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UNIVERSALISM/CULTURAL RELATIVISM AND THE QUEST FOR WOMEN'S HUMAN RIGHTS PROTECTION

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Abstract

The concept of Universalism of Human Rights presents the notion of the applicability of human rights to all humans. Universalism is described as the very essence of human rights because all persons irrespective of location are human beings. Thus the universalists' position is that human rights should be applicable to all persons - societal differences notwithstanding. Cultural relativism of human rights on the other hand promotes the idea that human rights in their present form are ideals whose implementation may oppose cultural notions which are the foundations of societies.

Citing cogent reasons for the disqualification of universalism and examples of culturally legitimized cruelty such as non recognition of women as human beings, female genital mutilation and honour killing against the viability of cultural relativism, the paper queries the effectiveness of the two concepts in the quest for the protection of women's rights in societies ridden with patriarchal and cultural prejudice. The paper advocates better recognition and protection of women's rights through two different approaches which it considers better options, namely: Cultural Feminism and the Minimalists' approach.

Introduction

With respect to human rights scholars there are essentially two divides, the universalists and the cultural relativists. That is those who conceive human rights to be universal and those who contend that it is culturally relative. The term "universalism" is used to describe doctrines or concepts of universal application. Therefore the general definition of human rights as rights which everyone possesses by virtue of their humanity is the premise upon which the Universalists base their postulations.¹ Though popularised

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¹ They acknowledge cultural differences but believe that similarities among individuals should prevail over cultural differences. See generally the following works: Bhabani Shankar Nayak 'Challenges of Cultural

by the international community, human rights provisions are also contained in the laws of many nations. Universalism is the essence of International human rights laws and its encompassing goal is to protect every *homo sapien* from the arbitrary exercise of sovereign power.² The universalism of human rights was formally expressed in the Universal Declaration of human rights (hereafter referred to as UDHR or the Declaration) as a philosophy aimed at promoting respect for basic human rights and freedoms.³ Thus the Declaration was seen as a powerful unifying force not only as a means of bringing together the world in common purpose but also as a means of ensuring the dignity and protection of all its citizens.⁴ This is premised on the belief that the values and principles underlying the concept of human rights are of a universal nature.

On the other hand, the issue of cultural relativism is an old opponent of universalism which has dogged the heels of human rights being of universal application from as far back as the drafting of the Declaration itself.⁵ The idea of cultural relativism⁶ is an anthropological concept which portrays the attitude of "objectivity" toward another culture. It is the opposite of ethnocentrism.⁶ Ethnocentrism in this context connotes "subjectivity". According to anthropologists the concept is a methodological ideal useful

Relativism and the Future of Feminist Universalism', *Journal of Politics and Law*, Vol. 6, No. 2, 2013. See Joseph Raz 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 31 - 47.

² Mary Robinson, former United Nations High Commissioner for Human Rights, UNDP Human Development Report 2000: Human Development and Human Rights (New York: Oxford University Press 2000) p.113 contained in Pityana Barney 'The challenge of culture for human rights in Africa: the African charter in a comparative context' in Malcolm D. Evans, Rachael Murray (eds) *The African Charter of Human and Peoples' Rights. The system in Practice 1986 - 2000*, Cambridge University Press, Cambridge England 2002 pg 219.

³ These include individual values and freedoms and also social and economic rights such as right to life, right to own property, freedom of expression, right to dignity of person, right to education, right to health and so on. The preamble to the UDHR also makes copious references to the idea that the human rights guaranteed therein were meant to be common to all. For instance, the second to the last sentence declare that "a common understanding of these rights and freedoms is of the greatest importance in the full realization of this pledge."

⁴ Author unacknowledged, 'Universalism and Dissent: Human Rights in a Changing World', *Harvard International Review*, Vol. 20, No.3, Summer 1998.

⁵ Before the Commission on human rights in 1947, the American Anthropological Association warned that the Universal Declaration would be "a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America." The AAA further argued that "what is held to be a human right in one country may be regarded as anti-social by another people." quoting the text of the AAA-statement on Human Rights, 49 *AM. ANTHROPOLOGIST* 539 (1947), contained in Zaubrecher, Katie L. 'When Culture Hurts: Dispelling the Myth of Cultural Justification for Gender-Based Human Rights Violations' *Houston Journal of International Law*.

⁶ Johnson, Thomas H., *Cultural Relativism: Interpretations of a Concept*, *Anthropological Quarterly* Vol. 8, No. 3 Summer 2007.

for the fair observation of other cultures. An Iranian writer Nafisi, says it is "supposed to be a progressive idea and to make us celebrate and learn from cultures that are different from our own. ..(and) make us more tolerant of those with whom we disagree".⁷

The purport of the argument of the cultural relativists against universalism is that values and norms are culture based and so there cannot be one set of universal values and norms on which human rights is based. Four variations of the cultural relativists' argument are identified.⁸ First, that since civiisations and cultures varies both in time and geographical location so too will their life-world vary.⁹ On this basis, cultural relativists postulate that every culture has its own idea of human rights which is relative to a particular place and at a given time since culture changes and is not static. To them international human rights standards as exemplified in various International Instruments of rights are simply European or Western notion of rights which are being imposed upon all other contemporary cultures for all time. Therefore, presenting these instruments as the ideal to which the whole world must subscribe amounts to an extension of western colonization.¹⁰ A second variation of this idea is that, even if it were to be agreed that there are some human rights norms which have universal acceptance, it would be impossible to attach similar value or weight to them irrespective of location and circumstance. Thirdly, although there are some human rights norms that do have universal acceptance, others are negotiable in the light of the prevailing cultural, historical or other values applicable at any given time or place. Fourthly, in any event, the nature of society and of the world is such that there is a multiplicity of cultures and values and these have to be respected since they provide an essential starting point for any understanding of societal norms.

Both Universalism and Cultural Relativism are Problematic

The argument of Universalism of human rights is problematic in some respects, this is due to the fact that where it asserts itself as the only ideal, it has the tendency to prejudice other cultural variation of rights as being unreasonable, archaic and uncivilized. And where this happens universalism will lose its essence and may also be unable to achieve its objective of promoting human rights enforcement. For instance, an impression of promoting western notion of human rights as being the best and the superior while others are inferior may be created. This will be particularly so when a State acts in a way

⁷ *ibid.*

⁸ N. Barney Pityana, *op cit* note 3 above.

⁹ See Joseph Raz, *op cit* note 2 above .

¹⁰ In reality many formerly colonised countries which are also a part of the opponents of universalism have neglected or refused to revise their laws to conform more to their societal norms or even glaring realities of the times. Examples abound in Nigeria whose basic criminal laws are colonial.

that negates the principle established in the international human rights instruments and such an offending State relies on cultural relativism as a defence but its defence is dismissed as unreasonable or as evidence of backwardness or uncivilisation. Universalism has too many challenges to be the realistic option for the moment for not only are the mechanisms to drive international law inadequate and often ineffective, but sometimes the persons who are the destination of those contentious rights are often unwilling to risk the displeasure of their local societies to live differently from what they are accustomed to.¹¹

In the same vein, cultural relativism is also a tool often used hypocritically by dictators and individuals to cover up their atrocities against other human beings. Many intolerable practices carried out with impunity by these actors remain the reasons which convince Universalists that the cultural argument cannot be left undisturbed.

Cultural Relativism – Antithesis to the Protection of Women’s Rights as Human Rights

There are many aspects of human rights which cultural relativists breach in the name of culture and most of these breaches are committed against women. Three notable examples are discussed below. First is the issue of the recognition and protection of women’s human rights which is essentially the struggle for recognition as equal members of the human race, second is female genital mutilation and third is honor killing. The last example is however not restricted to women.

Effect of Cultural Relativism on the Struggle for Recognition of Women’s Rights

The struggle to ensure the recognition of women’s human rights as protectable as the rights of their male counterparts is almost as old as the struggle to secure the rights of man against dictatorial governance. After the French revolution and the subsequent adoption of the Declaration of the Right of Man and the citizen in 1789, a French playwright and essayist Olympe de Gouge published ‘the Right of woman and the female citizen’ which she modeled after the Declaration of Man and the Citizen, by merely substituting the word “man” with “woman” wherever it was contained in the document.¹² In 1948 while drafting the Universal Declaration of Human Rights the drafters would have used the word ‘man’ in the Declaration throughout but for the unrelenting and notable efforts of two female Commission members Hansa Mehta of India and Minerva Bernadino of Dominica Republic. The result of their efforts was that the preamble

¹¹ For instance on the issue of women’s rights, women fear alienation from the community if they pursue their rights. See Zaunbrecher op cit note 6 above.

¹² Headlee Sue, Elfin Margaret, *The Cost of being female*, Praeger, Connecticut, 1996, p. 169.

contained a reference to equal rights of men and women and the gender neutral terms of 'human beings', 'everyone' and 'persons' were employed in the final draft.¹³

By every yardstick which human well-being is measured it is noted that women fare badly. Politically, they are marginalized, and socially they are victims of discriminatory practices and inequality aided by customs and traditions.¹⁴ Women are usually the poorest in any society since they lack the means of acquiring economic power. Despite the development and enlightenment brought about by the modern age, women are still denied equal employment opportunities with men in the economic field and their right to inheritance is usually contentious. Everywhere, the statistics on the level and incidence of violence against women is alarming. It is also unfortunate that most political systems do not provide adequate opportunities for redress. The right to correct and beat women is deeply rooted in notions of proprietorship/patriarchy fuelled by culture. From common law¹⁵ to Latin America legal Codes to Islamic law, the right of ownership of a woman by her father or husband as the case may be, resonates. The efforts of the international community to promote women's rights have been further frustrated by cultural relativism as international documents on women's rights protection have received the highest number of reservations,¹⁶ as a result of which these valuable documents are least respected and are more observed in the breach.¹⁷

All these anomalies are brought about by deference to culture and customary practices and the rejection of the universal application of human rights. Thus as Kabasakal noted "following a strict rule of cultural relativism would keep women's human rights "alien" virtually to all societies, and the emancipatory aspects of the international human rights regime would be undermined and jeopardised in the name of cultural preservation".¹⁸ A veritable example is Saudi Arabia where women are not allowed to drive cars, and cannot vote in an election. Equally, in many African societies, women are

¹³ Arat, Zehra F. Kabasakal, *Women's Rights as Human Rights: The promotion of Human Rights as a Counter Culture*, UN Chronicle. Vol. 45, Issue 2-3, June – September 2008, Pg 9+.

¹⁴ Such as Male child preference, bride price practices which confirms the female child as a chattel to be sold.

¹⁵ Poole Linda J. "CIM: Making Women's Rights Human Rights" *Americas (English Edition) Volume 45, Issue 2, March – April 1993, pg 48+*

¹⁶ According to Bhabani, *Challenges of Cultural Relativism and Feminism*, op cit note 2 above, Mayer notes that while reservations are not supposed to violate the principle, aims and goals of a treaty, often reservations do just that. She cites the example of many Islamic countries' reservations to Convention on Elimination of Discrimination Against Women (CEDAW), in order to preserve Islamic culture and religion; yet the purpose of CEDAW was to 'change cultural constructs which were a barrier to women's equality'.

¹⁷ The CEDAW has received the highest number of reservations than any other document. Mentioned in Kabasakal, op cit. note 13 above.

¹⁸ *ibid.*

denied the right to inheritance either from their fathers or spouses.¹⁹ While incidences of rape occur in India on a regular basis this phenomenon has just recently attracted the attention of the Indian government. In Egypt, sexual harassment and various forms of violence against women are carried out with impunity.²⁰

All the above are the basic testimonies to the reasons why women still constitute the “unfortunate” upon whose wellbeing the male dominated society thrives.

Female Genital Mutilation – Evidence of Cultural Practices

The drafting of the Universal Declaration of Human Rights rested on the hope that despite differing cultures and diverse economic and political systems, there were “common convictions” upon which basic human rights would be realized.²¹ Indeed the themes of dignity and respect for the human person reverberate from the preamble of the Declaration to the main provisions. The preamble proclaims the recognition and faith of the nations in the inherent dignity of the human person and denounces barbaric acts.²²

Specifically Article 1 reaffirms that all (men and women) are equal in dignity Article 3 guarantees security of person, Article 5 prohibits torture, cruel, inhuman or degrading treatment. In direct negation of these fundamental guarantees, an act as tortious and cruel as female genital mutilation is still being carried out in the name of culture. Though of high prevalence in Africa, it is also practiced in some parts of the Middle East and fast spreading to other parts of the world through immigration.²³ The World Health Organisation comprehensively defines Female genital mutilation (hereafter referred to in this paper as FGM)²⁴ as comprising all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for cultural or

¹⁹ For example the Igbo culture in Nigeria.

²⁰ BBC News Middle East, “Egypt worst for women out of 22 countries in Arab world” 12th November 2013 available at <http://www.bbc.com/news/world-middle-east-24908109> last accessed on 14th July 2014.

²¹ Mary Ann Glendon, *A World Made New*, in LAW, POLITICS, MORALS, supra note 2, at 139-40 quoted in Zaunbrecher op cit note 6 above.

²² The Second World War (1939-1945) which immediately preceded the drafting of the Declaration recorded carnage and human destruction on a scale and with such brutality that had not been witnessed in previous wars.

²³ In recognition of the advent of FGM in the United States of America, the State of Georgia enacted a law specifically prohibiting the act.

²⁴ “Female circumcision” and “female genital cutting” are also terms used to describe this procedure. While “circumcision” may be misleading because it has the tendency to be seen in the light of male circumcision which is medically beneficial, “genital cutting” may also be unable to appropriately describe the extreme forms of the genital cutting.

any other non-therapeutic reasons.²⁵ Four types of the genital cutting have been identified based on the degree of invasiveness. The first involves the excision of the prepuce with or without excision of part or all of the clitoris, the second, the excision of the prepuce and clitoris together with partial or total excision of the labia majora. The third type is the excision of part or all of the external genitalia and stitching or narrowing of the vaginal opening and the fourth refers to a general category of unclassified injuries to the genitalia including burning of the clitoris and surrounding tissues, scraping of the vagina orifice etc.²⁶

The FGM procedure is usually performed by non-medical personnel, without anesthesia and with the use of instruments like scissors, blades, stones, broken glass or any other sharp and accessible tool.²⁷ Information on the health benefits of this procedure is yet to emerge but there is an abundance of information on the health risks it poses to its victims. Each of the four types described above have been proved to have immediate and long term health complications.²⁸ Immediate complications range from bleeding to acute urine retention and to serious sepsis which results from using unsterilized instruments and exposure of cut genitalia to urine or faeces. Long term effects such as repeated urinary tract infection, chronic pelvic infection²⁹ and complications during pregnancy, before and after delivery are mostly associated with type II and type III procedure.³⁰ Additionally, it encourages the transmission of sexually transmitted diseases, including HIV/AIDS.³¹

The reasons why communities practice FGM have been categorized under psychosexual, religious, sociological (cultural), aesthetic and hygienic factors.³² The reasons for the practice are rooted in the desire for male domination and control over the women folk in all ramifications including their sexuality. The proponents argue that it is to ensure purity and chastity in women. Practically, removal of organs which enhances women's drive for sexual satisfaction both reduces the likelihood of a woman's voluntary surrender of virginity before marriage, and eases her demands for sexual attention that her

²⁵ Definition reproduced in Cook, Rebecca J. Dickens, Bernard and Fathalla Mahmoud, Female Genital Cutting (Mutilation/Circumcision): Ethical and Legal Dimensions. *International Journal of Gynecology and Obstetrics*, Vol. 79, pg 281-287, 2002.

²⁶ *ibid.*

²⁷ Broussard Patricia A. Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture Shaming Blaming, and Utilizing the Convention Against Torture, *Duke Journal of Gender, Law and Policy*, Vol: 15, Issue 1, January 2008, pg 19+

²⁸ *Ibid.* See also Cook Rebecca J. et al op cit. note 26 above.

²⁹ These two complications may damage the reproductive organs and cause infertility.

³⁰ Broussard Patricia A, op cit. note 28 above.

³¹ See UNICEF "Nigeria Female Genital Mutilation" available at <http://www.unicef.org/nigeria/FGM.pdf> accessed last on 17th March 2014.

³² *ibid.*

husband may be unwilling or unable to provide.³³ The practice is especially common in communities where premarital virginity is required as an indication of family honour. In some communities it may also be impossible for a lady to have a marriage partner if her genitalia remain untampered with.³⁴ Besides citing hygiene or cleanliness³⁵ as a reason for female genital mutilation, it is "believed to make conception and child bearing easier, to prevent malodorous vaginal discharges, to prevent all manner of sickness, vagina parasites and contamination of mother's milk. Circumcision has been mistakenly credited with curing women who suffer from... melancholia, nymphomania, hysteria, insanity .. epilepsy ... kleptomania ... and truancy".³⁶ All these reasons are not only unscientific, they are false and mere myths thus the clamour for the practice to come to an end.³⁷ Broussard movingly describes the fate of a female with a mutilated genital thus:

FGM has resulted in the neutering of many women; those subjected to its most extreme forms are no more than commodities who can give pleasure but who cannot receive it. In other words women are reduced to property. This is especially clear when FGM is viewed as more than the initial "cut" but a series of cuts that recur at the husband's demand. In extreme forms of FGM, the woman must be opened and closed after intercourse. This fact reduces women's genitalia to some sort of resealable packages which are kept protected for the users' pleasure.

The outcry against practices rooted in culture such as FGM is that a woman is a human being and so ought to be free such from torturous and inhuman practice like FGM. This is more so when it has not been scientifically proved or established that FGM has any medical benefit.

³³ Cook Rebecca et al op cit. 26 above.

³⁴ Fears of infertility of such a woman or even death during pregnancy preached as likely repercussions of such disobedience usually lead to this. See T.C. Okeke, USB Anyaehie, and CCK Ezenyeaku "An Overview of Female Genital Mutilation in Nigeria" Ann Med Health Sci Res. 2012 Jan-Jun; 2(1): 70-73. doi: [10.4103/2141-9248.96942](https://doi.org/10.4103/2141-9248.96942)

³⁵ Some communities believe that the female genitalia is inherently unclean and rituals including "circumcision" are needed to cleanse it. See UNICEF "Nigeria Female Genital Mutilation" op cit note 29 above.

³⁶ Broussard Patricia A, op cit. note 28 above.

³⁷ *ibid.*

Honour Killing – Evidence of Cultural Practice

Honour killing is one of the honour crimes being the murder of a person alleged to have brought shame on their family³⁸ or community.³⁹ The shameful act could be the refusal to enter into a marriage, commission of adultery or being in a relationship that displeased their relatives⁴⁰ or even for being homosexual.⁴¹ Honour killing of a woman⁴² takes place when a woman has actually been involved or is perceived to be involved in immoral behavior.⁴³ Such "immoral behavior" may take the form of marital infidelity, pre-marital sex⁴⁴, refusing to submit to an arranged marriage, demanding a divorce from an abusive husband, talking with men who are not relatives, flirting with men, or "allowing herself" to be raped.⁴⁵ In Sanliurfa, a town in Turkey, one young woman's "throat was slit in the town square because a love ballad was dedicated to her over the radio."⁴⁶

Though particularly prevalent in Muslim countries, of which Pakistan is chief⁴⁷, the crime occurs worldwide from South America to Asia⁴⁸ and has been reported in Bangladesh, Britain, Brazil, Ecuador, Egypt, India, Israel, Italy, Jordan, Pakistan, Morocco, Sweden, Turkey and Uganda, Afghanistan, Iraq and Iran and even the United

³⁸ See BBC – Ethics Guide http://www.bbc.co.uk/ethics/honourcrimes/crimesofhonour_1.shtml#h3 accessed on July 20, 2013.

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ See CNN.com, Shocking gay honor killing inspires movie <http://edition.cnn.com/2012/01/13/world/europe/turkey-gay-killing>. accessed on 16th July 2014.

⁴² Writers on the issue consensually agree that women are the major victims.

⁴³ (Yasmeen Hassan, "The Fate of Pakistani Women," *International Herald Tribune*, May 25, 1999.) cited in Gendercide Watch "A Case study: Honour killings and blood feud http://www.gendercide.org/case_honour.html accessed on 16 July 2013.

⁴⁴ According to Bhaskar Dasgupta, the autopsies of the dead bodies have proven that the majority of the victims were virgins, who had been killed because they had been accused of tarnishing the family's image by indulging in pre marital sex. Cited in Shantanu Gupta, 'Honour Killing: Glorification through murder?' (June 3, 2008) Available at SSRN: <http://ssrn.com/abstract=1413671> or <http://dx.doi.org/10.2139/ssrn.1413671>. In Jordan, the situation is the same. See http://www.ecoi.net/local_link/183325/286026_en.html accessed January 18, 2014.

⁴⁵ See generally Pelin Turgut, 'Honour' Killings Still Plague Turkish Province," *The Toronto Star*, May 14, 1998. Cited in Gendercide Watch *op cit.* note 44 above. See also Shantanu Gupta, *ibid.*

⁴⁶ Pelon Tergut, *ibid.*

⁴⁷ Rachel A. Ruane, 'Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan', 14 *EMORY INTL L. REV.* 1523, 1527-28 (2000). Cited in Zaunbrecher *op cit.* Note 6 above.

⁴⁸ See BBC – Ethics Guide *op cit* note 39 above.

States and Canada.⁴⁹ The exact figure of how many men and women who have been killed in the name of honour is not known. Not only is the crime difficult to detect as authorities and communities collaborate to cover up such crimes but there is also the difficulty of data collection in such countries. Equally unknown is the number of women who are maimed in attacks which fall short of killing⁵⁰. In the typical honour killing scenario the victim is accused of behavior incompatible with the honour of the family or community and is sentenced to death by members of his or her family. Where the victim is a female it is not unusual for female members of the family to be involved in the execution plan.⁵¹ They often act as denouncers who bring the 'misconduct' to the knowledge of the family and baits used to lure the victims to their deaths. The execution is then carried out by male members of the family, -the husband, the father, brothers, uncles or cousins of the victim. The 2008 killing of Ahmet Yildiz, a 26 year old homosexual who was shot in Istanbul was done by his father. Rania Arafat's murderer was her 17 year old brother Rami and was made possible by two of her aunts who told her they had arranged for her to meet with her forbidden Iraqi boyfriend out in the desert of Amman.⁵² In a bid to mitigate sentences the responsibility to carry out such killings is often thrust upon under-aged male relatives of the victim.

In a country like Jordan, honour killings are sanctioned by law. Article 340 of the Jordanian Penal Code⁵³ provides that a husband or a close blood relative who kills a woman caught in a situation highly suspicious of adultery will be totally exempt from sentence." Article 98, meanwhile, guarantees a lighter sentence for male killers of female

⁴⁹ See Gendecide Watch op cit 44 note above See also Phyllis Chesler "Honour Killings In the West" New York Times, March 16, 2014 available at <http://www.nytimes.com/2014/03/17/opinion/honor-killings-in-the-west.html?>

⁵⁰ Bangladesh (formerly East Pakistan) is a leading country in crimes like acid attacks by jealous or estranged men, which lead to such maiming. It is reported that as much as 2,200 cases are reported each year. (Ellen Goodman, "How Long Before We Take the Honor out of Killing?," *The Washington Post* (in the *Guardian Weekly*, April 6-12, 2000.) cited in gendecide watch op cit. note 44 above.

⁵¹ The notorious murder of Samia Imram a young married Pakistani woman who was shot in the office of the lawyer helping her to seek a divorce from her violent husband was reportedly carried out by a man who accompanied Samia's mother. Reported in Gendecide watch op cit note 44 above.

⁵² Julian Borger "In Cold Blood," *Manchester Guardian Weekly*, November 16, 1997 quoted in gendecide watch.

⁵³ Penal Code No. 16 of 1960. The text of the Article in English depends on the translator.

The Guardian 7 Sept. 1999 "He who discovers his wife or a female relative committing adultery and kills, wounds or injures one or both of them is exempted from any penalty and "The Jordan Times of 20 August, 1999 as "He who discovers his wife, or one of his female relatives with another in an adulterous situation, and kills, wounds or injures one or both of them, benefits from a reduction in penalty". See generally contents of Article 340 of the Penal Code http://www.ecoi.net/local_link/183325/286026_en.html accessed January 18, 2014.

relatives who have committed an act which is illicit in the eyes of the perpetrator.⁵⁴ A follow up of sentences handed down on charges arising from those provisions shows that once a murder has been judged an 'honour killing,' the usual sentence is from three months to one year.⁵⁵ Though prevalent in Islamic countries honour killing is not Islamic as it predated Islam. It is a cultural phenomenon rather than religious. Most honor killings occur in countries where the concept of women as a vessel of the family reputation predominates⁵⁶, and where the legal and social environment is conducive for the guardians of communal rights to violate individual rights with impunity.

In the light of the foregoing examples, if cultural relativism translates to the unabated continuation of the given situations, then it will definitely be an unattractive option to universalism.⁵⁷ Therefore, in view of the fact that neither the universalism nor cultural relativism serves as an appropriate approach to secure the rights and guarantee the fundamental freedom of women, scholars have propounded various theories and offer suggestions in their quest for an appropriate model for enforcing the rights of women. Though the present work may not lend itself into discussion of such theories or concepts, nevertheless the paper will recommend as suitable two approaches that can be employed to guarantee the rights and protection of women's rights. These are the Feminists Interventionists approach and Minimalists approach.

Feminists Interventionists Approach (Advocacy for Regionally developed Feminism)

This writer subscribes to the belief held by some scholars that feminism itself can serve as a compromise between universalism and cultural relativism. In his argument, Bell posits that feminist theory is beneficial as it succeeds in evading both 'homogenizing universalism and the paralysis of cultural relativism'.⁵⁸ Elshtain⁵⁹ echoes this argument by

⁵⁴The Middle East of November 1999 translates Article 98 as "He who commits a crime in a fit of fury caused by an unlawful or dangerous act on the part of the victim benefits from a reduction of penalty."

⁵⁵ See Gendercide watch op cit note 44 above.

⁵⁶Said Marsha Freeman, Director of International Women's Rights Action Watch at the Hubert Humphrey Institute of Public Affairs at the University of Minnesota quoted in Hillary Mayell "Thousands of women killed for family honour" http://news.nationalgeographic.com/news/2002/02/0212_020212_honorkilling.html . But compare her assertion to the opinion of Syed Kamran Mirza "Honour Killing is Absolutely Islamic" Islam Watch of 16 January 2008, available at http://www.islam-watch.org/SyedKamranMirza/honor_killing.htm accessed last on 18th March 2014. He claimed that all perpetrators usually cite the Quran or Islam as justification for their action.

⁵⁷ The challenge is still how to transport human rights from the pages of international instruments to become real determinants of experiences and situations of the lives of real people.

⁵⁸Bell, C. 'Women's Rights as Human Rights: Old Agendas in New Guises'. In A. Hegarty, & S. Leonard

stating that a global feminist consciousness can create feminisms which are unique to regions and develop from within women's existing culture, thus making feminism appropriate to the particular needs of women in various regions and cultures. Elshtain further argues that these feminisms, which are regionally developed, can serve to build bridges between dissimilar regions and cultures, without imposing one version of feminism on women all over the world. Bunting⁶⁰ also agrees with this line of thought stating that feminisms which are peculiar to culture and region must emerge, so that they can work against discrimination and oppression in ways which are culturally appropriate to their own community.

Peach's⁶¹ 'feminist pragmatic theory' about reconciliation of the tensions between universalism and cultural relativism within feminism, in which theory and practice are inseparable is considered useful in realizing women's human rights and all rights for which culture is a stumbling block. She argues that in some contexts the assertive approach of international human rights principles may be appropriate, while in other contexts this strategy would be ineffective. For instance the framework for women to make rights claims does not exist within all cultures.⁶² In the same vein, Zaunbrecher,⁶³ advocates that if universal human rights norms, like those embodied in CEDAW, are to have a significant impact on the everyday lives of the recipients, they must become integrated into the cultural conscience of citizens and governments. She also suggests

(Eds.), *Human Rights: An Agenda for the 21st Century*. London: Cavendish Publishing Ltd. 1999 Bell, C.

'Women's Rights as Human Rights: Old Agendas in New Guises'. In A. Hegarty, & S. Leonard (Eds.), *Human Rights: An Agenda for the 21st Century*. London: Cavendish Publishing Ltd. 1999

⁵⁹ Elshtain, J. B. Exporting Feminism *Journal of International Affairs*, 48(2), 1995.

⁶⁰ Bunting, A. Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies. *Journal of Law and Society*, 20(1), 1993.

⁶¹ Peach, L. J. 'Are Women Human? The Promise and Perils of 'Women's Rights as Human Rights'. In L. S. Bell, A. J. Nathan, & I. Peleg (Eds.), *Negotiating Culture and Human Rights*. New York: Columbia University Press. 2001.

⁶² According to her in some contexts depending upon the presence of a 'rights consciousness', the risk of backlash against international human rights, the historical experience of others using a legal rights approach, and whether there is sufficient agreement amongst the affected women to claim a particular right, that in fact education, literacy, and communal ownership of land may grant more benefit to the affected women. Drawing on the example of Thailand, where the sex trade is a major violation of women's rights she argues that merely asserting the fact that women's international human rights are being violated is of no benefit to the women in the Thai sex trade. The sex trade will hold sway as there are few opportunities for women to engage in waged employment. Thus, in this particular context Peach argues it would be most beneficial to implement strategies which provide alternate sources of waged employment for women.

⁶³ Op cit note 6 above.

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education of the people about citizens' rights and their obligations to respect the rights of others.⁶⁴

The Minimalist Approach

The minimalist approach is also often suggested as a bridge between universalism and cultural relativism. A minimalist framework establishes basic threshold criteria for meeting the most critical of human rights with the understanding that diverse societies, with localized traditions, histories, and cultures articulate and enforce human rights norms in different ways.⁶⁵ That may be interpreted as a conferment of some measure of discretion on States in the fulfillment of their human rights obligation yet preserving the core content of human rights.⁶⁶ A concrete example of such minimalist approach may be found in the European Union's use of the principle of "margin of appreciation"⁶⁷ to settle which human rights decisions can be made based on relative circumstances of a contracting State and which rights are deemed core rights imposed on all States regardless of variations in culture.⁶⁸ It is a tool for detecting when the core rights contained in the European Convention on Human Rights (thereafter referred to as ECHR) are violated within the context of a broader diverse system and useful for resolving clashes relating to values between an individual and his society.⁶⁹ It remains one of the European Court of Human Rights (thereafter referred to as ECtHR) primary tools for accommodating diversity within Europe, national sovereignty and the will of domestic majorities while still effectively enforcing the rights elucidated within the ECHR. This is presumably to

⁶⁴ The use of education programs to promote for instance women's rights is criticised by Davis Kristin, as exerting external, often western pressure on the communities.

⁶⁵ Adeleke F.A.R. Universalism versus Cultural Relativism - In search of the Appropriate Model for Enforcing Women's Rights (paper (unpublished) paper delivered at Annual Muslim Lawyers Continuous Legal Training held at Alausa Lagos 2013).

⁶⁶ The logical question will be how does the enforcement body determine that in respect of the fulfillment of a human right or the non-prevention of a violation, a State is within its discretion limits, (and has not violated a core human right), given that the provisions of international human right laws are meant not only to prevent violations but to give a clear definition of the very content of human rights?

⁶⁷ This liberal approach has already been employed by the US in respect of anti sodomy laws as epitomized by the *Lawrence v Texas* case 539 U.S. 558 (2003). Laws criminalizing sodomy between consenting adults might have been ruled unconstitutional in the 2003 *Lawrence* case.

⁶⁸ Aaron A. Ostrovsky, What's so funny about Peace, Love and Understanding? How the Margin of Appreciation doctrine preserves core human rights within cultural Diversity and legitimizes International Human Rights Tribunals' *Hanse Law Review* Vol.1 pg 47, 2005.

⁶⁹ *Ibid.*

preserve core European values and rights, the very thing that minimalists seek to achieve with universal human rights.⁷⁰

In the same way, in other regional human rights instruments e.g. African Charter on Human and Peoples Rights, the margin of appreciation can equally be employed to dichotomise between those rights which are core and non-derogable from those ones where derogation may be allowed upon a reasonable consideration of African cultural dictates that are relative to some African contracting states. The same principle may be applicable with regards to other regional human rights instruments like American Convention on Human Rights.

In the case of ECHR, the margin of appreciation applies only to derogable rights found in Articles 8 to 11 which provide personal freedoms.⁷¹ This is akin to allowing some derogations based on culture.

However, as more contracting States by consensus show that an activity has received widespread support, such activity becomes regarded as a core European right which must be protected. With regards to derogation, a right is not arbitrarily derogated unless there are justifications for such derogations. For instance most rights subject to limitation in the European Convention can be justified under three conditions prescribed also by the Convention. First, the derogation must be prescribed by law, must be in furtherance of a legitimate aim, and such must be necessary in a democratic society.

Few cases rightly exemplify the possibility of using the margin of appreciation to bridge the gap between universalism and cultural relativism. They are briefly discussed as follows:

In *Ireland v. UK*,⁷² on the right to freedom of movement, the ECtHR gave the UK government wide allowance to detain Irish citizens in order to quell a "campaign of violence carried out by the IRA." The court reasoned that the Contracting State is in a better position than the court to "decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it". In *Dudgeon v. UK*,⁷³ the ECtHR was faced with a question of a Contracting State's right to legislate on moral values. In this case the court had to interpret the actual effect of anti sodomy laws. Having fulfilled the first condition of being prescribed by law, the ECtHR shifted attention to the aims of the law. According to the UK (particularly Northern Ireland), the law was

⁷⁰ It may be important to note here that most human rights protected by the ECtHR are essentially of a civil and political nature. The rights violated in the examples given above are of this nature.

⁷¹ Article 8 provides for right to private and family life, Article 9 for freedom of conscience, thought and religion, Article 10 right to freedom of expression, Article 11 for right to peaceful assembly and freedom of Association

⁷² *Ireland v UK*, 2 EHRR 25 (1978) at para 36

⁷³ *Dudgeon v UK*, 4 EHRR 149 (1982)

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necessary to protect "vulnerable members of society, such as the young, against the consequences of homosexual practices."⁷⁴ The court agreed determining that some degree of regulation of sexual conduct was justified "to preserve public order and decency [and] to protect the citizen from what is offensive or injurious, thus, allowing that the aim could be legitimate. What was then left for determination was whether the violation of Dudgeon's and indeed any homosexual's rights was proportionate to the necessity of a democratic society. That is, is the aim that necessary in a democratic society to justify a deprivation of such right? The term necessary was interpreted based on the handy side⁷⁵ case as "a pressing social need" for which normally a margin of appreciation is left to national authorities to assess.⁷⁶

The court determined that the protection of morals especially in respect of one's private life as the sodomy matter represented was not a pressing social need. It also determined that it did not exactly fall within the purview of the core rights of the Convention. Thus the court's normally wide margin of appreciation narrowed when a regulation involved activities the court determined to be part of private life. The ECtHR held that the Northern Irish law was not sufficiently "necessary in a democratic society. The ECtHR took the view that sodomy was a legitimate sexual orientation thus what the sodomy laws proscribed was an "essentially private manifestation of the human personality".⁷⁷

⁷⁴ Homosexuality in any jurisdiction even where allowed is generally considered an abnormal behaviour
⁷⁵ (1976) 1 EHRR 737. The applicant, Mr. Richard Handyside, was proprietor of the publishing firm "Stage 1" in London. He published, among other books, *The Little Red Schoolbook*, the original edition of which was alleged to contain obscene materials calculated to corrupt its readers which were to be from age 12.

⁷⁶ The Court notes at this juncture that, whilst the adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), is not synonymous with "indispensable" (cf., in Articles 2 para. 2 (art. 2-2) and 6 para. 1 (art. 6-1), the words "absolutely necessary" and "strictly necessary" and, in Article 15 para. 1 (art. 15-1), the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (cf. Article 4 para. 3) (art. 4-3), "useful" (cf. the French text of the first paragraph of Article 1 of Protocol No. 1) (P1-1), "reasonable" (cf. Articles 5 para. 3 and 6 para. 1) (art. 5-3, art. 6-1) or "desirable". Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context". Available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499> accessed 2nd September 2013.

⁷⁷ The court went on to say that within Europe, based on increased tolerance within Contracting States, it is no longer considered "necessary or appropriate" to treat homosexual practices as criminal. With this ruling, by consensus within the Convention community, sodomy as a private sexual act between consenting adults was considered a core right protected under Article 8 which guaranteed right to private life. On the other hand the margin of appreciation will be widened when the court observes that there is restricted consensus on a particular right or practice within the parties to the Convention.

In *Dahlab v. Switzerland*⁷⁸, Lucia Dahlab, a primary school teacher in a government owned school in Geneva, was ordered to stop wearing a headscarf in observance of her Muslim faith while teaching in the school. Switzerland justified this order on the obligations “incumbent on the education authorities to observe strict denominational neutrality”. Dahlab’s headscarf, it argued, conveyed a religious message. The applicant brought claims to the ECtHR that her right to religious freedom (guaranteed under Article 9 of the ECHR) had been violated. The court considered the fact that there was little consensus among the Community’s States on whether religious scarf wearing was among the rights protected under Article 9 and so gave Switzerland a wide margin of appreciation. The Swiss Federal court had denied Dahlab the right to wear the headscarf to work because of the need, in “a democratic society,” to protect the right of State school pupils to be taught in a context of denominational neutrality, - a position which the ECtHR agreed with.

As seen, while the doctrine is useful for providing the parameters for gauging which human rights cannot be undermined in the struggle to recognise cultural relativism, it also acts as a temporary bridge between the two divides and has the potential to eventually unify them.⁷⁹

Conclusion

The purport of this work is to drive home the point that worldwide there is need for human rights to cease from being mere prints on the pages of international instruments to becoming a reality in the lives of people. While universalism is considered beneficial to the realization of human rights, the arguments of cultural relativism cannot be completely discarded. This leads to the inevitable conclusion that there is need for other theories to bridge the gap between universalism and relativism. Two such theories: the feminist’s intervention and minimalist approach are recommended in this work. It is the opinion of the writer that a single approach to human rights protection would not be an ideal solution and instead may require as increasingly evident a multi-dimensional approach or solution.

⁷⁸ *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 449.

⁷⁹ Another drawback may appear in the sense that the doctrine applies to ECHR Contracting Parties i.e. States who have assented to the Convention. The challenge for universalism on the world level is that some countries have refused to assent to those protective treaties, so there still exists the challenge of protecting the citizens of those countries.