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Conflicting Human Rights: An Analysis of the Practice of Female Genital Mutilation in the Broader Context of Religion vs. Women's Rights

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ABSTRACT

Women in almost all social set-ups continue to struggle for basic human rights to remain at par with their male counterparts. One of the most prevalent pushbacks that has existed from times immemorial, which they face even today happens to be from the constant conflict that arises between Freedom of Religion and Human Rights. This paper dives into one such ritualistic practice of Female Genital Mutilation/ Cutting (FGM/C), a gross violation of women's bodily autonomy that prevails in various parts of the globe. Through discussions, we try to look at this practice from the scope of national interventions as well as in the larger international debate between Shariah law and the progression of women and what are sort of the right questions to ask in the background of the politicization of religion by states. Overall, we hope to achieve a better understanding of how the bigger issues help us to cater to localized eradication of FGM/C.

I. FEMALE GENITAL MUTILATION/CUTTING (FGM/C): RIGHT TO RELIGION VS. WOMEN'S RIGHTS

Gender-based violence targeted at women has been prevalent across cultures, many of which have come with underlying risks towards women's health – one of which remains the archaic practice of female genital mutilation/cutting (FGM/C). Its implication on the lives of women has created a range of health complications both short and long-term such as haemorrhages, genital tissue swelling, urinary problems, etc. classified under the former and menstrual problems, complications during childbirth, re-opening the sealed vagina for the purpose of intercourse, etc. which comprise the latter.² Most commonly, the victims of this barbaric procedure are primarily female children and adolescents who undergo an immense amount of pain, lacking all agency in the decision to go through with FGM/C for ritualistic purposes is

¹ Author is a Student at O.P. Jindal Global University, Sonipat, India.

² World Health Organization: WHO. (2024c, February 5). Female genital mutilation. <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

performed without any health benefits adduced to it; while creating a series of human rights violations including equality, non-discrimination, right to life, right to freedom from torture and cruel, inhuman or degrading treatment or punishment, and rights of the child.³

There are often clashes between human rights principles and a predominant clash is one that arises between women's rights and religious rights. Those who engage in the practice of female circumcision argue from the perspective of culture and religion in a sense advocating for their right to profess and practice their religion freely. Inherently this sparks an argument on the opposing side of the issue wherein activists and proponents of human rights claim that such practices cannot seek to continue under the guise of the right to religion and culture.

To further simplify the dilemma between religious beliefs and human dignity it would be more appropriate to phrase the question of whether a woman's choice must prevail over the communal pressure. To get into the debate, it must first be established if true choice exists where there is an option for women to imagine the notion of a different possibility with an outcome that maintains her individuality as well as confirms her faith and practice. This choice often comes at the heavy cost of her having to choose between the diametrically opposing sides of the spectrum where at one end she either maintains her dignity and on the other end she succumbs to the decisions taken for her by her family. Now, when this choice is met with broad disapproval, the resulting loss of positive reinforcement and the risk of being ostracized make it harder for individuals and their families to pursue change, thus shaping the feasibility of their choices.⁴ Added to this when we look deeper into the meaning of choice, we must ascertain whether the woman's choice is one that she has control over and who informs and participates in its making. It then further stumbles into a spiral of what the set of values are that guide the decision-making process. Thus, the number of variables which include material, individual, structural and social domains overlapping to form a woman's life have to be accounted for in understanding the concept of choice is extensive within themselves as well as in intersection, could have multiple considerations which seems to be beyond the scope for literature to capture. It may, then be worthwhile to gauge on-ground approaches to mitigating this tussle.

II. INTERVENTIONS TO FEMALE GENITAL MUTILATION/CUTTING (FGM/C)

In an increasing effort towards eradicating the practice of FGM/C, social norms theory has a

³ Williams-Breault B. D. (2018). Eradicating Female Genital Mutilation/Cutting: Human Rights-Based Approaches of Legislation, Education, and Community Empowerment. *Health and human rights*, 20(2), 223–233.

⁴ Shell-Duncan, B. (2022). Social and structural factors influencing women's agency regarding female genital mutilation/cutting: an intersectional analysis – a reply to 'The prosecution of Dawoodi Bohra women' by Richard Shweder. *Global Discourse*, 12(1), 167-187. Retrieved Jul 18, 2024, from <https://doi.org/10.1332/204378921X16345524513807>.

forerunner explaining the mechanisms for behavioural transformation, influencing the design to expedite the cessation of this practice. In the context of FGM/C, gender norms are viewed as the basis for behaviour-specific social norms. Cultural norms for women that endorse FGM/C are frequently linked to ideals of modesty, sexual restraint, and concerns about aesthetics and hygiene.⁵ Programmes that have utilised this theory strive to create a dialogue to examine standard practices, transform individual preferences and organize efforts to change behaviours in the community through social networks. One of the ways to reinforce the application of social norms theory would be to recognize that individuals and communities exist within broader structural contexts like law, government, criminal justice, economic stability, and access to resources and services and that these external influences must be taken into account while engaging in this dialogue for intervention.

A. Senegal

A study conducted in Senegal by Bettina Shell-Duncan and colleagues (2020)⁶, shows that the position of FGM/C takes into account a number of factors that include the coinciding effect of systemic elements such as political climate, poverty, marginalisation, etc. Since these factors converge to create a situation that upholds the practices of FGM/C, it could be beneficial to target all of these categories leading to social classification of people in order to effectively neutralize it. This points to the study of intersectionality that realises that ‘power relations are to be analysed both via their intersections, for example, racism and sexism, as well as across domains of power, namely structural, disciplinary, cultural and interpersonal’.⁷ The study ultimately finds its conclusion in answering the question of choice to opt out of FGM/C by implementing the intervention in the form of addressing the multiple structural elements that had led up to the creation of such a practice, to begin with.

B. Kenya

Further, we look at the case of Kenya, where affirmative action has comparatively reached a more concrete yet equally problematic stage than Senegal. Anti-FGM measures in Kenya have explored many angles, an interesting perspective to take here could be to look at the problems faced in organizing interventions against this practice. As collated by the Republic of Kenya’s

⁵ LeJeune, J., & Mackie, G. (2008). Social Dynamics of Abandonment of Harmful Practices: A new look at the theory. UNICEF Innocenti Research Centre, Florence.

⁶ Shell-Duncan, B., Moreau, A., Smith, S., & Shakya, H. (2021). Women’s business? A social network study of the influence of men on decision-making regarding female genital mutilation/cutting in Senegal. *Global public health*, 16(6), 856-869.

⁷ Dyer, O. (2018). US judge drops FGM charges against two doctors, saying law is unconstitutional. *BMJ: British Medical Journal* (Online), 363.

Department of Gender and Social Services , we see that at the outset are the issues relating to cultural significance which relates to figuring out entry points and creating an effective dialogue is crucial to earning community trust and including them in the conversation to which they are stakeholders. Consequently, there arises the issue of communication which can be attributed to high illiteracy, wherein people begin to question whether there is a need to eradicate these practices now and may continue to engage in FGM/C given that there exists a gap in effective dissemination of the ideas of human rights principles including agency of women as well as child rights. Further, in the Kenyan approach, we see an issue that comes about with most forms of law-making which is the lack of constructive implementation strategies being put in place; wherein corruption takes up a role in offenders going scott-free and loopholes in the legislation such as protection of women under the age of 18, leaves women above 18 open to being violated without any criminal implications befalling on the perpetrators.

Now that some of the key problem areas have been defined from practical experiences in Kenya, we look ahead at some of the findings made in the study in relation to bettering the formulation of an effective strategy to extinguish FGM/C. Integration of the stakeholder's interests is a key place to start designing the scheme of implementation given that diversity exists in cultures that perform this practice. Adding onto the design aspect, it must be ensured that sound formative research is conducted with the target audience so that policies can truly align with culture-specific requirements.

Perhaps the most important element even more than the design, is that of bringing about reform in the social norms to modify community behaviour, which enables us to address the root cause and mobilize the community to encourage anti-FGM/C interventions. The acceptance of reform could have a substantial bearing in terms of exerting pressure on legislators to frame policies aimed at terminating it. Social Reform in the forms of awareness campaigns and impact attitudes may be a useful step but are insufficient in themselves and in order to test the influence that they attempt to bring about in terms of comprehension as well as changing communities' perspectives.

As much as the execution stage is crucial to successfully implement, thought given to deterrence must be an equally important aspect in bringing about the reform being sought after. Prosecution of offenders free from dishonest dealings and corruption would provide the jurisprudential basis for victims to feel safer in approaching courts in order to reinforce the anti-FGM/C interventions. Ratification of International conventions and treaties can add to this projection of women's upliftment that the state is trying to create through acknowledgement that the practice of FGM/C is in fact a gross human rights violation and ensure that this idea resonates with its

people.

III. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: RELIGION AND RESERVATIONS

Since, we have set out some of the on-ground observations and differences in cultural perceptions revolving around the idea of FGM/C; we need to further look into how these discriminatory notions play out at an international level to better understand in a broader sense why and how religion remains a point of contention in making head-way towards achieving global standards of women's dignity, for which we look at the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

A pertinent question that arises in the context of international regimes is whether they affect how the state behaves. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) effectiveness has been studied to observe that it has statistically to a certain extent found a slightly beneficial response from states.⁸ This deviation in the impact that CEDAW creates does not necessarily rely on a stronger implementation but rather on how the Convention pushes to change perceptions of women and to cause for elimination of casting women into stereotypical roles and thus it goes a step further than merely advocating for equality between men and women.⁹ This positive effect has been theorized to be created by making simpler changes such as codifying education rights for women, women's property rights during marriage, etc. which provides a framework for changes at the legal and institutional level, however, real change can be effectuated through enforcement of these laws.¹⁰

In furthering the objective of looking at state behaviour following the ratification of CEDAW we arrive at the highly debated topic related to the CEDAW, which is the issue of reservations, there is some value in looking at both sides of the argument. Reservation essentially operates as a double-sided coin where states are allowed to opt out of specific articles contained in a treaty which does lead to increased state participation and affirmation of the sovereignty of a state. On the flip side of this coin, we find members of the international community and activists who pursue the idea that there must be an inherent universality to an international treaty.¹¹

⁸ Hill, D. W. (2010). Estimating the Effects of Human Rights Treaties on State Behavior. *The Journal of Politics*, 72(4), 1161–1174. <https://doi.org/10.1017/s0022381610000599>.

⁹ Refworld - UNHCR's Global Law and Policy Database. (2024, February 10). CEDAW and the Human Rights Based Approach to Programming: a UNIFEM guide. Refworld. <https://www.refworld.org/reference/themreport/unifem/2007/en/53263>.

¹⁰ Englehart, N. A., & Miller, M. K. (2014). The CEDAW effect: international law's impact on women's rights. *Journal of Human Rights*, 13(1), 22-47.

¹¹ Saraswati, A. A. A. N. (2021). The Disclosure of Reservations to CEDAW on Women's Rights in Malaysia, Brunel, and Indonesia. *Indonesian J. Int'l L.*, 19, 515.

Now it may be that a hundred and eighty-nine countries¹² have ratified the CEDAW but what is of importance is that more than 40 states have reserved their rights to not abide by some of the Articles of the Convention and it becomes even more important to understand the cause behind these reservations. Most often, states base their objections to parts of a treaty on human rights by leveraging religious belief systems and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has been afflicted by this category of reservations.

The most common reservation among the members of the committee is towards Article 2 and 16 of the CEDAW. When we talk specifically about the former article, it reinforces the idea that states would be required to take some concrete steps in terms of public policy and legislative measures to consciously mitigate discrimination, establish equality between men and women, and repeal pre-existing discriminatory laws. The latter article speaks to the regulation of the constructs of marriage and divorce along with an equal parental role, decisions regarding the spacing of children and property rights of spouses.¹³

Countries like Egypt, Morocco, Bahrain and Libya have based their reservations to Article 2 of CEDAW on the Shariah laws. In addition to this list of countries, Kuwait, and Syria have shared their reservations to Article 16 partially or wholly and Saudi Arabia put forth a reservation to this article given the inconsistencies between Shariah law and the CEDAW. As a whole 20 Arab countries as well as Bangladesh and Pakistan have posed reservations on the basis of their Shariah laws. (cite-reconciliation) Other countries like Lebanon, Algeria, Jordan and Tunisia have entered into reservations on the basis of their national legislation. Bangladesh, Malaysia, Maldives and Mauritania have presented reservations to other articles on the basis of undefined “religious laws”.¹⁴ The overarching observation in such a broad interpretation of Shariah law being the authority for these reservations brings forth a theme of inconsistency and a method for states to essentially alter the way the convention applies to them which is a mechanism to not implement their obligations as per the international treaty standards.

IV. EFFECT OF THE RESERVATIONS

When we begin the discussion on reservations, the first task would be to first accurately describe the purpose of the convention. CEDAW was established to, “create legally binding standards

¹² State and Non-State parties to CEDAW. (n.d.). CEDAW. <https://cedaw.iwraw-ap.org/cedaw/state-and-non-state-parties-to-cedaw/>.

¹³ Keller, L. M. (2014). The impact of states parties' reservation to the convention on the elimination of all forms of discrimination against women. *Mich. St. L. Rev.*, 309.

¹⁴ Cook, R. J. (1989). Reservations to the Convention on the Elimination of All Forms of Discrimination against Women. *Va. J. Int'l L.*, 30, 643.

for women's human rights by highlighting civil, political as well as economic, social and cultural rights and placing them in a framework of the right to equality and non-discrimination based on sex.”¹⁵ The CEDAW Committee lays emphasis on states being conscious of the total outcome that the reservations have on the integrity of the treaty, to see if the reservations are conflicting with the purpose and object of the Convention. Therefore, allowing states to pick and choose which human rights would be beneficial to them would render the treaty redundant and ineffectual in developing international human rights standards.¹⁶

Articles 2 and 16 capture the essence of the CEDAW and base reservations specifically to Article 2 on religious laws, traditional beliefs and culture cannot be used as a weapon to stray from the object of the Convention. The Committee has declared such reservations irreconcilable with CEDAW and that they must be reviewed, modified or withdrawn because reservations cannot turn into a mechanism to let gender-based discrimination prevail and remove themselves from the position of the essential provisions being binding on them.

Pertaining specifically to Article 2(f) of the Convention which creates the need for states to solidify action on modification and abolishment of laws that continue to discriminate against women. Subsequently, Article 2 (g), relates to the removal of penal provisions that may have the same effect, which include a wide range of matters such as adultery, adequate provisions on sexual assault and rape, other impositions on appropriate attires for women etc. It can easily be grasped that these are some of the central issues that afflict women and if states choose to not ratify these articles, it will cause an imperative lacune in the way the Convention intends to perform.

Article 16 receives a similar pushback to Article 2 which concerns itself with the rights of a woman relating to marriage and family. It is widely understood that women face violence in the form of assault, marital rape, etc. inside their own homes is often unaccounted for. Besides various kinds of violence, there are a plethora of problems that afflict women within their community such as forced marriage of minor girls, desertion of women, criminalization of sexual relationships outside the marriage, rights to seek divorce and custody, etc. If states declare reservations against this article, they work towards reinforcing patriarchal norms where men take a position of authority with the women lacking agency in all the roles that they play as mothers, daughters, wives and sisters. These reservations speak volumes about how little

¹⁵ Asia Pacific, I. W. R. A. W. The Validity of Reservations and Declarations to CEDAW: The Indian Experience. Available at SSRN 1146815.

¹⁶ Cook, R. J. (1989). Reservations to the Convention on the Elimination of All Forms of Discrimination against Women. *Va. J. Int'l L.*, 30, 643.

progress we have made even ideologically where states are still actively rejecting to even accept basic changes to provide women dignity through laws that protect them within their own homes and communities.

V. IS SHARIAH LAW INCOMPATIBLE WITH CEDAW?

To judge whether Shariah law is at loggerheads with the concept of the advancement of women, we first look at how some countries have used their religious personal laws to object to certain provisions of CEDAW. The United Arab Emirates states its reservation to Article 2(f) of CEDAW, which was backed by the conflict it poses to Shariah views on inheritance and the reservation against Article 15(2), as it disagrees with Shariah laws on women's testimony, legal competence and ability to enter into contracts. As far as Article 16 goes, the UAE declares that it would accommodate its stipulations only to the extent that it lies in consonance with its religious laws.¹⁷

Egypt in lieu of Article 16, puts forth the view that equality as understood by the CEDAW does not coincide with their idea of equality. Instead of both sexes being equal before the law, there must instead be a fair balance between the rights and duties of men and women such that they complement each other.¹⁸ This pattern of vagueness multiples in Saudi Arabia's blanket observation, where it has stated that discharge themselves of any obligations to the treaty that do not align with Islamic law, with no clarification on what these incompatible provisions are, which allows them the freedom to interpret the provisions as per their convenience.

Arriving at the matter that is up for debate which is whether Islam and human rights are perpetually conflicting has to be considered primarily from the politicization of it. The common error that is made is that Islamism takes on the meaning of Islam, where Islamism relates to the political aspirations of some leaders in propagating views that do not accurately capture the beliefs of the religion. Western thought often preys on this indifference and paints the picture of human rights and Islam at war with one another without bothering to investigate the true contents of the religion. The problem is further complicated when Islamic nations in Middle East Asia and Africa themselves have disparate interpretations and applications of what Islam prescribes as the role of women in society.

Similar to other religions, Islam too co-exists with political ideologies and movements since its inception. The reservations made by Muslim countries to the articles of the treaty although

¹⁷ Bonner, A. S. (2009). Muslim states' reservations to CEDAW and possibilities for the reconciliation of shariah law with international women's rights norms. *HKJ Legal Stud.*, 3, 27.

¹⁸ Bonner, A. S. (2009). Muslim states' reservations to CEDAW and possibilities for the reconciliation of shariah law with international women's rights norms. *HKJ Legal Stud.*, 3, 27.

displayed as Muslim law against the international community; in reality, it is just heavy politicization of religion only to achieve the ends that states desire. Islamism employs gender discrimination as a tool to attribute patriarchal norms to Islam, disregarding the true beliefs and practices of the religion and the realization of the multiple incongruent ways that people choose to practice this faith. The question should rather focus on the innate will to culturally distinguish Islamic ideas from Western neo-imperialist ideas of human rights laws because of the prevalent West-East ideology conflict. This need to create a gap often comes from the imposition of what human rights ought to be from the Western lens without creating space for the East to be included in this conversation. The issue boils down to Muslim state governments fearing Westernization of their people, causing them to lose relevance and as such they find religion a convenient instrument to inhibit this movement. Resultantly, both the rigid abstraction of Shariah thought as advocated for by Islamic states and the Western incomprehension are the real parties to this conflict under the guise of Shariah and women's rights respectively.

VI. CONCLUSION: RECONCILIATION BETWEEN RELIGION AND HUMAN RIGHTS

Indivisibility between human rights remains one of the key principles as laid down in the preamble to the Universal Declaration of Human Rights (UDHR).¹⁹ Many opponents to this idea state that even though indivisibility as a goal is too utopian to be achieved when we break down the true meaning of this term, it prescribes the simple idea that for the realization of one human right, the other human rights must also be realized in order for the full effect of the UDHR to work for the betterment of our lives. From the discussions that this paper has engaged in thus far, I propose a two-step approach to reconciliation addressing two key issues i.e. interpretation of Islam and social norms-based approach for behaviour modification.

Firstly, as observed from reservations to CEDAW by Muslim countries, the goal, in this case, must primarily be to de-politicization in using religion as a shield to promote state interest. The case of Tunisia supports this idea through its persistent efforts in promoting equality. In contrast to other states posing reservations, Tunisia describes the ideal image of women's upliftment in its Code of Personal Status which advances a sequence of laws seeking to create equality between men and women in pivotal areas like marriage, custody of children, divorce, inheritance, etc.²⁰ through its progressive interpretation of Islam. It is almost too essential to leave out the picture that Tunisia had provided abortion rights to women long before Western civilizations by interpreting Shariah law as allowing to abort children preceding the existence of the child's soul

¹⁹ Zylberman, A. (2017). The indivisibility of human rights. *Law and Philosophy*, 36, 389-418.

²⁰ Khedher, R. (n.d.). Tracing the development of the Tunisian 1956 Code of Personal Status. *Virtual Commons - Bridgewater State University*. <https://vc.bridgew.edu/jiws/vol18/iss4/3/>.

which is four months after conception.²¹ This relatively modern approach adopted by Tunisia could essentially be seen as a torch-bearing initiative for commencing harmonization between religious laws and women's human rights.

Secondly, after addressing the issues of religious interpretation we circle back to the problem that we had begun the conversation with which is FGM. If we look at Social Norms Theory, a bare-bone understanding of it would entail that it attempts to adjust social behaviour by leveraging expectations and the need for acceptance within one's community. Since it would be out of the question to generate a universal model that would influence behaviour in diverse groups around the world with their own cultural relevance of this practice a better approach would be to lay down some key ideas to work out separate focus plans on eradicating FGM/C.

The UNFPA-UNICEF have collaborated to form the Joint Programme on Elimination of FGM/C. The reason for its inclusion as a recommendation in this paper is because, as we go deeper into understanding the issue of FGM/C it inevitably becomes important to look at social pluralism and how even though different communities follow the same rituals their incentivization might be different. The ACT Framework is guided by social norms and to describe briefly this framework – 'A' in ACT refers to assessing what people know, feel and do which involves assessing the prevalent belief systems, subsequently 'C' refers to the context in order to take into account how gender roles have constructed themselves and how that translates into power relations between men and women and lastly 'T' refers to tracking social change across time. These three combines to create continuous improvement in decisions, policies and practices by testing what works and what does with regard to a specific community. This framework proves to be a tool that can be used effectively to collate data in order to design and evaluate interventions aimed at doing away with FGM.

To conclude, this two-step approach to dealing first with the issue of integrating religion into what we typically observe as modernization and betterment of the lives of women and secondly by understanding the cultural intricacies to develop an effective intervention to the ritual of FGM/C could potentially lead to a step in the direction to reduce if not entirely reconcile religious laws and basic human rights of women.

²¹ Bonner, A. S. (2009). Muslim states' reservations to CEDAW and possibilities for the reconciliation of shariah law with international women's rights norms. *HKJ Legal Stud.*, 3, 27.