

The Missing Human in Human Rights Law: A gendered perspective of torture and other cruel, inhumane or degrading treatment, or punishment with specific emphasis on restriction of reproductive justice and gender-based violence

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Abstract

This article examines the meaning and potential merits of interpreting norms of torture and other cruel, inhumane or degrading treatment, or punishment (CIDTP) through a 'gender perspective'. It will place particular emphasis on understanding the denial of reproductive rights and gender-based violence as torture and CIDTP. I engage in a critical feminist study of the doctrinal aspects of the international human rights law on torture by analysing the legal practice of regional human rights courts and the UN Human Rights Committee by evaluating their case law and other legal mechanisms arising from these systems. In addition to these primary sources I also refer to secondary sources such as reports by UN Special Rapporteurs, studies by civil society organisations specialising in reproductive rights, and academic writing in this field. I advocate the integration of a feminist and intersectional framework through which to analyse the creation and implementation of human rights legislation, thereby improving the resilience and effectiveness of protections and redress provided by these rights. This will further incorporate gender into the mainstream practice of international human rights law and will strengthen the protection of those who are victimised and disempowered.

Introduction

Women, transgender and non-binary people across the world have endured continuous backlash against their reproductive and sexual rights through the regulation and restriction of their access to abortions, contraception and other family planning needs. States' failures to eradicate sexual violence, female genital mutilation (FGM), forced sterilisations and other violations of sexual and reproductive health are serious human rights violations that result in tremendous physical and psychological pain. However, the experiences of women, transgender and non-binary persons are rendered invisible by the androcentric nature of most international legislation. This is best illustrated in the United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (UNCAT), which fails to emphasise the gendered nature of torture and cruel, inhumane or degrading treatment or punishment (CIDTP) and the multiple ways non-men experience such situations in their daily lives.

My objective is to reinterpret the androcentric understanding of torture and CIDTP in order to re-examine the violations imposed on women, transgender and non-binary persons and their bodies in that as torture and CIDTP and to reinforce the urgency of addressing the issues at hand. Violations of reproductive rights lead to the further degradation of other human rights protections and affect more than just half of the human population. By fully incorporating a gendered perspective to the understanding of torture and CIDTP we can place obligations on states to prevent, punish and redress such instances faced by non-men with the same urgency as other instances of the same violations.

My analysis will commence by setting out the current state of the international law on torture and the relevant international and regional treaties governing the norms and enumerate the pre-existing instances of gender-mainstreaming. I will then explain the theoretical foundations of a gendered perspective and 'intersectionality' by briefly outlining the key concepts underpinning this framework. From there, I will launch into my central thesis of reframing the current understanding of torture and the associated international law beyond its androcentric underpinnings. Lastly, I will conclude on how an intersectional law on torture could offer us a world free of torture and CIDTP for all.

I will be relying on academic literature, documents from civil society organisations, reports from various UN and regional organisations and cases from regional human rights courts to reinterpret the denial of reproductive rights and gender-based violence as torture and CIDTP. In understanding these violations it is necessary to understand the importance of intersectionality, an analytical framework that attempts to identify the marginalising impact of various interlocking systems of power and privilege on individuals within society¹. These violations are multifaceted and so are the experiences; often dictated by specific vulnerabilities related to age, socio-economic class, physical and mental health, immigration status and race amongst other factors.

The International Law on Torture and State Obligations-

There is a wide range of international and regional legal instruments that prohibit torture such as the Convention against Torture (UNCAT) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR)², as mentioned above. Regional human rights treaties such as the American Convention on Human Rights (ACHR), the European Convention on Human Rights (EConHR) and the African Charter on Human and Peoples' Rights (The Banjul Charter) also prohibit torture and enshrine the right to life. Torture is also prohibited under international criminal law and international humanitarian law. The prohibition against torture and CIDTP has also attained customary international legal status and is a *jus cogens* norm of international law, entailing that states cannot derogate from it.³

Article 1 of UNCAT provides us with the definition of what constitutes torture by setting out the four elements required to meet the threshold – severe pain and suffering, intent, purpose and state involvement. In 2008, the Special Rapporteur on torture and CIDTP also proposed the addition of the 'element of powerlessness' to the above criteria.⁴ Powerlessness has been described as a situation 'where one person

¹ Brittney Cooper, 'Intersectionality' in Lisa Disch and Mary Hawkesworth (eds), *Oxford Handbook of Feminist Theory* (Oxford University Press 2016), 1

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. Article 7 states "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

³ UNGA 'Report of the International Law Commission, Sixty-sixth session' (2014) UN Doc A/69/10

⁴ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2008) UN Doc A/HRC/7/3, para 28

exercises total power over another'. This manifests in classic detention situations such as in prisons, asylum and refugee detention centres and even in hospitals where women are detained due to their inability to cover the costs of their medical treatment.⁵

Intensity is central to the distinction between torture and CIDTP and while no definitional thresholds have been set by the CAT committee, regional courts have carefully delineated the legal standards that distinguish torture from CIDTP. The European Court of Human Rights (ECtHR) in its *Ireland*⁶ judgement held that 'the distinction between torture and inhuman treatment derives principally from a difference in the intensity of the suffering inflicted.'⁷ In subsequent judgments on the issue of torture the court has upheld the *Ireland* ruling and noted that its intent was to attach a special stigma to torture which causes serious and cruel suffering.⁸

Under international law, states have both positive and negative obligations with regards to torture and CIDTP, they have to refrain from committing acts of torture and also prevent, punish and provide redress for any violations. Positive obligations can be understood widely and could include provision of knowledge and training to law enforcement and detention personnel, or, as proposed in the *Maputo Protocol on the Rights of Women in Africa*-

It could require states 'to discourage customary, cultural and religious practices which are inconsistent and violate the Banjul Charter and urge them to eliminate traditional and cultural beliefs, practices and stereotypes which help legitimise the gender-based violence and help it sustain and continue to exacerbate'⁹.

States are under international and regional obligations to ensure state agents, private individuals and others acting on behalf of the state or in relation to it comply with human rights law. As such, the state bears the onus of creating effective measures to curb violations against the freedom from torture and CIDTP to be committed, instigated, incited, or encouraged by public authorities and other persons

⁵ Centre for Reproductive Rights 'Briefing Paper- Reproductive Rights Violations as Torture and Cruel, Inhuman, or Degrading Treatment, or Punishment: A Critical Human Rights Analysis' (2010), 18

⁶ *Republic of Ireland v United Kingdom* (1978) 2 EHRR 25

⁷ *Ibid*, para 167

⁸ *Selmouni v France* (1999) 29 EHRR 403, para 96

⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) 2003, Articles 4 (The Rights to Life, Integrity and Security of the Person) and 5 (Elimination of Harmful Practices).

acting in an official capacity. If such a violation has occurred, the state is required to provide suitable mechanisms of investigation and redress to rectify the violation.¹⁰

The responsibility for human rights violations perpetrated by non-state actors also lies on states if they have failed to take reasonable measures to prevent harm to individuals and their human rights or if due diligence has not been exercised in securing equal access to human rights for all. State responsibility for non-state actors is vital to the eradication of violations that occur in the private sphere, most of which are gendered violations (such as marital rape and domestic violence) or violations that impact women disproportionately (female domestic workers face a higher degree of abuse than their male counterparts),¹¹ it is also vital to keep in check private actors such as private healthcare establishments, detention facilities and corporations which are often sites of CIDTP and torture.

In *Gonzales et al*,¹² the Inter-American Court of Human Rights (IACtHR) elaborated further on the responsibility of states to address gender-based violence perpetrated by non-state actors. The Court held that Mexico had defaulted on its obligation to ensure due diligence in investigating numerous murders and was found to have violated its general obligation to guarantee the rights enshrined in Articles 4, 5 and 7 of the American Charter of Human Rights (ACHR).¹³ However, it was not found to be internationally responsible for these violations, nor directly complicit in the commission of torture.¹⁴ Nonetheless, the court recognised the effect of a culture of gender-based discrimination on the violence that was perpetuated and even on the inaction of the state to investigate and prosecute.¹⁵

In addition to the above case, the CAT Committee in its General Comment 2 (2008) has made it explicit that if State authorities or those acting in an official capacity have knowledge or reasonable grounds to believe that non-state officials or private

¹⁰ UN Committee Against Torture 'General Comment No. 2: Implementation of Article 2 by States Parties' (24 January 2008) UN Doc CAT/C/GC/2

¹¹ Human Rights Watch 'I Already Bought You: Abuse and Exploitation of Female Migrant Domestic Workers in the United Arab Emirates' (2014), 32-33

¹² *Case of Gonzales et al. v Mexico* (Preliminary Objection, Merits, Reparations, and Costs) Inter-American Court of Human Rights (November 16 2009)

¹³ *Ibid*, 146 para 4

¹⁴ Concurring Opinion of Judge Cecilia Medina in the Case of *Gonzales et al. v Mexico* (November 16 2009), para 1. The Judge, despite agreeing with most of the judgement, believes that Mexico violated A 5(2) of the ACHR.

¹⁵ Human Rights Watch (n 11), para 164

actors are committing acts of torture and ill-treatment and fail to prevent, investigate, prosecute and punish those responsible according to CAT, then the State is complicit in the commission of such violations.¹⁶ Failure of the state to intervene and offer redress for torture emboldens non-state actors to continue committing acts which are prohibited under CAT with impunity. In fact, state inaction and indifference even encourages further torture and CIDTP.¹⁷ This principle has been found to be particularly applicable in instances of states' failure to prevent and protect victims from gender-based violence by the Committee.¹⁸

The Need to Adopt an Intersectional and Gendered Framework

This paper comes at a time when there is increasing attention towards sexual violence and denial of reproductive rights. At a global level, gender-sensitive policies¹⁹ are gaining prominence in the highest levels of policy making.

With the repeal of the Eighth Amendment of the Irish Constitution, the #MeToo movement against sexual violence in the workplace and an increased visibility of feminist thinking and movements; significant gains have been made against the marginalisation of non-male persons. Yet, attempts to police reproductive rights and reminders of sexual and gender-based violence are ever-present. Institutionalised attempts to marginalise the rights of women and non-binary persons continue to adversely impact development and implementation of domestic and international law and policy.

The importance of a gendered framework is one that is both practical and theoretical. An absence of gendered analysis usually results in the erasure of the experiences of women, LGBTI+ and non-binary persons. Their identities are often reduced to caricatures, obfuscating their complicated realities and preventing a holistic understanding of the problems that they face. This reduction enables the creation of

¹⁶ n 10, para 18

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ For instance, Goal 5 of the United Nations Sustainable Development Goals is 'Gender Equality': 'Goal 5: Achieve gender equality and empower all women and girls' (*United Nations Sustainable Development Goals*) < <https://www.un.org/sustainabledevelopment/gender-equality/>> Accessed 29th May 2019; See also: 'Gender Responsive United Nations Peacekeeping Operations' (*United Nations Department of Peacekeeping Operations*, January 2018) <<https://peacekeeping.un.org/sites/default/files/gender-responsive-un-peacekeeping-operations-policy-en.pdf>> Accessed 29th May 2019

exclusionary policies that perpetuate violence, deny agency and dehumanise women, non-binary and LGBTI+ persons.²⁰

Cognisance of particular norms related to gender-based discrimination and adequate application of a gendered-framework to analysing these norms can illuminate critical human rights violations and abuses of international law. For instance, an absence of knowledge regarding the applicable standards for the detention of victims of sexual violence can result in disregard of specific obligations that public and private agents bear under international law.²¹

Moreover, integrating a gender-centric analysis can help to recognise the specific impact that certain human rights situations or crises have on different individuals and populations. It can assist in tailoring humanitarian responses to provide appropriate relief, bettering the recommendations arising out of international reports and improving the implementation of human rights and other extra-legal measures.²²

In fact, a gendered perspective – especially in a field such as human rights – can encourage us to recognise that rights for non-men need not compete with those for men. In situations of sexual violence, where stigma still exists regarding the violence suffered by men, a perspective which is ‘gender-equal’²³ would recognise the nuances of gender and gender-based violence. Ultimately, the goal is universally beneficial: creating protections against sexual violence suffered by women and LGBTI+ people can be broadened to include the experiences of male victims.²⁴

But in order to devise a gendered and intersectional framework it is imperative to understand the meaning(s) of gender and intersectionality despite their widespread use; especially today where they have come to have different meanings depending on the communities they are being used by.

Gender is a social construction that is constantly evolving with the changing perceptions of society and intentional manipulation.²⁵ Feminists have contended that

²⁰ Office of the High Commissioner of Human Rights ‘Integrating A Gender Perspective Into Human Rights Investigations: Guidance and Practice’ (United Nations 2018), 10

²¹ *ibid*

²² *ibid*

²³ Pamela Scully, ‘Vulnerable Women: A critical reflection on human rights discourse and sexual violence’, (2009) 23 *Emory International Law Review* 100, 113.

²⁴ Helen Durham and Katie O’Byrne ‘The dialogue of difference: gender perspectives on international humanitarian law’ (2010) 92 *International Review of the Red Cross* 22, 49

²⁵ Laura Sjoberg and Caron E. Gentry, *Mothers, Monsters, Whores* (Zed Books 2007) 5

the socially constructed division between 'men' and 'non-men' is unnatural in that it materialises in power disparities constructed along gendered lines.²⁶

Commonly used, the term 'sex' is associated with the biological differences of persons whereas 'gender' is the socially-constructed difference amongst these persons. While the distinction between what the terms 'sex' and 'gender' mean is easy to understand, it is debatable to what extent can either be extricated from the other and how much the biology affects the manifestation of the social and vice-versa. For instance, Judith Butler considers the biology and the social to be interdependent constructions.²⁷

Sex and gender categories, regardless of origin tend to be divided along the lines of 'masculinities' and 'femininities' (or non-masculinities) based on stereotypes, expected behaviour and 'rules' that members from these separate and dichotomous groups are expected to adhere to. The creation of these supposedly irreconcilable dichotomies also creates a presumed binary in experiences of power and subordination that overlooks the fluid nature of gender-based violence. This social classification and treatment based on a perceived gender is called 'gendering'; it is not always consistent and specific but based on assumptions, not about the individual's characteristics but that of the perceived group.²⁸

Even though gender is a social construct, it should not be believed that gender and gendered oppression are somehow less real due to being an abstract concept. Imperatively, social constructions such as gender help to construct social life itself. As such, gender becomes a lived reality and so does the resultant gendering and subordination – cutting across temporal, spatial and cultural elements.²⁹ It would be misleading to characterise the 'gendered experience' as a uniform occurrence that is shared by all people perceived as male, female, or LGBTI+.

Recognition of this heterogeneous experience of gender is made possible by the analytical framework of intersectionality, which emerged in the late 1980s as a way to attend to the distinct position of black women and other women of colour, both within

²⁶ Ibid.

²⁷ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990)

²⁸ Ibid

²⁹ n 24, 6

the application of civil rights law and civil rights movements.³⁰ The theory was devised by Kimberlé Crenshaw who further elaborated on the methodology and concerns of intersectionality.³¹ The term developed into a framework that disrupted the tendency of civil rights discourse to treat race and gender as detached attributes of lived experiences and violations.³² Crenshaw asserted that black women existed at an 'intersection' of race and gender, thus suffering both sets of prejudices simultaneously.

Through its translation into the discourse of human rights and the particular issue of gender-based violence, intersectionality helps us not only to understand why a particular individual, for example an economically-marginalised woman of colour, might suffer the violation of her rights but also provides us with a more nuanced lens through which to suggest measures that cater to her specific needs.

Due to the economic and social differences that intersect with separate gender identities, the consequences of policies often vary along gendered lines. These differences are further compounded by factors such as race, class and sexuality. As a result, an intersectional analysis of policy and law is necessary to unravel the nuances behind individual experiences and violations and ultimately evaluate compliance.

Keeping in mind the need for a gendered and intersectional perspective, I will now evaluate the five key elements of torture and CIDTP (as mentioned in section one) through this lens.

Key Elements of Torture and CIDTP through a Gendered Perspective

As has been demonstrated above, preventing, punishing and protecting victims from torture and CIDTP is an indivisible norm of international law and compels states to put in place effective measures, especially those which protect minority and marginalised communities. Effective prevention depends on a well-founded understanding of the varied factors that determine victimisation and the sites they can

³⁰ n 1,3

³¹ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' [1991] 43 Stanford Law Review 1241, 1250

³² Joanne Conaghan, 'Intersectionality and the feminist project in law' in Emily Grabham et al (eds), *Intersectionality and Beyond* (Routledge 2009) 23

occur in. What follows is an analysis of the elements of torture and CIDTP from a gendered perspective.

Intent and Purpose

The intent and purpose elements of torture and CIDTP are closely interlinked and can often be inferred from one another. A person could be said to possess the intent to engage in a particular action and engage in the results of that action if they act with the requisite purpose. In the context of women's reproductive rights this is especially pertinent as violations are often a result of gender-based discrimination and patriarchal mentality with regards to gender roles in society. In his report as Special Rapporteur on Torture and CIDTP, Manfred Nowak held that in instances of gender-based violence 'the purpose element is always fulfilled'³³ if it can be demonstrated that the acts are gender-specific as discrimination is one of the criteria present in the CAT definition.

Additionally, if the act has a specific purpose the intent can be implied.³⁴ This is significant in understanding the discriminatory nature of legal and policy restrictions on access to reproductive justice,³⁵ the denial of which perpetuates toxic stereotypes about childbirth being a woman's sole duty. This carries the connotation that women lack the personal intellectual agency to make decisions concerning their sexuality and reproduction. Those who draft, pass and support such laws and policies do it with full knowledge of the detrimental effect the policies will have on the lives of women and non-cisgendered persons. These policies (and the lawmakers behind them) not only endanger the right to privacy and family life but also intentionally or negligently inflict harm on them.

Moreover, by stigmatising access to reproductive health, legislators cause a chilling effect whereby those in desperate need of those services are either unable to access them in the first place or find themselves stigmatised and denied follow-up care. Discriminatory laws can also render healthcare professionals complicit in human

³³ n 3, para 30

³⁴ *Ibid.*

³⁵ The concept was developed by women of colour as an alternative paradigm to the individualised discourse of 'reproductive rights': Kimala Price, 'What is Reproductive Justice?: How Women of Color Activists Are Redefining the Pro-Choice Paradigm' (2010) 10 *Meridians* 42; see also: L. Ross and R. Solinger, *Reproductive Justice: An Introduction* (University of California Press 2017); F. Bloomer et al, *Reimagining global abortion politics: A social justice perspective* (Bristol University Press 2019)

rights violations, even where the professional might not have the requisite intent. By placing serious punishments on the provision of safe abortion services for example, healthcare providers might be forced to deny medically-necessary treatment and favour the interests of the state to the detriment of their patient's health and wellbeing.³⁶

Severity of Harm and Suffering

No specific and clear criteria have been established to measure the level of suffering and harm that constitutes torture and CIDTP, but international and regional bodies rely on both objective criteria (such as duration, manner and execution of the torture) and subjective factors (such as age, gender and social status) to quantify the intensity of the alleged act. The assessment of the severity of harm and suffering is highly dependent on subjective factors as these may influence the objective factors. For instance, the sexual violence inflicted upon Yazidi women by ISIS resulted from the convergence of their religious identity and gender; these factors led them to be subjected to sexual slavery and other gender-based violence.³⁷

In *Miguel-Castro Prison*,³⁸ the IACtHR gave a judgement that was cognisant of the gendered nature of CIDT. The Court held that subjecting women (some of whom were pregnant) to forced strip searches, nudity, physical and psychological abuse while denying them medical treatment amounted to sexual violence and violated their right to humane treatment (Article 5 ACHR).³⁹ It announced that these acts caused the women 'serious psychological and moral suffering'.⁴⁰ Accordingly, it was held that Peru had failed in its obligations under the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Article 7(b))⁴¹ by failing to prevent this violence and punish those responsible.

State Involvement

Due to the *jus cogens* nature of the prohibition on torture and CIDTP, states have an obligation to prevent, punish and redress instances of torture and CIDTP

³⁶ n 4, 11

³⁷ UN Human Rights Council 'They Came to Destroy: ISIS Crimes Against the Yazidis' (15th June 2016) UN Doc A/HRC/32/CRP.2

³⁸ *Miguel Castro-Castro Prison v. Peru*, Inter American Court of Human Rights (Nov. 25, 2006)

³⁹ *Ibid*, 166 para 4-5

⁴⁰ *Ibid*, para 308

⁴¹ *Ibid*. 166, para 6

committed by agents of the state, those in official capacity, or non-state actors who commit such acts due to the lack of due diligence by the state.

In General Comment 35,⁴² the Committee for the Convention for the Elimination of Discrimination Against Women (CEDAW Committee) noted that the acts or omissions of private agents that exercise elements of government authority and provide public services will be attributable to the state.⁴³ It also notes that states have an obligation of due diligence when ensuring that corporations under their influence – either by regulation or by the use of incentives – don't commit human rights violations or perpetuate gender-based violence.⁴⁴

The General Comment reiterates that culture and social practices are the major obstacles to combating gender-based violence, but also cites factors which are consciously implemented by states such as austerity measures, reduction of public and international funding and policies governing corporations. In so doing, it recognises that external forces underpin the exacerbation of gender-based violence, especially in the Global South and implicitly places blame on the Global North.⁴⁵

Another aspect of state responsibility has been that of the state over a devolved constituent unit within its territory. This is embodied in CEDAW's report on the UK and its failure to protect women in Northern Ireland from human rights violations due to restrictive abortion laws.⁴⁶ In the report, CEDAW vice-chair Ruth Halperin-Kaddari said that 'the situation in Northern Ireland constitutes gender-based violence that may amount to torture or cruel, inhuman or degrading treatment'⁴⁷ and held that it is the responsibility of the UK government to ensure that all laws within its territory, including those of devolved constituent units are in line with the state's international

⁴² UN Commission on the Elimination of Discrimination Against Women 'General recommendation No. 35 on gender-based violence, updating general recommendation No. 19' (14 July 2017) UN Doc CEDAW/C/GC/35

⁴³ *Ibid*, para 14

⁴⁴ *Ibid*, para 24(b)

⁴⁵ Christine Chinkin 'CEDAW General Recommendation 35 on gender-based violence is a significant step forward' (*London School of Economics Centre for Women, Peace, and Security*, 6 September 2017) < <http://blogs.lse.ac.uk/wps/2017/09/06/cedaw-general-recommendation-35-on-violence-against-women-is-a-significant-step-forward/> > Accessed 25th April 2018

⁴⁶ UN Committee on the Elimination of Discrimination Against Women 'Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' (23 February 2018) UN Doc CEDAW/C/OP.8/GBR/1

⁴⁷ *Ibid*, para 65

obligations.⁴⁸ This recognition was monumental in not only recognising the discriminatory access to reproductive assistance in Northern Ireland as CIDTP, but also reprimanded the UK for shirking the burden and placing it rightfully on its shoulders. Moreover, reinterpreting denial of reproductive rights as torture and CIDTP, rightly demonstrates the gravity of the violence experienced.

Powerlessness

In his second report to the Human Rights Council, the Special Rapporteur on Torture and CIDTP proposed the inclusion of the criterion of 'powerlessness' in the definition of torture and CIDTP. 'Powerlessness' can arise in scenarios involving detention and demonstrative contexts where a person is unable to resist the use of force anymore, either due to coercion or use of restraints. 'If such coercion results in severe pain or suffering inflicted to achieve a certain purpose, it must even be considered as torture',⁴⁹ commented the Special Rapporteur.

This element has been applied to gender-specific harms such as rape, domestic violence and FGM all of which are facilitated by rendering the victim powerless, either physically, monetarily, or societally (through risk of ostracisation). In the case of domestic violence, powerlessness is a pervasive factor, often manifesting through various means such as restriction of financial resources, erosion of psychological will and strength, coercive control through reward and punishment – and even societal pressures and taboos surrounding divorce – may have the cumulative effect of forcing the victim to bear the violence without fleeing. Similarly, FGM is facilitated by a fear of social ostracization, from their parents and the wider community, rendering young victims powerless.

The element of powerlessness is integral to a gendered understanding of torture and CIDTP as it accommodates the specific attributes of the victim such as sex, age, religion, sexuality and health which could render an individual powerless in any instance.⁵⁰ Moreover, according to the Special Rapporteur, societal, institutional and legislative indifference towards the inferior status of women and non-cisgendered

⁴⁸ Ibid para 53

⁴⁹ UN Commission of Human Rights 'Report of the Special Rapporteur on the question of torture, Manfred Nowak ' (23 December 2005) UN Doc E/CN.4/2006/6, para 40

⁵⁰ n.3, para 29

persons creates conditions for powerlessness and subjects them to violations despite the so-called 'freedom to resist'.⁵¹

Notably, the above considerations on powerlessness align with the approach taken by the ECtHR and IACtHR, who are mindful of the various circumstances that could lead to torture and CIDTP and how those circumstances also affect the severity of the individual's experience of suffering and harm.⁵²

This gendered understanding of the elements of torture and CIDTP helps to contextualise the various violations women experience in terms that reflect their gravity. It is important that violations against women are noted to be more than just violations of their private life and health and are seen as torturous and cruel and impinging on their right to life and bodily integrity.

Reforming the Androcentricity of Torture and CIDTP

The classic image of torture is that of a man, hooded or subjected to stress positions, likely half naked and, post 9/11, a person of colour. It is rare that we visualise victims of domestic violence or pregnant persons who have been shackled during childbirth, denied access to reproductive health services and forced to continue an unwanted or unviable pregnancy to term. The private/public distinction ingrained in the formulation of international human rights law and especially civil and political rights does a disservice to people of marginalised gender identities, who experience torture and CIDTP in the private 'non-governmental' sphere rather than in the public sense that international human rights law targets.

In her second report as Special Rapporteur of Gender-based violence (the first Special Rapporteur to hold a gender-specific mandate),⁵³ Radhika Coomaraswamy drew parallels between the experiences of a victim of torture and those of a victim of domestic violence. She identified that in both cases with victims suffer physical and/or psychological violence (or, in some cases, death) at the hands of actors who intentionally and purposefully (often intending to punish) exercise coercive control over

⁵¹ Ibid.

⁵² Notable in cited cases from these regional systems.

⁵³ Hillary Charlesworth and Christine Chinkin '*The Boundaries of International Law*' (Manchester University Press, 2000) 219

their victims. This can be as a result of tacit state involvement where the state defaults on its obligation to ensure equal protection in preventing domestic violence.⁵⁴

Experts and jurists have established that both ‘the battered woman’ and ‘the prisoner’ live in constant fear of pain and suffering, suffer debilitating physical and mental violence and are rendered powerless to escape either by force or fear of the consequences. In the same report, Coomaraswamy upheld that the IHRL framework could help to address discriminatory laws and customs that allow the perpetuation of gender-based violence in the private sphere.⁵⁵

Other instances that could constitute torture and CIDTP by private actors include rape, FGM, forced abortions/pregnancies/sterilisation (as a result of familial or societal norms that prefer a male child or practices carried out by private healthcare providers), sexual slavery and honour-based crimes. These violations are widespread and affect millions of women and marginalised persons every year across the world, but due to androcentric understandings of torture they have become trivialised and their prevention, investigation and punishment is not given enough attention by state authorities. When they are construed to be of state-level importance, they are pigeon-holed into categories of ‘traditional practices’ or ‘crimes against modesty’, neither of which carry the stigma and urgency of torture and CIDTP.

The erasure of such crimes is not solely dependent on strong laws criminalising them, but also the enforcement of such laws. The latter is complicated by the normalisation of gender-based violence and state unwillingness to tackle the private sphere and cultural practices. This complexity is particularly apparent where cultural and social justifications have been used to defend FGM, in spite of its severe physical and psychological effects, lasting far beyond the procedure itself and affecting the sexuality and reproductive ability of victims. It can lead to severe bleeding, neurogenic shock due to pain, infection, septicaemia, fear of sex and post-traumatic stress disorder.⁵⁶

⁵⁴ UN Commission on Human Rights ‘Report of the Special Rapporteur on Gender-based violence, its Causes and Consequences, Ms. Radhika Coomaraswamy’ (5 February 1996) UN Doc E/CN.4/1996/53, para 44

⁵⁵ *Ibid* para 45

⁵⁶ n 3, para 50

The Human Rights Commission (HRC) has recognised FGM as a violation of the right to be free from torture under article 7 of the ICCPR,⁵⁷ the CAT Committee has recognised that the practice amounts to CIDTP under Article 16 of UNCAT and lastly the Special Rapporteur on Torture has upheld that FGM might constitute torture, regardless of its legality. Additionally, the medicalisation of the procedure still renders the practice unacceptable. In fact, failure to investigate and punish medical practitioners who carry out FGM amounts de facto consent by the state, leaving it accountable for the human rights violations resulting from the practice.⁵⁸

Accounting for torture and CIDTP that victimises women in the public sphere requires us to recognise the various sites where such violations can occur. Even a gendered understanding of torture it is limited to sexual violence, usually rape, occurring in circumstances of armed conflict and police or military custody. But while these examples are important, they do not define the majority of experiences that women have faced. Sexual violence takes place in hospitals, asylum detention centres, educational settings and prisons or other detention facilities.

The case of *M.M.*⁵⁹ illustrates the gendered experience of torture and CIDTP within a healthcare setting specifically. M.M. was drugged and raped by the doctor she was seeking treatment from. The rape resulted in vaginal haemorrhage that lasted for several days while she was denied medical help. M.M. was humiliated by the nurses she confided in and was subsequently misdiagnosed as menstruating, not haemorrhaging.⁶⁰ M.M. was prescribed medication that she could not afford, and was thus forced to go from one pharmacy to another – crying and haemorrhaging – until she reached a pharmacy that would provide free medication.⁶¹

The situation she had faced was inhumane, degrading and subjected her to severe levels of anguish, both mental and physical. The doctor that had raped her was acquitted by the criminal court and it was only with the assistance of non-governmental organisations that the victim was able to put a petition to the Inter-American Commission on Human Rights (IACHR). This resulted in a friendly settlement that

⁵⁷ UN Human Rights Committee 'General comment No. 28 on article 3- The equality of rights between men and women' (2000), para 11

⁵⁸ n 3, para 53

⁵⁹ *M.M. v Peru* (Report on Friendly Settlement) Inter-American Commission on Human Rights OEA/Ser.L/V/II.151 Doc. 34 (25 July 2014)

⁶⁰ *Ibid*, para 17

⁶¹ *Ibid*, para 18

demanded corrective actions from Peru to address the violations against M.M. and to prevent similar incidents from happening again.

Healthcare providers often have the tacit ability to impact patient autonomy when it comes to making decision regarding their healthcare. As patients become powerless in some situations, especially if they are already particularly vulnerable due to their mental or physical health, socio-economic status, immigration status and past victimisation. Powerlessness is only exacerbated in the context of stigmatised services such as reproductive health services. Access to these medically necessary services is often impeded by restrictive laws and policies or decisions made by practitioners due to their personal objections, both of which are affected by gender stereotypes.

Restrictions and complete denial of access to abortions can often lead to already-vulnerable women suffering cruel and degrading treatment. This has been exemplified in a wide variety of cases across the world. *K.L.*⁶² was one of the first cases in which the Human Rights Committee (HRC) ruled that ‘the denial of medically necessary abortion put K.L.’s physical and mental health at severe risk and violated her fundamental right to be free from CIDTP under article 7 ICCPR’.⁶³ In this case, the petitioner was denied abortion upon learning that her foetus had anencephaly – a fatal medical condition where either the foetus does not survive to term or dies soon after birth – and was forced not only to carry the pregnancy to term but also to breastfeed the baby for the four days it was alive.

In subsequent cases⁶⁴ regional and international systems have upheld reproductive rights, especially with regards to access to abortion. They have also stated that in certain circumstances (gauged qualitatively on the basis of vulnerability or risk to life of pregnant persons) when these rights are violated, the violations amount to CIDTP.

In a recent report, the African Commission on Human Rights (ACHR) recognised the serious consequences of such denial on the physical and mental

⁶² *K.L. v. Peru*, Communication No. 1153/2003, Human Rights Committee, U.N. Doc. CCPR/C/85/D/1153/2003 (2005)

⁶³ *Ibid*, para 6.3

⁶⁴ *LMR* (2011 Communication No. 1608/2007, Human Rights Committee, UN Doc. CCPR/C/101/D/1608/2007); *R.R.* (2011 ECHR 828); *P. and S.* (2012 ECHR 1853); *Mellet* (2016 Communication No. 2324/2013, Human Rights Committee, UN Doc CCPR/C/116/D/2324/2013); and *Whelan* (2017 Communication No. 2425/2014, Human Rights Committee, UN Doc CCPR/C/119/D/2425/2014).

wellbeing of the woman by examining the possible categorisation of denial of post-abortion treatment as torture and CIDTP.⁶⁵ Women are delayed or denied from seeking post-abortion care due to social stigma or the prohibitive costs of the care. Their suffering is made even graver whereupon they are detained for being unable to pay for the treatment that they medically require.⁶⁶

In cases such as *Tysi c*⁶⁷ and *A, B, C*⁶⁸ the ECtHR failed to uphold violations of Article 3 and instead classified the denial of access to abortion as a privacy issue. In *Tysi c*, it upheld that the privacy of the pregnant woman was inextricably linked to the developing foetus and that the balancing of the public interest with privacy laws must take into account the state's positive obligations to secure the bodily integrity of pregnant women from undue intrusion by public authorities. Conflicting practice must be noted, however, as in *A, B, C* the court struck this balance in the favour of public morality in the instances of A and B due to their less grievous circumstances.⁶⁹ Another key principle upheld in all of the above cases has been that in instances where access to abortion is legal, it must also be attainable and not subject to discrimination.

Women and non-cisgendered persons also suffer grave violence which could amount to CIDTP in non-traditional custodial settings such as asylum detention centres and schools. The practice of shackling women during childbirth is especially degrading example of this. Similarly, the abuse of power by school staff leaves lasting physical and psychological scars on their young and vulnerable victims.

Discrimination exacerbates gender-based violence in both public and private spheres by disproportionately impacting women and non-cisgendered persons from low income and other marginalised strata of society who are unable to access resources to provide them with recourse. Additionally, certain government programmes disproportionately harm such persons or are even targeted towards them.

⁶⁵ The African Commission on Human and People's Rights, 'Thematic Report on the Denial of Abortion and Post-Abortion Care as Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment'. (2017), para 14

⁶⁶ *Ibid*, para 18

⁶⁷ *Tysi c v. Poland* [2007] ECHR 219

⁶⁸ *A, B, and C v. Ireland* (2011) 53 EHRR. 13

⁶⁹ Stijn Smet 'A., B. and C. v. Ireland: Abortion and the Margin of Appreciation' (*Strasbourg Observers*, December 17 2010) < <https://strasbourgobservers.com/2010/12/17/a-b-and-c-v-ireland-abortion-and-the-margin-of-appreciation/> > Accessed 28th April 2018

Coercive sterilisation, which has been held to violate the right to be free from torture and CIDTP by the HRC,⁷⁰ is one such practice that is legitimised as a birth control programme specifically aimed at women from poorer communities who already struggle with supporting a family. For instance, nearly 4 million women were forcibly sterilised in India under government-run programmes between 2013 and 2014.⁷¹ Instead of providing access to free contraception or information about family planning, states have often taken it upon themselves to regulate the reproductive lives of some of the most vulnerable members of society, disproportionately targeting economic and racial minorities.

Another aspect of discrimination manifests in the inability to access necessary medical treatment due to the high costs associated with it. For instance, women in Ireland access abortions much later in their pregnancy than women in the UK due to having to account for the logistical costs of the travel and accommodation as well as the procedure itself. In light of the 8th Amendment referendum in Ireland, various stories by those who have travelled to get abortions have come to the forefront on social media, full of harrowing details. Many such stories remain unreported.

Towards an Intersectional Law against Torture

Reflecting on the international law on torture and CIDTP through a gendered and intersectional lens has made it amply clear that the human rights regime often discounts the experiences of a significant proportion of the human population and distances itself from the experiences of those who suffer discrimination based on class, race, income and health.

As subjects of international human rights law, our enjoyment of freedom is linked to the enjoyment of a variety of rights and so the violations we might experience extend across various rights regimes. Furthermore, the ability to redress these violations would depend on a variety of factors and will often leave those most in need of redress and protection vulnerable. This can only be reversed if multi-layered approaches are applied to problems arising out of the power imbalances embedded in society.

⁷⁰ n 4, 20

⁷¹ Soutik Biswas, 'India's dark history of sterilisation' *BBC News* (Delhi, 14 November 2014) <<http://www.bbc.co.uk/news/world-asia-india-30040790>> Accessed 28th April 2018

It is only possible to combat the constant subordination of women and non-cisgendered persons in hetero-patriarchal societies by rectifying our systemically inferior position by rightfully claiming real economic, social and political power in both public and private domains, the current lack of which precipitates into discriminatory treatment.⁷²

Additionally, placing responsibility on the international community to renew its commitment to eradicating gender-based violence is vital for women and non-cisgendered persons to achieve physical self-determination and live a life free of inhumanity. By strengthening the measures in the Optional Protocol to CEDAW and making the complaints process more robust we can ensure due diligence is done by states in safeguarding women's rights.

We must also continue efforts to contextualise gender-based violations and denial of reproductive justice outside of the sphere of 'women's rights' and in the language of 'human rights'. In so doing we avoid the risk of having our concerns and experiences ghettoised as 'non-mainstream' and ensure that the violence we suffer is treated at par with that of men.

Nonetheless, we must be aware of the shortcomings of rights discourse and recognise that women's experiences cannot always be translated into narrow, legalistic language. While rights discourse might hold emancipatory power, its structures and foundations are inherently designed to discriminate against the most vulnerable, and must be critiqued and reformed accordingly. The language of rights is complicated and evolving, making it a complex instrument at the international level but a flexible tool at the regional and local level. Ultimately, rights must not only be universally available but also universally accessible.

Through advocacy, strategic litigation and constant perseverance, to recognise the autonomy and capability of those from marginalised genders we can reaffirm that reproductive rights are human rights and end the perpetuation of harm resulting from patriarchy.

It is no longer enough to be brave in the face of violence, we want to be free of violence.

⁷² n 37, 229

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