be different and accordingly, respect for cultural differences can be fully in line with the principle of equality. This is because having equal rights is not the same as being treated equally. Indeed, equality and non-discrimination not only imply that equal situations should be treated equally, but also that unequal situations should be treated unequally. The Human Rights Committee (HRC) has underscored that 'the enjoyment of rights and freedoms on an equal footing ... does not mean identical treatment in every instance'.²⁷ Consequently, not all difference in treatment constitutes discrimination, as long as the criteria for differentiation are reasonable and objective and serve a legitimate aim.²⁸ Difference in

---

²⁵ IACtHR, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03 of September 17 2003, Series A No.18, para. 101.

²⁶ Pellet, note 21, 88.

²⁷ Human Rights Committee, General Comment No. 18, Non-Discrimination, 10 November 1989, para. 8. The ECtHR has reaffirmed this in many cases, including the cases of *Thlimmenos v. Greece* Appl. No. 34369/97 6 April 2000, para. 44 and *D.H. and others v. the Czech Republic* Appl. No. 57325/00, 7 February 2006, para. 44.

²⁸ Legal doctrine generally distinguishes between differentiation, distinction and discrimination. Differentiation is difference in treatment that is lawful; distinction is a neutral term which is used when it has not yet been determined

treatment may also involve affirmative or positive action to remedy historical injustices, social discrimination or to create diversity and proportional group representation.²⁹ Accordingly, States may have to take special measures for individuals and cultural communities, such as minorities and indigenous peoples, to promote diversity.

The report by the Special Rapporteur validly addresses the different forms of discrimination – direct, indirect and structural – that may affect women. The report stresses that structural discrimination ‘is the most difficult to bring to the surface and to combat’ (para. 44). It is often structural discrimination that prevents women from participation in certain aspects of life, thereby sustaining their underrepresentation in politics, but also in culture, media and science. This problem exists not only in underdeveloped countries, but also in developed countries. For instance, the structural underrepresentation of women in science in a developed country can be well-illustrated by a survey concerning women participation in Dutch universities. The study highlights that, broadly speaking, the higher the scientific position in the academic hierarchy, the smaller the number of women. With every step on the academic ladder the number of women decreases. For instance, in 2014, about 53 per cent of the graduates were female. In the next step of an academic career, the PhD candidates, the percentage of women was lower than men (about 43

---

whether difference in treatment is lawful or not; and discrimination is difference in treatment that is arbitrary and unlawful. Consequently, only treatment that results in discrimination is prohibited. See M. Bossuyt, ‘Prevention of Discrimination – The Concept and Practice of Affirmative Action’ (17 June 2002 UN Doc. E/CN.4/Sub. 2/2002/21) para. 91, p. 20.

²⁹ See, also, art. 1(4) of the International Convention on the Elimination of Racial Discrimination, adopted by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force on 4 January 1969:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The Human Rights Committee has further stated that the principle of equality under art. 26 ICCPR may sometimes require States parties to take affirmative action to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the ICCPR. Human Rights Committee, General Comment No. 18, Non-Discrimination, 10 November 1989, para. 10.

per cent). In every following functional step, the percentage of women decreased. One out of three assistant professors was female; one out of four associate professors and one out of six professors.³⁰

In the report the Special Rapporteur notes that it is hard to find good data on women's participation and representation. There are, however, some interesting initiatives. EurActiv has analysed the participation of women in politics and concluded that in 2015 only 22 per cent of national parliamentarians worldwide are female. If we look at Europe specifically, the Nordic countries do rather well with 41 per cent, but the rest of Europe together does not do better than 23 per cent. As regards participation of women in decision-making in relation to culture, the Compendium on Cultural Policies and Trends in Europe is of good use for data of individual countries as well as good practices at national levels, albeit for European countries only.³¹

Underlying discrimination, in particular its structural form, is often based on persistent gender stereotypes and patterns in societies sustaining the subordinate position of women. There is a tendency to see gender as a purely *cultural* construction and consequently to 'blame culture for bad behaviour',³² including the subordination or oppression of women.³³ As described above, gender may certainly be reaffirmed in cultural practices, beliefs and values in society, as well as in societal and cultural institutions and practices, such as legislation and government policies, education, the media, health care, housing, land ownership, etc.³⁴ Gender 'affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life'.³⁵

Whether this can all be blamed merely on culture is however questionable; it seems to be more complex. For instance, there is an important power element in the construction and reproduction of (unequal) gender

---

³⁰ 'Monitor Female Professors in The Netherlands' 2015, to be found at <http://www.lnvh.nl/monitor2015/>.

³¹ The compendium is sponsored by the Council of Europe and can be found at: <http://www.culturalpolicies.net/web/index.php>.

³² Leti Volpp, 'Blaming Culture for Bad Behaviour' (2000) 12 *Yale Journal of the Humanities* 89–115.

³³ Yvonne Rafferty, 'International Dimensions of Discrimination and Violence against Girls: A Human Rights Perspective' (January 2013) 14(1) *Journal of International Women's Studies* 1–23, 7–8.

³⁴ Holtmaat and Naber, note 5, 7–8, 52–3.

³⁵ '1999 World Survey on the Role of Women in Development' (United Nations New York 1999) ix as cited in Holtmaat and Naber, *ibid.*, 53.

relations.³⁶ The topic of power or power relationships is addressed by the Special Rapporteur at several places in the report. Power is indeed also determinant in relation to cultures and cultural communities. It is broadly recognized, and the report notes it as well, that cultures are not static, homogeneous entities. They are dynamic and heterogeneous. Cultures are as much about products as they are about processes.³⁷ The question is, who are the initiators and who are the decision-makers in these processes? For instance, who decides what the cultural values and practices of a community are and which of these should be preserved or changed and how? Often such processes are not inclusive but decided by power elites, thereby sustaining existing power relations. The report also addresses the issue of communities and their representation (para. 36). It asks several crucial questions to be taken into account, including: which groups are recognized and who within these groups is accepted as the legitimate voice of the community, by States as well as the international community, and to be added, by the community itself and members of that community? Whose power is preserved and who is challenging practices and norms or existing power structures (para. 68)?

Indeed, as the Special Rapporteur notes in her report (para. 22), women are often not part of decision-making processes in relation to culture, education, religion or politics.³⁸ The UN working group on discrimination against women also confirmed that stereotypes of women's gender roles negatively affecting women's effective participation in political and public life persist around the world. Stereotypes of female inadequacy or less capability continue to be used as a basis for their marginalization and segregation in decision-making positions. While topics such as education, health care and social welfare are allocated to women, men are assigned to economic and defence affairs.³⁹ 'Women's full participation requires that women be integrated into positions with

---

³⁶ Bronwyn Winter, 'Religion, Culture and Women's Human Rights: Some General Political and Theoretical Considerations' (2006) 29 *Women's Studies International Forum* 381–96, 382; Yvonne Rafferty, note 33, 7–8.

³⁷ Winter, *ibid.*, 382; Schalkwyk, note 12.

³⁸ Rafferty, note 33, 2; Winter, *ibid.*, 383; Overseas Development Institute (ODI), Pilar Domingo, Rebecca Holmes, Tam O'Neil, Nicola Jones, Kate Bird, Anna Larson, Elizabeth Presler-Marshall and Craig Valters, *Women's Voice and Leadership in Decision-making – Assessing the Evidence* (April 2015) available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9627.pdf>.

³⁹ 'Report of the UN Working Group on the Issue of Discrimination against Women in Law and in Practice' (UN Doc. A/HRC/23/50 19 April 2013) para. 69.

decision-making power across the spectrum of issues dealt with by the institutions to which they have been elected or appointed.⁴⁰

It is important to emphasize that participation in decision-making is a right in itself, and also a right of women, but it is also a prerequisite for the enjoyment of other human rights, such as the right to take part in cultural life or freedom of religion, expression, movement or assembly. The Special Rapporteur rightly stresses in her report that representation of women at all levels of decision-making, in general affairs as well as specific cultural affairs, is a crucial step in strengthening their role in shaping and enjoying cultural rights (para. 37).

5. 'MANY PRACTICES AND NORMS THAT DISCRIMINATE AGAINST WOMEN ARE JUSTIFIED BY REFERENCE TO CULTURE, RELIGION AND TRADITION'

Although international human rights law aims to respect and promote cultural diversity, it should not be blind to the challenges posed by it. Culture may have negative effects as well. Culture can for instance be used as a justification for harmful practices that are in conflict with or limit the enjoyment of human rights. In general, it cannot be over-emphasized that respect for cultural diversity cannot be an argument to systematically or grossly deny international human rights law. In the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005, art. 2(1)) it is formulated as follows:

cultural diversity can be protected and promoted only if human rights and fundamental freedoms ... are guaranteed. No one may invoke the provisions of this 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.

Cultural practices are very diverse, which makes it impossible but also undesirable to make general, abstract statements about their acceptability in relation to human rights. But it is important not to see cultural and religious practices as per se against women's rights, as if it is always a choice between one of the two. 'The struggle for women's human rights

---

⁴⁰ Ibid., para. 41.

is not *against* religion, culture, or tradition.’⁴¹ The critical issue is to empower women to own their culture, religion and traditions, as well as to enjoy their human rights and take part in decision-making.⁴²

The starting point is, as laid down in the Universal Declaration on Cultural Diversity (2001), that ‘all persons have the right to ... conduct their own cultural practices, subject to respect for human rights and fundamental freedoms’ (art. 5). In other words, cultural practices that are clearly in conflict with international human rights law cannot be justified as a reflection of cultural diversity and harmful practices affecting women and girls are not protected by cultural rights. Examples of such practices, as identified by the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) and the UN Committee on the Rights of the Child (CRC Committee), are FGM, child and/or forced marriage, polygamy and crimes committed in the name of so-called honour.⁴³

While some practices thereby fall outside the scope of protection of cultural rights, others may fall within the scope of protection, but be prohibited or restricted under a legitimate limitation of cultural rights. Cultural rights, just as other human rights, cannot be enjoyed unlimitedly. The general framework of such limitations is outlined in article 29(2) UDHR, in which it is stated that:

in the exercise of his rights and freedoms, everyone shall be subject to only such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Similar limitation clauses can be found in most human rights instruments. Sometimes they apply to the instrument as a whole, sometimes they are linked to a particular provision. These provisions allow States to limit the enjoyment of the right in question for reasons of morality,

---

⁴¹ Marsha Freeman, ‘Article 16 and the Right to Practice Ones Beliefs’, in Rikki Holtmaat and Ineke Boerefijn (eds) *Women’s Human Rights and Culture/Religion/Tradition: International Standards as Guidelines for the Discussion?* Proceedings of the Colloquium in the Peace Palace, The Hague 12 May 2009 (Utrecht: SIM Special nr. 32 2010) 63–65, 63, 64.

⁴² Ibid.; Bronwyn Winter, Denise Thompson and Sheila Jeffreys, ‘The UN Approach to Harmful Traditional Practices’ (2002) 4(1) *International Feminist Journal of Politics* 72–94.

⁴³ Joint General Recommendation No. 31 General Comment No. 18, see note 2, section IV, pp. 6–9.

security, health, public order and the rights and freedoms of others. Cultural and religious particularities may well be part of these reasons. Such limitation measures are meant to prevent the unlimited exercise of cultural rights seriously endangering the rights of others or of society as a whole. For example, freedom of expression can be limited in that creative expressions should not harm the cultural life of society as a whole or of specific groups, such as children. The right to take part in cultural life can be limited in cases where cultural activities use or promote racist or discriminatory expressions.

In other words, States, including the legislator, executive and judiciary at all different levels, have an important role to play in promoting cultural diversity with respect for human rights, including weighing and balancing the different interests of different communities and individuals. They also have a role in *changing* harmful cultural practices. Harmful practices are often prohibited by law, but still they are practiced. Changes in cultural practices are most successful if they arise within the cultural community itself and are not imposed from outside, by law or by the State. But this does not relieve States from the responsibility of finding ways to promote such changes. Several treaties emphasize this role of the State in eradicating harmful cultural practices. The CEDAW, for example, states in article 5 that:

States Parties shall take all appropriate measures: (a) 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 or on stereotyped roles for men and women.⁴⁴

The CRC contains in Article 24(3) that 'States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'.

---

⁴⁴ A similar provision can be found in art. 2(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005):

States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men ... with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes ... .

See, also, Holtmaat and Naber, note 5.

Although 'traditional practices' are not defined, it can be inferred from the drafting documents that this provision was targeted against FGM.⁴⁵

Several UN treaty-monitoring bodies have also emphasized the role of States in abandoning cultural practices that are against human rights. The CEDAW Committee has adopted a specific recommendation on female circumcision, urging States to eradicate this practice harmful to the health of women.⁴⁶ In its General Comment on the equal enjoyment of rights, the HRC has also stated that 'States Parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all Covenant rights.'⁴⁷ It has also listed a number of harmful cultural practices as violations of human rights. It maintains that female infanticide, widow burning and dowry killings are violations of the right to life, that forced abortion, forced sterilization and FGM are violations of the right not to be subjected to inhumane and degrading treatment, and that forced male guardianship is a violation of the freedom of movement.⁴⁸

More recently the CEDAW and CRC Committees have jointly adopted a General Recommendation on harmful practices.⁴⁹ In this document they have established the following criteria for the determination of harmful practices:

- a) they constitute a denial of the dignity and/or integrity of the individual and a violation of the human rights and fundamental freedoms enshrined in the two Conventions;
- b) they constitute discrimination against women or children and are harmful insofar as they result in negative consequences for them as individuals or groups, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential;

---

⁴⁵ Sonia Harris-Short, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' (February 2003) 25(1) *Human Rights Quarterly* 130-81, 136-7.

⁴⁶ Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 14, Female Circumcision, ninth session, 1990.

⁴⁷ Human Rights Committee, General Comment No. 28, Equality of Rights Between Men and Women (art. 3) (UN Doc. CCPR/C/21/Rev.1/Add. 10 29 March 2000) para. 5.

⁴⁸ *Ibid.*, paras 10, 16.

⁴⁹ Joint General Recommendation No. 31 General Comment No. 18, see note 2.

- c) they are traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, on the basis of sex, gender, age and other intersecting factors; and
- d) they are imposed on women and children by family members, community members or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent.⁵⁰

Several practices are specifically labelled as harmful, including FGM, child and/or forced marriage, polygamy and crimes committed in the name of honour.⁵¹ The CEDAW and CRC Committees further advocate a holistic approach to eradicate such practices, including data collection and monitoring, legislation and enforcement, prevention and protection and response.⁵² Such a holistic approach requires mainstreaming and coordination vertically and horizontally. 'Horizontal coordination requires organization across sectors, including education, health, justice, social welfare, law enforcement, immigration and asylum and communications and media. Similarly, vertical coordination requires organization between actors at the local, regional and national levels and with traditional and religious authorities.'⁵³ Women are certainly actors and stakeholders who should be part of this process.

UN treaty bodies further systematically encourage States to promote changes in harmful cultural practices in their dialogue with States under the periodic reporting procedure. Studies have shown that States during this dialogue often – at least formally – agree on the harmfulness or unacceptability of such practices, which is why they are prohibited by law. These States point out, however, that changing the deeply-rooted cultural convictions of certain communities is difficult and requires time and patience. Formal legislation prohibiting harmful practices and culturally motivated violence is not sufficient to eliminate the practice altogether.⁵⁴ What becomes clear is that the adoption of laws prohibiting harmful cultural practices may be necessary, but that it is not the only

---

⁵⁰ Ibid., para. 16.

⁵¹ Ibid., paras 19–30.

⁵² Ibid., s. VII.

⁵³ Ibid., para. 34.

⁵⁴ Harris-Short, note 45, 140–45, 164; Michael Ado, 'Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights' (August 2010) 32(3) *Human Rights Quarterly* 624–5, 631–5.

and not always the most effective way to get rid of them: a holistic approach including education and awareness raising is needed.⁵⁵

What is the role or responsibility of cultural communities themselves in this regard? How should cultural communities protect and promote their collective interest as well as the rights of their individual members? Cultural communities are important for individuals, but at the same time it is necessary to stress that individuals should remain autonomous and free to develop their own cultural identity. Cultural communities may have a certain amount of freedom to arrange their internal structure and institutions and they may also put limited pressure on their members to follow the cultural norms of the community. However, cultural communities should always guarantee and respect the rights and freedoms of their individual members. They should not only refrain from cruel, inhuman and degrading treatment of their members, but communities should also respect the right of their members to take part in the decision-making processes that determine and develop the community's cultural life. Moreover, the community should be based on non-coercive membership and respect the individual's right and freedom to leave the community. In order to be able to make informed choices about membership and participation in the community, communities should also respect the rights of their members to participate in society at large, e.g. through education, expression, information, election processes and labour.⁵⁶ Or as the report by the Special Rapporteur notes: 'To enjoy equal cultural rights, women must become equal participants and decision makers in all the cultural affairs of their own specific communities, and in the wider 'general' society.' (para. 37)

---

⁵⁵ Joint General Recommendation No. 31 /General Comment No. 18, see note 2, section VII, pp. 10–22; Winter, Thompson and Jeffreys, note 42, 72–94.

⁵⁶ Ado, note 54, 624–5; Brems, note 10, 18; Brems in Sajo (ed.), note 10, 227, 229; Yvonne Donders, *Towards a Right to Cultural Identity?* (Antwerp Intersentia 2002) 103–5, 338; Laura Reidel, 'What are Cultural Rights? Protecting Groups with Individual Rights' (2010) 9(1) *Journal of Human Rights* 70–74, 78; Leighton McDonald 'Can Collective Rights and Individual Rights Coexist?' (1998) 22 *Melbourne University Law Review* 372; Ch. Kukathas 'Are there any Cultural Rights?' (February 1992) 20 *Political Theory* 117, 128, 133–4.

6. RECOMMENDATIONS AND CONCLUDING REMARKS

This report by the Special Rapporteur is a well-elaborated and very comprehensive document on cultural rights and women, addressing issues of gender, discrimination and harmful practices, but also stressing the importance of culture for women. It provides an important contribution to the discussion on these issues by not painting a mere negative picture of the relationship between cultural rights and women, but by emphasizing the importance of cultural rights to empower women and to transform cultures. Of course, there are still many obstacles to tackle, including systemic discrimination of women and gender stereotypes of (the role of) women that underlie their subordinate position or cultural practices harmful to their health and dignity. Women in many parts of the world do not enjoy their human rights, including their cultural rights. The Special Rapporteur emphasizes in her report that cultural rights can be empowering and transformative rights. They should also be participatory rights, giving women the opportunity to fully participate and contribute to cultures and decision-making processes. The report ends with a large set of recommendations that cover a wide range of issues. While this does indeed reflect the broadness and complexity of the issues described in the report, it may also overwhelm States and other stakeholders which may not see the forest for the trees. The reports of the Special Rapporteur are, however, not meant as mere checklists for compliance with human rights treaties, but as helpful tools for States and other stakeholders to better understand and implement cultural rights. It may in that regard perhaps be interesting to add in future reports an analysis of other vulnerable groups. Indigenous peoples, minorities and migrants would perhaps be 'usual suspects' for a report on cultural rights. These groups however have specific instruments on their rights and have their own mandate holders.⁵⁷ This is also true for people with disabilities.⁵⁸ One group that comes to mind that may be interesting in relation to cultural rights are children. The CRC includes many cultural rights and children

---

⁵⁷ UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) and the Special Rapporteur on Minority Issues; UN Declaration on the Rights of Indigenous Peoples (2007) and the Special Rapporteur on Indigenous Peoples.

⁵⁸ Convention on the Rights of Persons with Disabilities (2006), and Special Rapporteur on Persons with Disabilities.

are important stakeholders in culture.⁵⁹ Perhaps a future report could deal with our future generations and their cultural rights.

---

⁵⁹ There is a Special Rapporteur on the sale of children, child prostitution and child pornography, but not on the full spectrum of children's rights.